



Opponent Testimony – Darby Creek Association
House Bill 175
Presented to the Ohio House Agricultural and Conservation Committee
May 25, 2021

Chairman Koehler, Vice Chair Creech, Ranking Member Brent and Members of the Ohio House Agriculture and Conservation Committee, thank you for the opportunity to provide testimony in opposition to House Bill 175.

My name is Anthony Sasson. I am representing the Darby Creek Association, a nonprofit volunteer-based organization dedicated for almost 50 years to protecting Big Darby Creek, our State and National Scenic River in central Ohio. The Big and Little Darby Creeks are a source of pride for the State of Ohio. But their biodiversity is under stress from a variety of sources, and we cannot afford to see ephemeral tributary streams to be filled, piped or otherwise degraded. These tributaries help determine much of the quality of Big Darby Creek.

Personally, I have over 40 years of experience in environmental science and policy. I have degrees in biology, geology and environmental science from universities in Ohio. I have extensive training and field experience in observing and interpreting stream conditions and quality.

Based on this background, I speak today in opposition to HB 175.

I have had the benefit of reading previous testimony on HB 175. On page 2 of Richard Warner's testimony dated May 2, 2021, Dr. Warner states "A small erosion gully is today classified as an "ephemeral stream"." He provided some photos. Based on my knowledge and experience in stream ecology and the Clean Water Act, as well as reading of the 2020 Ohio EPA general permit, which covers ephemeral streams, and reading other Ohio EPA documents defining streams, the features referred to by Dr. Warner are not ephemeral streams. His assertion is not correct. Instead, they appear to be erosional features and such features have been interpreted as that by Ohio EPA and others for many years, and I expect that to continue. They are not streams and not regulated.

Dr. Warner's Exhibit 3 "Summary of Negative Environmental Consequences of Ohio EPA's Regulation" could be misleading in that the causes of the problems listed are up-gradient sources, not the stream itself. He also does not include costs of compliance with the stormwater practices or units he appears to be promoting. He also does not refer to positive aquatic life environmental outcomes which are critical to Clean Water Act success.

Ohio EPA conducted substantial stakeholder outreach in 2020 concerning the general permit now in place related to ephemeral streams. As Ohio EPA clearly stated in their written testimony dated May 19, 2021:

“Ohio EPA categorically does not regard features such as agricultural and roadside ditches, grass swales, erosional features, or other artificially constructed channels (or pools) as ephemeral streams.”

Similar statements and illustrations are in earlier Ohio EPA documentsⁱ.

Also, it could be claimed that Ohio already is in alignment with the 2020 federal Navigable Waters Rule. Please see the Ohio 2020 general permit for ephemeral streams and Director Stevenson’s testimony. Both refer to reduced requirements for ephemeral stream protection, but recognize the need to provide protection for Ohio’s vulnerable surface waters.

In other proponent testimony from Kristin Watt, “ephemeral streams are pathways that reduce resistance to flow and increase the velocity of runoff from the watershed.” In themselves, ephemeral streams do not “increase the velocity of runoff.” Instead, increased flow is caused by up-gradient land use and resultant conditions. No stream increases its velocity by itself; it reacts to up-gradient sources on the land. Velocity is based on gradient and the volume of water the stream receives, and not caused by the stream itself. Eliminating these streams from ORC 6111 does not address the problem. For example, impervious surfaces and removal of natural vegetation up-gradient create increased volumes of stormwater and are the cause of erosion and stream quality degradation downstream, including in ephemeral, intermittent and permanent streams. These sources and this result is well known among stream ecologists and stormwater specialists. Many stormwater permittees might resist stormwater management or groundwater recharge requirements that would address this cause, as this could lead to a requirement for additional land being set aside for stormwater management up-gradient. I suggest asking what the costs and land area needs are for the stormwater management that would replace ephemeral streams.

According to the LSC, HB 175 “Excludes ephemeral features from water pollution control programs.” This apparently would attempt to eliminate all ephemeral streams from classification as a stream under ORC 6111. This appears to create a need for extensive water quality requirements to ensure that impacts to “waters of the state” do not occur, as they are prohibited under ORC 6111.

As mentioned, it is clear that features such as erosion gullies, roadside ditches, field ditches, etc., are not streams, therefore not ephemeral streams, and therefore have not been regulated under the Clean Water Act. Eliminating ephemeral streams from ORC 6111 goes too far and is inappropriate and unnecessary. It would lead to extensive confusion about how to achieve Ohio’s Clean Water Act goals because of ephemeral streams’ contributions to downstream quality and flow. Ephemeral streams are part of the solution to stream health and drinking water problems. Eliminating ephemeral streams from ORC 6111 would be like throwing out the baby with the bathwater.

Across Ohio, we are very concerned about cumulative impacts from a loss of protection for ephemeral streams, which are 22% of Ohio stream miles and often the first streams that water and pollutants enter. These loads determine in large part the downstream impacts. Although ephemeral streams flow for only relatively short periods, they are numerous, and the volume of water during those periods is large, carrying a significant portion of a watershed’s pollutants and delivering them downstream. Those

pollutants and the increased water volume come from up-gradient land. The receiving ephemeral streams are numerous and like the capillaries in the bloodstream. Their flow constitutes a major portion of the pollution load for an entire watershed. Nonpoint source pollutants and increased water volume are delivered in short-term spurts. The pollutant loads can accumulate over years to eventually reach these small streams, which collect runoff from a major fraction of a watershed's area. These ephemeral tributaries flow following storms. This is when the critical pollutant load is delivered and determines amount of pollutants going downstream.

Because ephemeral streams would no longer be protected in Ohio due to implementation of HB 175, it appears this bill would establish no obligation, expectation or standards for stormwater impacts to them. We are concerned that these ephemeral streams will be degraded because under HB 175 it could be legally possible to modify and not replace them, or replace them with stormwater units such as stormwater retention units or other control measures. Alternatively, stormwater retention requirements to replace ephemeral streams could be so great that permittees would balk at such stormwater management requirements. If considerably greater and demonstrably adequate stormwater management is not required, would that result in lower stream and habitat quality and possibly even allow putting ephemeral streams in pipes before discharge to larger streams?

We know from stream data observations of present stormwater systems that they typically do not improve downstream water quality, particularly to reach Clean Water Act attainment in small to medium-sized streams. While stormwater management like retention or detention units might slow water releases from the land and impervious surfaces, they can create other problems, like temperature increases and flow alteration, while also losing wildlife habitat and other stream functions such as channel nitrogen removal, organic matter transport and infiltration to groundwater. Ohio stream quality data continues to show nonattainment impacts even where stormwater units are installed. What has been seen to show more positive stream quality results has been protection of vegetated riparian stream corridors.

According to the Legislative Service Commission analysis of HB 175, the number of Water Quality Certifications to comply with Section 401 of the Clean Water Act averages less than 14 per year, with \$371,545 collected in fees by Ohio EPA for all certifications between 2015 and 2020. This contrasts with hundreds of stormwater permits active at any one time.

I have been part of a panel that reviews developers' proposals in the Big Darby watershed, and developers are featuring the protection of all streams within the development as positive, attractive features for homebuyers. These are developers' selling points, not burdens.

On another panel, over 15 years I reviewed about 100 Clean Ohio Fund proposals that protected ephemeral and other streams in Franklin County through conservation acquisitions of land. My observation is that it would be a far lower cost to the general public and more effective to continue to protect ephemeral streams in general through stormwater permits and Section 401 Water Quality Certifications than to shift their protection solely or predominantly to a taxpayer-funded conservation program which would address only a small portion of these streams. With hundreds of development projects that potentially impact ephemeral streams each year, most of these practice conservation-informed design and avoid impacting small streams and any required Section 401 mitigation. Not protecting ephemeral streams will lead to a need to much more extensively manage stormwater on-site and pollutants downstream.

While Ms. Watt stated in proponent testimony that “The protection of isolated wetlands is firmly entrenched in Ohio law,” we are concerned that Ohio wetlands that are largely dependent on surface water or precipitation might be at risk of not being protected because of HB 175. This is because the bill states “An ephemeral feature is a surface water that flows or pools only in response to precipitation.” An attorney or consultant might argue this eliminates some wetlands. Let’s hope not. We already have lost enough of Ohio’s wetlands, at over 90 %.

It is relatively common for Ohio cities or counties to have stream protection ordinances that might include ephemeral streams. These ordinances might include buffers or setbacks. These are required to lessen the impact of development, as Ohio data document that urban areas have some of the lowest quality streams on Ohio. This is due to stormwater impacts and lack of good quality riparian habitat. We oppose HB 175 to ensure that it will not hinder or eliminate such local communities’ ability to keep their ephemeral streams and implement such ordinances or otherwise lessen their effectiveness.

Ohio’s 36,000 miles of ephemeral streams constitute 22% of all Ohio stream miles in an estimate by The Ohio State University. Therefore, we urge HB 175 to not be passed, instead of lowering the protection standards for all of the tens of thousands of miles of ephemeral streams in Ohio.

Mr. Chairman, Mr. Vice-Chair, Ranking Member Brent and members of the committee, thank you for considering these points in opposition to HB 175.

¹ Ohio EPA, Division of Surface Water. 2002. Field Evaluation Manual for Ohio’s Primary Headwater Habitat Streams. Final Version 1.0.

Ohio EPA, Division of Surface Water. 2009. Field Evaluation Manual for Ohio’s Primary Headwater Habitat Streams. Review Version 2.3. https://epa.ohio.gov/Portals/35/rules/PHWHManual_2009.pdf