THE BUCKEYE INSTITUTE

Adopting a Commonsense Definition of "Waters of the State"

Interested Party Testimony
Ohio House Agriculture and Conservation Committee
House Bill 175

Andrew Geisler, Legal Fellow
The Buckeye Institute

May 25, 2021

As Prepared for Delivery

88 East Broad Street, Suite 1300 • Columbus, Ohio 43215 • (614) 224-4422 • BuckeyeInstitute.org

Chair Koehler, Vice Chair Creech, Ranking Member Brent, and members of the Committee, thank you for the opportunity to testify today regarding House Bill 175.

My name is Andrew Geisler. I am the legal fellow at **The Buckeye Institute**, an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.

Ohio's current legal, regulatory definition of "**waters of the state**" is over-broad. House Bill 175 would redefine the term consistent with the plain meaning and commonsense understanding of the phrase and remove "ephemeral water features" from the Ohio Environmental Protection Agency's (EPA) regulatory authority. The bill defines such features as "surface water flowing or pooling only in direct response to precipitation, such as rain or snow," and expressly states that "'[w]aters of the state' does not include an ephemeral feature." Properly redefining "waters of the state" is significant for several reasons.

First, House Bill 175's commonsense definition is consistent with the United States Supreme Court's plurality decision in ***Rapanos v. United States***. In that case, Justice Antonin Scalia's opinion criticized the Army Corps of Engineers' attempt to define "the waters of the United States" expansively. Citing Webster's Dictionary, Justice Scalia observed that the phrase "on its only plausible interpretation…includes only" waters that are "relatively permanent, standing or continuously flowing…'forming geographic features' that are described in ordinary parlance as 'streams[,]…oceans, rivers [and] lakes." According to *Rapanos*, the phrase "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall," and therefore removing "channels containing merely intermittent or ephemeral flow…accords with the commonsense understanding of" the waters of the United States. And by ensuring that ephemeral waters are not "waters of the state," House Bill 175 aligns Ohio's definition with *Rapanos* and the commonsense understanding of the term.

Second, redefining "waters of the state" statutorily will set an important example for Congress and other state legislatures to follow. Too often, Congress and state legislatures have abdicated their lawmaking authority to administrative agencies like the Ohio EPA. By reasserting its legislative prerogative and defining this important term by statute, the Ohio General Assembly could forestall years of unnecessary, expensive, and counter-productive back and forth between courts, regulatory agencies, industry, and property owners over the meaning of "waters of the state."

Such back and forth has plagued the federal version of the "waters of the United States" story and there is no reason for Ohio to repeat Congress' mistake. The federal Clean Water Act failed to adequately define "the waters of the United States." After decades of litigation, at least three muddled Supreme Court decisions, and federal administrative **rulemakings** by the Obama and Trump administrations, the Biden administration is **still trying to define** "waters of the United States" by rule. If Congress—rather than federal agencies and courts—had defined the term, much of this sordid legal drama could have been averted. Ohio should learn from that lesson and the General Assembly should assert its constitutional authority to make key policy decisions like this one.

Also, the House's effort to clarify the definition of "waters of the state" in House Bill 175 aligns with the core purposes of the **Clean Water Act**—namely, that it is "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution," and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." The General Assembly should meet that primary responsibility through legislation and resist the temptation to abdicate its duty to state regulators.

Finally, far from being environmentally detrimental, as Dr. Richard Warner discussed in his **proponent testimony**, this policy change would be environmentally beneficial as it would free up landowners to put in place "professionally engineered stormwater best management practices to replace the unstable ephemeral stream channels and gullies encountered at development sites."

House Bill 175 will align Ohio law with commonsense and with *Rapanos*. It will help Ohio avert avoidable missteps that have plagued courts, agencies, and federal law since 1972. And it offers an opportunity to lead by example as the General Assembly asserts its constitutional policymaking duties.

Thank you for the opportunity to testify. I am happy to answer any questions the Committee may have.

About The Buckeye Institute

Founded in 1989, The Buckeye Institute is an independent research and educational institution – a think tank – whose mission is to advance free-market public policy in the states.

The Buckeye Institute is a non-partisan, non-profit, and tax-exempt organization, as defined by section 501(c)(3) of the Internal Revenue code. As such, it relies on support from individuals, corporations, and foundations that share a commitment to individual liberty, free enterprise, personal responsibility, and limited government. The Buckeye Institute does not seek or accept government funding.