

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Agriculture

Regulation/Package Title: Livestock Environmental Permitting – Five Year Review

Rule Number(s):

901:10-1-(01, 04, 11); 901:10-2-(03, 07, 15, 17, 18); 901:10-3-(03, 05, 06);

901:10-4-(01, 03, 04); 901:10-5-(03, 04); 901:10-6-(05, 06).

Date: October 20, 2016

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☐ Rescinded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.

The rules contained in this package are overseen by the Division of Livestock Environmental Permitting. In December 2000, the state legislature gave the Ohio Department of Agriculture the responsibility for overseeing and permitting Ohio's largest livestock and poultry farms. Program staff is responsible for regulating how Ohio's largest livestock and poultry farms handle manure and waste water, as well as manage flies, rodents and other pests. In addition, program staff reviews architectural and engineering plans for these facilities to help ensure that manure and other waste water is properly contained within the facility and to protect Ohio's waterways and environment.

The rules have been reviewed by the Department and key stakeholders in order to comply with the five year rule review process. More specific information regarding the rules and their proposed amendments, if any, can be found below:

OAC 901:10-1-01 outlines the definitions as used in Division 901:10 of the Ohio Administrative Code. The rule is being amended to add a definition for the term "professional geologist." The term has been defined as a person qualified to practice geology and is presently registered by a state licensing or certification board as recognized by the American Institute of Professional Geologists.

OAC 901:10-1-04 sets forth the fees for the permit and certification applications as administered by the Division of Livestock Environmental Permitting. As the rule currently exists, the rule requires that the Director review the fees as described in the rule on a biennial basis. As amended, the rule will require the Director to review the rules on a periodic basis as necessary. The Department is keenly aware of the costs associated with their program and should any changes are necessary, the Department will participate, as required, in the administrative rule amendment process.

OAC 901:10-1-11 outlines discharge exclusions which do not require an NPDES permit. The rule is being amended to comply with the incorporation by reference standards. Specifically, updated references to CFR sections have been included in the rule. Additionally, the rule has been amended to clarify that the director of environmental protection means the director of the Ohio environmental protection agency.

OAC 901:10-2-03 sets forth standards for geological subsurface explorations required under this chapter. Specifically, the rule requires that these subsurface tests be completed to evaluate the suitability of the soil and ground strength in supporting both fabricated structures and manure lagoons/ponds. The rule is being amended to comply with formatting standards as determined by the Legislative Services Commission. Additionally, other formatting changes have been made to help with reader comprehension. Finally, in accordance with House Bill 64 in the 131st General Assembly, the division of soil and water was transferred from the Ohio Department of Natural Resources to the Ohio Department of Agriculture. The rule has been amended to remove references to the former division. No substantive changes have been made to this rule.

OAC 901:10-2-07 outlines the application requirements for a permit to operate and/or a national pollutant discharge elimination system permit. No changes have been made to this rule.

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OAC 901:10-2-15 outlines requirements for plans for the disposal of dead livestock. The rule has been amended to make formatting changes which helps clarify the rule. No substantive changes have been made to this rule.

OAC 901:10-2-17 sets forth the requirements for emergency response plans. The rule has been amended to make formatting changes which helps clarify the rule. Further a spelling error has been corrected. No substantive changes have been made to this rule.

OAC 901:10-2-18 outlines the requirements and procedures for when a facility no longer seeks a permit to operate by the Department. The rule has been amended to make formatting changes which helps clarify the rule. Further a spelling error has been corrected. No substantive changes have been made to this rule.

OAC 901:10-3-03 applies to discharges resulting from the production areas at horse and sheep concentrated animal feeding operations. The rule states that there shall be no discharge of such manures to the waters of the state. No changes have been made to this rule.

OAC 901:10-3-05 applies to discharges resulting from the production areas at duck concentrated animal feeding operations. The rule states that there shall be no discharge of such manures to the waters of the state. No changes have been made to this rule.

OAC 901:10-3-06 applies to discharges resulting from the production areas at swine, poultry, and veal calves concentrated animal feeding operations. The rule states that there shall be no discharge of such manures to the waters of the state. The rule is being amended to comply with the incorporation by reference standards. Specifically, updated references to CFR sections have been included in the rule. No substantive changes have been made to this rule.

OAC 901:10-3-11 outlines the process for obtaining a stormwater permit. The rule is being amended to comply with the incorporation by reference standards. Specifically, updated references to CFR sections have been included in the rule. Further, formatting changes have been made to remove the word “comment” from the rule. No substantive changes have been made to this rule.

OAC 901:10-4-01 outlines the requirements for a general permit to operate. The rule is being amended to add the word “and” to paragraph (E)(2)(c)(ii) to clarify that the Directory may consider all of the options (listed in paragraphs (i) through (iii)) in considering the discharge as a significant contributor of pollutants.

OAC 901:10-4-03 sets forth the notice requirements for those desiring to be covered by a general permit to operate. If all information is present, the director will notify the public and provide a thirty day window to submit public comments regarding the prospective permit. The rule has been amended to correct a grammatical error.

OAC 901:10-4-04 outlines the criteria for issuing and renewing NPDES general permits to operate. The rule has been amended to update a code reference that has changed.

OAC 901:10-5-03 outlines the enforcement procedures for violations of Chapter 903 of the Revised Code – or – the rules in Chapter 901:10 of the Administrative Code. The rule is being amended to remove all references to a review compliance certificate. Review compliance certificates have been eliminated from use due to the conversion of Ohio EPA’s permits to install into current ODA permits to operate. Further, in paragraph (D)(2) of the rule, a link was inappropriately placed in the rule. This link has been removed.

OAC 901:10-5-04 sets forth the civil penalty procedures and the penalty matrix for violations of this chapter. The rule is being amended to make formatting changes which allow for easier comprehension. Additionally, formatting changes have been made to the rule in order to comply with LSC’s drafting manual. There have been no substantive changes made to this rule.

OAC 901:10-6-05 sets forth the requirements for an NPDES fact sheet that must be prepared and mailed to all those interested. No changes have been made to this rule.

OAC 901:10-6-06 requires ODA to maintain a mailing list for interested persons. No changes have been made to this rule.

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

R.C. 903.08; 903.10

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.
Generally the regulations do not implement a federal requirement; however Section 901:10-3 of the Administrative Code implements the federal regulations for a national pollutant discharge elimination system (NPDES) permit under 40 C.F.R. 122.23 for those facilities which experience a discharge of pollutants.

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)?

Under Chapter 903 of the Revised Code, the Department is required to regulate concentrated animal feeding facilities (CAFFs) and concentrated animal feeding operations (CAFOs) and must establish a permitting system for such regulation. Additionally, these regulations implement permitting guidelines for the issuance of NPDES permits under the Federal Water Pollution Control Act when the USEPA approved the requested permit delegation transfer.

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These regulations ensure the state's largest operations follow science-based guidelines that protect the environment and the public while allowing the facility to be productive.

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

All CAFOs and CAFFs covered by these rules are inspected and any complaints regarding unsafe operations and/or discharges are investigated. The rules are judged as being successful when inspections and investigations find few violations or structural failures, and when there is no increase in the number of discharge reports filed with the Department.

Development of the Regulation

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

These rules were reviewed and amended by a broad group of stakeholders including the Concentrated Animal Feeding Facility Advisory Committee (CAFF Advisory Committee), interested members of the public, and various other professionals. The Committee met multiple times to discuss the content of the rules up for review and the suggested revisions.

The current composition of the committee is:

Carl Link – Ohio Pork Producers Council
Matt Andreas – Ohio Dairy Producers Association
Glen Feichtner – Ohio Cattlemen’s Association
Tom Herzfedl, Jr. – Ohio Poultry Association
Roger High – Ohio Sheep Improvement Association
Michael Mull, DVM – Ohio Veterinary Medical Association
Tony Anderson – Ohio County Commissioners Association of Ohio
Eric Dresbach – Ohio Water Environment Association
Jason Menchhofer – Ohio Environmental Health Association
Dick Lorenz – Water Management Association of Ohio
Adam Rissien – Ohio Environmental Council
Karen Chapman – Environmental Defense Fund
Vince Messerly – Public Representative
Russell Ludwig – Public Representative

Jack Rohrbach – Public Representative

Jim Raab – Ohio Department of Natural Resources

Rick Wilson – Ohio EPA

Maurice Eastridge, PhD – The Ohio State University

Kevin Elder – Ohio Department of Agriculture

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

On June 2, 2016, the CAFF advisory committee met to discuss topics related to the administration of Chapter 903 of the Revised Code. Specifically, the CAFF advisory committee discussed the implementation of Senate Bill 1 and Senate Bill 150 and their impacts to Chapter 903 of the Revised Code. In addition, the committee reviewed and discussed the rules of this package as they were up for five year rule review.

There was a great deal of discussion regarding all of the rules at the June 2nd meeting, however much of the conversation was centered on a select number of rules. OAC 901:10-1-04(O) was discussed at length with regards to the manner in which the Department would review the fees established by that rule. The committee voted to eliminate the Department's proposal to include language that the Department would review fees to determine the "cost of doing business." OAC 10-2-03 was discussed to determine whether requiring additional well logs to be contained in the geological report. Currently, the rule requires any well within 1,000 feet of the planned manure storage or treatment facility to be submitted. Some on the committee proposed that this distance be expanded to 2,500 feet. Department staff indicated that currently, most geological reports on liquid systems provide well logs out to 2,500 feet and most even go beyond this distance. The discussion was tabled until next meeting. At the end of the meeting, the committee elected to approve all of the rules submitted to the committee on that date except for OAC 10-1-04 and OAC 10-2-03.

On August 16, 2016, the CAFF advisory committee met again. At that meeting, the committee discussed OAC 10-1-01, OAC 10-1-04 and OAC 10-2-03. This was a continuation of the discussion held on June 2, 2016. At that meeting, the committee elected to approve a definition of "professional geologist" and voted to keep the requirement of well logs to be included with the geological reports within 1,000 feet. Additionally, the committee approved the finalized version of OAC 10-1-04.

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 are based on scientific manuals for best management practices where applicable, including but not limited to “Ohio Natural Resource Conservation Service, Conservation Practice Standards Section IV, Field Office Technical Guide” and “Agricultural Waste Management Field Handbook,” June 1999.

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?

As noted in question 8, the rules were changed as input was received from the various stakeholder groups and committees. Alternatives proposed at the meetings were analyzed, discussed, and often accepted. These alternatives were considered and parts adopted through interaction with the stakeholder community on what was appropriate and needed, and why some of these alternatives were not necessary and were too expensive to implement. The current rules were proposed as a result of consideration of these alternatives, and will ensure public safety and environmental protection. For Chapter 901:10-3, these regulations implement federal regulations, and as the state regulations must be the same or equal to the federal regulations, no alternative regulations were considered.

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.

As these regulations set minimum safety standards to protect the environment and the public, performance-based regulations are not appropriate.

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

The Department is given the sole regulatory authority over this matter in R.C. 903.08 and 903.10.

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 rules are already implemented without the above mentioned amendments and are communicated to the affected communities. Additional education and outreach will be performed with the affected communities of the changes by the DLEP, as well as with the

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committee that meets up to four times a year. Permit holders and applicants will have educational materials made available to them, and Department staff will assist with identifying infrastructure and operational needs of permit holders. The staff members of the DLEP ensure that all permit holders in Ohio are treated 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;

Any livestock and poultry farms that are considered CAFOs and/or CAFFs as they are defined under the statute are required to comply with these rules.

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

As currently implemented, the rules require each facility to be permitted and require time and cost to comply with the regulations, including the engineering and sanitary regulations affecting each facility. These rule amendments are not expected to have any new adverse impact.

The rules require soil and water testing depending on the facility. In addition, the rules require records to be generated and maintained, certain plans to be developed and adhered to, and to prevent any manure discharges into the waters of the State.

Further, permit holders may be subject to fines and other enforcement actions for violations to ORC Chapter 903 or the rules adopted thereunder.

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.

Each CAFO/CAFF must obtain either a permit to install, or a permit to operate, and other permits depending on the location and size of the facility. The fees for these permits can be found in OAC 10-1-04 and vary from \$500 to \$2,250.

All manure storage structures at the applicant’s property must be built in compliance with the standards set forth in rule. The Department’s engineers and inspectors review and inspect these facilities to ensure compliance. In addition, depending on the location of the facility the applicant may need to conduct water testing in order to

determine the ground water quality characteristics. These tests are done to determine the soil and water characteristics of the site in order to provide the applicant the information necessary to most efficiently plan the facility's manure storage locations and operations.

The cost of the plans required by these rules varies widely based on the location of the facility, the size of the facility, and if an independent contractor is selected to complete these plans.

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

The regulatory intent of the rules is to ensure public safety and environmental protection of Ohio's waterways and groundwater by regulating how Ohio's largest livestock and poultry farms handle and store manure. These rules achieve this protection by requiring standards that permit Ohio's farms affected by this regulation to still operate cost-effectively. Therefore, the adverse impact is considered to be justified.

Regulatory Flexibility

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

The regulations have different requirements depending on the size of the animal feeding facility. Major concentrated feeding facilities are required to be at greater distances from water sources than large, concentrated animal feeding facilities. The difference in requirements reflects additional safety requirements due to the amount of liquid or solid manure stored at the facility and the possible risk of contamination. Small and Medium facilities, if they have no discharges, are not regulated by these rules.

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?

The Department is primarily concerned with protecting public safety and the environment through compliance with these rules. Whenever possible, the Department will treat administrative violations that do not involve environmental damage as opportunities for improvement through warning notices and solicitation of corrective actions. Harsher enforcement options will be reserved for offenders who do not cooperate or those that have repeated violations.

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

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The Department has online resources and has field staff available to provide assistance. Training and seminars are also available.