

HOUSE AGRICULTURE & CONSERVATION COMMITTEE
OPPONENT TESTIMONY ON H.B. 175

Provided on May 28, 2021 by George A. Elmaraghy, Federal Commissioner, Ohio River Valley Water Sanitation Commission (ORSANCO) and member of the International Joint Commission Water Quality Board.

Chairman Koehler, Vice Chair Creech, Ranking Member Brent, and Members of the House Agriculture and Conservation Committee:

Thank you for the opportunity to share my strong objections to House Bill 175, legislation that would result in degradation of water quality in Ohio and reverse in the progress we made in the last fifty years.

H.B. 175 seeks to remove the Ohio EPA's authority for the oversight of all ephemeral features and exclude them from the definition of waters of the state. Ephemeral features are streams and wetlands that flow or pool in direct response to precipitation or melting snow. If enacted, discharging pollutants to or filling these features would not be regulated, and anyone could fill, dredge or discharge any pollutants to these waterbodies without a permit.

This will result in eliminating all protection and requirements related to ephemeral streams which represent more than 30 % of Ohio's primary headwaters streams. Ephemeral streams and wetlands play a major role in managing floodwaters, filtering contaminants, recharging groundwater and providing habitat for a variety of plant and animal species. Destroying them will result in degrading other larger water bodies that are the source of drinking water and used for fishing and recreation. This is not in the public's interest.

The Clean Water Act (CWA) is structured to protect and improve the water quality of "waters of the United States" (WOTUS) and "navigable waters". The CWA used these two terms to define the scope of the CWA and to regulate the discharge of pollutants and dredge and fill activities that impact surface waters. Since the enactment of the Clean Water Act (CWA) in 1970, the definition of these two terms were subject to litigation and political debate. The U.S. EPA developed rules to define these two terms. Also, over the years, The US to Supreme Court dealt with cases related to this issue. In 1985, the U.S. Supreme Court decided that "navigable waters" includes more than those waters that are deemed "navigable".

Obviously, these rules and the Supreme Court's decision were not successful in defining the scope of the CWA. In 2006 the Court revisited the issue again and offered a plurality decision, posing two possible interpretations of these two terms:

1. WOTUS must have "relatively permanent" waters that hold a "continuous surface connection" to a traditionally navigable water (Justice Scalia's interpretation).
2. WOTUS must have a "significant nexus" to a traditionally navigable water (Justice Kennedy's interpretation).

In 2015 the USEPA revised its WOTUS rules to adopt an approach that requires evaluating water bodies on a case-by-case basis under the “significant nexus” test. In 2017, President Trump signed an executive order directing USEPA to rescind the 2015 rule and develop a new rules based on Justice Scalia’s interpretation. These new rules, which became effective last June, excluded ephemeral features from the scope of the CWA protection with the expectation that these waters will be protected by states. After finalizing these federal rules, Ohio EPA made appropriate changes in its procedures to establish a permitting mechanisms to regulate impacts that may degrade ephemeral features. Also, about twelve years ago, after a decision by the US Supreme Court that eliminated isolated wetlands from the definition of WOTUS, Ohio and other states changed their laws and regulations to establish state permitting mechanisms to regulate discharges to isolated wetlands. Federal requirements are minimum requirements and it is expected that states would adopt more stringent requirements to protect waters that not defined as WOTUS, but these waters are important to protect water quality and the environment.

Currently, the Biden’s Administration is reviewing all rules that were enacted by the previous administration. It would unwise and short sighted to enact H.B. 175 without waiting for a decision from the Biden’s Administration on this issue.

Enacting H.B. 175 will result in reversing the progress we made in the last fifty years to clean Ohio’s streams and lakes to make them safe to be used for drinking water, fishing and swimming. I appeal to Ohio House Representatives and other interested parties to stop this misguided effort.

Vital clean-water protections are under legislative threat in Ohio:

George A. Elmaraghy

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By Guest Columnist, cleveland.com

COLUMBUS, Ohio -- In early March, [House Bill 175](#) was introduced by state Rep. Brett Hudson Hillyer of Ulrichsville, south of Canton. HB 175 seeks to remove the Ohio Environmental Protection Agency's authority for the oversight of all "ephemeral features" and exclude them from the definition of waters of the state.

Ephemeral features are streams and wetlands that flow or pool in direct response to precipitation or melting of snow. If HB 175 is enacted, discharging pollutants to or filling these features would not be regulated, and anyone could fill, dredge or discharge any pollutants to these bodies of water without a permit.

This would result in eliminating all protection and requirements related to ephemeral streams, which, according to Ohio EPA [testimony](#) on the bill, represent more than 30% of Ohio's primary headwater streams, that is, the small creeks, brooks, springs and ravines that are the origin of most rivers.

Ephemeral streams and wetlands play a major role in managing floodwaters, filtering contaminants, recharging groundwater and providing habitat for a variety of plant and animal species. Destroying them will result in degrading other larger water bodies that are the source of drinking water in Ohio and used for fishing and recreation.

The Clean Water Act is structured to protect and improve the water quality of "waters of the United States" (WOTUS) and "navigable waters." The act used these two terms to define its scope and to regulate the discharge of pollutants and dredge and fill activities that impact surface waters.

Since enactment of the Clean Water Act (CWA) in 1970, the definition of these two terms has been subject to litigation and political debate. The U.S. Environmental

Protection Agency developed rules to define these two terms. Also, over the years, the U.S. Supreme Court dealt with cases related to this issue. In 1985, the high court [decided](#) that the term “navigable waters” includes more than those waters that are deemed “navigable.”

George A. Elmaraghy, a former Ohio EPA official, worries about a legislative attempt to remove rain- and snow-fed "ephemeral" streams and ponds from regulatory oversight in Ohio.

Obviously, the EPA rules and the Supreme Court’s decision were not successful in defining the scope of the CWA.

In 2006, the Supreme Court [revisited the issue](#) and offered a plurality decision, posing two possible interpretations:

1. WOTUS must have “relatively permanent” waters that hold a “continuous surface connection” to a traditionally navigable waters (Justice Antonin Scalia’s interpretation).
2. WOTUS must have a “significant nexus” to a traditionally navigable waters (Justice Anthony Kennedy’s interpretation).

In 2015, the U.S. EPA and the US Corps of Engineers [revised the rules](#) to adopt an approach that requires evaluating water bodies on a case-by-case basis under the “significant nexus” test.

In 2017, President Donald Trump signed an [executive order](#) directing U.S. EPA and the Army Corps to revise the 2015 rule and to consider whether to develop new rules based on Justice Scalia’s interpretation.

These [new rules](#), which became effective last June, excluded ephemeral features from the scope of CWA protection, with the expectation that these waters will be protected by states.

After the federal rules were finalized, Ohio EPA made appropriate changes in its procedures to establish a permitting mechanism to regulate impacts that may degrade ephemeral features.

Currently, the Biden administration is reviewing all rules that were enacted by the previous administration. It is expected that the 2015 WOTUS rules will be reinstated.

Enacting HB 175 in Ohio would result in reversing the progress we have made in the last 50 years to clean Ohio’s streams and lakes, to make them safe to be used for

drinking water, fishing and swimming. I appeal to Ohio representatives and other interested parties to stop this misguided effort.

George A. Elmaraghy spent most of his career in Ohio state government, serving among other roles as chief of the surface water division of the Ohio Environmental Protection Agency. Currently, he is a federal commissioner for the Ohio River Valley Water Sanitation Commission and a member of the International Joint Commission Water Quality Board.