

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Agriculture

Regulation/Package Title: Soil & Water Conservation – Five Year Rule Review 2017

Rule Number(s): 901:13-1-(01-09, 12-20)

Date: December 18, 2017

Rule Type:

☒ New

☒ 5-Year Review

☒ Amended

☒ Rescinded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.

Chapter 901:13-1 of the Ohio Administrative Code (OAC) establishes state standards for a level of management and conservation practices to farming and animal feeding operations on farms in order to abate excessive soil erosion or the pollution of waters of the state by soil sediment including pollutants attached to the sediment and animal manure. This chapter further defines Ohio's pollution abatement grant program for landowners or operators to voluntarily install conservation practices.

The rules have been reviewed and amended pursuant to Chapter 119 of the Ohio Revised Code (ORC). The rules and the proposed amendments are as follows:

OAC 901:13-1-01 outlines the purpose of the Chapter and the definitions used within it. The rule has been amended to delete definitions of terms that are not used in the chapter and amend certain definitions to ensure that consistent terminology is being used throughout the chapter. Further, definitions were amended to ensure that these terms match the statutory definitions found in Chapter 939 of the Revised Code.

OAC 901:13-1-02 states that owners, operators, or persons responsible for an animal feeding operation (hereinafter “operator”) shall prevent pollution by operating and maintaining their facilities so that overflow or discharge of manure into waters of the state is prevented. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission’s guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-03 states that operators shall prevent pollution by designing, constructing, operating, and maintaining their operations to prevent seepage. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission’s guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-04 states that operators shall prevent pollution from discharge of manure contaminated runoff from animal feed lots and manure management facilities. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the

Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-05 states that operators shall prevent pollution from residual farm products. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. Further, the existing rule regulates "other waste waters." Due to a definitional change in OAC 901:13-1-01, this term has been replaced with "residual farm products."

OAC 901:13-1-06 states that operators shall prevent pollution caused from flooding of animal feeding operations. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-07 states that operators shall prevent pollution caused from sheet and rill erosion. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-08 states that operators shall prevent pollution caused from gully erosion. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-09 states that operators shall prevent pollution caused from wind erosion. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is

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due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-12 states that operators shall prevent pollution caused by placing soil directly into or in such a position that it may readily erode or slough into waters of the state. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-13 states that operators shall prevent pollution caused from composting dead animals. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-14 outlines the cost sharing program established pursuant to ORC 939.02(F). The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

OAC 901:13-1-15 is proposed to be rescinded. The rule outlined administrative procedures for the chapter. The contents of this rule have been incorporated in OAC 901:13-1-17.

OAC 901:13-1-16 outlines the operating procedures of the Department and the local soil and water districts in administering ORC Chapter 939 and OAC Chapter 901:13-1. The existing rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. Several paragraphs of the existing rule have been removed and incorporated into OAC 901:13-1-17. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. Further, the rule has been significantly streamlined in order to cut down on duplicative language.

OAC 901:13-1-17 outlines the operating procedures of the Department and the local soil and water districts in administering ORC Chapter 939 and OAC Chapter 901:13-1. The existing

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rule is proposed to be rescinded and replaced by a new version. The rescission is due to the Legislative Service Commission's guide on administrative rule drafting which states that if more than 50% of an existing rule has been amended it shall be rescinded and replaced with a new version. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. Further, the rule has been significantly streamlined in order to cut down on duplicative language. Finally, the proposed rule outlines the enforcement procedures from the investigation to emergency orders.

OAC 901:13-1-18 outlines the Department's authority to enter into agreements with soil and water districts. No changes have been proposed to this rule.

OAC 901:13-1-19 outlines the nutrient management planning requirements for watersheds in distress. The rule has been amended to reduce the frequency of review of these plans. The Department found that many of the management plans were needlessly reviewed every three years. In order to reduce the administrative cost of review, the Department has proposed to review every five years rather than three.

OAC 901:13-1-20 states that the director may designate watersheds in distress. The amendments proposed alter the format and structure of the rule which should allow for easier reading comprehension. The amendments do not impact the substance of the rule.

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?

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)?

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 these rules, enables Ohioans to conserve, protect, and enhance soil, water, and land resources.

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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 Ohio Soil & Water Conservation 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.

During a Commission meeting held on July 17, 2017, the Department discussed the draft rules and the proposed process with the Commission. The rules were then formally sent to the Commission on August 28, 2017.

On August 28, 2017, the Department sent via email the proposed rules to a large list of stakeholder groups. ODA received substantive comments from the Ohio Environmental Council; the Ohio Farm Bureau; Ms. Vickie Askins; and a coalition of the following commodity groups: the Ohio Pork Council, the Ohio Poultry Association, the Ohio Cattleman's Association, and the Ohio Dairy Producers Association. These substantive comments are addressed below in paragraph # 8.

The stakeholders emailed were as follows:

Ohio Environmental Council	Adam Rissien
Ohio State University	Adam Ward
Ohio Ecological Food and Farm Association	Amalie Lipstreu
Ohio Agribusiness Assoc.	Andrew Allman
The Nature Conservancy	Anthony Sasson
Capitol Consulting	Belinda Jones
Ohio Turf Association	Brian Laurent
County Commissioners Association of Ohio	Brian Mead

Ohio Pork Producers Council	Bryan Humphreys
Ohio Agribusiness Assoc.	Chris Henney
Ohio Wine Producers	Donniella Winchell
Ohio Beef Council/Ohio Cattlemen's Association	Elizabeth Harsh
Ohio Farm Bureau	Jack Irvin
Sierra Club, Ohio Chapter	Jennifer Miller
The Nature Conservancy	Jessica D'Ambrosio
Ohio Poultry Association	Jim Chakeres
Ohio Farmers Union	Joe Logan
Ohio Seed Improvement Assoc	John Armstrong
Ohio Forestry Association	John Dorka
The Nature Conservancy	John Stark
Ohio Corn & Wheat	John Torres
The Nature Conservancy	Josh Knights
Environmental Defense Fund	Katie Champan
Ohio Nursery Landscape Association	Kevin Thompson
Ohio Soybean Council	Kirk Merritt
Ohio Farm Bureau	Larry Antosch
Ohio Farmers Union	Linda Borton
Environmental Law & Policy Center	Madeline Fleisher
Ohio Agribusiness Assoc.	Margo Long
Lake Erie Foundation	Matt Fisher
Ohio Forestry Association	Michael Geary

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Ohio Federation of Soil and Water Conservation Districts	Mindy Bankey
Lake Erie Charter Boat Association	Paul Pacholski
The Nature Conservancy	Sara Madenwald
Ohio Dairy Producers	Scott Higgins
Ohio Corn & Wheat	Tadd Nicholson
Ohio Soil and Water Conservation Commission	Tom Price

On November 9, 2017, these rules were submitted to the Ohio Soil & Water Conservation Commission. The Commission reviewed the rules and approved the filing of these rules with the Common Sense Initiative and JCARR. 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
Dennis Corcoran	Member
Clark Sheets	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
Harold Neuenschwander	OFSWCD Officer
Kirk Hines	Chief, Division of Soil and Water, ODA

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, ODA received substantive comments from the Ohio Environmental Council; the Ohio Farm Bureau; Ms. Vickie Askins; and a coalition of the following commodity groups: the Ohio Pork Council, the Ohio Poultry Association, the Ohio

Cattleman's Association, and the Ohio Dairy Producers Association. These comments were made in relation to the set of proposed rules sent on August 28, 2017.

The rules sent to stakeholders on August 28, 2017, proposed modifying the NRCS 590 standards contained in the Field Office Technical Guide. The Department's proposed modification of these standards was due to potential conflicts with Chapter 939 of the Revised Code. Each stakeholder provided comments on this rule. Specifically, the Ohio Environmental Council stated that the ODA's rules should adopt the existing NRCS 590 standards rather than the proposed modified NRCS 590 standards. The Commodity Groups supported the streamlining of the standard in rules. The Ohio Farm Bureau Federation stated that the modification of the NRCS 590 standards could create additional confusion for livestock farmers. Based on the input of these stakeholders, the Department removed OAC 901:13-1-11 from this rule package. The Department continues to review the NRCS 590 standards and its interaction with Chapter 939 of the Revised Code.

Further, the remainder of the comments revolved around code references, definitions, and answering questions regarding the rules and/or the Department's statutory authority for certain rules. A large majority of the proposed definitional changes/concerns were addressed by the Department.

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 of this chapter are primarily based off of the Natural Resources Conservation Services (NRCS) Field Office Technical Guide. The Field Office Technical Guide is the primary technical reference for NRCS. It contains technical information about the conservation of soil, water, air, plant, and animal resources. The FOTG is managed by NRCS state technical specialists, but contains technical knowledge and standards used by field conservationists at the local level. These standards are based off of years of scientific research and study.

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 stated in paragraph eight above, the Department proposed modifying the NRCS 590 standards contained in the Field Office Technical Guide. The Department received comments both in favor and in opposition to this action. As a result of these comments, the Department pulled the modification from this rule package.

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 rules outline the set of best management practices to be used in abating agricultural pollution. These practices can be implemented in a variety of ways which depend on the operation, the number of animals, and the geographical layout of the facility. Therefore, the regulations are performance based.

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;

All animal feeding operations which are not subject to the licensing requirements of the Ohio Department of Agriculture, Livestock Environmental Permitting Program or subject to an NPDES permit through the United States Environmental Protection Agency.

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

Operations must invest time and resources in implementing the best management practices outlined by the rules of this chapter. Individuals who violate a provision of ORC Chapter 939 and OAC Chapter 901:13-1 may be subject to civil penalties or be required to take corrective actions as outlined in these rule.

c. Quantify the expected adverse impact from the regulation.

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

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who do commit a violation of these rules 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. Further, the quantified impact of corrective actions will depend entirely on the violation and the means to correct that violation.

Further, implementation of these best management practices could result in overall cost savings through more efficient nutrient use and higher yields in their agricultural practices.

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

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

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assistance through the Agricultural Pollution Abatement Program's cost share fund for the installation of structural practices to achieve compliance with the regulation.