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## ***Bill Analysis***

*Legislative Service Commission*

### **Sub. S.B. 393\***

126th General Assembly

(As Reported by H. Agriculture and Natural Resources)

**Sens. Mumper, Grendell, Niehaus, Schuler, Harris**

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#### **BILL SUMMARY**

- Modifies the requirements governing the issuance of individual and general national pollutant discharge elimination system (NPDES) permits by the Director of Agriculture.
- Alters two agricultural exceptions to permit requirements in the Water Pollution Control Law by specifying that the exceptions governing the application of any materials to land for agricultural purposes or runoff of the materials from that application or pollution by animal waste or soil sediment and the excrement of domestic and farm animals defecated on land or related runoff into any waters of the state do not apply to any discharge that is prohibited by, or for which a permit is required by, the Federal Water Pollution Control Act.
- Makes changes to a third agricultural exception to permit requirements in that Law, which is contingent on the United States Environmental Protection Agency's (USEPA's) approval of the NPDES program submitted by the Director, by specifying that the exception applies to any discharge that is within the scope of that approved NPDES program.
- Specifies that, contingent on the USEPA's approval of the NPDES program submitted by the Director of Agriculture, the Director of Agriculture must administer and enforce permits issued under section 402(A) of the federal Water Pollution Control Act within this state that are issued for any discharge that is within the scope of the approved NPDES program submitted by the Director.

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*\* This analysis was prepared before the report of the House Agriculture and Natural Resources Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Requires the Director of Environmental Protection to adopt rules specifying certain construction activities that may be conducted prior to approval of plans for a treatment or disposal works under the Water Pollution Control Law, and establishes the Preconstruction Rules Working Group for the purpose of developing the rules.

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## CONTENT AND OPERATION

### NPDES permits

#### Background

The Federal Water Pollution Control Act and regulations adopted under it establish the national pollutant discharge elimination system (NPDES) program. The program generally requires a permit, called a NPDES permit, to be obtained for the discharge of sewage, industrial waste, or other wastes into the waters of the state. A NPDES permit is issued for each point source of discharge. A NPDES permit may be an individual permit or a general permit.

Currently, the Director of Environmental Protection administers the NPDES program in Ohio (sec. 6111.03, not in the bill). However, the Concentrated Animal Feeding Facilities Law authorizes the Director of Agriculture to participate in the NPDES program and requires that Director to prepare and submit to the United States Environmental Protection Agency (USEPA) a state program for the issuance of NPDES permits for the discharging, transporting, or handling of storm water from an animal feeding facility or of manure. On and after the date on which the USEPA approves the program, authority for that portion of the NPDES program is transferred from the Director of Environmental Protection to the Director of Agriculture. (Sec. 903.08.) At the time that the bill was introduced, the USEPA had not approved the program.<sup>1</sup>

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<sup>1</sup> Current law defines: (1) "discharge" as adding from a point source to waters of the state (sec. 903.01(G), not in the bill), (2) "manure" as any of the following wastes used in or resulting from the production of agricultural animals or direct agricultural products such as milk or eggs: animal excreta, discarded products, bedding, process waste water, process generated waste water, waste feed, silage drainage, and compost products resulting from mortality composting or the composting of animal excreta (sec. 903.01(O), not in the bill), (3) "point source" as having the same meaning as in the Federal Water Pollution Control Act (sec. 903.01(X), not in the bill), and (4) "waters of the state" as all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border on, this

## Revisions

Under current law, on and after the date on which the USEPA approves the NPDES program submitted by the Director of Agriculture, no person can discharge manure from a point source into waters of the state without first obtaining a NPDES permit issued by the Director of Agriculture. Current law requires the owner or operator of a concentrated animal feeding operation (CAFO) to apply for an individual NPDES permit or for coverage under a general NPDES permit issued by the Director. The bill instead requires any person that is required by the Federal Water Pollution Control Act to obtain a permit for the discharge of manure to apply for an individual NPDES permit or for coverage under a general NPDES permit issued by the Director.

Under existing law, a CAFO is deemed to be a point source that discharges manure into the waters of the state unless the Director has determined that the CAFO has no potential to discharge manure into the waters of the state. If an owner or operator of a CAFO receives notice from the Director that the Director has determined that the CAFO has no potential to discharge manure, the owner or operator is not required to apply for an individual NPDES permit or for coverage under a general NPDES permit for that operation. The Director's determination must be made in accordance with rules. The bill eliminates those provisions. In addition, the bill authorizes the Director to issue, revoke, modify, or deny an individual NPDES permit that a person is required to obtain or issue, revoke, or

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*state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters (sec. 903.01(FF), not in the bill).*

*In general, existing law defines "concentrated animal feeding operation" as an animal feeding facility that has a total design capacity for a specified number of animals or that may be required to obtain a NPDES permit under certain circumstances (sec. 903.01(F), not in the bill). "Animal feeding facility" means a lot, building, or structure where both of the following conditions are met: (1) agricultural animals have been, are, or will be stabled or confined and fed or maintained there for a total of 45 days or more in any 12-month period, and (2) crops, vegetative forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot, building, or structure. "Animal feeding facility" also includes land that is owned or leased by or otherwise is under the control of the owner or operator of the lot, building, or structure and on which manure originating from agricultural animals in the lot, building, or structure or a production area is or may be applied. Two or more animal feeding facilities under common ownership are considered to be a single animal feeding facility if they adjoin each other or if they use a common area or system for the disposal of manure. (Sec. 903.01(B), not in the bill.)*

deny coverage under a general permit in compliance with all requirements of the Federal Water Pollution Control Act. (Sec. 903.08(B)(1).)

**Agricultural exceptions to Water Pollution Control Law**

Existing law prohibits anyone from causing pollution or placing or causing to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state. Such an action is a public nuisance unless the Director of Environmental Protection has issued a permit governing the action under the state Water Pollution Control Law. There are several statutory exceptions to the prohibition. The bill revises three of the exceptions dealing with agricultural activities. (Sec. 6111.04.)

Under current law, the prohibition does not apply to the application of any materials to land for agricultural purposes or runoff of the materials from that application or pollution by animal waste or soil sediment, including attached substances, resulting from farming, silvicultural, or earthmoving activities regulated by the law governing county commissioners or the Soil and Water Conservation Commission. The bill changes one of the laws under which the activities are regulated from the law governing the Soil and Water Conservation Commission to the law governing the Division of Soil and Water Conservation in the Department of Natural Resources. In addition, the bill specifies that the exception does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, the Federal Water Pollution Control Act or regulations adopted under it. (Sec. 6111.04(F)(3).)

Existing law also specifies that the prohibition does not apply to the excrement of domestic and farm animals defecated on land or related runoff into any waters of the state. As under the exception discussed above, the bill states that the exception does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, the Federal Water Pollution Control Act or regulations adopted under it. (Sec. 6111.04(F)(4).)

Under current law, on and after the date on which the USEPA approves the NPDES program submitted by the Director of Agriculture as discussed above, the prohibition does not apply to storm water from an animal feeding facility or manure. The bill retains the reference to the USEPA approval, but removes the references to storm water from an animal feeding facility and manure from the exception. Instead, the bill states that the prohibition does not apply to any discharge that is within the scope of the approved NPDES program submitted by the Director. (Sec. 6111.04(F)(5).)

### **Water pollution control permits**

Under existing law, the holder of a permit issued under section 402(a) of the Federal Water Pollution Control Act does not need to obtain a permit for a discharge authorized by the permit until its expiration date. The Director must administer and enforce those permits within this state and may modify their terms and conditions in accordance with the state Water Pollution Control Law. Presumably the reference to Director is to the Director of Environmental Protection, but the language is unclear.

The bill generally retains those provisions, but with one substantive revision. It clarifies that the reference to Director is to the Director of Environmental Protection and retains the authority of the Director of Environmental Protection to administer and enforce those permits with one exception. Under the bill, on and after the date on which the USEPA approves the NPDES program submitted by the Director of Agriculture as discussed above, the Director of Agriculture must administer and enforce those permits within this state that are issued for any discharge that is within the scope of the approved NPDES program submitted by the Director of Agriculture. (Sec. 6111.04(G).)

### **Adoption of rules concerning preconstruction activities for water treatment and disposal works**

The bill requires the Director of Environmental Protection, not later than 180 days after the bill's effective date, to adopt rules in accordance with the Administrative Procedure Act specifying construction activities that do not, by themselves, constitute installing works for the treatment or disposal of sewage or other waste for which approval of plans is required under the Water Pollution Control Law. The activities must include the grading and clearing of land, on-site storage of portable parts and equipment, and the construction of foundations or buildings that are not directly related to the installation of treatment or disposal works. The rules also must allow specified initial activities that are part of the installation of treatment or disposal works, such as the installation of electrical and other utilities for the works, prior to the approval of the plans for the works, provided that the owner or operator of the works has submitted the complete plans for the works to the Director and has notified the Director that this activity will be undertaken prior to the approval of the plans. Any activity that is undertaken under the rules adopted under the bill must be at the risk of the owner or operator. The rules adopted under the bill, to the extent possible, must be consistent with similar rules adopted under the Air Pollution Control Law. (Sec. 6111.451.)

### **Preconstruction Rules Working Group**

The bill creates the Preconstruction Rules Working Group consisting of the following members appointed by the Governor: a representative of the Ohio Farm Bureau Federation, a representative of the Ohio Manufacturers' Association, a representative of the Ohio Homebuilders Association, a representative of a statewide environmental advocacy organization, and a person representing the Ohio utility industry (Section 3(A)). The Governor must make appointments to the Working Group not later than 30 days after the bill's effective date. Vacancies on the Working Group must be filled in the manner provided for the original appointments. (Section 3(B).)

The bill requires the Preconstruction Rules Working Group to work with the Director of Environmental Protection in the development of proposed rules for purposes of the bill. The proposed rules must be developed not later than 180 days after the bill's effective date. The Director then must proceed to adopt the rules as required by the bill. Upon the expiration of the 180-day period for the development of the proposed rules, the Working Group ceases to exist. (Section 3(C).)

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## **HISTORY**

ACTION	DATE
Introduced	11-09-06
Reported, S. Agriculture	11-29-06
Passed Senate (27-4)	12-05-06
Reported, H. Agriculture & Natural Resources	---

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