

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Natural Resources

Regulation/Package Title: Agricultural Pollution Abatement – SB 1

Rule Number(s): 1501:15-5-21, 1501:15-5-22

Date: August 24, 2015

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☐ Rescinded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.

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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.

Senate Bill 1 of the 131st General Assembly prohibits the application of manure in the western basin on frozen ground, saturated soil, and during certain weather conditions. This prohibition is outlined in Ohio Revised Code (ORC) 1511.10 (A). Additional language in Senate Bill 1 states the owner or operator of a small agricultural operation or a medium agricultural operation may apply to the Chief of ODNR-Division of Soil and Water Resources for an exemption from ORC 1511.10 (A). The maximum exemption period is up to 1 to 2 years from the effective date of the legislation, dependent on the size of the operation. The exemption language is outlined in ORC 1511.11 (D).

In regards to the manure application prohibitions and the related exemption form requests, ORC 1511.11 (E) requires the Chief of ODNR-Division of Soil and Water Resources to specifically adopt rules that establish the following:

- (1) The amount of the civil penalty assessed under this section. The civil penalty shall be not more than ten thousand dollars for each violation.
- (2) Requirements governing the application form for an exemption submitted under division (D) of this section. The rules shall require the form to include all of the following:
 - (a) A statement from the applicant affirming that the applicant understands the provisions of sections 1511.10 and 1511.11 of the Revised Code;
 - (b) A statement from the applicant affirming that the applicant understands that the applicant must be in compliance with procedures established in the United States department of agriculture natural resources conservation service practice standard code 590 prepared for this state except procedures that are in conflict with this section and section 1511.10 of the Revised Code;
 - (c) A place for the applicant to explain the reasons for the necessity for the exemption;
 - (d) A place on the form that provides information on programs that may assist an applicant with methods to comply with division (A) of section 1511.10 of the Revised Code;
 - (e) A place on the form that provides the applicant an opportunity to request technical assistance or information from the chief or the applicable soil and water conservation district to assist the applicant to comply with division (A) of section 1511.10 of the Revised Code.

Rule 1501:15-5-22 has been developed to fulfill the requirement in ORC 1511.11 (E) (1). This rule establishes the civil penalties that may be imposed for applying manure in the

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western basin on frozen ground, saturated soil, and during certain weather conditions. For a minor violation, the chief may assess a civil penalty of up to two thousand dollars for each day of noncompliance. For a major violation, the chief may assess a civil penalty of up to ten thousand dollars for each day of noncompliance. All money collected through the civil penalties will be deposited into the agricultural pollution abatement fund.

Rule 1501:15-5-21 has been developed to fulfill the requirement in ORC 1511.11 (E) (2). This rule establishes the requirements governing the application form to be used for an exemption request from small and medium agricultural operations. If the exemption requests are approved, the operation may receive an exemption for a period of time up to 1 to 2 years from the effective date of the legislation in order to comply with the manure application prohibitions on frozen ground, saturated ground, and during certain weather conditions. The form will require the applicant to state the reasons for the necessity of the exemption and provide an opportunity for the applicant to request technical and/or programmatic assistance.

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

ORC 1511.11 (E) 1 & 2

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

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)?

The Department is statutorily required under Chapter 1511 of ORC with regulating the surface application of manure in the Western Lake Erie Basin (WLEB) of Ohio. The new rules required as a result of ORC 1511.11 (E) will establish: 1) the amount of civil penalty assessed for violating requirements set in ORC 1511.10 (A) 1, 2, & 3 (restrictions for the surface application of manure in the WLEB) and 2) requirements governing the information to be contained in an application form for an exemption request to be submitted by small and medium agricultural operations seeking an extension to comply with ORC 1511.10 (A) 1, 2, & 3.

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

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The Department will investigate complaints of improper manure applications in the WLEB and evaluate compliance with ORC 1511.10 (A) 1, 2, & 3. The Department will also analyze all exemption requests submitted by small and medium operations to evaluate the change in management of these livestock operations. These rules are considered successful when the number of complaints submitted is reduced, and manure applications in violation of ORC 1511.10 (A) 1, 2, & 3 are inconsequential.

Development of the Regulation

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

The following stakeholders comprise a list of agricultural, conservation, and environmental organization found within the state of Ohio. Each stakeholder was given a copy of the rules contained in this package and asked to submit comments to the Department.

Ohio Agribusiness Association – Chris Henney
Ohio Cattlemen’s Association – Elizabeth Harsh
Ohio Corn and Wheat Growers Association –Tadd Nicholson
Ohio Dairy Producers Association – Scott Higgins
Ohio Farm Bureau Federation – Adam Sharp
Ohio Farmers Union – Joe Logan
Ohio Federation of Soil and Water Conservation Districts – Mindy Bankey
Ohio Pork Council – Bryan Humphreys
Ohio Poultry Association – Jim Chakeres
Ohio Soybean Association – Adam Ward
The Nature Conservancy – Josh Knights
Ohio Environmental Council- Adam Rissien

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

Stakeholders provided valuable input on clarification to rules in 1501:15-5-05-21 (A) (3) and (A) (4), which will result in rules being more clearly understood by the impacted agricultural businesses.

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 rules in this package are administrative in nature; therefore, limited scientific data was used in development of these rules.

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?

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ORC 1511.11(E) (1) established a maximum limit on the civil penalty, ensuring that it shall be not more than ten thousand dollars for each violation. Various penalty schemes were considered in developing administrative rules, and it was determined that providing a range up to two thousand dollars for minor violations and up to ten thousand dollars for major violations would allow adequate discretion in minimizing the impact to first time offenders and those making adequate efforts to minimize pollution. Stakeholder participation indicated that this alternative as being the preferred penalty scheme.

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.*

The administrative rules being developed are more procedural or administrative in nature. Recently enacted statute in ORC 1511.11 requires administrative rules to be developed for a civil penalty fee structure and for development of an exemption form for delayed enactment of ORC 1511.10 for small and medium agricultural operations. The requirements outlined in 1511.10 for manure application are performance based.

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

Under Chapter 1511 of the Revised Code, the Chief of the Division of Soil and Water Resources is charged with administering the manure application restrictions for the Western Lake Erie Basin. A review of existing ODNr rules and ODA rules was completed, and no duplication was found.

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 framework to implement this regulation is largely in place as a result of existing administrative code in 1501:15-5-01 to 1501:15-5-20. This code establishes the framework for Ohio's Agricultural Pollution Abatement Program that is implemented statewide. This code allows the Chief of the Division of Soil and Water Resources to enter into cooperative agreements with boards of supervisors of soil and water conservation districts to implement Ohio's Agricultural Pollution Abatement Program. The two new rules being proposed are designed as an extension of this existing program and will be implemented in a similar manner.

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;**

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All farms that surface apply manure within the Western Lake Erie basin will be required to follow the requirements of ORC 1511.10. Only farms applying for a one or two year exemption or those in violation of 1511.10 would be impacted by the administrative rules being developed.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

Farms not in compliance with ORC 1511.10 may be assessed a civil penalty up to two thousand dollars for minor violations and up to ten thousand dollars for major violations. Farms not able to comply with the conditions outlined in ORC 1511.10 may request a one or two year extension dependent on the number of confined livestock. The overall adverse impact for those not able to comply with ORC 1511.10 would include: 1) costs to gather information and submit an exemption form request and 2) the cost of any civil penalties assessed to the farm for noncompliance.

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.

The overall cost or adverse impact from the two rules being proposed should be minimal. The rule specifying the exemption form request is only applicable for those farms not able to comply with ORC 1511.10. It is assumed that most farms will not need to request this exemption, and for those that will be requesting the exemption, the two page application form could be completed in less than one hour. The local soil and water conservation districts are a resource to assist in completing the forms. The rule outlining the civil penalties sections will only apply to those farms not in compliance with ORC 1511.10. It is assumed that most farms will be in compliance with ORC 1511.10, and the maximum penalty for a violation is \$10,000.

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

By providing a one or two year exemption for meeting ORC 1511.10 the adverse impact to the regulated business community or farms is reduced. The adverse impact of the civil penalties for noncompliance is reduced from a maximum of \$10,000 to \$2,000 by creating a two tiered penalty structure. The rule for the civil penalties also sets the penalties to up to two thousand dollars and up to ten thousand dollars to allow discretion in assessing the penalties. The overall justification for implementing these rules is to minimize agricultural pollution from manure applications in protecting Ohio’s streams and Lake Erie. It is necessary for Ohio to create a balance between improving water quality and minimizing the impact to the

agricultural industry for attaining those goals. The nutrient loads are resulting in harmful algal blooms that negatively impact Ohio's recreation, tourism, and drinking water.

Regulatory Flexibility

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

Yes. As proposed, OAC 1501-15-5-21, creates an application form for an exemption from Ohio Revised Code 1511.10(A). The owner or operator of a small or medium agriculture operation may submit this application to the Ohio Department of Natural Resources - Division of Soil and Water Resources. If granted, the exemption for a small agricultural operation will be through July 3, 2017. For medium agricultural operations, the exemption will be through July 3, 2016. Furthermore, ORC 1511.10(B) provides additional means of compliance by allowing farmers to apply manure onto a growing cover crop, inject it into the ground, incorporate it into the soil, or request to make an emergency application.

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?

These proposed rules do not contain administrative fines or civil penalties for paperwork violations.

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

Local soil and water conservation districts will be available to assist small businesses with compliance. The district will be able to provide technical assistance to help producers comply with Ohio Revised Code 1511.10(A). Should the producer choose to apply for an exemption, district will be able to help the producer complete the application form. The Ohio Department of Natural Resources - Division of Soil and Water Resources will also provide similar assistance.