

# Ohio Ag Manager

Management Information for Today's Agriculture Business

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The Ohio Ag Manager Team

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## [Another Lawsuit Filed over Ohios list of impaired waters](#)

*Written by Ellen Essman, Law Fellow, OSU Agricultural & Resource Law Program*

On May 17, 2017, the Environmental Law & Policy Center (ELPC) and two of its members filed suit against the U.S. Environmental Protection Agency (EPA) in the U.S. District Court for the Northern District of Ohio. ELPC filed the lawsuit to compel the EPA to either accept or reject Ohio's list of impaired waters. In April, the National Wildlife Federation and other groups sued the EPA in the U.S. District Court for the District of Columbia for the same reason. For more information on the first lawsuit and a more thorough background on the topic, read our previous blog post.

Federal regulation under the Clean Water Act requires states to submit lists every two years of waters they determine to be impaired. The regulation also requires the EPA to either accept or reject the state listings within thirty days. The Ohio Environmental Protection Agency submitted its list of impaired waters on October 20, 2016. The list did not include the open waters of the western basin of Lake Erie. The EPA has not made a decision on Ohio's list.

To make the situation more complex, Michigan did include its share of the open waters of the western basin of Lake Erie on its list. What is more, the EPA approved of Michigan's impaired waters list. The plaintiffs in both of these lawsuits seem to hope that forcing the EPA to make a decision on Ohio's impaired list will resolve the differences in the two states' listing of waters in the same general area of Lake Erie.

ELPC filed the lawsuit in the Toledo office of the U.S. District Court for the Northern District of Ohio, citing its

proximity to Lake Erie, and in particular, to the pollution problem in the western basin of the lake. ELPC's press release on its lawsuit is available [here](#).

### **Ohio Senate Passes CAUV Bill**

*Source: Peggy Hall, Ohio Agricultural Law Specialist*

Ohio's Senate has settled on its solution for fixing Ohio's CAUV formula. The Senate unanimously passed S.B. 36 yesterday after the Senate Ways and Means Committee adopted two amendments to the bill. The legislation aims to stem recent increases in property taxes for farmland enrolled in Ohio's Current Agricultural Use Valuation (CAUV) program. The Senate's bill will ensure that the CAUV formula "sticks to valuing farmland based on agricultural production," stated the bill's sponsor, Sen. Cliff Hite (R-Findlay).

In addition to including new factors in the CAUV formula, making changes to the capitalization rate calculation and addressing rates used for conservation lands (explained in detail in our earlier post on S.B. 36), the bill passed by the Senate yesterday contained two new provisions:

- A three year phase-in of the changes to the CAUV formula, which would begin the first tax year after 2016 in which a county's sexennial appraisal or triennial update occurs. The purpose of the phase-in is to reduce the financial impact of lowered property valuations on school districts.
- Replacement of the seven year rolling average determination of the equity yield rate with an equity yield rate that equals the 25-year average of the "total rate of return on farm equity" determined by the United States Department of Agriculture but that cannot exceed the loan interest rate used in the debt factor of the capitalization rate computation.

Last week, Ohio's House passed legislation containing different solutions for revising the CAUV program in H.B. 49 (see our summary of H.B. 49 [here](#)). Senate leaders yesterday indicated a willingness to work with the House to resolve the differences between the two bills. H.B. 49 is now before the Senate Finance Committee.

### **USDA Seeks Public Comment on Postponed GIPSA Rules**

*Written by: Chris Hogan, Law Fellow, OSU Agricultural & Resource Law Program*

The Grain Inspection, Packers and Stockyards Administration (GIPSA) is delaying the implementation of the Farmer Fair Practices rules. GIPSA is a USDA agency that facilitates the marketing of livestock, poultry, meat, cereals, oilseeds, and related agricultural products. One purpose of GIPSA is to promote fair and competitive trading practices for the benefit of consumers and agriculture.

On April 11, 2017, the USDA announced that GIPSA delayed the implementation of the Farmer Fair Practices rules until October 19, 2017. The delayed Farmer Fair Practices rules were originally set to be effective on December 20, 2016. According to the USDA, the delayed rules would protect chicken growers from retaliation by processors when growers explore opportunities with other processors, discuss quality concerns with processors, or when refusing to make expensive upgrades to facilities. GIPSA concludes that the Farmer Fair Practices rules alleviates these issues. However, several livestock groups argue that the delayed rules would have adverse economic effects on the livestock industry.

#### *Opportunity for Public Comment*

During the delay, the USDA is seeking public comment on the Farmer Fair Practices rules. The comment period offers the agricultural community an opportunity to suggest what action the USDA should take in regard to the Farmer Fair Practices rules. The USDA asked the public to suggest one of four actions that the USDA should take:

- 1. Let the delayed rules become effective
- 2. Suspend the delayed rules indefinitely
- 3. Delay the effective date of the delayed rules further, or
- 4. Withdraw the delayed rules

After receiving public comments, the USDA will consider the comments and make an informed decision regarding the delayed Farmer Fair Practices rules. According to Drovers, Secretary of Agriculture Sonny Perdue recently visited Kansas City, Missouri to speak with farmers, ranchers, and industry members. During the event, Secretary Perdue responded to a question about the GIPSA rule. "We're going to look at it very closely," said Perdue. The full Drovers article is [here](#).

More information on the delayed GISPA rules is [here](#). Leave a public comment on the delayed rules [here](#) by clicking “Comment Now.”

## [What’s Behind the Latest Lawsuit on Lake Erie’s Water Quality](#)

*Written by Ellen Essman, Law Fellow, OSU Agricultural & Resource Law Program*

The National Wildlife Federation (NWF) and five other environmental and outdoor groups (Plaintiffs) sued the United States Environmental Protection Agency (EPA) last week in the U.S. District Court for the District of Columbia. The Plaintiffs filed the lawsuit due to EPA’s failure to approve or disapprove the list of impaired waters submitted by the Ohio Environmental Protection Agency (OEPA) within the time limit required by law. The Plaintiffs are particularly concerned that the EPA’s lack of a decision on the impaired waters list may affect pollution in Lake Erie’s waters.

### *A background on impaired waters*

In 1972, Congress made amendments to the Federal Water Pollution Control Act of 1948. The result was what we know today as the Clean Water Act (CWA). The very first section of the CWA states: “[t]he objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

In order to meet that objective, the CWA sets forth “effluent limitations,” or in other words, the amount of pollution allowed to be discharged. Polluters have different effluent limitations dependent on a number of variables. The states are to “identify” the waters where the “effluent limitations [from certain polluters] are not stringent enough” to meet water quality standards. The specific polluters to be examined are: 1) point sources, and 2) public treatment works either in existence on July 1, 1977 or approved under the CWA before June 30, 1974. For reference, point sources are defined as “any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” Point sources are not “agricultural storm water discharges and return flows from irrigated agriculture.”

Those waters that states identify as not having stringent enough effluent limitations for point sources and public treatment works are called “impaired waters.” Along with the identification of impaired waters, states must also put forth total maximum daily loads (TMDLs), or the amounts of each kind of pollutant allowed. The CWA in its entirety is available [here](#).

A [regulation](#) promulgated by the EPA under CWA mandates that states submit the list of waters they determine to be impaired every two years. The list must include a description of the “pollutants causing impairment” and their total maximum daily loads (TMDLs). The same regulation requires the EPA “to approve or disapprove such listing and loadings not later than 30 days after the date of submission.”

On October 20, 2016, OEPA submitted its list of impaired waters in the Ohio Integrated Water Quality Monitoring and Assessment Report, available [here](#). The list of impaired waters included parts of Lake Erie, namely the Lake Erie Central Basin Shoreline and the Lake Erie Islands Shoreline. Significantly, OEPA did not include the open waters of the western basin of Lake Erie on its list. The EPA has not responded to Ohio’s list by approving or disproving its listings.

Michigan submitted its impaired waters list in November 2016 and the EPA approved the report on February 3, 2017. Michigan listed the entirety of the Lake Erie waters in the state’s jurisdiction as impaired. This would include Michigan’s share of open waters in the western basin of Lake Erie. Michigan’s report is [here](#).

### *The current lawsuit*

As discussed above, six environmental and outdoor groups based in Ohio, Michigan and Illinois sued the EPA and its national and Region 5 administrators for the lack of a decision on OEPA’s list of impaired waters. The EPA was required to make the decision within 30 days of October 20, 2016. The Plaintiffs gave the EPA prior warning of their intention to sue in a notice sent on December 19, 2016. Since then, the EPA still has not come to a decision about Ohio’s list of impaired waters.

At the crux of this lawsuit is the difference between Ohio and Michigan’s listings of waters in the same general area—the western basin of Lake Erie. Michigan listed the basin as impaired and Ohio did not. The Plaintiffs argue that the “inaction” on the part of the EPA “allows pollution... to continue unabated” throughout Lake Erie. Implicit in the Plaintiffs’ argument is that it seems unlikely that the EPA would allow one state to designate their Lake Erie

water as impaired while the other state does not since water does not necessarily stay within state boundaries. The Plaintiffs appear to anticipate that EPA, when forced to make a decision, will disapprove of Ohio's listing. Consequently, TMDLs could be established for greater areas of the Lake and water quality would likely be improved for the use and enjoyment of the Plaintiffs and their members.

As relief, the Plaintiffs asks the court to declare that EPA has violated its duty under the CWA and to require EPA to approve or disapprove OEPA's impaired waters list within thirty days of the court's order. The full complaint filed in the lawsuit is available [here](#).

*What would a disapproval of OEPA's list mean for Ohio?*

If the court compels EPA to make a decision and EPA decides that OEPA was wrong to exclude the open waters of the western basin of Lake Erie as impaired, EPA [regulations](#) give the EPA the authority to take action within thirty days. EPA actions would include identifying the waters as impaired and instituting the allowable TMDLs necessary to implement applicable water quality standards. After a public comment period and potential revisions to EPA's actions, it would be up to the state of Ohio to meet the EPA's TMDLs for the impaired waters.

What would a listing as impaired mean for Ohio residents—individuals, farms, and companies? It would probably mean increased regulations, likely in the form of reduced allowable loads of pollutants from the point sources and public treatment works discussed above. Time, effort, and money might be necessary to comply with such changes. Regulations and TMDLs might affect more Ohioans than before, since OEPA designated parts of Lake Erie as impaired but not others.

On the flip side, increased regulation could mean better water quality in Lake Erie for drinking, sport, and other uses. For now, Ohioans and others who use Lake Erie's waters or are located in areas that drain to the Lake will have to wait for the federal court to act on the lawsuit

### **[CAUV Changes Proposed Again, This Time in the State's Budget Bill](#)**

*Written by Chris Hogan, Law Fellow, OSU Agricultural & Resource Law Program*

The Ohio legislature continues to consider Current Agricultural Use Valuation (CAUV) this session. However, the latest discussion is not of Senate Bill 36, introduced by Senator Cliff Hite on February 7, 2017 (read more about that bill [here](#)). Instead, the current discussion centers on a new proposal in House Bill 49, Ohio's "budget bill." The House Finance Committee is currently considering that bill.

The budget bill proposal would require the equity yield rate used in the CAUV capitalization rate to equal the greater of the 25-year average of the total rate of return on farm equity published by the USDA or the loan interest rate. The capitalization rate is used to calculate a valuation from an annual profit for an average Ohio farm, considering only agricultural factors. The bill also proposes a holding period of 25 years for calculating equity build-up and land value appreciation in the formula.

The budget bill proposal also places a ceiling on the taxable value of CAUV land used for conservation purposes by requiring land to be valued as though it included the least productive soil. The proposed changes to the CAUV program would be phased in over two reassessment update cycles. The bill would also reconcile the proposed changes with the current formula by specifying that during the first three-year cycle in each county (beginning with tax year 2017), the tax value of CAUV land would include one half of the difference between its value under the new versus the old formula.

Time may soon tell whether Ohio lawmakers will address the agricultural community's concerns about property tax increases and if so, whether it will prefer the House's budget bill or the Senate's proposal. The budget bill is available [here](#)—see page 652 of that document for the changes to the CAUV formula. The Senate's bill, which has received four hearings before the Senate Ways and Means Committee, is available [here](#).

### **[U.S. EPA Wants Public Comments on Regulatory Reform](#)**

The U.S. Environmental Protection Agency (EPA) is seeking public input on EPA regulations that may be appropriate for repeal, replacement, or modification. The request for comments is in response to President Trump's Executive Order 13777, "[Enforcing the Regulatory Reform Agenda](#)," which required the heads of agencies such as the EPA to evaluate existing regulations and make recommendations to repeal, replace, or modify

regulations that create unnecessary burdens on the American people.

In announcing the agency's regulatory reform plans, EPA Administrator Scott Pruitt stated that, "EPA will be listening to those directly impacted by regulations, and learning ways we can work together with our state and local partners, to ensure that we can provide clean air, land, and water to Americans." Pruitt also issued harsh criticism of "misaligned regulatory actions from the past administration."

Consistent with President Trump's Executive Order, Pruitt appointed several EPA staff to a Regulatory Reform Task Force that will guide the agency's reform efforts. In establishing the public comment process, the Task Force is asking entities significantly affected by federal regulations, including state, local and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations to provide comments that will help the Task Force identify regulations that:

- Eliminate jobs or inhibit job creation;
- Are outdated, unnecessary or ineffective;
- Impose costs that exceed benefits;
- Create serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- Rely on data, information or methods that are not publicly available or sufficiently transparent for reproducibility;
- Derive from Executive Orders or other Presidential directives that have been rescinded or modified.

The comment period offers the agricultural community an opportunity to raise concerns with EPA regulations that may negatively impact agricultural production. Note that agencies such as the EPA do not base regulatory decision-making on the total number of comments for or against an issue; it is not like a popular ballot vote. Instead, the EPA must base its regulations on information contained in public comments as well as on scientific data, expert opinions, and facts. After receiving comments in this initial public participation period, the EPA will likely develop recommendations for regulatory reform. If so, the agency must offer the public additional opportunity to comment on its reform proposals.

The EPA will accept public comments on regulatory reform until May 15, 2017. Instructions for submitting comments are available [here](#). The agency has already received over 18,000 comments on its online docket, which is available [here](#). Members of the public may request that the EPA allow more time to submit comments, and the EPA may consider late-filed comments if their decision-making schedule permits it. However, commenters should be aware that agencies do not have to consider late comments.

The EPA is also hosting public meetings around the country on regulatory reform in regards to different topics such as water, chemical safety and pesticides. A list of the public meetings is available [here](#).

### **[Clearing the Fence Row and Trimming Back Overhanging Branches](#)**

*Written by: Chris Hogan, Law Fellow, OSU Agricultural & Resource Law Program*

Farmers are gearing up for spring and preparing to plant crops and graze livestock. Part of spring-cleaning may involve clearing partition fence rows at the edge of fields and trimming back overhanging branches above the fence. Overgrown tree branches can affect crops and pose a hazard to agricultural equipment. Removing trees that obstruct the fence row, noxious weeds tangled in the fence, and other unwanted vegetation is a serious matter for Ohio farmers. Ohio law provides for ways to clear a partition fence shared between two neighboring properties. Ohio law also cautions against damaging trees when trimming overhanging branches.

#### *Clearing the fence row*

This section only applies to the removal of vegetation in the fence row. Clearing overhanging trees above the fence is a separate matter discussed further below.

A partition fence is a fence that follows the division line between adjoining properties of two owners. The term "fence row" refers to the strip of land that is on either side of the fence. In order to keep a fence in good condition, owners should occasionally clear the fence row of obstructions caused by vegetation. Clearing a fence row keeps noxious weeds, brush, briars, and other vegetation from spreading onto a neighbor's property. Ohio law provides several methods for a landowner to clear the fence row legally.

The easiest way to clear the fence row is to ask a neighbor to clear his or her side of the partition fence. Ohio law creates a duty for owners on either side of a partition fence to clear brush, briars, thistles and other noxious weeds

in a strip four feet wide along the line of the fence, after a landowner gives notice to a neighbor asking them to do so. It is best to be polite, patient, and clear when speaking with a neighbor about when you would each like to clear the fence row. A landowner and a neighboring owner should try to establish a timeline to clear each side of the fence row.

What if a landowner asks a neighbor to clear the fence row on their side of a partition fence and they refuse? Once a landowner asks a neighbor to clear a fence row, that neighbor has ten days to do so. If a neighbor does not clear it within ten days, the landowner can ask the local board of township trustees to arrange for the fence row to be cleared.

After a landowner notifies the trustees that a neighbor refused to clear the fence row within ten days, the township trustees must view the property to determine if there is just cause for the complaint. Next, if there is a cause for the complaint, the trustees will enter into a contract with a third party to clear the fence row and certify the associated costs to the county auditor. The county auditor will bill the neighboring landowner for the work to clear the fence row. The auditor will assess these costs against the neighboring landowner by adding these costs to his or her property tax bill.

#### *Trimming back overhanging branches*

Landowners have the right to trim vertically and remove overhanging obstructions from above their side of the fence. Ohio courts recognize this privilege to remove obstructions, but not without limitations. Ohio courts do not permit landowners to cause harm to the other side of the property line. A landowner should be careful not to damage the neighbor's trees or trespass on to the neighbor's property when trimming overhanging branches. Landowners may be liable to a neighbor if they recklessly damage a neighbor's tree when removing overhanging branches.

Landowners should review their rights and responsibilities to maintain fences prior to clearing the fence row this spring. For more information on line fence law, visit the Ag Law Library [here](#).

### **[Addressing the Legal Side of Spring Agritourism Activities](#)**

*Written by: Chris Hogan, Law Fellow, OSU Agricultural & Resource Law Program*

Spring has sprung and many agritourism providers are busy gearing up for spring agritourism activities such as maple syrup production, school tours, and berry picking. Agritourism providers should take time this spring to review the key elements of Ohio's new agritourism law and understand how the law affects the agritourism operation.

Ohio's new agritourism law applies to qualifying farms, including you-pick operations and farm markets, when an agritourism activity is conducted on that farm. A qualifying farm under the law is either at least 10 acres in size or a farm under 10 acres that grosses an average income of \$2500 from production (the same requirements for qualifying for Ohio's CAUV property tax program). Agritourism activities include agriculturally related educational, entertainment, historical, cultural, or recreational activities. Below are two important benefits of Ohio's agritourism law that agritourism providers should review this spring: liability protection and zoning protection.

#### *Liability Protection*

One of the main benefits of the law is liability protection for agritourism providers against claims by participants injured as a result of an inherent risk of an agritourism activity. The law defines inherent risks to be dangers and conditions that are an integral part of the activity, including surface and subsurface land conditions, actions of wild animals and domestic animals other than vicious or dangerous dogs, dangers of farm structures and equipment, illness from contacting animals, feed or waste, and the participant's failure to follow instructions or use reasonable caution.

There are several limitations and requirements under the law that impact this liability protection. Most importantly, agritourism providers must post signs either at the entrance to the farm or at each agritourism activity in order to receive liability protection under the law. The signs must meet the specifications of the law. For more information about posting signs and the law's liability protection, our previous post on agritourism is [here](#).

#### *Zoning*

Ohio's agritourism law also provides some zoning protections to agritourism providers. Under the law, township and county zoning authorities cannot prohibit agritourism activities on farms. But, townships and counties can regulate some factors related to agritourism to protect public health and safety. These factors include the size of structures

used primarily for agritourism, setbacks for structures, ingress and egress from the parcel, and the size of parking areas. A township or county that wants to regulate these limited factors must have provisions addressing the factors in the local zoning code. We explain the zoning provisions of the agritourism law in more detail in our law bulletin, [here](#).

### *Preparing for the 2017 Season*

As agritourism providers prepare for the 2017 season, providers should take a few actions to ensure the benefits of the agritourism law for their operations:

- Post the required signs at the entrance to the agritourism operation or at each agritourism activity. Also, consider adding your own signs to give instructions, guide visitors safely around the property or warn visitors of potential hazards.
- Even with the law's liability protection, make sure the property is as safe and clean as possible. Spring is a good time to walk the property to identify any dangerous conditions that might put a visitor at risk and fix those conditions before inviting guests on the property.
- Farms under 10 acres in size should take time to brush up on good recordkeeping practices. Farms that are under 10 acres may be required to prove that they qualify as a farm under the agritourism law by showing \$2500 in gross receipts. Be sure to maintain all records of farm income.
- If starting a new agritourism activity, check the local zoning code to see if the township or county has zoning requirements for the few agritourism factors it can regulate. Be prepared for a visit by the local zoning inspector and be ready to show the inspector that the activity falls under the new agritourism law's zoning protections because it is "agritourism" conducted on a "farm."

A full description of the Ohio Agritourism Law is available via our law bulletin [here](#).

### **Have You Prepared Your Farm Business for Life After You?**

*by David Marrison, Associate Professor & Extension Educator*

During the past winter, one of the farm management workshops we conducted across Ohio was the "Passing on the Family Farm" series. In fact, almost 400 individuals were able to attend these workshops and other special presentations to learn how to plan for the future of their farms. These workshops were a great way for families to grow together by develop a farm succession game-plan and to begin to have crucial conversations.

Each farm family is different in regard to its goals for transition planning. Family dynamics, physical resources, financial position, and managerial styles vary from operation to operation. As farmers plan to transfer the family business to the next generation, there are a myriad of decisions to be made. One of the most difficult is determining how to be fair to off-farm heirs without jeopardizing the future of the heirs who have remained with the family business. Other decisions include deciding who will manage the business in the future, how to distribute assets, how and when the senior generation will retire, and how the business will deal with the unexpected.

So has your family discussed the future of your farm business? Seven years ago this May, our dairy farm was rolling along nicely and then my father was diagnosed with pancreatic cancer. My dad fought a courageous battle against this disease for seven weeks before passing away. His diagnosis came right during planting season which is one of the busiest times on a farm.

Two of the major questions I pose in our farm succession workshops are "**What knowledge would you need to pass on if you knew you had only 2 months to live?**" and "**How would your farm react to the loss of the principle operator?**" As you jump in the tractor this spring, I challenge you to think about the future of your farm. Many of us do our best thinking in the tractor, so challenge yourself to think about what knowledge and skills need to be transferred to the next generation so they can be successful without you.

**Opossum Approach** – I have often said the senior generation should "play possum" during planting or harvest season. What does this mean? Just as an opossum plays dead, so too should the principle operator. Take an unannounced week away from the farm during one of the busiest times of the year for your farm and allow the junior generation to take over with no communication from the senior generation. I know this sounds crazy but how else will you know what knowledge and skills have been transferred and which ones still need to be? It is a lot easier to come back after a short vacation and be able to answer the questions your son or daughter has. You won't have this opportunity when you pass away.

**365 Day Challenge**- Outside of using the opossum approach, it should be the goal of the senior generation to transfer at least one knowledge point or skill to the next generation each day. In fact, have you asked the next

generation what they need to be schooled up on? It is a great idea to ask the next generation what additional responsibilities they believe they should be taking on and what changes they would like to see made for them to be successful in the future. Have you completed a skills assessment with each son or daughter to see what training they need to be successful in the future?

Our farm succession team is here to help you. In addition to our one day or two day workshops, we are also available to speak at other events and to conduct kitchen-table meetings with your farm family. If you are interesting in learning more about how to successfully transition your farm to the next generation, please email me at [marrison.2@osu.edu](mailto:marrison.2@osu.edu) and I will be happy to dialogue with you! Our team also has a series of factsheets on farm transition planning and other planning documents available for your use

### **Contentious Des Moines Water Works Litigation Comes to an End**

*Source: Peggy Hall, Ohio Agricultural Law Specialist*

#### *Federal court dismisses Clean Water Act lawsuit against Iowa drainage districts*

A federal district court has dismissed the controversial Des Moines Water Works lawsuit that put the agricultural community on edge for the past two years. While the decision is favorable for agriculture, it didn't resolve the question of whether the water utility could prove that nitrates draining from farm fields are harming the utility's water sources. The court's dismissal prevents Des Moines Water Works from further asserting such claims.

The lawsuit by the Des Moines Water Works (DMWW) utility sued irrigation districts in three Iowa counties for allowing discharges of nitrates through drainage infrastructure and into the waterways from which the utility drew its water. In addition to claiming that the discharges violate the federal Clean Water Act's permitting requirements, DMWW also asserted nuisance, trespassing, negligence, takings without compensation, and due process and equal protection claims under Iowa law. The utility sought monetary damages for the cost of removing nitrates from its water as well as an injunction ordering the drainage districts to stop the discharges with proper permits.

The federal district court first certified several questions of state law to the Iowa Supreme Court to clarify whether Iowa law provided immunity to the drainage districts for DMWW's claims. On January 27, 2017, the Iowa Supreme Court responded in the positive, explaining that Iowa drainage districts had been immune from damages and injunctive relief claims for over a century because drainage districts "have a limited, targeted role—to facilitate the drainage of farmland in order to make it more productive." The Iowa court also clarified that Iowa's Constitution did not provide a basis for DMWW's constitutional arguments.

Turning to the party's claims in light of the Iowa Supreme Court's ruling, the federal district court focused on the drainage district's motion to dismiss DMWW's claims based on the doctrine of redressability, which requires a showing that the alleged injury is likely to be redressed by a favorable decision. The doctrine of redressability concludes that a plaintiff cannot have standing to sue and therefore cannot proceed in a case if the defendant doesn't have the power to redress or remedy the injury even if the court granted the requested relief.

The drainage districts argued that they could not redress DMWW's Clean Water Act claims because the districts had no power to regulate the nitrates flowing through the drainage systems. The court agreed, stating that "DMWW seeks injunctive relief and the assessment of civil penalties against the drainage districts arising from alleged duties and powers that the districts simply do not possess under Iowa law. DMWW may well have suffered an injury, but the drainage districts lack the ability to redress that injury."

The federal district court also dismissed DMWW's remaining claims against the drainage districts. DMWW argued that the immunity given the drainage districts as described by the Iowa Supreme Court prevented DMWW's remaining claims and thus violated the U.S. Constitution's Equal Protection, Due Process, and Takings Clauses. The federal district court found these contentions to be "entirely devoid of merit" and dismissed the state law claims of nuisance, trespassing, negligence, takings, due process and equal protection. Because none of the counts against the drainage districts survived the court's scrutiny, the court dismissed and closed the case.

#### *What does the decision mean for agriculture?*

The DMWW case was a futile but somewhat inventive attempt to allocate liability for nitrate pollution to the agricultural community. "Unregulated agricultural discharges into Iowa's rivers, lakes and streams continue to increase costs to our customers and damage Iowa's water quality and environment," said DMWW's CEO Bill Stowe upon filing the lawsuit. A public poll by the Des Moines Register soon after Stowe brought the DMWW lawsuit showed that 42% of the respondents agreed with him in believing that farmers should pay for nitrate removal from

DMWW's waters, while 32% thought those who lived in Des Moines should pay to remove the nitrates.

If the goal is to force agriculture to reduce nutrient run off or pay for the cost of removing nutrients from waterways, the DMWW case tells us that suing those who oversee agricultural drainage infrastructure projects is not the proper mechanism for accomplishing that goal. So will the next strategy be to sue the farmers who use the nutrients and the drainage infrastructure?

One challenge in suing farmers directly for nutrient runoff, and the issue that was not addressed in DMWW, is whether nutrient runoff from farm fields carried through drainage systems constitutes a "point source" that requires regulation under the Clean Water Act, or whether nutrient runoff fits within the agricultural exemption under the Clean Water Act. That law defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," but states that point sources do not include "agricultural storm water discharges and return flows from irrigated agriculture." What we still don't know after two years of DMWW litigation is whether a court would put the transport of agricultural nutrients through drainage systems in the point source definition or would consider it an agricultural exemption from the point source definition.

A second challenge in an attempt to bring agricultural nutrients under the Clean Water Act is whether a plaintiff could prove the actual origin of a downstream nutrient—who applied the nutrient that ended up downstream? DMWW sought to minimize this challenge by suing the drainage districts that oversee the entire region. But DMWW still would have had to trace the nutrients to the region, a difficult task.

Meanwhile, the agricultural community expects that its voluntary efforts to reduce nitrate and phosphorus runoff from farm fields will positively impact water quality and reduce the possibility of more litigation like the DMWW case. A multitude of voluntary efforts are underway, such as Iowa's Nutrient Reduction Strategy and the flourish of cover crops in the Western Lake Erie Basin. Ohio has also added a regulatory approach that requires farmers to engage in fertilizer application training.

Let's hope these initiatives will reduce nutrient impacts before another party is willing to point its finger and agriculture and pursue a lawsuit like DMWW. Read the federal district court's decision in DMWW [here](#). Our previous post on DMWW is available [here](#).

### **[Ohio Corn, Soybean and Wheat Enterprise Budgets Project Low to Negative Returns Again for 2017](#)**

*by: Barry Ward- Leader, Production Business Management, Ohio State University Extension*

Production costs for Ohio field crops are forecast to be slightly lower to slightly higher in 2017 depending on the crop and the profit picture remains poor, much the same as in 2016. Variable costs for corn for 2017 are projected to be \$328 to \$407 per acre depending on land productivity. Lower fertilizer costs are offset by somewhat higher fuel, chemical and interest costs.

Variable costs for 2017 Ohio soybeans are projected to range from \$194 to \$210 per acre. Some minor changes in soybean weed control assumptions led to higher herbicide costs. This higher cost together with higher fuel and interest expense more than offset lower fertilizer and seed costs.

Wheat variable expenses for 2017 are projected to range from \$161 to \$192 per acre, down slightly from 2016. Lower fertilizer prices are the primary drivers of lower variable costs in 2017 offsetting slightly higher herbicide costs.

With continued low crop prices expected for 2017, returns will likely be low to negative for many producers. Projected returns above variable costs (contribution margin) range from \$183 to \$342 per acre for corn and \$212 to \$384 per acre for soybeans. (This is assuming fall cash prices of \$3.65 per bushel for corn and \$9.40 per bushel for soybeans.) Projected returns above variable costs for wheat range from \$112 to \$205 per acre (assuming \$4.20 per bushel summer cash price).

Returns to land for Ohio corn (Gross Revenue minus all costs except land cost) are projected to range from -\$40 to \$107 per acre in 2017 depending on land production capabilities. Returns to land for Ohio soybeans are expected to range from \$39 to \$202 per acre depending on land production capabilities. Returns to land for wheat (not including straw or double-crop returns) are projected to range from -\$62 to \$25 per acre.

Total costs projected for trend line corn production in Ohio are estimated to be \$786 per acre. This includes all variable costs as well as fixed machinery, labor, management and land costs. Fixed machinery costs of \$130 per acre include depreciation, interest, insurance and housing. A land charge of \$187 per acre is based on data from the Western Ohio Cropland Values and Cash Rents Survey Summary. Labor and management costs combined are calculated at \$76 per acre. Returns Above Total Costs for trend line corn production are negative at -\$157 per acre.

Total costs projected for trend line soybean production in Ohio are estimated to be \$566 per acre. (Fixed machinery costs – \$108 per acre, land charge – \$187 per acre, labor and management costs combined – \$55 per acre.)

Returns Above Total Costs for trend line soybean production are also negative at -\$66 per acre.

Total costs projected for trend line wheat production in Ohio are estimated to be \$540 per acre. (Fixed machinery costs – \$126 per acre, land charge – \$187 per acre, labor and management costs combined – \$38 per acre.)

Returns Above Total Costs for trend line wheat production are also negative at -\$205 per acre.

These projections are based on OSU Extension Ohio Crop Enterprise Budgets. Newly updated Enterprise Budgets for 2017 have been completed and posted to the OSU Extension Agriculture and Natural Resources

Farm Management Tools website:

<https://aglaw.osu.edu/farm-management-tools/farm-budgets>

### [Are Your Dairy Farm Employees Willing to Learn?](#)

*by: Chris Zoller, Extension Educator, ANR in Tuscarawas County*

Developing employees is critical for the success of any farm. We say that, but do we believe it? New products, technologies, and practices are changing rapidly on dairy farms, and we know an employee development program will enable them to make better decisions and solve problems. But do employees really want to learn? Results of a survey recently released show that employees do want to learn!

Michigan State University interviewed 174 dairy farm employees representing 13 farms. Employees were asked to rate their interest in learning. A scale of 1 (“I already know enough to do my job”) to 5 (“I am interested in dairy and I want to learn more”) was used. The average was 4.73. In other words, they nearly unanimously selected 5 – “I am interested in dairy and I want to learn more”.

What do you think farm owners and managers believed employees would answer? Using the same scale, they rated employee interest in learning at 3.27. This is a much different ranking when compared to the one provided by employees.

What does this mean? Which picture is truer? Do employees really want to learn or were they just saying what they thought the interviewer wanted to hear? These are not meaningless questions – in fact, the extent and investment by farm owners in employee training depends on the answer. Employers have been reluctant to believe the results based on their own experience. Maybe their experience is a result of poor training methods, an incorrect approach, or poor timing.

Two veterinarians recently shared examples that strongly reinforce the results of this research. On one farm a graduate student (also a veterinarian) was gathering data for a research project. She described how employees asked her to teach them more about disease diagnosis, treatment, and why and how diseases occur. She scheduled a time to go back to talk to the employees about the transition period. She planned to be there no more than one and a half hours, but (because of the questions) was at the farm for three hours!

A second veterinarian reported on the results of a lunch meeting with employees from one farm. The veterinarian anticipated being with the group for no more than one hour. He reported being with the group for two hours because of the number of questions from the employees!

Why do the experiences of these veterinarians, and the results of the research, differ from what some dairy producers experience? Maybe the answer is in what the veterinarians indicated. Here are some key points:

- **Attitude** – the veterinarians believed employees wanted and were capable of learning, and they wanted to help them
- **Language** – they were able to speak the same language of the employees
- **Time** – they made time to meet with the employees

- **Why** – they explained cow physiology, “why” things happen, and “why” protocols are as they are

There may be other reasons, but the point is to recognize the desire most employees have to learn. Feed that desire and your employees will respond. Maybe you schedule time one day a week for a “dairy talk time” with your employees. Any topic is available for discussion or let employees suggest a topic in advance. Create an environment where learning is encouraged and you will gain employee loyalty and satisfaction.

This article was originally published in the *Farm & Dairy* newspaper, May 2017. (Source: This is a summary of a research project conducted by Phil Durst and Stanley Moore, Michigan State University. Read more at: *Hungry to learn?* Phil Durst, Michigan State University Extension, [http://msue-anr.msu.edu/news/hungry\\_to\\_learn](http://msue-anr.msu.edu/news/hungry_to_learn))

### [Hiring Youth Labor on Your Farm](#)

Source: Chris Zoller, Extension Educator, ANR, Tuscarawas County

Young people may be approaching you in the next few weeks looking for a summer job on your farm. Will you hire someone on the spot? Do you have work available for a minor to perform? Can a minor perform the same tasks as an adult? What do state and federal child labor laws say about youth employed in agriculture?

#### **Determine Your Needs**

- What jobs do you have available?
- Are there livestock tasks that need performed?
- What cropping tasks need completed?
- For how many hours do you need an employee?
- Are there special requirements you must be aware of when employing minors?

#### **Tasks Defined as Hazardous**

It’s not surprising that there are certain tasks in agriculture that have been identified as “hazardous” by the federal government. Ohio has adopted the same list. What’s included on this list?

- Operating a tractor of over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor;
- Operating or working with a corn picker, grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyer, unloading mechanism of a non-gravity type self-unloading wagon or trailer, power post hole digger, power post driver, or non-walking type rotary tiller;
- Operating or working with a trencher or earthmoving equipment, fork lift, potato combine, or power driven circular, band, or chain saw;
- Working in a yard, stall, or pen occupied by a bull, boar, or stud horse maintained for breeding purposes; a sow with suckling pigs; or a cow with a newborn calf (with umbilical cord present);
- Felling, buckling, skidding, loading, or unloading timber with a butt diameter of greater than six inches;
- Working from a ladder or scaffold at a height of over 20 feet;
- Driving a bus, truck, or automobile to transport passengers, or riding on a tractor as a passenger or helper;
- Working inside: a fruit, forage, or grain storage designed to retain an oxygen-deficient or toxic atmosphere; an upright silo within two weeks after silage has been added or when a top unloading device is in operating position; a manure pit; or a horizontal silo while operating a tractor for packing purposes;
- Handling or applying toxic agricultural chemicals identified by the words “danger,” “poison,” or “warning” or a skull and crossbones on the label;
- Handling or transporting explosives;
- Transporting, transferring, or applying anhydrous ammonia

The prohibition of employment in hazardous occupations does not apply to youths employed on farms **owned or operated** by their parents. In addition, there are some exemptions from this prohibition:

- 14 & 15 year old students enrolled in vocational agriculture programs are exempt from certain hazardous occupations when certain requirements are met; and
- Minors aged 14 & 15 who hold certificates of completion of training under a 4-H or vocational agriculture training program may work outside school hours on certain equipment for which they have been trained

#### **Minimum Age Standards for Agricultural Employment**

- Youths ages 16 & above may work in any farm job at any time

- Youths age 14 & 15 may work outside school hours in jobs NOT declared hazardous by the Secretary of Labor, unless the minor holds a 4-H or vocational agriculture tractor operation or machinery operation certificate. The certificate must be kept on file by the employer.
- Youths 12 & 13 years of age may work outside of school hours in non-hazardous jobs on farms that also employ their parent(s) or with written parental consent
- Youth under 12 years of age may work outside of school hours in non-hazardous jobs with parental consent, but **only** on farms where none of the employees are subject to the minimum wage requirements of the Fair Labor Standards Act (FLSA)
- Youths 10 & 11 years old may hand harvest short-season crops outside school hours for no more than eight weeks between June 1 & October 15 if their employers have obtained special waivers from the Secretary of Labor
- Youths of any age may work at any time in any job on a farm owned or operated by their parents

### **Who Enforces the Laws and What are the Penalties?**

Investigators of the Wage and Hour Division enforce youth employment provisions of the FLSA. They have full authority to conduct investigations, gather data, and assess compliance with the laws.

An employer that violates the youth employment provisions may be subject to civil money penalties (CMPs). The amount of the CMP assessment depends upon the application of statutory and regulatory factors to the specific circumstances of the case.

Generally speaking, child labor CMP assessments will be higher if the violation contributed to the injury or death of the youth involved. The severity of any such injury will be taken into account in determining the amount of a CMP. A CMP assessment may be decreased based on the size of the farm business. Also, CMP assessments will reflect the gravity of the violation and may be doubled if the violation is determined to be willful or repeated. A CMP assessment for a violation that causes death or serious injury of a minor is subject to a higher statutory cap. An injury qualifies as a "serious injury" for this purpose if it involves permanent or substantial harm. Both the significance of the injury and duration of recovery are relevant in determining whether an injury is serious. If more than one violation caused a single death or serious injury, more than one CMP may be assessed. Finally, CMP assessments based on the death or serious injury of a minor may be doubled to a higher statutory cap if the violation is determined to be willful or repeated.

### **How to Comply with the Law**

To be certain you are in compliance with the laws regulating the employment of minors in agriculture, take a few precautions to protect everyone involved.

- Verify the child's age and keep records
- Review and understand the list of agricultural work considered hazardous
- Remember that only your children and grandchildren are exempt from hazardous jobs
- Instruct minor employees about the jobs they may not perform
- Review safety procedures with employees
- For 14 and 15 year olds who have completed a 4-H or vocational agriculture tractor or machinery operation course, retain a copy of the certificate.

A job on a farm is a great opportunity for young people to learn about agriculture. It's also a good way for them to earn money toward a vehicle or furthering their education. View your farm operation as a way to provide opportunities for young people, but make certain you understand and follow the law.

### **Sources**

U.S. Department of Labor, Wage & Hour Division, <http://www.wagehour.dol.gov>  
 Peggy Hall and Catharine Daniels, Ohio Agricultural Law Blog, June 10, 2013,  
<https://ohioaglaw.wordpress.com/tag/employing-minors-on-farms/>

### **[Census of Agriculture: Important for Agriculture, Important to You!](#)**

*By Emily Adams, Extension Educator Coshocton County and Chris Bruynis, Extension Educator Ross County*

What an exciting and uncertain time to be involved in agriculture! There are several items affecting agriculture, most of which we have little influence over. Recently President Trump announced the Presidential Executive Order on Promoting Agriculture and Rural Prosperity in America (<https://www.whitehouse.gov/the-press-office/2017/04/25/presidential-executive-order-promoting-agriculture-and-rural-prosperity>) and that we would remain

in NAFTA (<http://www.cnn.com/2017/04/26/politics/trump-nafta/>). But amidst all the headline news, there is another important item for agriculture that we all can affect. That is the 2017 Census of Agriculture (<https://www.agcensus.usda.gov/>).

A lot has changed in the last five years since 2012 when the last Census of Agriculture was taken. Much of the federal funding decisions, farm support, and rural development policies are a direct result of the data collected in the Census of Agriculture. The Census of Agriculture provides the only source of uniform, comprehensive and impartial agricultural data for every county in the nation. Through the Census of Agriculture, producers can show the nation the value and importance of agriculture, and they can help influence the decisions that will shape the future of American agriculture for years to come. By responding to the Census of Agriculture, producers are helping themselves, their communities, and all of U.S. agriculture.

There are some interesting changes coming to the 2017 Census of Agriculture. These include: Expanded questions about food marketing practices, including the gross value of edible agricultural products sold directly to both consumers and retail markets. In 2012, this section only included yes/no type questions to determine whether an operation marketed food items directly to consumers.

Elimination of specific designations or titles such as principal operator and new/beginning farmer. Removing these designations helps to better capture the roles and contributions of women and new/beginning farmers. To maintain continuity with the principal operator data series in earlier censuses, the 2017 Census of Agriculture retains a principal operator bridge question.

An expanded question about who makes what kind of decisions on the farm. The 2017 Census questionnaire includes functional decision-making categories for each decision maker listed and asks respondents to mark all that apply: day-to-day decisions, land use/crop decisions, livestock decisions, record keeping/financial decisions, and estate planning.

Farmers can voluntarily sign up for the census at [www.agcensus.usda.gov](http://www.agcensus.usda.gov) by June 30 to make sure their voice is included in the results. Farmers are required to complete the census if selected by the deadline of February 5, 2018. Farmers should begin to look for Census forms in their mailboxes this December. There are also options to complete the Census online. The online form will be more user-friendly in 2017, automatically calculating totals and skipping questions that are not pertinent.

### **Wayne County Dairy Manure Storage Inventory Survey**

*by: Rory Lewandowski, Extension Educator Wayne County*

In early January 2017, the Wayne County Extension office in partnership with the Wayne County Farm Bureau, Wayne County SWCD and NRCS, the Wayne County Ag Success Team and the Wayne-Ashland Dairy Service Unit, mailed a survey to 339 Wayne County dairy farms to determine the current manure storage capacity on those farms. Addresses of dairy farms were provided by the Ohio Department of Agriculture (ODA) and included both Grade A and Grade B milk producers. The purpose of the survey was to gather base-line information to assess how prepared Wayne County dairy farms are to comply with Senate Bill 1 (SB 1) type of clean water/nutrient management legislation. Surveys were returned in early February of 2017 and Ohio University Environmental Studies graduate student Janessa Hill tabulated survey responses and prepared summaries of the results.

SB 1 legislation became effective on July 3, 2015 and currently covers the Western Lake Erie Basin and contains specific provisions regarding manure application and prohibitions against application of manure (and granular fertilizer) during winter months and when soils are saturated. Depending upon who you talk to, it is expected that this type of legislation will move state-wide in the future, possibly within two to five years. In order to comply with the winter application prohibitions and other manure application provisions, the general consensus of persons who work with manure management and write manure management plans, seems to be that most farms should have 9 to 12 months of manure storage. The SB 1 law provided medium-sized facilities (200-699 dairy cattle) a year to comply with the regulations. Small agricultural operations could apply for a two year exemption before compliance. The entire SB 1 legislation text is available at: <http://tiny.cc/OHSenateBill1>. A summary of SB1 legislation and explanation of the legislation written by Peggy Hall, OSU Extension director of the Agricultural & Resource Law program is available on-line at: <https://aglaw.osu.edu/blog-tags/manure-application>.

The dairy farm manure storage survey was designed to collect information regarding the type of manure storage present on dairy farms along with the storage capacity and typical manure application timing. Additionally, the

survey asked farms to rate the degree of financial hardship that would be experienced if legislation similar to SB 1 was extended to Wayne County and additional manure storage had to be added.

The goal is to use the collected survey information in conversations with legislators, policy makers, and other elected officials to provide a better understanding of the on-farm situation within the county. It is hoped that this baseline data might help to guide legislators as they craft water quality/nutrient management legislation and avoid unintended consequences for agriculture. The results of the survey have implications for compliance time frames, environmental considerations and the social fabric of the community. The information collected regarding the financial cost and hardship that will be incurred by adding additional manure storage has to be considered in any future clean water/nutrient management legislation.

According to Ohio Department of Agriculture (ODA) statistics, there are 32,000 milk cows in Wayne County. Surveys mailed back to the Wayne County Extension office represented a total of 14,811 dairy cows or about 46% of the ODA statistic number. The overall survey return rate was 33%. The majority of dairy farms who completed the survey indicated the use of both liquid and bedded pack manure storage systems for their milking herd, with bedded pack manure storage the dominant form of manure storage for the heifers and calves. When asked about a nutrient/manure management plan, 44% of the survey respondents stated they do have a current nutrient and manure management plan and 43% said they did not. With regard to manure storage capacity, 52% of the responding farms have less than 3 months of liquid manure storage, 36% have 3-6 months of storage, 5% have 7-9 months of storage and only 3% have 10-12 months of storage. With regard to solid manure storage, survey results indicate that 23% of the responding farms have less than 3 months of storage and 34% have 3-6 months of storage, 14% have 7-9 months of storage and 8% have 10-12 months of storage.

In terms of financial hardship, farms were asked to choose a statement that would best describe their situation if they had to construct additional manure storage to allow 9-12 months of storage capacity. Approximately 20% of the survey respondents checked "It could not be done in my current dairy situation. The dairy operation would end." Another 40% of the survey respondents checked the statement; "It could be done but at great financial hardship and greatly increasing risk of business failure." Another 14% of the respondents checked the statement "It would be done as part of the cost of staying in business." In a follow up question, 43% of the respondents stated they would not accept a government program if cost share support was provided to help finance the cost of additional storage to stay in business, while 11% said they would need 50% cost-share financing and 27% said it would require 75% cost share financing.

More information about the survey and survey summary documents with results to all the survey questions are available on the OSU Wayne county extension website at: <http://go.osu.edu/Waynedairymanuresurvey> .