



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

Business Impact Analysis

Agency, Board, or Commission Name: Renee Schmauch

Rule Contact Name and Contact Information: Renee Schmauch
Renee.Schmauch@agri.ohio.gov 614-728-6295

Regulation/Package Title (a general description of the rules' substantive content):

Notice of Quarantine- Box Tree Moth

Rule Number(s): 901:5-58-01 to 05

Date of Submission for CSI Review: 11/7/2023

Public Comment Period End Date: 11/30/2023

Rule Type/Number of Rules:

New/ 5 rules

No Change/ rules (FYR?)

Amended/ rules (FYR?)

Rescinded/ rules (FYR?)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIPublicComments@governor.ohio.gov

Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

The rule(s):

- a. ☐ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- c. ☐ **Requires specific expenditures or the report of information as a condition of compliance.**
- d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **Please briefly describe the draft regulation in plain language.**

Please include the key provisions of the regulation as well as any proposed amendments.

The rules contained in this chapter establish a quarantine against the highly destructive insect *Cydalima perspectalis*, more commonly known as the Box Tree Moth (BTM or “plant pest”). The Ohio Department of Agriculture (Department) is establishing this quarantine to prevent the plant pest’s artificial spread in the state of Ohio to protect Ohio’s horticulture industry from this destructive pest.

The rules contained in this package focus on science-based practices which support responsible agriculture practices while allowing Ohio to continue to grow its vital horticulture industry. These rules attempt to mirror regulations at the federal level, as well as harmonize with existing rules in Michigan and New York to provide a consistent set of standards.

OAC 901:5-58-01 is a new rule that sets out the notice of quarantine and the general rule that no person shall transport any regulated article from a regulated area to a non-regulated area in the state.

OAC 901:5-58-02 is a new rule that outlines the definitions that are used in the chapter.

OAC 901:5-58-03 is a new rule that sets forth the regulated articles for the quarantine.

OAC 901:5-58-04 is a new rule that outlines the regulated areas in the state.

OAC 901:5-58-05 is a new rule that outlines the conditions of movement as exceptions to the general rule found in OAC § 901:5-58-01.

3. **Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

ORC 927.52, 927.71

4. **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.**

Box tree moth is a federally regulated pest. USDA has implemented federal orders in New York and Michigan that allow those states to take the regulatory lead for this pest. This regulation would allow Ohio Department of Agriculture to regulate for BTM at the county level, rather than USDA implementing a statewide quarantine.

USDA Federal Orders: <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/plant-pest-and-disease-programs/pests-and-diseases/box-tree-moth>

5. **If the regulation implements a federal requirement, but includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

No, however, failure to adopt the mirroring federal quarantine areas could subject the state of Ohio to a full-state quarantine, rather than the current regulated areas.

6. **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)?**

The Department is statutorily tasked with preventing the spread of harmful pests in the state of Ohio. The box tree moth is an invasive pest from East Asia that poses a threat to boxwood plants. The boxwood is an important ornamental shrub and a valuable part of Ohio's nursery and horticulture industry that is one of the largest in the country with nearly \$500 million in total annual sales. By establishing a quarantine and placing restrictions on movement, the Department is preventing the artificial spread of the plant pest and therefore, helping to maintain a vital industry in Ohio.

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

The Department will continue to inspect infested counties and investigate concerns regarding the plant pest. The rules will be judged as being successful when inspections and investigations find few observations of the plant pest and when there is no increase in the number of the plant pest infested counties in the state.

8. **Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

No

Development of the Regulation

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

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The following stakeholders comprise a list of the leaders of several agricultural organizations found within the state of Ohio. The following stakeholders were contacted via email on September 13, 2023, for a public comment period open until September 27, 2023.

AmericanHort	Meagan Nace
AmericanHort	Craig Regelbrugge
Ohio Aggregates & Industrial Minerals	Patrick Jacomet
Ohio Agribusiness Assoc. (OABA)	Chris Henney
Ohio Agribusiness Assoc.(OABA)	Janice Welsheimer
Ohio Agribusiness Assoc. (OABA)	Chris Henney
Ohio Christmas Tree Association	Roger Koch
Ohio Christmas Tree Association	Valerie Graham
Ohio Corn & Wheat Growers Assoc.	Tadd Nicholson
Ohio Corn & Wheat Growers Assoc.	Luke Crumley
Ohio Dept. of Transportation (ODOT)	Robin Chambers-Dersoon
Ohio Dept. of Transportation (ODOT)	Pamela Vest Boratyn
Ohio Ecological Food & Farm Assoc.	Amalie Lipstreu
Ohio Environmental Council (OEC)	Pete Bucher
Ohio Environmental Council (OEC)	Chris Tavenor
Ohio Farm Bureau Federation (OFBF)	Adam Sharp
Ohio Farm Bureau Federation (OFBF)	Jack Irvin
Ohio Farm Bureau Fereration (OFBF)	Larry Antosch
Ohio Farmers Union	Joe Logan
Ohio Forestry Association	Jenna Reese
Ohio Lawn Care Assoc. (OLCA)	Mark Bennett
Ohio Green Industry Association	Tracy Schiefferle
Ohio Green Industry Association	Roni Peterson
Ohio Pest Mgmt.Assoc. (OPMA)	Sheri Maskow
Ohio Pest Mgmt Assoc. (OPMA)	Molly Mash
Ohio Produce Growers & Marketers	Valerie Graham
Ohio Seed Improvement Assoc. (OSIA)	John Armstrong
Ohio Soybean Council	Kirk Merritt
Ohio Soybean Council	Emilie Regula Hancock
Ohio State Beekeepers Assoc. (OSBA)	Peggy Garnes

Ohio Turfgrass Foundation	Mark Bennett
Ohio Turfgrass Foundation	Troy Judy
Ohio P.L.A.N.T.	Tony Seegars
Pesticide Applicator for Responsible Reg	Mike Grace
NPMA SPAR	Kurt Scherzinger
Ohio Turfgrass Foundation	Mark Bennett
Ohio Invasive Plants Council	Jennifer Windus
Ohio Invasive Plants Council	Gary Conley
Environmental Defense Fund	Karen Champan
Environmental Law & Policy Center	Madeline Fleisher
Ohio Agribusiness Assoc.	Andrew Allman
Ohio Agribusiness Assoc.	Chris Henney
Ohio Corn & Wheat	John Torres
Ohio Corn & Wheat	Tadd Nicholson
Ohio Farm Bureau	Leah Curtis
Ohio State University	Adam Ward
The Nature Conservancy	Jessica D'Ambrosio
The Nature Conservancy	Sara Madenwald
The Ohio State University	Peggy Hall
Ohio Soybean Association	Brandon Kern

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

One comment was received by a stakeholder wanting clarification concerning conditions of movement in rule 901:5-58-05. Specifically, the stakeholder wanted to make sure that a truck delivering products that must make stops in a regulated area and an area outside of the regulated area, would be allowed to do so. In response, the department added language to the rule to clarify the specific conditions in which a truck delivering products would be able to make stops in a regulated area as well as outside a regulated area.

11. 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 Department is using data and input from the Horticultural Research Institute, USDA – APHIS, PPQ, Canadian Nursery and Landscape Associations, New York Department of Agriculture, Michigan Department of Agriculture, the Ohio Green Industry Association, and the National Plant Board to support the decision to move ahead with this regulation. The primary data is the survey and inspection data of the presence or absence of the pest in given locations or on particular regulated articles (Buxus nursery stock). This data supports the limited distribution of BTM in Ohio at this time relative to the major production areas of boxwood in the state. This regulation will support safe movement of boxwood nursery stock within the regional, federal, and international framework.

- 12. 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?**
Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.

Stakeholder participation in reviewing the rules in this package has indicated to the Department that this is the best regulatory scheme at this time. For that reason, no other regulatory alternatives were considered.

- 13. 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 through Revised Code 927.70 to quarantine any state or portion of a state to prevent the spread of a pest into, within, or from the state of Ohio.

- 14. 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.**

Since the discovery of box tree moth in New York in 2021 the Department has been in consistent communication with Ohio's horticulture industry and educational institutions including, the Ohio State University, to help create educational programming. Prior to the effective date of these regulations, the Division of Plant Health will conduct additional communications to all licensed nursery stock producers and dealers in Ohio through email and via the nursery inspection staff. These regulations are modeled after similar programs already in place that nursery stock producers and dealers have familiarity with. Additionally, efforts have been made to model these rules after those already in existence in Michigan and New York, as well as taking into account federal provisions to ensure consistency across state lines.

Adverse Impact to Business

- 15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**

- a. Identify the scope of the impacted business community, and**
Any person who produces, transports, or plans to transport any of the regulated articles, i.e., Licensed nursery stock producers and dealers.

- b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).**

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.

Individuals are prohibited from moving any regulated article from a regulated area into a non-regulated area unless they meet the conditions of movement in OAC 901:5-58-04. This may cause loss of potential profits; however, the Department is preventing the artificial spread of the plant pest and therefore, helping to maintain market access in a vital industry in Ohio.

16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors*)

Failure to adopt the mirroring federal quarantine areas could subject the state of Ohio to a full-state quarantine, rather than the proposed regulated areas, which would have a greater regulatory burden on the business community.

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

The presence of BTM in Ohio has the potential to damage and kill boxwood shrubs in the landscapes of businesses and homes throughout the state. Additionally, the unchecked spread of the pest to additional areas of Ohio is likely to increase the cost of production and limit market access for Ohio's nursery stock beyond what the impact of the regulation would have on the regulated businesses. By establishing a quarantine and restrictions on movement, the Department is preventing the artificial spread of the plant pest and therefore, helping to maintain a vital industry in Ohio. Further, the Department has written the regulation in anticipation of USDA approved treatment programs which will provide options to the general prohibition by allowing the industry to ship from quarantined areas so long as they meet certain federally vetted requirements which allow the Department to certify that the shipment is free of the plant pest. Therefore, due to the considerations above, the adverse impact is considered justified.

Regulatory Flexibility

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

Due to the potential environmental and industry impact the plant pest could have on the state's horticulture industry, the Department did not create any exemptions or alternative means of compliance. However, as indicated above, regulated articles may be shipped with a certificate or a compliance agreement from quarantined areas and states once a USDA approved program is completed.

19. 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 works with all offenders to educate them on their requirements and their violations to ensure voluntary compliance. The related statute RC 927 does not authorize the

department to issue civil penalties for quarantine violations. Destruction of infested stock is the most typical outcome in an instance where a violation occurred and it is likely that an infestation exists. The department always seeks to minimize these actions to only the lots or loads of nursery stock at high risk, often with an option to return the stock to the source location for treatment, if practical.

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

The Department has online resources and has field staff available to provide assistance. Training and seminars are also available via the Department and the United States Department of Agriculture.