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# OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research  
and Drafting

Legislative Budget  
Office

H.B. 175\*  
134<sup>th</sup> General Assembly

## Bill Analysis

[Click here for H.B. 175's Fiscal Note](#)

**Version:** As Reported by Senate Agriculture and Natural Resources

**Primary Sponsor:** Rep. Hillyer

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## SUMMARY

### Ephemeral features

- Excludes ephemeral features that are not waters of the United States (WOTUS) under the federal Clean Water Act (i.e., those over which the U.S. Army Corps of Engineers lacks the jurisdiction to issue a dredge and fill permit) from regulation under Ohio's 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.
- For ephemeral features that are WOTUS under the federal Clean Water Act, maintains the authority of the Ohio Environmental Protection Agency (OEPA) to regulate impacts to these waters.
- Establishes mitigation requirements, best management practices, and reporting and monitoring requirements that apply when these regulated ephemeral features will be impacted and a section 401 water quality certification is required.
- Excludes particular types of projects, such as water quality improvement projects and small dredge and fill projects, from the bill's mitigation requirements, best management practices, and reporting and monitoring requirements.
- Regarding a regulated ephemeral feature, prohibits the Director of Environmental Protection from both of the following:

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\* This analysis was prepared before the report of the Senate Agriculture and Natural Resources appeared in the Senate Journal. Note that the legislative history may be incomplete.

- Imposing or requiring any mitigation standard, criteria, scientific method, process, or other procedure or policy not specified by the bill with respect to a proposed impact to the ephemeral feature; and
- Imposing any requirement on an activity impacting a regulated ephemeral feature beyond those specified in the bill or by administrative rule for any activity impacting an ephemeral feature that requires the issuance of a section 401 water quality certification.
- Eliminates the section 401 water quality certification review fee that currently applies to all ephemeral streams (\$5 per linear foot of stream to be impacted or \$200, whichever is greater).

### **Federal Interagency Review Team**

- Requires the Director of OEPA, the Director of Natural Resources, and the Director of Transportation to each appoint an agency designee and an alternate to the federal Interagency Review Team (IRT) (which reviews documentation and advises U.S. Army Corps of Engineers district engineers on mitigation projects).
- Specifies that the appointees must have significant experience in at least one specified subject area (wetland or stream restoration, enhancement and protection of wetlands or streams, or compensatory mitigation plan development).
- Requires at least one appointee to maintain minutes of IRT meetings and specifies that those minutes are a public record.

### **Protocols for the adoption of mitigation standards**

- Alters a provision of current law requiring all substantive standards used by the Director of OEPA to evaluate section 401 water quality certification mitigation proposals to be adopted via rule in accordance with the Administrative Procedure Act to specify all of the following:
  - All substantive standards used by the IRT when reviewing documentation related to mitigation activities are also subject to that provision;
  - The provision applies to any guidance or guidelines used by the Director or the IRT;
  - A mitigation proposal may include proposals involving a wetland mitigation bank or stream mitigation bank, in-lieu fee mitigation, or permittee responsible mitigation; and
  - The provision also applies to the establishment of performance metrics, a request for credit release, or termination of monitoring requirements.
- Eliminates a provision of current law authorizing the Director to use additional mitigation standards, criteria, etc. (without going through administrative procedures) in reviewing a mitigation proposal if the Director notifies the applicant in advance that additional standards will be considered as part of the review process.

- Establishes a 24-month timeline concerning the implementation of the changes specified above.

## **Property tax exemption**

- Establishes a property tax exemption for property held by a 501(c)(3) organization organized for conservation purposes if either of the following apply to the property:
  - The property is subject to a mitigation requirement pursuant to a section 401 water quality certification or isolated wetland permit; or
  - The property is a nature water project that receives funding through the H2Ohio program.

## **Class VI injection wells**

- Requires the Department of Natural Resources (DNR) to begin working with the U.S. EPA and the U.S. Department of Energy to develop a state underground injection control program for Class VI injection wells (used to inject CO<sub>2</sub> into deep rock formations).

## **Indian Lake weed mitigation**

- Requires the Director of DNR to enter into a memorandum of understanding with the Indian Lake Watershed Project concerning weed harvesting services at Indian Lake and appropriates \$500,000 for weed harvesting in FY 2022.

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## DETAILED ANALYSIS

### Federal regulation of ephemeral features

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.”<sup>1</sup> 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. Army Corps of Engineers (U.S. Army Corps) and U.S. Environmental Protection Agency (U.S. EPA);
- Discharges of pollutants into WOTUS 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 U.S. EPA 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.<sup>2</sup> 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.<sup>3</sup>

Attempting to clarify the rule, in 2015, the U.S. EPA 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 U.S. EPA to rescind the 2015 rule and instead adopt a new WOTUS rule reflecting the first approach offered by Justice Scalia in

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<sup>1</sup> 33 United States Code (U.S.C.) § 1362(7).

<sup>2</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

<sup>3</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

*Rapanos*.<sup>4</sup> That rule took effect on June 22, 2020.<sup>5</sup> Shortly thereafter, several lawsuits were filed challenging it.<sup>6</sup>

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. The court vacated the WOTUS rule and reverted back to the 1985 version of the rule (as further interpreted under the *Rapanos* “significant nexus” test) nationwide. Thus, under this decision, whether or not a body of water, including an ephemeral stream, is a WOTUS must be determined on a case-by-case basis, considering whether the water has a “significant nexus” to a traditionally navigable water. President Biden’s administration also began administrative rulemaking to revise and clarify the WOTUS definition. The public comment period for that rulemaking closed on February 7, 2022.<sup>7</sup> Until the rule is finalized, the Court’s ruling in *Pasqua Yaqui Tribe* is the current WOTUS rule.<sup>8</sup>

## Ephemeral features under state law

The bill alters the manner in which Ohio regulates ephemeral features, which are surface waters, not including wetlands, that flow or pool only in response to precipitation, such as rain or snow.<sup>9</sup> Under current law, ephemeral features are regulated under Ohio’s Water Pollution Control Law, and a person must obtain a permit from the Ohio Environmental Protection Agency (OEPA) to discharge dredge or fill material into an ephemeral feature. That permit is referred to as a section 401 water quality certification (401 certification). Any other discharge of pollutants into an ephemeral feature requires a National Pollutant Discharge Elimination (NPDES) permit.<sup>10</sup> The bill, instead, establishes the following two classes of ephemeral features:

1. Ephemeral features that are WOTUS under the CWA and subject to regulation by the U.S. Army Corps of Engineers (U.S. Army Corps) for dredge and fill operations. Under the bill, the discharge of dredge and fill material into this type of ephemeral feature requires a 401 certification issued by OEPA. Any other discharge of pollutants requires an NPDES permit from OEPA. In addition, other specific state requirements established by the bill apply to these ephemeral features and the issuance of 401 certifications, including mitigation requirements, best management practices, and reporting and monitoring requirements.
2. Nonregulated ephemeral features. These ephemeral features are not WOTUS under the CWA and are not subject to regulation by the U.S. Army Corps. The bill deregulates

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<sup>4</sup> Executive Order 13778 of February 28, 2017.

<sup>5</sup> 33 Code of Federal Regulations (CFR) § 328.3 (April 21, 2020).

<sup>6</sup> 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.

<sup>7</sup> See [86 Fed.Reg. 69372](#).

<sup>8</sup> U.S. EPA, “[Current Implementation of Waters of the United States](#).”

<sup>9</sup> R.C. 6111.01(V).

<sup>10</sup> See R.C. 6111.03(J) and 6111.04, not in the bill.

these ephemeral features and no permit under Ohio's Water Pollution Control Law is required from OEPA to conduct dredge or fill operations in them or discharge other pollutants in them (but see, "**Other state environmental laws**," below). Thus, if the ephemeral feature is not regulated under federal law, it will not be regulated under the bill's provisions.<sup>11</sup>

### **Regulated ephemeral features**

As indicated above, for those ephemeral features subject to regulation, the bill requires the issuance of a 401 certification from OEPA whenever the ephemeral feature will be impacted by a dredge and fill operation. The bill also establishes mitigation requirements, best management practices, and additional reporting and monitoring requirements that apply to the issuance of a 401 certification. These requirements vary, depending on whether the impact to the ephemeral feature is temporary or permanent. An impact is **temporary** when all of the following apply:

- It facilitates a proposed activity or aids in the access, staging, or development of any construction;
- It will not last more than two years; and
- Upon termination of the impact, the conditions of the ephemeral feature are expected to return to pre-impact functionality or better condition within 12 months after the termination.

A **permanent** impact is any impact that is not temporary.<sup>12</sup>

The bill delineates four distinct categories of requirements and standards that the Director of OEPA may impose:

1. Mitigation requirements and standards that apply when a feature will be permanently impacted;
2. Mitigation requirements and standards that apply when a feature will be temporarily impacted;
3. Best management practices that the Director may impose for:
  - a. Permanent impacts when the Director requires a person to conduct mitigation by constructing an equivalent area of channel or site-specific measurement to provide a geomorphically stable feature in the impacted watershed; or
  - b. Any temporary impact.<sup>13</sup>
4. Additional reporting and monitoring requirements the Director may impose for:

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<sup>11</sup> R.C. 6111.01(H) and (V) and 6111.311 to 6111.316; see R.C. 6111.03(J), not in the bill.

<sup>12</sup> R.C. 6111.311(F) and (G).

<sup>13</sup> R.C. 6111.313 and 6111.315.

- a. Permanent impacts when the Director requires a person to conduct mitigation by constructing an equivalent area of channel or site-specific measurement to provide a geomorphically stable feature in the impacted watershed; and
- b. All impacts. These requirements include, additional reporting and demonstrations that the Director may impose (such as providing the minimum acreage of the mitigation and demonstrating other factors regarding the mitigation) up to two years after the completion of construction of any required mitigation.<sup>14</sup>

The bill applies existing definitions for terms such as “mitigation,” “wetlands,” and “eight-digit hydrologic unit” when used in the context of the bill’s new requirements.<sup>15</sup>

### **Permanent impact: mitigation requirements**

The bill authorizes the Director to require a person proposing to permanently impact an ephemeral feature subject to regulation to do any of the mitigation tasks shown in the table below.<sup>16</sup>

Permanent impacts		
Mitigation task	Calculation to be used <sup>17</sup>	Additional specifications
Provide mitigation by constructing an equivalent area of channel at a 1:1 ratio	Use area of mitigation (AMIT) or site-specific measurements	The mitigation must provide a geomorphically stable feature within the 8-digit hydrologic unit watershed
Provide bioretention on the project site in accordance with the rainwater manual used by OEPA	Use AMIT or site-specific measurements	Performance and monitoring of performance can be no more than what is normally required for a bioretention structure
Provide increased volume and surface area to the water quality volume (WQV)	Use volume of mitigation (VMIT) or site specific measurements	<ul style="list-style-type: none"> <li>▪ WQV must be increased by the VMIT without increasing the maximum WQV discharge;</li> <li>▪ Drawdown times may be increased proportionally;</li> <li>▪ Additional required surface area may be in the form of a wetland shelf as part of a wet extended detention</li> </ul>

<sup>14</sup> R.C. 6111.314(A) and (B).

<sup>15</sup> R.C. 6111.311(D).

<sup>16</sup> R.C. 6111.313(B)(1).

<sup>17</sup> See “Mitigation calculations” table, below.

Permanent impacts		
Mitigation task	Calculation to be used <sup>17</sup>	Additional specifications
		<p>basin sized using the rainwater and land development manual;</p> <ul style="list-style-type: none"> <li>▪ Where no onsite stormwater detention is planned, surface water storage volume with slow discharge may be provided using the VMIT as the temporary storage volume; and</li> <li>▪ When storage practices will be used, performance and monitoring of performance must be no greater than normally required for a particular storage structure.</li> </ul>
Provide mitigation by constructing an equivalent area of channel at a 1:1 ratio by purchasing credits at an approved wetland mitigation bank or in-lieu fee mitigation program for the ephemeral feature that is being impacted within the impacted 8-digit hydrologic watershed	N/A	<ul style="list-style-type: none"> <li>▪ If there are no wetland mitigation bank credits or in-lieu fee mitigation credits within the mitigation bank service area that includes the impacted 8-digit hydrologic unit watershed, credits may be purchased from another provider in the state;</li> <li>▪ When mitigation will occur at an approved wetland mitigation bank, in-lieu fee mitigation program, or mitigation paid to the department of natural resources, mitigation credits must be acquired based on the acreage of streambed impacted and proof of acquisition must be sent to the Director before any impact may occur.</li> </ul>
Provide equivalent area of channel at a 1:1 ratio by contributing funds to the Department of Natural Resources for the purpose of stream improvement activities to address acid mine drainage or other water quality impacts	Use AMIT or site-specific measurements	This mitigation may occur outside of the 8-digit hydrologic unit watershed where the impacts will occur



## Mitigation calculations

For purposes of the mitigation calculations referenced in the table above, the bill defines and specifies certain terms, as shown below.<sup>18</sup>

Mitigation calculations		
Term	Unit of measurement in which resulting term is expressed	Calculation
Area of mitigation (AMIT)	Expressed in feet squared	<ol style="list-style-type: none"> <li>1. First, calculate the area of the streamway (ASW) as:               <ol style="list-style-type: none"> <li>a. Width of a streamway (WSW) multiplied by the valley length of stream (LV).</li> </ol> </li> <li>2. Next, calculate the AMIT as follows:               <ol style="list-style-type: none"> <li>a. For streams with a slope that is less than or equal to 2%, the AMIT = ASW divided by 2;</li> <li>b. For streams with a slope that is greater than 2%, but not more than 4%, the AMIT = ASW divided by 5;</li> <li>c. For streams with a slope of greater than 4%, the AMIT = ASW divided by 8.</li> </ol> </li> </ol>
Width of a streamway (WSW)	Expressed in feet	147 multiplied by $DA^{0.38}$
Valley length of stream (LV)	Expressed in feet	N/A
Drainage area (DA)	Expressed in square miles	N/A
Volume of mitigation (VMIT)	Expressed in cubic feet	VMIT = AMIT multiplied by 1, assuming a 1 foot stream depth
Site-specific measurements	N/A	Streambed area, bankfull width, entrenchment ratio, or flood prone area may be substituted for AMIT or VMIT

<sup>18</sup> R.C. 6111.311(A), (B), (C), (E), (H), (I), and (J); R.C. 6111.313(A).

Mitigation calculations		
Term	Unit of measurement in which resulting term is expressed	Calculation
Water quality volume (WQV)	N/A	Surface area divided by drawdown depth

### Temporary impacts: mitigation requirements

The bill requires the Director to require a person proposing to temporarily impact an ephemeral feature to do all of the following:

- Restore any ephemeral feature subject to regulation that is impacted upon completion of the temporary impact;
- Restore the flow regime to that of the pre-impact ephemeral flow regime or better;
- Restore the physical integrity of the ephemeral feature to its pre-impact or better condition;
- Provide at least three high resolution color photographs taken at the restored area, including one facing upstream, one facing downstream, and a close-up that clearly depicts the substrate composition and size for each restored ephemeral feature. Photographs must accurately depict the quality of the ephemeral feature and must not include excessive cover that would prevent the observation of substrates, such as leaf litter, snow, or ice.
- Continue to conduct monitoring or implement additional measures to meet performance standards if the restoration areas are not meeting restoration performance criteria within two years following the completion of restoration activities.<sup>19</sup>

### Best management practices

The bill authorizes the Director to require both of the following to perform best management practices:

1. Any person the Director required to perform mitigation for a permanent impact by constructing an equivalent area of channel or site-specific measurement to provide a geomorphically stable feature in the impacted watershed (see, row 1 of the “**Permanent impacts mitigation table,**” above);
2. Any person required to do mitigation for a temporary impact.

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<sup>19</sup> R.C. 6111.313(B)(2).

Under the bill, best management practices include 15 specifications regarding how construction activities should be conducted and how an impacted area must be restored. The specifications include requirements such as:

- The disturbance and removal of vegetation from the project construction area must be avoided where possible and minimized to the extent practicable;
- Fill material must consist of suitable non-erodible material and be maintained and stabilized to prevent erosion; and
- Chemically treated lumber must not be used in structures that come into contact with waters of the state.<sup>20</sup>

### **Additional reporting and monitoring**

The bill authorizes the Director to impose reporting and monitoring requirements on any person or entity that the Director required to perform mitigation for a permanent impact by constructing an equivalent area of channel or site-specific measurement to provide a geomorphically stable feature in the impacted watershed (see, row 1 of the **“Permanent impacts mitigation table,”** above). Those additional reporting and monitoring requirements include:

1. A requirement that mitigation required for the ephemeral feature be monitored for up to two years after completion of mitigation construction activities (including specifications that no further monitoring be required if performance criteria are met, but that the monitoring may be extended and a mitigation plan revised if not);
2. A requirement that construction of required mitigation begin no later than 30 days after completion of fill activities and must be completed no later than one year thereafter, unless additional time is required for the project;
3. A requirement that annual monitoring reports be submitted to the Director no later than December 31 of each year following the first full growing season and completion of mitigation construction until performance criteria are met; and
4. Requirements specifying what information the reports must contain (such as the status of all required mitigation for the project, contact information, a list of native seed mixes planted in all mitigation areas, and specific color photographs).<sup>21</sup>

The bill also establishes additional reporting and demonstration requirements that the Director may impose (such as providing the minimum acreage of the mitigation and demonstrating other factors regarding the mitigation) up to two years after the completion of

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<sup>20</sup> R.C. 6111.315(E), (H), and (O). For a complete list of the 15 best management practices, see R.C. 6111.315.

<sup>21</sup> R.C. 6111.314(A). For a complete list of details regarding what the annual report must contain, see R.C. 6111.314(A)(3)(a) to (h).

construction of any required mitigation, regardless of whether the impact of that mitigation was permanent or temporary.<sup>22</sup>

### **Exclusions**

The bill specifically excludes two types of projects from the bill's mitigation requirements, best management practices, and reporting and monitoring requirements. Under the bill, the Director may not impose these requirements or practices or any additional requirements upon either of the following:

1. A restoration or enhancement project that will result in a net improvement of water quality. The bill specifies that projects that will result in a net improvement of water quality may include a project under section 319 of the CWA, an H2Ohio project, a water resource restoration sponsor program, a wetland mitigation bank, or an in-lieu fee mitigation project. To qualify under this exception, a person must submit a demonstration as part of a mitigation proposal that the project will result in a net improvement in water quality.
2. A project for the filling or discharge of dredged material into a regulated ephemeral feature that impacts  $\frac{3}{100}$  of an acre or less of streambed. For purposes of this exclusion, when culvert maintenance or replacement is involved in the project, only an impact to a regulated ephemeral feature that goes beyond the enclosed configuration of the existing culvert structure must be included in the calculation of the impacted streambed acreage.<sup>23</sup>

### **Prohibition against additional requirements**

Regarding ephemeral features subject to the bill's requirements, the bill specifically prohibits the Director from both of the following:

- Imposing or requiring any mitigation standard, criteria, scientific method, process, or other procedure or policy not specified by the bill with respect to a proposed impact to a regulated ephemeral feature; and
- Imposing any requirement on an activity impacting a regulated ephemeral feature beyond those specified in the bill or by administrative rule for any activity impacting an ephemeral feature that requires the issuance of a 401 certification.<sup>24</sup>

### **Other state environmental laws**

Though certain 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

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<sup>22</sup> R.C. 6111.314(B).

<sup>23</sup> R.C. 6111.316.

<sup>24</sup> R.C. 6111.312.

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 an ephemeral feature. For example, the Department of Health can still regulate the deposit of radioactive material in an ephemeral feature.<sup>25</sup>

### Impacts to other statutes

To exclude certain 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 use this definition. Thus, the bill has the effect of also excluding those 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 any ephemeral features. The table below indicates all references to a defined term “waters of the state” that bear 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

<sup>25</sup> R.C. 6111.011. See R.C. Chapter 3748, not in the bill.

Revised Code sections containing "waters of the state"	Subject
939.01 and 939.10	Soil and water conservation
940.01 (F) and (G); see 940.02(G)	Soil and Water Conservation Commission

## Review fee

The bill eliminates the current review fee for a 401 certification that applies to any ephemeral stream. That fee is \$5 per linear foot of stream to be impacted, or \$200, whichever is greater.<sup>26</sup>

## Federal Interagency Review Team

The bill requires the Director of OEPA, the Director of Natural Resources, and the Director of Transportation to each appoint an agency designee and an alternate to the federal Interagency Review Team (IRT). Under the CWA, the IRT reviews documentation and advises the U.S. Army Corps of Engineers' district engineers on mitigation projects. Under the bill, the appointees to the IRT must have significant experience in at least one of the following three subject areas:

- The restoration of wetlands or streams;
- The enhancement and protection of wetlands or streams; or
- The development of compensatory mitigation plans.

At least one appointee must maintain accurate and complete minutes of IRT meetings, including any documentation of the basis for any comments or decisions of the IRT with respect to wetland mitigation banks, stream mitigation banks, in-lieu fee mitigation proposals, permittee responsible mitigations, approvals, credit releases, or management. The bill specifies the minutes are a public record.<sup>27</sup> Current law does not specify requirements concerning appointees to the IRT.

## Protocols for the adoption of mitigation standards

The bill alters a provision of current law requiring all substantive standards used by the Director of OEPA to evaluate 401 certification mitigation proposals to be adopted via rule in accordance with the Administrative Procedure Act. In so doing, the provision specifies all of the following:

- All substantive standards used by the IRT when reviewing documentation related to mitigation activities are also subject to that provision;

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<sup>26</sup> R.C. 3745.114.

<sup>27</sup> R.C. 6111.31(A) and (B).

- The provision applies to any guidance or guidelines used by the Director or the IRT;
- A mitigation proposal may include proposals involving a wetland mitigation bank or stream mitigation bank, in-lieu fee mitigation, or permittee responsible mitigation; and
- The provision also applies to the establishment of performance metrics, a request for credit release, or termination of monitoring requirements.

Current law creates an exception to the requirement that all substantive mitigation standards be adopted by rule. Under that exception, the Director may use additional mitigation standards, criteria, etc. (that are not established via rule) in reviewing a mitigation proposal if the Director notifies the applicant in advance that additional standards will be considered as part of the review process. The bill eliminates this exception.

Finally, the bill establishes a timeline by which the Director must adopt the rules as follows:

1. The Director must review and adopt the substantive standards not later than 24 months after the bill's effective date;
2. Beginning on the date the Director adopts the standards or 24 months after the bill's effective date, whichever is earlier, standards that have not been adopted by rule do not have the force of law and cannot be used in the review of any 401 certification, permit denial, or as a standard of mitigation;
3. The administrative actions taken by the Director are not subject to requirements governing the elimination of existing regulatory restrictions; and
4. Until the effective date of actions taken by the Director or 24 months after the bill's effective date, whichever is earlier, the Director may continue evaluating the adequacy of a mitigation proposal contained in an application for a 401 certification in accordance with current law.<sup>28</sup>

## Property tax exemption

The bill authorizes a property tax exemption for certain property owned or held by a 501(c)(3) organization that is dedicated to the conservation of natural resources or improving water quality. To be eligible for the property tax exemption, the property must be subject to one of the following:

1. The property is subject to a mitigation requirement pursuant to a section 401 water quality certification or isolated wetland permit; or
2. A project to improve the quality of the state's natural waters that receives funding through the H2Ohio program.<sup>29</sup>

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<sup>28</sup> R.C. 6111.31(C) and Section 4.

<sup>29</sup> R.C. 5709.09.

## Class VI injection wells

The bill requires the Department of Natural Resources (DNR) to begin working with the U.S. EPA and the U.S. Department of Energy to develop a statewide underground injection control program for Class VI injection wells (used to inject CO<sub>2</sub> into deep rock formations) in order to receive primary enforcement authority (primacy) in Ohio over those wells from the U.S. EPA.<sup>30</sup>

## Indian Lake weed mitigation

The bill requires the Director of DNR to enter into a memorandum of understanding with the Indian Lake Watershed Project concerning weed harvesting services at Indian Lake and appropriates \$500,000 for weed harvesting projects in FY 2022. The bill re-appropriates any unused portion of those funds for FY 2023.<sup>31</sup>

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## HISTORY

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

ANHB0175RS-134/ks

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<sup>30</sup> R.C. 1571.30. For more information regarding Class VI wells, see U.S. EPA, "[Class VI – Wells used for Geologic Sequestration of Carbon Dioxide.](#)"

<sup>31</sup> Sections 5 and 6.