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ATTORNEY GENERAL'S STATEMENT OF LEGAL AUTHORITY FOR THE OHIO DEPARTMENT OF AGRICULTURE'S MAJOR CATEGORY PARTIAL PERMIT NPDES PROGRAM

I. Attorney General's Statement Of Legal Authority

This Statement of Legal Authority is to certify on behalf of the Department of Agriculture of the State of Ohio, pursuant to Section 402(b) of the Federal Water Pollution Control Act (or the Clean Water Act), as amended, 33 U.S.C. Section 1251, *et seq.* (hereinafter referred to as the "CWA"), that in the opinion of the Attorney General, the laws of the State of Ohio provide adequate authority for the Ohio Department of Agriculture (hereinafter referred to as the "ODA") to assume, implement, maintain and enforce a partial permit program for a major category of discharges in Ohio now covered under the National Pollutant Discharge Elimination System (hereinafter referred to as "NPDES") permit program of the Ohio Environmental Protection Agency (hereinafter referred to as "OEPA"). This partial permit program applies to discharges of pollutants, especially manure and process waste water, from the major point source category of Concentrated Animal Feeding Operations (hereinafter referred to as "CAFOs") as defined at 40 C.F.R. Sections 122.23(b)(2), (4), (6), (9) and 122.23(c), and from certain Animal Feeding Operations (hereinafter referred to as "AFOs) as defined at 40 C.F.R. Section 122.23(b)(1). This partial permit program also applies to certain discharges of storm water from CAFOs and AFOs.

Note that ODA's definition of Concentrated Animal Feeding Facility (hereinafter referred to as "CAFF") at O.R.C. Section 903.01(E) and ODA's definition of Large CAFO at O.R.C. Section 903.01(M) are identical to the federal definition of Large CAFO set forth at 40 C.F.R. Section 122.23(a)(4). ODA's definition of Medium CAFO at O.R.C. Section 903.01(Q) is identical to the federal definition of Medium CAFO set forth at 40 C.F.R. Section 122.23(a)(6).

ODA's definition of Small CAFO at O.R.C. Section 903.01(EE) and O.A.C. Rule 901:10-3-07 is identical to the federal definition at 40 C.F.R. Sections 122.23(b)(9) and (c).

In addition, note that ODA's definition of Animal Feeding Facility in O.R.C. 903.01(B) (hereinafter referred to as "AFF") is broader than the federal definition of AFO set forth at 40 C.F.R. Section 122.23(b)(1), as AFF includes the land application area for manure set forth at 40 C.F.R. Section 122.23(b)(3). The definition of AFF also includes the common ownership provision set forth in the federal definition of CAFO at 40 C.F.R. Section 122.23(b)(2).

This Statement of Legal Authority (hereinafter referred to as the "SOLA") presents citations to and analyses of the Ohio statutes and rules which provide ODA with the authority to assume a partial NPDES permit program as provided for at 33 U.S.C. Section 1342(n)(3) and 40 C.F.R. Section 123.1(g). When Senate Bill 393, which was signed by the Governor on December 27, 2006, and the rule amendments heard without comment by Ohio's Joint Committee on Agency Rule Review ("JCARR") on December 28, 2006 become effective, the Ohio statutes and rules described will provide ODA with the authority to issue permits for discharges of pollutants, especially manure and process waste water, from CAFOs and certain AFOs and discharges of storm water from CAFOs and AFOs in compliance with the NPDES program set forth in the CWA and its implementing regulations.

Pursuant to federal requirements, ODA's NPDES program for CAFOs and AFOs encompasses a significant and identifiable part of the State of Ohio's NPDES program. Other aspects of the ODA program are described in the Program Description submitted by ODA, including the Compliance and Enforcement Program Description, the Memorandum of Agreement between ODA and OEPA, and the Memorandum of Agreement between ODA and the Ohio Department of Natural Resources (hereinafter referred to as "ODNR"). These documents are incorporated herein by reference as if fully set forth in this SOLA.

The legal authorities referred to in this SOLA are properly adopted Ohio statutes,

contained in the Ohio Revised Code, and are properly adopted rules, with the exception of the rule package mentioned below, contained in the Ohio Administrative Code (hereinafter referred to as the "O.A.C." or the "Administrative Code"). An affidavit from the ODA testifying that all currently effective rules have been properly adopted is contained in the program package submitted by the ODA. In addition, the SOLA refers to legislation amending O.R.C. 903.08 and O.R.C. 6111.04 which was passed by the Ohio General Assembly in Senate Bill 393 and adopted and signed into law by the Governor on December 27, 2006. Senate Bill 393 will become effective on March 27, 2007. Finally, a package of rule amendments, which include amendments to OAC 901:10-1-01, 901:10-2-14, 901:10-2-14 Appendix A, 901:10-2-14, Appendix E, 901:10-3-01, 901:10-3-02, 901:10-3-05, 901:10-3-06, 901:10-3-07, 901:10-3-08, 901:10-3-11, and 901:10-1-4-05, was public noticed and filed with JCARR on November 14, 2006. These rules were approved by JCARR on December 28, 2006 without comment and now await adoption by the ODA. The earliest date that ODA could adopt these rule changes is some date after January 16, 2007. The rule changes will become effective ten days after they are adopted by the ODA.

The statutory authorities cited in this SOLA in most instances utilize the language of the CWA, federal regulations, and the model Attorney General's Statement provided by the United States Environmental Protection Agency (hereinafter referred to as "USEPA"). Revised Code Sections 119.03(b) and 121.72 allow for incorporation or adoption of any federal statute and regulations by reference. This issue is discussed more fully in Section N of this SOLA entitled "Incorporation by Reference."

This certification is issued, in part, on the understanding that legislation which has been passed by the Ohio General Assembly in S.B.393, signed by the Governor on December 27, 2006, and which will be effective March 27, 2007, will amend Ohio Revised Code ("R.C.") 903.08 and R.C. 6111.04. This certification evaluates the legal authority based on the statutes as

amended effective March 27, 2007. This certification is further qualified because in some areas it is based on rule amendments that have been proposed but cannot yet be finalized. As stated above, a package of rule amendments was public noticed, filed with JCARR on November 14, 2006, and heard before JCARR on December 28, 2006 without comment. The earliest date that ODA could adopt these rule changes is some date after January 16, 2007, and the rules cannot be effective until ten days after adoption.

Subject to the limitations and representations set forth above and in the following discussion, I hereby certify that the laws of the State of Ohio provide adequate authority for the ODA to assume, implement, maintain and enforce a partial permit program for a major category of discharges in Ohio now covered under the NPDES permit program of the OEPA

JIM PETRO
ATTORNEY GENERAL

Date: 1-4-07

II. Transfer Of Authority From Ohio Environmental Protection Agency To Ohio Department Of Agriculture

a. Two-Stage Transfer of Authority

Senate Bill 141 (hereinafter referred to as "S.B. 141"), which was signed into law by Governor Taft on December 14, 2000 and became effective on March 15, 2001, enacted O.R.C. Chapter 903 entitled "Concentrated Animal Feeding Facilities." Chapter 903 provides for a two-stage transfer of authority in Ohio from OEPA to ODA to regulate the discharge of pollutants and storm water from CAFOs and AFOs.

Under the first stage, authority was transferred from OEPA to ODA for the state Permits to Install (hereinafter referred to as "PTIs") and the state Permits to Operate (hereinafter referred to as "PTOs") when the Director of ODA finalized the PTI and PTO program, i.e. when the Director adopted the necessary rules and hired the necessary personnel. See O.R.C. Sections 903.02(A)(2) and 903.03(A)(2). JCARR conducted its final hearing on ODA's proposed rules on June 3, 2002. The rules were placed on JCARR's consent agenda, were declared final by ODA, and became effective July 2, 2002 pursuant to O.R.C. Section 119.03(I). The rules can be found at O.A.C. Chapter 901:10. The necessary employees were hired by the Director of ODA by August of 2002. These employees are in ODA's Livestock Environmental Permitting Program (hereinafter referred to as "LEPP") and are described in ODA's Program Description. Subsequently, the State PTI and PTO program was finalized on August 19, 2002.

With the finalization of ODA's PTI and PTO program, ODA had the authority to enforce the terms and conditions of PTIs previously issued by OEPA for CAFOs and AFOs. See O.R.C. Section 903.04(B).[1] With the finalization of ODA's PTI and PTO program, PTIs previously issued by OEPA for CAFOs and AFOs are deemed to have been issued under O.R.C. Chapter 903. See O.R.C. Section 903.04(B). Persons who were issued PTIs by OEPA for a CAFO or

[1] Note that OEPA only issued PTIs, not PTOs, for CAFOs and AFOs.

AFO may continue to operate under the PTI issued by OEPA until either of the following occurs: (1) the PTI issued by OEPA is terminated through the denial of a Review Compliance Certificate (hereinafter referred to as "RCC"); or (2) the person is required to obtain a PTO from ODA. See O.R.C. Sections 903.04 (C)(1) and (2). Within two years from the date of finalization of the PTI and PTO program, ODA was required to inspect each CAFO or AFO previously issued a PTI by OEPA and determine if the facility was being operated in accordance with its PTI; was being operated in a manner that protects the waters of the state; and was being operated in a manner that minimized the presence and negative effects of insects and rodents at the facility and in the surrounding areas. See O.R.C. Sections 903.04(E) and (F). If all those criteria were met, ODA issued the facility a RCC which is valid for five years. See O.R.C. Section 903.04(H)(1). No later than 180 days before the expiration of an RCC, the owner or operator of the facility must apply for a PTO from ODA. See O.R.C. Section 903.04(H)(1).

After ODA finalized its state PTI and PTO program, USEPA issued its CAFO Final Rule. The CAFO Final Rule was signed on December 15, 2002, was published in the Federal Register on February 12, 2003, and became effective on April 14, 2003. In response, ODA revised both its statute and its rules. Chapter 903 of the O.R.C. was revised by House Bill 152 (hereinafter referred to as "H.B. 152") which went into effect on November 11, 2003. Chapter 901:10 of the O.A.C. was revised and the new rules went into effect on September 15, 2005.[2]

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[2] Since USEPA issued its CAFO Final Rule, there have been a number of challenges to the rule in the federal courts. In *Waterkeeper Alliance, Inc. et al. v. USEPA*, 339 F.3d 486 (2nd Cir., 2005), the Second Circuit vacated certain provisions of the CAFO Final Rule including *inter alia*: (1) the issuance of permits without reviewing the terms of the nutrient management plans; (2) the issuance of permits that do not include the terms of the nutrient management plans and without adequate public participation; and (3) the requirement that all CAFOs apply for NPDES permits or otherwise demonstrate "no potential discharge." The USEPA public noticed revisions to the CAFO rule incorporating the changes dictated by the *Waterkeeper Alliance* decision on June 30, 2006. The revisions have not been finalized.

There have also been two cases which successfully challenged some procedural aspects of the general NPDES permit scheme which also will have implications for CAFOs. The precise

Under the second stage, O.R.C. Sections 903.08(B)(1) and 903.08(C)(1) provide for the transfer of authority from OEPA to ODA for issuing NPDES permits for the discharge of pollutants, especially manure, process waste water and storm water from CAFOs and AFOs, after USEPA approves the program submitted by the Director of ODA. However, the statutory duty of CAFOs to apply for an individual NPDES permit or coverage under a general NPDES permit, as it currently appears in O.R.C. 903.08(B)(1), will be removed with Senate Bill 393, which was passed by the Ohio General Assembly, was adopted and has been signed into law by the Governor, and will become effective on March 27, 2007. Senate Bill 393 amends O.R.C. 903.08(B)(1) to remove the provisions which deem each CAFO to be a point source that discharges manure to waters. Further, the legislation removes the "no potential to discharge" NPDES permit exception currently in R.C. 903.08(B)(1). Until this legislation becomes effective on March 27, 2007, CAFOs are still presumed to be a point source that are required to apply for a NPDES permit. Upon program approval by the USEPA, the ODA will have the authority to require a CAFO to obtain a permit. The amendment to O.R.C. 903.08 will require any person required by the Federal Water Pollution Control Act or regulations thereunder to apply for NPDES individual permits or general NPDES coverage. Upon approval of ODA's NPDES program by USEPA, ODA will have the authority to enforce the terms and conditions of NPDES permits previously issued by OEPA for CAFOs and AFOs as well as for previously unpermitted CAFOs and AFOs. See O.R.C. Section 903.08(A)(2). Upon approval of ODA's

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effect on CAFOs is unknown at this time as the rulings represent a split in the federal courts over the applicability of the public participation requirements of the CWA to general NPDES permits. In *Environmental Defense Center, et al. v. USEPA*, 344 F.3d 832 (9th Cir., 2003), the Ninth Circuit held that certain provisions of the Phase II stormwater regulations requiring NPDES permits contravened the CWA in that they failed to provide for review of the notices of intent ("NOIs") for general permits and filed to make the NOIs available to the public and subject to public hearings and other public participation under the CWA. By contrast, in *Texas Independent Procedures, et al. v. USEPA*, 410 F.3d 964 (7th Cir., 2005), the Seventh Circuit held that NOIs for general NPDES permits for stormwater discharges from construction activities are not subject to the CWA's requirements for public hearing and public notice are as they are neither permits nor permit applications.

NPDES program by USEPA, NPDES permits previously issued by OEPA for CAFOs and AFOs shall be considered to have been issued under O.R.C. Chapter 903. See O.R.C. Section 903.08(A)(2). Persons who have been issued an NPDES permit by OEPA for the discharge of pollutants or storm water from a CAFO or AFO may continue to operate under the OEPA NPDES permit until it expires or is modified or revoked. See O.R.C. Sections 903.08 (B)(2) and 903.08 (C)(2).

b. Scope of ODA's NPDES Authority and OEPA's NPDES Authority

On August 12, 2002, OEPA and ODA entered into a Memorandum of Agreement setting forth their respective responsibilities for regulating public health and the environment as impacted by CAFOs and AFOs. Upon approval of ODA's NPDES program for CAFOs and AFOs, ODA will have the legal authority and responsibility for:

> administration of the NPDES program requirements for permitting, for compliance evaluations, and for enforcement authority with respect to NPDES permits for CAFOs, including animal feeding operations (AFOs), and for NPDES permits for the discharge, transport or handling of stormwater from animal feeding facilities in Ohio. ODA will be responsible for the enforcement program for unauthorized discharges regulated under Revised Code 903.08 from AFOs in Ohio by taking timely and appropriate actions in accordance with the CWA and applicable state law (Chapter 903. of the Revised Code).

Memorandum of Agreement between ODA and OEPA, pp. 4 and 5.

Even after approval of ODA's NPDES program for CAFOs and AFOs, OEPA will continue to have legal authority and responsibility to do the following:

> administer NPDES requirements for permitting, for compliance evaluations, and for enforcement authority with respect to all other NPDES permits in Ohio, including the pretreatment and sewage sludge program.
>
> OEPA is responsible for processing new, modified, and renewed NPDES permits for non-domestic wastewater discharges, including industrial, commercial, and silviculture. OEPA is responsible for processing new, modified, and renewed NPDES permits for domestic wastewater discharges, including publicly owned treatment works and privately owned treatment works.

> OEPA is responsible for sewage sludge management, including use, processing and disposal of sewage sludge.
>
> OEPA will remain responsible for stormwater discharges regulated under the NPDES program, including municipal separate storm sewer systems and stormwater associated with industrial activity, except discharge, transport, or handling of stormwater from CAFFs or CAFOs as regulated by ODA. OEPA will remain responsible for an enforcement program for unauthorized discharges from all but animal feeding facilities in its regulatory program. OEPA shall take timely and appropriate actions in accordance with the CWA and applicable state laws (Chapters 3745 and 6111 of the Revised Code) and the NPDES enforcement management system developed by OEPA for OEPA's use.
>
> OEPA will continue to regulate wetlands in accordance with state laws and rules and sections 401 and 404 of the Clean Water Act.
>
> OEPA will continue to regulate underground injection control (UIC) wells in accordance with Sections 6111.043 through 6111.047 of the Revised Code and rules set forth in Chapter 3745-34 of the Administrative Code, specifically including wells in classes I and IV and wells in class V that include agricultural wells.

Memorandum of Agreement between ODA and OEPA, pp. 5 and 6.

The Memorandum of Agreement also clarifies that OEPA and ODA will have a close working relationship even after USEPA approves ODA's NPDES permit program for CAFOs and AFOs. This ongoing relationship reflects the complementary nature of the duties and responsibilities of each agency to protect the public health and the environment. Generally, OEPA will provide ODA with technical support and technical information in administrative proceedings and court cases.

Specifically:

> OEPA will identify the need for water-quality based NPDES permits for permits to be issued pursuant to Chapter 903 of the Revised Code;
>
> OEPA will provide exclusion/waiver analyses for the purposes of the antidegradation policy;
>
> OEPA will develop waste load allocations to be used by ODA in NPDES permits where water-quality based effluent limitations are needed;
>
> OEPA will develop water-quality based effluent limitations for NPDES permits

issued by ODA pursuant to Chapter 903 of the Revised Code;

OEPA and ODA will notify one another with respect to emergency reports of manure spills and discharges or complaints of manure spills and discharges;

OEPA will notify ODA of any limitations in the extent of coverage of general NPDES permits to operate based upon stream designation or water quality as set forth in rule 901:10-4-01 of the Administrative Code;

ODA will be notified in order to participate in the development and implementation of Total Maximum Daily Load Plans ("TMDL") and/or comprehensive watershed planning (sponsored by OEPA and ODNR) for watersheds in Ohio, as scheduled by OEPA and ODNR, for water bodies potentially impacted by animal feeding operations; and

OEPA will provide technical support in legal or administrative proceedings where ODA is a party if issues pertain to water quality standards or waste load allocations established by OEPA.

Memorandum of Agreement between ODA and OEPA, pp. 7-8.

In addition, after approval of ODA's NPDES program, ODA and OEPA will continue to cooperate with each other and communicate as follows:

ODA will provide OEPA with an updated list of pending and approved permit applications on a quarterly basis, unless another schedule is required in the MOA between U.S. EPA and ODA.

OEPA will provide to ODA one copy of each areawide 208 planning document and a copy of the OEPA Continuing Planning Process as updated. OEPA will notify ODA of any changes and/or updates to any of the plans prepared in Ohio pursuant to Section 208 of the [Clean Water] Act. Prior to approval of a NPDES permit application, OEPA will consult with ODA on a permit-by-permit basis in order to maintain compliance with the Act. OEPA will decide if any proposed discharge would be in conflict with Ohio's areawide plans and notify ODA of that decision.

OEPA agrees to notify ODA regarding any draft or proposed areawide plan in order to provide ODA an opportunity to comment or to otherwise participate in the planning process.

On at least a weekly basis, ODA will transmit copies of NPDES permit applications received to OEPA.

OEPA shall provide assistance in determining if the application meets an exclusion or waiver under the antidegradation policy in rule 3745-1-05(D) of the OAC as needed.

OEPA shall provide a waste load allocation and development of water-quality based effluent limits for NPDES permits to be issued by ODA, as needed.

As required by rule 901:10-4-01 of the Administrative Code, general NPDES permits to operate will not be issued for new discharges associated with CAFFs requiring an NPDES permit if the receiving waters are designated as outstanding national resource water, outstanding high quality waters, superior high quality waters, or state resource waters, or to receiving waters that discharge to a water with one of these designations within two stream miles of the discharge.

OEPA will notify ODA of any proposed changes to designations in Ohio. ODA will notify OEPA of any proposed changes with the scope, extent and applicability of the general NPDES permit to operate.

ODA and OEPA agree to meet at least annually to coordinate fieldwork for any TMDL work occurring where water bodies are potentially impacted by animal feeding operations. The parties will endeavor to plan the field work so that ODA can support OEPA in sampling and monitoring those watersheds where CAFFs or CAFOs are located or to be located.

OEPA will also conduct fieldwork and may discover CAFFs that are unpermitted or are discharging without the required permits. In either case, OEPA shall notify ODA of its findings and transmit information to ODA for ODA's use.

OEPA will notify ODA of the development of plans for TMDLs within any watershed where one or more CAFFs or CAFOs hold permits issued by ODA. ODA will coordinate with OEPA in monitoring, sampling, surveillance and in the preparation of any reports for related TMDLs.

OEPA and ODA will work together on TMDL implementation plans, including public participation and public meetings; discussion and development of load and waste load allocations; strategies on NPDES permit development and issuance; and coordinated permit schedules with respect to the OEPA basin schedule of permit work.

As requested by ODA, OEPA shall assist ODA in the development of water-quality based permits or variances for water-quality based permits.

As a result of fieldwork and related studies of water-quality or TMDLs, OEPA may periodically notify ODA of any plans to recommend the following: a) Restricted use, scope or applicability of general NPDES permits for facilities regulated under Chapter 903 of the Revised Code or b) Limitations on the use, scope or applicability of general stormwater permits.

OEPA – DERR [Division of Emergency and Remedial Response] Duty Room will provide emergency notice by FAX, electronic communication or telephone to ODA. OEPA and ODA will mutually support one another and other involved departments or agencies until the emergency is over. In the event that ODA is notified of an emergency spill or manure discharge that causes injury to fish and wildlife and adversely impacts water quality, ODA will respond and provide

emergency notification to OEPA and other affected departments or agencies by FAX, or electronic communication or telephone.

Memorandum of Agreement between ODA and OEPA, pp. 22-26.

III. Authority Of ODNR

On August 29, 2005, OEPA and ODNR, specifically the Division of Soil and Water Conservation (hereinafter referred to as "DSWC"), entered into a Memorandum of Agreement setting forth their respective obligations concerning AFFs, AFOs, CAFFs, and CAFOs. Generally, the ODNR-DSWC provides technical advice and support to AFFs and AFOs that are not big enough to be Large CAFOs, that are not Medium CAFOs because they do not discharge, and that are not Small CAFOs because they have not been designated as such. See O.R.C. Sections 903.01(E), 903.01(M), 903.01(Q), 903.01(EE).

Specifically ODNR-DSWC has responsibility to:

> conduct surveys; conduct investigations dealing with agricultural pollution; develop plans for the conservation of soil resources; offer technical assistance with the agricultural pollution abatement program; develop management plans for AFFs; education, establish methods, techniques, or practices for composting dead animals; inspect composting at any facility; and assist in enforcement in the context of the following: information regarding designation (i.e., legal designation as an AFF, AFO, CAFF or CAFO), information regarding Section 903.082 of the R.C. [medium CAFOs or small CAFOs that require a NPDES permit], or emergency response.

Memorandum of Agreement Between ODA and ODNR, p. 2.

In conducting investigations or inspections, if ODNR-DSWC discovers an AFF that has caused agricultural pollution by its failure to comply with ODNR's standards set forth at O.R.C. Section 1511.02, the Chief of the DSWC shall send to the Director of ODA a copy of the Chief's order specifying that the AFF has caused agricultural pollution, has failed to comply with applicable standards, and that the AFF shall obtain a PTO from ODA as a Medium CAFO or Small CAFO. See O.R.C. Sections 903.082(A) and (B) and O.A.C. Rule 901:10-3-07. Upon receipt of a Chief's order, the Director of

ODA shall inspect the operation and, if the Director of ODA finds that it is not being operated in a way that protects waters of the state, the Director of ODA shall require the facility to obtain a PTO as a Medium CAFO or Small CAFO. See O.R.C. Sections 903.082(A) and (B) and O.A.C. Rule 901:10-3-07.[1] If best management practices cannot be implemented without modifying the existing facility, the owner or operator shall also apply to ODA for a PTI. See O.R.C. Section 903.082(B). Of course, a Medium CAFO or Small CAFO would also be required to obtain a NPDES permit under O.R.C. Section 903.08.

Senate Bill 393, discussed in more detail in Section (I), when effective, will amend O.R.C. 903.08 (B)(1) deleting the designation of a CAFO as a point source and the duty of a CAFO to apply for an individual NPDES permit or coverage under a general NPDES permit. The amended provision of O.R.C. 903.08 will require that any person required by the Clean Water Act to obtain a permit for the discharge of manure to apply to the director of the ODA for an individual NPDES permit or coverage under a general NPDES permit. This amendment, when effective, will be broad enough in its coverage to authorize and require NPDES permits for a Medium CAFO or Small CAFO to the same extent provided under federal law.

As with the OEPA, ODA and ODNR-DSWC acknowledge their sometimes overlapping roles and agree to share information discovered during inspections, information received from complaints, and information received regarding any emergencies, especially spills.

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[1] The ODA has a proposed rule change to O.A.C. 901:10-3-07(A) to correct a typo, changing "901.10" to "903.10". This proposed change has no other impact on the rule and was heard by JCARR without comment on December 28, 2006.

IV. Major Partial Permit Program For CAFOS And AFOs

A. Authority To Issue Permits

1. Existing And New Point Sources

Requirement: State law provides authority to issue permits for the discharge of pollutants by existing and new point sources to the same extent as required under the permit program administered by the USEPA pursuant to Section 402 of the CWA, i.e., NPDES permits.

Federal Authority: CWA §§ 301 (a), 402 (a)(1), 402 (b)(1)(A); 40 C.F.R. §§ 122.21 (a), 122.22, 122.23, 122.26, 412.12.

Ohio Statutory and Regulatory Authority:
O.R.C. § 903.01 (B), Definitions; Animal Feeding Facility
O.R.C. § 903.01 (G), Definitions; Discharge
O.R.C. § 903.01 (M), Definitions; Large CAFO
O.R.C. § 903.01 (O), Definitions; Manure
O.R.C. § 903.01 (Q), Definitions; Medium CAFO
O.R.C. § 903.01 (X), Definitions; Point source
O.R.C. § 903.01 (Y), Definitions; Process generated waste water
O.R.C. § 903.01 (Z), Definitions; Process waste water
O.R.C. § 903.01 (EE), Definitions; Small CAFO
O.R.C. § 903.01 (FF), Definitions; Waters of the state
O.R.C § 903.08 (A)(2), Participation in NPDES; permit; ODA authorized to enforce CAFO point source and storm water NPDES permits previously issued by OEPA
O.R.C § 903.08 (B)(1), Participation in NPDES; permit; ODA authorized to enforce CAFO point source NPDES permits[1]
O.R.C § 903.08 (B)(2), Participation in NPDES; permit; ODA authorized to enforce CAFO point source NPDES permits previously issued by OEPA[2]
O.R.C § 903.08 (C)(1), Participation in NPDES; permit; ODA authorized to enforce CAFO storm water NPDES permits
O.R.C § 903.08 (C)(2), Participation in NPDES; permit; ODA authorized to enforce CAFO storm water NPDES permits previously issued by OEPA

[1] As stated in Section I. O.R.C. 903.08(B)(1) will be amended by SB 393 to remove the duty of CAFOs to apply, the presumption that CAFOs are a point source and the no potential to discharge exception. The language of the amendment expressly requires any person that is required by the federal statute or regulations to obtain a permit for the discharge of manure and authorizes the Director of Agriculture to act on an application in accordance with the federal statute and regulations.
[2] As stated in Section I. ORC 903.08(B)(2) will be amended by SB 393 to remove the presumption that CAFOs are a point source.

O.R.C. § 903.08 (G), Participation in NPDES; permit; ODA shall establish terms and conditions of permits in accordance with rules compliant with CWA
O.R.C. § 903.08 (N), Participation in NPDES; permit; ODA's program to be administered in compliance with CWA
O.R.C. § 903.10 (F), Rules, ODA shall establish rules consistent with CWA[3]
O.R.C. § 6111.01 (H), OEPA, Definitions; Waters of the state
O.R.C. § 6111.04, OEPA, Acts of pollution prohibited; exceptions[4]

O.A.C. Rule 901:10-1-01 (AA), Definitions; Discharge
O.A.C. Rule 901:10-1-01 (UUU), Definitions; Point Source
O.A.C. Rule 901:10-1-01 (VVV), Definitions; Pollutant
O.A.C. Rule 901:10-1-03 (C), Criteria for decision-making; ODA shall deny, modify, suspend, or revoke NPDES permit
O.A.C. Rule 901:10-1-10 (D), Prohibitions; Discharge pollutants from an AFF without NPDES permit
O.A.C. Rule 901:10-1-10 (F), Prohibitions; Discharge storm water from point source without NPDES permit
O.A.C. Rule 901:10-3-11 (A)(15), Storm water permits general and individual; Definitions; Storm water
O.A.C. Rule 901:10-3-11 (B)(1), Storm water permits general and individual; General storm water permit requirements
O.A.C. Rule 901:10-3-11 (B)(2), Storm water permits general and individual; Construction storm water permit requirements

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Ohio law provides authority for ODA to issue permits for the discharge of pollutants, especially manure and process waste water from CAFOs and AFOs to the same extent as required under the NPDES permit program administered by the USEPA pursuant to Section 402 of the CWA. Ohio law also provides authority for ODA to issue

[3] Once SB 393 becomes effective on March 27, 2007, ODA rules which currently reference a duty to apply or no potential to discharge will need to be changed to remove that language. The ODA cannot make these changes to the rules until it has the authority to do so after the O.R.C. 903.08(B)(1) amendment becomes effective.
[4]Senate Bill 393 also amends O.R.C. 6111.04 (F) and (G) to comply with federal requirements. Senate Bill 141, the original legislation granting the transfer of NPDES authority to the ODA, removed sections of the exceptions in 6111.04(F) that caused U.S. EPA to express concern about the exceptions. The legislation passed in SB 393 corrects this situation, amending O.R.C. 6111.04 (F)(3), (4) ,(5) and (G) so that activities previously required to obtain NPDES permits continue to be required to obtain NPDES permits and the relationship between the language of R.C. 6111.04 requiring an OEPA issued NPDES permit and the O.R.C. 903.08 requirement for NPDES permits issued by ODA is properly described.

permits for the discharge of storm water resulting from CAFOs and AFOs to the same extent as required under the NPDES permit program administered by the USEPA pursuant to Section 402 of the CWA.

Discharge of Pollutants from CAFO Point Sources:

Chapter 903 of the Revised Code authorizes the Director of ODA to participate in the NPDES permit system in accordance with the CWA. See O.R.C. Section 903.08(A)(1). The Federal Water Pollution Control Act is also defined in O.A.C. Rule 901:10-1-01(A) as the "Act" and is generally referred to in this SOLA as the CWA.

Pursuant to O.R.C. Section 903.08 (B)(1):

> On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture, **no person shall discharge manure from a point source into waters of the state** without first obtaining a NPDES permit issued by the director of agriculture under this section. (Emphasis added.)

See also, O.A.C. Rule 901:10-1-10(D) which states:

> On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, **no person shall discharge pollutants from a point source into waters of the state** unless authorized by a valid and unexpired NPDES permit issued by the director or unless an application for renewal of such NPDES permit has been submitted by the person and is pending. (Emphasis added.)

The key terms used in this Ohio NPDES program are virtually identical to the key terms used in the federal statutory and regulatory definitions to create a State equivalent program.

"Discharge" is defined at O.R.C. § 903.01 (G) as "to add from a point source to waters of the state." **"Discharge"** is also defined at O.A.C. Rule 901:10-1-01(AA) to mean "to add any pollutant or combination of pollutants from a point source to waters of the state." **"Pollutant"** is further defined at O.A.C. Rule 901:10-1-01(VVV) as:

> dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
>
> It does not mean: (1) Sewage from vessels; or (2) Water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

Thus, Ohio's definitions of **"discharge"** at O.R.C. § 903.01 (G) and at O.A.C. Rule 901:10-1-01(AA) are identical to the federal definition of **"discharge"** at 33 U.S.C. Section 1362(16) and **"discharge of a pollutant"** at 33 U.S.C. Section 1362(12) and 40 C.F.R. Section 122.2. Furthermore, Ohio's definition of **"pollutant"** at O.A.C. Rule 901:10-1-01(VVV) is identical to the federal definition of **"pollutant"** contained in 33 U.S.C. Section 1362(6) and at 40 C.F.R. Section 122.2.

Not only does Ohio law prohibit the discharge of any pollutant, Ohio law also prohibits the discharge of any manure. **"Manure"** is defined very broadly at O.R.C. § 903.01 (O) to include:

> 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.

Thus, Ohio's definition of manure is virtually the same as the federal definition of **"manure"** set forth at 40 C.F.R. Section 122.23(b)(5).

Note that ODA's definition of **"manure"** also includes the terms **"process waste water"** and **"process generated waste water."** **"Process generated waste water"** is defined at O.R.C. Section 903.01(Y) as:

> water that is directly or indirectly used in the operation of an animal feeding facility for any of the following: (1) Spillage or overflow from animal watering systems; (2) Washing, cleaning, or flushing pens, barns, manure pits, or other areas of an animal feeding facility; (3) Direct contact swimming, washing, or spray cooling of animals; (4) Dust control.

"Process waste water" is defined at O.R.C. Section 903.01(Z) as:

> any process generated waste water and any precipitation, including rain or snow, that comes into contact with manure, litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or direct products such as milk or eggs.

Thus, Ohio's definition of **"process generated waste water"** and Ohio's definition of **"process waste water"** are together the equivalent of the federal definition of **"process wastewater"** found at 40 C.F.R. Sections 122.23(b)(7) and 412.2(d) which specifically pertain to the CAFO point source category. Ohio's definition of **"process generated waste water"** and definition of **"process waste water"** are also virtually the same as the definition of **"process wastewater"** found at 40 C.F.R. Section 122.2 which generally pertains to NPDES permits.

"Point source" is defined at O.R.C. Section 903.01(X) as having "the same meaning as in the Federal Water Pollution Control Act." **"Point source"** is also defined at O.A.C. Rule 901:10-1-01(UUU) as:

> any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, large concentrated feeding operation, medium concentrated feeding operation, small concentrated feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm-water runoff.

The definition of **"point source"** at O.A.C. Rule 901:10-1-01(UUU) is identical to the federal definition found at 33 U.S.C. Section 1362(14) and 40 C.F.R. Section 122.2 except that Ohio's definition includes Large CAFOs, Medium CAFOs, and Small CAFOs. This expanded definition of CAFOs is consistent with the recent changes made to the federal definition of CAFOs found at 40 C.F.R. Sections 122.23(a), 122.23 (b)(2),(4), (6), (9) and 122.23(c).

As noted earlier, the definition of **"Large CAFO"** at O.R.C. Section 903.01(M) is identical to the federal definition at 40 C.F.R. Section 122.23(b)(4). Similarly, the definition of **"Medium CAFO"** at O.R.C. Section 903.01(Q) is identical to the federal definition at 40 C.F.R. Section 122.23(b)(6).

In addition, O.R.C. Section 903.01(EE) specifies that a **"Small CAFO"** is one designated as such by the Director of ODA pursuant to rules. O.R.C. Section 903.10(F)(1) specifies that such designations shall include only those point sources for which a NPDES permit is required under the CWA. The designation rule is set forth at O.A.C. Rule 901:10-3-07 and gives the Director of ODA the authority to designate an AFF as a CAFO upon:

determining that it is a significant contributor of manure to waters of the state. In making a designation, the director shall consider the following factors:

(1) The size of the animal feeding facility and the amount of manure reaching water of the state;

(2) The location of the animal feeding facility relative to waters of the state;

(3) The means of conveyance of manure into waters of the state;

(4) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of manure into waters of the state; and

(5) Other relevant factors.

O.A.C. Rule 901:10-3-07(A). A facility will only be designated as a CAFO if the Director of ODA has conducted an on-site inspection of the AFF and found that either manure is discharged to waters of the state through a man-made device or manure is discharged directly into waters of the state which originate outside the AFF. See O.A.C. Rule 901:10-3-07(B).

This designation procedure in Ohio is identical to that contained in federal law at 40 C.F.R. Section 122.23(c). The federal regulation uses the words "pollutants" and "wastes" and "animal wastes and process waste waters," and "discharge of animal wastes." The Ohio rule uses the words "manure" and "discharge of manure." These words are equivalent as the definition of manure at O.R.C. Section 903.01(O) includes animal waste and process waste water. In addition, the Ohio statute is broad enough to encompass pollutants as used in the federal regulation as O.R.C. Section 903.10(F)(1)[5] specifies that designations shall include "point sources" and "point sources" are defined

[5] The ODA has a proposed rule change to O.A.C. 901:10-3-07(A) to correct a typo, changing "901.10" to "903.10". This proposed change has no other impact on the rule. The earliest date this rule amendment could be adopted by ODA is some date after January 16, 2007.

as any size CAFO from which "pollutants" may be discharged. See O.A.C. Rule 901:10-1-01(UUU).

The Director of ODA may also determine that an AFF is a Medium CAFO or Small CAFO in accordance with O.R.C. Section 903.082. See O.A.C. Rule 901:10-3-07. This "determination" process is separate from the "designation" process described above. Under O.R.C. Section 903.082, the Director of ODA may determine that an AFF should be permitted as a Medium CAFO or Small CAFO upon receipt of an order from ODNR-DSWC that the facility has caused agricultural pollution by failing to comply with standards established under O.R.C. Section 1511.02. Before making such a determination, the Director of ODA must inspect the facility and find that it is not being operated in a manner that protects waters of the state. See O.R.C. Section 903.082.

Finally, **"waters of the state"** is defined at O.R.C. § 903.01 (FF) as having "the same meaning as in section 6111.01 of the Revised Code. **"Waters of the state"** is defined at O.R.C. Section 6111.01(H) to include:

> all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and 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 upon, this state, or are within its jurisdiction, except those private waters that do no combine or effect a junction with natural surface or underground waters.

Ohio's definition of "waters of the state" is very broad and encompasses virtually all surface waters with no exclusions for waters on private property or non-continuous or intermittent water bodies. Thus, Ohio's definition of **"waters of the state"** is the state analogy to the federal definition of **"waters of the U.S."** found at 40 C.F.R Section

122.2 except that Ohio's definition does not include the territorial sea as Ohio does not border any territorial sea.

Consistent with this authority to issue NPDES permits for discharges of pollutants or manure O.R.C. Section 903.08 (G) also requires the Director of ODA to establish terms and conditions of NPDES permits:

> designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current water quality standards adopted under Section 6111.041 of the Revised Code, the most current antidegradation policy adopted under Section 6111.12 of the Revised Code, and other requirements of the Federal Water Pollution Control Act.

Conversely, the Director of ODA must deny, modify, suspend, or revoke an NPDES permit upon a determination that:

> (1) Discharge from the facility will prevent or interfere with attainment or maintenance of applicable water quality standards adopted under section 6111.041 of the Revised Code and the most current antidegradation policy adopted under section 6111.12 of the Revised Code; or
>
> (2) Discharge from the facility will not achieve compliance with national effluent standards; or
>
> (3) The administrator of the United States environmental protection agency objects in writing to the issuance of the NPDES permit in accordance with section 402(d) of the Act; or
>
> (4) The proposed discharge or source will conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the [Clean Water] Act; or
>
> (5) Forms, notices or reports required pursuant to the terms and conditions of the NPDES permit are false or inaccurate; or
>
> (6) The discharge is of any radiological, chemical, or biological warfare agent or high-level radioactive waste or medical waste; or
>
> (7) The United States army corps of engineers for the district in which the discharge is located objects in writing to the issuance of the

NPDES permit as substantially impairing navigation or anchorage; or

(8) Discharge from the facility will not achieve national standards of performance for new sources; or

(9) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; or

(10) The permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

(11) The applicant or owner or operator is required to obtain a state or other appropriate certification under section 401 of the [Clean Water] Act and 40 CFR section 124.53 and that certification has not been obtained or waived; or

(12) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or

(13) Discharge from the facility will not achieve and maintain compliance with other requirements of the [Clean Water] Act and the regulations promulgated thereunder.

See O.A.C. Rule 901:10-1-03 (C).

These above provisions ensure that the Ohio NPDES program for discharges of pollutants from CAFOs is at least as comprehensive as the federal program. In addition, O.R.C. Section 903.08 (N) requires ODA to administer its NPDES point source and storm water permit programs consistent with the CWA. Revised Code Section 903.10 (F) further requires ODA to promulgate rules consistent with the CWA.

One forthcoming clarification is an amendment to O.R.C. Section 6111.04 (F) which lists certain exemptions to the requirement for a water pollution permit issued by OEPA. When O.R.C. Chapter 903 was enacted into law by S.B. 141, O.R.C. Sections 6111.04 (F)(3), (4) and (5) were amended to specify that manure and storm water

discharges that were going to be under the jurisdiction of ODA would be exempted from OEPA's authority under O.R.C. Section 6111.04. This amendment has led to some uncertainty over the breadth of the ODA's regulatory control. Therefore, O.R.C. Sections 6111.04 (F)(3), (4) and (5) are now amended by Senate Bill 393 (referenced in I) to clarify the exceptions to the requirement for a water pollution permit issued by OEPA. When Senate Bill 393 becomes effective on March 27, 2007, it will re-insert the language in O.R.C. Section 6111.04(F)(3), (4), and (5) that was removed by Senate Bill 141. The changes to O.R.C. Section 6111.04(F) in Senate Bill 393 are as follows:

> (3) 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 Chapter 307 or 1511 of the Revised Code. Division (F)(3) of this section 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.
>
> (4) The excrement of domestic and farm animals defecated in land or runoff therefrom into any waters of the state. Division (F)(4) of this section 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.
>
> (5) On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, any discharge that is within the scope of the approved NPDES program submitted by the director of agriculture.

This amendment to O.R.C. Sections 6111.04 (F)(3), (4) and (5) makes it clear that certain agricultural activities involving animal waste, as well as storm water from such agricultural activities involving animal waste, will be regulated in accordance with the requirements of CWA.

Discharge of Storm Water From a CAFO or AFO

As to the discharge of storm water, O.R.C. Section 903.08 (C)(1) states:

> On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under this section, **no person shall discharge storm water resulting from an animal feeding facility without first obtaining a NPDES permit issued by the director of agriculture when such a permit is required by the Federal Water Pollution Control Act.** (Emphasis added.)

See also, O.A.C. Rule 901:10-1-10(F).

In addition to the requirement for a NPDES permit for the operation of a CAFO which results in a discharge of pollutants as described above, the CWA requires an NPDES permit for storm water discharges associated with facilities engaging in industrial activities, including CAFOs. See 40 C.F.R. Section 122.26 (b)(14)(i). The CWA also requires an NPDES permit for storm water discharges associated with construction activity at, or construction of, livestock feeding facilities involving AFOs, CAFOs and feedlots. USEPA Memorandum, "Applicability of the NPDES Program to Discharges of Storm Water Associated With Construction Activity at, or Construction of, Livestock Feeding Facilities," February 5, 1998. As of March 10, 2003, federal law now requires construction storm water permits for small construction activities which disturb less than five acres but more than or equal to one acre of land. See 40 C.F.R. Section 122.26 (b)(15).

O.A.C. Rules 901:10-3-11 (B)(1) and (2) as set forth below establish these same requirements:

> (1) General stormwater requirements. No person shall discharge stormwater resulting from an animal feeding facility without first obtaining a NPDES permit issued by the director of agriculture in accordance with rules when such a permit is required by the [Clean

Water] Act. The director may designate a stormwater discharge as a point source subject to a NPDES permit. In addition, any person may petition the director to require a NPDES permit for a discharge which is composed entirely of stormwater which contributes to a violation of water quality standard or is a significant contributor of pollutants to waters of the United States. Persons that have been issued a NPDES permit by the director of the Ohio environmental protection agency for the discharge of stormwater from an animal feeding facility prior to the date on which the USEPA approved the NPDES program submitted by the director of agriculture under this section may continue to operate under that permit until it expires or is modified or revoked. Such a permit shall be enforced by the director of agriculture upon the transfer of authority to enforce the terms and conditions of the permit.

(2) Construction stormwater requirements. No person shall discharge stormwater resulting from an animal feeding facility that is undergoing construction activities that include clearing, grading, excavating, grubbing and/or filling activities that result in the disturbance of one or more acres unless the person first obtains a NPDES permit issued by the director of agriculture in accordance with rules when such a permit is required by the Act. Persons that have been issued a NPDES permit by the director of Ohio environmental protection agency for the discharge of stormwater from an animal feeding facility prior to the date on which the USEPA approved the NPDES program submitted by the director of agriculture under this section may continue to operate under that permit until it expires or is modified or revoked. Such a permit shall be enforced by the director of agriculture upon the transfer of authority to enforce the terms and conditions of the permit.

Again, key terms in the above provisions are sufficiently analogous to the federal definitions to create a State equivalent program.

"Stormwater" is defined at O.A.C. Rule 901:10-3-11(A)(15) as:

the precipitation runoff, stormwater runoff, snowmelt runoff and any other surface runoff and drainage defined in 40 C.F.R. Section 122.26 (b)(13). Stormwater does not include construction site dewatering or agricultural stormwater discharges.

Stormwater resulting from an animal feeding facility includes immediate access roads and rail lines used or traveled by carriers of raw materials,

> products, waste materials, or by products used or created by the facility, sites used for handling material other than manure, refuse sites, sites used for storage and maintenance of material handling equipment, shipping and receiving areas, and under the control of the owner or operator. All areas that fall within the meaning of production area are excluded from this definition.

This Ohio definition of **"stormwater"** includes the identical federal definition of **"storm water"** found at 40 C.F.R. Section 122.26(b)(13) and is substantially similar to the federal definition of **"storm water discharge associated with industrial activity"** found at 40 C.F.R. Section 122.26(b)(14).

"Animal feeding facility" is defined at O.R.C. Section 903.01(B) the same as **"animal feeding operation"** at 40 C.F.R. Section 122.23 (b)(1) and is also defined to include "land that is owned or leased by the owner or operator of the lot, building, or structure and on which manure originating from the lot, building, or structure or a production area is or may be applied." Thus, the definition of AFF includes the definition of "land application area" set forth at 40 C.F.R. Section 122.23 (b)(3). The definition of AFF also includes the common ownership proviso set forth at 40 C.F.R. Section 122.23 (b)(2) in the federal definition of CAFO.

Thus, in addition to the specific storm water construction activity permits specified in O.A.C. Rule 901:10-1-10(B)(2), the Director of ODA is generally authorized under O.R.C. Section 903.08(C)(1) and O.A.C. Rules 901:10-1-10 (F) and 901:10-3-11 (B)(1) to require NPDES permits for storm water discharges when such a permit is required by the CWA. These provisions ensure that ODA's NPDES storm water program is at least as comprehensive as the federal program.

2. Disposal Into Wells

Requirement: State law provides authority to issue permits to control the disposal of pollutants into wells.

Federal Authority: CWA § 402 (b)(1)(D); 40 C.F.R. § 123.28

Ohio Statutory and Regulatory Authority:
O.R.C. Chapter 1501, ODNR – General Provisions
O.R.C. Chapter 1509, ODNR – Division of Mineral Resources Management – Oil and Gas
O.R.C. §§ 6111.043 through 6111.047, OEPA Water Pollution – Injection of Wastes Into Wells

O.A.C. Chapter 1501:9, ODNR – Division of Oil and Gas
O.A.C. Chapter 3745-34, OEPA – Underground Injection Control Program

ANALYSIS OF THE ATTORNEY GENERAL

In 1984, the USEPA authorized Ohio's Underground Injection Control ("UIC") Program as meeting the requirements of Section 1422 of the Safe Drinking Water Act (42 U.S.C.A. § 300 f, et seq.). Ohio's UIC Program is administered in part by OEPA and in part by the ODNR. OEPA regulates Class I, IV and V wells in accordance with Sections 6111.043 through 6111.047 of the Revised Code and Chapter 3745-34 of the Administrative Code. In addition, Class II and III UIC wells are regulated by ODNR, Division of Mineral Resources Management, in accordance with Chapters 1501 and 1509 of the Revised Code and Chapter 1501:9 of the Administrative Code.

The original Memorandum of Agreement for Ohio's UIC Program was entered into by USEPA and ODNR in 1984. This 1984 Memorandum of Agreement between USEPA and ODNR designated ODNR as the lead agency for Ohio's UIC Program, established OEPA's responsibility for and authority over Class I, IV and V wells, and

established ODNR's responsibility for and authority over Class III wells. In 1993, ODNR and USEPA entered into an Amendment to the 1984 Memorandum of Agreement which established ODNR's responsibility for and authority over all Class II and III injection wells. In 1993, ODNR and OEPA signed an agreement which clarified that, as the delegation of primacy to Ohio does not require one agency be designated as the lead agency, ODNR and OEPA independently implement their authority over injection well activities.

Upon approval of ODA's NPDES program for AFOs and CAFOs, any underground injection control well at any such facility will continue to be regulated through OEPA's program for Class I, IV and V wells or through ODNR's program for Class II and III wells. This continuance of OEPA's authority over Class I, IV and V wells in Ohio's UIC program is specifically reserved in the Memorandum of Agreement between ODA and OEPA discussed above. See Memorandum of Agreement between ODA and OEPA, p. 6.

3. Authority To Request Additional Information

Requirement: State law provides authority to request any information on the application as provided in rules.

Federal Authority: 40 C.F.R §122.21

Ohio Statutory and Regulatory Authority:

O.R.C. §903.08(D), Participation in NPDES; permit; The application shall include any information required by rule.

O.A.C. Rule 901:10-3-01(C), Additional requirements for a NPDES permit application; All applicants for NPDES permits must provide information listed in the rule to the director.

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Section 903.08(D) of the Ohio Revised Code requires that an application for a permit to include any information required by rule.

Rule 901:10-3-01(C) of the Ohio Administrative Code, as currently written, provides that all applicants for NPDES permits must provide the following information to the director:

> (1) The activities conducted by the applicant which require it to obtain a NPDES permit, specifically:
>
> > (a) Information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, chickens other than layers, swine weighing fifty-five pounds or more, swine weighing less than fifty-five pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);
> >
> > (b) The types of manure storage areas, waste containment areas, and total capacity for manure storage (tons/gallons);
> >
> > (c) The total number of acres under control of the applicant available for land application of manure;
> >
> > (d) Estimated amounts of manure generated per year (tons/gallons);

(e) Estimated amounts of manure transferred to other persons per year (tons/gallons); and

(f) For operations that must seek coverage under a permit after December 31, 2006, certification that a nutrient management plan has been completed and will be implemented upon the date of permit coverage.

40 C.F.R. Section 122.21(e)(1) provides in pertinent part that "The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits. An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction." O.A.C. Rule 901:10-3-01(C), as currently written, requires that applicants must provide to the director an extensive list of activities conducted by the applicant.

To grant the director more authority to request information not enumerated in the rule, O.A.C. Rule 901:10-3-01(C), which is part of the rule package referenced in Section (I), is being amended. This rule was part of the rule package that was heard on December 28, 2006 before JCARR without comment. The new language for O.A.C. Rule 901:10-3-01(C) will correspond more closely to 40 C.F.R Section 122.21(e) than before and is as follows:

(C) Any person who discharges or proposes to discharge pollutants and who does not have an effective NPDES permit, except persons covered by a general NPDES permit, must submit a complete application to the director in accordance with this rule. The director shall not issue a NPDES permit before receiving a complete application for a NPDES permit except general permits. An application for a NPDES permit is complete when the director receives an application form and any supplemental information which are completed to his or her satisfaction. All applicants for NPDES permits must provide the following information to the director:

(1) The activities conducted by the applicant, which require it to obtain a NPDES permit:

(a) Information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, chickens other than layers, swine weighing fifty-five pounds or more, swine weighing less than fifty-five pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(b) The types of manure storage areas, waste containment areas, and total capacity for manure storage (tons/gallons);

(c) The total number of acres under control of the applicant available for land application of manure;

(d) Estimated amounts of manure generated per year (tons/gallons);

(e) Estimated amounts of manure transferred to other persons per year (tons/gallons); and

(f) For operations that must seek coverage under a permit after December 31, 2006, certification that a nutrient management plan has been completed and will be implemented upon the date of permit coverage.

The amendment of O.A.C. Rule 901:10-3-01(C)(1) removes the word "specifically" and changes the language so the list of activities conducted by the applicant that require it to obtain a permit that follows is no longer exclusive. This new language will grant the director more authority to request supplemental information.

B. **Authority To Deny Permits**

Requirement: State law provides authority to ensure that no permit will be issued in any case where:

a. The permit would authorize the discharge of radiological, chemical or biological warfare agent or high-level radioactive waste;

b. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any waters of the United States;

c. The permit is objected to in writing by the Administrator of the USEPA, or his designee, pursuant to any right to object provided to the Administrator under Section 402(d) of the CWA;

d. The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the CWA; or

e. The issuance of the permit would otherwise be inconsistent with the CWA or the regulations promulgated thereunder.

Federal Authority: CWA §§ 301(f), 402 (b)(6), 402 (d)(2), 208(e); 40 C.F.R. §§ 122.4, 122.64, 123.29, and 123.44.

Ohio Statutory and Regulatory Authority:

O.R.C. § 903.08(E), Participation in NPDES; permit; ODA authorized to deny an application for a NPDES permit

O.R.C. § 903.08 (G), Participation in NPDES; permit; ODA shall establish terms and conditions of permits designed to achieve and maintain compliance with national effluent limitations, national standards of performance for new sources, water quality standards adopted by OEPA under O.R.C. § 6111.041, antidegradation policy adopted by OEPA under O.R.C. § 6111.12, and other requirements of CWA

O.R.C. § 903.08 (K)(1), Participation in NPDES; permit; No person shall make any false statement, representation or certification in an application for a NPDES permit or in any required form, notice or report

O.R.C. § 903.10(F)(11), Rules; Grounds and procedures for issuance, denial, modification, suspension, or revocation of NPDES permits

O.A.C. Rule 901:10-1-03(A), Criteria for decision-making; ODA shall deny, modify, suspend or revoke a PTI or PTO [includes NPDES permits]
O.A.C. Rule 901:10-1-03(C), Criteria for decision-making; ODA shall to deny, modify, suspend, or revoke an NPDES permit
O.A.C. Rule 901:10-1-10(G), Prohibitions; No person shall violate terms and conditions of NPDES permit

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Ohio law provides authority to ensure that NPDES permits can be denied for CAFOs or AFOs in cases where such permits could not be issued under federal law. Section 903.08(E) of the Revised Code requires the Director of ODA to deny an application for an NPDES permit if any of the following apply:

(1) The application contains misleading or false information.

(2) The administrator of the United States environmental protection agency objects in writing to the issuance of the NPDES permit in accordance with section 402(d) of the Federal Water Pollution Control Act.

(3) The director determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Federal Water Pollution Control Act.

Additional grounds for the denial of a NPDES permit shall be those established in Chapter 903 and rules.

O.R.C. Section 903.08 (G) affirmatively states that ODA shall issue permits consistent with the requirements of the CWA as follows:

> The director of agriculture shall establish terms and conditions of NPDES permits in accordance with rules. Terms and conditions shall be designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current water quality standards adopted under Section 6111.041 [6111.04.1] of the Revised Code, the most current antidegradation policy adopted under Section 6111.12 of the Revised Code, and other requirements of the Federal Water Pollution Control Act. In establishing the terms and conditions of a NPDES permit, the director, to the extent consistent with

that act, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit.

See also, O.R.C. Section 903.10(F)(11), authorizing the Director of ODA to promulgate rules establishing grounds and procedures for the issuance, denial, modification, suspension, or revocation of NPDES permits, including general permits.

The grounds established for the denial of an NPDES permit are contained in Rule 901:10-1-03(C) of the Administrative Code which states:

(C) In addition to the criteria set forth in paragraphs (A) and (B) of this rule, the director **shall** deny, modify, suspend, or revoke an NPDES permit if the director determines:

(1) Discharge from the facility will prevent or interfere with attainment or maintenance of applicable water quality standards adopted under section 6111.041 of the Revised Code and the most current antidegradation policy adopted under section 6111.12 of the Revised Code; or

(2) Discharge from the facility will not achieve compliance with national effluent standards; or

(3) The administrator of the United States environmental protection agency objects in writing to the issuance of the NPDES permit in accordance with section 402(d) of the [Clean Water] Act; or

(4) The proposed discharge or source will conflict with an areawide waste treatment management plan adopted in accordance with Section 208 of the [Clean Water] Act; or

(5) Forms, notices or reports required pursuant to the terms and conditions of the NPDES permit are false or inaccurate; or

(6) The discharge is of any radiological, chemical, or biological warfare agent or high-level radioactive waste or medical waste; or

(7) The United States army corps of engineers for the district in which the discharge is located objects in writing to the

issuance of the NPDES permit as substantially impairing navigation or anchorage; or

(8) Discharge from the facility will not achieve national standards of performance for new sources; or

(9) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; or

(10) The permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

(11) The applicant or owner or operator is required to obtain a state or other appropriate certification under section 401 of the act and 40 CFR section 124.53 and that certification has not been obtained or waived; or

(12) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or

(13) Discharge from the facility will not achieve and maintain compliance with other requirements of the act and the regulations promulgated thereunder.

(Emphasis added.)

In addition to these criteria for denying, modifying, suspending, or revoking a NPDES permit, O.A.C. Rule 901:10-1-03(A) also lists criteria for denying, modifying, suspending, or revoking a PTI, PTO or a NPDES permit. Under O.A.C. Rule 901:10-1-03 (A):

(A) Criteria for decision making by the director. The director **shall** deny, modify, suspend or revoke a permit to install or permit to operate if:

(1) The permit application contains misleading or false information; or

(2) The designs and plans fail to conform to best management practices and to the rules in this chapter or if the owner or operator fails to build the facility in accordance with design

plans as approved in the permit to install or in accordance with amended and approved design plans; or

(3) The plans for the manure management plan, the insect and rodent control plan and any other plans governing the operation fail to conform to best management practices and to rules of this chapter; or

(4) The director determines that the designs and plans describe a proposed discharge or source for which a NPDES permit is required under this chapter and that will conflict with an areawide waste treatment plant adopted in accordance with section 208 of the [Clean Water] Act; or

(5) The facility is not designed or constructed as a non-discharge system or operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality; or

(6) The director determines that the applicant or owner or operator has not complied with rule 901:10-1-10 of the Administrative Code.

(Emphasis added.)

Consistent with Section 301(f) of the CWA and 40 C.F.R. Section 122.4(f), Rule 901:10-1-03(C)(6) of the Administrative Code prohibits the issuance of a permit authorizing the discharge of "any radiological, chemical, or biological warfare agent or high-level radioactive waste."

Consistent with Section 402(b)(6) of the CWA and 40 C.F.R. Section 122.4(e), Rule 901:10-1-03(C)(7) of the Administrative Code prohibits the issuance of a permit if the "United States Army Corps of Engineers for the district in which the discharge is located objects in writing to the issuance of the NPDES permit as substantially impairing navigation or anchorage."

Consistent with Section 402(d)(2) of the CWA and 40 C.F.R. Sections 122.4(c), 123.29 and 123.44, Section 903.08(E)(2) of the Revised Code and Rule 901:10-1-

03(C)(3) of the Administrative Code prohibit the issuance of a permit which is objected to in writing by the Administrator of the USEPA.

Consistent with Section 208(e) of the CWA and 40 C.F.R. Section 122.4(g), Section 903.08(E)(3) of the Revised Code and Rules 901:10-1-03 (A)(4) and 901:10-1-03 (C)(4) of the Administrative Code prohibit the issuance of a permit which would conflict with a 208 areawide waste treatment management plan.

Consistent with 40 C.F.R. Section 122.4(a), Rule 901:10-1-03(C)(9) prohibits the issuance of any permit if the "discharge from the facility will not achieve and maintain compliance with other requirements of the Act and the regulations promulgated thereunder."

Each prohibition listed at 40 C.F.R. Section 122.4 and each reason for terminating or denying a permit renewal listed at 40 C.F. R. Section 122.64 has a corresponding prohibition in O.R.C. Section 903.08 (E), O.R.C. Section 903.08 (G), O.R.C. Section 903.10 (K), O.A.C. Rule 901:10-1-03(C), or in O.A.C. Rule 901:10-1-03(A),which also applies to NPDES permits as follows:

Re: Disclosure:
40 C.F.R. Section 122.64(a)(2) corresponds to O.R.C. Section 903.08 (E)(1), O.R.C. Section 903.08 (K)(1), and O.A.C. Rule 901:10-1-03(A)(1);

Re: Objection by USEPA:
40 C.F.R. Section 122.4(c) corresponds to O.R.C. Section 903.08 (E)(2) and O.A.C. Rule 901:10-1-03(C)(3);

Re: CWA Section 208(b):
40 C.F.R. Section 122.4(g) corresponds to O.R.C. Section 903.08 (E)(3), O.A.C. Rule 901:10-1-03(A)(4), and O.A.C. Rule 901:10-1-03(C)(4);

Re: Noncompliance with the Permit:
40 C.F.R. Section 122.64(a)(1) corresponds to O.A.C. Rule 901:10-1-03(A)(6) (which refers to O.A.C. Rule 901:10-1-10(G) which prohibits any person from violating the terms of a NPDES permit);

Re: Compliance with CWA – Water Quality Standards:
40 C.F.R. Sections 122.4(a) and (d) corresponds to O.R.C. Section 903.08 (G) and O.A.C. Rule 901:10-1-03(C)(1);

Re: Compliance with CWA:
40 C.F.R. Section 122.4(a) corresponds to O.R.C. Section 903.08 (G) and O.A.C. Rule 901:10-1-03(C)(2);

Re: Disclosure:
40 C.F.R. Section 122.64(a)(2) corresponds to O.R.C. Section 903.08 (K)(1) and O.A.C. Rule 901:10-1-03(C)(5);

Re: Discharge of Radiological, etc.:
40 C.F.R. Section 122.4(f) corresponds to O.A.C. Rule 901:10-1-03(C)(6);

Re: Interference with Navigation, etc.:
40 C.F.R. Section 122.4(e) corresponds to O.A.C. Rule 901:10-1-03(C)(7);

Re: Compliance with CWA and NSPS:
40 C.F.R. Section 122.4(a) corresponds to O.A.C. Rule 901:10-1-03(C)(8);

Re: Change in Condition:
40 C.F.R. Section 122.64(a)(4) corresponds to O.A.C. Rule 901:10-1-03(C)(9);

Re: Temporary or Permanent Reduction or Elimination:
40 C.F.R. Section 122.64(a)(3) corresponds to O.A.C. Rule 901:10-1-03(C)(10);

Re: Certification under CWA Section 401:
40 C.F.R. Section 122.4(b) corresponds to O.A.C. Rule 901:10-1-03(C)(11);

Re: Water Quality Standards of Affected States:
40 C.F.R. Section 122.4(d) corresponds to O.A.C. Rule 901:10-1-03(C)(12);

Re: Compliance with CWA:
40 C.F.R. Section 122.4(a) corresponds to O.A.C. Rule 901:10-1-03(C)(13);

Note that here is no corresponding Ohio rule for 40 C.F.R. Section 122.4(h) because Ohio does not border the territorial sea, the waters of the contiguous zone, or the oceans.

Finally, in accordance with USEPA's "National Pollution Discharge Elimination System State Program Guidance for Development and Review of State Program Applications and Evaluation of State Legal Authorities," July 29, 1986, Office of Water ("USEPA's NPDES Guidance Manual") at p. 3-9, there is nothing in Ohio law which requires the State to demonstrate "pollution" or similar environmental impact in order to deny a permit. Furthermore, in accordance with USEPA's NPDES Guidance Manual, there is nothing in Ohio law which provides dischargers with a right to a NPDES permit.

C. Authority To Apply Federal Standards and Requirements To Direct Discharges

1. Effluent Standards And Limitations And Water Quality Standards

Requirement: State law provides authority to apply, in terms and conditions of issued permits, applicable federal effluent standards and limitations and water quality standards promulgated or effective under the CWA, including:

(1) Effluent limitations pursuant to Section 301;

(2) Water quality related effluent limitations pursuant to Section 302;

(3) National standards of performance pursuant to Section 306;

(4) Toxic and pretreatment effluent standards pursuant to Section 307; and

(5) Ocean discharge criteria pursuant to Section 403.

Federal Authority: CWA §§ 301(b), 301(e), 302, 303, 304(d), 304(f), 306, 307, 402(b)(1)(A), 403, 208(e), and 510; 40 C.F.R. § 122.44 and Part 412

Ohio Statutory and Regulatory Authority:
O.R.C. § 903.01 (AA), Definitions; Production area
O.R.C. § 903.08 (F)(2), Participation in NPDES; permit; ODA authorized to issue general permits
O.R.C. § 903.08 (G), Participation in NPDES; permit; ODA shall establish terms and conditions of permits designed to achieve and maintain compliance with national effluent limitations, national standards of performance for new sources, water quality standards adopted by OEPA under O.R.C. § 6111.041, antidegradation policy adopted by OEPA under O.R.C. § 6111.12, and other requirements of CWA
O.R.C. § 903.10 (F)(2), Rules; Effluent limitations
O.R.C. § 6111.041, OEPA, Water quality standards
O.R.C. § 6111.12, OEPA, Antidegradation policy applicable to surface waters of state

O.A.C. Rule 901:10-1-01 (R), Definitions; Buffer strip
O.A.C. Rule 901:10-1-01 (UU), Definitions; Land application sites or land application areas
O.A.C. Rule 901:10-1-01 (GGG), Definitions; Multi-year phosphorous application
O.A.C. Rule 901:10-1-01 (BBBB), Definitions, Setback
O.A.C. Rule 901:10-1-03 (C)(2), Criteria for decision-making; ODA shall deny, modify, suspend or revoke NPDES permit if discharge from facility will not achieve compliance with national effluent standards

O.A.C. Rule 901:10-2-06, Manure storage pond and manure treatment lagoon
O.A.C. Rule 901:10-2-07, Contents of a PTO and NPDES applications
O.A.C. Rule 901:10-2-08, Contents of the manure management plan; inspections, maintenance and monitoring
O.A.C. Rule 901:10-2-09, Contents of manure management plan: nutrient budget
O.A.C. Rule 901:10-2-10, Contents of manure management plan: manure characterization
O.A.C. Rule 901:10-2-13, Contents of manure management plan: soil characterization
O.A.C. Rule 901:10-2-14, Contents of manure management plan: land application methods[3]
O.A.C. Rule 901:10-2-15, Manure management plan and the plan for the disposal of dead livestock
O.A.C. Rule 901:10-2-16; Permit to operate and operating record requirements
O.A.C. Rule 901:10-3-01 (A), (B), and (D)(2), Additional requirements for a NPDES permit application; Requirements for NPDES permit holders[4]
O.A.C. Rule 901:10-3-02, Effluent limitations definitions and applicability
O.A.C. Rule 901:10-3-03, Effluent limitations for horses and sheep
O.A.C. Rule 901:10-3-04, Effluent limitations for dairy cows and cattle other than veal calves
O.A.C. Rule 901:10-3-05, Effluent limitations for ducks category of feedlots[5]
O.A.C. Rule 901:10-3-06, Effluent limitations for swine, poultry and veal calves[6]
O.A.C. Rule 901:10-3-07 (A) and (B), Designated operations and determinations by the director[7]
O.A.C. Rule 901:10-3-08, Variances[8]

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[3] O.A.C. 901:10-2-14 will be amended if the proposed rule package referenced in Section I becomes effective. The amendment would correct subparagraph (D)(5) replacing an erroneous reference to paragraph (C) with the correct reference to paragraph (D). The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[4] O.A.C. 901:10-3-01 will be amended if the rule package referenced in Section I becomes effective. The proposed rule will amend language in section (C) (see Section 1(c)). The proposed rule also removes reference to O.R.C. 903.01 from section (D)(1) and makes a grammatical change in section (D)(2) capitalizing "Act", which is in reference to the Clean Water Act. The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[5] O.A.C. 901:10-3-05 will be amended if the rule package referenced in Section I becomes effective. Changes to this rule are discussed below The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[6] O.A.C. 901:10-3-06 will be amended if the rule package referenced in Section I becomes effective. The amended rule strikes "operation" from (A)(1) and adds language establishing "voluntary alternative performance standards". The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[7] O.A.C. 901:10-3-07 will be amended if the rule package referenced in Section I become effective. The amended rule corrects a typographical error by removing reference to "901.10" and replacing it with "903.10". The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[8] O.A.C. 901.10-3-08 will be amended if the rule package referenced in Section I becomes effective. The amended rule will correct typographical errors by capitalizing "Act" in reference to the Clean Water Act , inserting "with" in section (A), changing "apply" to "applies" in section (B)(6), changing "of" to "or" in (B)(6)(b), inserting "a" and "the" in (B)(6)(c), and changing "increase" to increased" in (B)(c)(ii)(b). The

O.A.C. Rule 901:10-3-09, Appeals of Variances
O.A.C. Rule 901:10-3-10, Standard permit terms and conditions; "Bypass" defined at O.A.C. Rule 901:10-3-10 (T) and "Upset" defined at O.A.C. Rule 901:10-3-10 (U)
O.A.C. Rule 901:10-3-11, Storm water permits general and individual[9]
O.A.C. Rule 901:10-4-04 (D), Criteria for issuing and renewing general NPDES permit to operate
O.A.C. Rule 901:10-4-05, General operating permit[10]

O.A.C. Chapter 3745-1, OEPA; Water quality standards
O.A.C. Rule 3745-1-05, OEPA; Antidegradation

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Ohio law complies with the CWA which requires states to have authority to adopt and apply federally promulgated, technology-based effluent limitations guidelines in their NPDES permits. Section 903.08 (G) of the Revised Code states:

> [t]he director of agriculture shall establish terms and conditions of NPDES permits in accordance with rules. Terms and conditions shall be designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current water quality standard adopted under Section 6111.041 of the Revised Code, the most current antidegradation policy adopted under 6111.12 of the Revised Code, and other requirements of the Federal Water Pollution Control Act.

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earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[9] O.A.C. 901:10-3-11 will be amended if the rule package referenced in Section I becomes effective. The amended rule will correct typographical errors including capitalizing "Act" in reference to the Clean Water Act. The amended rule also adds language to section (E) "Requirements for general and individual stormwater permits" requiring a stormwater pollution plan to contain spill prevention and good housekeeping techniques along with plans to divert clean water. The amended language states for what the spill prevention, good housekeeping techniques and plans to divert clean water shall be used. The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption.

[10] The ODA has proposed changes to O.A.C. Rule 901:10-4-05 in the rule package referenced in Section I. The earliest date that the proposed rule change could be adopted is some date after January 16, 2007. The rule cannot become effective until ten days after its adoption. These changes are discussed in more detail in other sections of this certification.

Section 903.10 (F)(2) of the Revised Code specifically empowers the Director of ODA to promulgate rules establishing "effluent limitations governing discharges into waters of the state that are authorized by permits."

These effluent limitations and water quality standards are also specified in Rule 901:10-3-01 which establishes compliance requirements for individual NPDES permit holders. Rule 901:10-3-01 (D)(2) of the Administrative Code states:

> Persons that have been issued a NPDES permit by the director are required to comply with the following requirements as determined by the director:
>
> (a) Rule 901:10-3-10 of the Administrative Code;
>
> (b) Rule 901:10-3-02 to 901:10-3-06 of the Administrative Code;
>
> (c) Applicable water quality standards adopted under section 6111.041 of the Revised Code;
>
> (d) National standards of performance for new sources;
>
> (e) The antidegradation policy adopted under section 6111.12 of the Revised Code; and
>
> (f) Other applicable requirements of the Act [the CWA].

These same requirements apply to general NPDES permits. See O.A.C. Rule 901:10-4-04(D).

a. <u>Effluent Limitations And NSPS</u>

Rule 901:10-3-02 (A) of the Administrative Code specifies that Rules 901:10-3-02 to 901:10-3-12[11] apply to all CAFOs subject to a NPDES permit and establish effluent limitations for the production area and land application area as defined at O.R.C. Section

[11] In this review the notation of 901:10-3-12 was noted as a typographical error. ODA has never adopted any rule 901:10-3-12. Thus, there does not exist any version of a rule 901:10-3-12 to refer to. ODA has proposed changes to 901:10-3-02 that correct this error.

903.01. The definition of **"production area"** at O.R.C. Section 903.01 (AA) is virtually identical to the definition of **"production area"** found at 40 C.F.R Section 412.2(h). The definition of **"land application area"** at O.A.C. Rule 901:10-1-01 (UU) and contained in the definition of "animal feeding facility" at O.R.C. Section 903.01 (B) is virtually identical to the definition of **"land application area"** set forth at 40 C.F.R. Section 412.2(e).

Rule 901:10-3-02 (C) of the Administrative Code defines "best practicable control technology currently available" (hereinafter referred at as "BPT") consistent with Sections 301(b) and 304 (b)(1)(A) and (B) of the CWA. Rule 901:10-3-02 (D) of the Administrative Code defines "best available technology economically achievable" (hereinafter referred to as "BAT") consistent with Section 301 (b) and 304 (b)(2)(A) and (B) of the CWA.

i. Effluent Limitations For Horses And Sheep

Rule 901:10-3-03 of the Administrative Code sets forth the effluent limitations for horses and sheep and applies to discharges resulting from the production areas at horse and sheep CAFOs. This rule is identical to the federal regulation at 40 C.F.R. Section 412 – Subpart A (Sections 412.10 through 412.15) which sets forth the effluent limitations attainable by BPT, BAT and new source performance standards (hereinafter referred to as "NSPS") for discharges resulting from the production areas at horse and sheep CAFOs.

The effluent limitation attainable by the BPT, set forth at O.A.C. Rule 901:10-3-03 (A), is that there shall be no discharge of process waste water or manure into

navigable waters unless either chronic or catastrophic rainfall events cause an overflow from a facility designed, constructed and operated to contain all the process generated wastewaters or manure plus the run-off from a 10-year, 24-hour rainfall event for the location of the point source. This is identical to 40 C.F.R. Section 412.12.

The effluent limitations attainable by the BAT and NSPS set forth at O.A.C. Rules 901:10-3-03 (B) and (C) are that there shall be no discharge of process waste water or manure into navigable waters unless either chronic or catastrophic rainfall events cause an overflow from a facility designed, constructed and operated to contain all the process generated wastewaters or manure plus the run-off from a 25-year, 24-hour rainfall event for the location of the point source. This is identical to 40 C.F.R. Sections 412.13 and 412.15

ii. Effluent Limitations For Ducks

Rule 901:10-3-05 of the Administrative Code sets forth the effluent limitations for duck CAFOs and applies to the production areas at dry lot and wet lot duck CAFOs. This rule as adopted was not identical to the federal regulation at 40 C.F.R. Section 412 Subpart B (Sections 412.20 through 412.26), which sets forth the effluent limitations attainable by the BPT and NSPS for the production areas at duck CAFOs.

The definitions of "dry lot" and "wet lot" at O.A.C. Rules 901:10-3-05 (A)(1) and (2) are identical to those same definitions at 40 C.F.R. Sections 412.21(a) and (b) respectively. The BPT effluent limitations set forth at O.A.C. Rule 901:10-3-05 (B) are nearly identical to those at 40 C.F.R. Section 412.22(a). However, O.A.C. Rule 901:10-

3-05 (B) currently does not identify BOD as the parameter of concern for the numeric limits displayed in the chart for "Maximum Daily" and "Maximum Monthly Average." In addition, the Maximum Daily limit of 3.66 is incorrectly stated as limited to a measure of kilograms per 1,000 ducks instead of pounds per 1,000 ducks. ODA has proposed changes to Rule 901:10-3-05 that adds BOD as a regulated parameter and corrects the Maximum Daily limit of 3.66 to a measure of pounds per 1,000 ducks. The metric unit in note 3 of the Rule will be changed from "Not to exceed most probable number (mpn) of 400 cells/100 ml at any time" to "Not to exceed most probable number (mpn) of 400 per 100 ml at any time." The proposed rule change to Rule 901:10-3-05 was heard at JCARR on December 28, 2006 without comment. The rule amendment cannot be adopted until some date after January 16, 2007 and will become effective ten days after adoption at the earliest.

Moreover, these errors are arguably harmless. There are no Large CAFO duck farms in existence in Ohio that are impacted by this rule. Any new, proposed Large CAFO duck farm will be required to comply with the NSPS for ducks set forth below. However, the proposed change in effluent limitations for the maximum daily and maximum monthly average in O.A.C. Rule 901:10-3-05(B) will mirror that of 40 C.F.R. Section 412.22, allowing Ohio to reflect the federal regulations exactly once these proposed amendments become effective.

The NSPS for duck CAFOs at O.A.C. Rule 901:10-3-05 (C) and at 40 C.F.R. Section 412.25 both prohibit discharges of process waste water plus the run off from a 25-year, 24-hour rainfall event at the location of the point source.

Additionally, O.A.C. Rule 901:10-3-05 (D) contains the identical pretreatment standards for new CAFO duck sources at set forth in 40 C.F.R. Section 412.26.

iii. Effluent Limitations For Dairy Cows And Cattle Other Than Veal Calves

Rule 901:10-3-04 of the Administrative Code sets forth the effluent limitations for dairy cows and cattle other than veal calves and applies to the production areas and land application areas for those CAFOs. This rule is identical to the federal regulation at 40 C.F.R. Section 412 – Subpart C (Sections 412.30 through 412.37) which sets forth the effluent limitations attainable by BPT, "best conventional pollutant control technology" (hereinafter referred to as "BCT"), BAT, and NSPS for the production areas and land application areas of dairy cows and cattle other than veal calves CAFOs.

For the production areas at CAFOs containing dairy cows and cattle other than veal calves, the effluent limitations attainable by the BPT, BCT, BAT, and NSPS are that there shall be no discharge of manure or process wastewater into navigable waters unless precipitation causes an overflow from a facility designed, constructed, operated, and maintained to contain all the manure and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event. See O.A.C. Rules 901:10-3-04 (A)(1)(a), (B)(1), (C)(1), and (D)(1). This effluent limitation is identical to that found at 40 C.F.R. Sections 412.31(a)(1)(i), 412.32(a), 412.33(a), and 412.35(a).

Additionally, O.A.C. Rules 901:10-3-04 (A)(1)(a)(ii), (B)(1)(a), (C)(1)(a), and (D)(1)(a) require that, in order to comply with BPT, BCT, BAT, and NSPS, the production area at CAFOs containing dairy cows and cattle other than veal calves must be operated in accordance with the requirements of the manure management plan in

O.A.C. Rule 901:10-2-08 and with the record keeping requirements of O.A.C. Rule 901:10-2-16. These additional requirements for the production area are also found at 40 C.F.R. Sections 412.31(a)(1)(ii), 412.32(a), 412.33(a), and 412.35(a). correspond to the additional measures set forth in 40 C.F.R. Section 412.37(a) and (b) as follows:

Re: Weekly inspections re: stormwater:
40 C.F.R. Section 412.37(a)(1) corresponds to O.A.C. Rule 901:10-2-08 (A)(1) and (4);

40 C.F.R. Section 412.37(a)(1)(i) corresponds to O.A.C. Rule 901:10-2-08 (A)(4)(h), (i) and (p);

Re: Daily inspections re: water lines:
40 C.F.R. Section 412.37(a)(1)(ii) corresponds to O.A.C. Rule 901:10-2-08 (A)(4)(n) and (p);

Re: Weekly inspections re: manure, litter, and process wastewater impoundments:
40 C.F.R. Section 412.37(a)(1)(iii) corresponds to O.A.C. Rule 901:10-2-08 (A)(4)(e), (f), (g) and (p);

Re: Depth markers:
40 C.F.R. Section 412.37(a)(2) corresponds to O.A.C. Rule 901:10-2-06 (A)(2), O.A.C. Rule 901:10-2-08 (A)(4)(o), and O.A.C. Rule 901:10-4-05 (D)(2);

Re: Corrective actions:
40 C.F.R. Section 412.37(a)(3) corresponds to O.A.C. Rule 901:10-2-08 (A)(4)(q);

Re: Mortality handling:
40 C.F.R. Section 412.37(a)(4) corresponds to O.A.C. Rule 901:10-2-08 (A)(4)(m) and O.A.C. Rule 901:10-2-15;

Re: Record keeping of inspections re: stormwater, water lines, and manure, litter, and process wastewater impoundments:
40 C.F.R. Section 412.37(b)(1) corresponds to O.A.C. Rule 901:10-2-16 (A)(1) (a) (i), (ii), (iii), (iv), and (ix);

Re: Records of inspection re: depth marker:
40 C.F.R. Section 412.37(b)(2) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(a)(i);

Re: Records of corrective actions:

40 C.F.R. Section 412.37(b)(3) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(a)(x);

Re: Records of mortality handling:
40 C.F.R. Section 412.37(b)(4) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(f);

Re: Records of design of manure or litter storage structures:
40 C.F.R. Section 412.37(b)(5) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(a)(xi); and

Re: Records of overflows:
40 C.F.R. Section 412.37(b)(6) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(a)(xii).

Furthermore, O.A.C. Rules 901:10-3-04 (A)(1)(b), (B)(1)(a), (C)(1)(a) and (D)(1)(a) contain the exact voluntary alternative performance standards for the production areas of these CAFOs set forth at 40 C.F. R. Section 412.31(a)(2). Rules 901:10-3-04 (A)(1)(c), (B)(1)(a), (C)(1)(a) and (D)(1)(a) of the Administrative Code require the CAFO to achieve the production area effluent limitations as of the date of permit coverage as set forth at 40 C.F. R. Section 412.31(a)(3).

For land application areas at CAFOs containing dairy cows and cattle other than veal calves, the effluent limitations attainable by the BPT, BCT, and BAT require the CAFO to develop and maintain the best management practices set forth in the manure management plan in O.A.C. Rule 901:10-2-07 (A)(1) and maintain the records specified in O.A.C. Rule 901:10-2-16. See O.A.C. Rules 901:10-3-04 (A)(2)(a) and (b), 901:10-3-04 (B)(1)(b), 901:10-3-04 (C)(1)(b), and 901:10-3-04 (D)(1)(b). These requirements are identical to those set forth at 40 C.F.R. Sections 412.31(b)(1) and (2), 412.32(b), and 412.33(b).

Rule 901:10-2-07 (A)(1) of the Administrative Code lists various best management practices to be set forth in the manure management plan. These best management practices for the land application areas for these CAFOs correspond to the federal regulations found at 40 C.F.R. Section 412.4 as follows:

Re: Best Management Practices:
40 C.F.R. Section 412.4(c) corresponds to O.A.C. Rules 901:10-2-07 through 901:10-2-14 and Appendices thereto;

Re: Nutrient Management Plan:
40 C.F.R. Section 412.4(c)(1) corresponds to O.A.C. Rules 901:10-2-07 through 901:10-2-14 and Appendices thereto;

Re: Determination of Application Rates:
40 C.F.R. Section 412.4(c)(2) corresponds to O.A.C. Rules 901:10-2-09, 901:10-2-10, 901:10-1-13, and 901:10-2-14 and Appendices thereto[12];

Re: Manure and Soil Sampling:
40 C.F.R. Section 412.4(c)(3) corresponds to O.A.C. Rules 901:10-2-10 and 901:10-2-13;

Re: Inspect Land Application Equipment for Leaks:
40 C.F.R. Section 412.4(c)(4) corresponds to O.A.C. Rule 901:10-2-08 (A)(3); and

Re: Setback Requirements:
40 C.F.R. Section 412.4(c)(5) corresponds to O.A.C. Rule 10-2-14, Appendix A, Table 2.

Note that the specialized definitions used in 40 C.F.R. Section 412.4 have equivalent counterparts in the Ohio rules. The definition of "setback" contained in 40 C.F.R. Section 412.4(b)(1) is identical to the definition of "setback" at O.A.C. Rule 901:10-1-01 (BBBB). The definition of "vegetated buffer" contained in 40 C.F.R.

[12] O.A.C. 901:10-2-14 will be amended if the rule package referenced in Section I becomes effective. The proposed amended rule replaces the erroneous reference in subparagraph (D)(5) to paragraph (C) with the correct reference to paragraph (D). The earliest this rule is can be adopted by the ODA is a date after January 16 and can become effective ten days after adoption by the ODA. Further, Appendix A, Table 2 and Appendix E, Table 2 will also be amended if the rule package referenced in Section I becomes effective.

Section 412.4(b)(2) is equivalent to the definitions of "buffer strip" at O.A.C. Rule 901:10-1-01 (R). The definition of "multi-year phosphorous application" at 40 C.F.R. Section 122.4(b)(3) is the same as the definition in O.A.C. Rule 901:10-1-01 (GGG).

The USEPA has expressed some questions related to certain aspects of land application as reflected in the currently effective rules. ODA has proposed amendments to O.A.C. 901:10-2-14, specifically Appendix A Table 2 and Appendix E Table 2 to address those questions. These amendments are part of the proposed rule package discussed above in Section I.

O.A.C. Rule 901:10-2-14 Appendix A, Table 2 is proposed to be amended to better clarify the land application restrictions. The second row label for the Land Application Restrictions Chart will have "surface" amended into it to read "Surface Waters of the State". The third row will change "Private of Public Wells" to read "Wells". The tenth row will delete "drains" so it will read "Field Surface Furrows". This was done to reflect an addition to the definitions in O.A.C. Rule 901:10-1-01 with the addition of "Field Surface Furrow".

Further, Note (1) will be amended to add the sentence "All winter surface applications must have prior approval from the Ohio Department of Agriculture". This addition clarifies the need for prior approval to apply during winter. The phrase "and field surface furrows" will be added to Note(1)(d). Note (2) will be deleted and replaced with;

> "Either a thirty five foot wide vegetative buffer strip must be present or a total setback of 100' must be maintained. As a compliance alternative, the concentrated animal feeding operation may demonstrate that a setback or buffer is not necessary because implementation or alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the one

hundred foot setback or a thirty five foot vegetative buffer. Buffer strip is defined in O.A.C. 901:10-1-01(R)."

Note (7) would be added which references O.A.C. Rule 3745-1-02(B)(77) and Note (8) will also add the language "The first setback refers to a vegetative buffer strip that must be maintained while the second refers to the total setback distance. Buffer strip is defined in O.A.C. 901:10-1-01(R)."

O.A.C. Rule 901:10-2-14 Appendix E, Table 2 is proposed to be amended to more clearly set forth the soil test and related application criteria. Appendix E, Table 2 will remove the labels of "Low Potential", "Moderate Potential", "High Potential" and "Very High Potential" from the "P" Soil Test Level. The amended chart will not rely on labels to classify levels of potential but instead will use the stated Bray P1 ppm levels. The Application Criteria will also be amended changing "NITROGEN" to "nitrogen" and deleting references to "organic by products". In the Application Criteria for the Bray P1 100-150 ppm the option for a multiple year application of Phosphorus is authorized under certain conditions. For the Bray P1 150 ppm Application Rate, the option to use the P site assessment in Appendix E, Table 1 is given.

The owner or operator of a CAFO containing dairy cows and cattle other than veal calves must also maintain records of the land application area specified at 40 C.F.R. Section 412.37(c). See O.A.C. Rules 901:10-3-04 (A)(2)(b), 901:10-3-04 (B)(1)(b), 901:10-3-04 (C)(1)(b), and 901:10-3-04 (D)(1)(b). These recordkeeping requirements for such CAFOs correspond to the additional measures set forth at 40 C.F.R. Section 412.37(c) as follows:

Re: Maintain Copy of Nutrient Management Plan On-Site:
40 C.F.R. Section 412.37(c) corresponds to O.A.C. Rules 901:10-2-07 (E), 901:10-2-08 through 901:10-2-16;

Re: Expected Crop Yields:
40 C.F.R. Section 412.37(c)(1) corresponds to O.A.C. Rule 901:10-16 (A)(1)(c)(viii), (ix), (x) and (xi);

Re: Dates of Land Application:
40 C.F.R. Section 412.37(c)(2) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(c)(xiv);

Re: Weather Conditions at Time of Application and 24 Hours Prior to and After Application:
40 C.F.R. Section 412.37(c)(3) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(c)(xviii);

Re: Test Methods Used to Sample Manure, Litter, Process Waste Water and Soil:
40 C.F.R. Section 412.37(c)(4) corresponds to O.A.C. Rules 901:10-2-10, 901:10-2-13 and 901:10-2-16 (A)(1)(b) and (c)(vi);

Re: Results from Manure, Litter, Process Waste Water and Soil Sampling:
40 C.F.R. Section 412.37(c)(5) corresponds to O.A.C. Rules 901:10-2-10, 901:10-2-13 and 901:10-2-16 (A)(1)(b) and (c)(vi);

Re: Explanation for Basis of Land Application:
40 C.F.R. Section 412.37(c)(6) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(c)(xii);

Re: Calculations Showing Nitrogen and Phosphorous to be Applied to Each Field:
40 C.F.R. Section 412.37(c)(7) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(c)(xii) and (xiii);

Re: Amount of Nitrogen and Phosphorous Actually Applied to Each Field:
40 C.F.R. Section 412.37(c)(8) corresponds to O.A.C. Rule 901:10-2-16 (A)(1)(c)(xiv) and (xv);

Re: Land Application Methods:
40 C.F.R. Section 412.37(c)(9) corresponds to O.A.C. Rule 901:10-2-08 (A)(1)(c)(xiv); and

Re: Date Land Application Equipment Inspected:
40 C.F.R. Section 412.37(c)(10) corresponds to O.A.C. Rule 901:10-2-08(A)(2) and (A)(3). [Note that ODA is more stringent, in requiring a record of maintenance, calibration and repairs, as well as periodic inspection.]

Rules 901:10-3-04 (A)(2)(c), 901:10-3-04 (B)(1)(b), 901:10-3-04 (C)(1)(b) and 901:10-3-04 (D)(1)(b) of the Administrative Code require the CAFO to achieve the land application area effluent limitations attainable by the BPT, BCT, and BAT as of December 31, 2006 as set forth at 40 C.F. R. Section 412.31(b)(3).

For land application areas at CAFOs containing dairy cows and cattle other than veal calves, the effluent limitations attainable by the NSPS require the CAFO to develop and maintain the best management practices set forth in the manure management plan in O.A.C. Rule 901:10-2-07 (A)(1) and to maintain the records specified in O.A.C. Rule 901:10-2-16. See O.A.C. Rule 901:10-3-04 (D)(1)(b). These requirements are identical to those set forth at 40 C.F.R. Sections 412.31(b)(1) and (2) as described above. Rule 901:10-3-04 (A)(2)(c) of the Administrative Code requires the CAFO to achieve the land application area effluent limitations as of the date of permit coverage as set forth at 40 C.F. R. Section 412.35(c). Finally, O.A.C. Rule 901:10-3-04 (D)(1)(d) contains the same NSPS for a CAFO commencing discharge after April 14, 1993 and prior to April 14, 2003 as set forth at 40 C.F.R Section 412.35(d).

iv. Effluent Limitations For Swine, Poultry And Veal Calves

Rule 901:10-3-06 of the Administrative Code sets forth the effluent limitations for swine, poultry and veal calves and applies to the production areas and land application areas for those CAFOs. This rule is identical to the federal regulation at 40 C.F.R. Section 412 Subpart D (Sections 412.40 through 412.47), which sets forth the effluent limitations attainable by BPT, BCT, BAT, and NSPS for the production areas and land applications areas of swine, poultry and veal calves CAFOs except as noted below.

For the production areas at CAFOs containing swine, poultry, and veal calves, the effluent limitations attainable by the BPT, BCT, and BAT are that there shall be no discharge of manure, litter, or process waste water into navigable waters unless precipitation causes an overflow from a facility designed, constructed, operated, and maintained to contain all the manure and process waste water including the runoff and the direct precipitation from a facility designed, constructed, operated, and maintained to contain all the manure and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event. See O.A.C. Rules 901:10-3-06 (A)(1)(a), (B)(1)(a), and (C)(1). This effluent limitation is identical to that found at 40 C.F.R. Sections 412.43(a)(1), 412.44(a), and 412.45(a).

Additionally, O.A.C. Rules 901:10-3-06 (A)(1)(a)(ii), (B)(1)(a) and (C)(1) require that, in order to comply with BPT, BCT, and BAT, the production area at CAFOs containing swine, poultry, and veal calves must be operated in accordance with the requirements of the manure management plan in O.A.C. Rule 901:10-2-08 and with the record keeping requirements of O.A.C. Rule 901:10-2-16. These additional requirements for the production area are also found at 40 C.F.R. Sections 412.43(a)(1), 412.44(a), and 412.45(a) and correspond to the additional measures set forth in 40 C.F.R. Section 412.37(a) and (b) as set forth above regarding dairy cows and cattle other than veal calves.

At this point, O.A.C. Rules 901:10-3-06 (A)(1)(b), (B)(1)(a), and (C)(1) do not contain the exact voluntary alternative performance standards for the production areas of these CAFOs set forth at 40 C.F.R. Section 412.31(a)(2). However, the current difference in these provisions means, in the opinion of the Attorney General, that the

ODA regulatory program for NPDES permits is actually more stringent than that of USEPA. See *Ohio Chamber of Commerce v. State Emergency Response Commission*, 64 Ohio St. 3d 619, 597 N.E.2d 487 (1992).[13]

However, ODA has proposed changes to O.A.C. Rule 901:10-3-06 (A)(1)(b) that contain almost identical language in 40 C.F.R. 412.31(a)(2) for voluntary performance standards for the production areas of CAFOs. Ohio's program will mirror the federal requirements for voluntary performance standards if the proposed rule becomes effective. The change to O.A.C. 901:10-3-06 establishing voluntary alternative performance standards is included in the rule package discussed in Section I and cannot be promulgated until some date after January 16, 2007.

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[13] Section 903.10 (F)(12) states, "The rules adopted under division (F) of this section shall be consistent with the requirements of the Federal Water Pollution Control Act." In the *Chamber of Commerce* case, Section 3750.02 (B)(1) required the State Emergency Response Commission to adopt rules that were consistent with and equivalent in scope, content, and coverage to USEPA's rules promulgated pursuant to the Emergency Planning and Community Right-To-Know Act of 1986 or "EPCRA." In the *Ohio Chamber of Commerce* case, the Chamber argued that this rulemaking language prevented the Commission from promulgating rules that are more stringent than what the EPCRA required. The Commission argued that O.R.C. Section 3750.02 (B)(1) merely sets forth minimum requirements that must be followed and only established a foundation upon which the Commission could adopt rules more stringent than federal law. The Commission's argument was supported by numerous provisions within EPCRA itself which specifically allowed states to set forth additional or supplemental requirements. The Ohio Supreme Court ruled for the Commission. Similarly, the Attorney General maintains that O.R.C. Section 903.10 sets forth rulemaking authority for the Director to adopt federal NPDES rules as the foundation of the CAFO regulatory program in Ohio.

This interpretation is consistent with 40 C.F.R. Section 123.25 which sets forth the requirements for a state NPDES permit program. Specifically, 40 C.F.R. Section 123.25 states, "All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements."

Rules 901:10-3-06 (A)(1), (B)(1), and (C)(1) of the Administrative Code require the CAFO to achieve the production area effluent limitations as of the date of permit coverage as set forth at 40 C.F.R. Sections 412.43(a)(2), 412.44(a), and 412.45(a).

For land application areas at CAFOs containing swine, poultry, and veal calves, the effluent limitations attainable by the BPT, BCT, and BAT require the CAFO to develop and maintain the best management practices set forth in the manure management plan in O.A.C. Rule 901:10-2-07 (A)(1) and to maintain the records specified in O.A.C. Rule 901:10-2-16. See O.A.C. Rules 901:10-3-06 (A)(2)(a), 901:10-3-06 (B)(1)(b), and 901:10-3-06 (C)(1)(b). These requirements are also found at 40 C.F.R. Sections 412.43(b)(1), 412.44(b), and 412.45(b) and are identical to those set forth at 40 C.F.R. Sections 412.31(b)(1) and (2) as set forth above regarding dairy cows and cattle other than veal calves.

Rules 901:10-3-06 (A)(2)(b), 901:10-3-06 (B)(1)(b), and 901:10-3-06 (C)(1)(b) of the Administrative Code require the CAFO to achieve the land application area effluent limitations attainable by the BPT, BCT, and BAT as of December 31, 2006 as set forth at 40 C.F. R. Sections 412.43(b)(2), 412.44(b), and 412.45(b).

For the production areas at CAFOs containing swine, poultry, and veal calves, the effluent limitations attainable by the NSPS set forth at O.A.C. Rule 901:10-3-06 (D)(1)(a) are that there shall be no discharge of manure or process waste water into navigable waters unless precipitation causes an overflow from a facility designed, constructed, operated, and maintained to contain all the manure and process waste water including the runoff and the direct precipitation from a facility designed, constructed, operated, and maintained to contain all the manure and process wastewater including the

runoff and direct precipitation from a 100-year, 24-hour rainfall event. This is consistent with 40 C.F.R. Section 412.46(a)(1).

Rule 901:10-3-06 (D)(1) of the Administrative Code requires that the NSPS production areas at CAFOs containing swine, poultry, and veal calves be operated in accordance with O.A.C. Rules 901:10-2-08 and 901:10-2-16. This Ohio rule corresponds to 40 C.F.R. Section 412.46(a)(2). Rules 901:10-2-08 and 901:10-2-16 of the Administrative Code correspond to the additional measures set forth at 40 C.F.R. Sections 412.47(a) and (b), which are identical to those at 40 C.F.R. Sections 412.37(a) and (b) as detailed above regarding dairy cows and cattle other than veal calves.

In addition, the provisions for upset and bypass apply to the NSPS production areas at CAFOs containing swine, poultry, and veal calves as required by 40 C.F. R. Section 412.46(a)(3). See O.A.C. Rule 901:10-3-06 (D)(1)(b). The Ohio definition of "upset" at O.A.C. Rule 901:10-3-10 (U) is identical to that set forth at 40 C.F. R. Section 122.41(n), and the Ohio definition of "bypass" at O.A.C. Rule 901:10-3-10 (T) is identical to that set forth at 40 C.F. R. Section 122.41(m).

For land application areas at CAFOs containing swine, poultry, and veal calves, the effluent limitations attainable by the NSPS require the CAFO to develop and maintain the best management practices set forth in the manure management plan in O.A.C. Rule 901:10-2-07 (A)(1) and to maintain the records specified in O.A.C. Rule 901:10-2-16. See O.A.C. Rule 901:10-3-06 (D)(2). These requirements are identical to those set forth at 40 C.F.R. Section 412.46(b) and at 40 C.F.R. Sections 412.31(b)(1) and (2) as described above regarding dairy cows and cattle other than veal calves.

Rule 901:10-3-06 (D)(3)of the Administrative Code requires the CAFO containing swine, poultry, and veal calves, to achieve the NSPS effluent limitations for the production area and the land application area as of the date of permit coverage as set forth at 40 C.F.R. Section 412.46(c). Rule 901:10-3-04 (D)(5) of the Administrative Code contains the same NSPS for a CAFO commencing discharge after April 14, 1993 and prior to April 14, 2003 as set forth at 40 C.F.R Section 412.46(e).

The NSPS for CAFOs containing swine, poultry, and veal calves also contains voluntary superior environmental standards. The standards set forth at O.A.C. Rule 901:10-3-06 (D)(4) are identical to those at 40 C.F. R. Section 412.46(d).

b. Water Quality Related Effluent Limitations

Rule 901:10-3-10 of the Administrative Code describes the standard permit terms and conditions for NPDES permits. Rule 901:10-3-10 (E) of the Administrative Code states that the general effluent limitations "shall, at all times, comply with Ohio water quality standards." Ohio's water quality standards are adopted by OEPA as set forth in O.R.C. Section 6111.041 and O.A.C. Chapter 3745-1. ODA will apply the water quality standards adopted by the OEPA pursuant to Section 6111.041 of the Revised Code and Chapter 3745-1 of the Administrative Code. This includes the antidegradation policy and criteria adopted by OEPA pursuant to Section 6111.12 of the Revised Code and pursuant to Rule 3745-1-05 of the Administrative Code.

c. Toxic And Pretreatment Effluent Standards

As to the requirements of Section 307 of the CWA, Section 903.08 (G) of the Revised Code requires the Director of ODA to establish effluent guidelines in NPDES permits in accordance with the CWA and thus implicitly authorizes ODA to apply, in

terms and conditions of issued permits, the toxic and pretreatment effluent standards established in Section 307 of the CWA. Rule 901:10-1-03 (C)(2) of the Administrative Code which requires the Director of ODA to deny, suspend or revoke an NPDES permit if discharge from the facility will not achieve compliance with national effluent standards also implicitly authorizes ODA to apply, in terms and conditions of issued permits, the toxic and pretreatment effluent standards established in Section 307 of the CWA.

d. Ocean Discharge Criteria

Finally, the ocean discharge criteria pursuant to Section 403 of the CWA do not apply to Ohio as Ohio does not border the ocean.

2. Effluent Limitation Requirements Of Section 301 And 307 Of The CWA

Requirement: In the absence of formally promulgated effluent standards and the limitations in Sections 301(b) and 307 of the CWA, State law provides authority to apply, in terms and conditions of issued permits, effluent limitations to achieve the purposes of these sections of the CWA using the permitting authority's best professional judgment ("BPJ"). Such limitations may be based upon an assessment of technology and processes as required under the CWA with respect to individual point sources, and include authority to apply:

> To existing point sources, other than publicly-owned treatment works, effluent limitations based on application of the best practicable control technology currently available or the best available technology economically achievable;
>
> To publicly-owned treatment works, effluent limitations based upon the application of secondary treatment; and
>
> To any point source, as appropriate, effluent standards or prohibitions designed to prohibit the discharge of toxic pollutants in toxic amounts or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly owned treatment works.

Federal Authority: CWA §§ 301, 304(d), 307, 402(a)(1), 402(b)(1)(A); 40 C.F.R. §§ 122.44, 125.3 and 403.

Ohio Statutory and Regulatory Authority:

O.R.C. § 903.08 (G), Participation in NPDES; permit; ODA shall establish terms and conditions of permits designed to achieve and maintain compliance with national effluent limitations, national standards of performance for new sources; water quality standards adopted by OEPA under O.R.C. §6111.041, antidegradation policy adopted by OEPA under O.R.C. § 6111.12, and other requirements of CWA

O.A.C. Rule 901:10-3-01 (G), Additional requirements for a NPDES permit application

ANALYSIS OF THE ATTORNEY GENERAL

ODA possesses the authority to apply, in terms and conditions of issued permits, effluent limitations to achieve the purposes of the CWA in the absence of formally promulgated effluent standards and limitations. The federal authority for the use of these Best Professional Judgment ("BPJ") based effluent limits is contained inferentially in Section 402(a)(1) of the CWA which authorizes the USEPA to issue a permit containing "such conditions as the Administrator determines are necessary to carryout the provisions of this Act . . ." The NPDES regulations at 40 C.F.R. Sections 125.3(c) and (d) list appropriate factors and considerations that must be applied when imposing technology based treatment requirements on a case-by-case basis under Section 402 (a)(1) of the Act. The regulations at 40 C.F.R. Section 122.44 list other basic requirements for permit content.

Under Section 903.08(G) of the Revised Code, the Director of ODA is **required** to:

> establish terms and conditions of NPDES permits in accordance with rules. Terms and conditions shall be designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current water quality standards adopted under section 6111.041 [611.04.1] of the Revised Code, the most current antidegradation policy adopted under section 6111.12 of the Revised Code, and other requirements of the Federal Water Pollution Control Act. In establishing the terms and conditions of a NPDES permit, the director, to the extent consistent with that act, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit.

Furthermore, O.R.C. Sections 903.10 (F)(2) and (4) authorize the Director of ODA to promulgate rules establishing effluent limitations and rules establishing permit terms and conditions.

Rule 901:10-3-01 (G) of the Administrative Code amplifies the Director's authority to establish effluent limitations and permit terms and conditions consistent with the CWA:

> In addition to conditions required in all permits to meet the requirements of rule 901:10-3-10 of the Administrative Code [Standard permit terms and conditions], the director shall establish conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the [Clean Water] Act and regulations. These shall include conditions under 40 C.F.R. sections 122.44 [Establishing limitations, standards, and other permit conditions], 122.46 [Duration of permits], 122.47 [Schedules of compliance] 122.48 [Requirements for recording and reporting of monitoring results] and 40 C.F.R. Part 132 [Water Quality Guidance for the Great Lakes System].

The general effluent limitations definitions and applicability for NPDES permits are set forth in O.A.C. Rule 901:10-3-02. The effluent limitations for horses and sheep are set forth in O.A.C. Rule 901:10-3-03. The effluent limitations for dairy cows and cattle other than veal calves are set forth in O.A.C. Rule 901:10-3-04. The effluent limitations for ducks are set forth in O.A.C. Rule 901:10-3-05. The effluent limitations for swine, poultry, and veal calves are set forth in O.A.C. Rule 901:10-3-06.

3. **Schedules of Compliance**

Requirement: State law provides authority to set and revise schedules of compliance in issued permits which require the achievement of applicable effluent standards and limitations within the shortest reasonable time consistent with the requirements of the CWA. This includes authority to set interim compliance dates in permits which are enforceable without otherwise showing a violation of an effluent limitation or harm to water quality.

Federal Authority: CWA §§ 301 (b), 303 (e), 304 (b), 306, 307, 402 (b)(1)(A), 502 (11) and 502 (17); 40 C.F.R. §§ 122.47 and 122.62, and 40 C.F.R. Part 132, Appendix F, Procedure 9.

Ohio Statutory and Regulatory Authority:

O.R.C. § 903.10 (F)(4), Rules; Terms and conditions of permits including schedules of compliance

O.A.C. Rule 901:10-1-03 (C)(13), Criteria for decision-making; ODA shall deny, modify, suspend or revoke NPDES permit if discharge will not achieve and maintain compliance with CWA

O.A.C. Rule 901:10-1-09 (C)(4), Permit modifications; compliance schedules

O.A.C. Rule 901:10-1-10 (G), Prohibitions; No violation of terms and conditions of NPDES permit

O.A.C. Rule 901:10-3-01 (G), Additional requirements for a NPDES permit application

ANALYSIS OF THE ATTORNEY GENERAL

Section 903.10 (F)(4) of the Revised Code requires the Director of ODA to promulgate rules establishing terms and conditions to be included in a permit including, inter alia, schedules of compliance. Rule 901:10-3-01(G) of the Administrative Code provides ODA with the authority to set schedules of compliance in issued permits as follows:

> In addition to conditions required in all permits to meet the requirements of rule 901:10-3-10 of the Administrative Code [Standard permit terms and conditions], the director shall establish conditions, as required on a

> case-by-case basis, to provide for and assure compliance with all applicable requirements of the [Clean Water] Act and regulations. These shall include conditions under 40 C.F.R. Sections 122.44 [Establishing limitations, standards, and other permit conditions], 122.46 [Duration of permits], 122.47 [Schedules of compliance], 122.48 [Requirements for recording and reporting of monitoring results] and 40 C.F.R. Part 132 [Water Quality Guidance for the Great Lakes System].

Thus, Rule 901:10-3-01 (G) authorizes ODA to establish schedules of compliance consistent with the general regulations set forth at 40 C.F.R. Section 122.47. Furthermore, Rule 901:10-3-01 (G) authorizes ODA to establish schedules of compliance consistent with the specific regulations set forth at 40 C.F.R. Part 132, Appendix F, Procedure 9 which establish compliance schedules applicable to a Great Lakes States such as Ohio. Both 40 C.F.R. Section 122.47 and 40 C.F.R. Part 132, Appendix F, Procedure 9 include authority to set interim compliance dates.

The Director of ODA is authorized to modify a compliance schedule of a NPDES permit upon a finding of good cause as follows:

> Compliance schedules. The director determines good cause exists for modification of a compliance schedule of a NPDES permit, such as acts of nature or acts of third parties, strike, flood, materials shortage or other events over which the owner or operator has little or no control and for which there is no reasonable available remedy. However, in no case may a NPDES permit compliance schedule be modified to extend beyond any applicable statutory deadline in the Act."

O.A.C. Rule 901:10-1-09 (C)(4). This rule is identical to 40 C.F.R. Section 122.62 (a)(4) which specifies the causes for modification of a compliance schedule.

Compliance schedules are enforceable without otherwise showing a violation of an effluent limitation or harm to water quality. Section 903.08 (G) of the Revised Code requires the Director of ODA to establish terms and conditions in permits designed to achieve and maintain full compliance with the CWA. A schedule of compliance is

recognized as a term and condition of a NPDES permit under Section 903.10 (F)(4) of the Revised Code. Under Rule 901:10-1-10 (G) of the Administrative Code, "[n]o person shall violate the terms and conditions of a permit to install, permit to operate, review compliance certificate, or NPDES permit." The Director of ODA is required to "deny, suspend, modify, or revoke an NPDES permit if the director determines" that a "[d]ischarge from the facility will not achieve compliance with any requirement of the Act and the regulations promulgated thereunder." O.A.C. Rule 901:10-1-03 (C)(13).

4. Variances

Requirement: State law provides authority for the State to review and act upon variances from applicable effluent limitations. To the extent that the State will consider variances, the State provisions are at least as stringent as federal requirements. State law does not allow any variances or adjustments to permit limitations not authorized under federal law.

Federal Authority: CWA §§ 301 (c), 301 (g), 301 (i), 301 (k), 301 (n), 301 (g); 40 C.F.R. § 124.62 and 40 C.F.R. Part 132, Appendix F, Procedure 2.

Ohio Statutory and Regulatory Authority:
O.R.C. § 903.10 (F)(3), Rules; Variances

O.A.C. Rule 901:10-3-08, Variances[1]
O.A.C. Rule 901:10-3-09, Appeals of variances

ANALYSIS OF THE ATTORNEY GENERAL:

Although not required under federal law, Ohio has chosen to authorize variances from effluent limitations and other permit requirements of the CWA to the extent consistent with the Act. Specifically, the Director of ODA shall promulgate rules to establish "[v]ariances effluent limitations and other permit requirements to the extent that the variances are consistent with the Federal Water Pollution Control Act."

These variances are established in Rule 901:10-3-08 of the Administrative Code which provides for consideration of variances in a manner consistent with the federal

[1] This rule will be amended to make minor grammatical changes. In addition, Rule 901:10-3-08 (B)(6)(b) will have "of" changed to "or" so the section will read "Timeframe for variances. A water quality based variance issued under paragraph (B)(6) of this rule shall not exceed five years *or* the term of the NPDES permit whichever is less..." This change will corrects a grammatical mistake and reflects the intent of the original language. The earliest that this amendment can be adopted is some date after January 16, 2007. The rule can become effective ten days after its adoption.

requirements. The Ohio statute and rules do not allow for any variances or adjustments to permit limitations not authorized under federal law.

Rules 901:10-3-08 (A), (B)(1) through (6), and (C) of the Administrative Code as it presently effective and as proposed to be amended are comparable to the provisions 40 C.F.R. Section 124.62 regarding variances under Sections 301 (i), 301 (k), 301 (c), 301 (b)(2), 301 (n) and 301 (g) of the CWA. These rules correspond to the federal regulations set forth at 40 C.F.R Section 124.62 as follows:

Re: Variance requests – incorporation into Permit:
40 C.F.R. Sections 124.62(e) and (f) correspond to O.A.C. Rule 901:10-3-08(A);

Re: Regional Administrator may deny, forward or submit to USEPA for variance request forwarded by Director of ODA:
40 C.F.R. Section 124.62(c) corresponds to O.A.C. Rule 901:10-3-08(B);

Re: Extensions under CWA Section 301(i):
40 C.F.R. Section 124.62(a)(1) corresponds to O.A.C. Rule 901:10-3-08(B)(1);

Re: Extensions under CWA Section 301(k):
40 C.F.R. Section 124.62(a)(2) corresponds to O.A.C. Rule 901:10-3-08(B)(2);

Re: Variances under CWA Section 301(c):
40 C.F.R. Section 124.62(b)(1) corresponds to O.A.C. Rule 901:10-3-08(B)(3);

Re: Variances based on Fundamentally Different Factors under CWA Section 301(n):
40 C.F.R. Section 124.62(e)(1) corresponds to O.A.C. Rule 901:10-3-08(B)(4);

Re: Variances based on CWA Section 301(g):
40 C.F.R. Section 124.62(e)(2) corresponds to O.A.C. Rule 901:10-3-08(B)(5); and

Re: Approval of variances – draft permit appeals:
40 C.F.R. Section 124.62(b)(2) and 40 C.F.R., Part 132, Appendix F, Procedure 2, (A) correspond to O.A.C. Rule 901:10-3-08(B)(6).

Rule 901:10-3-08 (B)(6) through (B)(11) as presently effective and as proposed to be amended is comparable to 40 C.F.R. Part 132, Appendix F, Procedure 2, which establishes water quality standards variance procedures for a Great Lakes State such as Ohio. These rules correspond to the federal regulations set forth at 40 C.F.R Part 132, Appendix F, Procedure 2, as follows[2]:

> Re: Applicability – New Great Lakes Dischargers:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (A)(1) adopts the definition of "New Great Lakes Discharger" set forth as Section 132.2 and corresponds with O.A.C. Rule 901:10-3-08(B)(6)(a)(i);
>
> Re: Applicability – ESA:
> 40 C.F.R., Part 132, Appendix F., Procedure 2, Section (A)(2) corresponds to O.A.C. Rules 901:10-3-08(B)(6)(a)(ii);
>
> Re: Applicability – Water Quality Standards:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (A)(3) corresponds to O.A.C. Rule 901:10-3-08(B)(6)(a)(iii);
>
> Re: Maximum Time Frame for Variances:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (B) corresponds to O.A.C. Rule 901:10-3-08(B)(6)(b);
>
> Re: Conditions to Grant a Variance:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (C) corresponds to O.A.C. Rule 901:10-3-08(B)(6)(c);
>
> Re: Submittal of Variance Application:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (D) corresponds to O.A.C. Rule 901:10-3-08(B)(6)(d);
>
> Re: Public Notice of Preliminary Decision:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (E) corresponds to O.A.C. Rule 901:10-3-08(B)(6)(e);
>
> Re: Final Decision on Variance Request:
> 40 C.F.R., Part 132, Appendix F, Procedure 2, Section (F) corresponds to O.A.C. Rule 901:10-3-08(B)(7);
>
> Re: Incorporating Variance into Permit:

[2] Note that the Ohio CAFO NPDES program does not provide for thermal pollution variances under CWA Section 316(a).

40 C.F.R., Part 132, Appendix F, Procedure 2, Section (G) corresponds to O.A.C. Rule 901:10-3-08(B)(8);

Re: Renewal of Variance:
40 C.F.R., Part 132, Appendix F, Procedure 2, Section (H) corresponds to O.A.C. Rule 901:10-3-08(B)(9);

Re: USEPA Approval:
40 C.F.R., Part 132, Appendix F, Procedure 2, Sections (I)(1) through (5) correspond to O.A.C. Rule 901:10-3-08(B)(10);

Re: State WQS Revisions:
40 C.F.R., Part 132, Appendix F, Procedure 2, Section (J) corresponds to O.A.C. Rule 901:10-3-08(B)(11).

Finally, O.A.C. Rule 901:10-3-09 provides for appeals of variances in a manner identical to the federal requirement set forth at 40 C.F.R. Section 124.64 (a).

D. Authority To Limit Permit Duration

Requirement: State law provides authority to limit the duration of permits to a fixed term not exceeding five years. State law provides for the automatic continuance of expired permits if the permittee files a timely and complete application for a new permit.

Federal Authority: CWA § 402 (b)(1)(B); 40 C.F.R. §§ 122.6, 122.46.

Ohio Statutory and Regulatory Authority:
O.R.C. § 119.01 (B), Ohio Administrative Procedure Act, "license"
O.R.C. § 119.06 (C), Ohio Administrative Procedure Act, Adjudication order of agency valid and effective; hearings; periodic registration of licenses
O.R.C. § 903.08 (I), Participation in NPDES; permit; Term not to exceed five years
O.R.C. § 903.08 (J); Participation in NPDES; permit; Renewal of permit

O.A.C. Rule 901:10-1-02 (D)(6), General administrative requirements for permits; Term not to exceed five years
O.A.C. Rule 901:10-1-02 (D)(7), General administrative requirements for permits; Renewal of permit
O.A.C. Rule 901:10-3-10 (F), Standard permit terms and conditions; Duty to reapply
O.A.C. Rule 901:10-4-01 (E), General permit to operate requirements; Term not to exceed five years
O.A.C. Rule 901:10-4-04 (B), Criteria for issuing and renewing NPDES general permit to operate; Term not to exceed five years

ANALYSIS OF THE ATTORNEY GENERAL

Ohio law clearly limits the duration of NPDES permits issued by ODA to a term not to exceed five years as required by Section 402(b)(1)(B) of the CWA and 40 C.F.R. Section 122.46(a). Section 903.08 (I) of the Revised Code states: "A NPDES permit may be issued under this section for a period not to exceed five years." Rule 901:10-1-02 (D)(6) of the Administrative Code establishes this same five-year durational limit for individual NPDES permits issued by ODA. Rules 901:10-4-01 (E) and 901:10-4-04 (B)

of the Administrative Code also establish a five-year durational limit for general NPDES permits issued by ODA.

Ohio law also provides for the administrative continuance of expired permits if the permitee has filed a timely and complete application for renewal within the specified time period. This administrative continuance of expired permits is consistent with ODA's NPDES regulations and is consistent with Ohio's Administrative Procedure Act.

Section 903.08 (J) of the Revised Code provides that an application for renewal of a NPDES permit must be submitted to ODA at least one hundred eighty (180) days prior to the expiration date of the permit. Rule 901:10-1-02 (D)(7) of the Administrative Code also provides that an application for renewal of an individual NPDES permit must be submitted to ODA at least one hundred eighty (180) days prior to the expiration date of the permit. Rule 901:10-3-10 (F) of the Administrative Code also provides that an application for renewal of a NPDES permit must be submitted to ODA at least one hundred eighty (180) days prior to the expiration date of the permit.

If ODA does not act upon a complete and timely filed permit renewal application before the existing permit expires, Chapter 119 of the Revised Code provides for the automatic continuance of the expired permit. Chapter 119 of the Revised Code, also known as the Ohio Administrative Procedure Act, governs the functioning of an administrative agency such as ODA. Specifically, Section 119.06 (C) of the Revised Code states, in part: "When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed an application for registration or renewal within the time and in the manner provided by statute or rule of the agency shall not be required to discontinue a licensed business or profession merely because of the failure of the

agency to act in the licensee's application." "License" under O.R.C. Section 119.01 (B) is defined as "any license, permit, certificate, commission, or charter issued by any agency" and would include an NPDES permit.

E. **Authority For Entry, Inspection And Sampling; And Applying Monitoring, Recording And Reporting Requirements To Direct Discharges**

Requirement: State law provides authority to:

1. Require any permit holder or industrial user of a publicly-owned treatment works to:

   (a) Establish and maintain specified records;

   (b) Make reports;

   (c) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate, biological monitoring methods);

   (d) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as may be prescribed); and

   (e) Provide such other information as may reasonably be provided.

2. Enable an authorized representative of the State, upon presentation of such credentials as are necessary, to:

   (a) Have a right of entry to, upon or through any premises of a permittee or of an industrial user of a publicly-owned treatment works in which premises an effluent source is located or in which any records are maintained;

   (b) At reasonable times have access to and copy any records required to be maintained;

   (c) Inspect any monitoring equipment or method which is required; and

   (d) Have access to and sample any discharge of pollutants to State waters or to publicly-owned treatment works resulting from the activities or operations of the permittee or industrial user.

Federal Authority: CWA §§ 308(a), 402(b)(2); 40 C.F.R. §§ 122.41 (h), (i), (j), 122.42 (a), 122.44 (i), 122.48.

Ohio Statutory and Regulatory Authority:

O.R.C. § 903.08 (G), Participation in NPDES; permit; ODA shall establish terms and conditions of permits in accordance with rules compliant with CWA
O.R.C. § 903.10 (F)(4), Rules; Terms and conditions of permits
O.R.C. § 903.12, Right of entry; access to records

O.A.C. Rule 901:10-1-01 (P), Definitions; Biosecurity
O.A.C. Rule 901:10-3-10 (H), Standard permit terms and conditions; Inspection and entry
O.A.C. Rule 901:10-3-10 (I), Standard permit terms and conditions; Duty to provide information
O.A.C. Rule 901:10-3-10 (J), Standard permit terms and conditions; Monitoring and records
O.A.C. Rule 901:10-3-10 (K), Standard permit terms and conditions; Monitoring test procedures
O.A.C. Rule 901:10-3-10 (L), Standard permit terms and conditions; Additional requirements, recording and reporting of monitoring results
O.A.C. Rule 901:10-4-05 (F), General operating permit; Inspections
O.A.C. Rule 901:10-5-02 (A), Right to enter property for investigations and inspections; Investigations and inspections
O.A.C. Rule 901:10-5-02 (B), Right to enter property for investigations and inspections; Biosecurity

ANALYSIS OF THE ATTORNEY GENERAL

Section 903.12 of the Revised Code provides ODA with the authority to enter onto public or private property, to access and copy any records, to inspect any monitoring equipment or method, and to access and sample any discharges of pollutants as required by Sections 308 (a)(4)(B) and 402(b)(2)(B) of the CWA and as listed in paragraph b, above. Specifically, Section 903.12 of the Revised Code states:

> (A) The director of agriculture or the director's authorized representative at reasonable times may enter on any public or private property, real or personal, to make investigations and inspections, including the sampling of discharges and the inspection of discharge monitoring equipment, or to otherwise execute duties that are necessary for the administration and enforcement of this chapter. The director or the director's authorized representative at reasonable times may examine and copy any records pertaining to discharges that are subject to this

> chapter or any records that are required to be maintained by the terms and conditions of a permit or review compliance certificate issued under this chapter. If refused entry, the director or the director's authorized representative may apply for and the court of common pleas having jurisdiction may issue an appropriate warrant.
>
> (B) No person to whom a permit or review compliance certificate has been issued under this chapter shall refuse entry to the director or the director's authorized representative or purposely hinder or thwart the director or the director's authorized representative in the exercise of any authority granted under division (A) of this section.

This grant of authority under O.R.C. Section 903.12 permits ODA to enter onto any public or private property, whether real or personal, to investigate, to inspect, to access and copy records, and to sample discharges is consistent with the requirements of Sections 308 (a)(4)(B) and 402(b)(2) of the CWA, as well as of 40 C.F.R Sections 122.41(i)(1) through (4).

This grant of authority under O.R.C. Section 903.12 is also consistent with page 3-16 of the USEPA's NPDES Guidance Manual which states:

> The State must have authority to enter and inspect, at reasonable times, any premises on which an effluent source is located or records required by the CWA are kept. In practice, this means the States must be able to inspect any NPDES permittee. Thus, a State exclusion for private residence is generally not authorized since a private residence may be a discharger regulated by the program or may be a depository for records required to be kept under federal law.

Rule 901:10-5-02 (A) of the Administrative Code also sets forth the same authority as set forth at O.R.C. Section 903.12, above, except that O.A.C. Rule 901:10-5-02 (A) states:

> [t]he director at reasonable times has the authority to enter the premises of an applicant for permit or the permit premises to make

> investigations and inspections including, but not limited to, the sampling of discharges and the inspection of discharge monitoring equipment, or otherwise execute duties that are necessary for the administration and enforcement of this chapter.

While the grant of authority under O.A.C. Rule 901:10-5-02 (A) is somewhat more limited than that under O.R.C. Section 903.12 in that the rule appears to limit ODA's access to only permittees or permit applicants, ODA's statutory authority under O.R.C. Section 903.12 is much broader. Section 903.12 of the Revised Code clearly grants ODA with broad powers to enter onto any public or private property regardless of whether the property is owned or operated by a permittee or permit application. Thus, Section 903.12 of the Revised Code authorizes ODA to enter upon any premises where an effluent source is located as required by Section 308(a)(4)(B) of the CWA.

Regulations providing ODA with the authority to enter onto public or private property, to access any copy and records, to inspect any monitoring equipment or method, and to access and sample any discharges of pollutants can be found at Rule 901:10-3-10 (H) (Standard permit terms and conditions; Inspection and Entry), Rule 901:10-4-05 (F) (General operating permit; Inspections), and Rule 901:10-5-02 (A) (Right to enter property for investigations and inspections; Inspections and investigations) of the Administrative Code. These Ohio Administrative Code rules correspond to the requirements at 40 C.F.R. Section 122.41(i) as follows:

> Re: Entry onto premises of regulated facility or activity:
> 40 C.F.R. Section 122.41(i)(1) corresponds to O.A.C. Rule 901:10-3-10 (H)(1), O.A.C. Rule 901:10-4-05 (F), and O.A.C. Rule 901:10-5-02 (A)(1);
>
> Re: Access to and copy any records required to be kept under permit:
> 40 C.F.R. Section 122.41(i)(2) corresponds to O.A.C. Rule 901:10-3-10 (H)(2), O.A.C. Rule 901:10-4-05 (F), and O.A.C. Rule 901:10-5-02 (A)(2);

Re: Inspect facilities, equipment, practices, and operations:
40 C.F.R. Section 122.41(i)(3) corresponds to O.A.C. Rule 901:10-3-10 (H)(3), O.A.C. Rule 901:10-4-05 (F), and O.A.C. Rule 901:10-5-02 (A)(1);

Re: Sample or monitor any substances or parameters:
40 C.F.R. Section 122.41(i)(4) corresponds to O.A.C. Rule 901:10-3-10 (H)(4), O.A.C. Rule 901:10-4-05 (F), and O.A.C. Rule 901:10-5-02 (A)(1).

ODA's regulations regarding authorizing entry onto public or private property, access and copy and records, inspection of any monitoring equipment or method, and access to and sampling of discharges of pollutants also include biosecurity measures. "Biosecurity" is defined at O.A.C. Rule 901:10-1-01 (P) as:

> the policies and measures taken for protecting food supply and agricultural resources from contamination. Biosecurity also refers to those measures taken to keep disease agents out of populations, herds or groups of animals where they do not already exist. Significant areas on a facility in biosecurity are sanitation, isolation of incoming or returning animals, cleaning and disinfection and traffic control to limit disease spread between all facilities in the production unit.

Specifically, under O.A.C. Rule 901:10-3-10 (H), the inspection of a facility and the entry upon the facility must be done in compliance with biosecurity procedures. Under O.A.C. Rule 901:10-4-05 (F), the general permit to operate provision regarding inspections also specifies that any inspection by ODA be performed in accordance with reasonable and appropriate biosecurity measures.

Rule 901:10-5-02 (B) of the Administrative Code describes in detail how biosecurity is to be implemented:

(1) Biosecurity refers to the policies and measures taken for protecting the food supply and agricultural resources from contamination.

(2) Upon entering the property of a facility, the inspector or investigator shall identify himself or herself with proper identification to prove that he or she is an agent of the Ohio department of agriculture.

(3) If an inspection is conducted prior to the application for a review compliance certificate or a permit under this chapter, the inspector or investigator shall notify the owner or operator in advance. The purpose of the notice is to inform the owner or operator of an inspection so that the inspector or investigator may be informed of the facility biosecurity procedures, if any. The director has the authority to authorize unannounced inspections or follow-up inspections of a facility as deemed necessary.

(4) If an owner or operator wants the Ohio department of agriculture to comply with its biosecurity plan, the owner or operator must submit its plan with the application for the permit to operate. If not, the department will act in accordance with its biosecurity policy.

ODA originally adopted a Biosecurity Protocol, dated March 20, 2001, a copy of which is included in the ODA program package submittal. ODA subsequently adopted a Supplemental Biosecurity Protocol entitled "Routine Biosecurity Procedures for ODA Livestock Environmental Permitting Program Personnel Visiting Farms, and Other Facilities With Livestock and Poultry," written by Dr. David Glauer, a copy of which is also included in the ODA program package submittal. Under ODA's Supplemental Biosecurity Protocol, inspectors or investigators should refrain from handling the same species on different facilities on the same day without prior approval by ODA. This is more stringent than the USEPA's biosecurity measures set forth in its final biosecurity guidance entitled "Routine Biosecurity Procedures for EPA Personnel Visiting Farm, Ranches, Slaughterhouses and other Facilities with Livestock and Poultry," issued December 10, 2001, which only require USEPA personnel to "acknowledge any and all other livestock facilities visited within the previous 48 hours . . . ." While ODA's 24-hour restriction is more stringent than USEPA's 48-hour acknowledgement, ODA's

Supplemental Biosecurity Protocol is certainly consistent with USEPA's biosecurity guidance.

ODA's biosecurity measures are not intended to impair the ability of ODA to inspect and investigate CAFOs or AFOs in order to ensure that such facilities are in full compliance with the CWA. While O.A.C. Rule 901:10-5-02 (B)(3) specifies that, if an inspection of a facility is done prior to the application for a RCC or PTI, the ODA inspector or investigator must notify the owner or operator in advance, the rule clearly authorizes ODA to make unannounced inspections or follow-up inspections. Overall, ODA's biosecurity measures are consistent with USEPA's biosecurity measures set forth in its final biosecurity guidance, "Routine Biosecurity Procedures for EPA Personnel Visiting Farms, Ranches, Slaughterhouses and other Facilities with Livestock and Poultry."

Sections 903.08 (G) and 903.10 (F)(4) of the Revised Code provide ODA with the authority to require permit holders to establish and maintain specified records; make reports; install, calibrate, use and maintain monitoring equipment or methods; take effluent samples; and provide other information as required by Sections 308(a)(4)(A) and 402(b)(2)(B) of the CWA and the regulations promulgated thereunder and as listed in paragraphs 1 and 2, above.

Section 903.08 (G) of the Revised Code requires the Director of ODA to establish terms and conditions of NPDES permits in accordance with rules. These terms and conditions must be designed to achieve and maintain full compliance with the CWA. See O.R.C. Section 903.08 (G). The rulemaking authority of ODA specifies that the terms and conditions of permits shall include the "... installation of discharge or water quality

monitoring methods or equipment; creation and retention of records; submission of periodic reports. ..." O.R.C. Section 903.10 (F)(4).

Rules 901:10-3-10 (I), (J), (K), and (L) of the Administrative Code amplify ODA's authority to require permit holders to establish and maintain specified records, make reports, install, calibrate, use and maintain monitoring equipment or methods, take effluent samples and provide other information as required by Sections 308(a)(4)(A) and 402(b)(2)(B) of the CWA and the regulations promulgated thereunder.

These Ohio Administrative Code rules correspond to the requirements at 40 C.F.R. Sections 122.41, 122.44, and 122.48 as follows:

Re: Establish and maintain specified records:
40 C.F.R. Sections 122.41(j)(2) and (3) [and CWA Section 308 (a)(4)(A)(i)] correspond to O.A.C. Rule 901:10-3-10 (J)(2) and (3) (Note that the Ohio rule requires records be retained for a longer period of time than the federal rule. The Ohio rule requires the records be retained for 5 years, whereas the federal rule only requires the records be retained for 3 years.);

Re: Make reports:
40 C.F.R. Section 122.48(b) [and CWA Section 308 (a)(4)(A)(ii)] corresponds to O.A.C. Rule 901:10-3-10 (L)(2);

40 C.F.R. Section 122.48(c) [and CWA Section 308 (a)(4)(A)(ii)] corresponds to O.A.C. Rule 901:10-3-10 (L)(3);

40 C.F.R. Section 122.44(i)(2) [and CWA Section 308 (a)(4)(A)(ii)] corresponds to O.A.C. Rule 901:10-3-10 (L)(4);

Re: Install, calibrate, use, and maintain monitoring equipment or methods:
40 C.F.R. Section 122.48(a) [and CWA Section 308 (a)(4)(A)(iii)] corresponds to O.A.C. Rule 901:10-3-10 (L)(1);

Re: Representative sampling:
40 C.F.R. Sections 122.41(j)(1) and 122.48(b) [and CWA Section 308 (a)(4)(iv)] correspond to O.A.C. Rule 901:10-3-10 (J)(1) and O.A.C. Rule 901:10-3-10 (L)(2);

Re: Test procedures:

40 C.F.R. Section 122.41(j)(4) and 40 C.F.R. Part 136 [and CWA Section 308 (a)(4)(A)(iii)] correspond to O.A.C. Rule 901:10-3-10 (K); and

Re: Duty to provide information:
40 C.F.R. Section 122.41(h) [and CWA Section 308 (a)(4)(A)(v)] corresponds to O.A.C. Rule 901:10-3-10 (I).

Note that O.A.C. Rule 901:10-3-10 (K) also requires monitoring be conducted according to O.A.C. Rule 901:10-2-04 for manure storage and treatment facilities and O.A.C. Rule 901:10-2-13 for the contents of the manure management plan. Rule 901:10-2-04 of the Administrative Code requires manure be sampled and analyzed in accordance with O.A.C. Rule 901:10-2-10 (A) through (D). Rule 901:10-2-13 of the Administrative Code specifies how soil characterization is to be performed.

Under O.A.C. Rule 901:10-2-16, the results of the manure and soil samples must be retained in the operating records for a minimum of 5 years. Under O.A.C. Rule 901:10-1-16, the results of the manure and soil samples are available and accessible for inspection and copying.

F. Authority To Require Notice Of Introduction Of Pollutants Into Publicly Owned Treatment Works And Compliance With Section 204 (B)

Requirement: State law provides authority to:

1. require in permits issued to publicly-owned treatment works conditions requiring the permittee to:

   (a) Give notice to the state permitting agency of new introductions into such works of pollutants from any source which would be a new source as defined in section 306 of the CWA if such source were discharging pollutants directly to state waters;

   (b) Give the state notice of new introductions of pollutants into such works from a source which would be a point source subject to section 301 of the CWA if it were discharging such pollutants directly to state waters;

   (c) Give the state notice of a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit;

   (d) Identify in terms of character and volume of pollutants any significant source introducing pollutants subject to pretreatment standards under section 307 (b) of the CWA as amended.

2. require compliance by industrial users with CWA requirements concerning user charges and construction costs.

Federal Authority: CWA §§ 402 (b)(8), 204 (b); 40 C.F.R. §§ 122.42 (b), 403.8, 403.10, 412.3, and 412.26

Ohio Statutory and Regulatory Authority:
O.R.C. § 6111.03 (J)(6), OEPA; Water Pollution Control; Powers of Director of OEPA;

O.A.C. Rule 901:10-3-02(E), Effluent limitations definitions and applicability; Requirement for any facility subject to O.R.C. Chapter 903 that discharges to a POTW
O.A.C. Rule 901:10-3-05(D), Effluent limitations for ducks category of feedlots; Pretreatment standards for new sources[1]
O.A.C. Chapter 3745-3, OEPA; Pretreatment Rules
O.A.C. Chapter 3745-36, OEPA; Permit Program Regulating Discharge of Non-domestic Wastewater into a POTW

[1] A minor grammatical change to (D)(2) is currently proposed which will not change the meaning but will merely change "publicly-owned" to "publicly owned". The earliest dat that the proposed rule change could be adopted is some date after January 16, 2007. The rule can become effective ten days after its adoption.

ANALYSIS OF THE ATTORNEY GENERAL

The authority to require notice before the introduction of pollutants into publicly-owned treatment works and to require compliance by industrial users with requirements concerning user charges and construction costs as set forth in Sections 402 (b)(8) and 204 (b) of the CWA and 40 C.F.R. Section 122.42 (b) resides with OEPA.

Revised Code Section 6111.03 (J)(6) states, in part:

> The director [of OEPA] shall condition each permit for a government-owned disposal system or any other "treatment works" as defined in the Federal Water Pollution Control Act upon the reporting of new introductions of industrial waste or other waste and substantial changes in volume or character thereof being introduced into those systems or works from "industrial users" as defined in section 502 of that act, as necessary to comply with section 402 (b)(8) of that act; upon the identification of the character and volume of pollutants subject to pretreatment standards being introduced into the system or works; and upon the existence of a program to ensure compliance with pretreatment standards by "industrial users" of the system or works.

The pretreatment program required by 40 C.F.R. Sections 403.8 and 403.10 is set forth in OEPA's regulations at O.A.C. Chapter 3745-3 of the Administrative Code which contains the pretreatment rules and O.A.C. Chapter 3745-36 which contains the pretreatment program regulating the discharge of non-domestic wastewater into a POTW. USEPA approved the Pretreatment Program administered by OEPA on July 27, 1983.

This authority over permits for publicly-owned treatment works will continue to reside with OEPA. However, if the source of pollutants being introduced into a publicly-owned treatment works is a CAFO, ODA has adopted the same regulatory requirements set forth in 40 C.F.R. Part 412.

Specifically, Rule 901:10-3-02(E) of the Administrative Code states: "Any facility or operation subject to chapter 903 of the Revised Code that introduces manure, including process wastewater, into a publicly owned treatment works must comply with 40 CFR part 403 and

chapter 6111 of the Revised Code and rules promulgated thereunder." This is consistent with the general pretreatment standards for CAFOs at 40 C.F.R Section 412.3

Furthermore, Rule 901:10-3-05(D) of the Administrative Code contains the identical pretreatment standards for new source duck CAFOs as that set forth at 40 C.F.R. Section 412.26. Specifically, any new source subject to pretreatment standards may not introduce any process wastewater pollutants into a POTW unless rainfall events cause an overflow from a facility designed, constructed, operated, and maintained to contain all the process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source.

G. Authority To Issue Notices, Transmit Data, Provide Opportunity For Public Hearings And Judicial Review

Requirement: State law provides authority to comply with requirements of the CWA and USEPA Guidelines for "State Program Submissions," 40 C.F.R. Part 123 (hereinafter "the Guidelines") to:

1. Notify the public, affected States and appropriate governmental agencies of proposed actions concerning the issuance of permits;

2. Transmit such documents and data to and from the USEPA and to other appropriate governmental agencies as may be necessary; and

3. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits; and

4. Provide an opportunity for judicial review in state court of the final approval or denial of permits.

Federal Authority: Generally: Sections 101(e), 304 (i)(2)(B) and 509(b) of the CWA.

Issue Notices - Function 7(a): Sections 402(b)(3) (public notice), 402(b)(5) (notice to affected States), 402 (b)(6) (notice to Army Corps of Engineers) of the CWA; 40 C.F.R. Sections 124.5 (modification, revocation and reissuance or termination of permits), 124.6 (draft permits), 124.10 (public notice), and 124.8 (fact sheet).

Transmit Data - Function 7(b): Sections 402(b)(4) (notice and permit applications to USEPA, 402(b)(6) (notices and fact sheets to Army Corps of Engineers) of the CWA; 40 C.F.R. Section 123.42 (receipt and use of Federal data), 123.43 (transmission of data to USEPA), 123.44 (USEPA review of and objections to state permits), and 124.10 (notice to other government agencies).

Provide Opportunity for Public Hearings - Function 7(c): Section 402(b)(3) (opportunity for public hearing) of the CWA; 40 C.F.R. Sections 124.10, 124.11, 124.12 and 124.17 (public hearings and public comment).

Provide Opportunity for Judicial Review - Function 7(d): Section 509(b) (judicial review of agency's actions) of the CWA; 40 C.F.R. Sections 123.30 (judicial review of approval or denial of permits), 124.6 (draft permits), and 124.19 (appeal of permits).

Ohio Statutory and Regulatory Authority:

O.R.C. § 903.09 (A), Draft NPDES permit; Draft permits to issue or modify NPDES permits

O.R.C. § 903.09 (F), Draft NPDES permit; Proposed actions to deny, modify, suspend or revoke NPDES permits without the consent of permittee

O.R.C. § 903.10 (F) (4), Rules; NPDES permits; Terms and conditions of permits

O.R.C. § 903.10 (F) (7), Rules; NPDES permits; Procedures for processing permit applications, including public notice and participation requirements

O.R.C. § 903.10 (F) (8), Rules; NPDES permits; Procedures for notifying USEPA of permit applications, ODA's action on applications, and any other information

O.R.C. § 903.10 (F) (9), Rules; NPDES permits; Procedures for notifying, receiving and responding to recommendations from states whose waters may be affected

O.R.C. § 903.10 (G); Rules; NPDES permits; Establish public notice and participation Requirements

O.R.C. § 3745.04, OEPA, Appeals to review commission; includes appeals of actions of the Director of Agriculture

O.R.C. § 3745.05, OEPA Hearings; subpoenas; order

O.R.C. § 3745.06, OEPA, Appeals to courts of appeal

O.A.C. Rule 901:10-5-03, Enforcement procedures

O.A.C. Rule 901:10-6-01, Notice

O.A.C. Rule 901:10-6-02, Contents of public notice

O.A.C. Rule 901:10-6-03, Coordination of CWA permit program with agencies of the United States

O.A.C. Rule 901:10-6-04, Public meetings

O.A.C. Rule 901:10-6-05, NPDES fact sheets

O.A.C. Rule 901:10-6-06, Public information

Ohio Case Law:

Martin v. Schregardus, (Franklin County 1996), 1996 Ohio App. LEXIS 4288

CLEAN v. Shank (Franklin County 1991), 1991 Ohio App. LEXIS 4433

CLEAN v. Schregardus (October 19, 1993), EBR Case No. 092958-092961

Yost v. Jones, 2002 Ohio 119

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ODA's authority regarding notices, data transmittal, and public participation are primarily found at O.A.C. Chapter 901:10-6. ODA's authority to promulgate these rules for NPDES permits is contained in O.R.C. Sections 903.10 (F)(7), (8) and (9) and O.R.C. Section 903.10 (G). Under the Revised Code, ODA has broad authority to establish rules regarding:

"(7) Procedures for processing permit applications, including public notice and participation requirements;

(8) Procedures for notifying the United States environmental protection agency of the submission of permit applications, the director's action on those applications, and any other reasonable and relevant information;

(9) Procedures for notifying and receiving and responding to recommendations from other states whose waters may be affected by the issuance of a permit."

O.R.C. Sections 901.10 (F)(7), (8) and (9).

Furthermore, ODA has authority to:

Establish public notice and participation requirements in addition to the procedures established in rules adopted under division (F)(7) of this section, for the issuance, denial, modification, transfer, suspension, and revocation of permits to install, permits to operate, and NPDES permits consistent with section 903.09 of the Revised Code, including a definition of what constitutes significant public interest for the purposes of divisions (A) and (F) of section 903.09 of the Revised Code and procedures for public meetings. The rules shall require that information that is presented at such a public meeting be limited to the criteria that are applicable to the permit application that is the subject of the public meeting.

O.R.C. Section 903.10 (G).

Issue Notices

ODA's statutes and rules provide the authority to notify the public, affected States and appropriate governmental agencies of draft permits and proposed actions concerning permits as required by Sections 402(b)(3), 402(b)(5) and 402(b)(6) of the CWA and 40 C.F.R Sections 124.5(c), 124.5(d), 124.6(a), 124.8 and 124.10. Note that there is a basic distinction between a draft permit which is issued prior to issuing or modifying a NPDES permit as described in O.R.C. Section 903.09(A) and a proposed action which is issued prior to the denial, modification, suspension or revocation of a

NPDES application or permit without the consent of the applicant or permittee as described in O.R.C. Section 903.09(F).

A draft permit under O.R.C. Section 903.09(A) is the same as a "draft action" which is defined by rule as:

> a written statement that gives the director's intention with respect to the issuance of any permit, including a NPDES permit or a general permit, concerning which persons authorized by regulation or by section 903.09 of the Revised Code may file comments or request a public meeting, but which will not be the subject of an adjudication hearing by the director.

See O.A.C. Rule 901:10-1-01 (FF).[5] A draft permit or draft action which then becomes final without an adjudicatory or administrative hearing before ODA may still be appealed directly to the Environmental Review Appeals Commission (hereinafter referred to as "ERAC") pursuant to Sections 3745.04 through 3745.06 of the Revised Code. See O.R.C. Section 903.09(F).

By contrast, a proposed action under O.R.C. Section 903.09(F) is an action that will not be final until the applicant or permittee has had an opportunity for an adjudicatory or administrative hearing before ODA in accordance with Ohio's Administrative Procedure Act which is set forth in Chapter 119 of the Revised Code. See O.R.C. Section 903.09(F). However, portions of Ohio's Administrative Procedure act do not apply to permit actions of the Director of ODA. Specifically the appellate remedy set forth in O.R.C. Section 119.12 does not apply. See O.R.C. Section 903.09(F). Instead, an appeal from an adjudicatory or administrative hearing before ODA on a permit action will be heard by ERAC pursuant to Sections 3745.04 through 3745.06 of the Revised Code. See O.R.C. Section 903.09(F).

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[5] A proposed rule change to O.A.C. 901:10-1-01,will, if it becomes effective, move the current (FF) to (EE). Under the proposed rule, "draft action" will be in 01(EE).

Section 903.09(A) of the Revised Code requires ODA to issue a draft permit prior to issuing or modifying a NPDES permit. Section 903.09(A) of the Revised Code further requires ODA to take the following steps in regard to notice of the draft permit: (1) mail notice of the draft permit to the applicant or permittee; (2) publish notice once in a newspaper of general circulation in the county where the CAFO is located or proposed to be located; (3) mail notice of the issuance of the draft permit and a copy of the draft permit to the board of county commissioners of the county and the board of township trustees of the township where the CAFO is located or proposed to be located; and (4) provide notice of the **draft permit** to any other person entitled to notice under the CWA.

The notice to the above parties under O.R.C. Section 903.09(A) must include the address where written comments can be sent and the period of time during which comments will be accepted, as established by rule. Rule 901: 10-6-02(A)(6)(a) of the Administrative Code provides that any person may submit a written statement on the draft permit within 30 days of the appearance of a public notice in a newspaper in the affected county and that any person may provide a statement for the record at a public meeting if a public meeting is scheduled.

If ODA receives written comments in an amount that demonstrates significant public interest, as established by rule, then ODA shall schedule a public meeting to provide information to the public and hear comments on the draft permit. See O.R.C. Section 903.09(A) and O.A.C. Rule 901:10-6-02(A)(6)(b). **"Significant public interest"** is defined at O.A.C. Rule 901:10-6-04(D) to mean: "statements made in writing by twenty or more persons expressing interest in the draft permit before the director or in the

antidegradation review and requesting a public meeting. Significant public interest may also include expressed interest by one or more public officials."

Rule 901:10-6-04(A) of the Administrative Code also provides that any person may file a request for a public meeting not later than thirty days after public notice of a draft permit or draft permit modification. The notice of such a public meeting shall be provided in the same manner as above for draft permits. See O.R.C. Section 903.09(A). In addition, the Director of ODA is independently authorized to hold a public meeting at the Director's discretion if such a meeting would help to clarify one or more issues involved in the draft permit. See O.A.C. Rule 901:10-6-01(D).

Section 903.09(F) of the Revised Code similarly requires ODA to issue a proposed action for the denial, modification, suspension or revocation of a NPDES application or permit without the consent of the applicant or permittee. Under O.R.C. Section 903.09(F), this proposed action must state ODA's intention to issue a final order with respect to the application or permit and the reason for the proposed denial, modification, suspension or revocation of the NPDES application or permit. Section 903.09(F) of the Revised Code further requires ODA to take the following steps in regard to notice of the proposed action: (1) mail notice of the proposed action to the applicant or permittee; (2) publish notice of the proposed action once in a newspaper of general circulation in the county where the CAFO is located or proposed to be located; (3) mail a copy of the proposed action to the board of county commissioners of the county and the board of township trustees of the township where the CAFO is located or proposed to be located; and (4) provide notice of the proposed action to any other person entitled to notice under the CWA.

The notice to the above parties under O.R.C. Section 903.09(F) must include the address where written comments can be sent and the period of time during which comments will be accepted, as established by rule. Again, O.A.C. Rule 901: 10-6-02(A)(6)(a) provides that any person may submit a written statement on the proposed action within 30 days of the appearance of a public notice in a newspaper in the affected county and that any person may provide a statement for the record at a public meeting if a public meeting is scheduled.

If ODA receives written comments in an amount that demonstrates significant public interest in the proposed action, as established by rule, then ODA shall schedule a public meeting to provide information to the public and hear comments on the proposed action. See O.R.C. Section 903.09(F) and O.A.C. Rule 901:10-6-02(A)(6)(b). Again, "significant public interest" is defined in O.A.C. Rule 901:10-6-04(D).

The notice of such a public meeting shall be provided in the same manner as above for proposed actions. See O.R.C. Section 903.09(F). As with draft permits, the Director of ODA is independently authorized to hold a public meeting at the Director's discretion if such a meeting would help to clarify one or more issues involved in the proposed action. See O.A.C. Rule 901:10-6-01(D).

ODA's statutes and rules provide the authority to notify the public, affected states, and appropriate governmental agencies, including USEPA, of the receipt of NPDES permit applications and any proposed actions or draft permits to the extent required under the CWA. These notice provisions in O.R.C. Sections 903.09(A) and 903.09(F) are also contained in Rules 901:10-6-01, 901:10-6-02, 901:10-6-03, 901:10-6-05, and 901:10-6-06 of the Administrative Code.

The provisions of the Administrative Code and those of the Revised Code applicable to actions by the Director of ODA correspond to the notice requirements in the CWA and in the Code of Federal Regulations as follows:

Re: Notice of permit applications to public and affected States:
Section 402(b)(3) of the CWA and 40 C.F.R. Section 124.10(c)(1)(iii) correspond to O.R.C. Section 903.10 (F)(7) and O.A.C. Rules 901:10-6-02 (A) and 901:10-6-02 (B);

Re: Generally, Public notice of draft permits for the issuance, agreed upon modification or proposed actions for modification, suspension, revocation, or denial of NPDES permits or applications:
40 C.F.R. Sections 124.5(c), 124.6 and 124.10(a)(ii) correspond to O.R.C. Sections 903.09 (A), 903.09 (F) and O.A.C. Rules 901:10-6-01 and 901:10-6-02;

Re: Notice to affected States providing opportunity for written recommendations to Ohio and requiring Ohio to notify the affected States and the Administrator of Ohio's failure to accept such recommendations:
Sections 402(b)(3) and (5) of the CWA and 40 C.F.R. Sections 124.10(c)(1)(iii) correspond to O.R.C. Sections 903.09 (A) and 903.09 (F) and O.A.C. Rules 901:10-6-02 (B)(2) and 901:10-6-03 (C);

Re: Notice to U.S. Army Corps of Engineers and recommendations by U.S. Army Corps of Engineers to deny NPDES permit or impose specific conditions:
Section 402(b)(6) of the CWA and 40 C.F.R. Sections 124.59 and 124.10(c) correspond to O.R.C. Sections 903.09 (A) and 903.09 (F) and O.A.C. Rules 901:10-6-02 (B)(2)(b) and 901:10-6-03 (B);

Re: Notice to government agencies:
40 C.F.R. Section 124.10 corresponds to O.A.C. Rules 901:10-6-02 (B) and 901:10-6-03 (C);

Re: Tentative permit determinations:
40 C.F.R. Section 124.6 corresponds to O.R.C. Sections 903.09 (A) and 903.09 (F) and O.A.C. Rule 901:10-6-01;

Re: Fact Sheets for Draft NPDES permits and modifications:
40 C.F.R. Sections 124.8 and 124.56 correspond to O.A.C. Rule 901:10-6-05;

Re: Notice of each NPDES permit application to USEPA:
Section 402(b)(4) of the CWA and 40 C.F.R. Section 123.43 correspond to O.A.C. Rule 901:10-6-03 (A); and

Re: Notice to local governments – Boards of County Commissioners and Boards of Township Trustees:

40 C.F.R. Section 124.10(c)(1)(x)(A) corresponds to O.A.C. Rule 901:10-6-01 (B).

The contents of the above notices as required by 40 C.F.R. Section 124.10(d)(1) are contained in O.A.C. Rule 901:10-6-02. The applicable provisions of the federal regulations correspond to the Ohio rules as follows:

Re: Notice content – Name, address and phone number of office processing permit and from which information may be obtained:
40 C.F.R. Sections 124.10(d)(1)(i) and (iv) correspond to O.A.C. Rule 901:10-6-02 (A)(1);

Re: Notice content – Name and address of permittee/applicant:
40 C.F.R. Section 124.10(d)(1)(ii) corresponds to O.A.C. Rule 901:10-6-02 (A)(2);

Re: Notice content – Description of business conducted:
40 C.F.R. 124.10(d)(1)(iii) corresponds to O.A.C. Rule 901:10-6-02 (A)(3);

Re: Notice content – Statement of comment procedures under 40 C.F.R. Sections 124.11 and 124.12 and time and place of hearing, including procedures to requires hearing, and other procedures for public to participate in final permit decision:
40 C.F.R. Section 124.10(d)(1)(v) corresponds to O.A.C. Rule 901:10-6-02 (A)(6); and

Re: Notice content – Location of facility, description of discharge point, and name of receiving waters:
40 C.F.R. Section 124.10(d)(1)(vii) corresponds to O.A.C. Rule 901:10-6-02 (A)(7).

In addition, ODA's public notice requirements incorporate OEPA's public involvement requirements for antidegradation reviews contained in O.A.C. Rule 3745-1-05 (C)(3). Rule 901:10-6-01 (A)(2) of the Administrative Code specifies that ODA will publish a public notice within thirty days of receipt of a NPDES permit requiring an antidegradation review as required by O.A.C. Rule 3745-1-05 (C)(3)(a). The purpose of ODA's notice, as set forth at O.A.C. Rule 901:10-6-01 (A)(2)(a) of the Administrative Code, is identical to that set forth at O.A.C. Rule 3745-1-05 (C)(3)(a). Rule 901:10-6-05 of the Administrative Code requires ODA to develop an information fact sheet with the identical information as required by O.A.C. Rule 3745-1-05 (C)(3)(b). ODA shall

maintain a mailing list which will include those interested in receiving information on antidegradation reviews as required by O.A.C. Rule 3745-1-05 (C)(3)(d). See O.A.C. Rule 901:10-6-06.

Under O.A.C. Rule 901:10-6-02 (A), ODA will also publish notice of the Director's draft permit or proposed action which includes an antidegradation review as required by O.A.C. Rule 3745-1-05 (C)(3)(g). Under O.A.C. Rule 901:10-6-01 (B)(2), ODA will notify ODNR, U.S. Fish and Wildlife Service, Ohio Department of Development, and any affected local areawide planning agencies if any of the proposed activities of a NPDES applicant may lower water quality as required by O.A.C. Rule 3745-1-05 (C)(3)(h). Finally, under O.A.C. Rule 901:10-6-01 (B) ODA will notify local officials, including county commissioners, township trustees, local health departments, the local soil and water conservation district, and those owners or operators of public water systems with a surface water intake located within 10 miles downstream of a proposed applicant.

Transmit data

ODA's rules contain the necessary authority prescribed by Section 402(b)(4) of the CWA and 40 C.F.R. Sections 123.43 and 123.44 to transmit data to the appropriate governmental agencies. Under O.A.C. Rule 901:10-6-03 (A), ODA shall transmit to USEPA copies of a NPDES permit application and of a draft NPDES permit as well as copies of any significant comments presented in writing pursuant to the public notice of a draft permit along with a summary of any significant comments presented at any public hearing on any permit in accordance with the requirements of 40 C.F.R. Section 123.43.

O.A.C. Rule 901:10-6-03 (A) also includes the opportunity for USEPA to review and object to state permits as required by 40 C.F.R. Section 123.44.

In addition, under Rule 901:10-6-03 (B) of the Administrative Code, ODA shall transmit copies of fact sheets prepared for draft NPDES permits and modifications to the U.S. Army Corps of Engineers as required by Section 402(b)(6) of the CWA.

Finally, under O.A.C. Rule 901:10-6-03 (C), ODA shall transmit the information specified in O.A.C. Rule 901:10-6-02 (which contains the contents of a public notice under 40 C.F.R. Section 124.10(d)(1)) to any state, interstate, federal or local government agency having jurisdiction over waters that may be affected by a discharge as required by 40 C.F.R. Section 124.10.

Provide Opportunity for Public Hearings

ODA's statutes and rules provide for the opportunity for public comment and public hearings to the same extent as required by Section 402(b)(3) of the CWA and its implementing regulations, specifically 40 C.F.R. Sections 124.10, 124.11, 124.12 and 124.17.

The notice requirements for draft permits under O.R.C. Section 903.09(A), for proposed actions under O.R.C. Section 903.09(F), and for both draft permits and proposed actions under O.A.C. Rule 901:10-6-02 (A)(6)(a) provide that any person may submit written comments within 30 days of the publication of the notice in a newspaper of general circulation as required by 40 C.F.R. Sections 124.10(b)(1) and 124.11. This 30-day comment period is also specified in O.A.C. Rule 901:10-6-04 (A) which states, in part:

> Not later than thirty days after public notice of a draft permit, draft permit modification, a proposed action to deny, suspend, or revoke a permit, or

any request for a no potential to discharge determination, <u>any person may file a request for a public meeting.</u>

(Emphasis added.)

If ODA receives written comments in an amount that demonstrates significant public interest, ODA shall schedule a public meeting to provide information to the public and take comments on the draft permit or proposed action. See O.R.C. Sections 903.09 (A), 903.09 (F) and O.A.C. Rule 901:10-6-02 (A)(6)(b). "Significant public interest" is defined at O.A.C. Rule 901:10-6-04 (D) to mean statements in writing by twenty or more persons expressing interest in the draft permit[6] or in the antidegradation review and requesting a public meeting. These significant public interest provisions are consistent with 40 C.F.R. Section 124.12(a)(1) which requires a State Director to hold a public hearing whenever he or she finds, based on requests for public hearings, that there is a significant degree of public interest in a particular draft permit.

As noted above, Rule 901:10-6-01(D) of the Administrative Code independently authorizes the Director of ODA to hold a public meeting at the Director's discretion if such a meeting would help to clarify one or more issues involved in the permit decision. This provision is consistent with the requirement at 40 C.F.R. Section 124.12(a)(2).

Consistent with the requirements of 40 C.F.R. Section 124.17, O.A.C. Rule 901:10-6-04 (J) of the Administrative Code provides that ODA shall issue a response to comments when a final permit is issued which includes: (1) a response to all significant comments or the draft NPDES permit or NPDES permit application; and (2) a report and

[6] Because O.R.C. Section 903.09 (F) requires the Director to publish notice of the Director's proposed action to deny, suspend, or revoke a permit, the procedures in this rule apply to such proposed actions.

a report of which provisions, if any, of the draft permit have been changed in the final permit and the reasons for the change.

ODA's rules also contain the necessary public comment and hearing requirements for NPDES permits for which antidegradation reviews are applicable. Rule 901:10-6-01 (A) of the Administrative Code provides that the publication of a public meeting shall be at least 45 days prior to the public meeting as required by O.A.C. Rule 3745-1-05 (C)(3)(c).

Rule 901:10-6-04 (B)(1) of the Administrative Code requires ODA to hold a public meeting within 90 days of receipt of a NPDES permit application where an antidegradation review is required for any Category 3 wetlands, a designated outstanding national resource water, an outstanding high quality water, a state resource water or a superior high quality water consistent with O.A.C. Rule 3745-1-05 (C)(3)(e). Rule 901:10-6-04 (B)(2) of the Administrative Code requires ODA to hold a public meeting within 90 days of receipt of a NPDES permit application where and antidegradation review is required fore general high quality waters other than Category 3 wetlands and for limited quality waters consistent with O.A.C. Rule 3745-1-05 (C)(3)(f).

Provide Opportunity for Judicial Review

Section 509(b) of the CWA and 40 C.F.R. Section 123.30 require State permit programs to provide an opportunity for judicial review in State court of the final approval or denial of permits which encourages and assists public participation in the permitting process. A State will meet this standard if law allows an opportunity for judicial review that is the same as that available to obtain judicial review of a federally-issued NPDES permit under the appeals procedure for federally-issued NPDES permits. Under the

appeals procedure for federally-issued NPDES permits, as set forth at 40 C.F.R. Section 124.19, any person who filed comments on a draft permit or participated in the public hearing on a draft permit may file an administrative appeal of the permit within 30 days after a final permit decision. Furthermore, 40 C.F.R. Section 124.19 specifies that any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review to the extent the draft permit differs from the final permit.

ODA's statute and rules establish an appeals procedure that is consistent with the federal requirements in that they provide an opportunity for a person who filed comments or participated in a public hearing on a draft permit the opportunity to ultimately obtain review in a State court. ODA's statute and rules also establish an appeals procedure that is consistent with the federal requirements, in that they provide an opportunity for those who failed to file comments or participate in a public hearing may still get to State court to the extent the draft permit differs from the final permit.

Under Section 903.09(A) of the Revised Code, ODA first issues a draft NPDES permit prior to issuing or modifying a NPDES permit. Under Rules 901:10-6-01, 901:10-6-02 and 901:10-6-04 of the Administrative Code, all draft permits are subject to public notice as well as the opportunity to request a public meeting and to file comments. Furthermore, if there is significant public interest, as discussed above, ODA shall schedule a public meeting. See O.R.C. Section 903.09 (A) and O.A.C. Rules 901:10-6-04 (C) and (D).

A draft permit or "draft action" defined at O.A.C. Rule 901:10-1-01 (FF)[7] which becomes final is issued without an opportunity for an adjudication or administrative hearing before ODA under Chapter 119 of the Revised Code. However, under O.R.C. Section 903.09 (F) and O.A.C. Rule 901:10-5-03 (F)(2)(a), a permit applicant or permit holder adversely affected by an order of the Director of ODA issuing a permit may appeal the order to ERAC under O.R.C. Sections 3745.04 through 3745.06 regardless of whether an adjudicatory hearing was held under O.R.C. Chapter 119. In addition, any person adversely affected by an order of the Director issuing a permit who filed comments or participated in the public hearing on the draft permit may also appeal the final order to ERAC under O.R.C. Sections 3745.04 through 3745.06. See O.A.C. Rule 901:10-5-03 (F)(2)(b). Under O.R.C. Section 3745.06, a decision of ERAC may be appealed to the Tenth Appellate District Court of Appeals of Ohio.

Similarly, under Section 903.09(F) of the Revised Code, ODA first issues a proposed action for the denial, modification, suspension or revocation of a NPDES permit. Again, under Rules 901:10-6-01, 901:10-6-02 and 901:10-6-04 of the Administrative Code, all proposed actions are subject to a public notice, as well as the opportunity to request a public meeting and to file comments. If there is significant public interest, ODA shall schedule a public meeting. See O.R.C. Section 903.09 (F) and O.A.C. Rules 901:10-6-04 (C) and (D).

In contrast to a draft permit or a draft action, a proposed action does not become final until the applicant or permittee has had an opportunity for an adjudication hearing under Chapter 119 of the Revised Code. See O.R.C. Section 903.09 (F). An appeal from

[7] As referenced in an earlier footnote in this section, "draft action" will be moved to (EE) in the proposed rule change currently proposed.

a proposed action, whether or not an adjudication hearing was held, also goes to ERAC pursuant to O.R.C. Sections 3745.04 to 3745.06. See O.R.C. Section 903.09 (F) and O.A.C. Rule 901:10-5-03 (F)(2)(a). Any person adversely affected by an order of ODA denying, modifying, suspending or revoking a NPDES permit may appeal the order to ERAC pursuant to O.R.C. Sections 3745.04 to 3745.06. See O.A.C. Rule 901:10-5-03 (F)(2)(b).

Revised Code Sections 3745.04 (B) and (E) establish that any person who was "a party to a proceeding" before the Director of Agriculture has standing appeal to ERAC for an order vacating or modifying the action of the Director or ordering the Director to perform an act. Case law under Section 3745.04 establishes a two-part test for standing: (1) the person submitted comments or letters on draft permits or attended public hearings/meetings on draft permits; and (2) the person was aggrieved or affected by the final action. See *Martin v. Schregardus* (Franklin County 1996), 1996 Ohio App. LEXIS 4288; *CLEAN v. Shank* (Franklin County 1991), 1991 Ohio App. LEXIS 4433, *CLEAN v. Schregardus* (October 19, 1993), EBR Case No. 092958-092961. A person is not "aggrieved" or "adversely affected" for standing purposes merely by his or her interest as a citizen. *Yost v. Jones*, 2002 Ohio 119; *CLEAN v. Shank.* A person is "aggrieved" or "adversely affected" for standing purposes if the alleged injury is definite, if the appellant can show he has suffered or will suffer a specific injury and that the injury will be redressed by court action, or if the injury is actual and immediate or threatened. *Yost v. Jones*. Thus, provided a person filed comments or letters or participated in public hearings/meetings in draft permits and that same person was aggrieved or affected by

ODA's final action, that person can file an appeal to ERAC and then ultimately to the Tenth Appellate District Court of Appeals of Ohio.

In addition, any person adversely affected by an order of ODA denying, modifying, suspending or revoking a NPDES permit who failed to file comments or participate in a public meeting on the draft permit may appeal the order to ERAC pursuant to O.R.C. Sections 3745.04 to 3745.06 to the extent the draft permit differs from the final permit. See O.A.C. Rule 901:10-5-03 (F)(2)(c). Under O.R.C. Section 3745.06, a decision of ERAC may be appealed to the Tenth Appellate District Court of Appeals of Ohio. Therefore, when taken as a whole, Ohio law, rules and caselaw provide sufficient opportunity for notice, participation and legal review.

H. Authority To Provide Public Access To Information

Requirement: State law provides authority to make information available to the public, consistent with the requirements of the CWA and USEPA's Guidance Manual, including the following:

1. The following information is available to the public for inspection and copying:

   (a) Any NPDES permit, permit application or form;

   (b) Any public comments, testimony or other documentation concerning a permit application; and

   (c) Any information obtained pursuant to any monitoring, recording, reporting or sampling requirements or as a result of sampling or other investigating activities of the State.

2. The State may hold confidential any information (except effluent data, permits, and permit applications) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

Federal Authority: CWA §§ 304(i)(2)(B), 308(b), 402(b)(2) and 402(j); 40 C.F.R. Part 2 and Section 122.7.

Ohio Statutory and Regulatory Authority:
O.R.C. § 149.43, State government; Documents, reports, and records; Availability of public records
O.R.C. § 903.10(I), Rules; Establish procedures for the protection of trade secrets from public disclosure

O.A.C. Rule 901:10-1-05, Trade secret requests for confidentiality

ANALYSIS OF THE ATTORNEY GENERAL

Ohio's laws and rules for NPDES permits for CAFOs are consistent with the requirements of the CWA mandating broad public access to information. Consistent with Section 308(b) of the CWA, 40 C.F.R. Section 122.7(b)(2), and Rule 901:10-1-05 (B) of

the Administrative Code, trade secret status may not be granted to effluent data as follows:

> Records, reports or other information obtained under Chapter 903 of the Revised Code or rules thereunder may be entitled to protection as trade secrets. In order to be protected, the applicant shall demonstrate to the director's satisfaction that all or part of such records, reports or other information (including attachments that are required to be submitted), or other part thereof (other than effluent data) to which the director has access under this rule, if made public would divulge methods or processes or other information entitled to protection as trade secrets.

O.A.C. Rule 901:10-1-05 (B).

Rule 901:10-1-05 (C)(1) through (4) of the Administrative Code is also consistent with Sections 308(b) and 402(j) and 40 C.F.R. Section 122.7 in that the following information is considered a public record for which a claim of trade secret status will be denied:

> (1) The name and address of any permit applicant or permittee;
>
> (2) Permit forms, permit applications, permits and sampling and effluent data;
>
> (3) Information required by NPDES application forms provided by the department including information submitted on the forms themselves and any attachments used to supply information required by the forms; and
>
> (4) Any public comments, testimony or other documentation from the public concerning a permit application.

O.A.C. Rule 901:10-1-05 (C).

This rule amplifies R.C. Section 903.10(I) which states, in part, that any rules adopted to establish procedures for the protection of trade secrets cannot include protection for information contained in applications, including attachments to applications, required to be submitted under O.R.C. Section 903.08.

Under the Ohio Public Records Act, set forth at Revised Code Section 149.43, all records held by a public office upon which the office relies in carrying out its duties are, subject to certain exceptions, available to the public for inspection and copying. Thus, under the Ohio Public Records Act, the records identified in O.A.C. Rule 901:10-1-05 (B) and (C) are available to the public for copying and inspection.

A claim for trade secrets status may be made to ODA for other information in a manner consistent with the Section 308(b) of the CWA. As stated above, Rule 901:10-1-05 (B) of the Administrative Code allows an applicant to demonstrate to ODA that "all or part of such records, reports or other information, or particular part thereof (other than effluent data) to which the director has access under this section, if made public would divulge methods or processes or other information entitled to protection as trade secrets." A trade secret is one of the exceptions to the definition of a public record under the Ohio Public Records Act. See R.C. Section 149.43 (A)(1)(v) which states that a "public record" does not include "records the release of which is prohibited by state or federal law." Thus, a claim for trade secrets would be evaluated in accordance with Revised Code Section 903.10 (I) and O.A.C. Rule 901:10-1-05 as well as the Ohio Public Records Act and case law interpreting what is a trade secret.

Consistent with Section 308(b) of the CWA, Rule 901:10-1-05 (F) of the Administrative Code allows ODA to disclose any record, report or other confidential trade secret information, without the applicant's or permittee's consent, to officers, employees or authorized representatives of Ohio, another state, or the United States when such disclosure is necessary for an enforcement action under Chapter 903 or when otherwise required by the CWA. See also O.R.C. Section 903.10(I).

I. Authority To Terminate Or Modify Permits

Requirement: State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

1. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry and inspection);

2. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

3. Change in any condition that requires elimination of the permitted discharge;

4. The permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification.

Federal Authority: CWA § 402(b)(1)(C); 40 C.F.R. §§ 122.41(f), 122.62, 122.63, 122.64 and 124.5.

Ohio Statutory and Regulatory Authority:
O.R.C. § 903.08 (B)(1), Participation in NPDES; permits[1]
O.R.C. § 903.08 (E), Participation in NPDES; permits; denial of NPDES permit applications
O.R.C. § 903.08 (L), Participation in NPDES; permits; Director may modify, suspend, or revoke NPDES permit for cause as established by rule
O.R.C. § 903.10 (F)(11), Rules; Grounds and procedures for the issuance, denial, modification, suspension, or revocation of permits, including general permits

O.A.C. Rule 901:10-1-03, Criteria for decision-making
O.A.C. Rule 901:10-1-09, Permit modifications
O.A.C. Rule 901:10-1-10 (C), Prohibitions; No discharge of pollutants or stormwater in excess of permissive discharges specified in NPDES permit

ANALYSIS OF THE ATTORNEY GENERAL

[1] As stated in Section I, Senate Bill 393 has been adopted and will amend O.R.C. §903.08 effective March 27, 2007. The amended language will grant the Director authority to issue, revoke, modify, or deny such an individual permit or issue, revoke, or deny coverage underage under a general permit in compliance with all requirements of the Federal Water Pollution Control Act. Rules implementing this proposed change in O.R.C. 903.08(B)(1) will be proposed after Senate Bill 393 is effective on March 27, 2007.

Ohio law provides authority for ODA to terminate or modify permits for the causes set forth in paragraphs I(1) through I(4), above. The rules regarding termination or modification of permits were adopted pursuant to Revised Code Sections 903.08(E), 903.08(L), and 903.10(F)(11). Revised Code Section 903.08(E) states, in part, that ODA shall deny an application for a NPDES permit if the application contains misleading or false information. Revised Code Section 903.08(E) further authorizes ODA to establish additional grounds for the denial of NPDES permits in rules. Revised Code Section 903.08(L) states that ODA "may modify, suspend, or revoke a NPDES permit issued under this section for cause as established by rule." Revised Code Section 903.10 (F)(11) authorizes ODA to establish "[g]rounds and procedures for the issuance, denial, modification, suspension, or revocation of permits, including general permits."

Rules 901:10-1-03 (C) and 901:10-1-03 (A)(6) of the Administrative Code require ODA to deny, modify, suspend or revoke a NPDES permit if ODA determines that the applicant or owner or operator has not complied with Rule 901:10-1-10 of the Administrative Code. Rule 901:10-1-10 (G) of the Administrative Code states that no person shall violate the terms and conditions of a NPDES permit. Thus, when read together, Rules 901:10-1-03 (C), 901:10-1-03 (A)(6) and 901:10-1-10 (G) of the Administrative Code provide ODA with the authority to terminate or modify a NPDES permit for the violation of any condition of the permit as required under paragraph I(1), above. This authority is consistent with Section 402(b)(1)(C)(i) of the CWA and with 40 C.F.R. Section 122.64(a)(1).

Rules 901:10-1-03 (C) and 901:10-1-03 (A)(1) of the Administrative Code require ODA to deny, modify, suspend or revoke a NPDES permit if the permit application

contains misleading or false information. These rules provide ODA with the authority to terminate or modify a NPDES permit for obtaining a permit by misrepresentation or failure to disclose all relevant facts as required under paragraph 9(b), above. This authority is consistent with Section 402(b)(1)(C)(ii) of the CWA and 40 C.F.R. Section 122.64(a)(2).

Rule 901:10-1-03 (C)(9) of the Administrative Code requires ODA to deny, modify, suspend or revoke a NPDES permit if ODA determines that there is a change in any condition that requires elimination of the permitted discharge. This rule provides ODA with the authority to terminate or modify a NPDES permit as required under paragraph 9(c), above. This authority is consistent with Section 402(b)(1)(C)(iii) of the CWA and 40 C.F.R. Section 122.64(a)(4).

Rule 901:10-1-03 (C)(10) of the Administrative Code requires ODA to deny, modify, suspend or revoke a NPDES permit if ODA determines that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination. This rule provides ODA with the authority to terminate or modify a NPDES permit as required under paragraph I(4), above. This authority is consistent with 40 C.F.R. Section 122.64(a)(3).

Rule 901:10-1-09 (A) of the Administrative Code specifies that when a permit is modified, only those conditions subject to modification are reopened. This is consistent with 40 C.F.R. Section 122.62. Additionally, O.A.C. Rule 901:10-1-09 (A) also specifies that a draft permit modification is subject to public notice and public participation procedures. This provision is also consistent with 40 C.F.R. Section 122.62.

Under Ohio's rules, the Director of ODA may propose to modify a permit based on information submitted by the owner or operator, based on information obtained through inspections, or based on a permit review by the Director consistent with 40 C.F.R. Section 122.62. See O.A.C. Rule 901:10-1-09 (B). The Director of ODA may also propose to modify a NPDES permit or revoke and reissue a NPDES permit, or both, at the request of any interested person consistent with 40 C.F.R. Section 122.62 and 40 C.F.R. Section 124.5. Rule 901:10-1-09 (C) of the Administrative Code states: "Either the director or any interested person may propose to modify a NPDES permit or revoke and reissue a NPDES permit or both for the following reasons . . . ."

Rule 901:10-1-09 (C)(1) through (C)(5) establish the same reasons for permit modification contained in 40 C.F.R. Sections 122.62(a)(1) through 122.62 (a)(5), i.e., alterations, information, new regulations, compliance schedules, and requests for a variance. While the language in O.A.C. Rule 901:10-1-09 (C)(4) regarding compliance schedules differs slightly from 40 C.F.R. Section 122.62(a)(4) in that the Ohio rule substitutes the phrase "acts of nature or acts of third parties" for "acts of God," this difference is insignificant. "Acts of nature" is merely a more secular term than "acts of God." Furthermore, the phrase "or acts of third parties" is merely redundant as it reiterates the phrase in 40 C.F.R. Section 122.62(a)(4) "or other event over which the permittee has little or no control." Rule 901:10-1-09 (C)(6) includes corrections for technical mistakes as a reason for a modification or revocation and reissuance of a NPDES permit consistent with 40 C.F.R. Section 122.62(a)(15).

A permit "modification" is defined at O.A.C. Rule 901:10-1-01 (FFF) to mean one or more of the following:

(1) A material and substantial alternation of the facility including an increase of the number of animals that exceed the design capacity of an existing facility by ten percent or more in excess of the design capacity set forth in the current permit, provided that in no case during a five year period shall the facility's or facility's capacity be modified to increase by more than ten percent in the aggregate;

(2) Any structural change to the facility that will alter compliance with siting criteria as set forth in rule 901:10-2-02 of the Administrative Code;

(3) Any changes to the insect rodent and control plan approved by the director except as set forth in paragraphs (E) and (F) in rule 901:10-2-19 of the Administrative Code;

(4) Changes described in rule 901:10-1-09 of the Administrative Code for NPDES operations; or

(5) Changes to the manure storage or treatment facility that result from any of the following:

(a) An expansion of the existing facility by ten percent or more in excess of treatment or storage capacity;

(b) A significant change in treatment technology; or

(c) Closure of part of the manure storage or treatment facility and termination of permit coverage under Chapter 903 of the Revised Code.

As stated above, draft permits for modifications are subject to public notice and public participation requirements. See O.A.C. Rule 901:10-1-09 (A).

ODA also lists in the Appendix to O.A.C. Rule 901:10-1-09 operational changes and major operational changes which are not permit modifications. These operational changes and major operational changes are intended to be minor modifications consistent with 40 C.F.R. Section 122.63.

J. Authority To Enforce The Permit And The Permit Program

Requirement: State law provides authority to:

1. Abate violations of:

   (a) Requirements to obtain permits;
   (b) Terms and conditions of issued permits;
   (c) Effluent standards and limitations and water quality standards; and
   (d) Requirements for recording, reporting, monitoring, entry, inspection and sampling.

2. Apply sanctions to enforce violations described in paragraph (1) above, including the following:

   (a) Injunctive relief, without the necessity of a prior revocation of the permit;
   (b) Civil penalties;
   (c) Criminal fines for willful or negligent violations; and
   (d) Criminal fines against persons who knowingly make any false statement, representation or certification in any form, notice, report or other document required by the terms or conditions of any permit or otherwise required by the State as part of a recording, reporting or monitoring requirement.

3. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under Section 309 of the CWA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained.

Federal Authority: CWA §§ 402 (b)(7), 309, 304 (a)(2)(C), 402(h), 504; 40 C.F.R. §§ 123.26 and 123.27.

Ohio Statutory and Regulatory Authority:

O.R.C. § 903.08(A), Participation in NPDES; permit; ODA authorized to participate in NPDES in accordance with CWA; ODA authorized to enforce CAFO point source and storm water NPDES permits previously issued by OEPA; ODA authorized to enforce CAFO point source and storm water NPDES permits previously issued by OEPA

O.R.C. § 903.08(B), Participation in NPDES; permit; ODA authorized to enforce CAFO point source NPDES permits; ODA authorized to enforce CAFO point source NPDES permits previously issued by OEPA[1]

O.R.C. § 903.08(C), Participation in NPDES; permit; ODA authorized to enforce CAFO storm water NPDES permits; ODA authorized to enforce CAFO storm water NPDES permits previously issued by OEPA

O.R.C. § 903.08(G), Participation in NPDES; permit; ODA shall establish terms and conditions of permits in accordance with rules

O.R.C. § 903.08(K), Participation in NPDES; permit; Prohibition against false statements, misrepresentations, or certifications in any NPDES form, notice or report; Prohibition against tampering with any monitoring method or device

O.R.C. § 903.08(M), Participation in NPDES; permit; Prohibition against violating any effluent limitation or other provision of a NPDES permit; Compliance with NPDES permit constitutes compliance with O.R.C. Section 903.08

O.R.C. § 903.10(F)(4), Rules; Terms and conditions of NPDES permits

O.R.C. § 903.17(A), Corrective actions, civil penalties concerning NPDES permits injunctions; Authority of ODA to impose corrective actions and civil penalties

O.R.C. § 903.17(B), Corrective actions, civil penalties concerning NPDES permits injunctions; Issuance of order and civil penalty up to $10,000.00 per day per violation after opportunity for adjudication hearing

O.R.C. § 903.17(D)(1), Corrective actions, civil penalties concerning NPDES permits; injunctions; Director of ODA may request that the Ohio Attorney General bring an action for injunction against any person violating or threatening to violate O.R.C. Section 903.08, terms and conditions of a NPDES permit, NPDES provisions of a Permit to Operate, rules adopted by ODA, or an order under O.R.C. Section 903.17(B)

O.R.C. § 903.17(D)(2), Corrective actions, civil penalties concerning NPDES permits; injunctions; In lieu of civil penalties under O.R.C. Section 903.17(A), the Director of ODA may request that the Ohio Attorney General bring an action for a civil penalty up to $10,000.00 per day per violation against any person who has violated or is violating O.R.C. Section 903.08 terms and conditions of a NPDES permit, NPDES provisions of a Permit to Operate, rules adopted by ODA, or an order under O.R.C. Section 903.17(B)

O.R.C. § 903.18(A), Emergency orders; Authority of Director of ODA to issues an emergency order without prior notice or adjudication hearing based upon the Director's determination that an emergency exists requiring immediate action to protect the public health, safety or the environment

O.R.C. § 903.99(B), Penalties; Criminal penalty of up to $25,000.00 per day per violation of the prohibitions against discharge of manure or storm water from an

[1] As mentioned in Section I, O.R.C. 903.08(B) will be amended by SB 393 to remove the presumption that CAFOs are a point source and therefore have a duty to apply for an individual NPDES permit or coverage under a general NPDES permit. The new language requires any person required by the Federal Water Pollution Control Act to obtain a permit for the discharge of manure to apply to the Director for an individual or coverage under a general NPDES permit. SB 393 also provides authority for the Director to issue, revoke, modify or deny an individual permit or coverage under a general permit in compliance with all requirements of the Federal Water Pollution Control Act.

animal feeding facility without an NPDES permit or violation of any effluent limitation established by rule or any other provision of a NPDES permit

O.R.C. § 903.99(C), Penalties; Criminal penalty of up to $25,000.00 per day per violation for knowingly making a false statement, representation, or certification in an application for a NPDES permit or any required form, notice, or report

O.A.C. Rule 901:10-3-10(H), Standard permit terms and conditions; Inspection and entry

O.A.C. Rule 901:10-3-10(J), Standard permit terms and conditions; Monitoring and records

O.A.C. Rule 901:10-3-10(K), Standard permit terms and conditions; Monitoring test procedures

O.A.C. Rule 901:10-3-10(L), Standard permit terms and conditions; Additional requirements for recording and reporting of monitoring results

O.A.C. Rule 901:10-3-10(Y), Standard permit terms and conditions; Reporting obligations

O.A.C. Rule 901:10-5-03, Enforcement procedures

O.A.C. Rule 901:10-5-04, Civil penalties

O.A.C. Rule 901:10-5-05, Emergency enforcement and cost recovery

ANALYSIS OF THE ATTORNEY GENERAL

Chapter 903 of the Revised Code and its implementing regulations authorize ODA to require discharge permits with terms and conditions specifying compliance with national effluent standards and state water quality standards and applying requirements for recording, reporting, monitoring, entry, inspection and sampling. Chapter 903 of the Revised Code and its implementing regulations provide the ODA with the authority to abate violations of these requirements and to apply sanctions to enforce violations of these requirements. ODA has authority to enjoin violations and to apply maximum civil and criminal penalties as required by federal law. ODA also has a compliance evaluation program in place which meets the requirements of the CWA.

Sections 903.08(A), (B) and (C) of the Revised Code authorize the ODA to require NPDES permits for the discharge of pollutants, especially manure and process waste water, from a point source and for the discharge of storm water from an animal

feeding facility. As referenced in Section (I), O.R.C. 903.08(B) of the Revised Code has been amended by Senate Bill 393 to remove the presumption that a CAFO is a point source and therefore under a duty to apply for an individual or coverage under a general NPDES permit. The amendment to the statute requires any person required by the Federal Water Pollution Control Act to obtain a permit for the discharge of manure to apply to the Director for an individual or for coverage under a general NPDES permit. Senate Bill 393 has passed the Ohio General Assembly, was adopted and signed by the Governor on December 27, 2006, and is expected to become effective March 27, 2007. The current version of O.R.C. 903.08(B) adequately protects waters of the state from a discharge of manure from a point source because it requires CAFOs to apply for an individual NPDES permit or coverage under a general NPDES permit. Section 903.08(G) of the Revised Code authorizes the ODA to establish terms and conditions of NPDES permits designed to achieve and maintain full compliance with national effluent limitations, national standards of performance for new sources, the most current state water quality standards, the most current state antidegradation policy and other requirements of the CWA. Under Section 903.08(M)(1) of the Revised Code, no person shall violate any effluent limit established by rule, and under Section 903.08(M)(2) of the Revised Code, no person shall violate any other provision of a NPDES permit issued by ODA.

Section 903.10(F)(4) of the Revised Code authorizes the ODA to establish terms and conditions of NPDES permits including: best management practices; installation of discharge or water quality monitoring methods or equipment; creation and retention of records; submission of periodic reports; schedules of compliance; net volume, net weight,

and, where necessary, concentration and mass loading limits of manure that may be discharged into waters of the state; and authorized duration and frequency of any discharges into waters of the state. Recording requirements are set forth at O.A.C. Rules 901:10-3-10(J) and (L). Reporting requirements are set forth at O.A.C. Rules 901:10-3-10(L) and (Y). Monitoring requirements are set forth at O.A.C. Rules 901:10-3-10(J) and (K). Entry and inspection requirements are set forth at O.A.C. Rules 901:10-3-10(H), and sampling requirements are set forth at O.A.C. Rules 901:10-3-10(J) and (K).

As required by Section 402(b)(7) of the CWA, Section 903.17(A) of the Revised Code authorizes ODA to abate violations of the above requirements, i.e., to obtain permits, to comply with the terms and conditions of issued permits including effluent standards and water quality standards, and to comply with the requirements for recording, reporting, monitoring, entry, inspection and sampling. Under Revised Code Section 903.17(A), ODA may propose to require corrective actions and assess a civil penalty against an owner or operator if ODA determines that the owner or operator is not in compliance with Section 903.08, the terms and conditions of a NPDES permit, the NPDES provisions of a permit to operate, or rules adopted under Section 903.10(F).

Thus, corrective action and a civil penalty can be imposed for failure to obtain permits as required by O.R.C. Section 903.08 and failure to comply with the terms and conditions of NPDES permits including effluent standards, water quality standards and requirements for recording, reporting, monitoring, inspection, entry and sampling established pursuant to Sections 903.08(G) and 903.10(F)(4) of the Revised Code.

The procedure for ordering corrective action and assessing a civil penalty is set forth at Section 903.17(A) (1) – (3) of the Revised Code which states that ODA may impose a civil penalty only if all of the following occur:

> (1) The owner or operator is notified in writing of the deficiencies resulting in noncompliance, the action that the owner or operator must take to correct the deficiencies, and the time period within which the owner or operator must correct the deficiencies and attain compliance.
>
> (2) After the time period specified in the notice has elapsed, the director or the director's duly authorized representative has inspected the point source, determined that the owner or operator is still not in compliance, and issued a notice of violation to require corrective actions.
>
> (3) The director affords the owner or operator an opportunity for an adjudication hearing under Chapter 119 of the Revised Code to challenge the director's determination that the owner or operator is not in compliance or the imposition of the civil penalty, or both. However, the owner or operator may waive the right to an adjudication hearing.

ODA has established a civil penalty assessment or a civil penalty matrix at O.A.C. Rule 901:10-5-04 (D) and (E) as well as Penalty Assessment Guidance and Penalty Calculation Worksheet which ODA may use in assessing the amount of a civil penalty. However, these rules and guidance documents are not intended to limit the penalty amounts established in Revised Code Chapter 903 or to limit the penalties to be sought in cases referred to the Ohio Attorney General.

Alternatively, and in lieu of action under O.R.C. Section 903.17(A), ODA may ask the Ohio Attorney General to bring an action for a civil penalty of not more than $10,000.00 per day per violation in the appropriate court against any person that has violated or is violating Section 903.08 of the Revised Code, the terms and conditions of a NPDES permit, the NPDES provisions of a permit to operate, the rules adopted under

Section 903.10(F) or any order issued under O.R.C. Section 903.17(B). This provision is consistent with Section 402(b)(7) of the CWA and 40 C.F.R. Section 123.27(a)(3)(i).

As required by Section 402(b)(7) of the CWA and 40 C.F.R. Sections 123.27(a)(1) and (2), ODA has the authority to obtain injunctive relief, without the necessity of a prior revocation of a permit, under Sections 903.17 (D)(1) and 903.18 of the Revised Code. Under O.R.C. Section 903.17(D)(1), the Director of the ODA may request, in writing, that the Attorney General bring an action for an injunction against any person violating, or threatening to violate Section 903.08 of the Revised Code, the terms and conditions of a NPDES permit, the NPDES provisions of a permit to operate, the rules adopted under Section 903.10(F) of the Revised Code, or an order for corrective action and a civil penalty issued under Section 903.18(B) of the Revised Code. This provision complies with 40 C.F.R. Section 123.27(a)(2).

Furthermore, under Section 903.18(A) of the Revised Code, ODA may issue an emergency order requiring immediate action without notice or adjudication hearing, to protect public health or safety or the environment. This emergency order shall take effect immediately and the person to whom the order is directed may request an adjudication hearing not later than thirty days after the request. This provision complies with 40 C.F.R. Section 123.27(a)(1). Rule 901:10-5-05 of the Administrative Code describes the emergency order enforcement procedure. Rule 901:10-5-05 of the Administrative Code further elucidates the circumstances under which an emergency order may be issued as follows:

> A danger to the public health, safety or the environment may include, but is not necessarily limited to, the following situations:

(1) When discharge threatens public or private drinking water supplies;

(2) When discharge threatens a primary contact recreation resource water;

(3) When the discharge directly causes flooding of residential housing, commercial property or industrial property, where direct use of the property would be hazardous to public health; and/or

(4) Other situations as determined by the director upon consultation with state and/or local environmental protection or health agencies.

As required by Sections 309 and 402(b)(7) of the CWA and 40 C.F.R. Section 123.27(a)(3)(ii), ODA has the authority under Section 903.99(B) of the Revised Code to seek criminal fines of not more than $25,000.00 per day per violation for discharging without a NPDES permit, for violating an effluent limit or a term or condition of a NPDES permit, or for violating the NPDES provisions of a permit to operate. This fine may be imposed whether or not the violations were willful or negligent. This is consistent with 40 C.F.R. Section 123.27(a)(3)(ii).

ODA is also authorized to seek criminal fines against any person who knowingly makes any false statement, representation or certification in any NPDES form, in any notice or report required by a NPDES permit, or who knowingly renders inaccurate any monitoring device or method required to be monitored. Section 903.99(C) of the Revised Code specifies that whoever knowingly violates O.R.C. Section 903.08(K) shall be fined not more than $25,000.00. Section 903.08(K)(1) of the Revised Code states: "No person shall make any false statement, representation or certification in an application for a NPDES Permit or in any form, notice or report required to be submitted to the director pursuant to the terms and conditions established in a NPDES permit issued under this section." Section 903.08(K)(2) of the Revised Code further states: "No person shall

render inaccurate any monitoring method or device that is required under the terms and conditions of a NPDES permit issued under this section." These provisions are consistent with Sections 309 and 402(b)(7) of the CWA and 40 C.F.R. Section 123.27(a)(3)(iii).

The maximum civil penalties and criminal fines specified above meet or exceed the minimum amounts required by 40 C.F.R. Section 123.27(a)(3)(i) through (iii) and are assessable for each day of violation as required by 40 C.F.R. Section 123.27(b)(1). The degree of knowledge or intent under O.R.C. Sections 903.99(B) and (C) is the same as that under the CWA as required by 40 C.F.R. Section 123.27(b)(2). Under O.A.C. Rule 901:10-5-03 (E), civil penalties assessed by ODA shall be commensurate with the nature and degree of violation as required by 40 C.F.R. Section 123.27(c).

Finally, ODA has established a compliance evaluation program consistent with the requirements of 40 C.F.R. Section 123.26. Under O.R.C. Section 903.12(A), ODA has the authority to enter onto any public or private real or personal property to make investigations and inspections, including, but not limited to, the sampling of discharges and the inspection of discharge monitoring equipment. ODA is further authorized under O.R.C. Section 903.12(A) to examine and copy any records pertaining to discharges subject to Revised Code Chapter 903 as well as any records required to be maintained by the terms of any permit or RCC issued under Revised Code Chapter 903. If refused entry, ODA may apply to the appropriate court of common pleas to obtain a warrant. See O.R.C. Section 903.12(A). See also, O.A.C. Rule 901:10-5-02. Thus, ODA's authority regarding entry, copying, inspection, and investigation is consistent with the requirements of 40 C.F.R. Section 123.26(c).

Rule 901:10-5-03 of the Administrative Code and ODA's Compliance and Enforcement Program document set forth ODA's annual inspection schedule and investigating procedures which together meet the requirements of 40 C.F.R. Sections 123.26(a), (b), (d) and (e).

Rule 901:10-5-03(B) of the Administrative Code requires ODA to conduct inspections and determine if a facility is not in compliance with its NPDES permit, NPDES provisions of a PTO, or rules adopted under ODA's program. Rule 901:10-5-03(C) of the Administrative Code further requires ODA to initiate an investigation of a facility based upon an observation by an agent or employee of ODA, upon notification by another agency, or upon a written complaint from a person. Any violations found as a result of such an investigation must be described in an inspection report. See O.A.C. Rule 901:10-5-03(C).

If the inspection report indicates a violation, ODA shall issue a "notice of deficiencies resulting in noncompliance" in writing to the owner or operator of the facility stating the period of time to correct the deficiencies. See O.A.C. Rule 901:10-5-03(D)(2). If the owner or operator is not in compliance within the time frame specified in the notice, then ODA shall issue a notice of violation to require corrective actions. See O.A.C. Rule 901:10-5-03(D)(4). ODA shall afford the owner or operator of the facility an opportunity for an administrative adjudication hearing under Revised Code Chapter 119 (the Ohio Administrative Procedure Act) to challenge ODA's determination that the facility is not in compliance, that an order be issued, that the permit be suspended or revoked, or that a civil penalty be imposed. See O.A.C. Rule 901:10-5-03(D)(5). The

owner or operator may waive the right to the administrative adjudication hearing. See O.A.C. Rule 901:10-5-03(D)(6).

ODA's Compliance and Enforcement Program document requires ODA to conduct biannual (twice per year) inspections of each regulated facility. The inspections will be performed using the ODA Inspection Form, revised July 20, 2004, amended May 2006. The inspection data will be entered into the Dayhoff database or data management system. The Dayhuff data management system will allow ODA to track and maintain information on inspections, investigations, inspection reports, complaints, violations, enforcement actions and documents, final orders (including joint stipulations and settlement agreements), and penalty assessments and payments.

K. **Authority For Public Participation In The State Enforcement Process And Judicial Review Of Approval Or Denial Of Permits**

Requirement: State law provides for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil administrative action by any citizen having an interest, which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(a) Investigate and provide written responses to all citizen complaints submitted;

(b) Not oppose intervention when permissive intervention may be authorized by statute, rule or regulation; and

(c) publish notice of and provide at least 30 days for a public comment on any proposed settlement of State enforcement action.

Federal Authority: CWA § 101(e); 40 C.F.R. § 123.27

Ohio Statutory and Regulatory Authority:
O.R.C. § 903.09, Draft NPDES permit and proposed actions; public meetings; application of antidegradation policy; proceedings on application for a permit
O.R.C. § 903.15, Complaint submitted to director; investigation

O.A.C. Rule 901:10-5-03, Enforcement procedures
O.A.C. Rule 901:10-6-01, Notice
O.A.C. Rule 901:10-6-02, Contents of public notices

ANALYSIS OF THE ATTORNEY GENERAL

Chapter 903 of the Revised Code and its implementing regulations provide for public participation in the State enforcement process consistent with the requirements of 40 C.F.R. Section 123.27(d)(2) regarding permissive intervention. Section 903.15(B) of the Revised Code provides that upon the receipt of a written, signed and dated complaint from a person aggrieved or adversely affected by an alleged nuisance related to a CAFF, ODA shall investigate the CAFF

to determine if it is in compliance with its permit, including its NPDES permit, or its RCC. See also O.A.C. Rule 901:10-5-01(B)(1) and (C). Section 903.15(B) of the Revised Code also provides that upon the receipt of an oral complaint from a person aggrieved or adversely affected by an alleged nuisance related to a CAFF, ODA may investigate the CAFF to determine if it is in compliance with its permit, including its NPDES permit, or its RCC. See also O.A.C. Rule 901:10-5-01(B)(2) and (D).

Furthermore, under O.R.C. Section 903.15 (C)(1), if ODA determines that the facility is in compliance with its permit, including its NPDES permit, or its RCC, ODA will dismiss the complaint and so notify the complainant. See also O.A.C. Rule 901:10-5-01(E). However, under O.R.C. Section 903.15(C)(2), if ODA determines that the facility is **not** in compliance with its permit, including its NPDES permit, or its RCC, ODA shall proceed to enforcement action under O.R.C. Section 903.16 or 903.17, or both. See also O.A.C. Rule 901:10-5-01(F).

These provisions are consistent with 40 C.F.R. Section 123.27(d)(2)(i) in that they comply with the procedures specified in 40 C.F.R. Section 123.26(b)(4) which states: "Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures." ODA will intake oral and written complaints in its Dayhuff computerized information system as described in more detail in ODA's Compliance and Enforcement Program Document. ODA will further report and maintain its findings, conclusions, and further legal actions on the Dayhuff computerized information system.

While ODA only provides a written response to complaints made in writing, any citizen can request a copy of a complaint investigation report. In addition, if the complainant provides their name and address, the inspector will be able to send a courtesy copy to the complainant.

Furthermore, Ohio Civil Rule 24(B)(2) provides for permissive intervention upon timely application and when either: (1) when a state statute confers a conditional right to intervene; or (2) an applicant's claim or defense and the main action have a question of law or fact in common. See e.g., *State ex rel. Montgomery v. Columbus*, 2003 Ohio 2658. Thus, with assurance from ODA that it will not oppose intervention by any citizen, ODA's program is consistent with 40 C.F.R. Section 123.27(d)(2)(ii).

ODA's program complies with 40 C.F.R. Section 123.27(d)(2) (iii) in that ODA has a mechanism to publish notice of and provide at least 30 days notice on any proposed settlement of a State enforcement action. As discussed in detail in Section G, above, "Authority to Issue Notices, Transmit Data, Provide Opportunity for Public Hearings and Judicial Law," Revised Code Section 903.09 (F) requires ODA to provide public notice as well as the opportunity for public comment and a public meeting on all proposed actions to deny, suspend or revoke a NPDES permit. In addition, Rule 901:10-6-01 (A)(5) of the Administrative Code requires ODA to give public notice of the proposed action to deny, suspend or revoke a NPDES permit or any action taken pursuant to O.R.C. Section 903.17. See also O.A.C. Rule 901:10-6-02 (A). As discussed in more detail in Section J, above, "Authority to Enforce the Permit and the Permit Program," actions under O.R.C. Section 903.17 includes actions of ODA for corrective actions and civil penalties and actions by the Attorney General for injunctions and for civil penalties. Thus actions under O.R.C. Section 903.17 would include settlements of enforcement actions. Furthermore, under O.A.C. Rule 901:10-6-04 and O.A.C. Rule 901:10-6-02, the notices of any proposed settlement actions are subject to a public comment period and the opportunity for a public meeting if there is significant public interest.

L. Conflict Of Interest: State Board Membership

Requirement: No state board or body which has or shares authority to approve permit applications or portions thereof, either in the first instance or on appeal, includes (or will include, at the time of approval of the State permit program), as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit. No State law requires representation on the State board or body which has or shares authority to issue permits of any person who would violate the conflict of interest provision contained in Section 304(i)(2) of the CWA.

Federal Authority: CWA § 304 (i)(2)(D); 40 C.F.R. § 123.25(c).

Ohio Statutory Authority:
O.R.C. § 903.081, Effect of receipt of income from permittee or applicant for permit

ANALYSIS OF THE ATTORNEY GENERAL

ODA's program is consistent with the CWA as it contains identical conflict of interest provisions to those set forth at Section 304(i)(2)(D) of the CWA and 40 C.F.R. Section 123.25(c).

Specifically, Revised Code Section 903.081 contains the following conflict of interest provision which meets the requirements of Section 304 (i)(2)(D) of the CWA and 40 C.F.R. § 123.25(c):

> (A) For purposes of section 903.08 of the Revised Code, no person shall issue a NPDES permit if the person receives or has received during the two years prior to the receipt of an application for a NPDES permit a significant portion of income from any NPDES permittee or any applicant for a NPDES permit. In addition, no person who, pursuant to an appeal of an action regarding a NPDES permit, has the authority to require or to order the director of agriculture to vacate or modify a NPDES permit shall require or order the director to vacate or modify a NPDES permit if the

person receives or has received during the two years prior to the filing of the appeal a significant portion of income from any NPDES permittee or any applicant for a NPDES permit.

(B) As used in this section:

(1) "Significant portion of income" means ten per cent or more of gross personal income in a calendar year or fifty per cent or more of gross personal income in a calendar year if the recipient of the income is more than sixty years of age and is receiving that portion of income under retirement benefits, including a pension or similar arrangement.

(2) "Income" includes retirement benefits, consultant fees, and stock dividends. "Income" does not include mutual fund payments or other diversified investments for which the recipient does not know the identity of the primary sources of the income.

(3) "Permittee" and "applicant for a NPDES permit" does not include any department or agency of the state.

The above provision ensures that the Director of ODA as well as the individual members of ERAC cannot receive, or cannot have received within the previous two years, a significant portion of their income directly or indirectly from permittees or permit applicants. "Significant portion of income" is defined at O.R.C. Section 903.081(B)(1) in an identical manner as it is defined in 40 C.F.R. Section 123.25(c)(1)(ii).

Note that the Director of ODA is appointed by the Governor under O.R.C. Section 121.03 (D), with the advice and consent of the Senate. The Director holds his office during the term of the appointing Governor, but is subject to removal at the pleasure of the Governor. See O.R.C. Section 121.03.

Furthermore, under Section 3745.02 of the Revised Code, the Governor also appoints the three members of ERAC, the administrative appeal board which hears appeals of final actions of the Director regarding permits, also with the advice and

consent of the Senate. See O.R.C. Section 3745.02. The term of office for each ERAC member is six years. See O.R.C. Section 3745.02.

Revised Code Section 3745.02 contains its own conflict of interest provision for ERAC Commissioners which states:

> The governor may remove any member of the commission from office for conflict of interest, malfeasance, or nonfeasance, after delivering written charges to the member together with at least ten days' written notice of the time and place at which the governor will publicly hear the member, either in person or by counsel, in defense of the charges. If the member is removed from office, the governor shall file in the office of the secretary of state a complete statement of the charges made against the member and a complete report of the proceedings thereon. The action of the governor in removing the member from office is final.

M. Authority To Issue General Permits

Requirement: State law provides the authority to issue and enforce general permits in accordance with the federal general permits regulation at 40 C.F.R. Section 122.28.

Federal Authority: CWA § 402 (a); 40 C.F.R. §§ 122.28, 123.23 and 123.27.

Ohio Statutory and Regulatory Authority:
O.R.C. § 903.08 (F), Participation in NPDES; permits; authority to issue general NPDES permits
O.R.C. § 903.10 (F) (12), Rules; Establish for NPDES permits; Definition of "general NPDES permit" establishing categories of point sources covered plus the criteria for issuing and determining eligibility under a general NPDES permit

O.A.C. Rule 901:10-4-01, General permit to operate requirements
O.A.C. Rule 901:10-4-02, General permit to operate coverage
O.A.C. Rule 901:10-4-03, Notification of coverage
O.A.C. Rule 901:10-4-04, Criteria for issuing and renewing NPDES general permit to operate
O.A.C. Rule 901:10-4-05, General operating permit[1]

ANALYSIS OF THE ATTORNEY GENERAL

The Department has adequate legal authority to issue and enforce general NPDES permits in accordance with the general permits regulation set forth at 40 C.F.R. Section 122.28. Section 903.08 (F) of the Revised Code authorizes ODA to issue general NPDES permits in lieu of individual NPDES permits to the extent consistent with the CWA. Specifically, O.R.C. Section 903.08 (F) states that ODA shall issue general NPDES permits in lieu of individual permits for categories of point sources when all of the following apply:

[1] The ODA has proposed changes to O.A.C. Rule 901:10-4-05 that cannot be adopted until some date after January 16, 2007 at the earliest. These changes are discussed in more detail below.

(1) Any discharges authorized by a general permit will have only minimal cumulative adverse effect on the environment when the discharges are considered collectively and individually.

(2) The discharges are more appropriately authorized by a general permit than by an individual permit.

(3) Each category of point sources satisfies the criteria established in rules.

Section 903.08 (F) of the Revised Code further outlines the process for obtaining coverage under a general NPDES permit:

> A person who is required to obtain a NPDES permit shall submit to the director a notice of the person's intent to be covered under an existing general permit, or at the person's option, an application for an individual NPDES permit. Upon receipt of a notice of intent for coverage under an existing general permit, the director shall notify the applicant in writing that the person is covered by the general permit if the person satisfies the criteria established in rules for eligibility for such coverage. If the person is ineligible for coverage under the general permit, the director shall require the submission of an application for an individual NPDES permit.

The rules governing general NPDES permits are found in Chapter 901:10-4 of the Administrative Code. Rules 901:10-4-01 (A)(1) and (B) of the Administrative Code, which specify the categories of sources or facilities for which a general NPDES permit may be issued, are consistent with 40 C.F.R. Section 122.28 (a)(2). See also O.A.C. Rule 901:10-4-04(A)(1). Rule 901:10-4-01 (A)(2) of the Administrative Code , which specifies the geographic areas or other boundaries for which general NPDES permits may be issued, is consistent with 40 C.F.R. Section 122.28 (a)(1).

Rule 901:10-4-01 (E)(2) of the Administrative Code, which specifies the reasons for which ODA may deny, modify, suspend or revoke NPDES general permit to operate coverage, is consistent with the reasons specified at 40 C.F.R. Section 122.28 (b)(3) for requiring an individual NPDES permit. Section 903.08 (F) of the Revised Code and Rule

901:10-4-03 of the Administrative Code require submission of a notice of intent for coverage under a general NPDES permit which is consistent with the requirements specified at 40 C.F.R. Section 122.28 (b)(2).

Rule 901:10-4-03 of the Administrative Code lists the contents of the notice of intent and is consistent with the required contents of the notices of intent for general NPDES permits found at 40 C.F.R. Section 122.28(b)(2), as well as with the required contents of notices of intent for general CAFO NPDES permits found at 40 C.F.R. Section 122.21(a)(1)(i) through (x).

Note that under O.A.C. Rule 901:10-4-01(B)(2), a major concentrated animal feeding facility is not eligible for coverage under a general CAFO NPDES permit. A "major concentrated animal feeding facility" or "MCAFF" is defined as "a concentrated animal feeding facility with a total design capacity of more than ten times the number of animals specified in any of the categories in division (M) of this section." O.R.C. Section 903.01 (N). Section 903.01 (M) of the Revised Code defines a Large CAFO consistent with the federal definition set forth at 40 C.F.R. Section 122.23(a)(4). This requirement that a MCAFF must obtain an individual permit is more stringent than federal law.

Rule 901:10-4-05 of the Administrative Code sets forth the specified conditions and limitations with which holders of certificates of coverage under a general NPDES permit shall comply. The conditions and limitations are detailed listing performance standards, operation and maintenance requirements, monitoring and reporting requirements, an emergency response plan, inspections, and general conditions that must be maintained. The proposed change to this rule will add enhanced applicability provisions which will extend requirements from the main portion of the ODA rules to

NPDES operations including general NPDES permits to the same the same extent that such requirements would be authorized or enforceable under federal law.

Finally, Rule 901:10-4-01 (E)(1) of the Administrative Code states that ODA may deny, modify, suspend or revoke eligibility for or coverage under a general NPDES permit for noncompliance with the permit or noncompliance with Chapter 903 of the Revised Code and the rules promulgated pursuant to Chapter 903. Thus, a violation of a general NPDES permit is subject to the full range of enforcement actions as described in Section J, above (Authority to Enforce the Permit and the Permit Program) as required by 40 C.F.R. Section 123.23 (c).

N. Incorporation By Reference

Requirement: State law provides authority to incorporate federal legal authority by reference. The incorporation by reference is proper and enforceable under State law.

Ohio Statutory and Regulatory Authority:
O.R.C. §119.03 (B), Procedure for adoption, amendment, or rescission of rules; If incorporated by reference
O.R.C. §§ 121.71 through 121.991, Incorporation By Reference In Rules,
O.R.C. § 121.72, Incorporations by reference; explanation of how to gain access and of incorporated version
O.R.C. § 121.75, When citation is sufficient
O.R.C. § 121.76, Exception to provisions

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Ohio law allows for incorporation by reference of federal statutes and regulations. Ohio law also allows for incorporation by reference of state statutes and regulations as well as generally accepted industry standards. Section 119.03 (B) of the Revised Code states: "If the proposed rule, amendment, or rescission incorporates a text or other material by reference, the agency shall comply with sections 121.71 to 121.76 of the Revised Code." Section 121.72 of the Revised Code, in part, states: "An agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule."

Under Section 121.72 of the Revised Code, an agency which incorporates a rule by reference is required to explain how and where persons reasonably expected to be affected by the incorporated rule can obtain a copy of the rule and is required to state the particular date or version of the rule. Under Section 121.73 of the Revised Code, when an agency electronically files rules with JCARR which incorporates a rule by reference,

the agency is required to also file an electronic copy of the rule incorporated by reference. Under Section 121.74 of the Revised Code, when an agency files a rule in final form which incorporates a rule by reference, the agency is required to either deposit a copy in each of the five depository libraries in the State or display a copy of the text of the rule on a website maintained or made available by the agency.

However, certain major exceptions to these requirements include the incorporation of a section of the U.S. Code, the incorporation of a regulation in the Federal Register or in the Code of Federal Regulations, and the incorporation of generally accepted industry standards that are generally available to persons who can be reasonably be expected to be affected by the rule. See O.R.C. Sections 121.75(A), (D) and (E). In addition, Ohio law contains exceptions for the incorporation of a section of the Revised Code, a rule in the Administrative Code, and a rule insofar as it is necessary to obtain or maintain authorization of a federally delegated program in Ohio. See O.R.C. Sections 121.76(A)(1), (A)(3), and (B)(2).

The Ohio program described in this SOLA only incorporates by reference sections of the U.S. Code, regulations in either the Federal Register or the Code of Federal Regulations, sections of the Revised Code, rules in the Administrative Code, and generally accepted industry standards available to persons reasonably expected to be affected the rules. Furthermore, the Ohio program described in this SOLA incorporates these items in order to obtain authorization of a federally delegated program. Thus, ODA is not required to do anything more than to properly cite to the specific statutes, regulations, rules, or generally accepted industry standards.

These rules of ODA make the following incorporations by reference:

a) Rule 901:10-1-01 (A) of the Administrative Code incorporates by reference the CW set forth at 33 U.S.C. Section 1251 *et seq.* as the definition of the Act under O.R.C. Chapter 903 and O.A.C. Chapter 901:10.

b) Rule 901:10-1-01 (D) of the Administrative Code incorporates by reference the definition of "agriculture" found at O.R.C. Section 1.61.

c) Rule 901:10-1-01 (F) of the Administrative Code incorporates by reference the federal method of analysis for ammonia (as N), meaning ammonia reported as nitrogen, found in table 1B at 40 C.F.R Part 136.

d) Rule 901:10-1-01 (Q) of the Administrative Code incorporates by reference the federal method of analysis for five-day biochemical oxygen demand (BOD5) found in table 1B at 40 C.F.R. Part 136.

e) Rule 901:10-1-01 (R) of the Administrative Code incorporates by reference four types of buffer strips described in ODNR's publication "Ohio Natural Resource Conservation Service, Conservation Practice Standards Section IV, Field Office Technical Guide," specifically: (1) "Filter Strips/Areas, No. 393," June 2002; (2) "Riparian Forest Buffer, No. 391," March 1997; (3) "Field Border, No. 386," June 2002; and (4) "Contour Buffer Strips, No. 332," June 2002.

f) Rule 901:10-1-01 (T) of the Administrative Code incorporates by reference the cold water designations made by OEPA and as set forth in O.A.C. Chapter 3745-1.

g) Rule 901:10-1-01 (LL) of the Administrative Code incorporates by reference the federal method of analysis for fecal coliform bacteria found in table 1B at 40 C.F.R. Section 136.3.

h) Rule 901:10-1-01 (JJJ) of the Administrative Code defines "new source" in accordance with the definition found at 40 C.F.R. Section 122.2.

i) Rule 901:10-1-01 (JJJ) of the Administrative Code incorporates by reference the definition of "new source criteria" in accordance with the definition found at 40 C.F.R. Section 122.29(b).

j) Rule 901:10-1-01 (KKK) of the Administrative Code incorporates by reference the federal method of analysis for nitrate (as N), meaning nitrate reported as nitrogen, found in table 1B at 40 C.F.R. Part 136.

k) Rule 901:10-1-01 (PPP)(2)(a)(ii) of the Administrative Code incorporates by reference the definition of "general partner" found at O.R.C. Section 1782.01(E), the definition of "limited partner" found at O.R.C. Section 1782.01(F), and the definition of "partnership" found at O.R.C. Section 1775.05.

l) Rule 901:10-1-01 (YYY) of the Administrative Code incorporates by reference the definition of "agriculture labor camp" found at O.R.C. Section 3733.41.

m) Rule 901:10-1-01 (AAAA) of the Administrative Code incorporates by reference the definition of seasonal salmonid habitat as meaning rivers, streams and embayments designated by OEPA as set forth in O.A.C. Chapter 3745-1.

n) Rule 901:10-1-01 (LLLL) of the Administrative Code incorporates by reference the federal method of analysis for total coliform or all coliform bacteria found at table 1A at 40 C.F.R. Section 136.3.

o) Rule 901:10-1-01 (MMMM) of the Administrative Code incorporates by reference the federal method of analysis for total dissolved solids or nonfilterable residue found at table 1B at 40 C.F.R. Part 136.

p) Rule 901:10-1-02 (A)(2) of the Administrative Code incorporates by reference the definition of a CAFO as an animal feeding facility subject to the NPDES permit as established in Section 402 of the FWPCA.

q) Rule 901:10-1-02 (A)(4)(ii) of the Administrative Code incorporates by reference the FWPCA.

r) Rule 901:10-1-02 (A)(4)(iii) of the Administrative Code incorporates by reference the FWPCA, the Safe Drinking Water Act ("SDWA"), and O.R.C. Section 6109.01.

s) Rule 901:10-1-02 (A)(6) of the Administrative Code incorporates by reference O.R.C. Section 307.204 regarding the board of county commissions and O.R.C. Section 505.26 regarding the board of township trustees.

t) Rule 901:10-1-03 (A)(4) of the Administrative Code incorporates by reference Section 208 of the FWPCA regarding the adoption of areawide waste treatment plans.

u) Rule 901:10-1-03 (B)(1) of the Administrative Code incorporates by reference the FWPCA, SDWA, and O.R.C. Section 6109.01.

v) Rule 901:10-1-03 (B)(1)(i)(c) of the Administrative Code incorporates by reference the definition of "partnership" found at O.R.C. Section 1775.05.

w) Rule 901:10-1-03 (C)(1) of the Administrative Code incorporates by reference the water quality standards adopted by OEPA under O.R.C. Section 6111.041 and the antidegradation policy adopted by OEPA under O.R.C. Section 6111.12.

x) Rule 901:10-1-03 (C)(3) of the Administrative Code incorporates by reference Section 402(d) of the FWPCA.

y) Rule 901:10-1-03 (C)(4) of the Administrative Code incorporates by reference Section 208 of the FWPCA.

z) Rule 901:10-1-03 (C)(11) of the Administrative Code incorporates by reference Section 401 of the FWPCA and 40 C.F.R. Section 124.53.

aa) Rule 901:10-1-05 (F) of the Administrative Code incorporates by reference the CWA.

bb) Rule 901:10-1-06 (D)(4)(a) of the Administrative Code incorporates by reference the "certified crop advisor" program conducted by the American Society of Agronomy.

cc) Rule 901:10-1-07 (G) of the Administrative Code incorporates by reference O.R.C. Chapter 119 and O.R.C. Section 119.12.

dd) Rule 901:10-1-07 (K) of the Administrative Code incorporates by reference O.R.C. Chapter 119.

ee) Rule 901:10-1-08 (D)(3) of the Administrative Code incorporates by reference the FWPCA, the SDWA, and O.R.C. Section 6109.01.

ff) Rule 901:10-1-08 (E) of the Administrative Code incorporates by reference the FWPCA, the SDWA, and O.R.C. Section 6109.01.

gg) Rule 901:10-1-08 (G) of the Administrative Code incorporates by reference the FWPCA.

hh) Rule 901:10-1-09 (B)(3) of the Administrative Code incorporates by reference O.R.C. Chapter 119.

ii) Rule 901:10-1-09 (C)(5) of the Administrative Code incorporates by reference 40 C.F.R. Section 122.21 and 40 C.F.R. Section 125.27(a).

jj) Rule 901:10-1-11 (A) of the Administrative Code incorporates by reference Section 404 of the FWPCA and O.R.C. Chapter 6111.

kk) Rule 901:10-1-11 (C) of the Administrative Code incorporates by reference the definition of "federal on-scene coordinator" found at O.R.C. Section 2305.39, and the federal official designated in the national contingency plan pursuant to 40 C.F.R. Part 300 or 33 C.F.R. Section 153.10(e).

ll) Rule 901:10-2-02 (E) of the Administrative Code incorporates by reference the definition of "low permeability material" as low permeability among the soil types of geologic material presented in Figure 7-11, Chapter 7, "Geological and

Ground Water Considerations," Part 651, Agricultural Waste Management Field Handbook, June 1999.

mm) Rule 901:10-2-03 (A)(2)(e) of the Administrative Code incorporates by reference O.A.C. Rule 3701-28-12 regarding wells constructed for sampling ground water.

nn) Appendix to Rule 901:10-2-03 of the Administrative Code incorporates by reference the National Soil Survey Handbook 618.20-2001, the American Association of State Highway and Transportation Officials ("AASHTO") Group Classification for soils including the AASHTO Standard No. M 145-91 (1995, and the Unified Soil Classification System.

oo) Rule 901:10-2-04 (F)(1)(d)of the Administrative Code incorporates by reference criteria for installing systems designed to capture and treat contaminated runoff and prohibit discharge of contaminated discharge from: (1) the "Ohio Natural Resource Conservation Service, Conservation Practice Standards Section IV, Field Office Technical Guide" which includes (a) "Pond, No. 378," January 2003; (b) "Constructed Wetland Conservation Practice Standard, No. 656," August 2000; (c) "Livestock Use Area Protection Procedure, No. 757," September 3, 2002; (d) "Composting Operation, No. 317," May 1, 2000; (e) "Critical Area Planting, No. 342," June 1, 2002; (f) "Dike, No. 113," June 1, 2002; (g) "Diversion, No. 362," June 1, 2002; (h) "Grade Stabilization Structure, No. 410," May 1, 1988; (i) "Pipeline, No. 516," June 1, 2002; (j) "Roof Runoff Structure, No. 538," June 1, 2002; and (k) "Sediment Basin, No. 350," June 1, 2002; (2) the "Ohio Livestock Manure and Wastewater Management Guide Bulletin 604, The Ohio State University Extension, January 1992"; and (3) USDA Natural Resources Conservation Service – NHCP.

pp) Rule 901:10-2-06 (A)(6)(c)(i) of the Administrative Code incorporates by reference ASTM D3212 – standard specification for joints for drain and sewer plastic pipes using flexible elastometric seals.

qq) Rule 901:10-2-06 (A)(6)(c)(ii) of the Administrative Code incorporates by reference ASTM C443 – standard specification for joints for concrete pipe and manholes, using rubber gaskets.

rr) Rule 901:10-2-06 (A)(9)(b) of the Administrative Code incorporates by reference procedures in Section 651.1080 of the "USDA, Natural Resources Conservation Service Agricultural Waste Management Field Handbook, Chapter 10, Geotechnical Design and Construction, November 1997" and "USDA, Ohio Natural Resources Conservation Service, Section IV, Field Office Technical Guide Conservation Practice Standard 521-F, Pond Sealing and Lining, Compacted Earth Line, December 2001."

ss) Rule 901:10-2-10 (A) of the Administrative Code incorporates by reference the sampling procedures for manure sampling and analysis contained in

"Recommended Methods of Manure Analysis" (a 3769, University of Wisconsin Extension, 2003).

tt) Rule 901:10-2-13 (B) of the Administrative Code incorporates by reference the soil fertility analysis found at "Publication 221, Recommended Chemical Soil Test Procedures for the North Central Region, Published by the North Central Regional Committee on Soil Testing and Plant Analysis (NCR-13), North Dakota Agricultural Experiment Station."

uu) Rule 901:10-2-13 (F) of the Administrative Code incorporates by reference the Bray P1 soil test or equivalent phosphorous soil tests such as Mehlich III, Olsen, or phosphorous retention tests.

vv) Rule 901:10-2-14 (C)(6) of the Administrative Code incorporates by reference "Managing Manure Nutrients at Concentrated Animal Feeding Operations, Appendix M, USEPA, EPA-821-B-04-006, August 2004."

ww) Appendix C, Table 5 to Rule 901:10-2-14 of the Administrative Code incorporates by reference the soils hydrological soil grouping found at USDA-NRCS Engineering Field Manual, Chapter 2 – Ohio Supplement (1989), Table 2.1, pages 2-42 through 2-83.

xx) Appendix C, Table 5 to Rule 901:10-2-14 of the Administrative Code incorporates by reference the local county's annual rainfall and seasonal rainfall found at USDA-NRCS Engineering Field Manual, Chapter 2 – Ohio Supplement (1989), Exhibit OH2-3, Supplement pages 1 through 4 and USDA-NRCS Engineering Field Manual, Chapter 2 – Ohio Supplement (1989), Exhibit OH2-7 and Sheets 1 through 3.

yy) Appendix E to Rule 901:10-2-14 of the Administrative Code incorporates by reference the USDA-NRCS National Soil Survey Handbook (2001), Section 618.55, the Revised Universal Soil Loss Equation Rule (RUSLE) and Section 618.72, the Wind Erosion Prediction Procedure.

zz) Rule 901:10-2-15 of the Administrative Code incorporates by reference O.R.C. Sections 941.14, 953.26, 1511.022, and 3734.02 regarding best management practices to burn, bury, render or compost dead livestock.

aaa) Rule 901:10-3-01 (A) of the Administrative Code incorporates by reference 40 C.F.R. Section 122.23(g).

bbb) Rule 901:10-3-01 (C)(4) of the Administrative Code incorporates by reference the Resource Conservation and Recovery Act ("RCRA"), the UIC program under the SDWA, the Prevention of Significant Deterioration ("PSD") program under the Clean Air Act ("CAA"), the non-attainment program under the CAA, the National Emissions Standards for Hazardous Pollutants (NESHAPS) preconstruction approval under the CAA, and dredge or fill permits under Section 404 of the CWA.

ccc) Rule 901:10-3-01 (D)(2)(c) of the Administrative Code incorporates by reference the water quality standards adopted by OEPA under O.R.C. Section 6111.041.

ddd) Rule 901:10-3-01 (D)(2)(d) of the Administrative Code incorporates by reference the national standards of performance for new sources under the CWA.

eee) Rule 901:10-3-01 (D)(2)(e) of the Administrative Code incorporates by reference the antidegradation policy adopted by OEPA under O.R.C. Section 6111.12.

fff) Rule 901:10-3-01 (D)(2)(f) of the Administrative Code incorporates by reference the other applicable requirements of the CWA.[1]

ggg) Rule 901:10-3-01 (E) of the Administrative Code incorporates by reference the FWPCA.[2].

hhh) Rule 901:10-3-01 (F)(1) of the Administrative Code incorporates by reference 40 C.F.R. Section 122.23(g) and 40 C.F.R. Section 122.23(h).

iii) Rule 901:10-3-01 (G) of the Administrative Code incorporates by reference 40 C.F.R. Sections 122.44, 122.46, 122.47, 122.48, and 40 C.F.R. Part 132.

jjj) Rule 901:10-3-02 (E) of the Administrative Code incorporates by reference 40 C.F.R. Part 403 and O.R.C. Chapter 6111 and the rules promulgated thereunder.

kkk) Rule 901:10-3-04 (D)(1)(d) of the Administrative Code incorporates by reference 40 C.F.R. Section 122.29(d)(1).

lll) Rule 901:10-3-06 (D)(5) of the Administrative Code incorporates by reference 40 C.F.R. Section 412.5 and 40 C.F.R. Section 122.29(d)(1).

mmm) Rule 901:10-3-08 (A) and (B) of the Administrative Code incorporates by reference the various types of variances found at Sections 301, 302, 303, and 306 of the CWA.[3]

nnn) Rule 901:10-3-08 (B)(6)(a)(ii) of the Administrative Code incorporates by reference the Endangered Species Act ("ESA").

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[1] The rule will be changed to correct a grammatical error changing "act" to "Act". This is not a substantive change. The earliest that this rule can be adopted is some date after January 16, 2007 and can become effective ten days after adoption.

[2] See footnote above.

[3] The rule will be changed to correct grammatical errors. These are not substantive changes. The earliest that this rule can be adopted is some date after January 16, 2007 and can become effective ten days after adoption.

ooo) Rule 901:10-3-08 (B)(6)(c)(ii)(a) of the Administrative Code incorporates by reference the antidegradation policy adopted by OEPA under O.R.C. Section 6111.12.

ppp) Rule 901:10-3-08 (B)(7) of the Administrative Code incorporates by reference O.R.C. Chapter 119.

qqq) Rule 901:10-3-08 (B)(11) of the Administrative Code incorporates by reference the water quality standards rules adopted by OEPA in accordance with O.R.C. Section 6111.041.

rrr) Rule 901:10-3-08 (C) of the Administrative Code incorporates by reference 40 C.F.R. Section 124.64 and O.R.C. Chapter 119.

sss) Rule 901:10-3-10 (A) of the Administrative Code incorporates by reference the CWA.

ttt) Rule 901:10-3-10 (H)(4) of the Administrative Code incorporates by reference the CWA.

uuu) Rule 901:10-3-10 (K) of the Administrative Codes incorporates by reference the test procedures set forth at 40 C.F.R. Part 136.

vvv) Rule 901:10-3-10 (V)(1) of the Administrative Code incorporates by reference 40 C.F.R. Section 122.29(b).

www) Rule 901:10-3-11 (A)(1) of the Administrative Code incorporates by reference ODNR, DSWC's document "Rainwater and Land Development, Ohio's Standards for Storm Water Management, Land Development and Urban Stream Protection, Second Edition, 1996."

xxx) Rule 901:10-3-11 (A)(9) of the Administrative Code incorporates by reference the permit conditions under Sections 301, 318, 402, and 405 of the CWA.

yyy) Rule 901:10-3-11 (A)(15) of the Administrative Code incorporates by reference the definition of stormwater meaning the precipitation runoff, stormwater runoff, snowmelt runoff and any other surface runoff and drainage found at 40 C.F.R. Section 122.26(b)(13).

zzz) Rule 901:10-3-11 (C)(3) of the Administrative Code incorporates by reference 40 C.F.R. Section 122.26.

aaaa) Rule 901:10-3-11 (D)(3) of the Administrative Code incorporates by reference the CWA.[4]

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[4] The rule will be changed to correct a grammatical error changing "act" to "Act". This is not a substantive change. The earliest that this rule can be adopted is some date after January 16, 2007 and can become effective ten days after adoption.

bbbb) Rule 901:10-3-11 (D)(7) of the Administrative Code incorporates by reference Sections 401 and 404 of the CWA.[5]

cccc) Rule 901:10-4-01 (E) of the Administrative Code incorporates by reference O.R.C. Chapter 119.

dddd) Rule 901:10-4-01 (G) of the Administrative Code incorporates by reference O.R.C. Chapter 119.

eeee) Rule 901:10-4-04 of the Administrative Code incorporates by reference Section 402 of the CWA.

ffff) Rule 901:10-5-01 (G) of the Administrative Code incorporates by reference Sections 301, 302, 306, 307, 318, 402, and 405(a)-(b) of the CWA.

gggg) Rule 901:10-5-03 (D)(5) of the Administrative Code incorporates by reference O.R.C. Chapter 119.

hhhh) Rule 901:10-5-03 (F)(1) through (3) of the Administrative Code incorporates by reference O.R.C. Chapter 119, O.R.C. Section 119.12, and O.R.C. Sections 3745.04 through 3745.06.

iiii) Rule 901:10-5-05 (C) of the Administrative Code incorporates by reference O.R.C. Chapter 119 and O.R.C. Section 119.12.

jjjj) Rule 901:10-6-01 (B)(1) of the Administrative Code incorporates by reference O.R.C. Section 6109.01.

kkkk) Rule 901:10-6-01 (B)(3) of the Administrative Code incorporates by reference the CWA.

llll) Rule 901:10-6-02 (A) of the Administrative Code incorporates by reference the antidegradation review established by OEPA under O.R.C. Section 6111.12.

mmmm) Rule 901:10-6-02 (A)(7)(a)(iii) of the Administrative Code incorporates by reference the antidegradation review established by OEPA in O.R.C. Section 6111.12.

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[5] The rule will be changed to correct a grammatical error changing "act" to "Act". This is not a substantive change. The earliest that this rule can be adopted is some date after January 16, 2007 and can become effective ten days after adoption.

nnnn) Rule 901:10-6-02 (C)(1) of the Administrative Code incorporates by reference Section 208(B) of the CWA.

oooo) Rule 901:10-6-02 (C)(2) of the Administrative Code incorporates by reference Section 303(E) of the CWA.

The follow rules have been filed and were heard by JCARR on December 28, 2006. The earliest that they can be adopted by the Director of the Ohio Department of Agriculture is some date after January 16, 2007, and can become effective ten days after adoption.

a) Rule 901:10-1-01(EE) of the Administrative Code incorporates by reference O.R.C. 903.09 regarding which persons authorized by regulation that may file comments or request a public meeting but which will not be the subject of an adjudication hearing before the director. This is currently found in O.A.C. Rule 901:10-1-01(FF).

b) Rule 901:10-1-01(FF)(1) of the Administrative Code incorporates by reference Ohio's wellhead protection and source assessment and protection programs regarding a public water system using groundwater. This is currently found in O.A.C. Rule 901:10-1-01(GG)(1).

c) Rule 901:10-1-01(FF)(2) of the Administrative Code incorporates by reference Ohio's source water assessment and protection program regarding a public water system using surface water. This is currently found in O.A.C. Rule 901:10-1-01(GG)(2).

d) Rule 901:10-1-01(HH) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-06(A)(9)(c)(ii). This is currently found in O.A.C. Rule 901:10-1-01(II).

e) Rule 901:10-1-01(II) of the Administrative Code incorporates by reference O.R.C. Section 903.01(F). Also incorporated by reference is facility means concentrated animal feeding facilities have the same meaning as O.R.C. Section 903.01(E). This is currently found in O.A.C. Rule 901:10-1-01(JJ).

f) Rule 901:10-1-01(JJ) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-6-05(A) regarding the statement of facts in relative to the issuance of a NPDES permit for the meaning of fact sheet. This is currently found in O.A.C. Rule 901:10-1-01(KK).

g) Rule 901:10-2-14 Appendix A Table 2 of the Administrative Code is part of a rule package referenced in Section I and as amended will incorporate by reference O.A.C. Rule 3745-1-02(77) and O.A.C. Rule 901:10-1-01(R).

h) Rule 901:10-2-14 Appendix E Table 2 of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-14 Appendix A Table 2 regarding

manure application restrictions and setbacks. Also incorporated by reference is O.A.C. Rule 901:10-2-14 Appendix E Table 1 regarding the use of the P Site Assessment for application criteria for soil tests with Bray P1>150 ppm.

i) Rule 901:10-3-01(D) of the Administrative Code removes a reference to O.R.C. Section 903.01 for the definition of concentrated animal feeding operation.

j) Rule 901:10-3-02(A) of the Administrative Code removes a reference to O.A.C. Rule 901:10-3-12 (this was a typographical error) as applicable and incorporates by reference O.A.C. Rule 901:10-3-11 in its place as the end range of rules that are applicable to concentrated animal feeding operations subject to a NPDES permit.

k) Rule 901:10-3-07(A) of the Administrative Code incorporates by reference O.R.C. Section 903.10(F). Removed from reference is O.R.C. Section 901.10 because this was a typographical error.

l) Rule 901:10-4-05(A) of the Administrative Code incorporates by reference the CWA.

m) Rule 901:10-4-05(A)(1) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-1-02 for the information required for NPDES permits.

n) Rule 901:10-4-05(A)(2) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-3-01.

o) Rule 901:10-4-05(A)(3) of the Administrative Code incorporates by reference O.A.C. Rules 901:10-2-08, 901:10-2-09, 901:10-2-10, 901:10-2-11, 901:10-2-13, 901:10-2-14, 901:10-2-15, 901:10-2-16, and 901:10-2-18 as the requirements with which a manure management plan has to comply.

p) Rule 901:10-4-05(A)(4) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-08.

q) Rule 901:10-4-05(A)(5) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-16.

r) Rule 901:10-4-05(A)(6) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-17.

s) Rule 901:10-4-05(A)(7) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-20.

t) Rule 901:10-4-05(B)(2) of the Administrative Code, which incorporated by reference O.A.C. Rules 901:10-2-08 to 901:10-2-14 and 901:10-2-16, is deleted and new language is inserted replacing (B)(2).

u) Rule 901:10-4-05(B)(3) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-06 regarding the operating level of manure treatment lagoons and manure storage ponds for new and existing facilities. This presently is found in O.A C. Rule 901:10-4-05(B)(4).

v) Rule 901:10-4-05(B)(4) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-05 regarding the operative level of fabricated structures for new and expanding facilities. This presently is found in O.A.C. Rule 901:10-4-05(B)(5)

w) Rule 901:10-4-05(G)(5) of the Administrative Code incorporates by reference O.A.C. Rule 901:10-2-18 regarding the completion of a closure plan. Removed from reference is O.A.C. Rule 901:10-2-17.