



**Ohio Senate Agriculture and Natural Resources Committee**  
**Opponent Testimony**  
**Amended House Bill 175**

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Good morning Chair Schaffer, Vice Chair Huffman, Ranking Member Fedor and members of the Senate Agriculture and Conservation Committee. My name is Cody Weisbrodt and I am an attorney and a Government Relations Policy Associate for The Nature Conservancy in Ohio. Thank you for the opportunity for TNC to offer testimony as an opponent of HB175.

The Nature Conservancy is a global organization with chapters in all 50 states and projects in over 70 countries. We are a non-partisan, nonprofit, science-based organization that seeks to conserve the lands and waters on which all life depends. More than 65,000 Ohioans are TNC supporters and we own and manage over 20,000 acres of nature preserves throughout the state. We also operate a mitigation bank that offers stream and wetland credits to allow permittees options to mitigate their impacts to Ohio's streams and wetlands. In our most recent mitigation project on Strait Creek in Brown County, we restored over a mile of high-quality stream and several acres of wetland on a former corn field and have other mitigation projects planned for the future.

I understand House Bill 175 is up for amendments today, some of which may significantly change the provisions of the bill. We have heard that discussions between the EPA and the bill sponsor have been progressing and a compromise may have been reached, which would be a positive development for the bill. We are hopeful that these amendments will continue to maintain important protections for Ohio's ephemeral streams while addressing some concerns raised by the bill's proponents. Our position on this legislation may change as well based on these amendments, however, given that they were unveiled today we have not been able to fully evaluate them. We hope that any future hearings on the bill would include public testimony and if our position changes because of these amendments we would be happy to come back and let the committee know.

**HB 175 is a step backward for Ohio's water quality**

The Nature Conservancy is opposed to HB175 because it will remove protections for ephemeral streams in Ohio and represents a setback for our efforts to improve water quality through programs like H2Ohio. Scientists who specialize in stream processes and aquatic communities have researched ephemeral streams and found that they play a vital role in watersheds. This is evident in a 2015 report from the US EPA entitled *Connectivity of Streams and Wetlands to Downstream Waters*. This 408-page report reviewed more than 1,200 peer reviewed articles. One major take away of this report is that quote "the scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function." TNC's data supports

these conclusions, and we submitted comments to the USEPA in the WOTUS rulemaking process in both the previous and current federal administrations citing the benefits of protecting ephemeral streams.

Protecting ephemeral streams is important both because of their connectivity to larger water bodies and the impact modifying them can have on overall water quality downstream. Ephemeral streams incorporate many important functions for watershed health. Some of these functions include accumulating beneficial nutrients like organic matter from the adjacent land, nutrient cycling, providing necessary habitat for organisms that are only found in ephemeral streams, and acting as a repository for the seeds and eggs of certain species. When enough precipitation or snow melt occurs the results of these essential functions are transported downstream into larger waterways.

Proponents of the bill have suggested that ephemeral streams are like the tiny branches of trees and therefore are not necessary for the health of the tree. Using that same analogy, most of those tiny branches contain leaves that are needed to supply the necessary nutrients to sustain the life of the tree. Not allowing protection for ephemeral streams is like defoliating a tree, and then asking the tree to survive with only a few leaves.

### **HB175 as written affects more than just ephemeral streams**

House Bill 175 rewrites the definition of the “waters of the state” in the Water Pollution Control Law to specifically exclude “ephemeral features.” By redefining the “waters of the state” to exclude “ephemeral features,” the bill opens the door to more than just filling ephemeral streams without mitigation. The bill entirely removes ephemeral features from the Water Pollution Control Law to treat ephemeral streams as it would any solid ground, ignoring these streams connectivity to larger streams, rivers, and lakes. Additionally, as noted in the Bill Analysis, the defined term “waters of the state” that is changed in the bill is used throughout Ohio law and has implications on laws that govern not only water pollution but also concentrated animal feeding facilities and forest management that have a direct impact on water quality. By removing the state’s authority to oversee ephemeral features in R.C. 6111.01, this bill could have implications far beyond the mitigation requirements for ephemeral streams alone. We urge the committee and the sponsor to consider whether this legislation as written may have detrimental consequences beyond simply removing a mitigation requirement for ephemeral streams.

### **HB 175 creates regulatory confusion rather than certainty**

Much of the discussion of HB175 has focused on the definition of WOTUS under the Clean Water Act and how that is applied to the states in ways that have often been conflicting and confusing. I will be the first to say that the WOTUS standard as applied due to various court decisions across the country is a patchwork of different rules, and that regulatory certainty is a worthwhile goal. However, HB 175 does not provide that certainty. Under the Clean Water Act, states may enact standards for their waterways that are stricter than those of the federal government, but a state cannot enforce lower standards than those imposed by the CWA. The WOTUS definition that is applied at this moment is NOT the 2020 rule promulgated during the Trump administration OR the 2015 rule promulgated during the Obama administration. Rather, due to the *Pasqua* court case in September of 2021 the EPA is not permitted to enforce the 2020 rule and has reverted to the “significant nexus” test proposed by Justice Kennedy in the *Rapanos* case. This test requires evaluation of certain water resources like ephemeral streams on a case-by-case basis to determine whether those resources have a significant nexus to navigable waters



that qualifies them as WOTUS. In another twist, the Supreme Court has also agreed to take up a challenge to this interpretation next year which could also affect this interpretation.

The current administration has already issued notice that it will revise the WOTUS rule issued in 2020 back to a standard more closely based on this pre-2015 rule and is holding roundtables around the country to refine the new standard this spring. If HB175 were to pass, the EPA would continue to evaluate Ohio's ephemeral streams on a case-by-case basis to determine their status, because that test is imposed at the federal level and preempts the lower state regulation. The criteria for ephemeral stream protection outlined by the EPA in the current General Permit provide more certainty to the regulated community in Ohio than a case-by-case evaluation and should be maintained.

In conclusion, we believe the current bill is a bad bargain for Ohioans and their water quality, and we urge the committee to vote no. Thank you for your time and I am happy to answer any questions the committee may have.