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H.B. 175
134th General Assembly

Bill Analysis

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Version: As Passed by the House

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, and does not include a wetland.
- 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, several lawsuits were filed challenging it.⁶

On August 31, 2021, a federal court in *Pasqua Yaqui Tribe vs. United States EPA* ruled that application of the 2020 WOTUS rule is suspended, vacating the WOTUS rule and reverting back to the 1985 version of the rule (as further interpreted under the *Rapanos* “significant nexus” test) nationwide. This means that under this decision, whether or not an ephemeral stream is a water of the United States must be determined on a case-by-case basis, considering whether the water has a “significant nexus” to a traditionally navigable water.

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 and *Pasqua Yaqui Tribe v. United States EPA*, 2021 U.S. Dist. Lexis 163921.

Ephemeral features

The bill applies the 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, not including a wetland, 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 features.⁸ And, discharging sewage or other pollutants into an ephemeral feature is not a prohibited act under the state Water Pollution Control Law.⁹ Because of this exclusion, the bill may conflict with the CWA (see **COMMENT**).

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. The following table illustrates the differences between the two terms.

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. An ephemeral feature does not include a wetland.

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

Other state environmental laws

Though ephemeral features are excluded by the bill from regulation under the Ohio’s Water Pollution Control law, the bill specifies that other pollution control laws still apply to deposits of waste in ephemeral features. In particular, the improper disposal of solid, infectious, or hazardous wastes or construction and demolition debris in ephemeral features is still prohibited. And, the Director of Environmental Protection and other state agencies may continue to take any actions under other laws (but not the Water Pollution Control Law) that apply to the discharge, deposit, dumping, or placement of waste, debris, or other materials in

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

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.

an ephemeral feature. For example, the Department of Health can still regulate the deposit of radioactive material in an ephemeral feature.¹¹

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.

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

¹¹ R.C. 6111.011. See R.C. Chapter 3748, not in the bill.

COMMENT

The bill excludes ephemeral features from regulation under the Ohio Water Pollution Control Law. As a result of the recent federal court decision in the *Pasqua* case since the bill's introduction, the bill, if enacted, would possibly conflict with current federal law, which re-institutes the "significant nexus" test.¹² As indicated above, that test requires a case-by-case evaluation of ephemeral features to determine if regulation is warranted. However, because an Arizona U.S. district court made this ruling, it could still be appealed and it is unclear how an appellate court would rule.

Additionally, the USEPA announced on June 9, 2021, that it is revisiting the WOTUS rule with new administrative rulemaking. If USEPA adopts a rule requiring regulation of ephemeral features, and the bill is enacted, the bill may also be in conflict with that new federal rule.¹³

Whenever there is a conflict between a state law and federal law, the federal law, subject to other constitutional law, "preempts" or takes precedence over the state law under the Supremacy Clause of the U.S. Constitution.¹⁴ As a result, Ohio cannot enforce statutes that conflict with federal statutes. And, in particular, the CWA does not allow states to enforce standards that are less stringent than the Act.¹⁵ Thus, if enacted, Ohio law might conflict with federal law and a court could find it preempted by the federal CWA and unconstitutional if challenged under the Supremacy Clause.

HISTORY

Action	Date
Introduced	03-03-21
Reported, H. Agriculture and Conservation	09-28-21
Passed House (61-33)	09-29-21

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¹² *Pasqua Yaqui Tribe v. United States EPA*, 2021 U.S. Dist. Lexis 163921.

¹³ USEPA, "EPA, Army Announce Intent to Revise Definition of WOTUS" (June 9, 2021) available at: <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>.

¹⁴ U.S. Constitution, Article VI, cl. 2.

¹⁵ 33 U.S.C. § 1370.