

**MEMORANDUM**

TO: Kirk Hines, Ohio Department of Natural Resources

FROM: Cory Bailey, Regulatory Policy Advocate, Lt. Governor's Office

DATE: October 28, 2015

RE: **CSI Review – Agricultural Pollution Abatement (OAC § 1501:15-5-21 and 1501:15-5-22)**

On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) § 107.54, CSI has reviewed the abovementioned administrative rules and associated Business Impact Analysis (BIA). This memo represents CSI's comments to the Agency as provided for in ORC § 107.54.

Analysis

On September 10, 2015, the Ohio Department of Natural Resources (ODNR) submitted a draft rule package consisting of two new rules to the CSI Office for review. The official public comment period closed on September 25, 2015 with five comments submitted.

Earlier this year, Senate Bill 1 (SB 1) was signed into law prohibiting the application of manure and fertilizer in the western Lake Erie basin on frozen ground, saturated soil, and during certain weather conditions. The prohibition is meant to protect Ohio's water supplies, including Lake Erie, from toxic algal blooms created by manure and fertilizer runoff. SB 1 delegates the authority for monitoring manure application to ODNR, while the authority to monitor fertilizer application has been delegated to the Department of Agriculture. As a result, the two new rules are specific to the application of manure.

The first rule, OAC § 1501:15-5-21, establishes an exemption form. A provision in the statute allows small and medium sized agricultural operators to apply for a one to two year exemption from the prohibition. The exemption is designed to give operators additional time to comply with the changes. In addition to general information like name and address, the rule requires that the operator explain why the exemption is necessary and provide information about its operation,

including an aerial photograph or map showing the fields where manure will be applied during the exemption.

The second rule, OAC § 1501:15-5-22, establishes civil penalties for violation of the statute. Violations are divided into two categories, major and minor. The rule defines what constitutes a major or minor violation, which is based on the volume of manure application, the level of risk, and whether the manure application has entered state waters. In the case of a minor violation, ODNR may assess a civil penalty of up to \$2,000 for each day of noncompliance. If a major violation is committed, the civil penalty may be as high as \$10,000 per day.

Comments were submitted by several organizations including the Ohio Environmental Council, The Nature Conservancy, and the Ohio Federation of Soil and Water Conservation Districts (OFSWCD) among others. Many concerns were raised, primarily regarding the penalty structure and how some of the terms are defined. According to ODNR, the comments from OFSWCD were received prior to submittal of the proposed rules to CSI and some of the recommendations were already incorporated. However, most of the suggestions made by stakeholders were not adopted. ODNR submitted written replies to each of the commenters addressing each point and explaining why the suggestions were not implemented. ODNR has drafted the rules to closely align with statute, leaving little room for flexibility.

The adverse impacts to business are the time and resources committed to completing the exemption form and the penalties assessed when operators fail to comply with the law. ODNR has included an “up to” provision for civil penalties, allowing for discretion when determining the amount of the penalty. According to the BIA, the overall justification for the adverse impacts is to minimize agricultural pollution from manure applications in order to protect Ohio’s streams and Lake Erie. ODNR also cites a statutory obligation to establish the rules.

ODNR has provided as much flexibility as possible while closely adhering to the statutory requirements. As a result, following review of the draft rules, BIA, and stakeholder outreach, it has been determined that the standards espoused by the CSI Office have been met, and the adverse impacts of the draft rules are justified.

Recommendations

For the reasons discussed above, the CSI Office does not have any recommendations for this rule package.

Conclusion

Based on the above comments, the CSI Office concludes that the Ohio Department of Natural Resources should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.