



Written Testimony on HB 175

Laurie A. Stevenson, Director

Chairman Koehler, Vice-Chair Creech, Ranking Member Brent, and members of the House Agriculture and Conservation Committee, Ohio EPA appreciates the opportunity to submit written testimony in opposition of HB 175, which seeks to remove the Agency's authority for the oversight of all ephemeral streams throughout Ohio.

What are Ephemeral Streams and Why are they Important?

It is important to understand the nature, characteristics, and function of streams and their contribution to healthy watersheds throughout Ohio. There are different types of streams, classified based on factors including: how frequently they flow; size; connection with other waterways, and the habitat/aquatic life they support.

There are an estimated 115,206 miles of primary headwater streams throughout Ohio. Of that total, an estimated 36,405 miles of those are ephemeral streams.

Ephemeral streams flow in response to rain or snow melt. While they are not like other streams that support fish habitat, ephemeral streams are important in our watersheds because they are located at the top of the watershed, and therefore can affect water quality downstream. The functions and benefits of ephemeral streams include:

- providing storage capacity during rain events;
- carrying water flow during rain events;
- capturing and filtering contaminants such as total suspended solids, nitrogen, and phosphorus;
- contributing to the biology and ecology of areas through
 - providing organically available material for macroinvertebrates and
 - creating habitat areas;
- providing for surface water and ground water interaction and recharge of ground water; and
- lowering water temperature downstream.

Ohio EPA categorically does not regard features such as agricultural and roadside ditches, grass swales, erosional features, or other artificially constructed channels (or pools) as ephemeral streams. Ohio EPA has not, does not, and will not regulate puddles or tire tracks.

Last year the Agency issued a general permit for ephemeral streams that effectively strikes a balance between protecting Ohio's water resources while accommodating economic growth and development in Ohio. This testimony outlines the Agency's approach and explains the stakeholder engagement undertaken to strike this balance.

Ephemeral Stream Regulatory Background

U.S. EPA's Navigable Waters Protection Rule, which removed ephemeral streams from the definition of "Waters of the United States," took effect in June 2020. As a result of this rulemaking, ephemeral streams are no longer subject to federal permitting under the Clean Water Act.

There is a long history of federal litigation, court decisions and rulemaking efforts surrounding the definition of "Waters of the U.S." and scope of the Clean Water Act. Congress passed the 2020 Navigable Waters Protection Rule to clarify the jurisdiction of the federal government. The law does not pass judgment on the value of ephemeral streams from an ecological, biological or water quality perspective. Rather, the rulemaking explicitly envisioned that the States would determine their own regulatory oversight of these resources. As stated in U.S. EPA's and Department of Army's press release on the final rulemaking "The agencies' *Navigable Waters Protection Rule* respects the primary role of states and tribes in managing their own land and water resources. All states have their own protections for waters within their borders and many already regulate more broadly than the federal government. This action gives states and tribes more flexibility in determining how best to manage their land and water resources while protecting the nation's navigable waters as intended by Congress when it enacted the Clean Water Act."

In Ohio, the General Assembly defined "waters of the state" in 1951, and later enacted Ohio Revised Code Chapter 6111 to provide for the oversight and protection of Ohio's water resources. Ephemeral streams are considered "waters of the state" under this chapter. Without an appropriate permit, impacts to "waters of the state" are prohibited under ORC 6111.

Before the new federal rules took effect, Ohio EPA began the process of developing a general permit for ephemeral streams to ensure the continued oversight of these resources. On June 25, 2020, Ohio EPA issued a final general permit. Absent this timely issuance, *no* impacts to ephemeral streams would have been allowable. Thus, issuing a general permit quickly following the new federal rules ensured that important development and construction projects could proceed under the existing state authority without delays or regulatory risk.

Stakeholder Outreach

The Agency provided opportunities for stakeholders to comment on the proposed general permit and discuss the terms of the permit with program staff. On May 7, 2020, Ohio EPA held a webinar to explain the proposed general permit. Ohio EPA held follow-up meetings with individual stakeholder groups to further discuss the permit and receive feedback from interested parties.

The following interested parties participated in meetings with Ohio EPA:

- Ohio Coal Association
- American Petroleum Institute – Ohio
- Ohio Oil and Gas Association
- Ohio Homebuilders Association
- Commercial Real Estate Development Association (NAIOP)
- Streams and Wetlands Foundation
- Ohio Farm Bureau
- Ohio Manufacturer’s Association
- Ohio Chamber of Commerce
- Ohio Municipal League
- County Commissioner’s Association of Ohio
- Association of Metropolitan Wastewater Agencies
- Ohio Water Environment Association
- The Nature Conservancy
- Ohio Environmental Council
- The Sierra Club
- National Wildlife Federation

Ohio EPA consistently welcomes stakeholder engagement and public participation in our permitting processes. We appreciate the time, attention, and constructive comments that interested parties provide that enhance our understanding of issues. Upon issuing a final permit, it is common practice for Ohio EPA to also include a responsiveness summary that accounts for comments received from stakeholders, and the Agency’s considered

response. The final permit and responsiveness summary for the ephemeral stream general permit can be found [here](#).

Striking a Reasonable Balance

In response to the federal changes described above, Ohio EPA created a simple, efficient general permit for ephemeral streams that allows applicants significant flexibility. Ohio EPA did not reinvent the wheel or add new requirements that were not previously in the federal regulations.

As a matter of regulatory efficiency, the Agency was also able to combine the conditions for an ephemeral stream with the existing general permit for isolated wetlands, saving applicants time and money. The permit application fee for ephemeral streams was reduced to a flat \$200 and the linear footage fee was eliminated.

In striking a balance between oversight and a reasonable permitting approach, other key provisions of the general permit include:

- creating a minimum threshold for impacts (300 feet), which require no pre-construction application and no mitigation;
- reducing duplicative requirements for sectors already under regulation from other programs, such as allowing coal operations the ability to demonstrate compliance through mitigation/restoration measures implemented under Surface Mining Control and Reclamation Act (SMCRA);
- allowing for enhanced stormwater controls (which restores similar functionality of ephemeral streams) as mitigation; and
- allowing applicants to submit off-site projects with water quality benefits as credit for mitigation.

There was an appeal of the ephemeral stream general permit and resolution of these appeal issues is ongoing at the Environmental Review and Appeals Commission. An appeal of a final permit action is not necessarily unusual, and the process gives Ohio EPA and stakeholders another avenue to engage in further dialogue and negotiations regarding the conditions in the general permit. Ohio EPA welcomes the additional opportunities to achieve consensus as these negotiations continue.

Consequences of Eliminating Oversight of Ephemeral Streams

This testimony has focused on the impacts of removing ephemeral streams from the definition of “waters of the state” as it relates to construction and fill activities. Another consequence of removing ephemeral streams from the definition of waters of the state is that this action would also eliminate Ohio EPA’s authority to issue National Pollution Discharge Elimination System (NPDES) permits for direct discharges of industrial wastewaters or sewage into these resources. The long-term effects of eliminating all such regulatory oversight will result in significant degradation of Ohio’s waterways. Unregulated, unlimited discharges into ephemeral streams that are located above underground aquifers also have the potential to adversely affect drinking water.

Ohio EPA’s mission is to oversee the protection of Ohio’s natural resources. Throughout the ephemeral stream general permit development process, Ohio EPA has attempted to strike a balance between a reasonable permitting approach that is protective of human health and the environment, while allowing for projects to advance in an efficient and flexible manner.

Ohio EPA appreciates the opportunity to provide comments on HB 175 and is available to answer any questions that members of the committee or bill sponsors may have. For any questions or comments, please contact Gretchen Craycraft, Deputy Director of Government Affairs, at Gretchen.craycraft@epa.ohio.gov or 614-309-0446.