



**Ohio House Agriculture and Conservation Committee
Opponent Testimony
Substitute House Bill 110**

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Good morning Chair Koehler, Vice Chair Creech, Ranking Member Brent and members of the House Agriculture and Conservation Committee. My name is Cody Weisbrodt and I am a Government Relations and Policy Associate for The Nature Conservancy in Ohio. Thank you for the opportunity 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, science-based organization that seeks to conserve the lands and waters on which all life depends. We work collaboratively with businesses, farmers, sportsmen groups, governments and local communities to develop pragmatic solutions to conservation challenges, including land conservation, water quality, and climate change. More than 65,000 Ohioans are Nature Conservancy 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, which are an option for permittees to meet their regulatory requirements through an accredited science-based conservation-focused program that mitigates the impacts to streams and wetlands in areas near the impact. 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.

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 (a stream with an identifiable bed and bank that flows only in direct response to precipitation) in Ohio and represents a setback for our efforts to improve water quality. The most recent Waters of the United States (or WOTUS) rule, which HB175 would emulate, ignores the well-established science on the importance of ephemeral streams. Rather than copy the flawed Federal rule, Ohio should be proud that our state has taken action of our own accord to protect these streams. The Ohio EPA estimates that there are over 36,000 miles of ephemeral streams in our state. Precipitation patterns are changing and we all know that small creeks are becoming raging rivers as we experience record intense rainfall. Conversely, the change in precipitation patterns may cause some intermittent streams to dry up further and become ephemeral streams in the future. Given these coming changes, Ohioans need as many water resources as possible to be protected and clean.

At a time when the state is spending tens of millions of dollars to combat water quality issues through the H2Ohio program, HB175 is a contradiction and will negatively impact our efforts. Ephemeral streams have important functions here in Ohio as headwater streams that feed into our larger lakes and rivers.

The Ohio EPA's "Headwater Stream Project" found that these streams provide benefits including processing nutrients and sediment, dissipating energy, maintaining stream energy dynamics, and protecting downstream water use and water quality. The EPA also found that *modified* headwater streams, rather than those left alone, were "a leading source of impairment to the water quality of larger streams into which they flow." Requiring mitigation for filling an ephemeral stream both encourages developers and others to design projects in ways that avoid impacting ephemeral streams, and when these impacts cannot be avoided, to mitigate them to minimize impacts to downstream water quality. The state of Ohio has an interest in protecting water quality for all Ohioans, but this bill prioritizes the rights of a few who want to fill ephemeral streams at the expense of the 5.2 million Ohioans who rely on drinking water systems downstream from these features.

HB175 as written affects more than just ephemeral streams

House Bill 175 rewrites the definition of the "waters of the state" in R.C. 6111.01(H) to specifically exclude "ephemeral features" as defined elsewhere in the bill. There are two issues from our perspective with this approach. First, by changing the term in 3745.114(G) from "ephemeral stream" to "ephemeral *feature*" and including surface water flowing or pooling in response to precipitation, the bill could exclude from protection some features currently protected under Ohio law as isolated wetlands. While the previous ephemeral stream definition applied only to flowing water with a channel bottom, the looser ephemeral feature definition is much less specific. This is concerning because existing isolated wetlands are important parts of the hydrology and ecosystems in a state like Ohio, which has lost an estimated 90% of its wetlands since European settlement.

Another concern with the language in the bill is that 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. As noted in the Bill Analysis, the term "waters of the state" 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.

Not all filling of ephemeral streams triggers mitigation requirements

To address some concerns raised in previous testimony, I want to note that not every project that fills an ephemeral stream must be mitigated. Although ephemeral streams are currently "Waters of the State" as that term is defined in R.C. 6111.01, the General Permit issued by the EPA that sets out the conditions under which a person must mitigate impacts to ephemeral streams contains several important exceptions. According to the General Permit:

Ephemeral Stream means a stream that meets the following conditions:

- 1) Contains an ordinary high water mark;
- 2) Flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice;
- 3) Has a channel bottom that is always above the local water table; and
- 4) Is determined to be excluded from jurisdiction under the federal water pollution control act.

Importantly, this definition means that some features that proponents of the bill mentioned as potentially regulated are in fact, not considered ephemeral streams for which mitigation is required and not currently regulated. Perhaps just as important as what the General Permit includes as an “ephemeral stream” is what it excludes. Any project that fills *less than* 300 total linear feet of ephemeral stream does not trigger a requirement to purchase mitigation credits or conduct on-site mitigation.

Additionally, the General Permit notes expressly that:

“Ephemeral streams do not include agricultural and roadside ditches, grass swales, erosional features, or other artificial channels constructed wholly in uplands that do not relocate an existing stream.”

The EPA wrote this permit after hearing from impacted organizations and, rather than seeking to regulate every puddle as has been sometimes portrayed, has sought to balance the organization’s cost concerns with the need to protect vulnerable ephemeral streams and their contributions to water quality in our state.

Permittees are NOT required to purchase stream mitigation credits

It is also important to recognize that any person who is required to mitigate their stream impacts is given the option to complete their own mitigation according to the conditions set by the EPA, which includes monitoring the mitigation project for several years to ensure that the mitigation is a success. Several proponents of the bill suggested that they would prefer to perform their own mitigation rather than pay for stream mitigation credits – and indeed, their wish has been granted as they are free to do that under the current system. Passing HB175 will not replace ephemeral stream mitigation credits with on-site mitigation but will instead entirely remove any requirement for a permittee to mitigate their impacts to these streams. We are concerned that unless these requirements are in place permittees will entirely cease to mitigate any harms to ephemeral streams and instead pass the cost for their impact to Ohio’s water downstream.

In conclusion, I want to make one final point. The EPA’s General Permit was issued last summer after a comment process which involved many of the proponents and opponents of the bill. Several of the proponents are also currently suing the EPA over this permit in the Environmental Review Appeals Commission, where recently filed status reports indicate that the proponents and the EPA are making progress in negotiations to resolve their conflicts. That means House Bill 175 represents the third bite at the apple for some of the proponents. And the scale of their complaint is also not that broad; according to the Fiscal Note for the bill, there have only been 81 WQCs that impact ephemeral streams in total issued from in the past 6 years.

There simply aren’t that many of these projects because the current permitting structure does allow limited impacts, provides mitigation flexibility and attempts to balance the water quality needs of all Ohioans with the economic reality of development. Passing HB175 means removing protections for all 36,000 miles of ephemeral streams across the state to reduce costs for less than twenty projects per year. This is a bad bargain for Ohioans and their water quality, and we urge the committee to vote no on the bill. Thank you for your time and I am happy to answer any questions the committee may have.