

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Agriculture

Regulation/Package Title: Soil & Water – Civil Penalty Rule

Rule Number(s): 901:13-1-99

Date: March 6, 2017

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☒ Rescinded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.

On July 3, 2015, Substitute Senate Bill 1 of Ohio's 131st General Assembly passed into law Ohio Revised Code (hereinafter "ORC") section 1511.10 which prohibited any individual from making surface applications of manure in Ohio's Western Basin under certain conditions. Further, Senate Bill 1 stated that the Director of Agriculture and the Chief of the Division of Soil and Water Resources shall adopt rules establishing the amount of the civil penalty for violations of ORC 1511.10. Ohio Administrative Code (hereinafter "OAC") 901:13-1-99 was created to fulfill this requirement and became effective on January 31, 2016.

Amended Substitute House Bill No. 64 of the 131st General Assembly transferred the Agricultural Soil and Water Conservation Program from the Ohio Department of Natural Resources to the Ohio Department of Agriculture effective January 1, 2016. With this bill, Chapter 939 of the Revised Code was created. Specifically, ORC 1511.10 was renumbered to 939.08. Additionally, ORC 939.02 was created giving the Director the authority to power to levy civil penalties for violations of any provision of the Chapter or the rules promulgated under it.

As stated above, the original 901:13-1-99 only referenced civil penalties for violations of 939.08 (formerly 1511.10). In accordance with the Legislative Service Commissions administrative rule drafting manual, the original rule has been proposed to be rescinded as there are amendments to more than 50% of the existing rule. The proposed 901:13-1-99 meets the statutory obligation in 939.02 by establishing the amount of the civil penalties for each potential violation of Chapter 939 or OAC Chapter 901:13-1. These penalties range from two-hundred and fifty dollars to ten thousand dollars based on the severity of the violation and any past non-compliance history with the violator.

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

R.C. 939.02

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.

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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 ORC Chapter 939, the Department is required to establish feasible and economically reasonable standards to achieve a level of management and conservation practices in farming operations that will abate wind or water erosion of the soil and abate the degradation of the waters of the state by residual farm products, manure, or soil sediment. The establishment of these standards, as well as, the enforcement mechanisms outlined in this rule, enable Ohioans to conserve, protect, and enhance soil, water, and land resources.

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

Any complaints regarding unsafe operations and/or discharges are investigated. The rules are judged as being successful when inspections and investigations find few violations 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.

Pursuant to ORC 939.02(E), the Ohio Department of Agriculture is to promulgate rules upon the advice and consent of the Commission. Further, the Commission is statutorily created to provide support and advice to the Ohio Department of Agriculture and the 88 soil and water conservation districts in the state.

On November 9, 2016, this rule was submitted to the Ohio Soil & Water Conservation Commission. The Commission reviewed the rule and was generally supportive. The composition of the Commission at the time of the meeting was:

Tom Price	Chairperson
Fred Cash	Vice Chairperson
Bill Knapke	Member
Etta Reed	Member
Bill Tom	Member
Larry Vance	OFSWCD Appointee
James Zehringer (Represented by Jim Raab)	Director, ODNR
Bruce A. McPherson (Represented by Scott Shearer),	Vice President, OSU CFAES
David Daniels (Represented by Kevin Elder)	Director, ODA
Craig W. Butler, (Represented by Russ Gibson),	Director, Ohio EPA
Kris Swartz	OFSWCD Officer

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Kirk Hines

Chief, Division of Soil and Water, ODA

On December 20, 2016, the proposed rule was emailed to industry stakeholders seeking their advice and input. ODA received a small number of phone calls regarding the proposed rule. The majority of the calls were to clear up confusion regarding the existing 901:13-1-99 and the proposed version. ODA received substantive comments from the Ohio Environmental Council, the Lake Erie Charter Boar Association, the Ohio Environmental Stewardship Alliance, and the Sierra Club Ohio Chapter. These substantive comments are addressed below in paragraph # 8.

The stakeholders emailed were as follows:

Capitol Consulting	Belinda Jones
County Commissioners Association of Ohio	Brian Mead
Environmental Defense Fund	Katie Chapman
Environmental Law & Policy Center	Madeline Fleisher
Ohio Agribusiness Assoc.	Andrew Allman
Ohio Agribusiness Assoc.	Chris Henney
Ohio Agribusiness Assoc.	Margo Long
Ohio Beef Council/Ohio Cattlemen's Association	Elizabeth Harsh
Ohio Corn & Wheat	John Torres
Ohio Corn & Wheat	Tadd Nicholson
Ohio Dairy Producers	Scott Higgins
Ohio Environmental Council	Adam Rissien
Ohio Environmental Council	Jack Shaner
Ohio Farm Bureau	Jack Irvin
Ohio Farm Bureau	Larry Antosh
Ohio Farm Bureau	Tony Seegers
Ohio Farm Bureau	Yvonne Lesicko
Ohio Farmers Union	Joe Logan
Ohio Farmers Union	Linda Borton
Ohio Farmers Union	Roger Wise
Ohio Federation of Soil and Water Conservation Districts	Mindy Bankey
Ohio Forestry Association	John Dorka
Ohio Forestry Association	Michael Geary
Ohio Nursery Landscape Association	Kevin Thompson
Ohio Pork Producers Council	Bryan Humphreys
Ohio Poultry Association	Jim Chakeres
Ohio Seed Improvement Association	John Armstrong
Ohio Soil and Water Conservation Commission	Tom Price
Ohio Soybean Council	Kirk Merritt

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Ohio Soybean Council
Ohio Turf Association
Ohio Wine Producers
The Nature Conservancy
The Nature Conservancy
The Nature Conservancy
The Nature Conservancy
The Nature Conservancy

Adam Ward
Brian Laurent
Donniella Winchell
Anthony Sasson
Jessica D'Ambrosio
John Stark
Josh Knights
Sara Madenwald

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

As stated above, on January 19, 2017, ODA received substantive comments from the Ohio Environmental Council, the Lake Erie Charter Boar Association, the Ohio Environmental Stewardship Alliance, and the Sierra Club Ohio Chapter. These substantive comments were sent to ODA collectively in one letter.

In summary, the comments requested that ODA increase the severity of the civil penalties levied for certain violations and establish a minimum penalty for major violations. Further, the comments requested the Department establish “a specific inspection program to ensure operations adhere to their plans.”

The Department elected to not incorporate the proposed changes into the rule. The Department enforces and considers all violations to be significant; however, a tiered approach was established to identify the violations for which the Department believes have the greatest impact on the environment and an appropriate maximum penalty. Additionally, the Department believes that this classification is consistent with several important steps regarding water quality in the state over the last few years. Specifically, the designation of Grand Lake St. Marys as a watershed in distress and the General Assembly’s legislative action prohibiting the application of manure on frozen and snow covered ground in the Western Lake Erie Basin. The proposed rule is consistent with these important steps, as violations to ORC 939.08 and paragraphs (B)(1), (B)(2), (B)(3) and (B)(5) of OAC 901:13-11 are the only major violations. Therefore, the Department elected to not adopt the coalitions’ suggested changes to elevate certain sections of the OAC to major violations.

In addition, the Department declined to establish a minimum penalty for major violations. Each violation has a unique set of facts and circumstances for which the Department considers when taking action. The establishment of a minimum penalty amount removes this

flexibility from the Department which could result in inequitable enforcement amongst violations. For those reasons, the Department declines to establish a minimum penalty for major violations as this provides the Department flexibility in responding to each violation.

Finally, the Department lacks the statutory authority to adopt an inspection program for all operations with manure management plans. Currently, the Department does not have the statutory authority to inspect without the landowner's permission absent a reason to believe that a violation exists. Therefore, absent this authority the Department lacks the statutory authority to create the inspection program referenced by the coalition.

In addition to the comments made above, the coalition requested that the Department review the remainder of the rules found in Chapter 901:13-1 of the Administrative Code. The Department did not address the coalition's comments for the rules outside of the one in this package. However, the remainder of this chapter is up for five-year-rule review at the conclusion of this year. The Department will work with these stakeholders, and all other stakeholders, in addressing the comments made to those rules.

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?

As this rule is purely an administrative one, no scientific data was used to develop the rule.

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?

ORC 939.02 requires the Department to adopt a schedule of civil penalties for violations of ORC Chapter 939 and OAC Chapter 901:13-1. Therefore, no other 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.

The proposed rule sets out a schedule of fines for statutory and administrative rule violations. Therefore, performance based regulations are not applicable.

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 ORC 939.02.

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.

Additional education and outreach will be performed with the affected communities of the changes with this rule. The staff members of the Division of Soil and Water ensure that all Ohioans 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;

Individuals who violate a provision of ORC Chapter 939 and OAC Chapter 901:13-1.

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

Individuals who violate a provision of ORC Chapter 939 and OAC Chapter 901:13-1 may be subject to civil penalties as outlined in this rule.

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.

There is no quantifiable impact for those individuals who remain in compliance with the standards in ORC Chapter 939 and OAC Chapter 901:13-1. However, individuals who do commit a violation of either of those chapters may be subject to civil fines in amounts from \$250 to \$10,000. The amount of the violation depends on the particular rule violated, the severity of the violation, and any past history of non-compliance.

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

ORC 939.02 requires the Department to adopt a schedule of civil penalties for violations of ORC Chapter 939 and OAC Chapter 901:13-1. Regardless, the regulatory intent of OAC Chapter 901:13-1 is to ensure protection of Ohio's natural resources by establishing best management practices and other technical guidance for Ohio's agricultural community to follow. Failure to follow these practices may result in a degradation of Ohio's natural resources through pollution and erosion. Civil penalties are enforcement tools which help to

ensure that these practices are maintained. 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.

As the regulatory intent of this rule is to ensure protection of Ohio's natural resources, no exemptions or alternative means of compliance are provided.

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?

Soil and Water Conservation Districts are present in every Ohio County to provide technical assistance to landowners. The Ohio Department of Agriculture can also provide financial assistance through the Agricultural Pollution Abatement Program's cost share fund for the installation of structural practices to achieve compliance with the regulation.