

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Agriculture

Regulation/Package Title: Soil & Water Conservation – Watershed in Distress

Rule Number(s): 901:13-1-(11, 19, 20, and 99)

Date: September 24, 2018

Rule Type:

X Amended

X 5-Year Review

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.

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 (Department), enacted and continues to enforce these regulations with careful and deliberate action at Grand Lake St. Marys. As you will see in the proposed rule, the Department will ensure that cooperative practice continues for future watersheds designated as “distressed”.

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 types of contributing nutrient sources to improve water quality.

Due to the presence of harmful algae blooms (HABs), Ohio Environmental Protection Agency’s 2018 Integrated Water Quality Report declared the Western Basin of Lake Erie “impaired” and amended its 2016 report to say the same. 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 next step for watersheds designated as “distressed”.

The rules and their proposed amendments are outlined below:

OAC 901:13-1-11 sets forth the rules and requirements for the land application of animal manure and nutrients in the state of Ohio. More specifically, the rule currently requires all Ohio farms to follow the conservation practices found in the relevant U.S. Department of Agriculture (USDA) “Field Office Technical Guide,” also known as the “590 standards,” developed by USDA’s Natural Resources Conservation Service. 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, and 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 the most 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 rule amendments would delay non-discharge enforcement of 590 standards in watersheds in distress to give farms sufficient time to complete their nutrient management plans. Finally, the proposed amendments update existing regulations for distressed

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watersheds located in the Western Lake Erie Basin to reflect the standards enacted in 2015's Senate Bill (SB) 1. SB 1 does not include the prohibition against spreading manure between December 15 and March 1 and instead incorporates a standard which bars spreading manure on frozen, snow-covered, or rain-soaked ground unless certain precautions are taken.

OAC 901:13-1-19 outlines the nutrient management planning requirements for watersheds in distress. The rule has been amended to 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 in accordance with the rule. The rule outlines the information that must be included within the nutrient management plan.

Further, the rule has been amended to require operations to attest to the completion of a nutrient management plan. This amendment removes the requirement that plans need to be submitted and approved by the Department. This amendment will aid 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, with the ability to request a plan at its discretion, subject to civil penalties if out of compliance. This mechanism is not dissimilar to other regulatory methods, such as auto insurance verification.

OAC 901:13-1-20 states that the director may designate watersheds in distress. No changes have been proposed to this rule.

OAC 901:13-1-99 establishes the schedule of civil penalties for violations to Chapter 901:13-1 of the Ohio Administrative Code. The rule has been amended to update a paragraph reference due to the proposed amendments to OAC 901:13-1-19.

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)?

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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, including attached substances. 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.

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

The Department will measure success in these regulations by an overall decrease of nutrient levels in all watersheds in distress. The Department will utilize water quality data from the Environmental Protection Agency of Ohio’s monitoring stations to collect this data.

Development of the Regulation

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

On August 5, 2018, the Department opened the stakeholder comment period. The stakeholders were invited to submit comments to the Department by August 17, 2018.

| Organization | Name |
|--|-------------------|
| Black Swamp | Rob Krain |
| Capitol Advocates | Rob Eshenbaugh |
| Capitol Consulting | Belinda Jones |
| CCAO | Adam Schwiebert |
| CCAO | Cheryl Subler |
| CJR Group | Gary Smith |
| Ducks Unlimited | Russ Terry |
| Environmental Defense Fund | Karen Champan |
| Environmental Law & Policy Center | Madeline Fleisher |
| Lake Erie Charter Boat Association | Dave Spangler |
| Lake Erie Charter Boat Association | Paul Pacholski |
| Lake Erie Foundation | Matt Fisher |
| Lake Erie Improvement | Jim Stoffer |
| National Wildlife Federation | Gail Hesse |
| Ohio Agribusiness Assoc. | Andrew Allman |
| Ohio Agribusiness Assoc. | Chris Henney |
| 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 Ecological Food and Farm Association | Amalie Lipstreu |
| Ohio Environmental Council | Trent Dougherty |
| Ohio Environmental Stewardship Alliance | Vickie Askins |
| Ohio Farm Bureau | Adam Sharp |
| Ohio Farm Bureau | Roger High |
| Ohio Farm Bureau | Jack Irvin |
| Ohio Farm Bureau | Larry Antosh |
| Ohio Farm Bureau | Tony Seegers |

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|--|--------------------|
| Ohio Farm Bureau | Yvonne Lesicko |
| Ohio Farm Bureau | Leah Curtis |
| Ohio Farmers Union | Joe Logan |
| Ohio Farmers Union | Linda Borton |
| Ohio Federation of Soil and Water Conservation Districts | Mindy Bankey |
| Ohio Forestry Association | John Dorka |
| Ohio Municipal League | Kent Scarlett |
| 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 |
| Ohio State University | Adam Ward |
| Ohio Township Association | Heidi Fought |
| Ohio Turf Association | Brian Laurent |
| Ohio Wine Producers | Donniella Winchell |
| Ohio's Lake Erie Shores and Islands | Larry Fletcher |
| Partners for Clean Streams | Kris Patterson |
| Pheasants Forever | Jim Inglis |
| The Nature Conservancy | Jessica D'Ambrosio |
| The Nature Conservancy | John Stark |
| The Nature Conservancy | Sara Madenwald |
| The Nature Conservancy | Tracy Freeman |
| TMACOG | Tim Brown |
| TMACOG | Kari Gerwin |

On August 13, 2018, the following stakeholders met with the Department to discuss the rules package at its campus:

| Organization | Name |
|--|-----------------|
| Capitol Advocates | Rob Eshenbaugh |
| Ohio Agribusiness Assoc. | Chris Henney |
| Ohio Beef Council & Ohio Cattlemen's Association | Elizabeth Harsh |
| Ohio Dairy Producers | Scott Higgins |
| Ohio Farm Bureau | Tony Seegers |
| Ohio Farm Bureau | Yvonne Lesicko |

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| Ohio Farm Bureau | Leah Curtis |
| Ohio Federation of Soil and Water Conservation Districts | Mindy Bankey |
| Ohio Pork Producers Council | Bryan Humphreys |
| Ohio Poultry Association | Jim Chakeres |
| Ohio State University | Adam Ward |
| Ohio Corn Growers Association | Brad Reynolds |
| Ohio Soybean Association | David Batocletti |

On August 15, 2018, a second meeting was held at the Department's campus to discuss the rules package. The following stakeholders were present:

| Organization | Name |
|---|-------------------|
| CCAO | Adam Schwiebert |
| Environmental Defense Fund | Karen Champan |
| Environmental Law & Policy Center | Madeline Fleisher |
| Lake Erie Charter Boat Association | Dave Spangler |
| Lake Erie Charter Boat Association | Paul Pacholski |
| Lake Erie Foundation | Matt Fisher |
| Lake Erie Foundation | Ron Wyss |
| National Wildlife Federation | Gail Hesse |
| Ohio Ecological Food and Farm Association | Amalie Lipstreu |
| Ohio Environmental Council | Pete Bucher |
| Ohio Farmers Union | Joe Logan |
| The Nature Conservancy | Tracy Freeman |
| TMACOG | Tim Brown |
| Ohio Forestry Association | Brad Perkins |
| | Bryan Stubbs |
| | Nicole Nelsen |
| Ohio Township Association | Heidi Fought |

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

Pursuant to the deadline established for August 17, 2018, the Department received comments from the following stakeholders:

Advocates for a Clean Lake Erie

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Alliance for the Great Lakes
Ms. Vickie Askins
Coshocton Soil and Water Conservation District
Environmental Law & Policy Center
Lake Erie Foundation
Mr. Matthew Langhals
National Wildlife Federation
Ohio Agribusiness Association
Ohio Cattlemen's Association
Ohio Corn & Wheat Association
Ohio Dairy Producers Association
Ohio Ecological Food and Farm Association
Ohio Environmental Council
Ohio Farm Bureau Federation
Ohio Pork Council
Ohio Poultry Association
Ohio Sheep Improvement Association
Ohio Soybean Association
The Nature Conservancy
Various Soil and Water Conservation Districts

Support was voiced from certain stakeholders regarding the anticipated positive impact on distressed watersheds that would result from the rules' enactment. Other stakeholders raised concerns that the rule package did not go far enough to regulate and restrict agricultural practices that are impacting Lake Erie's health. Others raised concerns with the anticipated costs and impact to industry of complying with the new regulations, their clarity, and the Department's capacity to implement them.

After review and consideration of the public's comments, the Department amended the proposed rule package and, on August 27, 2018, resubmitted it for additional public comment. Highlights of the Department's revisions include the following changes:

1. Make the proposed rule mirror the existing standards in the Revised Code that govern the application of manure and fertilizer on frozen, snow-covered and rain-soaked ground in the Western Basin. These standards were enacted in Senate Bill 1 of the 131st General Assembly;
2. Remove the manure application prohibition window for Grand Lake Saint Marys;

3. Give the Director more flexibility in establishing the deadline for the submission and approval of nutrient management plans; and
4. Allow farmers to attest to the completion of their nutrient management plans by the deadline, while maintaining Ohio Department of Agriculture oversight to verify the completion and incorporation of a nutrient management plan.

Items “3” and “4” are designed to assist both farmers and Ohio Department of Agriculture in the development of nutrient management 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 in the crafting of nutrient management plans and ease the concern raised in comments of the capacity to handle distressed designations. Additionally, out of the comments raised on 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, with the ability to request a plan at its discretion, subject to civil penalties if out of compliance. This mechanism is not dissimilar to other regulatory methods, such as auto insurance verification.

As a result of these amendments, the rules were resubmitted to stakeholders on August 27, 2018. Stakeholders were given until September 7, 2018, to submit comments.

Support was voiced from certain stakeholders regarding the flexibility of farmers to apply manure and nutrients during the winter months when conditions were favorable and safe to apply. In contrast, other stakeholders raised concerns that agricultural operations would no longer have any restrictions on the application of manure and nutrients. Stakeholders also raised concerns regarding the Department’s ability to enforce the new proposals.

The Department greatly appreciates the work done by producers, farmers, researchers and interested parties in the Grand Lake St. Marys watershed. The Department’s goal, is to continue to build on the successes made and ultimately reach a point where the designation can be lifted.

Due to the comments submitted to the Department, OAC 901:13-1-19 has been amended to require the Department to conduct an audit of at least 5% of the attestations submitted to determine compliance regarding completion of nutrient management plans. Further, a clerical error found in the same rule was corrected in paragraph (B)(1). No other comments were incorporated into the rule.

Ohio's laws and rules regarding watersheds in distress are not specific to individual watersheds. The draft rules, in their current state, would enact similar enforcement guidelines for all watersheds in distress and would provide producers more flexibility to apply manure, while still adhering to practices that reduce the risk of runoff and nutrient loss. The rules, contrary to the concerns of some stakeholders, still impose guidelines on the application of manure and nutrients in watersheds in distress. The current proposed rules create a uniform, state-wide standard that governs the application of manure and fertilizer on frozen, snow-covered and rain-soaked ground. This standard mirrors the statutory standard found in ORC 905.326 and ORC 939.08 in the Western Basin.

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?

Please see the attached report which summarizes the data which was used to develop this rule. This data shows 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.

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 outlined above, the Department considered all comments submitted by stakeholders in the two comment periods. The Department greatly appreciates the work done by producers, farmers, environmental groups, researchers, and interested parties in the Grand Lake St. Marys watershed. The Department's goal, is to continue to build on the successes made and ultimately reach a point where the designation can be lifted. While a number of alternative regulations were suggested, the Department believes that the rules as presented are the best option to reduce nutrient runoff in the state and improve current and future watersheds in distress.

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 rules contained in this package are performance-based regulations. The rules require the creation and attestation of nutrient management plans. These plans must be completed according to specific guidelines established in the rule, however the rule allows some flexibility in the creation of those plans.

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.

12. 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

13. 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;

The existing rule only applies to owners, operators and persons responsible for the land application of manure. The rule expands the impacted business community to also include all owners, operators, and persons responsible for the land application of nutrients on more than fifty acres of land.

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

The impacted community must comply with the Natural Resources Conservation Service (NRCS) 590 standards contained in the Field Office Technical Guide.

Members of the impacted business community which operate within a watershed in distress must develop and operate in conformance with a nutrient management plan that address the methods, amount, form, placement, cropping system and timing of all nutrient applications.

The nutrient management plans must be in a form as outlined in paragraph (C) of rule 901:13-1-19. These forms include the Ohio nutrient management workbook, USDA NRCS comprehensive nutrient management plan (CNMP), or an equivalent document which has been approved by the Department. 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 CNMP may have to install additional manure storage facilities.

All operations must attest to the completion of their nutrient management plan by the deadline established by the Director.

The aforementioned plans must be updated every three years as well as conditions changed. Further, after a plan update is complete, the operators must re-attest to their plan.

Operations within a watershed in distress must be assessed with the Ohio nitrogen leaching risk assessment procedure, the phosphorus index, and the soil test risk assessment procedure as necessary.

Operations within a watershed in distress must compete and maintain operating records as outlined in paragraph (F) of rule OAC 901:13-1-19. This requires time for compliance as well as storage capabilities for five years of records.

Failure to comply with these rules may be subject to civil fines as outlined in OAC 901:13-1-99.

c. Quantify the expected adverse impact from the regulation.

The costs of compliance with these rules varies widely based on the size, scope, and location of the operation. There are a number of operations within Ohio who already have a nutrient management plan which would satisfy this rule. These operations would not incur any additional costs due to these changes. Further, there are operations which have a number of the components of a nutrient management plan but do not fully meet the requirements of a complete plan. These operations would have reduced costs in completing their requirements under these rules.

Operations which apply manure and are required to obtain a CNMP could expect to occur costs of \$55/hour for the development of this plan. Based on data provided to the Department by USDA NRCS, the cost of a CNMP could range from \$2,400 to \$12,100. The cost of the CNMP varies greatly and depends on the operation including size and complexity. Operations which do not apply manure would only be required to obtain a “simple” nutrient management plan. Costs for these plans on average range between \$2,500 to \$3,000 per plan, per producer. In an effort to assist the regulated community, USDA NRCS may have funds available to lower the cost of these plans.

As stated in subparagraph (b) of question 14, operations which apply manure may have to install additional manure storage facilities. According to the USDA NRCS, each livestock facility on average would be expected to spend \$80,000 for these “practices” over a ten-year period.

In addition, operations within a watershed in distress may 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.

For comparison purposes, the Grand Lake St. Marys watershed was designated as “distressed” in early 2011. At that time, 165 livestock producers were obligated to meet rules and develop nutrient management plans. USDA NRCS 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. While this figure represents the total dollar amount spent by USDA NRCS it does not include additional expenses paid by operators that were not covered by USDA NRCS.

In order to comply with recordkeeping requirements, operators must spend time for compliance. Operators may have equipment which tracks and records all the necessary data however, this type of equipment is expensive and not required. Operators can accomplish the recordkeeping requirements manually and may store paper records or keep electronic copies.

Individuals 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 rule violated, the severity of the violation, and any history of non-compliance. Further, the quantified impact of corrective actions will depend entirely on the violation and the means to correct that violation.

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

As mentioned numerous times in this analysis, 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 (Department), enacted and continues to enforce these regulations with careful and deliberate action at Grand Lake St. Marys. As you will see in the proposed rule, the Department will ensure that cooperative practice continues for future watersheds designated as “distressed”.

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Regulatory Flexibility

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

The rules exempt operations which apply nutrients to less than fifty acres of land on an annual basis. Further, the rule provides methods of compliance for nutrient management plans and additionally permits the Director to stagger the deadlines to comply with the nutrient management plan and attestation requirements.

16. 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.

17. 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. When funding is available, the Department 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.