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VIA CERTIFIED MAIL

Matthew Gluckman
NPDES Programs Branch (WN-16J)
US EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3590

RE: The proposed transfer of Ohio's NPDES program from Ohio EPA to Ohio Department of Agriculture.

Dear Mr. Gluckman:

The undersigned organizations and individuals appreciate this opportunity to comment on the proposed transfer of Ohio's Concentrated Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) program from Ohio EPA (OEPA) to the Ohio Department of Agriculture (ODA).

The October 15, 2008 Federal Register notice for transfer of NPDES permitting to the ODA presents a multitude of environmental risks; significantly, the risk that ODA will not issue NPDES permits to CAFOs as required by the Clean Water Act (CWA), that if ODA does issue permits, it will do so in a faulty manner by failing to follow the requirements of the (CWA), and that ODA's enforcement of the permits issued will be inadequate.¹ Effective enforcement and permitting under the CWA depends heavily upon the nature of the agency that is given authority to implement the law.

In October 2006, the Environmental Integrity Project (EIP) released a report entitled, "*Giving Away the Farm: Why US EPA Should Reject the Ohio Department of Agriculture's Bid to Administer the Clean Water Act*," (<http://www.environmentalintegrity.org/pub397.cfm>). The

¹ State Program Requirements; Application To Administer the National Pollutant Discharge Elimination System (NPDES) Program for Concentrated Animal Feeding Operations (CAFOs); Ohio, 73 Fed. Reg. 61123 (proposed October 15, 2008).

report, which is attached to this letter, explains why the transfer of NPDES permitting to ODA would be detrimental to the enforcement of the CWA and to the protection of the environment surrounding animal feeding operations. The proposed Ohio program transfer does not adequately address the concerns raised in EIP's report. The report's findings and recommendations are summarized below.

I. There is a conflict of interest between the mission statement of ODA and the goal of the CWA in protecting the environment from water pollution.

The explicit mission of the ODA "is to provide regulatory protection to producers, agribusinesses, and the consuming public; to promote Ohio agricultural products in domestic and international markets; and to educate the citizens of Ohio about our agricultural industry." (Giving Away the Farm, p. 19, endnote, 131).

The general mission of the OEPA is to "protect the environment and public health by ensuring compliance with environmental laws and demonstrating leadership in environmental stewardship." (Giving Away the Farm, p. 19, endnote 132). The more specific mission for the division currently in charge of issuing NPDES permits (OEPA's Division of Surface Water) is to "protect, enhance and restore all waters of the state for the health, safety and welfare of present and future generations." (Giving Away the Farm, p. 19, endnote 133).

The contrast between these two missions is apparent: ODA is charged with promoting Ohio's agricultural industry, while OEPA must protect state waters from pollution. These missions may overlap, but they are not identical. Where ODA perceives that implementing the CWA conflicts with the needs of the agricultural community that it serves, it may feel bound by its statutory mission to protect the interests of its clientele.

EPA should not approve the transfer of such an important task - protecting Ohio's state water for the benefit of Ohio citizens - without resolving this conflict of interest.

II. ODA lacks "follow-through" on the enforcement of environmental programs it has in place.

EIP's report identifies numerous examples of ODA's failure to enforce environmental programs. One example is the Certified Livestock Manager (CLM) program. Under the CLM program, any person responsible for handling manure at a major CAFO or anyone who transports or applies at least 4.5 tons (dry) or 25 million gallons (liquid) of manure annually must be a CLM or "under supervision" of a CLM who is "reasonably available, but not necessarily physically present." (Giving Away the Farm, p. 19, endnote 138).

The CLM program was meant to ensure expert manure handling. However, EIP's 2006 review found that ODA had not implemented the program successfully:

- 1) ODA issued only two (2) warning letters to manure applicators in violation of the CLM. Neither applicator was required to pay a penalty or to obtain a CLM certificate. (Giving Away the Farm, p. 20, endnote 140).

- 2) ODA promised to issue a warning letter against a CLM-certified manure applicator for violation of setback requirements near a private well in May 2006, but ODA never issued the letter. (Giving Away the Farm, p. 20, endnote 141).
- 3) ODA's background check requirement for new CLM applicants has not been enforced effectively. This is evidenced by the discovery, two (2) years late, of Buckeye Egg Farm's operation under a habitual violator from the state of Iowa. (Giving Away the Farm, p. 20, endnote 143).

EIP's report also provides a half-dozen case studies (Buckeye Egg Farm and five (5) others) where lax enforcement in Ohio has allowed dirty CAFOs to evade compliance. (Giving Away the Farm, pp. 15-17). These examples indicate that ODA lacks the resources and motivation to adequately enforce the CWA.

III. ODA's numerous program deficiencies are proof that transfer of the NPDES program is unwarranted.

EIP's 2006 review found that ODA's program was full of deficiencies that make transfer of the NPDES program to ODA inappropriate:

- 1) ODA does not deter noncompliance through effective enforcement.
 - a. EIP's report provided many detailed examples of ODA's weak or non-existent penalties for violations of ODA rules, e.g.: ODA issued three (3) penalties in four (4) years. OEPA issued double the number of penalties in amounts more than seven (7) times that of ODA's average penalty. (Giving Away the Farm, p. 20, endnote 144).
- 2) ODA fails to effectively regulate manure transfer from permitted farms.
 - a. EIP's report highlighted ODA's failure to allow adequate public review of manure transfer. (Giving Away the Farm, p. 20).
- 3) ODA places inadequate restrictions on winter manure applications.
 - a. EIP's report highlighted the absence of ODA's restrictions on wintertime transfer of manure and ODA's willingness to ignore Ohio Department of Natural Resources' (ODNR's) newsletter statement that, "Protecting water quality would be a lot easier if farmers never needed to apply manure when fields are frozen or covered with snow." (Giving Away the Farm, p. 23, endnote 167).
- 4) ODA has significantly reduced permit coverage and reporting requirements.
 - a. EIP's report revealed the significant disparity in the number of reported state permits under OEPA and ODA's records, suggesting that many permitted facilities may fall off of ODA's radar. This will result in fewer permitted CAFOs. EIP's report also revealed ODA's lax recordkeeping and enforcement of its reporting requirement. (Giving Away the Farm, p. 23).

US EPA must be aware of these four (4) deficiencies in ODA's program, and determine whether they have been corrected before approving the transfer of Ohio's CAFO NPDES program to ODA.

IV. ODA is not ready to effectively oversee NPDES permitting because it does not have the required infrastructure in place.

In the history of events leading up to the October 15th Federal Register notice, the EPA and ODA exchanged a series of letters, which detailed EPA's required statutory and rule changes in Ohio law.² Two letters, dated April 4, 2007 and November 8, 2007, required changes in five (5) provisions of ODA's water standards for land application of manure, litter, and process wastewater.³ In addition, the letters required ODA to clarify or revise twenty six (26) provisions of legal authority/NPDES permitting requirements.⁴

On September 4, 2008, ODA responded to EPA's letters by "commit[ting] to pursue specified statutory and rule changes to address the issues identified by EPA."⁵

The undersigned take issue with the fact that EPA released its public notice in the Federal Register prior to ODA's enactment and adoption of the statutory and rule changes. These changes will provide the basic infrastructure that ODA will use to run the NPDES program. The Federal Register notice states that the transfer "is contingent on Ohio's enactment and adoption of the changes to Ohio law and administrative rules needed to resolve EPA's issues."⁶

Until the proposed statutory changes are enacted and adopted, there is no assurance to the public that the changes will be finalized as promised by ODA. In addition, there is no assurance as to what the final changes will look like. ODA's proposed language may be altered in the process of finalizing the statutory and rule changes such that the language does not meet EPA's standards for approval. Therefore, the public notice was premature. Unless the changes are enacted and adopted, the NPDES program is not ripe for transfer.

The undersigned therefore request that EPA grant an extension of the comment period for review of ODA's proposed statutory and rule changes as required by EPA. The proposed rules, included in ODA's September 4th letter, are extensive. The public has the right to assess whether ODA's revisions meet the standards set by EPA and to track any alterations in language that may arise. Thus, the public should have additional time to comment on the rules prior to the final adoption by ODA.

² <http://www.epa.gov/R5water/npdestek/odacafo.htm>.

³ Id. at 61124.

⁴ Id.

⁵ Id.

⁶ Id.

V. ODA does not have the practice, experience, and familiarity with the CWA to sufficiently enforce the requirements of 33 U.S.C. § 1342(b).

The CWA is a highly technical statute. Without an appropriate program structure, ODA will be unable to comply with 33 U.S.C. § 1342(b)(1)(A), (b)(2)(B), and (b)(2)(7), which list requirements for state permit programs.

- Subsection (b)(1)(A) requires all permits to “insure compliance” with §1311, §1312, §1316, §1317, and §1343 of the CWA. Thus, permits issued by ODA must be in compliance with effluent limitations, water quality related effluent limitations, national standards of performance, toxic and pretreatment effluent standards, and ocean discharge criteria, respectively.
- Subsection (b)(2)(B) covers recordkeeping and reporting. The subsection requires ODA to “inspect, monitor, enter, and require reports” that comply with §1318 of the CWA.
- Subsection (b)(2)(7) requires ODA to “abate violations of the permit or the permit program, including civil and criminal penalties.”

As an agency, ODA does not have the appropriate mission statement directives or experience to issue permits that ensure compliance with the CWA. Given ODA’s ineffective enforcement and oversight, referred to in sections II and III of these comments, ODA is not ready to implement extensive reporting requirements for NPDES permits or to abate violations of the permits by filing civil or criminal penalties.

V.1. ODA must meet additional requirements before transfer take place.

ODA must also meet the requirements of a related CWA section, §33 U.S.C. §1314(i). This section governs guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower of state programs under §1342. Specifically, ODA must follow the requirements of §1314(i)(d), ensuring that it has adequate funding, personnel, and manpower to implement the NPDES program and that the permit approval board is financially independent and unbiased⁷.

There is no indication from the October 15th Federal Register notice that ODA has considered the funding, personnel, and manpower requirements of administering this state program. EPA should not approve transfer of the program if ODA is not prepared to comply with both §1342 and §1314(i)(d).

⁷ §1314(i)(d) requires that “no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.”

VI. EPA should address the findings and recommendations in EIP's 2006 report and the concerns recited above before approving transfer of the NPDES program.

EPA should examine EIP's attached report. The October 15th Federal Register notice does not indicate whether EPA has reviewed the deficiencies identified in our report, and, if so, whether ODA has done anything to improve implementation of the Ohio program for CAFOs.⁸

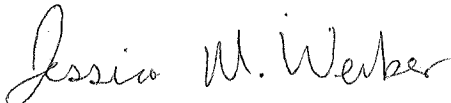
The findings in EIP's report and in the comments above show that EPA should disapprove the NPDES program transfer to ODA because such a transfer would be premature and improper.

ODA is not the correct agency to administer the program because:

- ODA's mission is incompatible with the goals of the CWA;
- ODA lacks the "follow-through" necessary to enforce environmental programs;
- ODA's program deficiencies make transfer unwarranted;
- ODA lacks the infrastructure it needs to run the NPDES program; and
- ODA does not have the adequate experience and expertise needed to run the CWA program in accordance with the law.

Again, the undersigned appreciate this opportunity to comment on the transfer of the Ohio NPDES program to the ODA and request that EPA grant an extension of the comment period for review of ODA's proposed statutory and rule changes.

Sincerely,



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⁸ See citation 1.

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