



**Sierra Club Ohio**  
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May 14, 2021

RE: House Bill 175

Dear Chairman Koehler, Vice Chair Creech, Ranking Member Brent, and members of the Agriculture and Conservation Committee,

Thank you for the opportunity to submit comments, please accept on behalf of Sierra Club Ohio, representing 120,000 members and supporters in Ohio.

House Bill 175 aims to exclude ephemeral features from water pollution control programs, including the section 401 water quality certification program. The bill applies the current 2020 WOTUS rule to exclude ephemeral features from regulation under Ohio's law governing water pollution control.<sup>1</sup> Additionally, this bill seeks to eliminate the section 401 water quality certification review fee that applies to ephemeral streams. That fee is minimal at \$5 per linear foot of stream to be impacted, or \$200, whichever is greater.<sup>2</sup>

Ephemeral stream channels often represent the headwaters of a stream. Given their large extent, these streams are important sources of sediment, water, nutrients, seeds, and organic matter for downstream systems and provide habitat for many species. Their inclusion is important in watershed-based assessments given their ecological importance in areas such as cumulative impacts and connection to downstream waters. Additionally, the loss of ephemeral streams will impact water quality and ultimately drinking water quality here in Ohio. The economic impacts of this seem counterintuitive as we continue to invest in the H2Ohio program and work toward better water quality. The impacts of water quality not only affect the health of Ohioans, but also recreation, sportsmen and outdoorsmen, and economic revenue generated through each of these. Additionally, the burden will be passed to consumers to manage the increased pollution. The EPA estimates over 36,000 miles of ephemeral streams exist in Ohio,

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<sup>1</sup> R.C. 3745.114(A) and (G), 6111.01(H) and (V), and 33 CFR § 328.3 (April 21, 2020)

<sup>2</sup> R.C. 3745.114

with more advanced mapping technology estimating that number closer to 45,000 miles, meaning this deregulation would affect every watershed in Ohio.

Within House Bill 175 an ephemeral feature is specified as a surface water flowing or pooling only in direct response to precipitation, such as rain or snow. The definition fails to clearly define what is truly an “ephemeral” stream. A wide variety of conditions related to the presence of water in a stream for varying lengths of time, water depths, hydrology, and flow regimes will exist across all watersheds and will vary across the state. Current law defines an ephemeral stream as a stream that flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and that has a channel bottom that is always above the local water table. The bill replaces the term ephemeral stream with ephemeral feature and changes the definition of this type of water, degrading the complexity and importance of ephemeral streams and subsequently eliminating protections for ephemeral streams in Ohio.

Additionally, House Bill 175 creates inconsistencies in regulation of ephemeral streams under the Ohio Revised Code. To exclude ephemeral features from regulation under Ohio’s Water Pollution Control Law, the bill alters the definition of “waters of the state.” However, other chapters of the Revised Code that do not appear in the bill utilize this definition. Thus, the bill has the effect of excluding ephemeral features for purposes of regulation under the following programs:

- R.C. 903.01 Concentrated Animal Feeding Facilities (CAFFs)
- R.C. 1503.50 Forest management
- R.C. 3746.07 Voluntary Action Program (VAP).

However, it does not include:

- 6119.011 Regional water and sewer districts
- 1513.01 and 1513.07(A)(5) Coal surface mining
- 1509.01 and 1509.22(C)(2) Brine disposal
- 6121.01 Ohio Water Development Authority
- 6112.01 Private sewer systems
- 939.01 and 939.10 Soil and water conservation
- 940.01 (F) and (G); see 940.02(G) Soil and Water Conservation Commission

This negates the argument that this bill creates uniformity with federal regulation, as it does not even create uniformity within state regulation.

Due to the inherent problems associated with this bill, Sierra Club Ohio opposes HB 175 which would remove protections for ephemeral streams, a biologically important class of streams. Additionally, in 2017, President Trump signed an executive order directing USEPA to rescind the 2015 rule and instead adopt a new WOTUS rule reflecting the first approach offered by Justice Scalia in *Rapanos*.<sup>3</sup> That rule took effect on June 22, 2020.<sup>4</sup> Shortly thereafter, twenty states and the District of Columbia filed a lawsuit challenging it, and litigation is still pending.<sup>5</sup> Due to

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<sup>3</sup> Executive Order 13778 of February 28, 2017

<sup>4</sup> 33 Code of Federal Regulations (CFR) § 328.3 (April 21, 2020)

<sup>5</sup> See *California v. Andrew Wheeler*, Civil Action No. 3:20-cv-03005.

this pending litigation additional legislation should not be passed that would further complicate the matter. We urge you to consider the points we have discussed and vote no on House Bill 175.

Sincerely,

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