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

AUG 0 9 2019

REPLY TO THE ATTENTION OF
W-15J

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

Dear Ms. Pelanda:

I am writing in response to former Governor Kasich's July 8, 2015, letter, in which the State of Ohio asks the U.S. Environmental Protection Agency, Region 5 (Region 5), 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).

Region 5 has been working with EPA Headquarters on a comprehensive review of Ohio's July 2015 request. As a result of that review and subsequent discussions with representatives of ODA, Ohio EPA, and the Office of the Ohio Attorney General, EPA has identified statutory provisions where clarification or revision may be needed. As described below, EPA comments relate to (1) the scope of the program that Ohio intends to transfer and (2) consistency with federal requirements given this scope. During the discussions with EPA, Ohio representatives acknowledged that statutory changes may be necessary for purposes of consistency with federal requirements.

The current language in Chapters 903 and 6111 of the Ohio Revised Code provides that upon EPA approval of Ohio's request, Ohio EPA's jurisdiction over all discharges of stormwater from AFOs, including discharges of stormwater resulting from construction activity occurring at AFOs, will be transferred to ODA. During the discussions with EPA, Ohio representatives informed Region 5 that the State is considering altering the scope of authority currently specified in Chapter 903 regarding discharges of stormwater. Specifically, they informed Region 5 that the State is considering allowing Ohio EPA to retain its current jurisdiction over discharges of stormwater resulting from construction activity occurring at AFOs rather than transferring this authority to ODA. The State would still seek to transfer to ODA the portion of the NPDES program regulating discharges of stormwater at CAFOs from industrial activity that is not construction activity.

If Ohio EPA is to retain its current jurisdiction over stormwater discharges from construction activity at AFOs, revisions to Chapters 903 and 6111 appear to be necessary to ensure that Ohio EPA retains such jurisdiction. Additionally, corresponding revisions to the Ohio Administrative Code and to the program documents in the July 2015 request are likely to be needed. EPA requests a written response that articulates Ohio's decision as to which state agency will have jurisdiction for discharges of stormwater resulting from construction activity occurring at AFOs, and identification of any proposed revisions to Chapters 903 and 6111 to ensure consistency with Ohio's decision regarding jurisdiction.

Ohio has also informed Region 5 that if Ohio EPA retains its current jurisdiction over discharges of stormwater resulting from construction activity occurring at AFOs, Ohio EPA is considering having ODA act as its duly authorized representative for purposes of conducting construction stormwater inspections at AFOs. Ohio EPA would retain its authorities to also conduct inspections. The federal NPDES regulations do not prohibit state directors from designating another state agency to act as a duly authorized representative for the purpose of inspections. However, Ohio should ensure that its state laws and regulations enable it to designate a duly authorized representative, and that its NPDES program documents clearly articulate the roles and responsibilities of each state agency. Further, Ohio EPA must retain exclusive authority to enforce the NPDES program for construction stormwater at AFOs. If Ohio decides to proceed with the designation, EPA requests to be informed of such decision so that EPA can work with Ohio to ensure that all relevant NPDES program documents reflect the designation.

In addition to the scope of authority issue discussed above, as discussed with representatives of Ohio during the past few months, our review has identified certain aspects of ODA's statutory authority as set forth in Chapter 903 of the Ohio Revised Code that may not be consistent with corresponding federal law or regulations. For each topic raised in the enclosure, EPA requests a written response from Ohio that either demonstrates the adequacy of ODA's statutory authority, clarifies such authority, or states that ODA intends to seek revisions to its current statutory authority to ensure conformance with applicable federal requirements, and identifies proposals for necessary revisions to Chapter 903. Any demonstration or clarification provided will be reviewed by EPA and, if appropriate, EPA may request a statement from the Ohio Attorney General memorializing such clarification.

EPA plans to provide additional comments and questions resulting from our review of Chapter 901:10 of the Ohio Administrative Code and other documents provided in Ohio's July 2015 request.

Region 5 is committed to continue working with the State as it seeks to transfer NPDES authority relating to CAFOs and AFOs from Ohio EPA to ODA. If additional discussion is needed regarding the topics raised in this letter or in the enclosure please have your staff contact Julianne Socha at (312) 886-4436, or feel free to contact Russ Rasmussen or myself directly at (312) 886-7535 or (312) 353-5425, respectively.

Sincerely,

Linda Holst

for Joan M. Tanaka
Acting Director, Water Division

Enclosure

cc: Tiffani Kavalec, Ohio EPA
Sam Mullins, Ohio Department of Agriculture
Catherine English, Office of Ohio Attorney General

Enclosure

The following comments identify aspects of ODA's statutory authority as set forth in Chapter 903 of the Ohio Revised Code that do not appear to be consistent with corresponding federal law or regulations. A complete state NPDES program must have the legal authority to implement federal requirements and must be administered in conformance with federal requirements. For each comment, please provide a written response that either demonstrates the adequacy of ODA's statutory authority, clarifies such authority, or states that ODA intends to seek revisions to its current statutory authority to ensure conformance with applicable federal requirements, and identifies proposals for necessary revisions to Chapter 903. 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.

1. 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 violations of, among other things, any duty to allow or carry out inspections, entry or monitoring activities. Section 903.12 of the Ohio Revised Code sets forth the Director's authority to enter premises, make investigations and inspections, take samples, and access records. EPA did not find violations of section 903.12 included in the list of violations for which the Ohio Attorney General is authorized to seek judicial civil penalties as set forth in section 903.17(D)(2), nor did EPA find violations of section 903.12 included in the list of violations in sections 903.30(A) and (B), which the Ohio Attorney General shall prosecute upon written request from the Director. Further clarification or statutory revisions are necessary to ensure that the Ohio Attorney General can seek judicial civil penalties as contemplated by 40 C.F.R. § 123.27(a)(3)(i).

2. 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 on a per-day basis for violations of permit conditions, filing requirements, inspection and entry related duties, and any regulations or orders of the director. The last sentence of section 903.17(D)(2) of the Ohio Revised Code appears to limit judicial assessment of per-day penalties to only violations of Director's orders for corrective action and assessment of penalties under section 903.17(B). Judicial assessment of per-day penalties is to be available for all violations as listed in 123.27(a)(3)(i). Further clarification or statutory revisions are necessary to ensure that Ohio has the authority for the judicial assessment of per-day penalties as contemplated by 40 C.F.R. § 123.27(a)(3)(i).

3. 40 C.F.R. § 123.27(d) requires state programs to provide for public participation in the state enforcement process by one of two ways that are set forth in §§ 123.27(d)(1) and (d)(2). The Ohio Attorney General's Statement of Legal Authority enclosed with Ohio's July 2015 request states on page 96 that Chapter 903 and the implementing regulations provide for public participation consistent with the requirements of 40 C.F.R. § 123.27(d)(2).

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 § 123.26(b)(4)." (emphasis added). Section 903.15(B) of the Ohio Revised Code states that the Director shall cause investigations of written complaints, but "may" cause investigations of oral complaints.

Thus, this section does not address that the state "will investigate" oral complaints. In addition, Section 903.15(C)(1) states that upon completion of an investigation resulting in a determination of compliance, the Director shall notify the complainant but does not specify that such notification will be in writing. In addition, section 903.15(C)(2) does not provide for a written response to the complainant if the director makes a finding of noncompliance. Therefore, the provisions do not appear to indicate that ODA will "provide written responses to all citizen complaints." Further clarifications or statutory revisions are necessary to ensure that ODA provides for public participation in the state enforcement process as established in the federal requirements. EPA recognizes that the level of effort required to provide a written response to a citizen complaint may vary depending on the information provided by the complainant and other relevant factors. For this reason, any proposed revisions to section 903.15 may be accompanied by further proposals for procedures described in state implementing rules and state program documents showing how ODA will investigate and provide written responses based on the format of the complaint received, the extent of information provided by the complainant, and the outcome of the investigation as well as other relevant factors.

4. A NPDES permitting authority must have authority to issue permits for the discharge of any "pollutants" for all point sources which that agency is authorized to permit. Section 903.08(G) of the Ohio Revised Code provides the Director with broad authority to establish terms and conditions of NPDES permits. However, section 903.10(E)(4) appears to limit this authority such that terms and conditions in a permit for net volume, net weight, concentration and mass loadings are limited to discharges of "manure" rather than discharges of "pollutants". Further clarification or a statutory revision is necessary to address the Director's authority for the establishment of terms and conditions in NPDES permits for discharges of pollutants not encompassed within the definition of manure.

Section 903.20 of the Ohio Revised Code provides for the creation of the concentrated animal feeding facility advisory committee (CAFF Advisory Committee). Section 903.20(C)(3) provides that the CAFF Advisory Committee, in consultation with ODA shall "prepare and, upon request, distribute written materials" to assist persons applying for a state permit for a new facility or modification to an existing facility. Section 903.20(C)(3) further states: "The materials also shall include information stating that, in addition to obtaining a permit to operate, it may be necessary to obtain a NPDES permit for the discharge of manure or storm water." Although EPA regulations do not address bodies such as the CAFF Advisory Committee or its written materials, EPA recommends that the phrase "discharge of manure or storm water" be changed to "discharge of pollutants" to enhance the clarity of the written materials prepared and distributed by the CAFF Advisory Committee which advise the regulated community on NPDES permit requirements.

5. 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. 40 C.F.R. § 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. Section 903.08(B)(1) of the Ohio Revised Code provides that the Director may "issue, revoke, modify or deny" an individual permit or "issue,

revoke, or deny coverage under a general permit" for a person discharging pollutants from a CAFO. Section 903.08(L) provides that the Director may "modify, suspend, or revoke a NPDES permit" issued under section 903.08 for cause as established by rule. Section 903.09(F) makes multiple references to the Director's proposed actions to "deny, modify, suspend, or revoke" NPDES permits. Section 903.10(E)(11) provides that the Director may adopt rules that establish "grounds and procedures for the issuance, denial, modification, suspension, or revocation of permits, including general permits," and section 903.10(F) provides that the Director may adopt rules that establish public notice and participation requirements for the "issuance, denial, modification, transfer, suspension, and revocation of permits to install, permits to operate, and NPDES permits."

As described above, the State uses different terminology in its authorities regarding the permitting actions authorized by state law. For this reason, it is unclear how the permit actions written in Chapter 903 of the Ohio Revised Code (e.g., issue, deny, modify, revoke, and suspend), and in the implementing rules in Chapter 901:10 of the Ohio Administrative Code, correspond to the permit actions established in 40 C.F.R. §§ 122.62, 122.64, and 124.5. It is necessary for the state to provide further clarifications regarding the terminology in the existing statutes and how it addresses all of the permit actions described in EPA's regulations or make statutory revisions to ensure that the Director has full authorities for the modification, revocation and reissuance, and termination of NPDES permits.

6. 40 C.F.R. § 123.25(c)(1)(i) defines "board or body" to include any individual who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal, and prohibits such entity from having a conflict of interest as defined in the provision. Section 903.081 of the Ohio Revised Code does not use the term "board or body" or any other term which refers to the entity's involvement in all the referenced permit actions (i.e., approvals in the first instance, modifications, reissuances, and appeals). Rather, section 903.081 states that "no person shall approve all or portions of a permit" or "serve on a board or commission that approves all or portions of a NPDES permit, including taking such action pursuant to an appeal of a NPDES permit," if such person has a conflict of interest. EPA did not find language in section 903.081 that prohibits conflicts of interest on the part of a person involved in the modification or reissuance of a permit, as contemplated by 40 C.F.R. § 123.25(c)(1)(i). Further clarification or statutory revisions are necessary to ensure that conflicts of interest are prohibited for all permit actions contemplated by 40 C.F.R. § 123.25(c)(1)(i).

Additionally, 40 C.F.R. § 123.25(c) provides that a member of any board or body which approves all or portions of permits shall not receive "a significant portion of income directly or indirectly from permit holders or applicants for a permit." Section 903.081 prohibits a person that approves all or portions of a NPDES permit from receiving "a significant portion of income from any NPDES permittee or any applicant for a NPDES permit" and prohibits a person from serving on a board or commission that approves all or portions of a NPDES permit if the person receives or has received "a significant portion of income from any NDPES permittee or any applicant for a NPDES permit." Section 903.081 does not include qualifying language similar to the federal regulation that the prohibited significant income cannot be received "directly or

indirectly". It is necessary for the state to provide further clarifications regarding whether it views the prohibitions discussed in 903.081 to include both direct and indirect sources of income or to make statutory revisions to ensure that its authorities expressly state that the prohibited significant income cannot be received directly or indirectly.

7. 40 C.F.R. § 122.23(h)(1) provides the procedures for CAFOs seeking coverage under a general permit. This provision states that "[i]f the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit." Section 903.08(F) of the Ohio Revised Code states: "Upon receipt of a notice of intent for coverage under an existing general permit, the director shall notify the applicant in writing that the person is covered by the general permit if the person satisfies the criteria established in rules for eligibility for such coverage." EPA did not find a requirement in section 903.08(F) for the Director to provide for public review and comment on the notice of intent and the CAFO's nutrient management plan prior to the Director's notification of coverage under the general permit. Further clarification or statutory revisions are necessary to ensure that the public participation process required by § 122.23(h) is completed prior to the Director's notification of coverage to the applicant.

8. Section 903.01(G) defines "discharge" to mean "to add from a point source to waters of the state." The federal definition at 40 C.F.R. § 122.2 states: "'discharge' when used without qualification means the 'discharge of a pollutant.'" 40 C.F.R. § 122.2 defines "discharge of pollutant" to mean "(a) Any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source,' or (b) Any addition of any pollutant or combination of pollutants to the waters of the 'contiguous zone' or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any 'indirect discharger.'"

Ohio's statutory definition differs from the definition of "discharge" established in the Ohio Administrative Code at 901:10-1-01(AA), which includes the phrase "any pollutant or combination of pollutants" as part of the definition. Please provide additional information describing how the State's provisions are consistent with the federal regulations or make revisions as necessary to ensure that the definition of "discharge" in section 903.01 is consistent with the federal definition in § 122.2.

9. EPA requests clarification as to whether ODA or Ohio EPA is to have jurisdiction for the NPDES program for discharges of pollutants resulting from animal feeding operations that are not or were not concentrated animal feeding operations. Sections 903.08(A)(2), (B)(1)

and (B)(2) of the Ohio Revised Code appear to provide the ODA Director with authority only for discharges of pollutants from concentrated animal feeding operations. However, section 903.15 provides that a person may submit a complaint to the Director regarding the discharge of a pollutant from an "animal feeding operation" (which would include concentrated animal feeding operations), and section 903.08(H) provides that "animal feeding facilities"[1] (same) needing both a NPDES permit and a Permit to Operate shall be issued one permit. Please explain whether the State intends for ODA to have jurisdiction over discharges of pollutants resulting from all animal feeding operations, except for discharges of stormwater from construction activity, or if the State intends for Ohio EPA to continue to regulate discharges of pollutants from animal feeding operations that are not concentrated animal feeding operations.

10. Sections 903.08(B) and (C) of the Ohio Revised Code include language stating that violations of these sections are declared a "public nuisance" for purposes of state enforcement. A declaration of public nuisance is not required for federal enforcement of noncompliance. EPA requests clarification about whether the enforcement authority provided by section 903.17 is independent of, or dependent upon, a violation being declared a public nuisance and an explanation of how the requirement of a declaration of public nuisance does not limit the state's enforcement authorities.

11. The term "medium concentrated animal feeding operation" is defined at section 903.01(Q) in the Ohio Revised Code. Sections 903.01(Q)(2)(a) and (b) of this definition refer to discharges of pollutants to "waters of the United States". Neither the Ohio Revised Code nor the Ohio Administrative Code provide a definition for "waters of the United States". EPA recommends adding a citation to the federal regulatory definition of "waters of the United States" to clarify the scope of the definition at section 903.01(Q).

[1] The terms "animal feeding facility" and "animal feeding operation" as used in Chapter 903 of the Ohio Revised Code have the same meaning. See sections 903.01(B) and (C) of the Ohio Revised Code.