

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Natural Resources

Regulation/Package Title: Division of Mineral Resources Management -- 2014 Package, Industrial Minerals rules

Rule Number(s): 1501:14-1-01, 1501:14-1-05, 1501:14-1-09, 1501:14-1-16, 1501:14-2-01, 1501:14-3-12, 1501:14-3-13, 1501:14-5-04, 1501:14-6-01, and 1501:14-6-02.

Date: January 23, 2015 - Revised BIA

Rule Type:

☐ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

The Division of Mineral Resources Management (DMRM) is proposing to amend ten rules that regulate industrial minerals (IM) surface mining. Seven of these rules were due for their five-

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year-review per section 106.03 of the Revised Code. Another rule, 1501:14-1-09, is being revised to clarify a performance bond requirement. Two rules are incorporation by reference rules that need to be updated as the publication dates of the Code of Federal Regulations and the United States Code change. All ten rules have been reviewed by DMRM pursuant to section 106.03; thus, the JCARR filing will indicate that they have undergone their five-year-review.

DMRM has reviewed these rules and determined that amendments are necessary principally due to changes in Revised Code Chapter 1514. made by SB 315 of the 129th General Assembly (effective 9/10/2012), changes in the IM rules that became effective 9/17/2010, to clarify certain requirements, and to correct errors or update information.

The following is a list of the rules, their key provisions, and the significant changes proposed for them. (Note: for a complete list of every change proposed for each rule, please see the attached rules – there is a comprehensive summary at the beginning of each rule.)

1501:14-1-01 Definitions. This rule contains the definitions that apply to Chapters 1501:14-1- to 1501:14-6 of the Administrative Code. Significant proposed amendments:

(PP). Definition revised to include all entities included in section 1.59 of the Ohio Revised Code.

(QQ). New definition of probable hydrologic impacts, a phrase used in rule 1501:14-6-01(I).

(CCC). The definition of "surface mining" updated to include the new language from SB 315 of the 129th General Assembly, which took effect 9/10/2012.

1501:14-1-05 Permit transfers. This rule sets out the process for transferring permit rights. Significant proposed amendments:

(A)(3). Sentence added to clarify that the name of the applicant seeking the transfer must be identical to the name of the applicant on each of the documents filed with the chief under paragraphs (A)(3)(a) to (A)(3)(c).

1501:14-1-09 Payment of fees and filing of performance bond. This rule contains the requirements for the payment of fees and the filing of performance bonds related to industrial minerals surface mining. Significant proposed amendment:

(F). New paragraph to clarify that industrial minerals surface mining fees are to be deposited into the Surface Mining Fund created in ORC section 1514.06.

1501:14-1-16 Incorporation by reference and 1501:14-2-01 Incorporation by reference of mine safety standards. These two rules contain the dates of publication of the Code of Federal Regulation and the United States Code for those federal regulations and federal laws that are

incorporated by reference in the IM rules and tell the public where these regulations and laws can be found.

For both rules: update of the edition of the Code of Federal Regulations. For 1501:14-1-16: update of the edition of the United States Code.

For 1501:14-1-16 (B)(3). New reference listed because this reference was added to the definition of "surface mining" in section 1514.01 of the Revised Code by SB 315 of the 129th General Assembly, which took effect 9/10/2012.

1501:14-3-12 Beneficial quarry fill. This rule contains the requirements for using lime mining wastes as a quarry fill. There are no significant amendments proposed for this rule.

1501:14-3-13, Controlled placement of LMW. This rule contains the requirements for the placement, transportation, and compaction of lime mining wastes. Significant proposed amendment:

Introductory sentence. The word "placement" added to clarify.

1501:14-5-04 Watercourse variances. This rule contains the requirements for obtaining a variance to conduct industrial minerals surface mining within 50 feet of a watercourse of a certain size drainage area. Significant proposed amendments:

Introductory paragraph: "less" changed to "fewer" to agree with the language of ORC section 1514.10 (E)(3).

(A)(2). New provision requiring that an applicant for a variance submit as part of the request the name of the watercourse and the distance to the highwater mark of the watercourse from the variance area where the proposed activities would be conducted.

1501:14-6-01 Permit application requirements for beneficial use of LMW. This rule contains the permit requirements for the beneficial use of lime mining wastes in the reclamation of an industrial minerals surface mining operation. Many changes are proposed for this rule simply to make the language and the paragraph organization consistent throughout the rule. Significant proposed amendments:

(A)(1). Reference changed to read, "...the requirements of sections 1514.02 and 1514.021 of the Revised Code."

(A)(5). First two sentences removed because all permits that were existing at the time that this rule originally became effective are by now in compliance. Third sentence modified to clarify the requirements.

(B). Revised to clarify that all proposed beneficial uses of LMW must meet the requirements of (B)(1) and (2).

(B)(1) and (B)(2). Paragraph titles added ("Identification and description" and "Characterization"). Provisions that were previously part of (B)(2) and (B)(3) have been re-organized into sub-paragraphs (B)(2)(a) to (c).

(B)(2)(b). Website information added for US EPA publications and for ASTM International. ASTM D3987-85 (out-of date number) corrected to ASTM D3987-06.

(B)(4). Revised to clarify the requirements.

(B)(5). Revised to clarify who must take the action and what requirements must be met, and to be consistent with the language of (B)(4).

(B)(5)(a). "or feet per day" added.

(C). "and any LMW beneficial use area proposed to be amended to the permit" added.

(C)(1). "LMW" added and "permit" removed, so that the rule will consistently refer to "the proposed LMW beneficial use area."

(E)(1)(c). The phrase "in the aquifers and water table" removed because it is not needed.

(E)(1)(f). In most of the rule, the term "lime processing facility" has been changed to the more general term, "LMW beneficial use." Clarification added regarding the cone of depression requirement.

(E)(3). First sentence modified to clarify the requirements. The second sentence proposed to be removed because the reference to (A)(6) is wrong -- the rule does not contain a provision regarding a substitute description of baseline water quality.

(E)(4)(e). This provision moved to new paragraph (E)(6) so that the ground water requirements of (E) are organized the same way as the surface water requirements of (F).

(F)(1) and (F)(2)(a). Both paragraphs revised so they use consistent language and so that they both apply to either a proposed permit that includes a proposed LMW beneficial use area or an existing permit that is proposing to add a LMW beneficial use area.

(F)(4). Paragraph reference to be removed because it is incorrect and unnecessary.

(G). The rule is revised throughout to refer consistently to: "monitoring plans" (not programs), "active operation," "the active operational monitoring period," and "the five-year post-reclamation monitoring period."

(G)(1). "cone of influence" changed to "cone of depression" to be consistent with the rest of the paragraph.

(G)(1)(b). Revised to clarify.

(G)(1)(c), (G)(2)(d), (G)(3)(a), (G)(3)(b)(vi), and (G)(4)(b)(vi). Phrase moved to clarify meaning of the sentence.

(G)(1)(b), (G)(2)(b), (G)(3)(b) and (G)(4)(b). Revised so the rule has consistent requirements -- all four paragraphs will require "a suitable justification by the applicant" if an applicant wishes to reduce the frequency of sampling or monitoring.

(G)(2)(c). Paragraphs re-organized, with the provisions of currently effective paragraphs (G)(2)(c) to (g) becoming sub-paragraphs (G)(2)(c)(i) to (v), to clarify the meaning of the requirements.

(G)(2)(d). Revised to clarify.

(G)(2)(e). The phrase "the ground water quality monitoring program" proposed to be removed because it is not needed.

(G)(4)(b)(ii), (iii) and (iv). The currently un-numbered paragraphs that follow (G)(4)(b)(ii) have been given sub-paragraph numbers (G)(4)(b)(iii) and (iv) in order to follow the same organization as paragraph (G)(3)(b).

(J). "amended areas" changed to "any LMW beneficial use area proposed to be amended to the permit."

(K). Since this paragraph is about a permit application or an amendment application, the requirements are revised throughout to reflect that the map might be either an application map or an amendment map showing either the permit area or the amended area.

1501:14-6-02 Distance limitations on the placement of LMW. This rule contains the distance limits for the placement of lime mining wastes in industrial minerals surface mining reclamation. Significant proposed amendments:

(A). Second sentence revised to clarify the requirements.

(C). Revised to remove a redundant phrase.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Ohio Revised Code section 1514.08 is the statutory authority for all of these rules. Additional statutory authority:

- For rule 1501:14-1-05, ORC section 1514.02 (F)
- For rule 1501:14-1-09, ORC sections 1514.02 and 1514.04
- For rule 1501:14-5-04, ORC section 1514.10 (E)(3) and (F)(3)
- For rules 1501:14-3-12, 1501:14-3-13, 1501:14-6-01 and 1501:14-6-02, ORC section 1514.081

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?
If yes, please briefly explain the source and substance of the federal requirement.

No, Ohio's industrial minerals surface mining regulations are not related to a federal regulatory program.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

In general, OAC Division 1501:14 protects Ohio's land and water resources and the public from the potential negative impacts of industrial minerals (IM) surface mining.

- The public purpose of rule 1501:14-1-01 is to define the terms used in OAC Division 1501:14 so it is clear exactly what the IM surface mining rules require and how they are being applied.
- The public purpose of rule 1501:14-1-05 is to ensure that when an IM surface mining permit is transferred, all the rights and responsibilities of the permit are clearly and fully transferred to the new permittee.

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- The public purpose of rule 1501:14-1-09 is to ensure all fees and performance bonds required for IM surface mining are properly submitted to the Chief of DMRM .
- The public purpose of rules 1501:14-1-16 and 1501:14-2-01 is to provide the public with the dates of publication of those federal laws and federal regulations that are incorporated by reference in the IM rules, and to tell the public where these federal laws and rules are located.
- The public purpose of rules 1501:14-3-12, 1501:14-3-13, 1501:14-6-01, and 1501:14-6-02 is to provide for the use of lime mining wastes in surface mined areas under carefully controlled conditions that protect the public and the environment.
- The public purpose of rule 1501:14-5-04 is to ensure that, when the Chief grants a variance related to mining near small watercourses, as provided in ORC section 1514.10 (E)(3) and (F)(3), the watercourse and the surrounding area are protected.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

DMRM has the unique and difficult responsibility of regulating the industrial minerals surface mining industry in a way which strikes a balance between protecting society and the environment from potential adverse effects of mining operations and satisfying the nation's need for industrial minerals as essential resources for economic growth.

DMRM will measure the success of these rules by seeing that industrial minerals surface mining continues to be carried out in Ohio in an environmentally protective manner and that all mined lands are reclaimed and restored to a productive post mining land use.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

By letter dated June 2, 2014, DMRM Chief Lanny Erdos mailed these rules and their proposed changes to the following persons, requesting that they review and comment on them:

Brian Barger, Attorney at Law, Eastman & Smith, Ltd.

Trent A. Dougherty, Managing Director of Legal Affairs, Ohio Environmental Council.

Pat Jacomet, Executive Director, Ohio Aggregates and Industrial Minerals Association.

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On August 11, 2014, Chief Erdos, Deputy Chief Dave Crow and IM Hydrologist Kelly Barrett met with Brian Barger and Pat Jacomet at the OAIMA to discuss the draft rules. The OAIMA representatives requested a more detailed explanation for one of the proposed changes and two small changes to two proposed rules in order to clarify the scope of the proposed amendments. This information was sent to the OAIMA by e-mail on August 26. An OAIMA representative notified DMRM that the changes and explanation were satisfactory.

See response to Question 8 for more information.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The OAIMA representatives asked for a more detailed explanation for the proposed change to the definition of “person” in 1501:14-1-01. DMRM provided the following explanation: This definition is proposed to be changed to include all the entities included in the definition of person in ORC section 1.59, which is the general section of Ohio law that includes definitions that apply to all of the Revised Code.

OAIMA asked that the definition of “probable hydrologic impacts” in 1501:14-1-01 be revised to specify that the definition relates to the use of lime mining wastes only. DMRM has amended the definition to clarify that “probable hydrologic impacts” is applicable to the use lime mining wastes in rule 1501:14-6-01 of the Administrative Code.

OAIMA expressed concern that a proposed revision in 1501:14-6-01 (A)(1) could have unforeseen broader consequences. DMRM has amended the sentence to remove a reference to all of ORC Chapter 1514. and to instead include a reference to only 1514.02 and 1514.021, the two permitting sections of ORC 1514.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The rule changes are being proposed in order to provide for better clarity and consistency. The proposed updates are supported by existing definitions that have already been established in existing laws.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn’t the Agency consider regulatory alternatives?

No alternative regulations were considered; ORC Chapter 1514. does not allow for alternative means of compliance with these rules.

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11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

No, because ORC Chapter 1514. dictates the parameters of the regulations.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The ODNR Division of Mineral Resources Management is the sole agency with authority under the ORC to regulate industrial minerals surface mining. The other laws and rules under the authority of the ODNR DMRM were reviewed to avoid conflict.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The changes proposed in this IM rule package are mostly corrections and clarifications that will not change the way that IM surface mining is regulated. Only three changes that are proposed will result in changes in IM permitting procedures:

1. An applicant for a variance related to mining near a small watercourse would need to submit as part of the request the name of the watercourse and the distance to the highwater mark of the watercourse from the variance area where the proposed activities would be conducted.
2. An applicant applying to use lime mining wastes as a low permeability material would be allowed to indicate the hydraulic conductivity in either centimeters per second or in feet per day.
3. An applicant seeking to follow an alternate schedule for ground water or surface water sampling during active mining or during the postmining reclamation period would need to provide "a suitable justification" for any of these proposed alternate schedules.

These new requirements will be applied consistently across Ohio via DMRM's permit process. Implementation will occur with updates being given by DMRM staff to the regulated industry during the permitting and revision process. The Ohio Aggregates and Industrial Minerals Association will also be advised of the implementation so they can update their members.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

Answer to question a: The affected business community is all of Ohio’s IM surface mining operators.

Answer to questions b and c with regard to the amendments proposed to these rules: DMRM does not anticipate that these rule amendments will have an adverse impact on the IM mining industry because most of the proposed amendments simply correct errors or clarify regulations that are already being followed.

The three proposed changes described in answer no. 13, above, will not have a significant impact on the IM mining industry because:

- The first change requires the applicant to submit basic location and distance information that will not cost any additional money to collect or submit.
- The second change allows the applicant another option in how information can be submitted.
- The third change simply requires the same consistent standard justification for all four instances when an applicant may request an alternate sampling frequency.

Answer to questions b and c with regard to the rules as a whole:

Rule 1501:14-1-01 contains the definitions that apply to Chapters 1501:14-1- to 1501:14-6 of the Administrative Code and is therefore an integral part of the IM surface mining regulatory program.

Rule 1501:14-1-05 contains the requirements for transferring the rights to conduct industrial minerals surface mining from one person to another. This rule was created in 2005 to carry out the legislative mandate of ORC section 1514.02 (F), enacted by SB 83 of the 124th General Assembly, effective 3/15/2002. This law requires that a transfer of the right to mine be accomplished by filing an application for the transfer with the Chief. The law directed the Chief to establish criteria and procedures for approving or disapproving the transfer. Rule 1501:14-1-05 requires that the application contain specific information about the applicant wishing to succeed to the right to mine, and that the applicant provide performance bond and public liability insurance coverage, as well as copies of any right-of-entry deeds or leases. ORC Chapter 1514. does not give the Chief discretion with regard to who can mine under a transfer. Any person wishing to conduct an IM surface mining operation in Ohio must be eligible to obtain a permit under the law, must mine according to the approved permit, and must provide the required bond, insurance and rights of entry documents.

Rule 1501:14-1-09 contains the requirements for paying fees and filing performance bond. It implements the fee and bonding provisions of ORC sections 1514.02 and 1514.04. 1514.02 establishes a \$500 permit fee for surface mining, a \$250 permit fee for in-stream mining, and an acreage fee of \$75 multiplied by the number of acres estimated to comprise the land affected within the first year of operation. Section 1514.04 establishes a bond of \$10,000, “unless otherwise provided by rule.” It also establishes a bond of \$500 per acre of land for every acre of land to be affected that exceeds 20 acres. Rule 1501:14-1-09 contains a modification of the \$10,000 bond provision: for permits of 20 or fewer acres issued prior to August 15, 2002, (the effective date of SB83, which raised the bond from \$2,000 to \$10,000), the bond is \$2,000, or \$500 per acre of land to be affected, whichever is greater. This modification was put in the rule in order to “grandfather in” existing small IM operators who might find it difficult to meet the higher bond requirement.

Rules 1501:14-1-16 and 1501:14-2-01 list and state the dates of publication of the federal regulations and federal statutes that are incorporated by reference in the rules of Chapters 1501:14-1- to 1501:14-6 of the Administrative Code. The rules are being updated to comply with the requirements of ORC section 121.72. They do not have an adverse impact on the regulated industry.

Rules 1501:14-3-12, 1501:14-3-13, 1501:14-6-01 and 1501:14-6-02 all regulate the beneficial use of lime mining wastes (LMW) in surface industrial minerals mining operations. These rules have been in effect since 2005. They were created to carry out the legislative mandate of ORC section 1514.081, enacted by SB 15 of the 124th General Assembly, effective 10/8/2001. This law directed the Chief to establish standards and requirements for the beneficial use of LMW in surface industrial minerals mining. The law also directed the Chief, in order to protect human health and the environment, to establish standards and requirements for: the monitoring of ground water associated with the beneficial use of LMW; and the taking of corrective action in

the event of a subsurface discharge of leachate from the beneficial use of LMW or of contamination of ground water resulting from the beneficial use of LMW. The rules contain detailed requirements on the transportation, placement, and compaction of LMW. The rules require a permittee wishing to use LMW to collect and submit a great deal of additional application information, including: a description and characterization of the LMW; the hydrology and geology of the mine area; operations and reclamation plans; ground and surface water monitoring plans for both the active mining operation and the postmining period; and additional LMW-specific mapping details. The LMW rules were created with significant industry involvement; DMRM staff met with quarry owners to discuss the details of these requirements. These rules are appropriate and necessary in order to allow for the use of LMW in IM surface mining reclamation while protecting the public and the environment from the potential adverse effects of LMW pollution.

Rule 1501:14-5-04 was created in 2005 to implement a provision of SB 83 of the 124th General Assembly, effective 3/15/2002. This provision allows the Chief to adopt rules that establish a means to obtain a variance from the watercourse distance limits of ORC section 1514.10 (E)(3) and (F)(3). The rule requires the applicant for a variance to submit a request to the Chief that includes detailed information on the mining operation and the watercourse to be affected. Unless an operator has this variance, ORC 1514.10 (E)(3) and (F)(3) prohibit any IM surface mining within 50 feet of watercourses of a certain size. This rule therefore benefits industry by allowing a variance to this prohibition.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

ORC Chapter 1514. establishes the parameters for these rules. The chapter provides many safeguards to protect the public and the environment from the potential adverse effects of industrial minerals surface mining.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

ORC Chapter 1514. does not contain any small business exemptions but does provide one alternative means of compliance for small operators. ORC section 1514.02 (A)(12) allows operators (other than in-stream mining operators) who intend to extract less than 10,000 tons of minerals annually and no incidental coal to submit a tax map and USGS topographic map in lieu of a map prepared and certified by a surveyor or engineer.

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Ohio law also provides for a reduced filing fee for small operators. ORC section 1514.03 requires small operators (those who intend to extract less than 10,000 tons of minerals annually and no incidental coal) and in-stream mining operators to submit a filing fee of \$250 each year with their annual report rather than the \$500 filing fee required of larger operators.

In addition, the definition of “surface mining” in ORC 1514.01 (A) provides exceptions to regulation under Chapter 1514. for certain circumstances, e.g., test or exploration boring, construction operations, routine dredging, and sanitary landfills, as well as “the extraction of minerals, other than coal, by a landowner for the landowner’s own noncommercial use where such material is extracted and used in an unprocessed form on the same tract of land” and “the removal of minerals to a depth of not more than five feet, measured from the highest original surface elevation of the area to be excavated, where not more than one acre of land is excavated during twelve successive calendar months.”

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

Section 119.14 is not applicable to the regulation of IM surface mining because a violation of ORC Chapter 1514. or OAC Division 1501:14:

- Has the potential to cause serious harm to the public interest that DMRM is charged to protect.
- Presents a direct danger to the public health or safety, or the risk of severe environmental harm.

18. What resources are available to assist small businesses with compliance of the regulation?

DMRM’s IM Program staff are available to help anyone who needs guidance or assistance in complying with these rules.

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