



January 5, 2026

U.S. Environmental Protection Agency,  
United States Army Corps of Engineers  
Docket ID No. EPA-HQ-OW-2025-0322  
VIA *Federal eRulemaking Portal*: <https://www.regulations.gov/>  
And by email to: OW-Docket@epa.gov

**Re: Updated Definition of “Waters of the United States”; Docket ID No. EPA–HQ–OW–2025–0322**

To U.S. Environmental Protection Agency and U.S. Department of the Army, Corps of Engineers (“Agencies”):

These comments in opposition to the Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52498 (Nov. 20, 2025) (“Proposed Rule”), are submitted by Kentucky Waterways Alliance, Kentucky Resources Council, Kentucky Sierra Club, Kentucky Conservation Committee, and Appalachian Citizens Law Center (“Commenters”). The proposed rule to redefine the scope of Waters of the United States (“WOTUS”) subject to the jurisdiction and protections of the Clean Water Act (“CWA”) is contrary to the intent and purpose of the CWA, conflicts with Supreme Court precedent, lacks scientific and evidentiary support, and is otherwise arbitrary and capricious.

Core federal CWA protections are essential to safeguarding the health and safety of Kentuckians and ensuring the continued health of Kentucky’s waterways. The waters eligible for these protections have already been significantly narrowed by the U.S. Supreme Court’s 2023 decision in *Sackett v. EPA*. The Agencies now propose to redefine the term “waters of the United States” to dramatically curtail the CWA further, in ways not required by *Sackett*, leaving innumerable streams, wetlands, and other waters without protection. The Proposed Rule runs counter to evidence-based science and the CWA’s fundamental purpose: to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. In a state like Kentucky, where thousands of miles of streams, extensive wetlands, and karst groundwater systems are closely interconnected, additional erosion of federal protections threatens water quality, public health, and downstream communities.

## I. KENTUCKY'S WATERWAYS ARE A CORNERSTONE OF OUR ECONOMY, CULTURE, AND GROWTH

Water is not simply an environmental resource for Kentucky, but a defining feature of our identity, economy, and culture. Three of our borders are formed by major rivers. Our economy relies on abundant water not only for manufacturing, agriculture, energy production, and tourism, but for attracting new industries that increasingly seek water-secure locations. Clean, fishable, swimmable, drinkable water is a fundamental expectation shared by all Kentuckians, regardless of political affiliation or region. Kentucky is water, and water is our commonwealth:

- Kentucky contains more than 92,000 miles of rivers and streams. 45 major lakes cover over 440,000 acres, with reservoirs holding 2.9 trillion gallons of water.<sup>1</sup>
- Kentucky and Alaska were the two only states not in drought during 2024.<sup>2</sup>
- Kentucky's water is the foundation of its world-famous racehorses and Bourbon.
- More than 1.5 million Kentuckians are served by public water-supply systems that rely on groundwater, and 416,000 Kentuckians get their drinking water from wells or springs.<sup>3</sup>

Yet even with this abundance, Kentucky waterways are under significant stress, demonstrating the need for stronger protection, not further erosion. Indeed, Kentucky has lost 80% of its historical wetlands – retaining only 360,000 acres of its historical 1.53 million acres – which filter water, slow flooding, and replenish our surface water sources and groundwater.<sup>4</sup> One study found that at least 89,000 acres of Kentucky's remaining wetlands effectively lost protections under *Sackett*.<sup>5</sup> According to some reports, the proposed rule may now remove protection for all but 15%, or 44,000 acres, of Kentucky's existing wetlands.

65% of Kentucky rivers and streams, an estimated 51,960 miles, are considered intermittent and/or ephemeral and are critical for refilling reservoirs and aquifers residents rely on for drinking water sources.<sup>6</sup> The proposed rule would likely remove all protection from Kentucky's ephemeral streams, despite their evidence-based ecological and hydrological connection to jurisdictional waters. Many of Kentucky's intermittent streams could lose protection as well. Maintaining as much protection for Kentucky's ephemeral and intermittent streams and wetlands is crucial for many reasons, including that our extensive karst topography permits groundwater to move quickly underground, allowing pollution to spread rapidly with little filtration.

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<sup>1</sup> [https://www.kymitigation.org/content.aspx?page\\_id=22&club\\_id=839312&module\\_id=746455](https://www.kymitigation.org/content.aspx?page_id=22&club_id=839312&module_id=746455)

<sup>2</sup> <https://www.drought.gov/news/2024-review-look-back-drought-across-united-states-12-maps-2025-01-08>

<sup>3</sup> [https://www.kymitigation.org/content.aspx?page\\_id=22&club\\_id=839312&module\\_id=746455](https://www.kymitigation.org/content.aspx?page_id=22&club_id=839312&module_id=746455)

<sup>4</sup> <https://publications.mgcafe.uky.edu/files/ID279.pdf>

<sup>5</sup> See [https://www.nrdc.org/sites/default/files/2025-03/Wetlands\\_Report\\_R\\_25-03-B\\_05\\_locked.pdf](https://www.nrdc.org/sites/default/files/2025-03/Wetlands_Report_R_25-03-B_05_locked.pdf).

<sup>6</sup> <https://19january2021snapshot.epa.gov/sites/static/files/2014-09/documents/kentucky.pdf>;  
<https://19january2021snapshot.epa.gov/sites/static/files/2014-09/documents/kentucky.pdf>

Weakening the CWA will exacerbate already diminished water quality. Statistics from the 2024 Integrated Report to Congress on the Condition of Water Resources in Kentucky show that our water quality is already falling below the goals of the CWA:

- 68% of 2024 305(b) assessments resulted in Impaired status.
- 70% of 2024 305(b) river miles assessed are Impaired.
  - o 80% of Impaired river miles are without a TMDL.
- 87% of 2024 305(b) lake acres assessed are Impaired
  - o 100% of Impaired lake acres are without a TMDL.
- 45% of 2024 305(b) spring acres assessed are Impaired.
  - o 95% of Impaired spring acres are without a TMDL.
- 78% of Kentucky waterways are impaired for swimming.
- 56% are impaired for fish consumption.
- 59% are impaired for warm water aquatic habitat.

Few other states demonstrate the need to enhance protection for waterways better than Kentucky. Poor permitting, weak regulatory programs, wetland draining, and stream straightening and destruction have led to multiple natural disasters in Kentucky. With 86% of Kentucky communities situated within the floodplains, removing safeguards that kept natural water infrastructure on the landscape has led to mass flooding and destruction of communities. Analysis of major federally declared natural disasters from 2011-2024:

- From 2011 – 2024 Kentucky experienced 23 federally declared major disasters. 20 of those disasters were flood related.
- In 2024, Kentucky contained 5 of the top 10 counties in the US experiencing the most, major declared natural disasters in the United States. These counties experienced 16 to 15 disasters each. In 2023, Kentucky contained 8 of the top 10 counties in the US.
- In February 2025, all 5 of Kentucky’s top disaster-prone counties experienced another major declared flooding disaster.
- In April 2025, 3 of Kentucky’s top disaster-prone counties experienced a second major declared flooding disaster.

The challenges above represent just some of the costs placed on Kentucky residents from reduced permitting and protection of waterways. Further, more frequent and intense climate-related extreme weather is expected to continue with our warming climate. The Agencies and our communities cannot afford to eliminate protections for waters that help mitigate the impacts of climate change. While regulatory compliance costs have been characterized as burdensome, the cost of cleaning up pollution from waterways, restoring wetlands, and addressing public health crises from contaminated drinking water is far higher than the cost of responsible permitting and compliance. The type of deregulation proposed in this rule simply shifts the cost from industry to Kentucky residents who live downhill and downstream.

For instance, Kentucky’s 23 disasters have cost taxpayers \$1.53 billion in federal disaster recovering funding in the past 13 years. The 2022 Kentucky floods alone were estimated to cost \$450-\$950 million to rebuild damaged homes. Kentucky’s Green Sinks program estimates that

every \$1 spent on green infrastructure translates to \$8-\$13 in economic impact and avoided cleanup costs. This last figure disguises the fact that those initial dollars are public dollars, paid by taxpayers and communities who could avoid such financial burdens and environmental impacts if a strong regulatory program existed to safeguard wetlands, streams, and water quality.

Further narrowing CWA jurisdiction would depart from congressional intent, ignore decades of established scientific understanding, increase risks for Kentucky communities, and shift substantial costs to local governments, utilities, and residents.

## II. LEGAL BACKGROUND

### A. Clean Water Act: Continued Weakening of the WOTUS Rule

The Clean Water Act is the primary federal statute governing protection of the Nation's waters, and its effectiveness depends fundamentally on the scope of waters subject to its protections. Congress enacted the CWA in 1972 in response to widespread and well-documented failures of prior water pollution control laws, recognizing that many of the Nation's waters had become "unfit for most purposes."<sup>7</sup> In doing so, Congress declared a national objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and established the elimination of pollutant discharges into navigable waters as a central goal. 33 U.S.C. §§ 1251(a), 1311(a), *et seq.*

Rather than limiting federal jurisdiction to waters that are navigable in fact,<sup>8</sup> Congress deliberately defined "navigable waters" broadly to mean "the waters of the United States," including the territorial seas. 33 U.S.C. § 1362(7). This definitional choice reflected Congress's understanding that protecting downstream navigable waters necessarily requires safeguarding upstream waters, tributaries, wetlands, and other aquatic features that contribute flow, pollutants, sediment, and ecological functions to larger water systems. Congress structured the CWA to rely on scientific and technical expertise to implement its broad mandate, rather than embedding rigid jurisdictional limits that would fail to account for hydrologic reality.

Since enactment of the CWA, the scope of "waters of the United States" ("WOTUS") has been shaped through agency rulemaking and judicial interpretation. Although the Supreme Court has limited federal authority under the Act, it has never required the narrowest possible interpretation of WOTUS. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), 531 U.S. 159 (2001), the Court rejected federal jurisdiction over isolated, non-navigable intrastate ponds based solely on the presence of migratory birds, cautioning against jurisdiction untethered from the Act's text and structure. In *Rapanos v. United States*, the Court produced no majority opinion, instead articulating competing standards for jurisdiction. Justice Scalia's plurality required a "relatively permanent" water body connected to traditional navigable waters and a continuous surface connection to wetlands; Justice Kennedy's concurrence introduced the "significant nexus" test, allowing jurisdiction over waters and

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<sup>7</sup> Congressional Research Service (CRS), *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Serial No. 93-1, January 1973, pp. 1412, 1420-1425.

<sup>8</sup> *Daniel Ball*, 77 U.S. 10 Wall. 557 557 (1870) and subsequent case law.

wetlands that significantly affect the chemical, physical, or biological integrity of navigable waters. *Rapanos v. United States*, 547 U.S. 715 (2006).

Most recently, *Sackett v. EPA* further constrained the scope of federal jurisdiction by rejecting the significant nexus test and adopting a more restrictive reading of WOTUS with respect to wetlands. *Sackett* rejected the significant nexus test entirely and adopted the Scalia *Rapanos* plurality as the controlling interpretation. The Court held that only those wetlands with a continuous surface connection to relatively permanent, standing or continuously flowing bodies of water qualify as WOTUS, drastically narrowing federal jurisdiction under the Clean Water Act. Although *Sackett* narrowed certain aspects of Clean Water Act coverage, it did not eliminate federal authority over waters connected to WOTUS, nor did it compel the agencies to disregard the Act’s overarching purpose or scientific understanding of hydrologic connectivity when implementing the statute.

Against this statutory and judicial backdrop, the agencies’ proposed redefinition of “waters of the United States” represents a discretionary policy choice to constrict CWA protections beyond what is required by precedent—one with significant implications for states like Kentucky, where the scope of the Commonwealth’s water protection program is expressly linked by statute to the federal definition of waters of the United States through direct reference to the United States Code.

## **B. “Waters of the Commonwealth”: Legislative History in Kentucky**

Since the 1970s and until 2025, Kentucky law defined the “waters of the Commonwealth” broadly, reflecting the same hydrologic and ecological realities that informed the creation of the federal Clean Water Act. Historically, Kentucky’s definition of “waters of the Commonwealth” has been central to the Kentucky Energy and Environment Cabinet’s authority over intrastate waters, serving both as the basis for state programs regulating waters beyond federal jurisdiction and as the jurisdictional foundation for the Commonwealth’s implementation of federally delegated Clean Water Act programs. Until recently, “waters of the commonwealth” meant 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, that are situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction.<sup>9</sup> This approach recognized that Kentucky’s water resources - particularly its extensive headwater stream networks, karst geology, and interconnected surface and subsurface waters - function as integrated systems in which upstream and adjacent waters directly influence downstream water quality.

During the 2025 Regular Session the General Assembly, the definition was changed from this definition so that “waters of the commonwealth” now means: “ (a) navigable waters, as defined in 33 U.S.C. sec. 1362.; (b) sinkholes with open throat drains; (c) naturally occurring artesian or phreatic springs, as well as any other spring used as a source of domestic water supply; and (d) wellhead protection areas that are situated wholly or partly within or bordering

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<sup>9</sup> <https://apps.legislature.ky.gov/recorddocuments/bill/25RS/sb89/bill.pdf>

upon the Commonwealth or within its jurisdiction.”<sup>10</sup> As enacted, SB 89 expressly ties the scope of Kentucky’s CWA-related regulatory program to the federal definition of “waters of the United States” through direct reference to the United States Code. As a result, any narrowing of the federal definition of waters of the United States automatically and immediately constricts the scope of waters protected under Kentucky law.

In a state where the majority of stream miles consist of headwaters and intermittent or ephemeral channels that ultimately feed navigable rivers such as the Ohio, Cumberland, and Tennessee Rivers, changes to the federal definition are not abstract legal exercises; they directly determine whether waters that function as part of connected hydrologic systems—based on how water moves, accumulates, and transports pollutants in the real world—remain protected from pollution or are left without meaningful regulatory safeguards.

As Senate Bill 89 ties Kentucky’s definition of protected “waters of the Commonwealth” to the federal definition of WOTUS, the proposed rule would remove protections for many Kentucky’s waterways in significant ways, without consideration of the water quality impacts that result from modifying the Clean Water Act’s jurisdictional scope.

### **III. GENERAL COMMENTS**

EPA is obligated, in implementing the Clean Water Act, to formulate and apply a definition of “waters of the United States” that is grounded in scientific understanding of hydrology and water connectivity as they function in practice, so as to faithfully carry out Congress’s directive to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. Instead, the proposed rule adds confusion, deepens harm, and unduly narrows the Agencies’ jurisdiction under the CWA.

#### **A. The Proposed Rule Adds Confusion and Deepens Harm**

Rather than providing clarity, the proposed changes to the definition of WOTUS would compound the damage already caused by the *Sackett* decision and introduce even greater regulatory uncertainty. By the agencies’ own analysis, the combined effect of the Supreme Court’s ruling and this proposal would strip federal safeguards against pollution and destruction for more than 80% of wetlands and millions of miles of streams nationwide, including 85% of Kentucky wetlands and countless headwater streams vital to the health of our watersheds.

The proposal further muddies the waters by creating a new and ill-defined framework for determining which streams and wetlands are protected. In particular, the agencies suggest using a “wet season” concept to establish jurisdictional waters yet fails to explain what the term means or how it would be applied. A “wet season” standard would vary widely by location, timing and duration of wet periods across Kentucky, and in many circumstances vary widely from one watershed to another. This lack of consistency would make it difficult for regulators and the public to know when jurisdiction is present, which undermines predictable enforcement and increases risk of violations.

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<sup>10</sup> KRS 224.1-010(32)

At the same time, the proposal would categorically exclude ephemeral streams and most intermittent streams from protection. In Kentucky, intermittent and ephemeral streams make up 65% of our stream systems, and even traditionally perennial streams are becoming less reliable as climate-driven drought and extreme weather alter Kentucky's water patterns. Kentucky's small headwater streams are widespread and closely connected to larger waterbodies and groundwater systems which supply our drinking water sources.

While some may consider the upper reaches of the stream systems as inconsequential from an ecological or water quality standpoint, ephemeral and intermittent stream reaches play a critical role in stream system health. Eliminating protection for them would have far-reaching negative consequences, as discussed more below.

Protecting non-perennial streams is both scientifically necessary and consistent with the *Sackett* decision. Any approach that limits CWA protections solely to perennial streams would ignore hydrologic reality and undermine water quality protections. The proposed "wet season" concept is both problematic and goes beyond *Sackett*. Further, for streams, reliable data on flow timing and duration is often unavailable, and in many regions, including Kentucky, stream flow does not neatly align with a single, predictable "wet season." This ambiguity would make the CWA more difficult to administer and enforce.

The proposed rule risks accelerating more waterway loss by removing federal oversight and allowing increased dumping, filling, and pollution of streams and wetlands. For Kentucky, which has only 20% of our historical wetlands, that would mean greater threats to drinking water, increased flooding, and further degradation of the rivers and streams that communities across the Commonwealth rely on.

**B. The Proposed Rule Overlooks the Costs and Consequences for Kentucky Communities, Local Economies, and Wildlife**

The proposed rule does not meaningfully assess the real-world consequences of withdrawing CWA protections from large numbers of streams and wetlands. In Kentucky, the costs of these rollbacks would fall squarely on the public, showing up as increased risks to drinking water safety, greater flooding and storm damage, heightened wildfire risk in drought-prone areas, and the loss of natural resources that support jobs and community stability.

The exclusion of protections for ephemeral and intermittent stream reaches has profound negative consequences for public and semi-public drinking water systems in the Commonwealth. As is seen from the attached document captioned *Percentage of Surface Drinking Water from Intermittent, Ephemeral, and Headwater Streams in Kentucky*, which data was derived by the Kentucky Energy and Environment Cabinet in 2025 from the National Hydrography Dataset Plus at medium resolution; Federal Safe Drinking Water Information System 4<sup>th</sup> Quarter 2006 Data, the impact of excluding ephemeral and intermittent streams from protection from filling and pollution, will impose significant treatment and other costs on water users. In Kentucky, 15,065 total miles of streams provide water for surface water intakes supplying public drinking water systems; of this, 8,185 miles, or 54%, 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.

As pollution increases in unprotected headwater, ephemeral, and intermittent stream reaches, drinking water utilities that rely on surface and groundwater, would be forced to spend more to treat water to meet health standards. Those higher treatment costs would ultimately be passed on to customers, adding to the financial strain faced by many Kentucky households already struggling with rising utility bills.

The importance of wetlands and small streams to clean water and flood protection in Kentucky cannot be overstated. Wetlands naturally filter pollutants before water reaches rivers, groundwater and reservoirs, they store and slow floodwater, replenish groundwater and streams during dry periods, and provide irreplaceable habitat for fish and wildlife. The EPA has recognized wetlands as among the most productive ecosystems on Earth, comparable to coral reefs and rainforests. Yet the proposal would deny protection to many seasonal and geographically isolated wetlands, including those that provide critical habitat for migratory birds that travel through or overwinter in Kentucky. These wetlands support breeding, feeding, and migration for millions of birds, waterfowl, and other species that are integral to the Commonwealth's ecological health and outdoor heritage.

Clean water is also a cornerstone of Kentucky's economy. Businesses and communities depend on reliable, clean water supplies, and decades of experience show that strong water protections support, rather than hinder, economic growth. The streams and headwaters at risk under this proposal sustain valuable sport fisheries by providing spawning and nursery habitat and delivering cool, clean water to larger rivers downstream.

Hunting, fishing, and outdoor recreation contribute significantly to Kentucky's rural economies, supporting local outfitters, guides, lodging, and small businesses. Hunting, fishing, boating, and wildlife watching represent a \$5.9 billion industry in Kentucky, supporting around 70,000 jobs and \$343.9 million in local tax income. As a whole, outdoor recreation in Kentucky generates \$12.8 billion in consumer spending, 120,000 jobs, \$3.6 billion in wages and salary, and \$756 million in state and local tax revenue. In many Kentucky communities, this seasonal recreation revenue can make the difference between a business surviving or closing its doors.

**C. The Proposed Rule Disproportionately Impacts Kentucky and Misconstrues Cooperative Federalism and the Framework of the CWA**

The Agencies assert that the Proposed Rule is needed to preserve the "traditional sovereignty of States over their own land and water resources pursuant to the cooperative federalism framework predicated by the Act" and that as federal jurisdiction secedes, State regulation will fill the gap. 90 Fed. Reg. at 52499. However, this model breaks down in states like Kentucky, where in 2025, Senate Bill 89 restricted the Commonwealth's ability to define its state jurisdictional waters and adopt protections that are more protective than CWA standards. As federal coverage is narrowed, Kentucky is legally constrained from filling those gaps.

In states that retain the authority to enact stronger safeguards, lost federal protections may be partially replaced at the state level. Kentucky does not have that flexibility. Under SB 89, when water falls outside federal jurisdiction, they are left unprotected, effectively opening them to dumping, filling, or degradation with limited regulatory oversight. This creates a regulatory vacuum that undermines water quality, public health, and the resilience of Kentucky’s watersheds.

The proposal to eliminate “interstate waters” as a jurisdictional category puts Kentucky at amplified risk. Many of Kentucky’s rivers and streams receive water from upstream states, meaning Kentucky communities are already vulnerable to pollution originating beyond our borders. Even if Kentucky wished to respond more aggressively, SB 89 limits the tools available to do so. The *Sackett* decision does not require removing this long-standing safeguard and it will weaken protections for waters that cross state lines and places Kentucky at even greater risk from upstream pollution it cannot control.

Taken together, the rollback of federal protections, Senate Bill 89, and Kentucky’s statutory prohibition on more stringent state standards transform cooperative federalism into a one-sided burden for the Commonwealth. Without a strong federal baseline, Kentucky communities, ecosystems, and downstream communities will bear the costs of pollution while lacking the authority to fully protect the waters they depend on.

#### **IV. THE PROPOSED RULE VIOLATES THE CLEAN WATER ACT, ADMINISTRATIVE PROCEDURE ACT, AND GOES FAR BEYOND COMPLYING WITH THE SUPREME COURT’S DECISION IN *SACKETT***

##### **A. The Proposed Rule Violates the Administrative Procedure Act**

Federal agency rulemaking is governed by the Administrative Procedure Act (APA), which establishes both the procedures agencies must follow when promulgating regulations and the standards courts apply when reviewing those actions. Federal agencies must act within the bounds of their statutory authority and adhere to reasoned, lawful decision-making. Under 5 U.S.C. § 706, agency actions must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” This standard requires agencies to examine relevant data, articulate a rational connection between the facts found and the choices made, and offer a reasoned explanation for any policy changes, particularly where a new rule departs from prior interpretations.<sup>11</sup>

The Agencies have failed to ensure that their interpretations are firmly rooted in the text and objectives of the Clean Water Act,<sup>12</sup> supported by the administrative record, and consistent

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<sup>11</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (agency action is arbitrary and capricious when the agency fails to provide a reasoned explanation).

<sup>12</sup> *West Virginia v. EPA*, 597 U.S. 697, 721–23 (2022) (holding that agencies must point to clear congressional authorization when asserting regulatory authority of vast economic and political significance).

with scientific and technical realities relevant to the statutory program. Specifically, the Agencies failed to consider the effects of the Proposed Rule on the Clean Water Act’s statutory “objective” to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>13</sup>

**B. The Proposed Elimination of Interstate Waters from the Definition of WOTUS is Contrary to the Clean Water Act**

Commenters strongly oppose EPA’s proposed revisions to 40 C.F.R. § 120.3(a)(1)(iii), which would eliminate interstate waters as an independent category of jurisdictional waters under the Clean Water Act. By removing interstate waters from the general definition of “waters of the United States,” the proposed definition departs from the statute’s plain meaning, Congress’s expressed intent, longstanding agency interpretation, and existing judicial precedent recognizing interstate waters as a core component of federal CWA jurisdiction. This change reflects a discretionary narrowing of CWA protections without meaningful analysis of the waterbodies affected or the downstream consequences of that change. The proposed rule therefore carries significant implications for states such as Kentucky, where water systems cross state boundaries or contribute flow to interstate waters.

**i. The Proposed Rule Departs From the CWA’s Plain Meaning, Congress’s Expressed Intent, Longstanding Agency Interpretation, and Existing Judicial Precedent Recognizing Federal Jurisdiction Over “Interstate Waters” as a Core Component of the CWA**

Pursuant to 5 U.S.C. § 706(2)(C), the Agencies are prohibited from narrowing or expanding statutory programs through regulatory interpretation in a manner inconsistent with the statute’s text, structure, or purpose. Eliminating “interstate waters” as a distinct category of jurisdictional waters exceeds that authority. The Clean Water Act defines “navigable waters” as “the waters of the United States,” 33 U.S.C. § 1362(7) – language that, on its face, encompasses waters that traverse or form boundaries between states.<sup>14</sup> Conditioning jurisdictional status over interstate waters upon satisfaction of an additional regulatory test improperly narrows the statute beyond its ordinary meaning.

Congress reinforced this understanding throughout the CWA by repeatedly treating interstate waters as a protected category of waters subject to federal oversight. *See, e.g.*, 33 U.S.C. § 1313(a) (preserving water quality standards for “interstate waters” and directing EPA to continue reviewing and enforcing those standards). These provisions function coherently only if interstate waters remain within Clean Water Act jurisdiction; categorically excluding them would render these statutory protections internally inconsistent or ineffective. Congress’s intent to retain jurisdiction over interstate waters is reflected not only in the CWA’s text and structure,

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<sup>13</sup> 33 U.S.C. § 1251(a)

<sup>14</sup> Waters shared by more than one state are, by definition, waters of the United States as a whole, not solely of any single state.

but also in the circumstances of its enactment.<sup>15</sup> The Act was adopted against a fragmented federal water pollution framework that treated interstate and navigable waters under overlapping and sometimes inconsistent regimes.<sup>16</sup> Rather than narrowing federal authority, Congress unified and preserved jurisdiction over both extending CWA coverage to interstate waters regardless of navigability and to traditionally navigable waters regardless of whether they crossed state lines.<sup>17</sup>

The proposed definition also departs from decades of consistent EPA and Army Corps interpretations treating interstate waters as an independent jurisdictional category of waters of the United States<sup>18</sup>—interpretations entitled to substantial weight<sup>19</sup> and their abandonment not adequately justified. Supreme Court precedent supports the agencies’ longstanding interpretations that the Clean Water Act includes interstate waters as an independent jurisdictional category.<sup>20</sup>

EPA may not, through regulatory revision, disclaim responsibility for waters Congress unmistakably placed within the scope of the CWA. Because the proposed definition eliminates federal jurisdiction over interstate waters in a manner inconsistent with the Clean Water Act’s text, structure, and longstanding statutory scheme, it exceeds EPA’s delegated authority and is unlawful under 5 U.S.C. § 706(2)(C).

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<sup>15</sup> Revised Definition of “Waters of the United States” Response to Comments Document SECTION 2 – LEGAL ARGUMENTS, 27-47 (“2023 Rule RTC”). [https://www.epa.gov/system/files/documents/2022-12/02\\_2022\\_Legal\\_RTC.pdf](https://www.epa.gov/system/files/documents/2022-12/02_2022_Legal_RTC.pdf).

<sup>16</sup> See the Federal Water Pollution Control Act (FWPCA) of 1948 (and its later amendments) and Refuse Act (section 13 of the Rivers and Harbors Act), promulgated in 1890. The FWPCA declared “pollution of interstate waters” and their tributaries to be a federal nuisance and authorized federal abatement actions. It defined interstate waters as any waters that cross or form state boundaries, without requiring navigability. The Rivers and Harbors Act regulated discharges into “navigable waters and their tributaries.”

<sup>17</sup> [https://www.epa.gov/system/files/documents/2022-12/02\\_2022\\_Legal\\_RTC.pdf](https://www.epa.gov/system/files/documents/2022-12/02_2022_Legal_RTC.pdf).

<sup>18</sup> With the exception of the short-lived 2020 rule, the agencies have consistently treated interstate waters as an independent basis for Clean Water Act jurisdiction for more than five decades. *See* 38 Fed. Reg. 13,528, 13,529 (May 22, 1973); 40 Fed. Reg. 31,320, 31,324 (July 25, 1975); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

<sup>19</sup> *See United States v. Am. Trucking Ass’ns*, 310 U.S. at 549) “the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to ‘great weight.’”; *see also Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 388 (2024).

<sup>20</sup> *See: City of Milwaukee v. Illinois*, 451 U.S. 304, 317–18 (1981) (Clean Water Act establishes a comprehensive federal regime governing pollution of interstate waters, displacing federal common law); and *see: Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992) (confirming EPA’s authority to regulate discharges into interstate waters and enforce downstream water quality standards). Neither *Rapanos v. United States*, 547 U.S. 715 (2006), nor *Sackett v. EPA*, 598 U.S. 651 (2023), disturbs this settled understanding. Both decisions addressed the scope of Clean Water Act jurisdiction over wetlands not non-wetland interstate waters, and neither decision questioned Congress’s authority to regulate interstate waters or suggested that such waters must independently satisfy an additional jurisdictional test.

ii. **The Agencies don't provide analysis about the practical implications for categorically excluding "interstate waters"**

The APA obligates an agency to disclose the technical data, analysis, and reasoning underlying a proposed rule so that the public can meaningfully evaluate and respond to it. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237–38 (D.C. Cir. 2008). Absent such disclosure, the public cannot “point out where that information is erroneous or where the agency may be drawing improper conclusions from it.” *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984); *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009). Here, the agencies do not assess how categorically excluding interstate waters as an independent category of Clean Water Act jurisdiction would alter permitting obligations, enforcement authority, or downstream state protections, nor does it evaluate how that exclusion would interact with statutory provisions that expressly rely on federal oversight of interstate waters, including downstream water quality standards, interstate notice and consultation requirements, and protections against cross-border pollution. By failing to disclose or analyze these foreseeable consequences, the agencies deprive the public of a meaningful opportunity to comment and offers no reasoned explanation for how the proposed definition can operate coherently within the existing statutory scheme.

iii. **The Significant Impacts to Kentucky and Interstate Waters Were not Adequately Considered**

The impacts of categorically excluding interstate waters are neither speculative nor abstract in Kentucky, a state whose surface waters are defined by shared drainage systems and downstream interstate connectivity. Kentucky borders and contributes flow to multiple interstate river systems that function as primary pathways for water and pollutant transport among states.

Kentucky’s hydrology is dominated by extensive networks of intermittent and non-perennial streams that form the upper reaches of interstate watersheds. Many of these waters cross state lines or contribute flow to interstate rivers despite lacking continuous surface flow or exhibiting the tributary characteristics newly required under the proposed rule. In southeastern Kentucky, headwater streams along the Kentucky–Tennessee border contribute to both the Cumberland River system, which ultimately drains to the Ohio and Mississippi Rivers, and the Big Sandy River system, which flows to the Ohio River—reflecting complex Appalachian drainage patterns that span Kentucky, Tennessee, Virginia, and West Virginia.

Within these basins, waters such as the Clear Fork cross the Kentucky–Tennessee boundary before joining larger interstate rivers, while the Big Sandy River Basin is formed by tributaries extending across multiple states. Many of these interstate waters originate as headwater streams with episodic or seasonal flow and may lack a continuous surface connection to relatively permanent, standing, or continuously flowing waters as required by the proposed definition. Although these waters function hydrologically as components of interstate systems, they may not independently qualify as jurisdictional waters under the proposed framework.

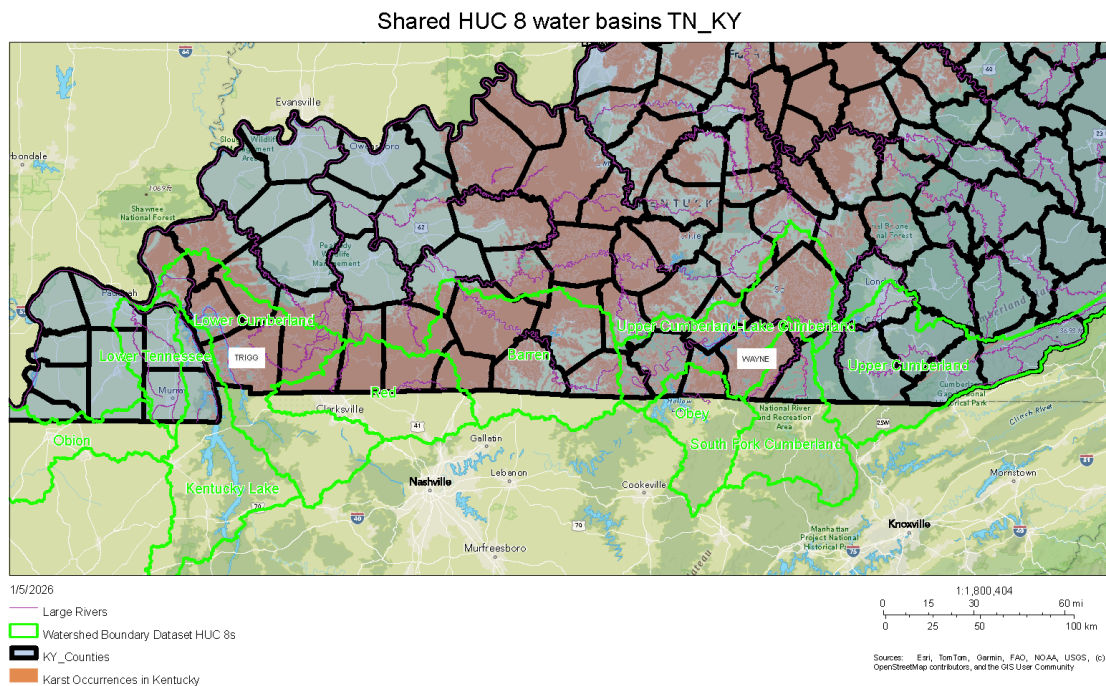
The Proposed Rule would exclude from Clean Water Act jurisdiction certain interstate waters in Kentucky that cross or form state boundaries but do not meet newly imposed flow or connectivity thresholds. This exclusion would create regulatory gaps affecting waters that

contribute to interstate pollutant transport and downstream water quality, notwithstanding their physical and functional role within interstate river systems. In a state where interstate watersheds are built from networks of intermittently connected headwaters, excluding such waters undermines the Act’s longstanding objective of protecting downstream states from upstream pollution and ensuring consistent federal oversight of waters shared among the states.

Such a change would present a significant risk for the KY–TN line-border in the Trigg county-to-Wayne county karst belt, where hydrologic connectivity and pollutant transport frequently occur through headwaters, sinking streams, springs, and adjacent wetlands do not track political boundaries. The KY–TN boundary across this corridor is primarily a surveyed line rather than a boundary river. In this setting, interstate hydrologic effects often occur through smaller features (headwaters, intermittent channels, spring runs, and wetlands) rather than an obvious interstate mainstem at the border.

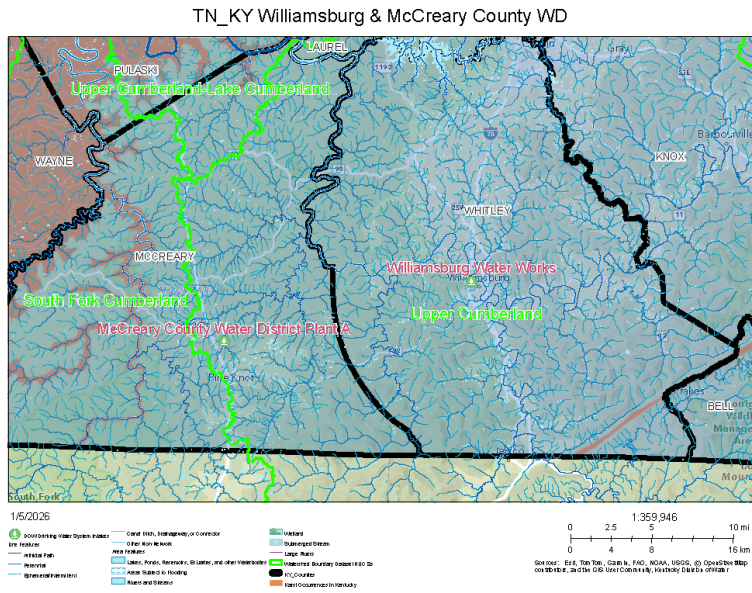
Furthermore, in such karst terrain, surface channels may sink, flow through subsurface conduits, and re-emerge at springs that then feed surface waters. A Kentucky Geological Survey dye-trace study in Logan County documented swallow-hole-to-spring dye detection illustrating the potential for rapid recharge-to-spring transport in conduit-flow settings (Currens, KGS, Logan County karst study).

The map below identifies the following KY–TN shared HUC-8 subbasins (interstate basins): Upper Cumberland (05130101); South Fork Cumberland (05130104); Obey (05130105); Upper Cumberland–Lake Cumberland (05130103); Barren (05110002); Red (05130206); Lower Cumberland (05130205); Kentucky Lake (06040005); Lower Tennessee (06040006); and Obion (08010202):

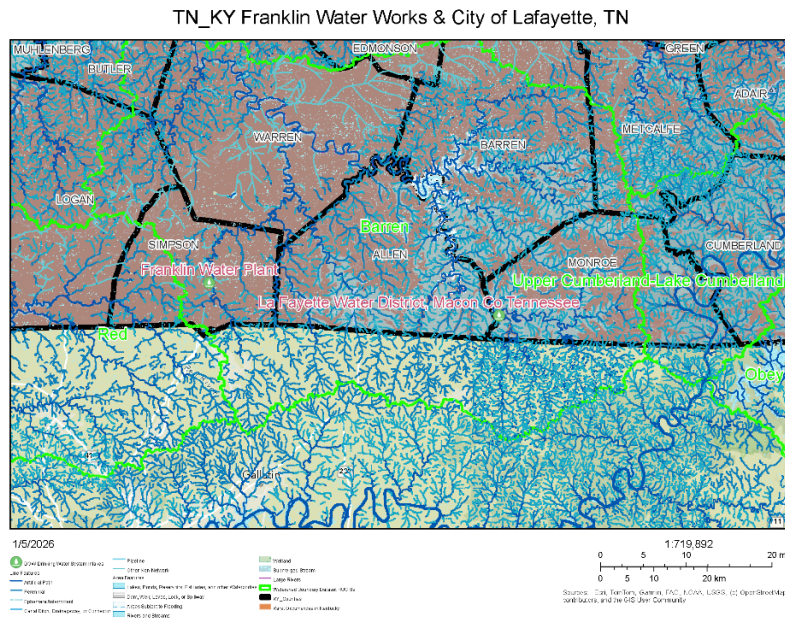


The maps below demonstrate shared HUC-8s to public water systems/source-water protection areas on both sides of the KY–TN line, underscoring that these interstate basins are not abstract polygons but operational source-water landscapes. Examples identified include:

- Williamsburg Water Department (KY1180471) — Upper Cumberland (HUC 05130101) (Map 1)
- McCreary County Water District (KY0740276) — South Fork Cumberland (HUC 05130104) (Map 1)



- Franklin Water Works (KY1070144) — Barren (HUC 05110002) (Map 2)
- City of Lafayette, Tennessee (system id TN 0000373) — Barren (HUC 05110002) (Map 2)



The Proposed Rule arbitrarily relies on a numeric claim (15 interstate-only determinations) to support the conclusion that impacts will be “few,” but does not identify the determinations, provide identifiers, or disclose the methodology necessary for public verification and comment. The Proposed Rule also inadequately addressed the issues of line borders and karst conditions. Its illustrative framing emphasizes interstate rivers crossing state boundaries, fails to address line-border settings where interstate consequences may be driven by headwaters, intermittent channels, spring runs, and adjacent wetlands—features at heightened risk of exclusion once the independent interstate waters hook is removed. The Proposed Rule also arbitrarily fails to address interstate externalities and source-water protection. Where shared HUC-8 basins supply or influence public drinking water on both sides of the line, shifting additional reliance to state programs without an accompanying, record-based discussion of interstate spillover risk and implementation safeguards is not adequately supported.

For line-border settings such as the KY–TN Trigg-to-Wayne karst belt, the deletion of the stand-alone interstate waters category is not supported by an adequately transparent administrative record. At a minimum, the agencies should supplement the docket with the determination set, methods, and line-border/karst examples requested above, and should issue explicit implementation guidance sufficient to prevent jurisdictional gaps and inconsistent outcomes across Corps districts in shared KY–TN basins, particularly where public water supply/source-water protection interests are implicated. Such impacts must be disclosed.

**C. Excluding Ephemeral and Intermittent Streams from the Definition of WOTUS is Not Supported by Science, Arbitrarily Departs from 50 Years of Agency Regulations, and is Contrary to the CWA.**

The Agencies’ proposed changes to the definition of WOTUS that exclude ephemeral and intermittent streams – including redefining “relatively permanent” and “tributary” – are contrary to the intent of the CWA, Supreme Court precedent, prior regulations, and the best available science. Protection of headwater ephemeral and intermittent streams is critical to the health of our streams and rivers, and the protection of the integrity of these upper reaches of the riverine systems is a matter of public importance and sound science.

As noted in a 2020 Kentucky Division of Water Report,

[headwater] streams (either intermittent or perennial) and their ephemeral tributaries serve multiple functions often overlooked in environmental planning and land use decision-making. They are the key interface between the surrounding landscape and larger waterbodies. Healthy headwater streams provide habitat to relatively distinct and diverse invertebrate assemblages, and by assimilating nutrients, organic matter, and sediments, they export high quality water in the form of goods and services (e.g., water supply, recreation, waste assimilation, flood control, and ecological values) (Yoder et al. 2000, Wallace and Meyer 2001). These streams are also closely connected to groundwater resources and provide thermal refuges to many organisms in both winter and summer. Despite possessing these attributes, little is known about the biological potential of small headwater streams in Kentucky.

Pond, Gregory and McMurray, *A Macroinvertebrate Bioassessment Index for Headwater Streams of the Eastern Coalfield Region, Kentucky*, Kentucky Division of Water (2002) p. 1. A copy of this report is attached to these comments and incorporated herein by reference as if fully set forth below.

The loss of stream reaches due to filling associated with mining and development activity, has both qualitative and quantitative impacts on downstream reaches, receiving waters, and communities. Headwater streams provide hydrologic retention capacity, the loss of which increases frequency and intensity of downstream flooding and lower base flows. (Dunne & Leopold 1978). That increased frequency and intensity of flooding results in increased channel erosion downstream (Trimble 1997).

Additionally, headwater streams retain sediments in headwater channels; the loss of which leads to excess sediment transport downstream (Waters 1995). They are the most active uptake and retention sites within the stream network, (Alexander 2000, Peterson 2001) and their elimination results in increased downstream transport of nutrients. The Congressional goal of ending water pollution is compromised greatly by artificial segmentation and exclusion of the upper reaches of stream systems due to flow characteristics alone, and to the exclusion of the other contributions made by these transitional zones from upland flow to perennial streams and waterbodies.

Headwater streams provide unique habitats for aquatic biota, and their elimination from the landscape increases the vulnerability for extinction of aquatic invertebrate, amphibian, and fish species (Morse et al 1993). Headwater streams and their forested canopy provide thermal refuges for fishes when spring-fed, providing refuge from freezing during winter (Power 1999) and cool refuges in summer (Curry 1997). They are sites for physical and biological processing of inputs of organic matter from the watershed like falling leaves. The fine particles transported from headwaters are important food resources for ecosystems downstream, and their elimination can result in reduced inputs of fine particulate food resources for downstream ecosystems.

Elimination of ephemeral stream reaches will also compromise the achievement of the goals and purposes of the Clean Water Act in a manner repugnant to the announced goals and purpose of the law. A 2024 analysis of the role of ephemeral stream contributions to drainage networks in the United States sought to provide a quantitative assessment of the impact of “differing interpretations of regulatory jurisdiction under the United States Clean Water Act, including the current standard adopted by the Supreme Court of the United States in 2023.” Brinkerhoff et al., *Ephemeral stream water contributions to United States drainage networks*, Yale University (2024). A copy of the study is attached to these comments and incorporated herein by reference as if fully set forth below. The researchers noted:

Our findings show that ephemeral streams are a likely pathway through which pollution may influence downstream water quality, a finding that can inform evaluation of the consequences of limiting US federal jurisdiction over ephemeral streams under the CWA. In this context, we assessed the geographic extent of the CWA with and without inclusion of ephemeral streams. We found that, on average across basins, ephemeral streams account for 59% of all drainage network extent.... However, this is underestimated due to

the previously discussed lack of groundwater pumping, a missing stream order, and a lower bound on model resolution[.] Even as an underestimate, this still represents an upward revision of the only previous CONUS mapping effort finding that 43 to 56% of the CONUS river network extent is ephemeral but with acknowledged errors of omission [.] Taking the results shown in Figs. 1 to 4 in aggregate, along with regional assessments of headwater contributions to downstream water quality (17, 18) and recent global assessments of nonperennial stream extent (8, 12, 14), a consistent picture emerges. Nonperennial rivers (in particular, ephemeral streams) disproportionately influence river water composition along the entire drainage network, from small headwaters that are almost entirely nonperennial all the way to the major navigable mainstems of the HUC4 river systems in this study. This ephemeral influence directly implicates downstream water quality standards[.]

The conclusion of the Brinkerhoff study should give the Agencies pause before finalizing a rule that excludes ephemeral and intermittent reaches of our nation’s waters from protections. Such a rule would greatly compromise, and significantly increase, the complexity and costs of attempting to attain and maintain water quality standards and uses, and to end pollution. The study concludes: “Excluding ephemeral streams from coverage under the CWA would substantially narrow the extent of federal authority to regulate water quality in the United States.” *Id.* p. 6.

**D. Commenters Object to the Expanded Categorical Exclusions from jurisdictional waters**

The Agencies propose to modify three of the eight existing regulatory exclusions from the definition of WOTUS: the exclusion for waste treatment systems, the exclusion for prior converted cropland, and the exclusion for ditches. Commenters object, as redefining these exclusions to make them broader and limit the overall scope of WOTUS is arbitrary and contrary to the CWA.

**i. Prior converted cropland**

The proposed definition substantially broadens and entrenches the exclusion for prior converted cropland in a manner that reduces the scope of Clean Water Act jurisdiction beyond prior practice. Under the pre-existing framework, prior converted cropland loses its excluded status upon a change in use—i.e., when the land is no longer available for agricultural production—allowing federal jurisdiction to reattach based on current conditions and function. The proposed definition replaces that present-use standard with a far more restrictive test, under which land remains excluded unless it is both abandoned and has reverted to wetlands as newly defined. The proposed definition ties prior converted cropland status to historical manipulation before December 23, 1985, rather than to current agricultural use or contemporaneous administrative determinations.

The EPA does not explain why historical land manipulation, rather than current hydrologic function or present land use, is a rational basis for excluding waters from Clean Water Act jurisdiction, nor does it justify this departure from prior practice with reasoned

analysis. Categorically excluding prior converted cropland is runs contrary to established science and the objective of the Clean Water Act.

The proposed definition further narrows CWA jurisdiction by requiring that prior converted cropland be both “abandoned” *and* have “reverted to wetlands” before jurisdiction can reattach. EPA offers no reasoned explanation for why abandonment alone is insufficient, or why land that is no longer used for agriculture but continues to function hydrologically as a wetland should remain categorically excluded. This conjunctive standard has no basis in the Clean Water Act, which turns on the presence and function of waters—not on continued agricultural intent—and reflects irrational line-drawing untethered from statutory purpose or science.

The Agencies’ justification for excluding prior converted croplands is based on assumptions about their “degraded” nature and fails to account for the reality where these lands frequently serve as buffers between intensive row-crop or pasture operations and surface waters. As USDA has recognized, currently farmed historical wetlands can have a “considerable effect on water quality” within their watersheds. That functional reality, not historic land manipulation, should control jurisdiction under the Clean Water Act. A categorical exclusion for prior converted croplands therefore conflicts with both the statute’s text and its core objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.

Such a categorical exclusion of prior converted croplands is particularly consequential in Kentucky, where large portions of agricultural land consist of historically drained wetlands that continue to exhibit wetland hydrology. These areas remain seasonally saturated, interact directly with surface waters, and influence nutrient and sediment movement across the landscape, making their exclusion from Clean Water Act protections scientifically and environmentally significant.

Kentucky’s landscape has been shaped by centuries of wetland drainage and agricultural conversion. In Kentucky’s agricultural regions—especially in the Bluegrass, Pennyroyal, and western coalfield areas—historically drained wetlands converted to cropland remain prevalent across floodplains.

“Water management efforts in frontier Kentucky focused mainly on manipulation of surface waters, especially wetlands and small streams. Kentucky is one of only ten states to have lost at least 70 percent of their original wetland acreage. Based on soil surveys from the 1970s, approximately 1,566,000 acres (6.1 percent) of Kentucky’s 25, 852, 800 acres are estimated to have been wetlands at the time of first settlement (KSWCC 1982). By the mid-1980s, only 300,000 wetland acres remained – a statewide loss of 81 percent (Dahl 1990). [...] Agricultural development was responsible for most of the loss, as wetlands were drained, filled, or otherwise converted to cropland.”<sup>21</sup> Because Kentucky has lost roughly 80% of its original wetlands to agriculture and related land use change, hundreds of thousands of acres in the Commonwealth likely meet the historical criteria for prior converted cropland, amplifying the significance of any expanded categorical exclusion for such lands.

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<sup>21</sup> <https://eec.ky.gov/Environmental-Protection/Water/PermitCert/WQ401Cert/Documents/Geomorphic%20Characteristics%20of%20Streams%20in%20the%20Bluegrass%20Physiographic%20Region.pdf>

USDA research has shown that drainage of wetlands is often only partially effective, leaving prior converted croplands seasonally saturated and hydrologically connected to nearby streams and rivers. These conditions support denitrification and nutrient processing functions that reduce nitrate and sediment export from agricultural fields into downstream waters. Kentucky has long identified nutrient pollution from agricultural sources as a leading water quality concern.<sup>22</sup> The Commonwealth’s Division of Water developed a Nutrient Reduction Strategy<sup>23</sup> to guide efforts to reduce nitrogen and phosphorus loading into waters of the Commonwealth, recognizing that elevated nutrient levels contribute to eutrophic conditions, low dissolved oxygen, harmful algal blooms, and associated impacts on aquatic life, recreation, and drinking water supplies. Kentuckians have experienced these effects firsthand, including documented harmful algal blooms in the Ohio River that have disrupted recreation and local water use.<sup>24</sup>

Kentucky has invested substantial time, funding, and technical resources in addressing nutrient pollution from agricultural sources through its Nutrient Reduction Strategy, Agriculture Water Quality Act, and associated best-management-practice programs administered by the Energy and Environment Cabinet. Despite coordinated state efforts, nutrient pollution remains a significant challenge: nonpoint source runoff, especially from agricultural land, continues to be a major contributor to water quality impairment across Kentucky. Proper nutrient management planning, including monitoring soil fertility, balancing nutrient applications, and minimizing runoff, is a cornerstone of Kentucky’s agricultural water quality strategy precisely because excess nutrients from manure and fertilizer can otherwise enter streams and rivers and degrade water quality.

Excluding prior converted croplands from Clean Water Act jurisdiction would undercut the very foundation of these state efforts, disregard this well-established science, and removes protections from lands that continue to perform water-quality functions essential to interstate waters.

**ii. Waste treatment system**

The proposed definition of “waste treatment system” impermissibly expands the categorical exclusion by encompassing all components of a system—whether active or passive, conveyance-based or retention-based—and by covering features designed not only to treat wastewater prior to discharge, but also to eliminate discharge altogether. This expansion substantially increases the risk that natural waters and impoundments of jurisdictional waters may be removed from Clean Water Act protection merely because they are used for waste management purposes.

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<sup>22</sup> <https://eec.ky.gov/Environmental-Protection/Water/Protection/Pages/Nutrient-Reduction-Strategy.aspx>

<sup>23</sup> <https://storymaps.arcgis.com/stories/e9ef82eaadf04ccd907829029f2b017c>

<sup>24</sup> <https://eec.ky.gov/Environmental-Protection/Water/Protection/Documents/2022%20Draft%20Nutrient%20Reduction%20Strategy%20Update.pdf>

This exclusion is contrary to the Clean Water Act’s text and purpose. Congress directed that the Act apply to “the waters of the United States,” 33 U.S.C. § 1362(7), without regard to how those waters are used. Nothing in the statute authorizes EPA to categorically remove jurisdiction from waters simply because they are converted into service as waste treatment systems. To the contrary, Congress enacted the CWA to end the practice of using rivers, streams, and wetlands as repositories for pollution.

The proposed definition also conflicts with long-standing judicial precedent recognizing that diversion or impoundment does not strip a water of its jurisdictional status. A water of the United States does not lose federal protection simply because it is controlled, impounded, or modified for industrial purposes.<sup>25</sup> By allowing natural waters to be reclassified as excluded waste treatment systems, the proposed definition creates a loophole that permits regulated entities to evade Clean Water Act protections by repurposing jurisdictional waters as pollution control infrastructure.

The proposed definition is further flawed because it treats a system’s *intended design* as dispositive of jurisdiction, regardless of whether the system actually eliminates discharges in practice. Merely labeling a pond or impoundment as “designed to eliminate discharge” does not mean that discharges are, in fact, eliminated. In reality, many such systems routinely discharge pollutants through overtopping, structural failure, seepage, subsurface flow, or emergency releases—particularly during high-precipitation events that are increasingly common.

By conditioning exclusion on design intent rather than demonstrated performance, the proposed definition creates a sweeping loophole: any jurisdictional water could be removed from Clean Water Act protection simply by asserting that it is part of a system intended to retain or treat waste, even where that system predictably and repeatedly discharges pollutants to downstream waters. The Agencies offer no explanation for why speculative design objectives should override empirical evidence of hydrologic connectivity and pollutant transport. This approach is arbitrary and capricious under the Administrative Procedure Act because it ignores real-world conditions, contradicts the Clean Water Act’s focus on actual pollutant discharges, and fails to ensure that excluded features are truly isolated from jurisdictional waters. A regulatory framework that hinges on stated purpose rather than functional reality invites abuse, undermines enforceability, and is incompatible with the Act’s core goal of preventing pollution at its source.

The Agencies have failed to provide a reasoned explanation for this expanded exclusion or to reconcile it with their own acknowledgment that most impoundments of jurisdictional waters remain waters of the United States. Nor have they explained why waste treatment systems cannot be constructed as wholly man-made features outside of natural waters. This failure to grapple with statutory text, precedent, and reasonable alternatives renders the exclusion arbitrary and capricious under the Administrative Procedure Act.

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<sup>25</sup> See, e.g., *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (“[N]or can we agree that one can denationalize national waters by exerting private control over them.”); *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007), cert. denied, 554 U.S. 918 (2008) (“it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern.”).

The expansion of the waste treatment system exclusion is particularly consequential in Kentucky, where industrial and extractive activities have historically relied on impoundments constructed in or from natural waters. Coal slurry impoundments in eastern and western Kentucky are frequently created by damming streams or valleys, converting jurisdictional waters into long-term repositories for coal preparation waste. Under the proposed definition, such impoundments could be characterized as “components of a waste treatment system” designed to retain or settle pollutants, creating a pathway for natural streams and wetlands to be categorically excluded from Clean Water Act protections.

Similarly, industrial lagoons associated with chemical manufacturing, petroleum refining, metal processing, and power generation across Kentucky are often hydrologically connected to adjacent streams, floodplains, and wetlands. Many of these lagoons were constructed decades ago, prior to modern siting and lining standards, and continue to interact with surrounding waters through seepage, overtopping during high-water events, or subsurface flow. Treating these features as excluded waste treatment systems risks removing Clean Water Act jurisdiction from waters that continue to function as part of the broader aquatic system.

In coal-impacted regions of Kentucky, the proposed definition also raises concerns regarding valley fills, sediment ponds, and slurry retention structures that intercept headwater streams. These features are frequently justified as pollution control measures but are nonetheless formed by impounding or replacing jurisdictional waters. Allowing such features to fall outside Clean Water Act jurisdiction simply because they serve a waste management function undermines the Act’s core objective of preventing the degradation of the Commonwealth’s waters at the source.

Kentucky’s experience demonstrates why a categorical exclusion is inappropriate. Where waste treatment systems are needed, they can be constructed as wholly human-made features, sited outside natural waters, and engineered to prevent hydrologic interaction with streams and wetlands. The proposed definition instead creates incentives to rely on existing waters as waste infrastructure, eroding Clean Water Act protections in a state where legacy industrial and mining features remain widespread and environmentally significant.

Kentucky provides concrete examples demonstrating why an expanded waste treatment system exclusion is unsound. In Pike County, sediment control ponds at the Clintwood JOD mining complex—designed to retain and treat mining wastewater—became so filled with waste that they discharged “black water” directly into Big Creek and the Levisa Fork, upstream of Fishtrap Lake, a drinking water source for Pikeville. State investigations confirmed that the ponds’ diminished capacity rendered them ineffective at retaining sediment, resulting in direct contamination of jurisdictional waters. This incident illustrates that waste treatment systems are not hydrologically isolated infrastructure, but integral components of aquatic systems whose exclusion from Clean Water Act jurisdiction would undermine source-level pollution control.<sup>26</sup>

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<sup>26</sup> <https://appvoices.org/2025/02/04/clintwood-jod-cited-for-black-water-spill>

Kentucky also bears the legacy of catastrophic failures associated with slurry impoundments. In 2000, the failure of a 72-acre coal slurry impoundment in Martin County released approximately 250–300 million gallons of toxic slurry into Wolf Creek, Coldwater Fork, and the Tug Fork River, contaminating more than 100 miles of waterways, killing aquatic life, and disrupting drinking water supplies. This disaster illustrates the inherent risks of treating large impoundments—constructed from or in jurisdictional waters—as functionally separate from the aquatic systems they directly affect.<sup>27</sup>



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### iii. Ditches

The proposed definition expands the definition of “ditches” from those that are “excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water (including roadside ditches)” to mean “those that are constructed or excavated entirely in dry land.” This represents a significant departure from the existing regulatory framework, which limits the exclusion to ditches constructed in dry land that do not carry relatively permanent flow to downstream waters. See 40 C.F.R. §120.3, 33 C.F.R. § 328.3(b)(3).

The Agencies characterize this change as consistent with prior practice, but that characterization is misleading. By eliminating flow-based and functional limitations and focusing solely on the ditch’s original construction context, the proposed definition converts a

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<sup>27</sup> <https://www.ebsco.com/research-starters/environmental-sciences/west-virginia-kentucky-coal-sludge-spill>

<sup>28</sup> Eilperin, J., and S. Mufson. 2013. Many coal sludge impoundments have weak walls, federal study says. Washington Post, April 24. Online at [http://www.washingtonpost.com/national/health-science/many-coal-sludge-impoundments-have-weak-walls-federal-study-says/2013/04/24/76c5be2a-acf9-11e2-a8b9-2a63d75b5459\\_story.html](http://www.washingtonpost.com/national/health-science/many-coal-sludge-impoundments-have-weak-walls-federal-study-says/2013/04/24/76c5be2a-acf9-11e2-a8b9-2a63d75b5459_story.html), accessed on December 22, 2025.

narrow, conditional exclusion into a sweeping categorical carve-out that removes entire classes of flowing waters from CWA protection.

This expanded ditch exclusion is unlawful and arbitrary and capricious under the Administrative Procedure Act. First, it lacks any grounding in the Clean Water Act’s text. The statute applies to “the waters of the United States,” 33 U.S.C. § 1362(7), and contains no basis for excluding waters simply because they were artificially excavated. Congress did not distinguish between “natural” and “manmade” tributaries where both convey pollutants to downstream waters, nor did it authorize EPA to remove flowing waters from jurisdiction based on their origin rather than their function.

Second, the Agencies fail to acknowledge or justify the magnitude of the change they propose. Ditches that function as tributaries, carry relatively permanent flow, or drain wetlands act as direct conduits for pollutants to downstream waters in the same manner as natural streams. Excluding these waters categorically ignores decades of scientific understanding and prior agency findings recognizing that hydrologic function, not construction history, determines water quality impacts. The Agencies offer no scientific analysis demonstrating that ditches constructed in dry land pose less risk to downstream waters than other tributaries, rendering the exclusion unsupported by the administrative record.

Third, the proposed rule impermissibly removes language limiting the exclusion to ditches that drain only dry land, thereby allowing ditches that drain wetlands to fall outside Clean Water Act jurisdiction without explanation. This silent expansion directly conflicts with Congress’s explicit concern—expressed during the 1977 Clean Water Act amendments—about the draining of wetlands through ditch construction. The Agencies’ failure to grapple with that legislative history further underscores the arbitrary nature of the proposal.

Fourth, the proposed shift in the burden of proof compounds these defects. By placing the burden on the Agencies to demonstrate that a ditch was not constructed entirely in dry land—and by presuming exclusion where historic information is unclear—the rule effectively allows unpermitted discharges into ditches unless regulators can reconstruct decades-old land conditions. This reversal of the traditional burden governing statutory exemptions conflicts with settled law and creates a regulatory vacuum that polluters can readily exploit.

Finally, the exclusion is not compelled by *Sackett*. That decision did not mandate the categorical exclusion of flowing tributaries based on construction history, nor did it suggest that manmade waters conveying pollutants to jurisdictional waters fall outside the Clean Water Act’s reach. The Agencies’ reliance on *Sackett* to justify this expansion is therefore misplaced.

The proposed ditch exclusion is particularly problematic in Kentucky, where ditches play an outsized role in watershed hydrology. Across the Commonwealth’s agricultural regions, roadside and farm drainage ditches routinely intercept shallow groundwater, drain former wetlands, and convey nutrient-laden runoff directly into creeks, rivers, and reservoirs. In karst landscapes common to central and south-central Kentucky, ditches often provide rapid surface pathways into sinkholes, sinking streams, and connected groundwater systems that supply public drinking water.

In western Kentucky’s row-crop regions and eastern Kentucky’s mined landscapes, ditches frequently function as de facto tributaries, carrying sediment, nutrients, metals, and other pollutants during storm events and periods of sustained flow. Excluding these features categorically—without regard to flow permanence, connectivity, or pollutant transport—would remove Clean Water Act oversight from some of the most significant pollution pathways affecting Kentucky waters.

Kentucky’s experience demonstrates that ditch construction and maintenance are not benign activities. Improperly designed or maintained ditches accelerate erosion, increase downstream sedimentation, and amplify nutrient loading into already-impaired waters. By eliminating federal jurisdiction over these features, the proposed rule would undermine existing state and federal efforts to control nonpoint and point source pollution, shift additional regulatory burdens onto limited state resources, and erode protections for waters that Kentuckians rely on for drinking water, recreation, and ecological integrity.

For these reasons, the categorical exclusion of ditches—particularly those that carry flow, drain wetlands, or function as tributaries—is unsupported by law, contradicted by science, and arbitrary and capricious under the Administrative Procedure Act.

**E. Commenters Object to the Narrowed Definitions that Exclude Critical Waters from Protection under the CWA**

**i. Continuous surface connection**

The proposed WOTUS rule inserts and defines the term “continuous surface connection,” relying on Supreme Court decisions in *SWANCC*, *Rapanos*, and *Sackett* as its stated justification. However, the Agencies’ interpretation significantly exceeds what those cases require.<sup>29</sup>

Under the proposed rule, jurisdictional wetlands must be adjacent (i.e. having a continuous surface connection) to traditionally navigable waters or adjacent to impoundments or tributaries that are “relatively permanent, standing or continuously flowing” and with a continuous surface connection to WOTUS.<sup>30</sup> The rule defines “continuous surface connection” as requiring the presence of surface water at least during the wet season and physical abutment (i.e., touching) of a jurisdictional water. Notably, the term “wet season” is left undefined, introducing substantial ambiguity and uncertainty into jurisdictional determinations.

This definition is both overly restrictive and unworkably vague. It conflicts with the intent of Congress in enacting the Clean Water Act, disregards the best available science, and departs from decades of consistent agency interpretation. These impacts will be especially pronounced in Kentucky, a state with historically extensive wetlands that provide critical ecological services, yet where no comprehensive state-law protections exist to fill the resulting regulatory gaps.

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<sup>29</sup> Federal register D.2.

<sup>30</sup> See 40 C.F.R. §120.3 (a)(4)

The Clean Water Act was enacted “to restore and maintain the physical, chemical, and biological integrity of the Nation’s waters.”<sup>31</sup> The proposed definition of “continuous surface connection” undermines this purpose by arbitrarily narrowing the scope of jurisdictional wetlands beyond what Supreme Court precedent requires and contrary to past agency interpretation.

Both the *Rapanos* plurality and the *Sackett* Court focused on whether adjacent wetlands share a close physical connection with waters of the United States so that “there is no clear demarcation”<sup>32</sup> between the two (*Rapanos*) or “as a practical matter they are indistinguishable” from jurisdictional waters (*Sackett*).<sup>33</sup> However, neither case suggests that the wetland must have surface hydrology for the entirety – or any defined portion - of the *wet season* (emphasis added) to satisfy this standard.

To the contrary, agency regulations and interpretations spanning multiple administrations have long recognized that wetlands are functionally integrated with adjacent navigable waters even where surface water is absent for extended periods.<sup>34</sup> Agencies have consistently acknowledged that wetlands maintain critical connections through shallow subsurface flows, soil saturation, groundwater exchange, and geomorphic continuity—particularly in landscapes characterized by steep slopes, restrictive soil horizons, or karst geology. Kentucky exemplifies these conditions, where extensive karst systems facilitate subsurface hydrologic connections between wetlands and downstream waters.

For decades, the Agencies have expressly rejected rigid hydrologic thresholds as both scientifically unsound and administratively unworkable.<sup>35</sup> The proposed rule offers no reasoned explanation for abandoning these settled interpretations. This unexplained departure from longstanding agency practice renders the definition arbitrary and capricious.

While the Supreme Court has required that certain adjacent wetlands be physically connected to jurisdictional waters, the Agencies’ decision to impose both a strict abutment requirement and a surface-water-during-the-wet-season test creates an artificial threshold not compelled by statutory text, precedent, or science. This approach risks excluding wetlands that are functionally and ecologically inseparable from jurisdictional waters—particularly in states like Kentucky—thereby undermining the core objectives of the Clean Water Act.

The impacts in Kentucky will be significant. Kentucky has already experienced dramatic wetland loss relative to its historic baseline, with more than 80% of the Commonwealth’s original wetlands drained or removed for agricultural conversion, pasture, and other land uses—a

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<sup>31</sup> 33 U.S.C. § 1251(a)

<sup>32</sup> *Rapanos v. U.S.*, 547 U.S. at 742

<sup>33</sup> *Sackett*, 598 U.S. at 667

<sup>34</sup> See Technical Report at 177.

<sup>35</sup> [https://www.epa.gov/sites/default/files/2015-03/documents/wous\\_erd2\\_sep2013.pdf](https://www.epa.gov/sites/default/files/2015-03/documents/wous_erd2_sep2013.pdf) ; <https://scispace.com/pdf/connectivity-of-streams-and-wetlands-to-downstream-waters-an-4j7kxsatmw.pdf>

decline that has left wetlands composing less than 2.5% of the State’s land area today.<sup>36</sup> This loss reflects centuries of conversion of bottomland hardwood forests, cypress swamps, marshes, and other freshwater wetland types that once fringed Kentucky’s rivers and streams, particularly in western Kentucky where large wetland complexes were most common.<sup>37</sup>

The ecological functions provided by these wetlands have been materially diminished: their capacity to filter nutrients and sediments, attenuate floods, recharge groundwater, and provide diverse wildlife habitat has been reduced as their area and hydrologic integrity have been lost.<sup>38</sup> Although Kentucky has developed tools such as the Kentucky Wetland Rapid Assessment Method (KY-WRAM) to monitor and assess wetland condition across a range of types, including sloughs, sinkhole depressions, woodland vernal pools, and bottomlands, these efforts affirm how limited and vulnerable remaining wetlands are.<sup>39</sup>

Kentucky’s landscape is deeply shaped by karst topography, which directly influences wetland hydrology and ecological connectivity in ways that the proposed “wet season” surface-connection requirement fails to capture. Karst terrain is characterized by sinkholes, sinking streams, springs, and underground drainage networks and it occurs extensively across the Commonwealth; roughly 40–55% of the state is underlain by rocks capable of karst development, with about 20–25% exhibiting well-developed karst drainage and conduit systems that link surface water and groundwater in highly dynamic ways.<sup>40</sup> In these landscapes, water does not move solely along the surface in response to seasonal precipitation; rather, precipitation infiltrates quickly through soil and fractures to recharge karst aquifers, emerging as seeps and springs that sustain streamflow even during dry periods.<sup>41</sup>

Groundwater discharge from karst systems therefore contributes significantly to wetland soil saturation and hydrologic function outside of defined rainy seasons, such that hydrologic connectivity cannot be determined by surface water presence during a “wet season” alone. Karst basins in south-central Kentucky have been shown through fluorescent dye-tracing and high-resolution stage monitoring to respond rapidly to storm events—sometimes within 40 minutes to 1.5 hours—and to continue discharging water days after precipitation events have ended, underscoring that subsurface flow paths transmit water long after surface hydrology appears absent.<sup>42</sup>

Because karst systems integrate surface and subsurface flows, wetlands underlain by carbonate bedrock often depend on groundwater upwelling, losing stream inputs, and

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<sup>36</sup> <https://www.nature.org/en-us/about-us/where-we-work/united-states/kentucky/stories-in-kentucky/western-kentucky-floodplains-wetlands> ; see also <https://eec.ky.gov/Environmental-Protection/Water/Protection/DocsGuidebook/KY%20Watershed%20Planning%20Guidebook%20-%20Watershed%20Basics.pdf>

<sup>37</sup> *Id.*

<sup>38</sup> <https://eec.ky.gov/Environmental-Protection/Water/Protection/Pages/Wetlands.aspx>

<sup>39</sup> <https://eec.ky.gov/Environmental-Protection/Water/Monitor/Pages/KYWRAM.aspx>

<sup>40</sup> <https://pubs.usgs.gov/sir/2009/5240/sir2009-5240.pdf>

<sup>41</sup> <https://eec.ky.gov/Environmental-Protection/Water/Reports/Reports/KentuckysWaterHealthGuide.pdf>

<sup>42</sup> [https://caves.org/wp-content/uploads/Publications/JCKS/v84/84\\_1\\_27.pdf](https://caves.org/wp-content/uploads/Publications/JCKS/v84/84_1_27.pdf)

subterranean recharge to maintain saturation and ecological function, and these contributions are not captured by a surface-only “wet season” threshold.<sup>43</sup> These wetlands may lack visible surface water for extended periods, yet remain hydrologically connected to downstream waters through subsurface flow paths that transport nutrients, sediments, and contaminants, and that regulate baseflow to streams and rivers.<sup>44</sup> Under the proposed definition, these wetlands could be excluded from jurisdiction simply because they lack visible surface water during part of the year, undermining not only hydrologic science but also the Clean Water Act’s foundational objective of protecting waters that contribute to the integrity of downstream navigable waters.

**i. Relatively permanent**

The proposed definition revises the definition of “relatively permanent” waters to mean “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season,”<sup>45</sup> and further requires that such surface hydrology be present for the entirety of the wet season. This definition represents a substantial narrowing of jurisdiction relative to existing regulations and long-standing agency interpretations, which have consistently recognized that relatively permanent waters may include seasonal and intermittent waters whose flow regimes vary regionally and do not align neatly with precipitation patterns.

By tying jurisdiction to the presence of surface water during a precipitation-based “wet season,” a term the Agencies do not define, the proposed rule introduces a rigid threshold that is disconnected from hydrologic reality and inconsistent with both Supreme Court precedent and the scientific record. The result is a definition that excludes waters based not on their functional role in downstream systems, but on an arbitrary overlap between surface flow and a seasonally defined precipitation window.

The proposed redefinition of “relatively permanent” is contrary to the text, purpose, and structure of the Clean Water Act. Congress enacted the Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and the Supreme Court has repeatedly emphasized that jurisdiction may not turn on artificial or formalistic distinctions that undermine that objective. While the *Rapanos* plurality recognized that jurisdiction does not extend to “ephemeral” features, it explicitly affirmed coverage of “seasonal rivers” and waters that may experience temporary interruptions in flow.<sup>46</sup> The *Sackett* Court adopted that standard without suggesting that surface flow must coincide with, or persist throughout, any particular precipitation season.

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<sup>43</sup> Leibowitz, Scott G., Parker J. Winington, Jr., Kate A Schofield, Laurie C. Alexander, Melanie K. Vanderhoof, and Heather E. Golden, 2018. Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework. *Journal of the American Water Resources Association* (JAWRA) 1-25. <https://doi.org/10.1111/1752-1688.12631>

<sup>44</sup> Blair, R.J., Carigan, E.D., Currens, J.C. *et al.* Pilot study to integrate existing karst flow data for Kentucky, USA into the National Hydrography Dataset of US Geological Survey. *Carbonates Evaporites* 27, 123–131 (2012). <https://doi.org/10.1007/s13146-012-0094-5>

<sup>45</sup> 40 C.F.R. §120.2(a)

<sup>46</sup> 90 Fed. Reg. at 52518 (citing *Rapanos* at 732 n.5).

Nothing in *Rapanos* or *Sackett* requires that surface hydrology be present for the entirety of the wet season, nor do those decisions endorse the use of precipitation-based metrics as a proxy for hydrologic permanence. To the contrary, both decisions acknowledge that waters may be jurisdictional even where flow is interrupted by dry spells, drought, or seasonal variability. By imposing a wet-season-long surface flow requirement, the proposed rule would exclude waters that the Supreme Court itself recognized as within the scope of the Act.

The Agencies' approach also represents an unexplained departure from decades of regulatory practice. For nearly fifty years, EPA and the Corps have declined to impose bright-line duration requirements on intermittent or seasonal waters, recognizing that flow regimes vary widely based on climate, geology, topography, and land use. In 2023, the agencies found that in much of the Southeast, while precipitation is distributed uniformly throughout the year, increased evapotranspiration during the growing season can reduce or eliminate surface flow in the late summer or early autumn.<sup>47</sup> The proposed rule offers no reasoned explanation for abandoning that conclusion now, nor does it identify any new scientific evidence that would justify reversing course.

By conditioning jurisdiction on whether surface water is present during a defined wet season, rather than on whether a waterbody functions as part of a connected aquatic system, the proposed definition arbitrarily removes protections from waters Congress intended to cover, creates substantial uncertainty for regulators and landowners alike, and invites evasion by incentivizing alterations to flow timing rather than meaningful pollution control. For these reasons, the proposed redefinition of “relatively permanent” waters is arbitrary and capricious and should not be adopted.

In Kentucky, surface water hydrology does not neatly track a single “wet season,” and the state’s hydrologic regime demonstrates why this requirement is both scientifically unsound and likely to exclude waters that are functionally connected to downstream waters.

Kentucky receives abundant rainfall year-round, with average annual precipitation between 42 and 52 inches and seasonal patterns that include winter–spring flooding and summer–fall drought conditions, meaning that surface flows frequently vary independently of any single “wet season.”<sup>48</sup> In addition, Kentucky’s extensive karst and alluvial landscapes, where groundwater discharge contributes substantially to streamflow and wetland saturation, decouple surface hydrology from precipitation timing. Groundwater in Kentucky’s aquifers maintains baseflow in streams and supports wetland water levels during dry periods, such that surface flow may be intermittent while subsurface connectivity remains significant.<sup>49</sup> Research from Kentucky hydrologic studies demonstrates that groundwater stored in hill slopes and shallow aquifers contributes to wetland and stream hydrology outside of major rainfall events, with water

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<sup>47</sup> 88 Fed. Reg. at 3086.

<sup>48</sup> <https://www.kyclimate.org/hydrology>

<sup>49</sup> <https://eec.ky.gov/Environmental-Protection/Water/GW/Pages/GWBasics.aspx>

levels influenced by recharge and evapotranspiration dynamics rather than continuous surface flow alone.<sup>50</sup>

This pattern is echoed in modeling and field studies of headwater networks and baseflow dynamics, which show that streamflow permanence in small Kentucky catchments is governed by complex interactions among climate, soils, geology, and groundwater discharge, and that waters with intermittent surface flow nonetheless contribute materially to downstream flows and water quality.<sup>51</sup> For example, in some western Kentucky perennial streams, baseflow supplied by groundwater maintains flow even when surface inputs fluctuate, and seasonal variation in discharge does not equate to hydrologic disconnection.

Because the proposed definition anchors jurisdictional status to surface water presence during a designated “wet season”—a metric that bears little relationship to how water actually moves, stores, and sustains ecological function in Kentucky watersheds—it would exclude waters that have demonstrable hydrologic contributions to downstream systems. This approach ignores decades of hydrologic science showing that waters with intermittent surface flow and strong groundwater connectivity still exert major influence on downstream chemical, physical, and biological integrity, undermining the Clean Water Act’s objective of protecting waters that materially affect tributaries and navigable waters.

Finally, the Proposed Rule lacks implementation feasibility and arbitrarily relies on the use of ineffective screening tools. The proposal appears to contemplate increased reliance on screening and modeling products such as WebWIMP, APT, and SDAMs, along with additional site-specific documentation, to operationalize concepts such as wet season continuity and relative permanence. If the agencies intend for these tools and associated methods to inform jurisdictional determinations, the administrative record should clearly describe their intended role and limitations. The record should also specify any performance standards or error bounds that will be used to promote consistent outcomes. These products were developed for broad hydrologic characterization and planning applications. They were not designed to function as determinative instruments for parcel-level jurisdictional findings. Using them as substitutes for clear decision criteria can compound assumptions that are difficult to verify through routine field methods. This approach is likely to increase file development time, expand disputes over jurisdictional calls, and reduce predictability.

More broadly, the proposal shifts implementation toward a framework that demands more verification, modeling, and coordination while providing fewer clearly administrable decision rules. Hydrologic inputs relevant to wet season and relative permanence determinations are not uniformly available at a national scale. The proposal also does not establish standardized evidentiary requirements. As a result, implementation is likely to become uneven and resource

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<sup>50</sup> Sweet, Ethan and Malzone, Jonathan; Assessing the Periodic Groundwater Flow Conditions of a Perched Aquifer System in the Daniel Boone National Forest, *Eastern Kentucky University, Department of Geosciences* <https://digitalcommons.murraystate.edu/postersatthecapitol/2018/EKU/4>

<sup>51</sup> Mahoney, D. T., Christensen, J. R., Golden, H. E., Lane, C. R., Evenson, G. R., White, E., Fritz, K. M., D'Amico, E., Barton, C. D., Williamson, T. N., Sena, K. L., & Agouridis, C. T. (2023). Dynamics of streamflow permanence in a headwater network: Insights from catchment-scale model simulations. *Journal of Hydrology*, 620, Article 129422. <https://doi.org/10.1016/j.jhydrol.2023.129422>

intensive. The agencies should explain why these additional limiting constructs are necessary to comply with Supreme Court precedent. The agencies should also explain how the resulting narrowing remains consistent with the Clean Water Act’s objective to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.

**ii. Tributary**

The Proposed Rule adopts an unduly restrictive definition of “tributary” that would substantially narrow Clean Water Act jurisdiction and undermine the statute’s core objectives. Under the proposal, a tributary must not only exhibit relatively permanent flow, but must also maintain that flow continuously as it passes through all intervening natural and artificial features, and must possess a defined bed and bank.<sup>52</sup> This approach departs sharply from longstanding regulatory practice and excludes numerous waters that are functionally connected to downstream navigable waters.

First, the proposed definition would sever jurisdiction over upstream reaches whenever flow passes through features that do not themselves convey relatively permanent flow, including culverts, dams, tunnels, wetlands, debris piles, or boulder fields. As a result, otherwise jurisdictional tributaries could lose protection simply because surface water temporarily moves through ordinary landscape features or engineered infrastructure. By tying jurisdiction to uninterrupted relatively permanent surface flow through every segment of a system, the proposal arbitrarily excludes waters that continue to deliver water, sediment, nutrients, and pollutants to downstream navigable waters.

Second, the proposal would eliminate protection for tributaries lacking a clearly defined bed and bank, even where those waters are relatively permanent or permanent in function. This formalistic requirement disregards the reality that many streams—particularly headwaters and low-gradient systems—do not exhibit sharply defined channels yet play a critical role in maintaining downstream water quality and ecological integrity.

Together, these changes create large and obvious loopholes in Clean Water Act coverage by allowing jurisdiction to be defeated through the presence or construction of minor natural or artificial features. They also incentivize manipulation of flow pathways rather than meaningful pollution control, contrary to Supreme Court guidance cautioning against interpretations that invite evasion of the Act. The proposed tributary definition is therefore inconsistent with congressional intent, Supreme Court precedent, prior agency interpretations, and the best available science, and should not be adopted.

The proposed definition of “tributary” departs from decades of agency practice without justification. For nearly fifty years, EPA and the Corps have consistently recognized that tributary systems function as integrated hydrologic networks, even where flow characteristics vary along the length of a stream. No prior regulatory regime—including the 2015 Rule, the 2020 Rule, the 2023 Rule, or the post-*Sackett* Amended 2023 Rule—removed Clean Water Act protections from upstream tributary reaches simply because flow passed through a non-

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<sup>52</sup> 90 Fed. Reg. at 52521.

permanent natural or artificial feature. Instead, the agencies evaluated tributaries based on the flow characteristics that best described the tributary reach as a whole, using objective and scientifically grounded tools such as Strahler stream order. The proposed definition abandons this established approach in favor of an undefined and subjective concept of “similar flow characteristics,” without explaining how similarity is to be assessed or why this shift is warranted. Likewise, no prior rule required a tributary to possess a continuously defined bed and banks as a prerequisite for jurisdiction.

The proposed definition is also inconsistent with the best available science. The scientific record overwhelmingly demonstrates that tributaries—including intermittent and seasonally flowing waters—play a critical role in maintaining the chemical, physical, and biological integrity of downstream navigable waters. The Agencies reaffirmed these conclusions in the 2023 Technical Support Document, which reviewed thousands of peer-reviewed studies published since 2014 and confirmed that tributaries exert strong downstream influence even where surface hydrology is interrupted by natural or human-made features. The Technical Report expressly recognizes that hydrologic, chemical, and biological connections persist where streams flow underground, through karst systems, culverts, or boulder fields, and that such features do not sever downstream connectivity. The proposed definition disregards these findings without identifying new scientific evidence or analytical errors that would justify reversing course, rendering the change arbitrary and capricious.

Finally, the proposed definition creates significant regulatory loopholes and perverse incentives that undermine the Clean Water Act’s objectives. By excluding upstream tributaries whenever relatively permanent flow is interrupted, the definition would substantially reduce Clean Water Act coverage and invite jurisdictional avoidance. Artificial features could be constructed—or existing features strategically used—to sever jurisdiction over otherwise protected waters, while ordinary natural features would have the same effect. These loopholes are especially troubling where infrastructure is designed to convey water outside the precipitation wet season, meaning upstream waters could lose protection even where flow is continuous and ecologically significant for much of the year. The result would be a widespread loss of protections for tributaries that Congress intended the Act to cover.

Kentucky’s extensive karst landscape provides a clear and concrete illustration of how the proposed definition of “tributary” would exclude waters that are hydrologically continuous and functionally significant solely because their flow becomes intermittent, subsurface, or morphologically atypical along portions of their course. Large areas of central and south-central Kentucky are underlain by soluble limestone, where surface streams routinely lose flow into sinkholes, swallow holes, and sinking reaches, travel through subterranean conduits, and later reemerge as springs that discharge directly into traditionally navigable waters.<sup>53</sup> These transitions are not anomalies but defining features of how tributary systems function in karst terrain.

The Mammoth Cave region exemplifies this hydrologic reality. Surface tributaries originating on the Pennyroyal Plateau frequently lose visible flow as they enter sinkholes and vertical shafts, after which water moves through miles of underground channels before

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<sup>53</sup> <https://pubs.usgs.gov/publication/wsp1837>

discharging to the Green River. Along this pathway, flow may alternate between open conduits, partially flooded passages, and diffuse fracture networks, producing spatial and temporal variability in discharge that is inherent to karst systems. These underground streams often lack a continuously defined surface bed and banks, and their flow may fluctuate between periods of rapid conveyance following recharge events and lower-velocity baseflow sustained by epikarst and matrix storage. Yet despite this intermittency and subsurface routing, the water continues to move through a single tributary system and directly contributes to the quantity and quality of flow in the Green River.

Hidden River Cave in Horse Cave, Kentucky, provides a particularly well-documented example of how the proposed definition would sever jurisdiction from an otherwise intact tributary. Hidden River functions as a trunk stream within a karst groundwater subbasin that receives water from surface channels, stormwater infrastructure, and sinking streams across multiple counties. Dye-tracing studies have shown that water entering karst features like sinkholes connect rapidly to underground cave systems and springs—often within an hour—demonstrating direct hydrologic continuity between surface inputs and the subterranean river.<sup>54</sup> However, the Hidden River stream also exhibits variable discharge and includes reaches without a surface-expressed bed and banks, characteristics typical of karst conduit flow. Under the proposed definition, the point at which surface water enters the cave system—or where flow passes through debris-filled or morphologically diffuse recharge zones—could render the upstream tributary non-jurisdictional, even though the same water continues downstream and resurfaces to feed the Green River.

Scientific studies of karst hydrology consistently demonstrate that subsurface streams and conduits commonly exhibit intermittent or variable flow regimes while remaining fully integrated into downstream river systems. Flow in karst aquifers occurs through a combination of fast conduit flow, slower fracture and matrix flow, and temporary storage in the epikarst, producing discontinuous surface expression without interrupting hydrologic connectivity.<sup>55</sup> These systems frequently lack stable, continuously defined channel morphology, particularly where surface streams transition into losing reaches or diffuse recharge zones. Nonetheless, they transport water, nutrients, sediment, and contaminants to downstream waters and exert measurable influence on river hydrographs, baseflow persistence, and water quality.

By excluding waters that pass through subterranean rivers, sinking reaches, debris-filled channels, wetlands, or other natural features that do not convey relatively permanent flow—or that lack a clearly defined bed and bank—the proposed definition would fragment tributary systems precisely where karst hydrology is most active. In Kentucky, this would mean that a tributary could lose Clean Water Act protection not because it ceases to function, but because it functions as karst systems naturally do: intermittently, belowground, and without surface morphology that fits a conventional channel model.

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<sup>54</sup> Cesalea N. Osborne, David J. Keeling, Jason S. Polk, Patricia N. Kambesis, and Kevin B. Cary. Land-use impacts on the hydrology of the Hidden River groundwater subbasin, Horse Cave, Hart County, Kentucky. *Journal of Cave and Karst Studies*, v. 84, no. 1, p. 27-40. DOI:10.4311/2021ES0107

<sup>55</sup> Fuyun Huang, Yuan Gao, Zizhao Zhang, Xiaonong Hu, Xiaoguang Wang, Shengyan Pu, Simulating precipitation-induced karst-stream interactions using a coupled Darcy–Brinkman–Stokes model. *Hydrol. Earth Syst. Sci.*, 29, 6285–6307, 2025 <https://doi.org/10.5194/hess-29-6285-2025>

This outcome bears no relationship to actual watershed processes. In karst regions like Kentucky, intermittency, subsurface flow, and morphological variability are not indicators of hydrologic insignificance; they are core characteristics of tributary systems that sustain downstream navigable waters. Treating these features as jurisdictional endpoints would sever protection for upstream waters that remain chemically, physically, and biologically connected to downstream rivers, undermining the Clean Water Act's objective to protect the integrity of the Nation's waters based on functional outcome.

#### **F. The Agencies' Proposed Alternatives Are Flawed and Unworkable**

The Proposed Rule's solicitation of multiple, materially different alternative approaches confirms that the proposal does not yet present a single, stable, and administrable interpretation of the core concepts it relies upon. These alternatives are not minor implementation choices. They would produce fundamentally different jurisdictional outcomes. The proposal also does not provide a comparative, record-based explanation showing that any specific alternative is both consistent with Supreme Court precedent and capable of being applied consistently across hydrologic settings.

The Proposed Rule discusses defining "wet season," including the "wettest three months (91 days)" concept, and solicits comment on different ways to interpret "at least during the wet season" (coincident flow, proportional but lagged flow, or "some months" in response to wet season). With respect to wet season, the agencies request comment on competing interpretations intended to better align with the Rapanos plurality's discussion of seasonal rivers. Even under alternative interpretations, tying jurisdiction to a defined wet season construct remains poorly suited to the wide variability of flow regimes. Flow regimes vary due to storage, groundwater exchange, snowmelt, watershed characteristics, and interannual climate variability. Replacing one wet season construct with another does not resolve the underlying problem. Hydrologic systems do not conform predictably to rigid seasonal boundaries, and a jurisdictional standard keyed to such constructs will produce unstable and inconsistent outcomes.

The alternative of limiting relatively permanent waters to perennial flow would represent a categorical narrowing that is not compelled by Supreme Court precedent. It would exclude large portions of the stream network in regions where perennial waters comprise a minority of total stream miles. A perennial-only approach would also generate inequitable and inconsistent outcomes across landscapes. It would favor waters with sustained flows while excluding naturally intermittent systems that nonetheless perform critical watershed functions and influence downstream integrity.

The Agencies solicit comment on an alternative approach whereby WOTUS would encompass 'traditional navigable waters', tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters; all other waters would be excluded. This alternative would restrict jurisdiction to traditional navigable waters, tributaries that flow directly into them, and wetlands with a continuous surface-water connection. Such a framework would eliminate coverage for broad classes of headwaters and non-perennial systems. It would also disregard the well-established reality that these waters influence downstream water

quality, flow timing, aquatic habitat, and flood storage even when surface expression is discontinuous or seasonally variable.

Finally, the alternatives that rely on fixed flow-duration thresholds, such as 90-day or 270-day standards, substitute calendar metrics for hydrologic function. These thresholds are neither scientifically grounded nor workable as a jurisdictional line. Duration of visible surface water is not a reliable proxy for downstream influence. Fixed thresholds would also cause jurisdiction to fluctuate from year to year due to drought, wet years, and climate shifts, which would create regulatory instability. In addition, these thresholds presume access to continuous monitoring or comparable records. Most waters do not have such data available through routine collection by agencies or applicants. In practice, determinations would rely on inference, indirect proxies, or incomplete data, which would increase dispute and litigation risk.

The alternatives presented do not cure the proposal's fundamental defects. They introduce additional arbitrary criteria and further disconnect jurisdiction from watershed function. Before adopting any alternative, the agencies should provide a transparent comparative analysis in the docket. That analysis should identify the chosen approach, explain the legal rationale for that choice, describe the evidentiary basis supporting it, and quantify the expected jurisdictional and administrative consequences. The agencies should not rely on a menu of divergent standards that is likely to yield inconsistent implementation.

#### **IV. CONCLUSION**

The Proposed Rule reflects an approach to Clean Water Act jurisdiction that is narrower, more fragmented, and less grounded in science and experience than any framework the Agencies have previously administered. Across multiple definitions and exclusions, the proposal replaces functional, watershed-based analysis with rigid criteria that fails to account for how waters actually operate as interconnected systems. This shift departs from decades of agency practice, contradicts the Agencies' own recent scientific determinations, and risks undermining the Act's core objective of protecting the chemical, physical, and biological integrity of downstream navigable waters.

The Agencies should reconsider the proposed revisions in their entirety. Rather than adopting definitions that fragment watersheds and elevate form over function, the Agencies should retain an approach that reflects scientific reality, promotes regulatory clarity, and faithfully implements the Clean Water Act's mandate to protect the Nation's waters as integrated and interconnected systems.

Clean water is not political or ideological. Water knows no political parties or geographical boundaries. Water only follows one path: downstream. Anything placed in that waterway, whether or not it has a "continuous surface connection" or is "relatively permanent," will travel downstream in Kentucky, into the lakes and streams we swim in, the waters we fish on, and into the water sources we drink from. We urge you to protect the whole water system and to reject the approach in the Proposed Rule that would leave so many of Kentucky's streams, wetlands, and other waterways without protection.

Sincerely,

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**ATTACHMENTS:**

1. *A Macroinvertebrate Bioassessment Index for Headwater Streams of the Eastern Coalfield Region, Kentucky* (2002)
2. *The Value of Headwater Streams*, State College, Pennsylvania (1999)
3. *Map, Percentage of Surface Drinking Water from Intermittent, Ephemeral, and Headwater Streams in Kentucky*
4. Brinkerhoff, C. B., Gleason, C. J., Kotchen, M. J., Kysar, D. A., & Raymond, P. A. (2024). *Ephemeral stream water contributions to United States drainage networks. Science.*