

**MEMORANDUM**

**TO:** David Miran, Ohio Department of Agriculture

**FROM:** Travis Butchello, Regulatory Policy Advocate

**DATE:** September 11, 2017

**RE:** **CSI Review – Plant Health-Invasive Plants (OAC 901:5-30-01 and 901:5-30-02)**

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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) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

**Analysis**

This rule package consists of two new rules proposed by the Ohio Department of Agriculture (ODA). The rule package was submitted to the CSI Office on June 20, 2017 and the public comment period was held open through July 7, 2017. Amended rules were submitted on July 14, 2017 with a second comment period open until July 24, 2017. Seven comments were received during the both comment periods.

The new rules establish a list of invasive plant species in Ohio and allow ODA to regulate the species by identifying them and establishing prohibited activities associated with them including sale, distribution, and cultivation. The purpose of the rules is to regulate the invasive plants in compliance with Am. S.B. 192 of the 130<sup>th</sup> General Assembly. By establishing the provisions contained in the rules, ODA contends they are helping protect Ohio's native plant life.

ODA engaged in a two-year long stakeholder outreach process, which included contacting all of the nurseries across the state including the Ohio Nursery and Landscape Association (ONLA), park systems, and municipalities. During this process, many concerns were raised by

stakeholders, which included plants on the list, the process of adding or subtracting plants from the list, evaluation criteria to determine which plants are invasive, and phase out periods. For example, one stakeholder organization stated two types of grass were on the list that are used as livestock feed. ODA responded that per ORC 901.50, they would remove the grasses because they are exempt from the list due to their purpose of being used as feed. Throughout the early stakeholder outreach process and public comment period, numerous concerns were raised by the ONLA and ODA had multiple conversations to discuss their issues appropriately.

First, the ONLA expressed concern about the objectivity of the evaluation process for which species of plants made the list. In particular, they referenced ODA's advisory use of the Ohio Invasive Plants Council (OIPC), which is made up of academics, scientists, and an industry professional. The ONLA contended there were no mechanisms in place preventing local government land managers from sending a recommendation to the OIPC, stating a plant was invasive without objective proof, and thereby allowing the OIPC to determine a plant was invasive based on the recommendation when in fact, the plant was not. After subsequent conversations between the ONLA, ODA, and CSI, ODA explained that the OIPC is an advisory council to the ODA and their recommendation is not binding. Further, they noted that the OIPC does not make recommendations based solely on a land manager's opinion and other factors, such as quantitative data of the plant's adverse impact on native species in Ohio, weigh in determining which plants OIPC thinks should make the list.

Second, the ONLA contended that ODA should first consult the entire nursery industry before they determine a phase out period to ensure that the financial impact to the nurseries is the least amount possible. ODA took issue with these suggestions and responded that the ORC directs ODA to evaluate the economic impact of a plant species on the State, not on nurseries. Subsequent discussions with the ONLA and CSI clarified to ONLA that the CSI process includes an economic impact analysis. During the CSI process, the ONLA would have the opportunity to comment and ODA would be required to approximate the adverse cost to the industry.

ODA contends that they will continue to have an open dialogue with the ONLA regarding plants that are added or subtracted from the list, phase out periods and their impact on the industry, and the evaluation criteria, which influence ODA's choice to remove or add a plant to the list. As done throughout the draft rule process where ODA removed two species from the list based upon feedback by stakeholders, they maintain that they will continue to solicit the opinion from relevant stakeholders including the ONLA to ensure that the correct and proper plants exist on the invasive species list. As a result of the conversations with both ODA and CSI, the ONLA was satisfied with the final version of the rules.

Seven comments were submitted during the CSI public comment periods and were made by members of associations who were also engaged during the early stakeholder outreach period. Each of the seven comments referenced the aforementioned categories of issues raised during the early stakeholder outreach process and ODA chose to respond similarly.

The rules impact any person who produces, sells, offers to sell, transports or plans to transport any of the prohibited plants listed in the rule. Nurseries may incur some losses of revenue for plants that may be included on the list however, ODA contends that the purpose of the phase out periods was to help nurseries plan and reduce their stock accordingly to reduce as much adverse impact as possible. ODA states in the BIA that the regulatory intent outweighs the adverse impact because ODA is required to create and maintain an invasive plant species list to ensure compliance with the ORC and they engaged stakeholder feedback as required by CSI process to help create the final list.

### **Recommendation**

For the reasons explained above, this office does not have any recommendations regarding this rule package.

### **Conclusion**

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