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December 30, 2025

Kevin J. McOmber, Regional Administrator
U.S. EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street SW
Atlanta, Georgia 30303-8960

Re: U.S. Environmental Protection Agency's ("EPA") and Department of the Army's Proposed Rule - Updated Definition of "Waters of the United States"; 90 Fed. Reg. 52,498 (November 20, 2025) – Docket EPA ID No. EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW

Dear Administrator McOmber:

The Kentucky Division of Water (Division) respectfully submits the attached comments on the EPA's and the Department of the Army's (Agencies) proposed rulemaking for the Updated Definition of "Waters of the United States" (WOTUS) published on November 20, 2025 (90 Fed. Reg. 52,498).

As to the numerous technical and policy-driven alternatives proposed in the rulemaking, the Division cannot provide full meaningful engagement at this time. The Division cannot fully review the impact of the rule to the Commonwealth due to the breadth of alternatives, and lack of a single, straight-forward proposal. In addition, a short comment period of 45 days with several holidays within that period is insufficient for full meaningful review by the Commonwealth and the public. The Division, therefore, requests an extension of the comment period to at least 60 days or for the Agencies to withdraw the proposed rulemaking and re-propose as a Notice of Proposed Rulemaking Action (NPRM) to allow for full consideration and review. In the event this extension request is not granted, the Division submits the attached comments for consideration.

Thank you for the opportunity to provide comment, for further clarification, please feel free to contact me at Sarah.Marshall@ky.gov or 502-782-3279.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Marshall".

Sarah Marshall, Director
Kentucky Division of Water



Comments on U.S. Environmental Protection Agency's ("EPA") and Department of the Army's Proposed Rule - Updated Definition of "Waters of the United States"

Cooperative Federalism and Implementation Issues

The proposed rulemaking promotes cooperative federalism by recognizing and preserving the primary responsibilities and rights of States to prevent pollution within their borders and to plan the development and use of their land and water resources. See 33 U.S.C. 1251(b). The Commonwealth of Kentucky (Commonwealth) supports continued cooperative federalism as contemplated by the Clean Water Act (CWA), and agrees that the states are in the best position to implement responsibilities over their own waters, and to carry out Congress' overall objectives to restore and maintain the integrity of the Nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources.

Currently, the Commonwealth's statutory definition of "Water" or "Waters of the Commonwealth," found in KRS 224.1-010(32), includes all waters designated as navigable waters, as defined in 33 U.S.C. sec. 1362, and other waters with special characteristics that are meant to protect groundwater. The Commonwealth's definition of its state waters is tied directly to the federal definition of Waters of the United States (WOTUS). Kentucky and other similarly situated states need time to implement the changes proposed by the Agencies, and to make changes to state statutory and regulatory schemes to maintain protection of their resources.

It is impossible to predict the outgrowth of the final rule because the Agencies have listed many alternative approaches in the rule, and public participation has yet to occur on the new proposed rulemaking. Therefore, the Agencies need to include a glide-path for implementation of a new rule that includes a specific timeframe for state legislatures to reconsider their current statutory framework. Because of the way the Commonwealth has defined its own waters, as set out in KRS 224.1-010(32), there will almost certainly be a significant loss of protection for wetlands and waters within our borders as a result of the proposed rule. The extensive training and multi-year program development and implementation necessary to fill the technical and scientific gaps created by the changes made by the rule will strain limited staffing and budget resources.

States downstream depend on upstream states' headwaters and wetlands. A narrower WOTUS definition will create cross-border water quality impacts, especially in interstate basins like the Ohio River. In states like the Commonwealth that have limited or no independent programs, this rule would leave large gaps in regulatory coverage, leading to losses that the CWA was designed to prevent.

"Relatively permanent"

The proposed definition of "relatively permanent" extends beyond what the U.S. Supreme Court required in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). The Court concluded that the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"¹ This reading follows

¹ *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 671 (2023), citing *Rapanos v. United States*, 547 U.S., 715, 739 (2016).

from the CWA's deliberate use of the plural "waters," which refers to those bodies of water listed above and did not require year-round flow, wet season continuity, or uninterrupted surface connections throughout an entire hydrologic period. The interpretations in the proposed rulemaking expand the test beyond the bounds of *Sackett* and would exclude many waters that were expressly recognized as potentially jurisdictional by the Court.

The Division supports overall regulatory certainty through definitions and bright-line tests. Adding definitions that further explain parts of the implementation of the definition of WOTUS will provide regulatory certainty, if done correctly. However, the requirement that a water be relatively permanent only if it has surface water throughout the "wet season" is ambiguous and will lead to inconsistent determinations across districts, states, and even individual staff. Hydrologic conditions fluctuate rapidly, and without clear, measurable definitions of surface water and wet season, agencies and regulated entities will face significant challenges in documenting and verifying that this standard has been met.

"Tributary"

The proposed tributary definition requiring "relatively permanent" flow and a "continuous surface connection" during the wet season is impractical to implement. As stated above, hydrologic conditions change rapidly, making it nearly impossible to verify "continuous" surface flow in the field with consistency. Many streams in the Commonwealth may not meet this definition even though they are functioning, integral parts of the watershed that convey flow, sediment, nutrients, and biota during critical hydrologic periods. Excluding tributaries that lack a continuous wet season connection will remove protection from streams that directly influence downstream water quality, groundwater exchange, flood attenuations, and aquatic habitat.

The proposed requirement that a tributary must maintain relatively permanent flow all the way downstream with no breaks in jurisdiction creates a significant barrier to implementation, as even short hydrologic breaks can sever jurisdiction upstream. Many watersheds in the Commonwealth naturally contain short losing reaches, especially in karst terrain. Treating these natural breaks as jurisdictional breaks ignores regional hydrology and will result in entire headwater networks being classified as non-jurisdictional, despite their ongoing contribution to downstream waters. This will result in inconsistent determinations.

Wetlands

Requiring wetlands to have a "continuous surface connection" during the wet season does not align with established wetland science, which recognizes that many wetlands meet hydrologic criteria through saturation, not surface inundations. Many wetlands, especially depressional, slope, groundwater fed, forested, and headwater wetlands are saturated but not visibly flooded, and would be excluded under this definition despite providing full wetland functions. The wet season requirement ignores the role of soil saturation, perched water tables, groundwater discharge, and subsurface hydrology, which are central drivers of wetland function in the Commonwealth. Documenting wet season surface water connections would require repeated site visits or continuous monitoring, which is overly burdensome for agencies and applicants. Wetland hydrology varies year to year, and many wetlands will not flood every wet season, even though they remain functional. Implementation of this standard is not practicable.

Alternative Methods and “Continuous Surface Connection”

Defining “continuous surface connection” to be consistent with the NWI’s semi-permanently flooded water regime and require surface water at least during the growing season would be scientifically incorrect. In the Commonwealth, the growing season occurs during some of the driest months of the year. A growing season standard would cause most wetlands to be rendered non-jurisdictional under this method. Hydrology is particularly variable during the growing season in the Southeast, where “wet season” flows typically occur in the winter or early spring” as noted in this proposed rule. (90 Fed. Reg. 52,524) Using the growing season to define “continuous surface connection” would create a misleading and unimplementable test that excludes wetlands simply for following normal seasonal drying patterns.

The proposed interpretation of wet season is narrower than the *Rapanos* plurality, which recognized seasonal rivers but did not require continuous wet season flow. Tying jurisdiction to a strict “wet season” duration would exclude many waters the U.S. Supreme Court agreed were properly within EPA’s jurisdiction to remain jurisdictional, especially in regions with variable hydrology like in the Commonwealth. Any flow-duration test more than wet season but less than perennial would still be scientifically unsupported and difficult to implement.

The proposed alternative approaches of requiring surface water to be present for ≥ 90 days or ≥ 270 days are arbitrary, as *Sackett* did not establish or imply any minimum number of days of surface water presence to determine whether a water is relatively permanent. Surface water duration is not a reliable indicator of hydrologic permanence or functional connection.

Hydrologic conditions vary year to year, meaning a 90-day or 270-day requirement would create inconsistent jurisdictional outcomes. Documenting this standard would require repeated site visits or continuous monitoring, which is overly burdensome for agencies and applicants.

Relatively permanent waters should not be limited to perennial waters. The *Sackett* and *Rapanos* plurality opinions clearly contemplate that seasonal and intermittent waters can still qualify. Choosing to limit CWA jurisdiction to waters that are relatively permanent to perennial flow would go beyond the U.S. Supreme Court decision, thereby creating inconsistent jurisdictional determinations that fail to reflect real hydrologic conditions in much of the United States.

Limiting jurisdiction only to traditionally navigable waters, their direct flowing tributaries, and wetlands with a continuous surface water connection would create a definition of WOTUS that would eliminate protections for the vast majority of wetlands, ephemeral, intermittent, headwater, perennial, and groundwater-fed systems, which are essential to downstream water quality and watershed function. This would also remove “permit shield” protections for many CWA permittees as afforded by 33 U.S.C sec. 1342, and would create major water quality impacts, including increased sedimentation, nutrient loading, and reduced flood storage. This alternative approach would be far narrower than the U.S. Supreme Court’s own language and inconsistent with the CWA’s goal of protecting the integrity of the nation’s waters.