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## **SB 89: NARROWING PROTECTIONS FOR KENTUCKY'S WATERS**

### **KRC FACT SHEET #2: CORRECTING MISCONCEPTIONS WHAT DOES SENATE BILL 89 REALLY DO?**

Senate Bill 89 redefines "waters of the Commonwealth" to limit protections against pollution to only those waters that are defined as "navigable" under the federal Clean Water Act. That Act defines "navigable waters" as "waters of the United States, including the territorial seas" (WOTUS) and provides authority for the U.S. Environmental Protection Agency and the U.S. Department of the Army to define WOTUS in regulations – a definition that has been in flux since 2015.

Because the reach of federal law is limited to pollution affecting interstate waters, the protections against pollution in the Clean Water Act have **never** reached **all** Kentucky waters of state value or concern.

Kentucky law has long defined "water" and "waters of the Commonwealth" to cover both surface water and groundwater, including "any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes, and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction." KRS 224.1-010(32). This definition reflects Kentucky's unique water system and karst topography. Although groundwater and surface water are often thought of as two different things, groundwater is frequently the sustaining supply for surface water in Kentucky.

By narrowing the definition of "waters of the Commonwealth" to remove all waters that are not "navigable" under the federal Clean Water Act, SB89 will end protections for all groundwater under Chapter 224 (our environmental protection statutes), ephemeral streams, and the upper reaches of most streams and river systems in Kentucky. Kentucky's ephemeral streams, which flow in response to rainwater and snowmelt, are critical for slowing floodwaters and supporting aquatic ecosystems. These streams are important for filtering natural pollutants, but unabated pollution will inevitably enter river networks from ephemeral streams and flow into larger rivers during precipitation events, ultimately lowering water quality downstream.

Our drinking water systems, which rely on ephemeral streams and other small or inconsistently flowing bodies of water, will undoubtedly be impacted. According to EPA, about 65% of all Kentucky's streams and rivers are ephemeral or intermittent (which may also lose protections as WOTUS under future federal rules) and 54% of streams providing water for surface water intakes that supply public drinking water systems are intermittent, ephemeral, or headwater streams. Over 3.2 million people in Kentucky receive drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral, or headwater streams. Losing protection for these waters would have significant impacts on all Kentuckians.

Responding to the public outcry that has been caused by Senate Bill 89's assault on clean water in Kentucky, supporters have claimed that the narrowing of "waters of the Commonwealth" to mirror the Clean Water Act definition won't impact our waters, and that all that is intended is to align the Kentucky's surface water discharge permit program to the scope of the federal Clean Water Act regarding which discharges need to obtain permits under Section 402 of the Act. **This fact sheet addresses those false claims.**

We all live downstream, and Kentuckians deserve clean water for drinking, irrigation, recreation, and for industries and businesses. Despite efforts to muddy the waters on the reach and negative impacts of SB 89, the damage SB89 will do to Kentucky's water resources, economy, and people goes far beyond just syncing state discharge permit requirements to federal permits under the Clean Water Act.

***Claim 1: SB 89 does not leave groundwater without protections from pollution. Groundwater is protected by numerous other provisions of state and federal law, including KRS Chapter 151 and the federal Safe Drinking Water Act's Underground Injection Control program. This bill does not interfere with these safeguards at all, nor does this change any local requirements that protect groundwater.***

Fact: Groundwater is not protected under the federal Clean Water Act and would no longer be protected against pollution in Kentucky under KRS Chapter 224, which contains the statutory provisions pertaining to pollution control, water quality, environmental emergencies, waste management, and hazardous waste, among other provisions. KRS Chapter 151, the Safe Drinking Water Act, and other laws are wholly insufficient to protect groundwater from pollution, particularly for rural Kentuckians relying on private wells and springs for their water for household, agriculture, and other uses.

KRS Chapter 151, captioned "Geology and Water Resources," is primarily focused on water resources issues (flooding, drought, water withdrawals, stream construction) rather than on water quality and pollution control. Chapter 151 does not contain any permitting provisions that limit or control discharges of pollution into groundwater.

Many of the sections of KRS Chapter 151 address groundwater **monitoring**, which has little value for preventing or addressing pollution without a mandate and standards to prevent pollution.

Under KRS § 151.120, groundwater may be subject to “regulation for the public welfare as provided in KRS Chapters 146, 149, 151, 262 and 350.029 and 433.750 to 433.757.” However, none of these chapters or laws contain a specific prohibition against pollution of groundwater, in contrast to the prohibition against water pollution in KRS 224.70-110.

The Safe Drinking Water Act’s Underground Injection Control Program is also not sufficient to protect groundwater resources (and private groundwater wells) from pollution for several reasons. First, the drinking water standards that are authorized under the law only apply to public and semi-public water systems, and do not regulate the quality of water from private wells, springs, and other groundwater resources. Second, only aquifers below a certain dissolved solids content and with a certain yield that are or can be used for drinking water (called Underground Sources of Drinking Water, or USDWs) and which have a certain dissolved solid content are protected, whereas groundwater resources that are useful for other purposes are not protected. Third, it is only injections through wells affecting groundwater that are regulated, and surface activities that contaminate groundwater are not controlled. This protection does not apply to pollution entering other groundwater resources and from other surface activities, that could become contaminated without regulation and then migrate.

One of the most significant gaps that is created by excluding groundwater from “waters of the Commonwealth” is in the area of waste management. Current regulations impose requirements for siting, liners, leachate collection, and monitoring, all intended to protect groundwater (and groundwater users) from pollution. By replacing the current definition of “waters of the Commonwealth” to mean only “navigable waters” under the Clean Water Act, SB89 removes all groundwater resources from the pollution prohibition in KRS 224.70-110 and from the protections set forth in KRS Chapter 224. This means waste sites will be able to contaminate groundwater without responsibility, since those waters and the users of those waters are no longer protected under Chapter 224. If groundwater beyond a waste site boundary is no longer a protected resource, then “pollution” does not occur, despite the ruin of those waters for other uses and users.

***Claim 2: SB 89 does not harm our drinking water. Kentucky’s public drinking water systems will still be fully and comprehensively regulated under the federal Safe Drinking Water Act and existing regulations related to public water supply intakes and private water wells. The coal industry specifically will still be required to avoid any impact to drinking water.***

Fact: The Safe Drinking Water Act requires only that public and semi-public water systems treat water to reduce the level of contaminants to acceptable thresholds. This will remain true if SB89 were passed. But the **cost** of treatment will significantly increase. Excluding groundwater and headwater ephemeral streams from protection will make our waters dirtier and add pollution to waters downstream, impacting Kentucky's water systems. Our water treatment plants can remove many of the contaminants from a water source, but it is much less expensive to filter and sanitize clear, clean water, and some contaminants cannot be cheaply removed. We will have to pay more to avoid being poisoned.

Adding back in language protecting "wellhead protection areas" doesn't solve the problem because it fails to protect the hundreds of thousands of Kentuckians who have private wells, disproportionately impacting rural Kentucky and treating those well water sources as unworthy of protection.

Furthermore, the Safe Drinking Water Act does not regulate the quality and safety of drinking water from private water supplies, such as the domestic wells and springs that serve as drinking water for 416,000 Kentuckians. The thousands of private wells used by Kentuckians for agricultural irrigation and livestock purposes are also not protected by the Safe Drinking Water Act. SB 89, contrary to the claim, "does harm our drinking water" if passed, since the groundwaters and headwater streams that provide water supplies for private wells and springs will no longer be "waters of the commonwealth" protected from pollution by others.

***Claim 3: SB 89 does not remove protections from hazardous substance dumping. It will still be illegal to dump hazardous substances in water. The federal Resource Conservation and Recovery Act, Comprehensive Environmental Compensation Recovery and Liability Act, and KY's mini-superfund statute (KRS 224.1-400) all prohibit dumping of any hazardous substances and require cleanup of hazardous substances in appropriate cases, including cases of groundwater contamination. SB 89 does not affect these laws at all.***

Fact: Removing groundwater from those "waters of the Commonwealth" that are protected against pollution will substantially weaken the regulation of waste disposal, and will absolutely remove protections for groundwater in hazardous substance spills and clean-ups.

The core statute on hazardous substances spills and releases, KRS 224.1-400, seeks to control and remedy releases of hazardous substances, pollutants, and contaminants **into the environment, a term defined to include waters of the Commonwealth.** If the "environment" no longer includes groundwater or ephemeral streams under this state law, then contamination of either will no longer trigger action or cleanup.

Additionally, whether action to remedy a spill or release of a hazardous substance must be taken would no longer have to give consideration to impacts on groundwater – since whether there is a need to take action to address releases of hazardous substances depends on what is needed to protect human health, safety, and the “environment,” which would no longer include groundwater. Groundwater is a significant pathway of exposure to hazardous pollution, and if it is no longer a protected resource as a “water of the Commonwealth,” then pollution to groundwater is no longer actionable, and the effectiveness or sufficiency of a response to a spill or release will no longer be measured by whether groundwater is protected, or whether contamination of groundwater is corrected.

Similarly, the siting of waste facilities, and the determination of compliance of landfills and other waste sites, require compliance with environmental performance standards that prohibit discharges to “waters of the Commonwealth.” Solid waste regulations that currently protect groundwater and headwater streams from pollution as waters of the Commonwealth will no longer be able to rest on that authority. Discharges of leachate, the garbage juice from landfills, would no longer be prohibited into these waters, making downstream reaches of the streams more polluted. Nor will pollution of groundwater be a violation, since that water resource would no longer be protected.

Discharging or dumping hazardous substances, pollutants, or contaminants into groundwater and headwater ephemeral streams would no longer be prohibited under Chapter 224, since these water resources would no longer be protected. Federal “cleanup” laws are not substitutes for the lost protections for these waters.

***Claim 4: SB 89 does not remove all environmental protections for our water sources, nor does it threaten the water quality of our rivers, lakes and streams.***

Fact: SB89 **will impact** the water quality of our rivers, lakes and streams. Groundwater is not protected under the federal Clean Water Act and would no longer be protected against pollution in Kentucky. Dumping or discharging pollution into most headwater ephemeral streams would no longer be limited or prohibited, compromising downstream water quality, including groundwater. Kentucky’s rivers and streams all begin with headwaters – the upper reaches of stream systems that flow only part of the year, but which are critical for trapping floodwaters, filtering pollutants, and supporting aquatic ecosystems. Discharging or dumping hazardous substances, pollutants, or contaminants into waters that are not WOTUS would no longer be prohibited and Kentucky’s general prohibition against water pollution in KRS 224.70-110 would no longer apply to Kentucky’s waters that are not WOTUS. Removing pollution protections for groundwater and essential parts of our river systems will undoubtedly lower water quality downstream, including into our rivers, lakes and streams.

Lakes, ponds, and water storage reservoirs, that are constructed upland rather than by impounding streams, would also lose all protections against pollution. Other Kentucky laws prohibiting water pollution as to these waters would also be weakened. Changing the definition of “waters of the Commonwealth” impacts at least 35 state regulations, numerous state laws, and Kentucky’s regulatory authority to protect the quality of drinking water, public health, natural ecosystems, and nature-based water infrastructure within Kentucky.

***Claim 5: SB 89 simply aligns KY’s definition of “Waters of the Commonwealth” with federal law which protects “navigable waters” (rivers, lakes, and many wetlands) in accordance with the 2023 U.S. Supreme Court Sackett decision. It merely applies a federal standard for purposes of KRS 224. SB 89 will ensure EEC can’t go further than the federal government and over-regulate your ditch, ephemeral streams (which only temporarily flows when it rains) or a wetland on your own private property that’s only wet when it rains.***

Fact: If the goal of Senate Bill 89 is simply to “align” the Cabinet’s permitting under the KPDES program with the scope of NPDES permitting under the Clean Water Act, **that is already provided in state regulations.** Under 401 KAR 5:055 Section 4(4), a KPDES permit shall not be required for “a discharge that is not regulated by the U.S. EPA under the Clean Water Act Section 402, 33 U.S.C. 1342.” **SB 89 is not needed, since this regulation already provides alignment of the KPDES permit program with only those waters regulated by the EPA under the Clean Water Act.**

If the intent is to sync state KPDES discharge permits with *Sackett*, and if the General Assembly believes that such a provision should be in statute (even though it is already in the agency regulations), then it should amend KRS 224.16-050, which specifically addresses the issuance of such permits by the Cabinet under the Clean Water Act. Instead, by drastically narrowing the definition of “waters of the Commonwealth” – a definition that applies to **all** environmental protection provisions under Chapter 224 – the bill goes so much further, eliminating protections for groundwater and tens of thousands of miles of ephemeral streams, which will have significant impacts on all downstream waters.

SB 89 is not merely about “alignment” of this one water pollution program with federal law. The definition of “waters of the commonwealth” has always been broader than “waters of the United States,” and it should remain broader. The reach of the Clean Water Act is limited to pollution affecting **interstate waters** and was never intended as a substitute for a state’s protection of all its intrastate waters.

Kentucky’s ephemeral streams, which flow in response to rainwater and snowmelt, are a critical part of Kentucky’s river systems. They slow floodwaters, support aquatic ecosystems, and provide water for surface water intakes that supply public drinking

water. Unregulated pollution entering our river networks from headwater and ephemeral streams flow into larger rivers during precipitation events, ultimately lowering water quality downstream.

There is another significant concern in tying our definition of “waters of the Commonwealth” to what is actually a **regulatory definition of WOTUS**. This federal definition has changed, accordion-like, multiple times over the years, with multiple rule changes since 2015, and another rule change likely to come. Relying on a federal definition that remains in-flux would create confusion and inconsistency for Kentucky’s regulated entities. There is also no current database of all waters in Kentucky that are federally protected as WOTUS and those that are not, which will create delays and likely, litigation on a case-by-case, permit-by-permit, stream-by-stream basis.

By tying our definition of state waters to the federal definition, SB89 would also make Kentucky the only state in the United States to surrender its authority to define and regulate its own waters to the federal government in this way. Kentucky should protect **all** of its waters and not cede the power to define what is worthy of protection to Washington D.C.

SB89 does so much more than prevent “over-regulation” of a private ditch or an ephemeral stream “that’s only wet when it rains.” SB89 fails to consider how Kentucky’s water chemistry is dependent on the entire watershed, including ephemeral streams, and that underground and interconnected waters will lose protection. For example, Skinframe Creek is a Perennial stream that is fed by McElroy Creek, Hewlett Creek, Tinsley Creek and White Sulphur Creek in Caldwell County. Because Skinframe Creek eventually goes underground, the U.S. Army Corp of Engineers determined that the entire watershed (16,804 acres) contains no WOTUS. Skinframe Creek contains 29,000 ft of perennial stream, 28,000 ft of intermittent stream and 30 acres of wetlands that will no longer be “waters of the Commonwealth” under SB89. These are functioning waters of the Commonwealth that are used for drinking water, recreating, fishing, watering livestock, and crop irrigation. This same scenario will happen all over Kentucky in areas where streams go underground.

Removing pollution protections for these essential parts of our river systems will also make downstream reaches of the streams more polluted for those regulated dischargers into WOTUS, increasing costs due to the need for tighter limits for these dischargers.

***Claim 6: SB 89 will not decrease KY’s economic development opportunities. In fact, SB 89 will actually have the inverse effect by the regulatory certainty it will provide. Job creators locate and expand in states where government does not overregulate or create unnecessary red tape. SB 89 will let our farmers, home***

***builders, coal industry and manufacturers prosper without unnecessary government overreach.***

Fact: This bill provides anything BUT regulatory certainty, as explained above. Shifting the definition of Waters of the Commonwealth to align solely with the federal definition of WOTUS will create significant permitting delays, regulatory inconsistencies, and uncertainty for businesses in Kentucky.

The term “navigable waters” in the Clean Water Act, which is defined by federal regulations defining “WOTUS,” defines the scope of required permitting under the pollutant discharge permitting program (Section 402 of the Act) and the dredge and fill program (Section 404). The U.S. Army Corps of Engineers makes jurisdictional determinations as to whether a proposed activity will affect a WOTUS only for Section 404 permits, a process that takes six months to over a year due to limited staff, required field assessments, and the absence of a final methodology for determining which headwater streams are in or out of protection.

The U.S. Army Corps of Engineers does not, and will not be required under SB 89, to make jurisdictional determinations for Kentucky under the 402 program. With the adoption of the new definition for “waters of the Commonwealth,” tied to federal regulations, the Cabinet will now be required to make a permit-by-permit jurisdictional determinations about whether the proposed discharge is into a “water of the United States.” The Division of Water will need to apply the federal guidance and practices that are used when determining what constitutes a WOTUS – which means acquiring the standards, retraining staff, and reviewing all existing permits that are up for renewal, and all new or modified permits in order to determine which discharges are into regulated waters and what should be the appropriate standards.

This will cause significant impacts to the KPDES permitting program. Under the current “waters of the Commonwealth” definition and framework, Kentucky’s Division of Water can issue KPDES permits efficiently, allowing businesses to begin construction in a timely manner. However, if “jurisdictional determinations” must be made for every impacted waterbody before a permit can be issued (which will be necessary under SB89), new projects or permits could be delayed by a year or more. Uncertainty will also increase, as WOTUS determinations will be subject to changing Army Corps protocols and possible changes of the WOTUS definition itself, rather than a consistent state standard. Litigation will ensue over disagreements about where the line between a WOTUS and a non-regulated water ends.

Finally, SB89 hamstring the Cabinet from regulating waters that are intrinsic to the complete water cycle. Pollution is washed downstream. Even if an ephemeral or intermittent stream is dry when discharge occurs, it will rain at some point and wash the cumulative discharge downstream. If you are in the eco-tourism or outdoor



recreation business, SB89 will negatively impact your business. For example, Louisville hosts the Iron Man competition (and almost lost it because of algae blooms that caused a health hazard warning). Increased and unregulated pollution, flowing more freely from intermittent streams eventually leading to the Ohio River, could cause the algae blooms to increase and risk Louisville's bid for the Iron Man. The same goes for any other eco-tourism-based business that relies on a functioning and healthy ecosystem.

Hunting, fishing, and other wildlife-related recreation produces a \$5.9 Billion-dollar economic impact for Kentucky, supporting 70,000 jobs. The outdoor recreation industry in Kentucky is estimated to generate \$12.8 Billion in consumer spending annually, none of which would be possible without maintaining healthy ecosystems and clean waterways. Allowing pollution of ephemeral streams and of groundwater will lower water quality and lessen these opportunities.

Finally, water is a valuable resource to Kentuckians and to new businesses looking to locate in our state. Allowing the degradation of the Commonwealth's waters will increase costs for regulated entities and will negatively impact economic development opportunities for Kentucky.