



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

W-15J

July 1, 2020

Sent via electronic mail to [administration@agri.ohio.gov](mailto:administration@agri.ohio.gov)

Dorothy Pelanda, Director  
Ohio Department of Agriculture  
8995 East Main Street  
Reynoldsburg, Ohio 43068-3399

Dear Ms. Pelanda:

The U.S. Environmental Protection Agency, Region 5, in consultation with EPA Headquarters, has been working on a comprehensive review of the State of Ohio's July 8, 2015 request from former Governor Kasich to approve the transfer of certain regulatory responsibilities from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA), namely the portions of the National Pollutant Discharge Elimination System (NPDES) program regulating concentrated animal feeding operations (CAFOs) and discharges of stormwater at animal feeding operations (AFOs). As part of this review, EPA sent you a letter on August 9, 2019, identifying statutory provisions in Chapters 903 and 6111 in the Ohio Revised Code for further clarification or revision by Ohio. In furtherance of this review, and after discussions with representatives of your staff at ODA, Ohio EPA, and the Office of the Ohio Attorney General, EPA is now identifying provisions of Chapter 901:10 of the Ohio Administrative Code where clarification or revision may be needed to ensure ODA has adequate authority to implement the requested portions of the NPDES program.

We look forward to working with you to resolve these remaining issues either by ODA providing demonstration or clarification that the state's existing requirements are adequate to implement the NPDES program, or by ODA seeking revisions to Chapter 901:10. Any demonstration or clarification will be reviewed by EPA and, if appropriate, EPA may request a statement from the Ohio Attorney General memorializing such clarification. EPA stands ready to assist ODA to ensure that any proposed revisions to Chapter 901:10 will be adequate to implement the NPDES program.

The enclosure does not address conformance of Chapter 901:10 with all federal requirements. Topics that are not covered in the enclosure include requirements of 40 C.F.R. § 122.26 and

40 C.F.R. Part 450 applicable to discharges of stormwater, reporting requirements of 40 C.F.R. Parts 3 and 127, the Water Quality Guidance for the Great Lakes System in 40 C.F.R. Part 132, and relevant Effluent Guidelines and Standards in 40 C.F.R. Subchapter N (in particular, 40 C.F.R. Part 401). EPA's comments pertaining to Chapter 901:10 of the Ohio Administrative Code as they relate to the above topics will be in a separate, forthcoming letter from EPA.

We appreciate ODA's efforts, as well as those of representatives from Ohio EPA and the Office of the Ohio Attorney General, to support and collaborate with EPA as we review Ohio's proposed NPDES program transfer. Region 5 is committed to continue working with the State as it seeks to transfer portions of its NPDES authority from Ohio EPA to ODA. Once you have had an opportunity to review the enclosed comments, please have your staff contact Julianne Socha at (312) 886-4436 to schedule follow up discussions on this letter or any other related issues, or feel free to contact Russ Rasmussen or myself directly at (312) 886-7535 or (312) 886-6735, respectively.

Sincerely,

**Tera L. Fong**  
Digitally signed by Tera L. Fong  
Date: 2020.07.01  
14:25:34 -05'00'

Tera L. Fong  
Division Director, Water Division

Enclosure

ecc: Tiffani Kavalec, Ohio EPA  
Sam Mullins, Ohio Department of Agriculture  
Kelly McCloud, Ohio Department of Agriculture  
Jenna C. Foss, Office of Ohio Attorney General

## **Enclosure**

The following EPA comments identify Ohio Department of Agriculture (ODA) regulations as set forth in Chapter 901:10 of the Ohio Administrative Code where clarification or revision may be needed to ensure consistency with corresponding federal regulations, and federal regulations applicable to state programs which appear to be missing from Chapter 901:10. For each comment, please provide a written response that demonstrates the adequacy of the state regulation, provides clarification, or states that ODA intends to seek revisions to ensure that the regulation conforms to the federal requirements. Any demonstration or clarification will be reviewed by EPA and, if appropriate, EPA may request a statement from the Ohio Attorney General memorializing such clarification.

### **I. ODA's NPDES program must meet the applicable requirements of 40 C.F.R. § 123.25 for permitting discharges of pollutants**

#### **Incorporation by Reference**

1. 40 C.F.R. § 123.25(a) requires that all state programs must have the legal authority to implement and be administered in conformance with specific provisions of 40 C.F.R. Parts 3, 122, 124, 125, 127, 129, 132, and 133, and Subchapter N. The Statement of Legal Authority from the Ohio Attorney General ("AGS") included in the proposed revision to the Ohio NPDES program to transfer portions of the program from Ohio EPA to ODA ("Request to Transfer") identifies specific rules in Chapter 901:10 which incorporate certain federal statutes and certain of the aforementioned federal regulations by reference. See AGS at pp. 105-114. Incorporation by reference ("IBR") is one approach states can use to adopt state requirements that conform to federal requirements.<sup>1</sup> When IBR is used, state rules must clearly identify which federal rules are adopted and how these federal rules will be implemented in the state National Pollutant Discharge Elimination System (NPDES) program, and that state rules do not limit or restrict the scope of the federal rules that have been incorporated by reference.

(a.) Upon review of Chapter 901:10, EPA could not determine the particular NPDES authority or requirements being incorporated into the administrative rules. Therefore, there are many federal regulations for which parallel state rules cannot be found. Many IBRs in ODA's regulations are broad, vague, or otherwise insufficiently specific. For example, the AGS represents that rule 901:10-1-09(E)(5) "incorporates by reference 40 C.F.R. § 122.21 and 40 C.F.R. § 125." See AGS at p. 108. Rule 901:10-1-09(E)(5) contains one of a number of identified reasons for the modification or revocation and reissuance of a NPDES permit, namely a fundamentally different factors ("FDF") variance "within the time specified in 40 CFR section 122.21 or 40 CFR section 125 for an NPDES permit." Only 40 C.F.R. §§ 122.21(m)(1) and

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<sup>1</sup> States seeking NPDES program approval must adopt administrative regulations that are as stringent as the federal regulations. States may do so through adoption of specific State regulations that parallel federal requirements, incorporation of federal requirements by reference, or a combination of the two. Regardless of the method, States seeking NPDES program approval must have administrative regulations that include all applicable federal requirements in a manner consistent with the federal program.

125.32(a) establish timeframes applicable to FDF variances. The remaining portions of § 122.21 (which establishes permit application requirements) and Part 125 (which establishes criteria and standards for the NPDES program) do not pertain to timeframes for FDF variances or to requests to modify or revoke and reissue an NPDES permit. Any attempt to incorporate the entirety of 40 C.F.R. § 122.21 by reference would be most appropriate in a section of state rule that prescribes the content of NPDES permit applications. Likewise, any attempt to incorporate by reference all of the criteria and standards relevant to NPDES CAFO permits set forth in Part 125 would be most appropriate in a section of state rule prescribing conditions that the Director shall include in NPDES permits. EPA would like to discuss with ODA a path to (1) effectively identify federal rules to be adopted through IBR or (2) expressly incorporate all federal requirements into the ODA rules, to ensure that ODA requirements are consistent with the federal NPDES program.

(b.) State rules cannot limit or restrict the scope of federal rules that are incorporated by reference. Certain state regulations in Chapter 901:10 appear to have done so. For example, the AGS represents that rule 901:10-3-01(F) “incorporates by reference 40 C.F.R. § 122.44”, among other federal regulations.<sup>2</sup> See AGS at p.112. Rule 901:10-3-10(F) provides that the Director shall establish conditions in a permit to “provide for and assure compliance with all applicable requirements of the act and regulations” including, among other federal regulations, 40 C.F.R. § 122.44. However, rule 901:10-3-10(F) restricts the establishment of permit conditions to those “required on a case-by-case basis”, and appears to limit the establishment of the conditions in 40 C.F.R. § 122.44 (and the other listed federal regulations) to only those which establish “compliance schedules and authority to set interim compliance dates.” Section 122.44 provides that NPDES permits shall include conditions that meet specific requirements when applicable. Some of the requirements set forth in 40 C.F.R. § 122.44 that permit conditions must meet include technology-based effluent limitations and standards (see 40 C.F.R. § 122.44(a)); requirements necessary to achieve water quality standards including requirements more stringent than promulgated effluent limitations and standards (see 40 C.F.R. § 122.44(d)); and best management practices to control or abate the discharge of pollutants (see 40 C.F.R. § 122.44(k)). Federal regulations do not provide the Director with the discretion to include conditions in each NPDES permit that meet the requirements of 40 C.F.R. § 122.44 only on a case-by-case basis, or to limit the inclusion of permit conditions in 40 C.F.R. § 122.44 to those that establish compliance schedules. The same concern applies to the other federal regulations listed in rule 901:10-3-10(F). EPA would like to discuss with ODA a path to ensure that all federal rules or requirements to be adopted through IBR are adopted without limitations or restrictions.<sup>3</sup>

(c.) An IBR has the effect of fully adopting the relevant federal requirement into the state’s rules. The AGS identifies federal statutes and rules that are adopted into Chapter 901:10 by IBR, but some of these federal statutes and rules are not relevant to the portions of the NPDES

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<sup>2</sup> These include 40 C.F.R. §§ 122.46, 122.47, 122.48, and Part 132.

<sup>3</sup> A valid and clear IBR in the state’s rule is particularly important for 40 C.F.R. § 122.44, since Chapter 901:10 does not appear to have a parallel regulatory provision for § 122.44. The technology- and water quality-based effluent limitation permit requirements of § 122.44, as well as other sections of federal regulations that are cross-referenced in § 122.44, are fundamental to a NPDES program.

program that Ohio requests to transfer to ODA, or the IBR introduces confusion within Ohio law as to which state agency will administer elements of the federal program. For example, the AGS states that rule 901:10-3-02(E) incorporates by reference 40 C.F.R. Part 403. See AGS at 112. The supporting documents in the Request to Transfer state that Ohio EPA will retain administration of the pretreatment program which includes administration of the federal requirements established in Part 403. Please clarify why Chapter 901:10 incorporates by reference federal statutes and rules that are not stated as the subject of the Request to Transfer.

(d.) Please explain which version of the Code of Federal Regulations is incorporated by reference in the current Chapter 901:10. Rule 901:10-1-01(QQQQ) defines "40 C.F.R." to mean "Title 40 of the Code of Federal Regulations effective July 1, 2010." Federal regulations applicable to the portions of the NPDES program ODA seeks to administer have been revised since the July 1, 2010 publication date. Additionally, several of the specific incorporations of federal rules in the text of Chapter 901:10 identify dates that are inconsistent with the publication date of July 1, 2010 specified within ODA's definition of "40 C.F.R." at rule 901:10-1-01(QQQQ). Please propose a revision to ensure that the state rules incorporate by reference the most current version of federal regulations including any necessary revisions to specific incorporations in the text of Chapter 901:10.

#### Application for a Permit and Signatories

2. 40 C.F.R. § 122.21(b) provides that when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit. In comparison, rule 901:10-1-02(D)(3) provides that when a concentrated animal feeding operation is owned by one person but is operated by another person, the operator "may" obtain a permit. This state requirement does not impose a mandatory duty on the operator to obtain a permit under such circumstances. Please identify any other state requirement comparable to 40 C.F.R. § 122.21(b), or propose revisions to ensure that an operator is under a mandatory duty to obtain a permit under these circumstances.

3. 40 C.F.R. § 122.21 establishes requirements for the application for a NPDES permit. Section 122.21(f) establishes information that applicants for NPDES permits must provide. Section 122.21(g) establishes application requirements for, among other entities, existing manufacturing discharges including storm water discharges. Section 122.21(i) establishes requirements for new and existing CAFOs. 40 C.F.R. § 122.26(c) establishes additional application requirements for discharges of storm water associated with industrial activity. In ODA's regulations, application requirements for NPDES permits are included in rules 901:10-1-02(A) and (D), 901:10-2-07(A), and 901:10-3-01(B) and (C). EPA did not find any requirements in these rules for a permit applicant to submit the following information required in federal regulations

(a.) No more than four SIC or four NAICS codes that best reflect the principal products or services provided by the facility as required by 40 C.F.R. § 122.21(f)(3).

(b.) 40 C.F.R. § 122.21(f)(6)(iii) requires an applicant to provide the Director a list of permits or construction approvals received or applied for under various federal programs, including the NPDES program. Rule 901:10-3-01(C)(5) is Ohio's corresponding rule to 40 C.F.R. § 122.21(f)(6). EPA did not find a requirement for an applicant to provide a list of permits or approvals received or applied for under the NPDES program.

(c.) The information required by 40 C.F.R. § 122.21(g) which would be applicable if a livestock operation were applying to ODA for a NPDES permit to authorize a discharge of pollutants other than manure, litter and process wastewater pollutants.

(d.) The information required by 40 C.F.R. § 122.26(c) for discharges of storm water associated with industrial activity.

(e.) 40 C.F.R. §§ 122.21(f)(2) and 122.21(i)(1)(ii) require an applicant for a NPDES permit to provide the mailing address and location of the facility. Section 122.21(f)(7) requires the applicant for a NPDES permit to provide a topographic map extending one mile beyond the property boundaries of the source identifying specific features. EPA could not find parallel provisions in Chapter 901:10. Please propose a rule revision that would ensure that permit applicants supply the above information as required by federal rules.

4. 40 C.F.R. § 122.22(a) prescribes who shall sign permit applications. Section 122.22(a)(3) prescribes signatories for permit applications for a municipality, State, Federal or other public agency. EPA did not find comparable signatory requirements in Chapter 901:10. Please identify where in Chapter 901:10 a comparable requirement to 40 C.F.R. § 122.22(a)(3) can be found, or propose revisions to add a comparable requirement.

5. 40 C.F.R. § 122.28(b)(2)(ii) requires that notices of intent for coverage under a NPDES general permit shall be signed in accordance with § 122.22. EPA did not find a comparable requirement in Chapter 901:10. Please identify where in Chapter 901:10 a comparable requirement can be found, or propose revisions to add comparable requirement.

#### Permit Actions

6. 40 C.F.R. §§ 123.25(a)(22), (23) and (25) require that state programs must have legal authority to implement and must be administered in conformance with 40 C.F.R. §§ 122.62, 122.64, and 124.5(a), (c), (d) and (f), respectively. Section 124.5(a) provides that permits may be "modified", "revoked and reissued", or "terminated" either at the request of any interested person or upon the Director's initiative. In contrast, rule 901:10-1-03(C) provides that the Director "shall deny, modify, suspend, or revoke an NPDES permit" when the Director determines that specific criteria has been met. Rule 901:10-3-10(C) states: "The NPDES permit may be modified, revoked and reissued, or terminated for cause." Rule 901:10-3-10(D) provides that noncompliance is grounds for, among other things, the following permit actions: "permit revocation; suspension; modification; or denial of a permit renewal application". Rule

901:10-4-01(E) provides that the Director can “deny, modify, revoke or suspend” a general permit to operate. Rule 901:10-4-01(E)(2) provides that the Director may “modify, suspend, or revoke eligibility for coverage under a NPDES general permit to operate”.

As illustrated above, the State’s rules use different and inconsistent terminology regarding permit actions compared to the permit actions provided for in federal regulations. For this reason, it is unclear how the permit actions in ODA’s rules (e.g., issue, deny, modify, revoke, revoke and reissue, terminate, and suspend), correspond to the permit actions established in 40 C.F.R. §§ 122.62, 122.64, and 124.5. Further, the ODA rules contemplate a permit action, suspension, that is not contemplated in the federal program. Please clarify ODA’s terminology in the existing rules and how it addresses all of the permit actions described in EPA’s regulations and whether it includes a category of action not included in federal rules, or make revisions to ensure that permit actions provided for in Chapter 901:10 conform to the federal actions for the modification, revocation and reissuance, and termination of NPDES permits. If the rules include a category of actions not included in the federal rules, and ODA proposes to retain the category in the rules, then please identify the procedures and rule provisions applicable to completion of the actions including, but not limited to, public participation and EPA review.

7. 40 C.F.R. § 122.62 states that “[i]f cause does not exist under this section or § 122.63 [minor modifications], the Director shall not modify or revoke or reissue the permit.” Rule 901:10-1-09(B) provides that “the director may modify a permit for the following reasons which include, but are not limited to” the causes listed, which include the causes listed in 40 C.F.R. § 122.62. (Emphasis added). EPA limits permit modification to a specified range of circumstances; due to the language emphasized above, ODA does not limit modifications to such circumstances. To the extent a permit modification is allowed for any reason that is not within the scope of 40 C.F.R. §§ 122.62 or 122.63, ODA’s permit program would be less stringent than the federal requirement. Please propose a revision to rule 901:10-1-09(B) that would ensure that the causes for modification are as stringent as the federal requirements for modification.

8. 40 C.F.R. § 122.62(a)(4) provides that a NPDES permit may be modified if the Director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood or material shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. Section 122.62 states that “[i]f cause does not exist under this section or § 122.63 [minor modifications], the Director shall not modify or revoke or reissue the permit.”<sup>4</sup> Rule 901:10-1-09(E)(4) provides that the Director may modify a NPDES permit if the Director determines good cause exists for modification of a compliance schedule, such as acts of nature or “acts of third parties”, strike, flood, material shortage or other events over which the owner or operator has little or no control and for which there is no reasonably available remedy. “Acts of third parties” is not included in the list of causes for compliance schedule modification in § 122.62(a)(4).

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<sup>4</sup> As discussed in the NPDES State Program Guidance, States may adopt any or all of the causes for modifications included in § 122.62(a). However, States may not create additional causes or justifications for modification. NPDES State Program Guidance for Development and Review of State Program Applications and Evaluation of State Legal Authorities (40 C.F.R. Parts 122-125 and 403), Volume 1, July 29, 1986, p. 4-37.

The AGS, p. 84, states: “While the language in O.A.C. 901:10-1-09(E)(4) regarding compliance schedules differs slightly from 40 C.F.R. § 122.62(a)(4) in that the Ohio rule substitutes the phrase ‘acts of nature or acts of third parties’ for ‘an act of God,’ this difference is insignificant.” However, an “act of God” in legal contexts is generally understood to be independent of any act of human agency, such as that of a third party. An “act of God” is defined as an “act occasioned exclusively by forces of nature without the interference of any human agency”. Black’s Law Dictionary (6<sup>th</sup> Edition). “Act of nature” means “act of God”. *Id.* See also City of Piqua v. Morris, 98 Ohio St. 42 (1918) (“act of God” means a disaster “due directly and exclusively to ... a natural cause, without human intervention”).

The AGS goes on to state: “Furthermore, the phrase ‘or acts of third parties’ is merely redundant as it reiterates the phrase in 40 C.F.R. § 122.62(a)(4) ‘or other events over which the permittee has little or no control.’” Although some third-party actions could be events over which the owner or operator has little or no control, there could be instances where the owner or operator does have control or influence over acts of third parties.

Please expand on the interpretation in the AGS that “acts of third parties” is comparable to an “act of God” or “other events over which the permittee has little or no control”, or propose revisions to ensure that rule 901:10-1-09(E)(4) is as stringent as § 122.62(a)(4).

9. 40 C.F.R. § 124.5(a) provides that permits may be modified, revoked and reissued, or terminated at the request of any interested person (including the permittee) or upon the director’s initiative. Rule 901:10-1-09(E) provides that the Director or an interested person including the permittee may request a modification or a revocation and reissuance, or both. Rule 901:10-1-03 provides for permit termination (i.e., revocation or ending of permit coverage) by the Director. EPA did not find any requirement in Chapter 901:10 that provides that an interested third party may request permit termination, as required by § 124.5(a).

Section 124.5(a) also provides that all requests for modification, revocation and reissuance, and termination shall be in writing and shall contain facts or reasons supporting the request. Rules 901:10-1-09(F) and (G) set forth requirements for what an owner or operator must submit if requesting a permit modification. Rule 901:10-2-18(C) provides that a permittee planning to end permit coverage must notify the Director, and identifies what the permittee must submit to the Director. EPA did not find any state requirements in Chapter 901:10 requiring that a request from an interested person who is not an owner or operator or the permittee for the modification, revocation and reissuance, or termination of a permit shall be in writing, or establishing what the contents of such request shall include, as required by § 124.5(a).

Please identify where in Chapter 901:10 comparable requirements to those established in 40 C.F.R. § 124.5(a) may be found, or propose revisions to ensure consistency with 40 C.F.R. § 124.5(a).

10. 40 C.F.R. § 124.5(c)(1) requires that if the Director tentatively decides to modify or revoke and reissue a permit then a draft permit shall be prepared incorporating the proposed changes, and in the case of a revoked and reissued permit, the Director shall require the submission of a new application. With regard to a tentative decision by the Director to revoke and reissue a



permit, EPA did not find a comparable state requirement. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

11. 40 C.F.R. § 124.5(c)(2) provides that when a permit is revoked and reissued the entire permit is reopened, and that during any revocation and reissuance proceeding the permittee shall comply with the existing permit until a new final permit is reissued. EPA did not find comparable state requirements. Please identify where comparable requirements can be found, or propose revisions to add comparable requirements.

12. 40 C.F.R. § 122.28(b)(1) provides that NPDES general permits may be issued, modified, revoked and reissued, or terminated in accordance with the applicable requirements of 40 C.F.R. Part 124. Section § 124.5(a) provides that permits may be modified, revoked and reissued, or terminated at the request of any interested person (including the permittee) or upon the Director's initiative. Rule 901:10-1-09(E) provides that the Director or an interested person including the permittee may request a modification of a permit. However, rule 901:10-4-01(G) provides that only the Director may modify general permits. Please clarify whether rule 901:10-4-01(G) prevents or limits an interested person, including the permittee, from requesting that a general permit be modified as provided for in rule 901:10-1-09(E), or propose a revision to allow interested persons and permittees to request modifications of NPDES general permits.

#### Permit Conditions

13. Rule 901:10-3-01(E) provides that “[i]n establishing the terms and conditions of the NPDES permit, the director, to the extent consistent with the act, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit.” This state rule does not appear to parallel a specific federal regulation required for a state program and appears to present a conflict with federal requirements. For example, 40 C.F.R. § 122.44(d) requires that NPDES permits include water-quality based effluent limitations. However, under federal regulations technical feasibility and economic costs are not factors for consideration in the development of such effluent limitations for inclusion in NPDES permits. Additionally, 40 C.F.R. § 122.41(a) requires that permittees must comply with all conditions of a permit. Section 122.41(a) does not provide for a reasonable period of time for coming into compliance with the permit. Permittees can have additional time to comply with terms and conditions of a permit only if the permittee has been issued a compliance schedule in accordance with requirements of 40 C.F.R. § 122.47. Please clarify how rule 901:10-3-01(E) will ensure implementation of federal requirements, or propose a revision to delete this rule.

14. 40 C.F.R. § 122.41 establishes conditions that apply to all NPDES permits. With the exception of 40 C.F.R. § 122.41(l)(9), the “permittee” is the identified person required to comply with the requirements established in § 122.41. In ODA regulations, standard permit terms and conditions applicable to NPDES permits are included in rule 901:10-3-10. Some of these state provisions indicate that the provision is applicable to the “owner or operator” in contrast to the federal regulations, while some of these state provisions indicate that the provision is applicable to the “permittee”, consistent with federal regulations. To ensure consistency with federal regulations, rule 901:10-3-10 should be revised to replace the phrase “owner or operator” with

“permittee” or ODA should commit to write permits to apply permit conditions deriving from § 122.41 to the named permittee.

15. 40 C.F.R. § 122.41 establishes conditions that apply to all NPDES permits. In ODA regulations, standard permit terms and conditions applicable to NPDES permits are included in rule 901:10-3-10. EPA did not find any requirements in this rule comparable to the following federal requirements:

(a.) 40 C.F.R. § 122.41(j)(3)(iv) provides that NPDES permits shall include a condition that records of monitoring information shall include the individual(s) who performed the analysis. Please identify whether any ODA regulation provides for inclusion of this information in the NPDES permit, or propose a revision to ensure consistency with § 122.41(j)(3)(iv).

(b.) 40 C.F.R. § 122.41(l)(4) requires permits to state that “monitoring results shall be reported at the intervals specified elsewhere in this permit”. Section 122.41(l)(4)(i) provides that “monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices”; it also requires electronic reporting pursuant to 40 C.F.R. Parts 3 and 127. Section 122.41(l)(4)(ii) provides that if the permittee monitors any pollutant more frequently than required by the permit using approved test procedures, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director. Section 122.41(l)(4)(iii) states that “[c]alculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.” Additionally, 40 C.F.R. § 122.41(l)(7) states that permittees shall report all instances of noncompliance not reported under 40 C.F.R. § 122.41(l)(4) (which pertains to monitoring reports) at the time monitoring reports are submitted. EPA did not find comparable state requirements. Please clarify whether ODA’s regulations provide for these provisions, or propose revisions to ensure consistency with §§ 122.41(l)(4) and (l)(7).

16. 40 C.F.R. § 122.41(i) requires the permittee to allow the Director or an authorized representative, upon presentation of credentials, to enter premises, and, at reasonable times, to have access to records, conduct inspections, and sample or monitor. CWA § 308(a)(B) provides federal statutory authority, upon presentation of credentials, for the right of entry to any premises in which an effluent source is located to conduct inspections. The federal regulations for compliance evaluation programs at 40 C.F.R. § 123.26(c) require the State Director or State officers to have the authority to enter any site or premises subject to regulation to inspect. The only limitation on entry imposed in federal law and regulations is presentation of credentials and other documents as may be required by law. The State parallel requirements at rule 901:10-3-10(H) impose an additional condition of compliance with biosecurity procedures before a permittee shall allow the Director entry and inspection. As stated in guidance,<sup>5</sup> EPA agrees that state biosecurity procedures should be followed, and states should consider facility-specific biosecurity procedures prior to inspection and entry. However, inspection and entry conditioned

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<sup>5</sup> NPDES Compliance Inspection Manual, EPA Publication Number: 305-K-17-001, Interim Revised Version, January 2017, Chapter 15, p. 375.

by state rule upon compliance with a facility's biosecurity procedures or ODA's biosecurity procedures would be more limiting than the federal requirements at 40 C.F.R. §§ 122.41(i) and 123.26(c) and should not be included as a condition of inspection and entry. Please propose rule revisions to ensure that permit terms and conditions pertaining to entry and inspection are consistent with and as stringent as the federal requirements for such.

17. 40 C.F.R. § 122.41(I)(5) establishes reporting requirements for compliance or non-compliance with a compliance schedule included as a condition of a permit. 40 C.F.R. § 122.47 establishes requirements applicable to compliance schedules included in permits. 40 C.F.R. § 122.43(a) requires that in addition to conditions required in all permits set forth in 40 C.F.R. §§ 122.41 and 122.42, the Director shall establish conditions in permits, as required on a case-by-case basis, to provide for and ensure compliance with all applicable requirements in §§ 122.46, 122.47(a), 122.48, and parts 3 and 127. Rule 901:10-3-10(R) appears to be an attempt to parallel all three of these federal requirements, but the language of rule 901:10-3-10(R) is not fully consistent with any of these. Please clarify which federal requirement rule 901:10-3-10(R) is intended to parallel, identify where comparable state requirements to 40 C.F.R. §§ 122.41(I)(5), 122.47, and 122.43(a) can be found, or propose revisions to add comparable requirements.

#### Fact Sheet, Public Notice of Permit Actions, Public Comments, and Public Hearings

18. 40 C.F.R. §§ 124.8(a) and 124.10(e) require that the Director mail a copy of the fact sheet prepared for a draft permit to the permit applicant. EPA did not find a comparable state requirement. Please identify where a comparable requirement can be found, or propose a revision to ensure fact sheets are sent to applicants.

19. 40 C.F.R. § 124.8(a) requires the Director to send the fact sheet to any person who requests the fact sheet. EPA did not find a comparable state requirement. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

20. 40 C.F.R. §§ 124.8(b) and 124.56 identify specific information that shall be contained in the fact sheet. EPA did not find comparable state requirements. Rule 901:10-6-05(A) does provide that a "fact sheet shall include such information as may be required by federal statute or rule and may also include such additional information as the department deems desirable," and rule 901:10-4-04(C) does provide that a fact sheet for a general permit must set forth "the principal facts and significant factual, legal, methodological and policy questions considered in preparing the general permit." Please clarify how rules 901:10-6-05(A) and 901:10-4-04(C) will be implemented to ensure that the content of fact sheets will include the specific content identified in federal regulations, or propose a revision that identifies the specific information to be contained in fact sheets.

21. 40 C.F.R. § 124.10(c) establishes methods for providing the public notice required by 40 C.F.R. § 124.10(a)(1) for a draft permit<sup>6</sup> and a public hearing, and identifies recipients who must receive public notice by mail. Public notice of the draft permit, notice of intent to deny a

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<sup>6</sup> 40 C.F.R. § 124.2 defines *Draft permit* to mean "a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a 'permit.' A notice

permit application (referred to as a proposed action in the Ohio Administrative Code), and scheduling of a public hearing (referred to as a public meeting in the Ohio Administrative Code) must be mailed to the persons listed in 40 C.F.R. §§ 124.10(c)(1)(i)-(iv), (ix), and (x).

(a.) 40 C.F.R. § 124.10(c)(1)(ii) requires the state to mail notice of a draft permit, a proposed action, or scheduling of a public meeting to any other agency which the Director knows has issued or is required to issue a RCRA, UIC, CAA, NPDES, 404, or sludge management permit for the same facility or activity. EPA did not find comparable state provisions. ORC sections 903.09(A) and (F) state that ODA “shall provide” notice of draft permits and proposed actions “to any other persons that are entitled to notice under the Federal Water Pollution Control Act.” Rule 901:10-6-01(B)(3) states that ODA “shall provide” notice of a proposed action “to any other persons that are entitled to notice under the Federal Water Pollution Control Act.” However, these state provisions do not specify that such notices shall be mailed, nor do they cover notices for the scheduling of public meetings. Please propose rule revisions or create procedures that ensure that notifications, notification methods, and recipients are consistent with 40 C.F.R. § 124.10(c)(1)(ii).

(b.) EPA did not find that rule 901:10-6-03(C) specifies the method by which notice of draft permits and proposed actions will be provided to any affected state, interstate, federal or local government agency having jurisdiction over fish, shellfish, and wildlife resources or over coastal zone management plans, the relevant state historic preservations office, and any affected Indian tribe. 40 C.F.R. § 124.10(c)(1)(iii) requires this notice to be mailed. Additionally, rule 901:10-6-03(C) does not provide that notice of the scheduling of a public meeting will be mailed to these persons, as required by 40 C.F.R. § 124.10(c)(1)(iii).

40 C.F.R. § 124.10(c)(1)(iv) also requires that notice of a draft permit, a proposed action, or scheduling of a public meeting be mailed to the U.S. Fish & Wildlife Service and National Marine Fisheries Service. EPA did not find a state rule requiring notice to the U.S. Fish & Wildlife Service or the National Marine Fisheries Service by mail. Rule 901:10-6-01(B)(2) does provide that notice by mail will be provided to the U.S. Fish & Wildlife Service if an antidegradation review of a NPDES permit application indicates the potential to lower water quality. However, this is narrower than the notification that is required by 40 C.F.R. § 124.10(c)(1)(iv), and does not provide for notification to the National Marine Fisheries Service.<sup>7</sup>

Please clarify whether ODA has a state rule that identifies the method of notification, or propose a revision to ensure the state’s method of notification is consistent with 40 C.F.R. §§ 124.10(c)(1)(iii) and 124.10(c)(1)(iv).

(c.) EPA did not find that rule 901:10-6-02(C) specifies the method by which notice of a draft permit, a proposed action, or scheduling of a public meeting will be provided to any State agency responsible for plan development under 40 C.F.R. §§ 208(b)(2), 208(b)(4) or 303(e) of the

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of intent to terminate a permit and a notice of intent to deny a permit as discussed in § 124.5, are types of ‘draft permits.’ A denial of a request for modification, revocation and reissuance or termination, as discussed in § 124.5, is not a ‘draft permit.’ A ‘proposed permit’ is not a ‘draft permit.’”

<sup>7</sup> The National Marine Fisheries Service, an office of the National Oceanic and Atmospheric Administration within the Department of Commerce, has a Great Lakes program.

CWA. 40 C.F.R. § 124.10(c)(1)(iv) requires this notice to be mailed. Please clarify whether ODA has a state rule that identifies the method of notification, or propose a revision to ensure the state's method of notification is consistent with 40 C.F.R. § 124.10(c)(1)(iv).

(d.) EPA did not find a state rule requirement to mail notice of a draft permit, a proposed action, or scheduling of a public meeting to the U.S. Army Corps of Engineers ("ACOE"), as required by 40 C.F.R. § 124.10(c)(1)(iv). Rule 901:10-6-03(B) does provide that a fact sheet will be transmitted to the ACOE at the time of public notice of an application for issuance or modification of a permit, and that, upon request, a copy of the application for NPDES permit or a copy of the draft NPDES permit will be provided. However, providing a copy of the application or draft permit "upon request" is not comparable to the notice requirements of 40 C.F.R. § 124.10(c)(1)(iv), nor does rule 901:10-6-03(B) provide for mailing of a notice of a draft permit, a proposed action, or scheduling of a public meeting to the ACOE. Please clarify whether ODA has a state rule that identifies notification requirements, including method of notification, applicable to the ACOE, or propose a revision to ensure that state notice requirements are consistent with 40 C.F.R. § 124.10(c)(1)(iv).

(e.) 40 C.F.R. § 124.10(c)(1)(x)(A) requires notices of draft permits, proposed actions, and scheduling of public hearings to be mailed to any unit of local government having jurisdiction over the area where the facility is proposed to be located. Rule 901:10-6-01(B)(1) requires ODA to mail notice of the issuance of a draft permit and a copy of the draft permit to the board of county commissioners, board of township trustees, local board of health, local soil and water conservation district, and owners or operators of public water systems, where the facility is located or proposed to be located. Rule 901:10-6-01(B)(3) requires ODA to mail notice of a proposed action and a copy of the proposed action to the board of county commissioners and the board of township trustees where the facility is located or proposed to be located.

EPA did not find a state rule requirement for ODA to mail notice of scheduling of the public meeting to units of local government having jurisdiction over the area where the facility is proposed to be located or State agencies. Please clarify whether ODA has a state rule applicable to these entities that requires notification of the public hearing, including method of notification, or propose a revision to ensure that state notice requirements are consistent with 40 C.F.R. § 124.10(c)(1)(x)(A).

(f.) EPA did not find a state requirement to mail notices of draft permits, proposed actions, and scheduling of public meetings to each State agency having any authority under State law with respect to the construction or operation of the facility as required by 40 C.F.R. § 124.10(c)(1)(x)(B). Please clarify whether ODA has a state rule that requires such notification, including method of notification, or propose a revision to ensure that state notice requirements are consistent with 40 C.F.R. § 124.10(c)(1)(x)(B).

22. 40 C.F.R. § 124.10(a)(1) requires the Director to provide public notice for a draft permit and for a public hearing. § 124.10(c) identifies the method of delivery for these notices and a list of recipients for such notices, which include multiple state and government agencies. 40 C.F.R. § 124.10(d) identifies the contents for these notices. Hence, federal rules require notices of draft permits and public hearings to be given to state and government agencies, and identify the

contents of these required notices. Rule 901:10-6-02(B) identifies what must be included in “the notice required by paragraph (A) of rule 901:10-6-01 of the Administrative Code to be given to state and governmental agencies”. However, rule 901:10-6-01(A) does not apply to or require any notices to state and governmental agencies. Thus, ODA has no provision identifying the contents of these notices to state and government agencies, as required by 40 C.F.R. § 124.10(d). Please clarify whether the reference to rule 901:10-6-01(A) establishes notice requirements consistent with 40 C.F.R. §§ 124.10(a)(1), 124.10(c), and 124.10(d), or propose revisions to rule 901:10-6-02(B) to reduce any confusion.

23. 40 C.F.R. § 124.10(c)(1)(ix) further establishes procedures for how the state should develop the mailing list for public notices. Rule 901:10-6-06 establishes similar procedures for developing a mailing list, except that ODA’s rule only refers to persons or groups interested in receiving fact sheets and public meeting notices. To conform to 40 C.F.R. § 124.10(c)(1)(ix), ODA’s mailing list should include persons interested in receiving notices of draft permits and proposed actions, as well as fact sheets and public meeting notices. Please clarify whether the state’s rules require the development of a mailing list for persons interested in notices for draft permits and proposed actions, or propose revisions to ensure that mailing lists are developed for such persons.

24. 40 C.F.R. § 124.10(d)(1)(vii) requires all public notices to include a general description of the location of each existing or proposed discharge point and the name of the receiving water. In contrast, rule 901:10-6-02(A)(4) requires that for the issuance of permits or proposed actions, public notices shall include the location of the facility and a “short description of any discharge indicating whether any discharge is a new or an existing discharge.” Please clarify whether rule 901:10-6-02(A)(4) requires public notices to include the location of any existing or proposed discharge point and the name of the receiving water as required by 40 C.F.R. § 124.10(d)(1)(vii), or propose revisions to ensure that such information is included in public notices for the issuance of permits or proposed actions.

25. 40 C.F.R. § 124.10(d)(2)(i) requires that the public notice of a hearing shall contain reference to the dates of previous public notices relating to the permit. Rule 901:10-6-04 does not include a requirement for ODA to include in its public notices for public meetings a reference to the dates of all previous public notices relating to the permit.<sup>8</sup> Please clarify whether ODA’s rules provide for such reference, or propose revisions to ensure that ODA’s public notices for public meetings contain a reference to the dates of all previous public notices relating to the permit.

26. 40 C.F.R. §§ 124.10(d)(2) and 124.10(d)(1)(iii) require public notices for hearings to include a brief description of the business conducted at the facility or activity described in the permit application or the draft permit. EPA did not find a comparable state requirement in rule 901:10-6-04(E) for public notices for public meetings. Please clarify whether other state rules require such information, or propose revisions to ensure that this information is included in public notices for public meetings.

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<sup>8</sup> Rule 901:10-6-04(E)(4) does provide that the public notice of the public meeting shall include the date of issuance of the notice of the draft permit. However, this is insufficient to cover the dates of any other public notices related to the permit that ODA may have issued.

27. 40 C.F.R. § 124.10(e) states that a copy of the fact sheet, the permit application, and the draft permit shall be mailed to all persons identified in 40 C.F.R. § 124.10(c)(1)(i)-(iv).

(a.) In accordance with 40 C.F.R. §§ 124.10(c)(1)(ii) and 124.10(e), the Director shall mail a copy of the fact sheet, the permit application, and the draft permit to any agency, including EPA, which the Director knows has issued or is required to issue a RCRA, UIC, CAA, NPDES, 404, or sludge management permit for the same facility or activity. Rule 901:10-6-02(B)(3) provides that notice of NPDES permit applications to government agencies shall include a copy of the fact sheet and a statement that a copy of the application for a NPDES permit or the draft NPDES permit including ancillary papers “will be provided upon request.” Please clarify whether state rule requires the fact sheet to be mailed to government agencies, or propose revisions to ensure the method of delivery is consistent with 40 C.F.R. § 124.10(e).

Additionally, providing a copy of the permit application and draft permit “upon request” is not comparable to the notice requirements of § 124.10(e) which does not have language authorizing states to furnish copies of permit applications and draft permits only upon request. Please clarify whether the Director is required by state rule to mail a copy of the permit application and draft permit to government agencies identified in 40 C.F.R. § 124.10(c)(1)(ii), or propose revisions to ensure that state rule requires delivery of these documents, including the method of delivery, consistent with 40 C.F.R. § 124.10(e).

(b.) In accordance with 40 C.F.R. §§ 124.10(c)(1)(iii) and 124.10(e), the Director shall mail a copy of the fact sheet, permit application, and draft permit to federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, the Advisory Council on Historic Preservation, State Historic Preservation Officers, and any affected States, which includes any Indian Tribes treated as States. Rule 901:10-6-03(C) requires ODA to “provide” the public notice information in rule 901:10-6-02 to federal or state agencies with jurisdiction over fish, shellfish, and wildlife resources, the relevant state historic preservations office, any affected state, and any affected Indian tribe. Additionally, rule 901:10-6-02(B)(3) requires public notices to state and governmental agencies to include a copy of the fact sheet and a statement that a copy of the application for a NPDES permit or the draft NPDES permit including ancillary papers “will be provided upon request.” Providing a copy of the permit application and draft permit “upon request” is not comparable to the notice requirements of 40 C.F.R. § 124.10(e), which does not have language authorizing states to furnish copies of permit applications and draft permits only upon request. Please clarify whether the Director is required by state rule to mail a copy of the permit application and draft permit to government agencies and states as identified in 40 C.F.R. § 124.10(c)(1)(iii), or propose revisions to ensure that state rule requires delivery of these documents, including the method of delivery, consistent with 40 C.F.R. § 124.10(e).

(c.) In accordance with 40 C.F.R. §§ 124.10(c)(1)(iv) and 124.10(e), the Director shall mail a copy of the fact sheet, permit application, and draft permit to any State agency responsible for plan development under Section 208(b)(2), 208(b)(4) or 303(e) of the CWA, 33 U.S.C. §§ 1288(b)(2), 1288(b)(4), and 1313(e). Rule 901:10-6-02(C) states that notice required by rule 901:10-6-02(B) shall also “be given” to any agencies responsible for plan development under Sections 208(b) or 303(e) of the CWA. Additionally, Rule 901:10-6-02(B)(3) requires public

notices to state and governmental agencies to include a copy of the fact sheet and a statement that a copy of the application for a NPDES permit or the draft NPDES permit including ancillary papers “will be provided upon request.” Providing a copy of the permit application and draft permit “upon request” is not comparable to the notice requirements of 40 C.F.R. § 124.10(e) which does not have language authorizing states to furnish copies of permit applications and draft permits only upon request. Please clarify whether the Director is required by state rule to mail a copy of the permit application and draft permit to government agencies and states as identified in 40 C.F.R. § 124.10(c)(1)(iv), or propose revisions to ensure that state rule requires delivery of these documents, including the method of delivery, consistent with 40 C.F.R. § 124.10(e).

(d.) In accordance with 40 C.F.R. §§ 124.10(c)(1)(iv) and 124.10(e), the Director shall mail a copy of the fact sheet, permit application, and draft permit to the U.S. Army Corps of Engineers. EPA did not find a state requirement to mail copies of the permit application and draft permit to the ACOE. If rule 901:10-6-02(B) applies to the ACOE, rule 901:10-6-02(B)(3) indicates that copies of the NPDES permit application and the draft NPDES permit including all ancillary papers “will be provided upon request”. This is not comparable to the notice requirements of 40 C.F.R. § 124.10(e), which requires these documents to be mailed, and which does not have language authorizing states to furnish copies of permit applications, draft permits, or related papers only upon request. Please clarify whether ODA is required by state rule to mail these documents to the ACOE, and whether copies of permit applications, draft permits, and ancillary papers are required to be included in the notices mailed to the ACOE. Otherwise, please propose revisions to ensure that the permit application and draft permit are provided to the ACOE by mail, and that the state’s rules require the copies of the above documents to be included in notices to the ACOE.

28. 40 C.F.R. § 124.11 provides that during the public comment period, any interested person may submit written comments on the draft permit. As stated in 40 C.F.R. § 124.6, a notice of intent to deny a permit application is a type of draft permit which follows the same procedures as any draft permit. In ODA’s rules, a notice of intent to deny a permit application is termed a “proposed action”. While rule 901:10-6-02(A) states that it applies to proposed actions as well as to the issuance of NPDES permits, rule 901:10-6-02(A)(6)(a) only provides that public notices shall state that any interested person may submit a written comment on the draft permit. There is no language allowing any interested person to submit comments on a proposed action. Please clarify whether state rules allow interested persons to submit written comments on proposed actions (including proposed permit denials), or propose revisions to allow such comments.

29. 40 C.F.R. § 124.12(a) requires the Director to hold a public hearing when he or she finds there is a significant degree of public interest in a draft permit. Rule 901:10-6-04(C) states that ODA shall hold one public meeting<sup>9</sup> when ODA determines that there is “significant public interest” in a draft permit or proposed action, or where required by statute or rule. Rule 901:10-6-04(D) defines significant public interest to mean twenty or more persons or one or more public officials expressing interest in the draft permit or in an antidegradation review and

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<sup>9</sup> Public meeting is defined at ORC section 903.01(CC) to mean a “nonadversarial public hearing at which a person may present written or oral statements for the director of agriculture’s consideration.”



requesting a public meeting. Rule 901:10-6-01(D) provides that ODA may hold a public meeting at the Director's discretion, whenever, for example, such a public meeting might clarify one or more issues involved in the permit decision.

40 C.F.R. § 124.12(a) requires the Director to hold a public hearing when he or she finds there is a significant degree of public interest in a draft permit. Under federal regulations, a notice of intent to deny a permit is a type of draft permit (see 40 C.F.R. § 124.6(b)). Under ODA's laws and regulations, the Director's intent to deny a permit is a "proposed action" rather than a "draft permit" (see ORC section 903.09(F) and Rule 901:10-6-01(A)(5)). EPA did not find any reference in rule 901:10-6-04(D) to a notice of intent to deny a permit or any other type of proposed action. By not having a provision that requires a public meeting when there is a significant degree of public interest in a proposed action, ODA's rules do not meet the federal requirement for public meetings for permit denials. Please clarify whether the state's rules allow for a public meeting to be held when there is significant public interest in a proposed action, or propose revisions to allow such public meeting for a proposed action.

30. 40 C.F.R. § 124.59(a) provides that review or appeal of denial of a permit or of conditions specified by the ACOE shall be made through the applicable procedures of the ACOE. Rule 901:10-6-02(B)(2)(b) identifies actions the Director shall take in response to recommendations from the ACOE. However, EPA did not find a requirement comparable to 40 C.F.R. § 124.59(a) regarding the application of ACOE procedures for review or appeal. Please identify where in Chapter 901:10 a comparable requirement to 40 C.F.R. § 124.59(a) can be found, or propose revisions to add a comparable requirement.

31. 40 C.F.R. § 124.59(b) provides that the Director may include conditions in a permit, to the extent they are determined to be necessary to carry out the provisions of 40 C.F.R. § 122.49 and the CWA, based on written comments from the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or other State or Federal agencies with jurisdiction over fish, wildlife, or public health advising the Director that the imposition of specified conditions are necessary to avoid substantial impairment of fish, shellfish, or wildlife resources. EPA did not find a comparable state requirement. Please identify whether ODA's rules provide for this action, or propose a revision providing for such action.

32. 40 C.F.R. § 124.59(c) provides that the Director may consult with other federal and state agencies before issuing a draft permit and may reflect their views in the fact sheet or the draft permit. EPA did not find a comparable state requirement enabling the ODA Director to consult with other federal and state agencies and to reflect such agencies' views in the fact sheet or draft permit, consistent with 40 C.F.R. § 124.59(c). Please clarify whether ODA's rules provide for this action, or propose a revision providing for such action.

### NPDES general permits

33. ORC section 903.03(E) gives the Director the authority to issue general permits to operate in lieu of individual permits to operate. ORC section 903.08(F) authorizes the Director to issue NPDES general permits in lieu of NPDES individual permits. These two sections of the Ohio Revised Code provide for general permits to operate issued pursuant to state legislation, and

NPDES general permits issued pursuant to CWA authority. Rule 901:10-1-02(A)(2) provides that a person who seeks coverage by a general permit must refer to rules 901:10-3-11 and 901:10-4-01 to 901:10-4-05 for a general permit to operate, NPDES general permit, or a general NPDES storm water permit. Consistent with the Ohio Revised Code, rule 901:10-1-02(A)(2) identifies two types of general permits, i.e., a general permit to operate and a NPDES general permit. It further distinguishes a general NPDES storm water permit from these other types of general permits.

Rules 901:10-4-01 to 901:10-4-05 do not clearly distinguish between requirements that apply to general permits to operate authorized by ORC section 903.03(E), and requirements that apply to NPDES general permits authorized by ORC section 903.08(F). For example, the federal requirements at 40 C.F.R. § 122.28(a) for areas and sources to be covered under NPDES general permits are paralleled by ODA at rule 901:10-4-01(A), but ODA uses the term “general permit to operate” rather than “NPDES general permit”. Nowhere is it explicitly indicated that the authorities in rule 901:10-4-01(A) are applicable to NPDES general permits. Thus, ODA’s rule is less stringent than EPA’s. Further, Chapter 901:10-4 uses the terms *general permit*, *general permit to operate*, *NPDES general permit to operate*, and *general NPDES permit*, but does not provide definitions for any of these terms, nor are these terms used consistently. It is therefore difficult to determine which requirements apply to which type of general permit.

Please clarify which terms and requirements established in Chapter 901:10-4 apply to ODA’s authority to issue NPDES general permits pursuant to ORC section 903.08(F), and which apply to general permits to operate pursuant to ORC section 903.03(E). Please propose any rule revisions that may be necessary to ensure that ODA’s NPDES general permit requirements are clearly delineated as such, and are consistent with and as stringent as the federal NPDES general permit requirements.

The following comments, numbered 34 through 42, are based on EPA’s assumption that all provisions of rule 901:10-4 are applicable to NPDES general permits regardless of which general permit term is used in the rule.

34. 40 C.F.R. § 122.28(b)(1) provides that NPDES general permits may be issued, modified, revoked and reissued, or terminated in accordance with the applicable public notice requirements of 40 C.F.R. Part 124 or corresponding state regulations.<sup>10</sup> 40 C.F.R. §§ 124.5(c)(1) and (d)(1) provide that if the Director decides to modify, revoke and reissue, or terminate a permit, the Director shall follow the procedures for a draft permit under 40 C.F.R. § 124.6. 40 C.F.R. § 124.10(a)(ii) requires the Director to give public notice that a draft permit has been prepared under 40 C.F.R. § 124.6(d). ODA’s public notice regulations corresponding to 40 C.F.R. Part 124 are in Chapter 901:10-6. For the modification, revocation and reissuance, or termination of NPDES general permits by ODA, EPA did not find a requirement in rule 901:10-4-01 or elsewhere for ODA to follow the notice and procedural requirements of Chapter 901:10-6. Please clarify whether ODA is fully obligated to follow applicable notice and procedural requirements of Chapter 901:10-6 when modifying, revoking and reissuing, or terminating a

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<sup>10</sup> 40 C.F.R. § 124.2 defines permit to include a NPDES general permit.

NPDES general permit, or propose a revision to ensure such procedures are followed for such actions.

35. Rule 901:10-4-01(E) provides that if the Director denies a general permit the Director will afford the affected parties with the opportunity to request a hearing. Please clarify if this reference to denying a general permit refers to issuance of the original general permit or an individual CAFO's request for coverage under a general permit. By its own terms, rule 901:10-4-01(E) suggests that the denial subject to the opportunity for a hearing applies to the issuance of the original general permit. However, denial of the issuance of an original general permit is not an actual permit action contemplated by the federal rules. Additionally, requiring an opportunity for a hearing when ODA "denies" the issuance of a general permit would be inconsistent with the federal authorities at 40 C.F.R. §§ 122.28(a) and (b)(3)(i), which do not require a hearing when the director decides not to issue a general permit for certain areas or sources, or removes authorized sources from coverage under a general permit when appropriate. Finally, there are two sets of federal requirements for public participation that ODA must include in its administrative rules to conform with federal requirements, i.e., requirements set forth in Part 124 which apply to all NPDES permits, and those set forth in 40 C.F.R. §§ 122.23 and 122.42 specific to CAFO permits. It is not clear what federal requirement rule 901:10-4-01(E) is intended to parallel. Clarification from the state will provide EPA the information needed to assess if the Ohio administrative rules parallel federal requirements.

36. ORC section 903.08(F) states "the director of agriculture shall issue general NPDES permits that will apply in lieu of individual NPDES permits." (Emphasis added). Rule 901:10-4-01(A)(1) provides that the Director "shall develop general permits", which appears consistent with the ORC section 903.08(F). In contrast, rule 901:10-4-01(C) states that "[i]f the [D]irector decides to issue a general permit", then notice procedures are to be followed. (Emphasis added.) Such language in rule 901:10-4-01(C) appears to give the Director discretion on whether to issue a general permit, thus presenting an apparent inconsistency with the mandatory duty imposed on the Director to issue and develop a NPDES general permit presented in rule 901:10-4-01(A)(1) and ORC section 903.08(F). 40 C.F.R. § 122.28(a)(3) does not impose a mandatory duty on the Director to issue a NPDES general permit. Please clarify whether ODA's authorities impose a discretionary or mandatory duty on the Director to issue a NPDES general permit for CAFOs, and, if appropriate, propose any necessary revisions to resolve the inconsistency.

37. 40 C.F.R. § 122.28(a)(3) provides that the Director may issue a NPDES general permit in accordance with water quality-based limits where sources within a specific category or subcategory of dischargers are subject to water quality-based limits imposed pursuant to 40 C.F.R. § 122.44. EPA did not find a comparable state requirement in Chapter 901:10. Please clarify whether by this omission ODA intends the Director to not have the authority to issue a NPDES general permit as provided by 40 C.F.R. § 122.28(a)(3), or propose revisions to add a comparable requirement.

38. 40 C.F.R. § 122.28(b)(2)(iii) requires that NPDES general permits specify the deadline for submitting a notice of intent for coverage under a NPDES general permit. EPA did not find a comparable requirement in Chapter 901:10. Please identify where in Chapter 901:10 a comparable requirement can be found, or propose revisions to add a comparable requirement.

39. 40 C.F.R. § 122.28(b)(3)(iii) provides that an owner or operator authorized by a NPDES general permit may request to be excluded from the coverage of the NPDES general permit. Section 122.28(b)(3)(iii) prescribes the procedural actions that the owner or operator shall take for the request and a time frame for such required actions. Rule 901:10-4-02(D) provides that any person covered by a general permit may choose to pursue an individual permit, and rule 901:10-4-03(D) provides that a person eligible for a general permit may provide notice that the person wishes to receive an individual permit. However, EPA did not find that either rule prescribes the procedural actions or time frame for actions that such person shall take when requesting to be excluded from coverage by the general permit. Please clarify whether state rules provide comparable action and time frame for action as prescribed in 40 C.F.R. § 122.28(b)(3)(iii), or propose revisions to add a comparable requirement.

40. 40 C.F.R. § 122.28(b)(3)(iv) provides that when an NPDES individual permit is issued to an owner or operator otherwise subject to a NPDES general permit, the applicability of the NPDES general permit to the permittee is automatically terminated on the effective date of the NPDES individual permit. The only state rules EPA found that addressed such automatic termination were rules 901:10-3-11(C)(2) and 901:10-3-11(C)(4). However, these rules only apply to general permits for discharges of stormwater. Please identify where in Chapter 901:10 a comparable requirement to 40 C.F.R. § 122.28(b)(3)(iv) can be found for any general permit issued by the Director, or propose revisions to add a comparable requirement.

41. 40 C.F.R. § 122.28(b)(3)(v) provides that a source excluded from a NPDES general permit solely because it already has an NPDES individual permit may request that the Director revoke the NPDES individual permit and that the source be covered by the NPDES general permit. Upon revocation of the NPDES individual permit, the NPDES general permit shall apply to the source. EPA did not find a comparable state requirement. Please identify where in Chapter 901:10 a comparable requirement to § 122.28(b)(3)(v) can be found, or propose revisions to add a comparable requirement.

42. 40 C.F.R. § 122.23(h)(1) requires that the public must be notified of the Director's proposal to grant coverage to a CAFO under a NPDES general permit and requires that the Director shall notify the owner or operator and inform the public that coverage has been granted. Section 122.23(h)(1) requires that the process for submitting public comments and the hearing process must follow the procedures applicable to draft permits established in 40 C.F.R. § 124.11 through § 124.13. Section 124.12(a)(4) requires that notice of a public hearing be given as specified in § 124.10. Section 124.10(c) provides that notice of the public hearing be given by mailing a copy to, among others, the applicant and persons on the mailing list, and notice to the public, in a manner constituting legal notice to the public under State law. See 40 C.F.R. §§ 124.10(c)(1)(i), 124.10(c)(ix), and 124.10(c)(3).

Rule 901:10-4-03(E) provides that any public meeting over the Director's proposal to grant coverage under a general permit to an applicant shall be conducted as described in rule 901:10-6-04. EPA did not find a requirement in rule 901:10-6-04 to mail notification of the public

meeting on the Director's proposal to grant coverage under a general permit to the applicant or persons on the mailing list, as required by 40 C.F.R. §§ 124.10(c)(i) and (ix). ORC section 903.09(A) does provide that notice of the public meeting shall be mailed to the applicant. However, EPA did not find a method of notification to persons on the mailing list in ORC section 903.09. Additionally, ORC section 903.09(A) does not appear to apply to NPDES general permits. Please clarify whether ORC section 903.09(A) is applicable to NPDES general permits. If ORC section 903.09(A) is applicable to NPDES general permits, please propose rule revisions to prescribe a method for notification of a public meeting to persons on the mailing list. If ORC section 903.09(A) is not applicable to NPDES general permits, please propose rule revisions to prescribe a method of notification of a public meeting to the applicant and to persons on the mailing list.

CAFO NPDES program for discharges of manure, litter and process wastewater pollutants including technical standards for nutrient management required by 40 C.F.R. § 123.36

43. 40 C.F.R. § 122.21(i)(1)(x) requires that a nutrient management plan be submitted with an application for a NPDES permit for a CAFO, and that the nutrient management plan must minimally satisfy the requirements specified in 40 C.F.R. § 122.42(e), and, for CAFOs subject to 40 C.F.R. Part 412, Subparts C and D, the requirements in 40 C.F.R. § 412.4(c). The federal regulations at 40 C.F.R. § 122.42(e)(1)(vi) require that a nutrient management plan include site specific conservation practices to be implemented to control runoff of pollutants to waters of the United States. Rules 901:10-2-07(A)(1) and 901:10-3-01(B)(2) require that a manure management plan submitted with an application for a NPDES permit must comply with the requirements of rules 901:10-2-08 to 901:10-2-11, 901:10-2-13 to 901:10-2-16, and 901:10-2-18. These rules do not include a requirement for the manure management plan to include site specific conservation practices that will be implemented to control runoff of pollutants with respect to land application areas, as is required by 40 C.F.R. § 122.42(e)(1)(vi). Rule 901:10-2-08(D)(8) does require that appropriate buffer strips or equivalent practices to control runoff to waters of the state be identified for the production area, but not for land application areas. EPA did not find a requirement elsewhere in Chapter 901:10 comparable to 40 C.F.R. § 122.42(e)(1)(vi) with respect to land application areas. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

44. 40 C.F.R. § 122.42(e)(1)(ix) requires that any permit issued to a CAFO must include a requirement to implement a nutrient management plan, and that the nutrient management plan must identify specific records that will be maintained to document the implementation and management of the best management practices required in §§ 122.42(e)(1)(i) – (e)(1)(viii). Section 122.42(e)(1)(iv) provides that confined animals cannot have direct contact with waters of the United States.

Rule 901:10-3-01(D) provides that persons that have been issued a NPDES permit by the Director are required to comply with the requirements established in 901:10-3-01(D)(1)-(7). Rule 901:10-3-01(D)(7) provides that a CAFO is required to comply with the terms of the CAFO's manure management plan, including among other things, identification of specific

records that will be maintained as required by rules 901:10-2-16(A)(1)(a) to (A)(1)(f), (A)(1)(k) to (A)(1)(l), (A)(2), (A)(3)(b) to (A)(3)(s), and (A)(6).

EPA did not find a requirement in these provisions for permittees to identify records that will be maintained to document implementation and management of the best management practices that ensure that confined animals will not have direct contact with waters of the state. Please identify where a comparable requirement can be found, or propose revisions to ensure that the above records are identified in the manure management plan.

45. 40 C.F.R. § 122.23(e)(2) requires that unpermitted large CAFOs must maintain documentation specified in 40 C.F.R. § 122.42(e)(1)(ix). Section 122.42(e)(1)(ix) requires identification and retention of records that will be maintained to document, among other things, the best management practices that ensure that confined animals will not have direct contact with waters of the state. Rule 901:10-3-02(A) requires that unpermitted large CAFOs must maintain the records specified in rule 901:10-2-16. EPA did not find requirements in rule 901:10-2-16 to maintain records of actions taken to prevent direct contact of confined animals with waters of the state. Please identify where a comparable requirement can be found, or propose revisions to ensure that these records are maintained by unpermitted large CAFOs.

46. 40 C.F.R. § 122.42(e)(5) provides that the terms of the nutrient management plan included in a NPDES permit must include, among other things, the fields available for land application. Rule 901:10-3-01(D)(7)(i) provides that the terms of the manure management plan include the land application areas identified as available pursuant to rule 901:10-2-09(C). However, rule 901:10-2-09(C), as well as ODA's manure management form DLEP 3900-007, part 10, only provides for a total summary of land application acres to be used for the duration of the permit, not the identification of fields available for land application. Please identify a comparable state requirement for the identification of fields available for land application as a term of the manure management plan, or propose revisions to add a comparable requirement.

47. 40 C.F.R. § 122.42(e)(2)(ii) requires that a copy of the CAFO's site-specific nutrient management plan be maintained on site and made available to the Director upon request. EPA did not find a comparable state requirement. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

48. 40 C.F.R. § 122.42(e)(6)(ii)(A) requires that the Director must include in the permit record nutrient management plans that are revised due to non-substantial changes. EPA did not find a comparable state requirement. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

49. 40 C.F.R. § 122.42(e)(6)(i) requires that any permit issued to a CAFO must require that when a CAFO owner or operator makes revisions to its nutrient management plan, the owner or operator must provide to the Director the most current version of its nutrient management plan and identify changes from the previous version. Section 122.42(e)(6)(ii) also imposes a duty on

the Director to determine if the changes necessitate revision to the terms of the nutrient management plan incorporated into the NPDES permit. Rule 901:10-1-09(M) does impose these requirements. However, rules 901:10-1-09(K) and (L) establish procedures for operational changes, and rules 901:10-1-09(I) and (J) establish procedures for major operational changes that differ from the process in rule 901:10-1-09(M). Some of the operational and major operational changes identified in Appendices A and B to rule 901:10-1-09 include changes that could result in a revision to a CAFO's manure management plan subject to the requirements of rule 901:10-1-09(M). For example, Appendix A to rule 901:10-1-09 provides that the use of different land application areas is an operational change and requires the owner or operator to identify and record new land application areas in the operating record which an authorized representative of the Director may review and signify approval by signing and dating the CAFO's operating record. Please clarify whether a CAFO with a NPDES permit that makes operational changes or major operational changes pursuant to rule 901:10-1-09(I)-(L) is also required to provide to the Director the most current version of its nutrient management plan and identify changes from the previous version consistent with 40 C.F.R. § 122.42(e)(6)(i). In addition, please clarify whether the Director has a duty to determine if such changes would necessitate revision to the terms of the nutrient management plan incorporated into the NPDES permit and provide any required notice to the public and permittee, consistent with Section 122.42(e)(6)(ii).

50. 40 C.F.R. § 122.42(e)(1)(vii) requires that any NPDES permit issued to a CAFO include a requirement to implement a nutrient management plan that identifies protocols for appropriate testing of manure, litter, process wastewater, and soil. 40 C.F.R. § 122.42(e)(5) defines the terms of the nutrient management plan as the information, protocols, best management practices, and other conditions in the nutrient management plan that are necessary to meet the requirements of 40 C.F.R. § 122.42(e)(1). 40 C.F.R. § 122.42(e)(5) requires that any NPDES permit issued to a CAFO must require compliance with the terms of the nutrient management plan and these terms are subject to public notice requirements established in 40 C.F.R. § 124.10(a)(1). Rule 901:10-2-10(A) requires that manure sampling and analysis follow procedures in "Recommended Methods of Manure Analysis" (A3769), University of Wisconsin Extension, 2003. Rule 901:10-2-10(C) requires that manure from each storage or treatment facility be analyzed, but rule 901:10-2-10(F) provides that an owner or operator may request approval from the Director to change the number of samples needed to be representative of each manure storage and treatment facility and to utilize composite sampling between manure storage or treatment facilities.

Sampling procedures in Publication A3769 do not provide that samples must be taken from each manure source, and do not identify the number of samples or subsamples that need to be taken per manure source. Further, Publication A3769 does not address compositing samples between manure storage and treatment facilities. Protocols for appropriate testing of manure, litter, and process wastewater are terms of the nutrient management plan under § 122.42(e)(5). Also under § 122.42(e)(5), NPDES permits must include these terms and these terms must be made available for public comment. Please clarify whether the facility-specific manure management plans will include protocols to address the manure sampling requirements set forth in rules 901:10-2-10(C)

and (F) that are not included in Publication A3769, or propose revisions to ensure these terms will be included and made available for public comment.

51. 40 C.F.R. § 412.37(b) requires that large dairy, cattle, swine, poultry and veal CAFOs must maintain a complete copy of information required by 40 C.F.R. §§ 122.21(i)(1) and 122.42(e)(1)(ix) and the records required by 40 C.F.R. § 412.39(b)(1) through (b)(6) for a period of five years from the date they are created. Additionally, 40 C.F.R. § 412.37(c) requires that large dairy, cattle, swine, poultry and veal CAFOs must maintain on-site for a period of five years from the date they are created a complete copy of the information required by 40 C.F.R. §§ 412.4 and 122.42(e)(1)(ix) and the records specified in §§ 412.37(c)(1) through (c)(10). EPA did not find a comparable state requirement for the retention of these records for a period of five years from the date the records are created. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

52. 40 C.F.R. § 412.37(c) requires that each CAFO must maintain on-site a copy of its nutrient management plan. EPA did not find a comparable requirement in Chapter 901:10. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

53. 40 C.F.R. § 412.37(b) requires that, among other information, the information required by 40 C.F.R. § 122.21(i)(1) and § 122.42(e)(1)(ix) must be maintained by the CAFO and made available to the Director for review upon request. Section 412.37(c) requires that large dairy, cattle, swine, poultry and veal CAFOs maintain the information required by § 412.4 and the records specified in §§ 412.37(c)(1) through (c)(10). Rule 901:10-2-16(A) provides that an operating record shall be generated as part of a NPDES permit, and rule 901:10-2-16(A) identifies records and documents that must be included in the operating record.

(a.) EPA did not find a state requirement that requires retention of all the information required by 40 C.F.R. § 122.42(e)(1)(ix). More specifically, EPA did not find a state requirement to document actions taken to prevent direct contact of confined animals with waters of the state. See 40 C.F.R. § 122.42(e)(1)(iv). Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

(b.) EPA did not find a state requirement that requires creation and retention of records for information required by 40 C.F.R. § 412.37(c)(7). More specifically, EPA did not find a state requirement that a CAFO maintain records of calculations showing the total nitrogen and phosphorus to be applied to each field, including sources other than manure, litter, and process wastewater. Please identify where a comparable requirement can be found, or propose revisions to add a comparable requirement.

(c.) 40 C.F.R. § 412.37(c)(6) requires that the CAFO must maintain on-site records providing an explanation of the basis for determining manure application rates. The technical standards included in rule 901:10-2-14 provide that the manure application rate shall be based on the



nitrogen leaching risk assessment, the phosphorus soil test assessment, and the phosphorus index risk assessment procedures. Rule 901:10-2-16(A)(3)(I) requires the CAFO's operating record to include results from the nitrogen leaching risk assessment and the phosphorus soil test assessment but, does not require that results from the phosphorus index risk assessment be recorded and documented. Please identify where in Chapter 901:10 results of the phosphorus index risk assessment are required to be recorded in a manner that conforms to 40 C.F.R. § 412.37(c)(6), or propose revisions to add this recordkeeping requirement.

54. ODA's program must include technical standards for nutrient management that are consistent with the requirements in § 412.4(c)(2) in accordance with 40 C.F.R. § 123.36. Under 40 C.F.R. § 412.4(c)(2)(i), application rates for manure, litter, and other process wastewater applied to land must minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director. Such technical standards must include a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters, and address nutrients on each field to achieve realistic production goals while minimizing nitrogen and phosphorus movement to surface waters. Rule 901:10-2-14(E)(1) relates to the determination of manure application rates and provides the option of using either the phosphorus index risk assessment procedure ("P-index") or the phosphorus soil test risk assessment procedure to assess land application areas prior to land application. The phosphorus soil test risk assessment procedure set forth in rule 901:10-2-14, Appendix E, Table 2, provides that when Bray P1 > 150 ppm, a CAFO has the option of not applying any additional P<sub>2</sub>O<sub>5</sub> or using the P-index to determine phosphorus application. The cited source for rule 901:10-2-14, Appendix E, Table 2, is *USDA-NRCS (2001). Field Office Technical Guide – Conservation Practice Standard. Section 1. Columbus, OH.* This cited source does not include the option of using the P-index when Bray P1 > 150 ppm. Please provide documentation supporting use of the P-index on fields with high phosphorus soil results, specifically addressing why it is appropriate to allow additional phosphorus applications on such fields to minimize phosphorous transport while achieving realistic production goals., or propose revisions to ensure consistency with the federal requirement in 40 C.F.R. §§ 412.4(c)(2)(i) and 123.36

55. ODA's program must include technical standards for nutrient management that are consistent with the requirements in 40 C.F.R. § 412.4(c)(2). Under 40 C.F.R. § 412.4(c)(2)(i), application rates for manure, litter, and other process wastewater applied to land must minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director. Such technical standards must include a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters, and address nutrients on each field to achieve realistic production goals while minimizing nitrogen and phosphorus movement to surface waters. Additionally, 40 C.F.R. § 412.4(c)(5) identifies setback requirements prohibiting the application of manure, litter, and process wastewater closer than 100 feet to downgradient surface waters or conduits to surface waters, unless a specified compliance alternative is exercised. Ohio's technical standards provide restrictions applicable to land application on frozen and snow-

covered ground. One such restriction is found in rule 901:10-2-14, Appendix A, How to Use Appendices to this Rule, note 12. Note 12 provides that the setbacks in Appendix A, Table 2, column 3, should (emphasis added) be followed. Use of the term “should” implies that the setbacks required in Appendix A, Table 2, column 3 are not mandatory, which appears contrary to other provisions of rule 901:10-2-14 that require land application in accordance with setbacks, and contrary to 40 C.F.R. § 412.4(c)(5). Please clarify which setbacks are mandatory and which are at the discretion of the CAFO, or propose revisions to ensure that setbacks are mandatory and thus as stringent as the setback requirements in 40 C.F.R. § 412.4(c)(5).

56. Under 40 C.F.R. § 412.4(c)(2)(i), application rates for manure, litter, and other process wastewater applied to land must minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director. Rule 901:10-2-14, Appendix A, Table 2, footnote 1.e., provides that application rates shall not exceed rates that are specified in “Table 4 – Determining the Most Limiting Manure Application Rates for winter application”. EPA could not find this referenced table in Chapter 901:10. Omission of these rates from the state’s rules renders such rates ineffective and unenforceable, and less stringent than the requirements in § 412.4(c)(2)(i). Please provide EPA with a copy of Table 4 to enable EPA to complete an evaluation of the winter application rates.

#### Conflict of Interest

57. 40 C.F.R. § 123.25(c) requires that a State NPDES program shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or had during the previous two years received, a significant portion of income<sup>11</sup> directly or indirectly from permit holders or applicants for permits. While ORC section 903.081 is a state statutory provision pertaining to this federal conflict of interest requirement, the statute is silent on direct and indirect sources of income. There is also no regulation in the Ohio Administrative Code implementing such statutory authority that prohibits persons from approving all or portions of a NPDES permit, or serving on a board or commission that approves all or portions of a NPDES permit, who receive, or have received within two years prior to an application or serving on a board or commission, a significant portion of income directly or indirectly from a NPDES permittee or applicant. Please explain how Ohio laws and rules may be as stringent as 40 C.F.R. § 123.25(c) in this regard, or propose revisions to ensure stringency with the federal conflict of interest provision.

## **II. ODA’s NPDES program must include the requirements set forth in 40 C.F.R. § 123.26 for a compliance evaluation program**

58. 40 C.F.R. § 123.26(d) requires that state program investigatory inspections shall be conducted, samples shall be taken, and other information shall be gathered in a manner that will produce evidence admissible in an enforcement proceeding or in court. EPA did not find state

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<sup>11</sup> 40 C.F.R. § 123.25(c)(1)(iv) defines income to include “retirement benefits, consultant fees, and stock dividends.”

authorities in Chapter 901:10 that fulfill these duties. Please identify state authorities that address ODA's authority or duty to conduct inspections, take samples, and gather other information in a manner that will produce evidence admissible in an enforcement proceeding or in court, as required by 40 C.F.R. § 123.26(d).

59. Section 308(a)(B) of the Clean Water Act, 33 U.S.C. § 1318(a)(B), provides broad federal statutory authority, upon presentation of credentials, for the right of entry to "any premises in which an effluent source is located" in order to conduct inspections. The federal regulations for compliance evaluation programs at 40 C.F.R. § 123.26(c) require the State Director or State officers to have the authority to enter "any site or premises subject to regulation" to inspect. The federal permitting regulations at § 122.41(i)(1) require the permittee to allow the Director, or an authorized representative, upon presentation of credentials and other documents, as may be required by law, to enter the permittee's premises where a regulated facility or activity is located or conducted. ORC section 903.12 gives ODA authority to enter any public or private property to make investigations and inspections. Rule 901:10-5-02(A)(1) establishes entry procedures. However, these procedures are limited to premises of an applicant for a permit or a permittee. Rule 901:10-5-03(B) provides that a representative of the department shall conduct inspections and determine if the owner or operator is not in compliance, but rule 901:10-5-03(A) limits the applicability of rule 901:10-5-03(B) to only CAFOs, CAFFs and major CAFFs. Federal entry and inspection authorities encompass "any" premises and are not limited to permittees, applicants for permits, or CAFOs. Please clarify how rule 901:10-5 provides authority to enter to the extent authorized by ORC section 903.12, and to any site or premises subject to regulation as required by federal entry authorities, or propose rule revisions to match the scope of authority provided in ORC section 903.12.

60. Section 308(a)(B) of the Clean Water Act, 33 U.S.C. § 1318(a)(B), provides broad federal statutory authority, upon presentation of credentials, for the right of entry to "any premises in which an effluent source is located" in order to conduct inspections. 40 C.F.R. § 123.26(c) requires the State Director or State officers to have the authority to enter "any site or premises subject to regulation" to inspect. 40 C.F.R. § 122.41(i)(1) requires the permittee to allow the Director, or an authorized representative, upon presentation of credentials and other documents, as may be required by law, to enter the permittee's premises where a regulated facility or activity is located or conducted. These federal authorities do not contain a requirement to provide advance notice of any inspection. Rule 901:10-5-02(B)(3) provides that prior to submission of a permit application by a facility, an ODA inspector shall notify the owner or operator in advance of an inspection so the inspector can be informed of the facility biosecurity procedures. (Emphasis added.) The last sentence of rule 901:10-5-02(B)(3) provides that the Director has the authority to conduct unannounced inspections which is consistent with the authority provided by ORC section 903.12. However, the use of "shall" in the first sentence of rule 901:10-5-02(B)(3) limits the Director's authority to conduct unannounced inspections. It also conflicts with and is less stringent than federal entry and inspection authorities. To ensure the Director's authority is consistent with federal entry and inspection authorities, please propose a revision to the rule 901:10-5-02(B)(3) to ensure the Director's statutory authority to conduct unannounced inspections prior to submission of a permit application is not limited.

61. 40 C.F.R. § 123.26(a) requires state programs to have processes for possible enforcement of “all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).” Section 123.26(b) requires state programs to have procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. These processes and authorities must extend to permittees and other regulated entities, and non-CAFOs as well as CAFOs. Rule 901:10-5-02(A)(1) of the Ohio Administrative Code establishes entry procedures. However, these procedures are limited to premises of an applicant for a permit or a permittee. Rule 901:10-5-03(B) provides that a representative of the department shall conduct inspections and determine if the owner or operator is not in compliance, but rule 901:10-5-03(A) limits the applicability of rule 901:10-5-03(B) to only CAFOs, CAFFs and major CAFFs. Please clarify how Chapter 901:10-5 conforms to 40 C.F.R. §§ 123.26(a) and (b), or propose rule revisions to ensure consistency with the federal provisions.

### **III. ODA's NPDES program must include the enforcement authority as established in 40 C.F.R. § 123.27**

62. 40 C.F.R. § 123.27(b)(2) provides that the burden of proof and degree of knowledge or intent required under state law for establishing civil and criminal NPDES violations shall be no greater than that required of EPA when EPA brings a judicial action under the CWA. The provision further states that this requirement is not met if the state includes mental state as an element of proof for civil violations. For civil judicial actions, EPA's burden of proof is generally preponderance of the evidence, and liability under the CWA is strict. EPA did not find state regulations in Chapter 901:10 describing such standards. Please clarify whether ODA has a similar burden of proof and standard of liability when pursuing a judicial civil action for NDPEs violations, and identify the legal authorities describing such standards.

63. 40 C.F.R. § 123.27(d)(2)(i) requires that the state agency “will investigate and provide written responses to all citizen complaints submitted pursuant to procedures in 40 C.F.R. § 123.26(b)(4).” Rule 901:10-5-01(C) provides that the Director will cause investigation of all written, signed and dated complaints. However, rule 901:10-5-01(D) provides the Director “may” cause investigation of oral complaints. This provision is not consistent with 40 C.F.R. § 123.27(d)(2)(i) which requires the state agency to investigate all citizen complaints, including oral complaints. Additionally, rule 901:10-5-01(E) states that if upon investigation ODA determines that a facility is in compliance, the complaint shall be dismissed, and the complainant and the owner or operator shall be notified. EPA did not find a requirement that this notice shall be in writing as required by 40 C.F.R. § 123.27(d)(2)(i). Furthermore, rule 901:10-5-01(F) provides that if a facility is determined to be in non-compliance after an ODA investigation in response to a complaint, the Director shall take certain enforcement actions. However, EPA did not find a requirement for ODA to provide for any notice, written or otherwise, to the person who submitted the complaint, after ODA makes the non-compliance determination. Section 123.27(d)(2)(i) requires written responses to all citizen complaints. Please identify where comparable requirements to § 123.27(d)(2)(i) regarding investigation of oral complaints and providing written responses to all citizen complaints can be found, or propose revisions to add comparable requirements.

64. 40 C.F.R. § 123.27(a)(3)(i) requires a state to have the authority to assess or sue to recover in court civil penalties for the violation of any duty to allow or carry out inspection, entry or monitoring activities. Rule 901:10-5-03(E) provides that the Director shall assess penalties in accordance with rule 901:10-5-04. Rule 901:10-5-04(E)(2)(a)(ii) indicates that under ODA's penalty matrices, failure to provide access to premises or records when required by statute, rule, or order is a Category I (major) violation. Therefore, the Director has the ability to assess penalties against a person who denies access to premises or records. However, EPA did not find a provision in Chapter 901:10 that provides that ODA can pursue a judicial action for civil penalties against non-permittees or non-applicants. ODA is only authorized to seek such judicial action if the refusal is by a permittee or applicant in violation of any access-related terms and conditions of a permit or application rule. Please identify whether ODA's regulations authorize ODA to seek judicial penalties against a non-permittee or non-applicant who refuses access to premises or records, or propose a revision to add a requirement comparable to 40 C.F.R. § 123.27(a)(3)(i).

65. 40 C.F.R. § 123.27(d)(2)(iii) requires that any state administering a federal program shall provide assurances that it will publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action. There does not appear to be an explicit requirement to provide 30-day public notice of a settlement of a state enforcement action in Ohio's rules. ODA rule 901:10-6-01(A)(5) does require that the Director shall give public notice for any actions pursuant to ORC section 903.17. However, rule 901:10-6-01(A)(5) does not include a requirement that notice shall be provided for at least 30 days. Rule 901:10-6-01(A), which does establish that notice shall be at least 30 days prior to a public meeting, is specific to notices that are required or authorized by ORC section 903.09; notice requirements in ORC section 903.09 are specific to permit actions and do not include notice requirements for enforcement actions. Rule 901:10-6-02, which sets forth requirements for the content of public notices, is specific to draft permits and does not encompass enforcement actions. Rule 901:10-6-02(A)(6)(a) provides that a public notice shall include a statement that "any interested person may submit a written comment on the draft permit and may request a public meeting". EPA did not find any requirements regarding the content of a notice that would pertain to a proposed settlement of a state enforcement action. Please clarify whether there is a state requirement that provides for 30-day notice of proposed settlements of state enforcement actions, or propose a revision to add a requirement comparable to 40 C.F.R. § 123.27(d)(2)(iii). Additionally, please clarify what information will be included in the content of any such notice.

#### **IV. General Comments**

66. A NPDES permitting authority must have the authority to issue permits for the discharge of any pollutants from all point sources which that agency is authorized to permit. Although ORC section 903.08(B)(1) provides that no person shall discharge "pollutants" from a CAFO without first obtaining a NPDES permit from ODA, many of the implementing regulations in Chapter 901:10 of the Ohio Administrative Code only address discharges of "manure". Please review and revise as appropriate Chapter 901:10 to ensure that ODA's regulations apply to discharges of

pollutants and are not limited to only discharges of manure. Specific provisions where EPA found ODA's regulations to be limited include rules 901:10-3-03 through 901:10-3-07, and rule 901:10-5-04.

67. Inconsistent use of terminology and blending of NPDES and non-NPDES requirements may make it difficult to defend or challenge determinations of compliance or noncompliance with NPDES requirements set forth in Chapter 901:10. For example, instead of using the term "discharge of pollutants" in its NPDES authorities, ODA frequently employs the more restrictive term "discharge of manure" throughout the state's NPDES rules. Such use limits the jurisdictional coverage of ODA's NPDES program and renders it less stringent in scope than the federal program. See CWA §§ 301 and 402, 33 U.S.C. §§ 1311 and 1342; 40 C.F.R. §122.1(b)(1). Please review Chapter 901:10 and make revisions as appropriate to ensure (1) terminology is consistent throughout Chapter 901:10, and (2) NPDES requirements are clearly distinguished from requirements applicable to Ohio's Permit to Install and Permit to Operate programs.

68. Chapters 901:10-1 through 901:10-6 of the Ohio Administrative Code include references to several incorrect state administrative code provisions. Incorrect references could render the regulations meaningless or inconsistent with federal requirements.<sup>12</sup> Please review and revise these chapters to ensure that all sections of the Ohio Administrative Code are referenced or otherwise cited correctly. EPA identified incorrect references in the following.

|                           |                             |                          |
|---------------------------|-----------------------------|--------------------------|
| 901:10-1-09(M)            | 901:10-1-09(M)(1)(b)        | 901:10-1-09(M)(1)(c)     |
| 901:10-2-16(A)            | 901:10-2-20(H)              | 901:10-3-01(D)(7)(b)     |
| 901:10-3-01(D)(7)(d)      | 901:10-3-01(D)(7)(i)(i)     | 901:10-3-01(D)(7)(i)(ii) |
| 901:10-3-01(D)(7)(i)(iv)  | 901:10-3-01(D)(7)(i)(iv)(a) | 901:10-3-02(B)           |
| 901:10-3-07(A)            | 901:10-3-08(B)(10)(e)       | 901:10-3-11(D)(1)(v)     |
| 901:10-3-11(D)(11)(b)(ii) | 901:10-3-11(E)(1)(a)        | 901:10-5-03(B)           |
| 901:10-4-01(A)            |                             |                          |

69. 40 C.F.R. § 122.2 defines "owner or operator" as this term applies to 40 C.F.R. Parts 122, 123 and 124. Rule 901:10-1-01(NNN) defines "owner or operator" for purposes of ORC sections 903.02, 903.03, 903.04 and 903.05, which are sections that do not include NPDES authorities. EPA did not find a definition of "owner or operator" as it applies to sections of ORC Chapter 903 that include NPDES authorities. Please identify the definition of "owner or

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<sup>12</sup> For example, rule 901:10-1-09(M)(1)(b) defines one type of substantial change to a manure management plan incorporated as a term and condition of an NPDES permit as "any change to the maximum amounts of nitrogen and phosphorous derived from all sources for each crop pursuant to paragraph (D)(1)(g)(ix) of rule 901:10-3-01 of the Administrative Code." There is no rule 901:10-3-01(D)(1)(g)(ix) contained in ODA's regulations. Rule 901:10-3-01(D) in general concerns certain compliance requirements within NPDES individual permits, but contains nothing about nitrogen or phosphorous amounts. Rule 901:10-1-09(M)(1)(b) is therefore an incomplete and non-effective NPDES provision.

operator” for purposes ODA’s NPDES authorities, or propose a revision to include a definition that conforms with the definition included in 40 C.F.R. § 122.2.

70. 40 C.F.R. § 122.62 provides for modifications to NPDES permits. Rule 901:10-1-01(FFF)(4) states that for NPDES permits, permits to install, and permits to operate, “modification” means, among other things, “[c]hanges described in rule 901:10-1-09 of the Administrative Code as being grounds for modification of the permit type.” (Emphasis added.) The state’s rule as currently written is inconsistent with and less stringent than 40 C.F.R. § 122.62, which provides for modifications to NPDES permits and their terms and conditions, but has no provision for modification of permit types. To be consistent with 40 C.F.R. § 122.62, the sentence should be revised to exclude permit type.