



**Written Testimony of National Mining Association; National Stone, Sand, & Gravel Association; and National Association of Home Builders  
Before the Ohio Senate  
Agriculture and Natural Resources Committee  
Proponents of HB 175  
November 30, 2021**

Chairman Schaffer, Vice Chairman Huffman, and Ranking Member Fedor. Thank you for the opportunity to provide written testimony in support of HB 175.

The purpose of our testimony is to provide a national perspective on the myriad legal and regulatory uncertainties regarding the U.S. Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (Corps) definition of "waters of the United States" (WOTUS), and explain why, in light of the regulatory uncertainties plaguing the current federal WOTUS definition, it is wholly appropriate for this Committee to consider changes to the State of Ohio's definition of "waters of the state" concerning ephemeral streams.

As a general matter, our associations support reasonable regulations that protect the nation's waters, afford certainty regarding which features are regulated at the state and/or federal levels, and provide an efficient permitting process for regulated entities to seek required permits. A clear definition of WOTUS under the Clean Water Act (CWA) is key to protecting the environment and reducing the regulatory costs and burdens associated with permitting and subsequent mitigation costs for infrastructure, energy, manufacturing, and housing projects and a range of other vital economic development activities. Our members need clear and consistent rules that can be implemented easily on the ground so they can comply with the law, operate with confidence, and plan future investments with certainty.

But for many years, our members have been stuck on a rollercoaster of regulatory uncertainty and confusion with no end in sight. Changing federal definitions and years of litigation over the scope and legality of various WOTUS rules, including the jurisdictional status of common features like isolated wetlands, ephemeral streams, and drainage ditches, have resulted in countless project delays and increased costs for the regulated community – with no demonstrable benefit to the environment.

With at least three WOTUS regulatory regimes potentially at play and another two-step rulemaking anticipated during the Biden administration, regulatory uncertainty continues at the federal level.<sup>1</sup> Even if EPA and the Corps propose and finalize the first of their two anticipated

---

<sup>1</sup> On Aug. 30, 2021, the U.S. District Court for the District of Arizona remanded and vacated the NWPR, but litigation is ongoing. The vacatur order is on appeal to the U.S. Court of Appeals for the Ninth Circuit and the business intervenors have moved for a stay pending appeal. In response to the Arizona court's

WOTUS rules in the next year, extensive litigation is virtually certain and likely will take years to resolve.<sup>2</sup> Accordingly, it appears unlikely that stakeholders will have clarity regarding how ephemeral features are regulated under the federal WOTUS definition in the next several years.

When it comes to the jurisdictional status under Ohio state law of marginal features like ephemeral streams, roadside drainage ditches, and other erosional features that only contain water in response to a rainfall event, there is no reason why the Ohio General Assembly cannot resolve the regulatory confusion that has eluded the federal agencies for decades by passing HB 175.

Indeed, when enacting the CWA, Congress specifically recognized the state's authority to regulate its own land and water resources within its borders as being consistent with the need to protect water quality nationwide. See 33 U.S.C 1251(b). Therefore, HB 175's proposal to remove ephemeral features from the State of Ohio's "waters of the state" is consistent with the authorities that states have under the CWA.

We appreciate the opportunity to provide this testimony in support of HB 175. Please reach out to the contacts below if you have any questions.

Caitlin McHale, Assistant General Counsel  
National Mining Association  
[cmchale@nma.org](mailto:cmchale@nma.org)

Emily Coyner, Senior Director, Environmental Policy  
National Stone, Sand, & Gravel Association  
[ecoyner@nssga.org](mailto:ecoyner@nssga.org)

Michael Mittelholzer, Assistant Vice President, Environmental Policy  
National Association of Home Builders  
[mmittelholzer@nahb.org](mailto:mmittelholzer@nahb.org)

---

ruling, EPA and the Corps halted implementation of the NWPR nationwide and reverted to implementing the pre-2015 regulatory regime, which includes regulations from 1986 and guidance documents addressing several Supreme Court decisions. While a second district court in New Mexico remanded and vacated the NWPR, numerous other courts chose to remand the rule to the agencies *without* vacating it. Additionally, the 2015 Clean Water Rule, while repealed by the 2019 Repeal Rule, could potentially spring back into play in Arizona and New Mexico as there are claims challenging the 2019 Repeal Rule in each of those cases. And, finally, the current administration announced on June 9, 2021, that it intended to craft its own WOTUS rule via a two-step rulemaking process. The "step one" rule would officially repeal the NWPR and codify the pre-2015 regulatory regime. A prepublication version of the proposed "step one" rule was released publicly on Nov. 18, 2021, but it has not yet been published in the *Federal Register*. Once published in the *Federal Register*, it will be subject to a 60-day public comment period. After the comment period ends, it likely will take months for the federal agencies to respond to comments, prepare the supporting materials and economic analyses, finalize the rule, and prepare it for final publication. There is no public timeline regarding "step two" of this administration's anticipated WOTUS rulemaking, which likely will take even longer to draft, propose for public comment, and finalize.

<sup>2</sup> Our associations are part of broader industry coalitions that are involved in litigation defending the NWPR in numerous courts across the country and have been involved in litigation on previous WOTUS rules.