

**MEMORANDUM**

TO: David Miran, Ohio Department of Agriculture

FROM: Danielle Dillard, Regulatory Policy Advocate

DATE: October 15, 2018

RE: **CSI Review – Watersheds in Distress (OAC 901:13-1-11, 901:13-1-19, 901:13-1-20, and 901:13-1-99)**

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 four amended rules submitted by the Ohio Department of Agriculture (Department) as part of the statutorily required five-year rule review. The rule package was submitted to the CSI Office on September 24, 2018 and the comment period closed on October 5, 2018. Seven comments were received during this time and responses to those comments were provided on October 12, 2018.

The rules in Ohio Administrative Code (OAC) 901:13-1 set forth the guidelines for application of manure and nutrients impacting distressed watersheds in the state of Ohio. Farms within watersheds that have been designated as distressed are subject to the enforcement of 590 standards even if they have not experienced a discharge to waters of the state. Farms outside of watersheds that have been designated as distressed are subject to enforcement of 590 standards only if they experience a discharge. These standards include limiting application rates for manure and nutrients based on field conditions, as well as minimum setback distances for the application of manure in order to protect water quality.

The proposed amendments update existing regulations for distressed watersheds located in the Western Lake Erie Basin to reflect the standards enacted in Senate Bill 1 of the 131st General Assembly. The statute does not include the current prohibition against spreading manure between December 15 and March 1, but instead incorporates a standard which bars spreading manure on frozen, snow-covered, or rain-soaked ground unless certain precautions are taken. Updating the standards to reflect Senate Bill 1 will allow for more general application of these rules throughout the state if necessary. OAC 901:13-1-19 outlines the nutrient management planning requirements for watersheds in distress, and the amendments will require all owners, operators, or persons responsible for applying nutrients on more than fifty acres on an annual basis within a watershed in distress to develop a nutrient management plan. The Department will adopt an attestation mechanism of approval of nutrient management plans, with the ability to request a plan at its discretion, in lieu of requiring that all plans be submitted and approved.

As part of early stakeholder outreach, the Department provided a copy of the rules to the leaders of several farm, animal, and environmental organizations within Ohio and asked for comment. It also held a series of meetings with interested stakeholders to discuss the rules. The Department received a considerable amount of feedback encompassing a wide range of issues. Some stakeholders were supportive of the rules, noting the positive impacts that will result. Others raised concerns that the rules do not go far enough to regulate and restrict harmful practices. The Department also received feedback concerning the overall monetary costs to the farm industry and the Department's capacity to implement the rules.

The Department made a number of revisions following early stakeholder outreach. Most notably, it amended the rules to mirror the existing state standards for the application of manure and fertilizer on frozen, snow-covered, and rain-soaked ground in the Western Lake Erie Basin. It also removed the manure application prohibition window for Grand Lake Saint Marys. Finally, the Department increased its flexibility in establishing the deadline for the submission and approval of nutrient management plans, and will allow farmers to attest to the completion of their plans by the deadline while maintaining Department oversight to verify completion and incorporation of the plans.

The Department notes that the amendments to the nutrient management plan requirements are designed to assist both farmers and the Department in the development of those plans. The Director will have the authority to allow up to three years to craft nutrient management plans and to stagger the implementation deadlines of nutrient management plans. This is designed to create flexibility and ease the concern raised in comments about the Department's capacity to handle distressed designations. Additionally, due to comments regarding the Department's ability to handle a large influx of nutrient management plans after a designation, the Department will move to adopt an attestation mechanism of approval of nutrient management plans. Specifically, the Department will audit at least five percent of nutrient management plans yearly with the ability to

request a plan at its discretion. Operators will be subject to civil penalties if their nutrient management plan is not in compliance with the rules.

Seven comments were received during the CSI comment period, and one of those comments was in full support of the rules as drafted. The remaining comments ranged in tone; some commenters called for tighter regulations while others expressed concerns that the amendments are overly burdensome. The Ohio Environmental Council, Menke Consulting, and Guardians of Lake St. Marys all expressed concerns that the rules do not place enough restrictions on the application of nutrients and manure.

The Ohio Environmental Council requested that the Department review fifteen percent of the nutrient management plan attestations, instead of only five percent. The Department noted that the language regarding attestations is “at least” five percent, so it has the ability to audit a higher percentage of plans if necessary. Menke Consulting suggested using the same application timeframes for nutrients and manure, and the Guardians of Lake St. Marys opposed the removal of the winter prohibition on application of nutrients and manure. The Department noted that the amendments mirror statutory authority for the Western Lake Erie Basin, so it is unwilling to make changes to the nutrient and manure application standards. By modeling the rules after state law the Department is able to maintain general applicability, and will be able to use these rules for distressed watersheds throughout the state should more waterways be designated as distressed.

The Environmental Defense Fund and Menke Consulting raised concerns over the definition of “growing crop” in one of the exceptions to the rule. The Department stated that it will not define the term, because it is not defined in the state statute so it does not have the authority to do so. It also noted that “growing crop” is an industry term so it does not foresee any issues arising over interpretation of the term. The Department has conducted outreach and education to the regulated community as to its meaning so there is no confusion. The Environmental Defense Fund also raised concerns over a discrepancy between the clause limiting nutrient application to at least twelve hours prior to a rain event, and the exception that allows for any nutrient application when the nutrients will be absorbed within twenty-four hours. The group asked whether the practical effect of the exception would result in operations being able to circumvent the weather-dependent application timeframe. The Department states that the exception is not intended to be used to avoid complying with the twelve-hour application timeframe when there is precipitation forecasted. It notes that recording the weather when applying nutrients is part of the recordkeeping process, and it will not interpret the exception in the rule as justification for applying nutrients outside of the designated application window.

Alliance for the Great Lakes asked general clarification questions about the attestation process. It wanted to know how the Department would identify operations to be audited, and inquired about the timeline for Department review. The Department stated that it currently reviews nutrient

management plans on a three-year basis; should any additional watersheds be designated as distressed the Director is required to establish a deadline for attestations. The Department plans to stagger the deadlines for attestation based on factors such as farm size and watershed size. It notes that the smallest operations will have the longest amount of time to comply. It has not established a plan for how it will establish the sampling process or at what time those plans will be audited.

The Ohio Farm Bureau raised concerns over the monetary impact the rules will have on farmers. It does not dispute the Department's estimated amounts for the cost to develop nutrient management plans, but feels that the costs are too burdensome. The Department notes that many operations already have complete or partial nutrient management plans in place, and will incur minimal costs. It points to the staggered attestation deadlines as a way for operations to absorb these costs over a period of years instead of having to complete nutrient management plans immediately. The Ohio Farm Bureau also raised concerns over the Department's statutory authority to establish the rules, and points out that agriculture is not the sole contributor of nutrients in distressed watersheds. With regard to statutory authority, the Department notes that ORC 939.02 gives it rule-making authority to enforce agricultural pollution abatement. It does not dispute the statement that agriculture is not the sole contributor of nutrients in distressed watersheds, but states that improving water quality is an important goal and addressing all types of contributing nutrient sources is essential to achieving that goal.

The rules impact all owners, operators, and persons responsible for the land application of nutrients on more than fifty acres of land in a watershed in distress. These individuals must comply with the Natural Resources Conservation Service's 590 standards contained in the *Field Office Technical Guide*. Members of the impacted business community who operate within a watershed in distress must develop and operate in accordance with a nutrient management plan that address the methods, amount, form, placement, cropping system, and timing of all nutrient applications. At a minimum, these plans must include soil tests, manure analysis (if applicable), planned application rates, field information, as well as other points of information outlined in rule. Depending on the size and scope of the operations which are required to obtain a comprehensive nutrient management plan, an impacted individual may have to install additional manure storage facilities.

The cost of compliance varies widely based on the size, scope, and location of the operation. There are a number of operations within Ohio with existing nutrient management plans that comply with the rules. These operations would not incur any additional costs. There are also operations which have a number of the components of a nutrient management plan, but do not meet the requirements of a complete plan. These operations would incur minimal costs to complete their plans. An operation completing a nutrient management plan for the first time will incur the highest costs.

Operations which apply manure and are required to obtain a comprehensive nutrient management plan can expect to incur costs of \$55 per hour for the development of this plan. Based on data provided to the Department by the United States Department of Agriculture (USDA) Natural Resources Conservation Service, the cost of a certified plan can range from \$2,400 to \$12,100. The cost of the plan varies greatly and depends on factors like size and complexity. Operations that do not apply manure would only be required to obtain a “simple” nutrient management plan. Costs for these plans on average range from \$2,500 to \$3,000 per plan, per producer. In an effort to assist the regulated community, the USDA Natural Resources Conservation Service may provide financial assistance to offset the cost of these plans. Operations applying manure may also have to install additional manure storage facilities. Based on national data, the Department estimates that each livestock facility will be expected to spend an additional \$80,000 over a ten year period. The Department estimates that fifteen to thirty percent of impacted operations are livestock facilities.

The Department notes that the Grand Lake St. Marys watershed was designated as distressed in early 2011. At that time, 165 livestock producers were obligated to develop nutrient management plans. USDA Natural Resources Conservation Service assisted with the implementation of these plans and contributed \$15,000,000. On average, this equates to \$91,000 per producer and \$183 per acre of farmland.¹

Operations within a watershed in distress may also be required to implement other practices such as installing filter strips onto their farmland, correcting and preventing erosion issues, and purchasing new equipment to comply with nutrient placement requirements. Lastly, operators will incur administrative costs to comply with recordkeeping requirements. This cost will vary based on the complexity of the system an operator chooses to track and record data.

The Department justifies any adverse impact because the State of Ohio has long considered water quality as a top priority. The original rules on watersheds in distress were adopted in 2010, and the Grand Lake St. Marys watershed was designated as distressed in early 2011. The administration, originally through the Department of Natural Resources, and now the Department of Agriculture, enacted and continues to enforce these regulations with careful and deliberate action. Ohio has invested more than \$3 billion since July 2011 in Lake Erie and its watershed to improve drinking water and wastewater facilities, monitor water quality, plant cover crops, recycle dredge material, install controlled drainage structures on farm fields, and fix faulty septic systems.

Ohio sees this challenge as not caused by a single contributing source, but an effort to address all

¹ This figure does not include additional expenses paid by operators that were not covered by USDA Natural Resources Conservation Service.

types of contributing nutrient sources to improve water quality. It has become clear that focusing solely on manure-based nutrient management plans for watersheds in distress limits the distress designation to only one type of agriculture nutrient source, and all agriculture-based nutrient sources should be considered. The Department views this rule package as the proper next step to help improve watersheds designated as distressed.

Recommendation

For the reasons explained above, the CSI office does not have any recommendations for 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.