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OHIO LEGISLATIVE SERVICE COMMISSION

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Office

H.B. 175
134th General Assembly

Fiscal Note & Local Impact Statement

[Click here for H.B. 175's Bill Analysis](#)

Version: As Passed by the House

Primary Sponsor: Rep. Hillyer

Local Impact Statement Procedure Required: No

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Highlights

- The Ohio Environmental Protection Agency may experience a minimal annual loss in water quality certification revenue credited to the Surface Water Protection Fund (Fund 4K40).
- Local governmental agencies may experience an administrative cost savings related to the preparation of certain water quality certification applications.

Detailed Analysis

The bill's changes to the regulation of ephemeral streams and features include:

- Excluding ephemeral features from water pollution control programs, including the Section 401 water quality certification (WQC) program;
- Specifying that an ephemeral feature is a surface water flowing or pooling only in direct response to precipitation, such as rain or snow; and
- Eliminating 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).

Current regulation and fees

Under current law, "ephemeral streams" are subject to regulation by the Ohio Environmental Protection Agency (Ohio EPA) and any impacts to them require a permit. The Ohio Revised Code defines an ephemeral stream as 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 a channel bottom that is always above the local water table. Until recently, these

applications for certification were subject to the Section 401 water quality certification process. Section 401 certifications, as they are more commonly referred to, are those required under the federal Clean Water Act Section 401: State Certification of Water Quality.¹

On June 22, 2020, U.S. EPA's new Navigable Waters Protection Rule became effective. This rule removed ephemeral streams from the definition of Waters of the United States. According to Ohio EPA, this rule change removed the requirement for "Section 401" certification for these streams. Therefore, ephemeral streams are no longer subject to federal permitting under Section 404 of the Clean Water Act and states can no longer certify impacts to ephemeral streams under Section 401 authority.² As such, the fee related to \$5 per linear foot of the stream to be impacted (or \$200, whichever is greater) no longer applies.

However, under R.C. Chapter 6111, impacts to waters of the state without a permit are prohibited. To the extent that Ohio EPA is currently reviewing impacts to waters of the state, those applications are now subject to the "general permit for ephemeral streams." This specific type of permit carries a flat fee of \$200, which is credited to the Surface Water Protection Fund (Fund 4K40).

The table at the end of this document illustrates the number of WQC applications from state fiscal year (SFY) 2015 through 2020. Not all WQC applications include a review of an ephemeral feature. As noted above, Ohio EPA no longer charges fees based on \$5 per linear foot of the stream impacted and instead only charges a flat fee of \$200. Because of this change, data shown in the SFY 2020 column should be compared to prior years with some caution.

With regard to ephemeral features, the bill further clarifies that Ohio EPA continues to have enforcement authority over:

- Any discharge, deposit, dumping, or placement of wastes (R.C. Chapter 3734); and
- Any discharge, deposit, dumping, or placement construction and demolition debris (R.C. Chapter 3714).

Likewise, other state agencies will retain their regulatory authority over the discharge, deposit, dumping, or placement of waste, debris, or other materials in an ephemeral feature.

State fiscal effects

At the state level, the bill primarily affects Ohio EPA and the processing of WQC applications. Since federal rule changes have effectively, as a matter of practice, already removed certain fees related to the regulation of ephemeral streams/features, most notably the \$5 fee per linear foot of the stream, one aspect of the bill essentially codifies current practice, and thus would have no new fiscal impact on Ohio EPA's revenues. However, changes to the definition of an ephemeral stream may affect the annual number of WQC applications. Since the number of WQC applications that include an ephemeral stream is relatively low, averaging less than 14 per

¹ <https://www.epa.gov/cwa-401/clean-water-act-section-401-state-certification-water-quality>.

² Twenty states and the District of Columbia have filed a lawsuit challenging this federal rule change. The litigation is still pending.

year, any such annual impact on costs to review future applications or their corresponding fee revenue is likely to be minimal.

As state agencies are already exempt from WQC fees, there would be no fiscal impact on these entities. Of note is that certain definitional changes might create some uncertainty in the regulation of other areas of the law including concentrated animal feeding facilities, forest management, and the Ohio EPA's Voluntary Action Program (VAP). Please refer to the LSC bill analysis for the detailed explanation of these potential impacts.

Local fiscal effects

While state agencies are exempt from WQC fees, local governmental agencies are not. Since June 2020, WQC applications carry a flat rate fee of \$200. This would continue under the bill, however, certification and review of portions of an application that specifically relate to an ephemeral stream/feature would no longer be required. This change could result in an administrative cost savings for those local governmental entities that seek certification after the bill becomes effective.

Water Quality Certifications (WQCs) by Ohio EPA, SFY 2015-SFY 2020							
Category	SFY 2015	SFY 2016	SFY 2017	SFY 2018	SFY 2019	SFY 2020	Total
Number of Section 401 WQCs Issued	44	35	62	45	56	54	296
Number of WQCs That Included Ephemeral Stream Impacts	15	15	18	8	13	12	81
Total Ephemeral Stream Fees Paid	\$70,800	\$29,770	\$120,530	\$24,375	\$98,360	\$27,710	\$371,545
Range of Ephemeral Stream Fees Paid Per Application	\$0-\$16,950	\$0-\$6,395	\$0-\$25,000	\$0-\$9,330	\$0-\$25,000	\$0-\$13,400	\$0-\$25,000
Number of Section 401 WQCs Issued Exempt From Fees*	12	8	17	13	21	9	80

*Per R.C. 3745.114(D), state agencies and the U.S. Army Corps of Engineers are exempt from Section 401 fees.