

Testimony on Substitute HB 175
Ohio Senate Agriculture & Natural Resources Committee
November 30, 2021

Chairman Schaffer, Vice Chairman Huffman, and Ranking Member Fedor, thank you for allowing me to provide testimony in support of HB 175, in order to remove ephemeral streams from the definition of “Waters of the State.” I serve as the President of several different entities that are involved in surface mining, real estate development and oil and gas exploration. I have over 45 years of experience in these industries.

In 2020, the U.S. Environmental Protection Agency (U.S. EPA) developed the Navigable Waters Protection Rule, which replaced the 2015 Clean Water Rule and provided a consistent definition of “Waters of the United States” (WOTUS). The 2020 Rule expressly excluded “ephemeral features” from the definition of WOTUS and thus, they were no longer regulated under the Clean Water Act. One thing you should appreciate is that the WOTUS rule has been the source of extensive litigation for decades leading to a variety of inconsistent and patchwork applications of the rule throughout the United States. In 2020 a California District Court denied a suit seeking to enjoin the 2020 Rule and the Tenth Circuit Court of Appeals reversed a Colorado District Court decision to enjoin the 2020 Rule. Most recently an Arizona District Court issue a ruling vacating the 2020 ruling and remanding the matter to the Agency. This case is currently on appeal. Even with the vacated rule, not all ephemeral streams are regulated at the federal level. It is clear after several decades of litigation that the federal definition will always be a moving target, but Ohio does have the ability to provide clarity about what is a water of the state and what is not.

I have had the opportunity to work in land development, excavation and mine reclamation in Eastern Ohio for my entire career. In my opinion what the Ohio EPA classifies as ephemeral streams are in fact simply erosional features created by rain water runoff and the topography of the land. Often the opinions of the various regulators and experts will differ on what is and is not an ephemeral feature leaving the fate of a project to the luck of the draw.

As a private family business owner we do not have the ability to hire various engineers to conduct studies of these erosional features. In response to the 2020 Rule, the Ohio EPA developed a new “General Permit for Isolated Wetlands and Ephemeral Streams”. The costs associated with the current General Permit and mitigation of ephemeral streams will cost several hundred thousand dollars on most projects, if they go forward at all. In some cases, we could expend \$1,000,000. HB 175 provides the opportunity to remove additional red tape and allow Ohio businesses to succeed without harming the environment. The requirements and the costs in the General Permit are most detrimental to small businesses who do not have the staff or budget to meet the requirements.

HB175 will not allow businesses to dump pollution in rivers or send pollution downstream. This was made very clear in the amendments added to the end of HB175. Ohio businesses are heavily regulated and cannot engage in pollution. HB 175 simply allows small businesses to avoid red tape and costly assessments and mitigation banking fees. Our businesses are required to reclaim property under best management practices issued by the Ohio Department of Natural Resources. Additionally, when we impact a site we are required to take steps to properly address water run off on the property. The NPDES permitting system would also regulate any offsite discharges that occur from our properties. So HB175 does not allow a property owner to pollute, it simply allows a property owner to control the flow of

rainwater off of their property in the way that allows the owner to maximize the use and value of their property.

I have reviewed many misleading articles showing biologists holding crayfish arguing that animals will be killed if an ephemeral feature is removed. I have come across many ephemeral features over the years and they do not contain fish and crayfish. They are, by their very definition, dry at all times except in direct response to rain. I have also heard claims that they assist to control flooding and reduce downstream nutrient transmission. Instead ephemeral streams speed water flow, cause erosion and carry extensive amounts of sediment downstream to be deposited into protected intermittent and perennial streams and rivers. Appreciate that during construction, businesses are required to prevent the same type of erosion and downstream sedimentation that occur from ephemeral streams found in nature. Allowing a landowner to control the flow of rainwater off their property is something that everyone does at their own home and there is no reason to create a bright line prohibition for businesses who attempt to alter the surface flow of rainwater.

Appreciate that regardless of all the litigation at the federal level, not all ephemeral streams are regulated by the Federal Government. Yet in Ohio, despite situations where there is no federal regulation, we are now required to obtain a General Permit. The General Permit requires us to obtain a JD from the Army Corp of Engineers, conduct biological and physical habitat assessments of the ephemeral feature, develop a mitigation plan requiring longitudinal and cross-sectional profile measurements, design forested riparian buffer areas for 50 feet along each side of the stream, determine sinuosity, meander wavelength, belt width, radius of curvature, meander arc length, etc. The General Permit also requires that we must hire a consultant on an annual basis to monitor the reclaimed ditch for up to five years after we complete a project, detail any erosion, sedimentation, head cutting, aggradation, entrenchment, and degradation as well as the success of each plant community type and individual trees planted in the buffer area. The General Permit requires us to hire various consultants for years before and after a project is completed. It also requires us to convince a landowner to sign an environmental covenant to govern their property forever. What landowner would be willing to sign a document holding them responsible for the mitigated ephemeral erosion ditch and riparian corridor forever? It's clear the mitigation requests are unreasonable, and the only alternative is to pay money for mitigation bank credits. It is also clear that the cost of mitigation credits will only continue to increase in the future further harming small businesses. **This is not about the permit fee to the EPA, but is about the cost of all of the requirements to satisfy all of the criteria in the Ohio EPA General Permit.**

As an example, we are attempting to obtain a permit to remine an old abandoned prelaw mining site for clay and aggregates on a property owned by a local church. Our goal as part of that effort is to smooth out the property and remove the old abandoned pits and highwalls to provide a flat area for the church to have a ball field and recreational area. However, the steep slopes on this property, like most areas in Appalachia, have erosional features caused by water runoff. Removing or impacting these erosional features will cost my company \$197,000 if we purchase stream mitigation credits, which is the most likely choice as onsite mitigation costs under current regulations are difficult to predict. Unfortunately, due to this extra cost we will likely have to avoid this area, leave the aggregates in this area unrecovered and forgo any reclamation and ball field work we could have done. In this case, the church will suffer lost aggregate royalty revenue and will miss the chance to have a once in a lifetime property enhancement project done as a byproduct of mining and reclamation. If we were allowed to flatten the area and provide ball fields for the church obviously, we would have developed appropriate surface drainage

systems to avoid increased sediment run off from the property. The law requires us to take those steps already and that will remain in place even after HB175.

As I have detailed above, current overregulation of ephemeral streams is irresponsible, impractical, and wasteful of our natural resources and is unnecessary burden upon the many landowners and businesses in Ohio. It stagnates growth and reasonable land use. For these reasons, I urge your support for HB 175, which will reduce unnecessary government regulation and will reduce cost for businesses in Ohio, while also protecting our state's waterways.

Sincerely,

Keith B. Kimble
Dover, Ohio