IN THE
SUPREME COURT OF OHIO

STATE OF OHIO EX REL. DAVE YOST, OHIO ATTORNEY GENERAL	)	**Case No. 2020-0091**
Appellant	)	**On appeal from the Stark County Court of Appeals,**
v.	)	**Fifth Appellate District**
ROVER PIPELINE LLC, ET AL.,	)	**Court of Appeals**
Appellees	)	**Case No. 2019CA00056**

BRIEF OF AMICUS CURIAE THE OHIO ENVIRONMENTAL COUNCIL AND SIERRA CLUB IN SUPPORT OF APPELLANT

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INTRODUCTION

While constructing an interstate natural gas pipeline, on April 8, 2017, Appellee Rover Pipeline, LLC ("Rover") spilled 1,000 gallons of drilling fluids into Ohio wetlands near Indian Fork River. Ohio Environmental Protection Agency, *Director's Final Findings and Orders*, 3 (July 7, 2017) https://www.epa.ohio.gov/Portals/35/enforcement/Rover.pdf (accessed June 19, 2020). The drilling fluids accumulated and spread through a 2,500 square foot area of the wetland. *Id.* Two days later, on April 10, Rover spilled 600 gallons of drilling fluids into Ohio waters in Richland Township, Belmont County. *Id.* Three days later, on April 13, 2017, Rover spilled several million gallons of drilling fluids into a Category 3[1] wetland adjacent to the Tuscarawas River. *Id.* At 4. The drilling fluids spread across a 500,000 square foot area. *Id.*

The pattern continued, with 50,000 gallons spilled on April 14, 200 gallons spilled on April 17, and 200 gallons spilled on April 22. *Id.* At 5. Additionally, Rover committed more than six stormwater violations under R. C. 6111.04 and an open burning violation under OAC Rule 3745-19-04(A). *Id.* at 6 - 9.

With this backdrop of environmental violations, the case before the Court represents a classic tale in environmental law, where a company attempts to justify its pollution of state waters through any means necessary and avoid the consequences of its actions. Appellee Rover followed the tried and true process of the Clean Water Act ("CWA" or "the Act") to obtain the privilege to construct an interstate pipeline that had the risk of polluting waters of the state of Ohio. After a

[1] "Wetlands assigned to category 3 may include, but are not limited to: wetlands which contain or provide habitat for threatened or endangered species; high quality forested wetlands, including old growth forested wetlands, and mature forested riparian wetlands; vernal pools; and wetlands which are scarce regionally and/or statewide including, but not limited to, bogs and fens." Ohio Adm. Code 3745-1-54(C)(3).

lengthy back and forth with the permitting agencies at the federal and state level, the process took more than a year—not uncommon for large scale projects with the potential to impact miles of streams and acres of wetlands. However, despite this lengthy amount of time, the Appellee did not appeal or dispute the validity of the state certificate it was granted by the Appellant Ohio EPA. Not until the Ohio EPA caught the Appellee numerous times polluting the waters of the state with millions of gallons of sludge did Appellee suggest the agency waived its certification—and therefore its authority—to enforce any laws or regulations to protect waters of our state.

The Appellees and the lower court wish to lead the Ohio Supreme Court to believe this is just a case about Ohio EPA missing a deadline. However, the negative implications of maintaining the lower court opinion will be dramatic to the human and wildlife who depend on the waters of the state. The case will affect more than internal agency approval processes. The resulting impact of the millions of gallons of pollution from Appellee's construction on the waters of the state devastated state water resources, wildlife depending on the resource, and the citizens who use and enjoy the impacted resource. The lower court's decision, if allowed to stand, would add to this devastation by creating an exploitable process through which permittees could eliminate the authority of the state of Ohio to enforce its water quality regulations throughout the state.

The CWA's established principle of cooperative federalism undermines the appellee's argument. Waiver of 401 certification does not bind the state of Ohio to likewise waive enforcement of its own environmental laws. Federal environmental policy has always acted as the "floor" of environmental protections, ensuring minimum standards nationwide while allowing states to implement more stringent protections if they so choose. In fact, Ohio currently follows a more stringent Waters of the State rule in comparison to the federal interpretation of Waters of the United States. The U.S. EPA's new definition, going into effect on June 22, 2020, states:

> the term ‘‘waters of the United States’’ means: (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) Tributaries; (3) Lakes and ponds, and impoundments of jurisdictional waters; and (4) Adjacent wetlands.

85 Fed.Reg. 22250, 22338. In Ohio, the legislature established a broader definition for its regulated waters:

> Waters of the state means all streams, lakes, ponds, marshes, watercourses, waterways, springs, irrigation systems, drainage systems, and other bodies of water, surface or underground, natural or artificial, that are situated wholly or partially within this state or within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.

R.C. 1509.01(V). Yet, the appellee wishes this Court to adopt a patently absurd reading of the CWA that flies in the face of the text and purpose of a fifty-year federal/state framework. The broader implications of the appellee's reading will devastate Ohio's environment, its citizens, and the principles of cooperative federalism established in environmental jurisprudence.

If the lower court decision is allowed to stand, Ohio EPA acting, pursuant to its independent authority in R.C. 6111.05 to investigate discharges into waters of the state, would have their hands tied. It can no longer act to prevent illegal discharges occurring before its eyes. Stripped of its long-standing authority to enforce permit violations in R.C. 6111.04 in pipeline cases and to initiate prosecution by the Ohio AG for injunctive and civil relief in R.C. 6111.07 and R.C. 6111.09 (and criminal penalties under R.C. 6111.99), Ohio's state government would be helpless to protect the waters of the state.

The lower court relies on the presumption that the state waives its authority to enforce its section 401 certification restrictions if it does not approve or deny a certification application within exactly one year of the applicant's first contact with the agency on the subject. *See State ex rel. Yost v. Rover Pipeline et al.*, 2019-Ohio-5179 (5th Dist.). This presumption appears to even extend

to instances where the application is incomplete or even when the applicant refiles an amended application. The absurdity that may result from such a regulatory structure is not difficult or unreasonable to imagine.

An applicant who does not wish to be bound by the minimum protections on the water resources they choose to impact could merely submit an "application" with little or no detail, ignore the requests of the Ohio EPA to supply information in order for the agency to make a decision, and wait out the clock for a waiver. On the other hand, in a scenario where the agency and the applicant are working together to make sure there is a certification allowing for the project to continue with the least impact on Ohio's waters, the Ohio EPA may be forced to deny the application and require the applicant to start over from scratch in order to preserve its authority against the waiver. Under the latter scenario, appeals and litigation over the denial would surely occur, causing more expenditure of time and money by both sides. These obvious results of the lower court's strict waiver presumption mean negative impacts to either party, whether environmentally, economically, or more likely both. Therefore, Amici urge the Ohio Supreme Court to reverse the lower court's ruling and protect Appellant Ohio EPA's authority to protect our waters.

INTERESTS OF AMICUS CURIAE

Amicus Ohio Environmental Council ("OEC") is a state-wide non-profit, non-partisan environmental and conservation organization, composed of nearly 100 organizational groups and thousands of individual members throughout the state. Over the past 50 years, the OEC has advocated for policies to secure healthy air, land, and water for all who call Ohio home. Many of our members live, work, and recreate on waters of the state of Ohio -- those same waters that would be negatively impacted by the loss of state authority to protect activities that threaten water quality.

Amicus Sierra Club is a national nonprofit organization with 67 chapters and about 800,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass working to restore and maintain the chemical, physical, and biological integrity of the nation's waters, and to protect such waters from pollution from dirty fuel pipelines. The Ohio Chapter of the Sierra Club has approximately 23,000 members throughout the state.

Amici routinely comment on NPDES permit applications, Section 401 water quality certifications, and Ohio EPA surface water protection rules and regulations. Therefore, the Amici have an interest in ensuring the Ohio EPA retains its authority to protect and preserve Ohio's waters and that reliable implementation of Ohio water quality rules and delegated Clean Water Act Authority. The decision below adversely impacts the Amici's ability to safeguard those protections in rule and law, as well as adversely impacts the groups' members' use and enjoyment of the waters of the state.

STATEMENT OF THE FACTS AND CASE

Amicus Curiae hereby adopt the Statement of the Facts and Case delineated by Appellant State of Ohio.

ARGUMENT

State environmental protection agencies, such as the Appellant, use CWA Section 401 certifications to determine and certify projects that might generate water pollution. In particular, 401 Certifications ensure the project complies with the requirements of the CWA. 33 U.S.C. 1341(a)(1). However, the CWA also distributes other general regulatory powers to the states. *Id.*

According to the CWA, states must act on a request for 401 certification within a "reasonable period of time"—not more than one year. *Id*. If the state does not act within that period of time, the power of the state to regulate *with respect to the 401 certification* is considered waived. 33 U.S.C. 1341(d). In connection with its federal application, Rover requested a 401 certification from the Ohio EPA.

On December 7, 2015, Ohio EPA timely notified Rover that its 401 certification application was administratively incomplete and that Rover had omitted certain documents required by statute: (1) a copy of the U.S. Army Corps of Engineers jurisdictional determination letter; and (2) a copy of the U.S. Army Corps of Engineers public notice regarding the permit application or notification that the project was authorized under a general permit. More than seven months later, Rover finally provided the missing documentation. Ohio EPA subsequently determined the application administratively complete and moved forward with the approval process. Rover submitted a revised 401 certification application on February 23, 2017. The Ohio EPA issued the certification immediately the following day. Two months later, Rover began illegally discharging into Ohio waters.

The State of Ohio filed a complaint against Rover based on these incidents, alleging that Rover had violated Ohio's water pollution laws. Rover argued that because more than a year had lapsed from the receipt of Rover's incomplete application, the State waived its rights under Section 401 to approve the project. *State ex rel. Yost v. Rover Pipeline et al.,* 2019-Ohio-5179, ¶20 (5th Dist.). The lower courts agreed with Rover. In particular, the trial court determined that, by waiving its rights with respect to approval of the 401 application, Ohio essentially relinquished its rights outside of the cooperative federalism framework of the CWA. *Id.* at ¶ 27-31. It no longer had the power to enforce its own state water-pollution laws at all, even to the point of finding that a state's

401 waiver cannot be undone by agreement of the parties. *Id. at* ¶ 31. This misinterpretation has led the State of Ohio to appeal to the Ohio Supreme Court. Amici support the state's position, both to protect its regulatory authority and Ohio's environment. The Court should reverse the decision of the lower court for the reasons detailed below.

I. The text of the Clean Water Act does not support the proposition that waiver of the state's 401 certification waives a state's ability to enforce its own laws.

The Fifth District on appeal, supporting the trial court's opinion, sets forth conflicting determinations of law in reading the CWA. First, the court makes clear that its holding "in no way stands for the position that the State of Ohio does not have rights relative to the construction of a natural-gas pipeline through the State and a right to impose regulations to curb disastrous environmental impacts on its waterways as a result of such construction," but then states that "in order to assert its rights, the State of Ohio is required to act in conformance with the Clean Water Act," meaning it is required to act on the 401 certification. *Id* at ¶ 28. The ambiguity of the court's use of "rights" presents two results: (1) waiver of the rights associated with the 401 certification under this framework; and (2) the state's complete forfeiture to enforce multiple chapters of its legislative and administrative code. The latter is an entirely different outcome and a result not supported by a plain reading of the CWA—nor binding precedent.

The CWA states: if a state "fails or refuses to act on a request for certification . . . the certification requirements of this subsection shall be waived with respect to such *Federal application*." 33 U.S.C. 1341(a)(1) (emphasis added). Nowhere in this provision does the waiver include a general forfeiture of the state's enforcement of state environmental laws. Reading this provision to waive all rights related to environmental enforcement renders "with respect to such Federal application" meaningless.

Additionally, subsection (d) explains that the 401 certifications set forth the limitations and monitoring requirements *of certification*, requiring that the state set forth effluent limitations in such certification to assure compliance with both federal and state law. 33 U.S.C. 1341(d). This requirement is not dispositive of a state's ability to enforce those laws outside the context of the certification; although states "shall" set forth the limitations necessary to ensure compliance, the only consequence of waiver is that those limitations are not incorporated into the federal permit. Congress has made explicitly clear that the CWA shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including such boundary waters) of such States." 33 U.S.C. 1370.

II. The cooperative federalism structure of the Clean Water Act allows Ohio to participate in the federal permitting process without waiving the right to enforce its own environmental laws.

The CWA was enacted with the intent of preserving state roles in protecting their waters from harmful pollution. 33 U.S.C. 1251(b). The federal government's interest in streamlining authorization of large-scale energy and infrastructure projects is necessarily at odds with state interests in water quality and other environmental impacts resulting from such projects.

Congress attempted to balance these interests by preserving the state authority through 401 certifications, allowing the state to determine the limit of pollutants the project may discharge into bodies of water and monitoring requirements to assure compliance with federal and state laws. This overlap in authority is just a single example of concurrent jurisdiction of both state and federal power with respect to many environmental laws, often referred to as "cooperative federalism." It assures strict compliance with environmental standards as prescribed by law.

Cooperative federalism is wholly separate from the doctrine of preemption or commandeering. "[W]here the Federal Government directs the States to regulate, it may be state

officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Natl. Fedn. of Indep. Business v. Sebelius*, 567 U.S. 519, 578, 132 S.Ct. 2566, 2602, 183 L.Ed.2d 450 (2012). Spending Clause programs like the one in *Sebelius* do not pose this danger when a state must accept the federal conditions in exchange for federal funds. The quid pro quo exchange preserves a state's choice to actively participate in a regulatory field. In contrast, "there is nothing 'cooperative' about a federal program that compels state agencies . . . to *abandon regulation of an entire field*." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 783, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (O'Connor, J., concurring in part) (emphasis added). Such a federal program would preempt state regulation, which is not the case for the CWA.

Ohio courts have recognized the three methods of federal preemption: (1) where federal law expressly preempts state law; (2) where federal law has occupied the entire field; and (3) where there is a conflict of laws. *Haynes v. Dayton Metro. Hous. Auth.*, 188 Ohio App.3d 337, 2010-Ohio-2833, 935 N.E.2d 473, ¶ 19 (2d Dist.). The CWA does not expressly preempt state regulation of water quality, and in fact explicitly does the opposite, reserving state authority. It says, "Nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharge of pollutants." 33 U.S.C.A. 1370. The purpose of statutes incorporating cooperative federalism, like the CWA, is to establish programs allowing states, within limits established by federal *minimum* standards, to enact and administer their own regulatory programs structured to meet their own particularized needs. *F.E.R.C.* at ¶ 40. Thus, no field preemption exists. Finally, no conflict between federal and Ohio water regulatory frameworks exists. The CWA permits states to regulate

water quality standards *more stringently* than the federal requirements, and such regulation cannot be, nor has any court found it to be, "in conflict" with the lower federal standards.

Rover argued, and the Fifth District court of appeals erroneously agreed, "in short, States have choices; and their choices have consequences." *State ex rel. Yost v. Rover Pipeline, LLC*, 2019-Ohio-5179, ¶ 26 (citing Brief of Appellees Rover Pipeline LLC and Mears Group, Inc., at 21). But even if Ohio waived its rights with regard to the effluent standards set out in Rover's 401 certification, the CWA does not include a mandated usurpation of Ohio's ability to control water quality. "The purpose of Section 401 is to preserve the authority for the States to set standards that are more stringent than the level of protection afforded in a federal permit, and, therefore, the purpose of this section is to *supplement* and not *supplant* the requirements for obtaining a federal permit." *Natl. Assn. of Home Builders v. U.S. Army Corps of Engineers*, 453 F.Supp.2d 116, 134 (D.D.C.2006) (citing *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 n. 114 (D.C.Cir.1987)).

In the past, the U.S. EPA has emphasized the cooperative approach state agencies should take regarding 401 certifications. U.S. EPA guidance on section 401 encourages states to assess the impact of *all associated activity* in determining whether to issue certification, and at the same time, it affirms section 401(d) provision of authority to states to impose limits on associated activities. U.S. EPA, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES, at 14 (April 2010), https://19january2017snapshot.epa.gov/sites/production/files/2016-11/documents/cwa_401_handbook_2010.pdf (Accessed June 19, 2020). *See Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir.2018) (recognizing Virginia's authority to consider, and impose limitations on, "upland" construction activities in issuing section 401 certification for similar gas pipeline).

While Section 401(d) provides the option for the Ohio EPA to incorporate additional limitations as conditions in the 401 certification, it does not eliminate Ohio's enforcement authority if it foregoes to include state-based limitations in the permit. The only consequence, if Ohio EPA chooses not to include the condition in the federal permit, is that the limitation is not incorporated *into the federal permit*. Section 401 includes an explicit "savings" clause, section 401(b), which rejects the trial court's conclusion that a failure to identify a limit pursuant to 401(d) waives other authority to enforce it: "Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. 1341(b). In a sense, 401(d) is simply expanding Ohio's authority to condition the federal certification with limitations and conditions of state law necessary to ensure compliance with state water quality standards, "or any other appropriate requirement of State law," if it so chooses. *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700, 711, 713-714, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). To interpret section 401 as overriding a state's authority to control water quality is a gross misinterpretation of the Clean Water Act. *See Natl. Assn. of Home Builders* ("the authority provided to the states to control water quality is not usurped by Section 401," discussing 33 U.S.C. 1341(b)).

Importantly, interpreting 401(d) as an optional source of additional state authority does not render section 401 redundant. Section 401, more broadly, applies to the federal permitting agency, requiring the federal agency to consult with the state through cooperative federalism. Section 401 provides an important expansion of authority over projects where states are unable to regulate a proposed activity directly. Not every state is like Ohio, where Clean Water Act permitting authority has been delegated to the Ohio EPA. States may also lack direct regulatory authority

when a federal project is regulated under a statute (unlike the Natural Gas Act) that does not have a savings clause explicitly preserving states' delegated Clean Water Act authority. Notably, the Federal Power Act, 16 U.S.C. 791a et seq (regulating hydroelectric dams) has broad preemptive effect but contains no analogue to the Natural Gas Act's savings provision.

Thus, to read the CWA as barring the Ohio EPA from enforcing the Ohio Revised Code and Administrative Codes undermines the purpose and intent of the 401 certification process–and the cooperative federalism established in CWA jurisprudence. The Clean Water Act begins by stating:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. 1251(b). The statute further provides:

> Except as *expressly* provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt *or enforce* (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370 (emphasis added). The lower courts erroneously concluded that section 401(d) can negate all other state authority, when the Clean Water Act explicitly states otherwise. Even if the Ohio EPA waived its section 401 authority, the waiver is not grounds for dismissing the agency's other claims.

III. Reading the Clean Water Act to foreclose a state's right to enforce its environmental laws in cases of waiver permits private actors to circumvent applicable state laws.

The lower court emphasized the "bright-line rule" from *N.Y. State Dept. of Environmental. Conservation v. FERC,* providing that the timeline for state action should not exceed one year after

receipt of such a request. *Rover* at ¶ 19 (citing *N.Y. State Dept. of Environmental. Conservation v. F.E.R.C.*, 884 F.3d 450, 456 (2d Cir. 2018)). But receipt of incomplete applications cannot satisfy "receipt" for the purposes of the CWA. In a similar pipeline case, a separate federal circuit ruled that the one-year waiver clock does not begin until the application is administratively complete. *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 72, 729 (4th Circuit 2009). They viewed the language not as a bright line test, rather finding the statute ambiguous on the issue and entitled to Chevron deference. The *AES Sparrows Point* court upheld the Corps' determination that Maryland had not waived its right to grant or deny AES's § 401(a)(1) Certification Request. *Id*.

Yet even taking the lower court's conclusion that the waiver language is clear, we contend that the present case is distinguishable from the Second Circuit's decision on which it relies. The Second Circuit was concerned that if the statute required "complete" applications, "states could blur this bright-line rule into a subjective standard." *N.Y. State Dep't of Envtl. Conservation* at ¶ 19. That is not the case here. Ohio EPA correctly addressed and identified the missing information and worked cooperatively with Rover to complete the application. Importantly, under R.C. 6111.30, an application for a federal water quality certification must include ten specific pieces of information in order for the application to be considered complete, including "a copy of a letter from the United States army corps of engineers documenting its jurisdiction over the wetlands, streams, or other waters of the state that are the subject of the section 401 water quality certification application." R.C. 6111.30(A)(1).

In its December 7, 2015 notice, Ohio EPA found that Rover's 401 certification application did not comply with Section 6111.30 of the Ohio Revised Code. It also appropriately informed Rover that it needed to supplement its application with a copy of the U.S. Army Corps of Engineers jurisdictional determination letter. Finally, it notified Rover of the need for a copy of the U.S.

Army Corps of Engineers public notice regarding the permit application--or notification that the project was authorized under a general permit. Seven months later, on July 14, 2016, Rover provided the missing documentation. The Ohio EPA subsequently determined the application administratively complete.

In the present case, due to Rover's missing documentation followed by missing information, it took more than a year in total for the agency to review it and issue the certification. However, Rover submitted the missing documentation seven months after the Ohio EPA required Rover to supplement its application. The "reasonable time" required under the Clean Water Act should not toll until an application is complete; otherwise, absurd results can occur, where an applicant submits little to no information for an application but doesn't provide the additional information until the "one year" mentioned in the statute is almost finished. Moreover, even after the late supplementation, the application was still not complete in terms of necessary information. Thus, the Ohio EPA had to spend another seven months to address and identify the missing information with Rover as a gesture of goodwill instead of rejecting it outright.

The fact that the Ohio EPA issued the certification the day after the submission of the revised application shows the agency did its best to expedite the process. There was no bureaucratic or intentional delay of the agency in the present case. Rover was in no way prejudiced by that delay. They did not appeal the 401 certification for being late. It was not until they later polluted waters of the state and violated the terms and conditions of the 401 did they believe the 401 should not apply.

If the one-year time period begins upon receipt of any an incomplete application, corporations could easily game the system by submitting a clearly deficient application to start the clock, submitting incomplete applications until the one-year time period expires. To take the lower

court's logic to its fullest extent, the Ohio EPA and its administrators will need to either approve or reject all applications for 401 certification regardless of deficiencies to avoid failing to act. And, as Appellant argues, approval or rejection of the certification request will be the only way to avoid a waiver of the ability to enforce *all state environmental laws* the project might violate. This outcome renders the 401 certification process a mere formality and puts both private companies and regulatory bodies at a disadvantage in producing economically viable and environmentally friendly projects. More importantly, it allows federal law to breach the veil of cooperative federalism, superseding Ohio's ability to protect its own environment using measures that go above and beyond the national baseline.

For example, under current federal and state regulations, discharge into groundwater presently can only be regulated by states unless the groundwater connects to Waters of the United States. The Supreme Court recently explored this specific question and held that a permit is required when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, __ U.S. __, 140 S.Ct. 1462, 1476 (2020).Waiver of ability to enforce state environmental laws would allow such discharge, thus completely eliminating a field of regulation the state of Ohio has chosen to regulate more stringently than the federal government. The same is true when two federal statutes, rather than a state and federal statute, work together to regulate the same activities. "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115, 134 S.Ct. 2228, 189 L.Ed.2d. 141 (2014). Such "complementary" statutes should be plainly regarded as effective in their own right,

because of their different requirements and protections. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Internatl., Inc.*, 534 U.S. 124, 144, 122 S.Ct. 593, 151 L.Ed.2d. 508 (2001).

IV. Public interest in preserving ephemeral streams and wetlands and avoiding irreparable environmental injury weighs in favor of Appellant.

If the Fifth District's holding stands, the most vulnerable parts will be ephemeral streams and wetlands which are not going to be protected by the final US EPA set to finalize on June 22, 2020. USEPA recently excluded ephemeral streams and many wetlands from the Clean Water Act's definition of Waters of the United States. 85 Fed.Reg. 22250, 22251. The Navigable Waters Protection Rule defines the term "ephemeral stream" as surface water flowing or pooling only in direct response to precipitation. *Id.* at 22275. The definition itself inherently disregards potential environmental effects of a stream only in direct response to precipitation. Specifically, surface water flowing only in direct response to a heavy rain for a long time can spread effluents or sewage. A primary drinking water wellfield for communities can be hundreds of feet away from the ephemeral stream. The definition of the term "ephemeral stream" does not consider an enormous potential consequence of flows solely due to precipitation.[2]

Ohio has over 36,000 miles of ephemeral streams. *See* Ohio EPA's Public Interest Center, *Ohio EPA Announces Draft General Permit for Impacts to Ephemeral Streams* (May 8, 2020)

[2] A notorious example is Greenbush Draw, an ephemeral stream in Arizona. John Dougherty, *Raw Deal: Decades of Sewage Overflows and Health Problems Plague Two Arizona Border Towns* (Mar. 15, 2018), https://therevelator.org/raw-sewage-arizona-border/, (accessed June 15, 2020). Since the mid-1980s, the residents have too often suffered sewage overflows after heavy rains or pump failures. Rafael Carranza, *Bisbee-area residents frustrated by slow response to Mexico sewage leak* (Sept. 19, 2017), https://www.azcentral.com/story/news/politics/border-issues/2017/09/19/bisbee-area-residents-frustrated-slow-response-mexico-sewage-leak/679462001/, (accessed June 15, 2020). Heavy rainfall turns the ephemeral stream into a raging torrent. John Dougherty, *Raw Deal: Decades of Sewage Overflows and Health Problems Plague Two Arizona Border Towns* (Mar. 15, 2018), https://therevelator.org/raw-sewage-arizona-border/, (accessed June 15, 2020). It damages cattle ranches and towns with raw sewage flowing from Mexico. Id. In 2013, then-U.S. Sens. John McCain and Jeff Flake wrote then-U.S. Secretary of State John Kerry over 10 million gallons of sewage flowing each day from Mexico to the US. Mike Sunnucks, *McCain, Flake worry about Mexican sewage flowing into Arizona*, (2013), https://www.bizjournals.com/phoenix/news/2013/05/13/mccain-flake-worry-about-mexican.html, (accessed June 15, 2020).

https://www.epa.state.oh.us/News/Online-News-Room/News-Releases/ohio-epa-announces-draft-general-permit-for-impacts-to-ephemeral-streams, (accessed June 17, 2020). Ephemeral streams help control run-off and erosion, reduce flooding potential, and help filter pollutants. *Id*. Isolated wetlands have important functions in water management, nutrient retention and supporting wildlife habitat. *Id*. Even after promulgation of the new rule defining the Waters of the United States, Ohio plans to continue to protect isolated wetlands under the existing state Isolated Wetland Permitting (IWP) process. *Id*. Ohio also plans to create an efficient permitting process to continue oversight of ephemeral stream impacts. *Id*.

Ohio EPA's IWP dates back to 2001. *See* R.C. 6111.02(A); *see also* R.C. 6111.028. Existing state permitting mechanisms to address ephemeral stream impacts include Construction Storm Water General Permits, 401 Water Quality Certifications, and Isolated Wetland Permits. Ohio would need new mechanisms to address impacts to ephemeral streams for projects on sites not otherwise covered under the permits above. If a project is not provided a water quality certification and the lower court's ruling stands, it deprives Ohio of its rights to enforce the state laws. Long-standing efforts of Ohio to protect ephemeral streams and wetlands must be maintained.

In reality there is no perpetual line between distinctions of perennial, intermittent, and ephemeral streams. Any single stream can turn into a totally different one in a short period, depending on human activities, climate change, and unexpected incidents. Even if a stream has been considered ephemeral and not protected from pollutants, an unusual heavy rain can make the stream flow into a drinking water source. Ohio is choosing to protect ephemeral streams, going above and beyond the federal floor established by the new definition of "Waters of the United

States." If the lower court's decision stands, the Ohio EPA will lose these valuable protections in certain circumstances.

CONCLUSION

The lower court's interpretation of the 401 certification process allows private companies to submit incomplete applications, run out the clock, and dump several million gallons of drilling fluid into Ohio's most vulnerable ecosystems without facing any consequences from the Ohio EPA. After working cooperatively to establish sufficient effluent limits based on a deficient application, Ohio EPA would be barred from enforcing environmental laws that work to protect and maintain Ohio's environment, resources, and citizens. For the reasons set forth by Amicus Curiae, as well as those set forth in Appellant's Merit Brief, this Court should reverse the Fifth District's holding.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Amicus Curiae The Ohio Environmental Council and Sierra Club in Support of Appellant* was served upon the following parties of record via electronic transmission this 19th day of June, 2020.

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