



4673 Northwest Parkway
Hilliard, Ohio 43026
614-457-6000
mbi@mwbinst.com

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Representative Juanita Brent
District 12
Ohio House of Representatives
77 S. High St, 10th Floor
Columbus, OH 43215
rep12@ohiohouse.gov

Re: Opposition to House Bill 175, Deregulate certain ephemeral water features

Dear Chairman Koehler, Representative Brent and members of the Ohio Agricultural and Conservation Committee,

The Midwest Biodiversity Institute opposes HB 175, which would “Deregulate certain ephemeral features” under the Clean Water Act in Ohio. We strongly encourage you and other committee and General Assembly members to oppose this bill, which would negatively affect Ohio’s water resources.

MBI is a 501(c)(3), not-for-profit corporation specializing in water quality issues including applied research with aquatic bioassessments, water quality standards, monitoring and assessment, and state bioassessment program development. As part of this mission MBI has conducted numerous reviews of proposed rules, permits, and other agency actions both in Ohio and other states. It is from this extensive base of experience that we offer our attached comments.

1. This change in the definition of Waters of the State under Ohio Revised Code 6111 seems both prescriptive and premature given that the current federal administration is considering changes to the Waters of the United States (WOTUS) rule with the goal of better unifying the federal 2015 and 2020 interpretations (Re: recent U.S. Senate testimony by U.S. EPA assistant administrator nominee for Water). HB 175 could “lock” Ohio into a situation where state law is less stringent than a revised federal rule and a likely violation of the Clean Water Act.

2. Nationwide standard methods have not yet been developed that would implement the last federal administration's June 2020 Navigable Waters Protection Rule. Based on this fact alone, HB 175 is completely premature and an irresponsible rush to lock something in place that preserves irresponsible, non-scientific deregulation and poor public policy as a result.
3. The definition of "ephemeral" provided in the proposed statute, is wholly inadequate from an implementation and management standpoint. To be effective, the law will require the adoption of extensive and complicated, science-based implementation rules. The language of the law itself is far too vague to interpret in a consistent and effective way. Coupled with the observations on likely federal implementation mentioned above, this proposal is premature at best.
4. Whatever the actual jurisdictional changes that result from HB 175, downstream waterbody uses and water quality, such as for drinking water and wildlife, MUST be maintained and protected under federal regulation(40 CFR, Part 131). That aspect of the Clean Water Act (CWA) is (and has been) firmly in place, and we are concerned that implementation of HB 175 will not assure that this basic, federal provision is met. At some point along its length, all ephemeral streams will gain flow and become waters of the state subject to regulation. There are far too many ambiguities and complications in defining and determining where this point occurs. This bill does not attempt to address this issue and, as a result, the bill creates a serious question of how the state's CWA obligations for these streams would be managed by the Ohio EPA.
5. By simply deregulating these small streams that many pollutants flow into, the bill would work against recent efforts to improve water quality under the H2Ohio program. Many H2Ohio efforts are oriented to protect ephemeral streams ("features") and the important ecological services and benefits they provide in protecting downstream water quality.
6. The options for ephemeral streams as described by the proponents of this legislation include various stormwater related best management practices (BMPs) that purportedly substitute for natural stream hydrology and quality features. BMPs, especially for urban stormwater, have been greatly oversold in terms of their actual effectiveness in controlling pollution and achieving high stream quality. Few, if any, such "BMP's" have been shown to restore impaired streams to Ohio's water quality standards. In fact, these BMPs actually have detrimental impacts regarding temperature and flow alteration. Most proclaimed successes are based simply on the number if such practices that are utilized

as opposed to any actual conditions or outcomes. This is especially true for aquatic biology like fish and macroinvertebrates found in the receiving streams.

When urban land development reaches about 20-25% of watershed area, compliance with water quality standards (WQS) declines to below the minimums required by the CWA. This has been known since the mid-1990s, yet policies have failed to reverse this pattern and some have ignored it altogether. In areas where this legislation would remove CWA jurisdiction over streams, downstream waters simply cannot be effectively protected. This would mean that HB 175 would place Ohio in conflict with the CWA under the suggested BMPs recommended by the proponents of HB 175.

In addition, some of the proposed BMPs can actually make pollution worse by concentrating pollutants and toxicity, converting less harmful forms of certain chemicals (metals, ammonia) to more harmful forms, disrupting natural flow regimes, and elevating temperatures well above background. Instead, relying on the natural features and functions provided by ephemeral streams is far superior to constructed BMPs that sever and distort the interaction between intermittently present surface waters and the hyporheic zone just beneath the stream surface, which reduces the availability of natural assimilative capacity. Ephemeral streams are the capillaries of a watershed, delivering the water and its contents downstream. They are not the cause of issues such as nutrient pollution and erosion. Multiplied by the 36,000 miles of streams (a potentially minimum estimate) that HB 175 will affect, the consequences to downstream uses such as drinking water supplies, recreation and wildlife are enormous.

7. There are a host of other unanticipated consequences of HB 175, both in the environment and in the chaos it will introduce to the management of water quality in Ohio. One important consequence it creates is the addition of new and potentially expensive layers of NPDES permitting, especially for ephemeral streams that are conduits for polluting discharges located upstream. Unfortunately, that could be an outcome to force yet another legal showdown at the U.S. Supreme Court.
8. For clarification, the Ohio General Permit for Filling Category 1 and Category 2 Isolated Wetlands and Ephemeral Streams (adopted in 2020) states: "Ephemeral streams do not include agricultural and roadside ditches, grass swales, erosional features, or other artificial channels constructed wholly in uplands that do not relocate an existing stream." Ohio EPA's related 2020 Field Manual also defines what is NOT a stream, and therefore not even an "ephemeral" stream. Examples of some features which are NOT ephemeral

streams (or any type of stream) in this manual include: grass swales, roadside ditch, erosion rills, field waterways, and field/drainage tile.

9.

We are concerned that this bill will be interpreted as removing a significant portion of Ohio's current wetlands from protection. In Sec. 6111.01 (H), this bill states that "'Waters of the state" does not include an ephemeral feature." We are very concerned this section might be interpreted such that it would not protect the many Ohio wetlands that depend on precipitation and surface water for a significant part of their hydrology. Importantly, ephemeral streams affect the hydrology of many of Ohio's wetlands. Therefore, their protection is paramount and tied to the condition of wetlands. As you know, the 2020 federal Clean Water Act rule did not protect the majority of Ohio's wetlands, which are largely "isolated." Following the 2001 U.S Supreme Court SWANCC decision on isolated wetlands (which are the overwhelming majority of Ohio's wetlands), Ohio established an isolated wetland permitting law in ORC 6111.02. It would be a major loss to Ohio's environment if this "ephemeral features" bill also would negatively affect Ohio's wetlands, which already have been reduced by 90% of their original extent.

Maintaining the current level of stream protections and opposing HB 175 will continue to provide improvement and many benefits, making Ohio a better place to live. More than 80% of stream miles in Ohio are miles of primary headwater streams. About 32% of our primary headwater streams are ephemeral, according to the present definition. Properly protected ephemeral streams with vegetated buffers reduce sediment and nutrient delivery to larger streams and drinking water sources, including, for example, Lake Erie. Ephemeral streams of good to excellent quality can reduce downstream flooding, prevent excess erosion and provide habitat for wildlife. Intact ephemeral streams can protect property values, maintain biological diversity and support hunting and fishing. Thoughtless alteration or loss of the hydrologic and biological processes of ephemeral streams can lead to cumulative decline of a whole river system, such as Ohio's best, our State and National Scenic Rivers, and other outstanding and exceptional water resources.

For these reasons, we vigorously oppose HB 175. We appreciate the opportunity to provide input on this critical water quality program issue.

Very truly yours,



Peter A. Precario, Executive Director
Midwest Biodiversity Institute