Testimony of Nathan Vaughan, Esq.
In Support of HB 175
Before the Ohio House Agriculture and Conservation Committee
4th Hearing
May 25, 2021

Honorable Members of the Committee, Chairman Koehler, Vice Chair Creech, and Ranking Member Brent.

My name is Nathan Vaughan. Thank you for this opportunity to submit testimony in support of HB 175.

I am an attorney and have been licensed to practice law in the State of Ohio since 2004. I was in private practice with a Northeast Ohio Law Firm for nine years and have served as an inhouse attorney with Kimble Company and its affiliates since 2013 representing various privately-owned businesses associated with Kimble Company. My primary practice areas include real estate, general business, labor law and natural resources. Two of the businesses that I represent are Steele Hill Properties II, LLC and RHDK Investments, LLC which own real estate throughout Northeastern Ohio. This issue is important to my clients because the requirement to mitigate ephemeral streams has a substantial and detrimental impact on my client's ability to utilize their property.

I believe there are several pieces of information that need to be revisited and addressed from prior proponent and opponent testimony. First, is the proponent testimony of Richard Warner, PhD, who demonstrated extensive experience in matters of ephemeral streams and was recently invited by the National Academy of Science, Engineering and Medicine to provide recommendations on management strategies to reduce hydrologic and environmental risk. His testimony was very compelling, so much so, I am compelled to restate his Exhibit 3 list (below in Items a. though m.) of *negative* environmental consequences resulting from the replacement and expansion of ephemeral streams.

a. Water will be conveyed faster from watersheds;
b. Faster moving water will erode stream channels;
c. Streams will become deeper, wider and degraded;

d. Stream bed & bank erosion will fill streams with sediment, further exacerbating flooding.
e. Infrastructure, such as, culverts, bridges, roads and utilities may be inadequate and damaged;
f. Downstream flooding will increase;
g. Water quality will degrade;
h. In-channel and floodplain habitat will be degraded;
i. Aquatic, terrestrial and avian wildlife will have limited or no access to water in upland areas and must relocate or perish;
j. Habitat diversity will be diminished;
k. Groundwater recharge will be reduced;
l. Nutrients will be rapidly transported downstream like in a pipe;
m. Eutrophication or toxic algal bloom potential will increase for Lake Erie, the Ohio River and other water bodies.

This list of consequences is quite comprehensive and alone provides reason enough for the passage of HB 175.

Second, in some of the written opponent testimony submitted, statements are made about the functions and benefits of ephemeral streams, which include:

a. Providing storage capacity during rain events;
b. Capturing and filtering contaminants such as total suspended solids; and
c. Providing for surface water and ground water interaction and recharge of ground water.

The above three functions and benefits of ephemeral streams are directly opposite of the list of consequences of ephemeral streams presented by Richard Warner, PhD. Based on my personal experiences in representing my clients, I concur with Dr. Warner's list.

For example, in Item a. in the list above, I do not believe ephemeral streams provide storage. I have seen ephemeral streams flow during rain events on my client's properties and they merely convey muddy water quickly downstream, erode more soil, and adds to downstream flooding problems. Ephemeral streams do not store water, they are the pathways that convey stormwater to quickly runoff the land. Ephemeral streams should be replaced by storage features,

such as, stormwater basins that truly store water, prevent downstream channel erosion, and reduce downstream flooding.

For a second example, in Item b. in the list above, I do not believe ephemeral streams capture and filter total suspended solids (silts and clays). Again, ephemeral streams are the pathways that convey stormwater runoff quickly off the land to larger downstream channels and the water in the ephemeral stream is always muddy. The muddy appearance is created by the silts and clays being transported downstream in the fast-moving water of the ephemeral stream. In fact, the fast-moving water conveys silts and clays downstream to larger bodies of water, such as, Lake Erie and the Ohio River and is likely part of the problem for the severe algal bloom problems in Lake Erie and the Ohio River.

For a third and last example, in Item c. in the list above, ephemeral streams provide for recharge of ground water. It is my understanding, that ground water recharge requires area, water depth and time for water to be 'driven' into the ground. An ephemeral stream is typically very narrow (e.g., 1 to 2 feet wide) and only has water in it for a very short time. Thus, ephemeral streams do not have the three basic criteria of area, water depth and time to 'drive' water into the ground.

Third, some opponent testimony has indicated that a consequence of HB 175 will be eliminating Ohio EPA's authority to issue National Pollution Discharge Elimination System (NPDES) permits for direct discharges of industrial wastewaters or sewage into ephemeral streams. I believe that if an industrial discharge went into an ephemeral stream, the stream could be classified as an intermittent or perennial stream because of the flow and therefore could be regulated by NPDES under the Clean Water Act. Regardless, if the industrial discharge flows into or is conveyed downstream by stormwater to an intermittent or perennial stream, it becomes a point source discharge and thus, is regulated by NPDES.

As a practical example of the impacts of ephemeral streams on a landowner's property my client, Steele Hill Properties II, LLC owns 91 acres of land located in Streetsboro, Ohio. My client has been trying to sell this 91-acre tract for more than a year. No sale has occurred and the real estate agents representing my client have indicated the biggest problem with the acreage is the potential unknown amount of environmental regulatory requirements that will be required to use the property. Studies conducted have indicated there are approximately 3,865 linear feet of

ephemeral streams on the property. The cost to mitigate these features at $250 per foot is almost $1,000,000 which far exceeds the original purchase price of the property in 2009.

Another Item I would like to touch on is the position that ephemeral streams do not include grass swales, roadside ditches and various other features. Ohio Revised Code Section 6111.01 (H) defines "Waters of the state" very broadly to include "…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." Even if an Ohio regulatory body chooses not to regulate grass swales, roadside ditches and other features, by leaving the Ohio Revised Code definition broad, Ohio opens itself up to litigation from outside parties. These outside parties, typically not from Ohio, simply file lawsuits against our state agencies and force settlements that are not in the best interest of Ohio. Modifying the definition of waters of the state to remove ephemeral features is the only way to avoid these future challenges.

In closing, the General Assembly should embrace this opportunity to support HB 175, prevent imprudent, unnecessary and costly regulation of ephemeral streams, and join numerous other States that do not regulate ephemeral streams. Thank you.