



Ohio Senate Bill 2, 129th General Assembly
Presented to: The Ohio Senate Committee on
GOVERNMENT OVERSIGHT & REFORM
Chairman, Senator Seitz
On behalf of: Ohio Environmental Council
Presented by: Trent Dougherty, Director of Legal Affairs
Date: February 17, 2011

Chairman Seitz, Vice Chairman Grendell, Ranking Member Smith, and Committee Members:

My name is Trent Dougherty, Director of Legal Affairs at the Ohio Environmental Council (OEC). The OEC is a network of more than 100 local and statewide environmental-conservation organizations and several thousand individual citizens. Our mission is to secure healthy air, land, and water for all who call Ohio home. Thank you for this opportunity to testify as an Opponent on Senate Bill 2 (As Introduced).

First of all, I would like to thank the Office of the Lieutenant Governor, and specifically Mark Hamlin, for reaching out to OEC a few weeks ago, and meeting with us to discuss the Common Sense Initiative (CSI) and the Administration's plans for reform. OEC intends to be an objective partner and work often and cooperatively with CSI. The stated intentions and goals of Senate Bill 2 (SB 2) are laudable. Regulatory Reform to help small businesses quickly maneuver the bureaucratic labyrinth of state government and fully comply with Ohio's environmental and human health protection laws is worthy aspiration. OEC is fully supportive of procedural changes to Ohio's regulatory structure that reform the regulatory landscape of Ohio for current and future economic development. I have had the pleasure of sitting on Governor Strickland's Advantage Ohio Air Permitting Regulatory Reform Advisory Committee in 2007 and 2008 where OEC and members of the regulated community agreed upon such procedural changes in the Air Pollution permitting program. Also, OEC was an active participant in the 127th Ohio General Assembly's Regulatory Reform Task Force hearings.

During those processes, OEC consistently expressed our interest in regulatory reform—reform that is:

- Fair and balanced and promotes the uniform and objective application of the law;
- Transparent and open to participation by all interested parties—including and especially the public—in its administration and application;
- Based on sound science and objective criteria and measures and flexible enough to account for improved technologies and practices.

The OEC is not, however, open to any “reform” that is:

- Intent on weakening human health or environmental protections, especially any automatic or across-the-board dismantling or preemption on an existing or future State protection or safeguard to be no stronger than its corresponding Federal minimum standard;
- Based on claims that at best are anecdotal or at worst are exaggerated or unsubstantiated;
- So rigid and inflexible that it stymies advancement and utilization of technology and science.

OEC and the environmental, conservation, and public health advocacy community desire strong regulation, but not regulation for regulation sake. We advocate for regulation to protect and preserve the human health of the people of Ohio. Those regulations that are adding costs and not benefiting Ohio’s environmental or human health; or those regulations cannot be reasonably complied with, must be jettisoned, and replaced with those that will work.

We agree with the sentiments of the Governor’s First Executive order that the state’s regulatory scheme should have a priority of compliance with the law, however, compliance with laws protective of the people of Ohio. Regulations to protect public health and the environment must be based on sound science and engineering – not political science. This also goes for any reformation of these regulations.

The Lieutenant Governor, in her testimony last week, acknowledged what the CSI office will NOT do: That “Regulatory Reform will not seek to eliminate regulations that make sense and work well. It will not blindly promote the interests of one group over those of another. It will not place the health or well-being of Ohioans at risk.” We hope that the Governor and the Lieutenant Governor adhere to these precepts and put the public interest first before that of the state’s corporate community – public welfare before corporate welfare.

However, we are concerned and question whether SB 2 furthers the laudable goals of CSI as well as protect against what the reform is **not** meant to accomplish. Therefore we request the following amendments and clarifications.

Operative terms must be defined narrowly and with the intent to assist Small Businesses

The Lieutenant Governor also, in her testimony last week, stated that “diverting precious staff time toward complying with government requirements” could kill jobs. If that is the case, then that should educate the determination of the operative term “small business” of this CSI process – not an arbitrary 500-employee threshold. The following questions need to be answered when determining the proper and legitimate scope of that definition.

- Is this small business definition representative of any disadvantaged business that currently cannot afford to comply with current regulations?
- Has there been documentation made available showing the number of the members of this small business class have closed or have not operated in Ohio due to regulation in Ohio?

- What percentage of Ohio’s businesses does this represent? Do all of these businesses feel the same “adverse impacts” in the same way?
- Do all “small businesses” in that class have the same capability of hiring or contracting with professional services to assist with regulatory compliance (i.e. attorneys or engineers)?
- Should not a more qualitative definition be used, on a case-by-case basis -- which a business of any number of employees cannot comply with current or proposed regulations because of documented scarcity of human or financial resources?

SB 2 must be amended to develop appropriate definitions, not only of “small business” but also important operative terms that could result, unnecessarily, in the revocation of regulations that protect the health of Ohioans. According to section 108.12, almost any proposed rule that affects small business will have an adverse impact on small business. Any proposed rule that applies to a small business that requires a license or permit, that imposes a criminal or civil penalty or other sanctions, that requires the report of information as a condition of compliance, or that “otherwise requires a small business to spend time or make expenditures that are not directly related to its business operations [,]” has an adverse impact on small business. SB2 Section 108.12. This is incredibly broad. This essentially means that most proposed rules that affect small business will adversely impact small business.

This broad definition of adverse impact, when put together with other sections, seems to eliminate, or drastically reduce, an agency’s ability to regulate small business. Section 121.82(A) requires an agency, when developing a rule, to “[e]valuate the proposed rule against the small business impact analysis instrument and incorporate features into the proposed rule that will eliminate or adequately reduce any adverse impact the proposed rule might have on small businesses[.]” Section 108.13, which sets out the requirements for the small business impact analysis instrument, does not seem to require the agency to consider the purpose of the proposed rule, or the level of necessity of the rule to ensure public health and welfare. If, while developing a rule, an agency must evaluate the rule against the small business impact analysis instrument and incorporate features that eliminate or adequately reduce any adverse impact on small business, and the instrument does not require the agency to consider the need or purpose of the regulation, then the agency has very little or no ability to regulate small business with proposed rules.

The key is whether the impact is so adverse that it hinders compliance or dissuades economic development. What is adverse to some may not be adverse to others, or is a matter of degrees of impact. For example, having to pay \$2000 to obtain a permit may possibly pose an adverse impact to a tiny start-up company. However, that should not be the basis for exempting a large number of businesses to comply with a regulation. Further, great thought must go into defining what constitutes how a rule is determined to be unnecessary, ineffective, contradictory, redundant or inefficient.

We believe, however, that there should be transparent and measurable goals and outcomes for specific regulations, and those outcomes based on the best science available. This is a very important component to the proposed analysis of regulations under CSI’s perview, to include an analysis of the costs to Ohio and Ohioans in terms of environmental and human

health. State agencies must have goals for these regulations, especially those meant to protect human and environmental health, and must report how Ohio is achieving these goals through the regulation.

JCARR's new prong needs clarified

This bill gives the Joint Committee on Agency Rule Review (JCARR) the ability to reject the filing of a proposed rule if “at any time while the proposed rule is in its possession, it discovers that the proposed rule might have an adverse impact on small businesses and the agency has not included with the filing a small business impact analysis or has included a small business impact analysis that is inadequately prepared.” SB2 Section 121.83.

The discretion of the Committee, under this language is great, and provides the potential for inconsistent application and abuse. We urge clarification of JCARR's responsibility under this provision by answering these questions: What standards are JCARR supposed to use in evaluating whether or not a proposed rule has an adverse impact on small business? What deference is JCARR supposed to give to the agencies' determination that there is no adverse impact to small business if the agency does not file an inadequate small business impact analysis (i.e. what constitutes inadequate)?

Section 119.03(I)(1)(f), a new prong of the JCARR analysis, allows JCARR to recommend a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof if it finds “[t]hat the rule-making agency has failed to demonstrate that the regulatory intent of the proposed rule, amendment, or rescission outweighs its adverse impact on small businesses in this state.” SB2 Section 119.03(I)(1)(f). This is the only provision of the bill that mentions balancing the regulatory intent against the adverse impact to small business. The agency is supposed to evaluate the proposed rule that might have an adverse impact on small business with the small business impact analysis instrument, and the bill does not require this instrument to contain standards for weighing the regulatory intent against the adverse impact on small business. See SB2 Section 108.13.

As with the previous section, the discretion of the Committee, under this language, is great, and provides the potential for inconsistent application and abuse. We urge clarification of JCARR's responsibility under this provision by answering these questions: How is JCARR to determine if the regulatory intent outweighs the adverse impact on small business, especially if the agency is not given the opportunity to demonstrate its regulatory intent and the need for

the rule? While this bill does not have a cost-benefit analysis, the main deficiency in Regulatory Reform bills of the past, this provision does have similar faults.

While the above is not a full cost-benefit analysis, it does introduce a balancing that could invalidate, unjustly, rules that require expenditure versus a benefit that is difficult to quantify. The economic impact of agency rules and regulations should also include the economic impact not only on the entity subject to the regulation, but also to the community and other small businesses – collateral costs of non-regulation. For example, regulations to protect water quality and habitat could greatly benefit the health of communities as well as the economics of charter and commercial fishing industries. The analysis, to be a valid and justifiable cost benefit analysis, cannot determine just whether the cost to a business is too high, but whether the benefit to human health and the environment is outweighed by the cost. Further, the costs to Ohioans, health, safety and welfare of not having the regulation should also be considered. An excellent example is the development of ODNR Division of Soil and Water Resources' Distressed Watershed regulations. Without this rule, the now defined "distressed watershed" of Grand Lake St. Marys was stricken with years of pollution that culminated in the outbreak of toxic algae which caused health problems and loss of the areas previously lucrative recreation and tourism industry. The lack of regulation, in this instance, had a high degree of both adverse economic impact as well as adverse human health and quality of life impacts.

As an aside, an important (and long needed) reformation of the JCARR process should be focused on JCARR's third criteria (Section 119.03(I)(1)(c): "the rules do not conflict with the intent of the legislature in enacting the statute under which the rule is proposed." To provide mechanisms to truly determine the legislative intent of the governing statute, the General Assembly should be permitted to codify legislative intent and findings, as well as provide legislative transparency by transcribing committee hearing proceedings and making those and written testimony readily available.

Important additions necessary to SB 2

Two very important missing pieces to SB 2 that may garner our support for the legislation, if incorporated, are (1) regulator accountability to commentators on a regulation, and (2) early and effective involvement of all stakeholders in the development of the rules.

An essential component of regulatory reform that is not in SB 2, that benefits all stakeholders, is the consistent requirement for the agency to be accountable to those who submit comments, whether or not from business under 500 employees. Agency accountability is what the regulatory reform initiatives in SB 2 and CSI are all about. However, there is no requirement for agencies to acknowledge, truly consider, respond, and publish responses to comments. The responsible agency needs to explain why the agency did or did not incorporate

the comments into the final regulation. While some agencies do respond to comments, this is certainly not the case for every regulatory action, nor is many of the responses fully adequate. Beyond merely providing an opportunity for interested parties to comment on a regulatory decision, the agency must be accountable to these interested parties. The agencies should all publish public comments and the official responses of the agency to these comments. For the benefit of the parties who took time, effort, and limited resources to comment on proposed action, and the validity of the decision making process, the decision maker must explain why the comment was or was not considered in the final decision.

Currently, the method regulators use to provide public notice and public input varies widely from Agency to Agency, and sometimes Division to Division within an agency. The best and most productive modes of informing interested parties and the public, providing ample opportunity to gather substantive comments and be accountable to those commentators must be implemented in each and every agency.

Furthermore, state agencies also should incorporate stakeholder involvement at earlier stages in the process. Currently the notice and comment period for many rules and regulations are held for a 30-day period after the regulations are drafted, vetted through the bureaucratic channels, and signed off by the Director. Needless to say, many decisions have already been made, and great amount of state agency time has been spent developing these rules, but with little input from those who must live with these rules. If enough negative reaction is felt by the agency, it will then table and review the rule – this is highly inefficient.

For example, in 2006, the Ohio EPA promulgated rules on stream and wetlands mitigation. While the environmental community felt they were based on sound science, the rules were not protective enough. The regulated community felt that the rule changes were overreaching and would be a regulatory burden. The rules were tabled, and then an external advisory group of stakeholders were convened and met for a period of 18 months. Three years later, the final rules, developed with stakeholder input and involvement, will be finalized in the upcoming weeks. Important environmental protections and the importance of regulatory certainty for the regulated community were lost for over three years because the agency did not involve all stakeholders early enough. While such a large EAG may not be advisable for each and every regulation, the lesson surely is to include all stakeholders as early as possible and as involved as possible.

Early input from stakeholders can be an important money saver as well for the state. Relying on experts from every side of a regulatory issue to study and analyze a set of rules throughout the drafting of the rules allows the state to utilize the private sector to vet the impacts on (for example) the environment and the regulated community. Further, it saves time and resources that currently are spent on lawyers defending rule challenges, and put them back to work helping, and at times forcing, the regulated community to comply.

Conclusion

Regulations to protect public health and the environment were required by the General Assembly to benefit and protect the people of this state, and must continue to do so. Reformation should be focused on process and not on substantive protections. However, if a regulation is adding costs **and** not benefiting Ohio's environmental or human health, it must be replaced with regulations that are protective.

We respectfully ask the Committee to amend the bill by clarifying and limiting the scope of jurisdiction and to add sections to allow for full stakeholder involvement. Thank you for your considering our perspective.

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