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Bill Analysis

Version: As Introduced

Primary Sponsor: Rep. Hillyer

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SUMMARY

- Excludes ephemeral features from water pollution control programs, including the section 401 water quality certification program.
- Specifies that an ephemeral feature is a surface water flowing or pooling only in direct response to precipitation, such as rain or snow.
- Eliminates the section 401 water quality certification review fee that applies to ephemeral streams (currently \$5 per linear foot of stream to be impacted, or \$200, whichever is greater).

DETAILED ANALYSIS

Deregulation of ephemeral features

Background

The federal Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into “navigable waters,” which the statute defines as “waters of the United States, including the territorial seas.”¹ The terms “navigable waters” and “waters of the United States” (WOTUS) are used for purposes of several CWA programs, including:

- Statutory schemes governing discharges of dredged or fill material under CWA Section 404, administered jointly by the U.S. Corps of Army Engineers and U.S. Environmental Protection Agency (USEPA);

¹ 33 United States Code (U.S.C.) § 1362(7).

- Discharges of pollutants from “point sources” under CWA Section 402, delegated to most states for permitting under the National Pollution Discharge Elimination System (NPDES); and
- Spills of oil and hazardous substances under Section 311.

Over time, the USEPA has adopted rules defining the types of water bodies that are encompassed within the term “navigable waters.” In 1985, the U.S. Supreme Court held that “navigable waters” includes more than only those waters that would be deemed “navigable” in the “classical” or traditional sense.² However, the scope of these terms remained somewhat unclear, and the Court revisited the issue in 2006.

In *Rapanos v. United States*, the Court offered a plurality decision, posing two possible interpretations of the term:

1. Justice Scalia and three other Justices found that these waters are “relatively permanent” waters that hold a “continuous surface connection” to a traditionally navigable water.
2. Justice Kennedy, in a concurring opinion, wrote that to be a navigable water, a WOTUS must have a “significant nexus” to a traditionally navigable water.³

Attempting to clarify the rule, in 2015, the USEPA adopted the second approach, evaluating waters on a case-by-case basis under the “significant nexus” test. However, In 2017, President Trump signed an executive order directing USEPA to rescind the 2015 rule and instead adopt a new WOTUS rule reflecting the first approach offered by Justice Scalia in *Rapanos*.⁴ That rule took effect on June 22, 2020.⁵ Shortly thereafter, twenty states and the District of Columbia filed a lawsuit challenging it. That litigation is still pending.⁶

Ephemeral features

The bill applies the current 2020 WOTUS rule to exclude ephemeral features from regulation under Ohio’s law governing water pollution control.⁷ An ephemeral feature is a surface water that flows or pools only in response to precipitation, such as rain or snow. The bill effectuates this change by specifying that ephemeral features are not “waters of the state.” Thus, under the bill, Ohio EPA is not required to issue permits for impacts to ephemeral

² *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

³ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁴ Executive Order 13778 of February 28, 2017.

⁵ 33 Code of Federal Regulations (CFR) § 328.3 (April 21, 2020).

⁶ See *California v. Andrew Wheeler*, Civil Action No. 3:20-cv-03005.

⁷ R.C. 3745.114(A) and (G), 6111.01(H) and (V), and 33 CFR § 328.3 (April 21, 2020).

features.⁸ And, discharging sewage or other pollutants into an ephemeral stream is not a prohibited act.⁹

Under current law, “ephemeral streams” are subject to regulation by Ohio EPA and any impacts to them require a permit, most notably a section 401 water quality certification for dredge and fill operations. The bill replaces the term ephemeral stream with ephemeral feature and changes the definition of this type of water as follows:

Current law	The bill
An ephemeral stream is a stream that flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and that has channel bottom that is always above the local water table.	An ephemeral feature is surface water flowing or pooling only in direct response to precipitation, such as rain or snow.

As a result of the bill’s changes, the current review fee for a section 401 water quality certification that applies to an ephemeral stream is eliminated. That fee is \$5 per linear foot of stream to be impacted, or \$200, whichever is greater.¹⁰

Impacts to other statutes

To exclude ephemeral features from regulation under Ohio’s Water Pollution Control Law, the bill alters the definition of “waters of the state.” However, other chapters of the Revised Code that do not appear in the bill utilize this definition. Thus, the bill has the effect of excluding ephemeral features for purposes of regulation under the following programs:

Citation	Heading
R.C. 903.01	Concentrated Animal Feeding Facilities (CAFFs)
R.C. 1503.50	Forest management
R.C. 3746.07	Voluntary Action Program (VAP)

In addition, many other provisions of the Revised Code refer to “waters of the state” with similar or slightly varying definitions than that used in the Water Pollution Control Law. In these provisions, the term “waters of the state” does not exclude ephemeral features. The table below indicates all references to a defined term “waters of the state” that does not exclude ephemeral features, but that bears some relation to the Water Pollution Control Law.

⁸ R.C. 6111.01(H) and (V); see 6111.03(J), not in the bill.

⁹ See R.C. 6111.04, not in the bill.

¹⁰ R.C. 3745.114.

Revised Code sections containing "waters of the state"	Subject
6119.011	Regional water and sewer districts
1513.01 and 1513.07(A)(5)	Coal surface mining
1509.01 and 1509.22(C)(2)	Brine disposal
6121.01	Ohio Water Development Authority
6112.01	Private sewer systems
939.01 and 939.10	Soil and water conservation
940.01 (F) and (G); see 940.02(G)	Soil and Water Conservation Commission

HISTORY

Action	Date
Introduced	03-03-21