



98th House District

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Committees

Chairman: Civil Justice
Energy & Natural
Financial Institutions

Brett Hudson Hillyer

State Representative

Chairman Koehler, Vice Chairman Creech, and Ranking Member Brent:

Thank you for the opportunity to deliver sponsor testimony on House Bill 175, and delving into the topic of “Waters of the State” and “Navigable Waters of the United States”. House Bill 175 helps clarify an age-old question: What can the government regulate and to what extent. House Bill 175 was drafted in response to several constituent concerns that were brought to me by businesses and leaders in my community in response to the Federal Government’s rule in the Navigable Waters Protection Rule (NWPR) in April 2020. The Federal Government sought to streamline definitions for “Navigable waters of the United States” in 85 FR 22250.

As Justice Alito said in his concurrence in *Sackett v. EPA* 566 U.S. 120,

The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that [****20] the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to [***378] show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a Nation that values due process, not to mention private property, such treatment is unthinkable.

Sackett v. EPA, 566 U.S. 120, 132, 132 S. Ct. 1367, 1375 (2012)

Ohio’s definition is equally troubling as cited in ORC 6111.01:

“Waters of the state” means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.

Ohio Rev. Code Ann. § 6111.01 (Page, Lexis Advance through File 115 (HB 295) the end of the 133rd (2019-2020) General Assembly)

Ohio currently has three distinct stream classifications:

1. Ephemeral Streams- a stream that flows in direct response to rain or snow melt. It receives little to no water from a spring or a headwater.
2. Intermittent Streams- a stream with a well-defined channel that contains water for only part of the year.
3. Perennial Stream- A constant stream that flows most of the year.

Currently, the Ohio EPA regulates ephemeral streams. Ohio has fee structure in place of \$5.00 a foot or \$250 for the project, whichever is greater in regards to ephemeral stream work. This can quickly add up and can cost \$10,000- \$40,000 a project. As you can imagine, this can quickly take an already costly project and increase the cost to developers and consumers.

The General Permit’s requirement to replace and create additional ephemeral streams will only increase water flows of streams during rain events. This disturbs wildlife, increases erosion, results in more sediment in streams, and causes downstream flooding. Instead, the Ohio EPA should encourage entities involved with land development to have their professional engineers use watershed storage mechanisms known as best management practices (BMPs) to increase storability in the watersheds during a rain event. These practices will release water back into the streams more slowly by increasing infiltration during rain events. The result will lessen stream bank erosion, reduce sediments in streams, and help prevent downstream flooding.

Entities involved with land development and their engineers are well-trained in the design and construction of storm water BMPs. The Ohio EPA’s General Permit was hastily crafted with limited stakeholder involvement, resulting in unnecessary bureaucracy and detrimental consequences. The legislature can eliminate this bureaucracy by following the actions taken at the federal level and removing ephemeral streams from the definition of “Waters of the State.”

I appreciate your time and attention to this very important matter. Over the next several hearings, you will hear from experts in the field of water pollution and environmental remediation. I look forward to the discussion and am happy to answer any questions you may have.

Respectfully submitted,

Brett H. Hillyer

A handwritten signature in black ink, appearing to read "Brett H. Hillyer". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.