

## **HB 175 Proponent Testimony**

### **Senate Agriculture and Natural Resources Committee**

**November 30, 2021**

Chairman Schaffer, Vice Chairman Huffman, Ranking Member Fedor, and members of the Committee:

Thank for the opportunity to provide testimony in support of House Bill 175 to remove ephemeral streams from the definition of “waters of the state” under Ohio Revised Code 6111.01. My name is Ryan Elliott. I am an attorney with the Vorys law firm here in Columbus, Ohio, and I have been practicing environmental law for over 11 years. My practice involves matters across the entire spectrum of environmental law, including, as it relates to HB 175, the regulation of impacts to “Waters of the United States” under the federal Clean Water Act and “Waters of the State” under Ohio’s Water Pollution Control law, ORC 6111. I am here today on behalf of a coalition of industry groups, including the Ohio Oil & Gas Association and the Ohio Home Builders Association who, among other industries, have been engaged in a decades-long debate with regulators regarding what water features are regulated and to what extent and the mitigation obligations related to such.

The threshold issue driving this inquiry is whether a particular water feature is a “Water of the United States” or a “Water of the State”. While the definition of what constitutes a “Water of the United States” is currently in a state of flux (and seemingly has been uncertain more often than not since the term was first defined in 1972), HB 175 would provide much needed clarity within Ohio by expressly *excluding* “ephemeral features” from the definition of “Waters of the State.” “Ephemeral features” were excluded from the federal definition of “Waters of the United States” under the April 2020 Navigable Waters Protection Rule (85 FR 22250). However, in light of recent federal court decisions in cases challenging the Navigable Waters Protection Rule, U.S. EPA and the Army Corps have expressed their intent to revert back to the pre-2015 regulatory framework for “Waters of the United States” under which some *but not all* ephemeral features will be considered a “Water of the United States” subject to federal jurisdiction under the Clean Water Act. For those ephemeral features which are determined not to be Waters of the United States, HB 175 will eliminate unnecessary and costly administrative burdens on industries critical to Ohio’s economy, including the production of mineral resources, aggregates, and commercial and residential development.

Under existing Ohio law, "Waters of the state" is very broadly defined as:

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.

Thus, as currently defined, “Waters of the State” includes ephemeral streams. Please understand that ephemeral streams flow only in direct response to rainfall. They are geomorphically unstable features that provide little to no water storage during a storm event and, thus, have little to no biological function. Instead, ephemeral streams are pathways that reduce resistance to flow and increase the velocity of runoff from the watershed, effectively serving as conduits transporting silts and clays further downstream in the watershed.

The inclusion of ephemeral streams in the definition of “Waters of the State” unnecessarily subjects impacts to these unstable water pollution conduits to Ohio EPA’s full array of regulatory requirements, including permitting and mitigation requirements. Such regulatory coverage for ephemeral streams produces uncertainty and, significantly, imposes additional costs on the regulated community without providing any demonstrable environmental benefits.

It should be noted that industry groups are currently negotiating revisions to Ohio EPA’s General Permit for impacts to ephemeral streams that could achieve much of what HB 175 is intended to remedy – i.e. reduce unnecessary administrative burdens and excessive costs currently associated with having to mitigate for impacts to ephemeral streams. These burdens impede economic development projects across the State. A revised General Permit – although more reasonable and, thus, more palatable to the regulated community than the current regulatory scheme – is not a statutory amendment. It is a permit that can be amended at any time by Ohio EPA. Nor would the General Permit limit Ohio EPA’s authority to regulate ephemeral streams to the extent that HB 175 will.

Finally, it should be noted that Indiana Senate Bill 389, which deregulated ephemeral streams *and* certain isolated wetlands, was signed into law on April 29, 2021. The protection of isolated wetlands is firmly entrenched in Ohio law, and HB 175 will not change that. HB 175 is not “anti-environment” nor will it reduce the protection of other water features already provided for in federal regulations. To that end, consider the fact that there are an estimated 36,000 miles of ephemeral streams in Ohio, only .007% of which (or about 14,000 feet, or less than 3 miles) are impacted each year. This illustrates how impacts to ephemeral streams are not a primary contributor to water pollution in Ohio, and how the continued regulation of impacts to ephemeral streams certainly will not solve Ohio’s water pollution issues. However, the continued regulation of ephemeral features, particularly to the extent they are currently regulated, puts Ohio at a competitive disadvantage from other states across the country as it relates to the cost of development and what property owners can and cannot do with their property.

HB 175 will remedy Ohio’s current economic disadvantage, and provide industry with much needed statutory certainty.

Thank you for your time and consideration. I am happy to answer any questions, and I urge your support of HB 175.

