NOV 0 8 2007

WN-16J

Robert J. Boggs, Director
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, Ohio 43068-3399

Dear Mr. Boggs:

I am writing in response to former Governor Taft's December 28, 2006, letter, in which the State of Ohio asked the U.S. Environmental Protection Agency, Region 5, to approve the transfer of National Pollutant Discharge Elimination System (NPDES) authority for concentrated animal feeding operations (CAFOs) from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA). The submittal included a program description, an Attorney General's statement, supporting statutes and regulations, a draft Memorandum of Agreement between ODA and EPA Region 5, and supporting documentation.

EPA is committed to working with the State as it seeks to transfer NPDES authority for CAFOs to ODA, and to ensure that the program is not disrupted during the transfer process. In April 2007, we provided an initial response to ODA, expressing four specific concerns regarding ODA's standards for land application of manure, litter, and process wastewater, and indicating that these concerns must be resolved, or they may prevent EPA from approving the revised program. ODA still must resolve these concerns. We also provided additional questions regarding ODA's land application standards, which ODA answered in a June 2007 letter. Thank you for your answers.

EPA Region 5 has been working with EPA Headquarters on a comprehensive review of the remainder of Ohio's application. Our review has identified an additional concern regarding application of manure on snow or frozen soil. Please see section II of the enclosure. In addition, certain aspects of ODA's statutory and regulatory authority do not appear to be consistent with federal regulations. We are therefore seeking clarification or revisions with respect to ODA's authority to regulate CAFOs to the extent required by the federal regulations. For each topic raised in section I of the enclosure, ODA will need to either revise the relevant provision or element of the application, or provide clarification as to the adequacy of its current authority.

Thank you for the opportunity to review Ohio's revised program. Once you have had an opportunity to review the enclosure, please have your staff contact Matt Gluckman, CAFO Coordinator, at (312) 886-6089 to discuss these issues, or feel free to contact me directly.

Sincerely yours,

/S/ RDT

Robert D. Tolpa
Acting Director, Water Division

Enclosure

cc: Chris Korleski, Director, Ohio EPA
Marc Dann, Ohio Attorney General
Mr. Kevin Elder, ODA
Mr. George Elmaraghy, Ohio EPA

bcc: Ms. Linda Boornazian, OWM
Ms. Allison Weideman, OWM-Permits Division
Mr. George Utting, OWM- Permits Division
Mr. Louis Eby, OWM- Permits Division
Michael Berman, CA-14J
Gary Prichard, CA-14J
Timothy Henry, WD-15J
Peter Swenson
Steven Jann
Matt Gluckman

G:NPDES/comment letter on ODA submittal 1107/M/Gluckman/11/16/07

EPA Comments on the Ohio Department of Agriculture's December 28, 2006 Application for NPDES Program Authority for Concentrated Animal Feeding Operations

I. Comments

A. Statutory authority

1. Scope of ODA's authority to regulate discharged pollutants. The Clean Water Act prohibits the unauthorized discharge of "pollutants," which are defined in §502(6) as

   "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. . ."

   ODA's regulations purport to give the ODA Director authority to regulate "pollutants." However, ODA's statutory authority appears to be limited to regulation of manure, CAFO-related process/process-generated wastewater, and storm water. As a result, ODA does not appear to have the statutory authority to regulate the discharge of pollutants beyond those within the definition of manure and storm water, such as might be introduced from a co-located facility, or into a CAFO from a commercial or industrial source (e.g., a food processor). Ohio will need to revise ODA's authority to enable ODA to address such situations, or specify the State's current authority to do so, including which State agency or department has authority to administer the authorizing statute.

2. ORC 903.10(C) and (F) require ODA to adopt rules that, among other things, establish (1) best management practices (BMPs) which govern the storage, transportation, and land application of manure and (2) terms and conditions to be included in a permit, including, as applicable, BMPs. The statute defines BMPs as practices established in rules. ORC 903.01(C).

   Chapter 901 of the OAC specifies a number of BMPs that govern the storage, transportation, and land application of manure. *See*, for example, OAC 901:10-2-14. At the same time, it requires ODA to establish NPDES permit conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the Federal Water Pollution Control Act (FWPCA) and regulations thereunder including, but not limited to 40 CFR 122.44. Paragraph (k) in 122.44 requires NPDES permits to include BMPs under certain circumstances. While the paragraph does not specify the BMPs required in each instance, it does establish expectations for the outcomes that the practices must achieve.

It appears that the ORC may require ODA to establish a specific BMP in the OAC before ODA will have authority to impose the practice as a condition in an NPDES permit. Please specify ODA's authority for setting a specific BMP in a permit, when such a BMP does not exist in ODA rules.

3. Terms and conditions of permits. ORC 903.08(G) states that, in establishing the terms and conditions of an NPDES permit the director, to the extent consistent with the FWPCA, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit. For Large CAFOs, EPA already accounted for technical feasibility and economic costs when it developed the Effluent Limitations Guidelines and New Source Performance Standards for the CAFO Point Source Category, and except for limited opportunities for variances from technology-based standards, ODA would not be able to consider these factors further in establishing effluent limitations. For Medium and Small CAFOs, and for land application under the control of Large horse, sheep and duck CAFOs for which EPA has not established technology-based standards, these factors may be considered in setting Best Professional Judgment-based limitations to the extent consistent with 40 CFR 125.3(d). However, these factors are not relevant in setting water quality-based effluent limitations, although they may be relevant outside of the permitting context in evaluating the water quality standards upon which such limitations are based in accordance with Section 303(c) of the Clean Water Act. With respect to compliance schedules, such schedules would be available in establishing water quality-based effluent limits to the extent authorized by EPA requirements and where the State's water quality standards clearly authorize the use of such schedules, but would not otherwise be available in setting water quality-based effluent limitations. Please confirm that use of the factors referenced in Subpart (G) would be limited consistent with federal requirements identified above for the purpose of establishing NPDES permit conditions.

4. Public Participation. Public participation and notice are required elements of the NPDES program, see, CWA §402(b)(3); 40 CFR 123.25. ORC 903.09 and OAC 901:10-6 establish public participation requirements for ODA to follow in the issuance of NPDES permits. ORC 903.09(E) and OAC 901:10-6-01(C) address situations where the Director fails to provide adequate notice or to provide for a public meeting. It appears that these provisions may authorize inadequate notice, or limit opportunities for public hearings. Ohio will need to revise or delete ORC 903.09(E) and OAC 901:10-6-01(C), or specify how ODA's authority to provide public participation consistent with the federal requirements would be retained, in light of these provisions.

5. Conflict of Interest. ORC 903.081 addresses the effect of receipt of income from permittees or applicants for permits. The focus of this provision is on whether a person may take a *specific action* (i.e., issue, vacate, modify) on an NPDES permit during a two year period from receiving significant income from an NPDES permittee or permit applicant. Under 40 CFR 123.25(c), persons who

have received a significant portion of their income from an NPDES permittee or applicant *may not serve* on such boards or bodies. The federal provision specifically includes "any individual, including the Director, who has or shares the authority to approve all or portions of permits either in the first instance as modified or reissued, or on appeal." While the Statement of Legal Authority indicates on page 127 that the ODA program has identical conflict of interest provisions as the federal requirements, the State statutory provision appears to be narrower than the federal provision. The State's conflict of interest authority will need to be revised consistent with the federal requirement.

6. Denial of request for permit modification. 40 CFR 124.5(b) requires a state implementing a permitting program to provide a written response denying a request for a permit modification to interested parties as well as to owners and operators. ORC 903.09(F) only covers such notice to owners and operators, and thus appears to be narrower than the federal requirement. Ohio will need to revise its authority to ensure that written responses to denials of requests for permit modification will be provided to interested parties other than CAFO owners or operators, or specify the provisions which establish that requirement.

7. Designation authority. ORC 903.10(F)(1) requires ODA to adopt rules that designate concentrated animal feeding operations which are subject to NPDES permit requirements. It provides that this designation "shall include only those point sources for which the issuance of NPDES permits is required under the [FWPCA]." Under the federal NPDES program, AFOs meeting the definition of "Large CAFO" and certain AFOs meeting the definition of "Medium CAFO" are defined as point sources, § 502(14) of the CWA and 40 CFR 122.23(a). These CAFOs require permits for discharges and proposed discharges. 40 CFR 122.21. Other AFOs are not defined as point sources. They do not require permits as a general matter. However, federal regulations provide that the Director may designate an AFO as a CAFO under certain circumstances. 40 CFR 122.23(c). Under the federal program, the designation of an AFO as a CAFO is a discretionary action; there is nothing in the FWPCA or regulations which compel the Director to require an AFO that is not defined as a CAFO to obtain a permit. As discussed on page 21 of the Statement of Legal Authority, OAC 901:10-3-07 appears to provide a designation procedure identical to that provided under 40 CFR 122.23(c). However, it appears that the language in ORC 903.10(F)(1) highlighted above potentially limits ODA's designation authority. Ohio needs to either revise or clarify its authority so ODA can designate AFOs as CAFOs to the same extent as under the federal regulations.

B. <u>Regulatory authority</u>

8. Definition of nonpoint source. Rule 901:10-1-01(LLLL) defines nonpoint source pollution to mean any source of pollutants other than those defined as point sources. It provides that nonpoint sources include but are not limited to direct wet and dry deposition and overland runoff.

This definition appears to improperly exclude direct wet and dry deposition and overland runoff from the scope of ODA's proposed NPDES program. Ohio needs to strike the second sentence from the definition or clarify that the sentence does not have the effect of excluding the following from the ODA program:

a. Uncollected and unchannelized additions of pollutants that flow over land to which a CAFO owner or operator has applied manure, litter, or process wastewater. Please note that the Second Circuit Court of Appeals rejected a claim that such discharges are excluded from the scope of the federal NPDES program. *See Waterkeeper Alliance, et al.*, v. *EPA*, 399 F.3d 510, 511 (2nd Cir. 2005).
b. Overland runoff from the production area at an AFO that is defined or designated as a Large CAFO, a Medium CAFO, or a Small CAFO. Please note that overland runoff from production areas at Large CAFOs is included within the scope of the federal NPDES program, as is overland runoff from Medium CAFOs and Small CAFOs where such runoff discharges directly to waters of the United States which originate outside of and pass over, across, or through the facility (production area).
c. Process wastewater discharges that result from direct wet or dry deposition of manure, as the term is defined in 40 CFR 122.23(b)(5), originating from a CAFO production area. Please note that process wastewater discharges from production areas including, but not limited to, precipitation that has come into contact with raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding, is included within the scope of the federal NPDES program. 40 CFR 122.23(b)(7), 122.23(e), 68 *Federal Register* 7198, February 12, 2003.

9. Based on the language in OAC 901:10-1-02(A)(2) and ODA's Program Description, it is our understanding that CAFOs would need to have both a permit to operate (PTO) and an NPDES permit, and that the NPDES provisions would be incorporated into, and specified in the PTO. Understanding of this dual permitting approach is critical to understanding how ODA intends to regulate CAFOs. For readers not familiar with this structure, however, use of terms such as Concentrated Animal Feeding Facility (CAFF), Major Concentrated Animal Feeding Facility (MCAFF) and the interrelationship between PTOs and NPDES permits may not be clear. Please provide, perhaps in the Program Description, further clarification as to the relationship between PTOs and NPDES permits. In particular, are there facilities that would be required to obtain PTOs but not NPDES permits, or visa versa, and which types of facilities would be in those categories?

10. OAC 901:10-1-02(A)(2) states, "the term NPDES permit, NPDES operation, and concentrated animal feeding operation is an animal feeding facility that is subject to the NPDES permit as established in section 402 of the Act . . . ." The intent of this provision appears to be to establish that where the regulations use the terms NPDES permit, NPDES operation and CAFO, they refer to the portion of a PTO dealing with NPDES, and recognize that the NPDES language will be in PTOs. As written, however, this provision could be read as defining CAFOs as only those facilities with NPDES permits. The term "NPDES operation" is also not defined in the state regulations. Please clarify the intent of this provision, and whether the use of "NPDES operation" is creating a new regulatory term.

11. Bases for permit modifications. OAC 901:10-1-09 does not appear to require permit modification in the circumstances described in 40 CFR 122.62(a)(6), (7), (8), (10), (11), (12), or (16). ODA will need to revise its regulations to include those provisions relevant to CAFOs or clarify its authority to modify permits consistent with the listed causes.

12. Sampling and analysis. OAC 901:10-2-4(A) and 901:10-2-10 provide that manure shall be sampled and analyzed in accordance with certain requirements[2]. Paragraph (B) in OAC 901:10-2-04 and paragraph (A) in OAC 901:10-2-10 provide exceptions to the sampling and analysis requirements. While the exception in OAC 901:10-2-10(A) applies only when a person applies for a permit to install or requests approval of an operational change in accordance with OAC 901:10-1-09, the exception in OAC 901:10-2-04(B) appears to be expressed without qualification. ODA will need to revise OAC 901:10-2-04(B) or clarify that the exception established therein is limited to the circumstances provided in OAC 901:10-2-4(A).

13. Additional requirements for an NPDES permit application. OAC 901:10-3-01(E) states: "In establishing terms and conditions of the NPDES permit, the director, to the extent consistent with the Federal Water Pollution Control Act, shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit." See also, OAC 901:10-3-10(A). This provision raises the same questions as comment 3 above, regarding ORC 903.08(G). Please confirm that use of the factors referenced in Subpart (E) would be limited consistent with federal requirements identified in comment 3 for the purpose of establishing NPDES permit conditions.

14. Defined Terms Relating to Who Needs to Apply for NPDES Permit. OAC 901:10-3-02(B) states that an animal feeding operation is defined as a concentrated animal feeding operation *only* if the specific threshold specified in division (M) of section 903.01 of the Revised Code [for Large CAFOs] is met for any one animal species. It also states that "concentrated animal feeding operation" *may* also mean any animal feeding facility that meets the criteria of

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2 For comparison purposes, 40 CFR § 412.4(c)(3) requires Large CAFOs in the cattle, swine, and poultry subcategories to analyze manure samples for nitrogen and phosphorus content a minimum of once per year.

division (Q) [Medium CAFOs] or division (EE) of section 903.01 [Small CAFOs] of the Revised Code. Use of the terms such as "only" and "may" in this provision appear to qualify the requirement for CAFOs to seek NPDES permits, although it appears from ORC 903.01(F) and OAC 901:10-3-01(A) that all CAFOs are required to get permits to the same extent as the federal requirements. ODA will need to revise OAC 901:10-3-02(B) to ensure that CAFOs are required to seek NPDES permits to the extent required under the federal regulations, or clarify that the provision does not affect the State's other provisions regarding which operations must apply for permits.

15. Stockpiles. OAC 901:10-3-2 through 10-3-11 contain effluent limitations applicable to the production and land application areas at Large CAFOs. The rules generally provide, in part, that there shall be no discharge of manure from production areas at such CAFOs. ORC 903.01(AA) defines production areas to include manure storage and treatment facilities, among other features. While OAC 901:10-1-01(CCC) defines such facilities to include stockpiles without regard to the period of time over which they are maintained, OAC 901:10-1-01(JJJJ) appears to provide that stockpiles maintained for a period of 14 days or less are not included within the meaning of the term manure storage facilities. Based on this definition, it appears that stockpiles maintained for 14 days or less are not subject to the production area effluent limitations in OAC 901:10-3-2 through 10-3-11. ODA needs to revise this definition to ensure that manure stockpiles, even those maintained for less than 14 days, are considered part of a CAFO's production area, and are thus subject to effluent limitations to the same extent as under the federal requirements.

16. Standard permit terms and conditions, monitoring and records. 40 CFR 122.41(l)(4) requires that monitoring results be reported on Discharge Monitoring Reports (DMRs). There does not appear to be a specific counterpart to this requirement in OAC 901, although OAC 901:10-3-10(L)(4) provides authority for ODA to require reporting on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than one [per] year. Please clarify whether this or other provisions provide authority to require permitted CAFOs to submit monthly monitoring reports. While the need for CAFOs to submit DMRs will be limited (e.g., for Medium CAFOs with discharges or facilities using voluntary alternative performance standards under 40 CFR Part 412), such authority remains necessary for implementation of a CAFO permitting program.

17. Bypass. 40 CFR 122.41 defines bypass as the intentional diversion of waste streams from any portion of *a treatment facility*. ODA's regulations define bypass as any intentional diversion of manure from any portion of *the production area*. (OAC 901:10-3-10(T)) [emphasis added]. While recognizing that the state has tailored its bypass provision for the CAFO context, it appears that the change may expand the provision to encompass a much broader set of circumstances than the narrow ones addressed by the federal bypass regulation.

In addition, the wording in OAC 901:10-3-10(T)(4) of the State's bypass provision varies from the federal bypass provision at 40 CFR 122.41(m)(4)(i). Under the federal provision, all three circumstances listed in the provision must be satisfied to avoid a potential enforcement action for a bypass. By ending each paragraph with a period and failing to include the word 'and,' the Ohio provision appears to allow the possibility of avoiding enforcement if any of the three circumstances exist.

To address both of these issues, ODA will need to revise OAC 901:10-3-10(T)(4) to be consistent with the federal bypass provisions.

18. General permits. It is our understanding that ODA is not intending to establish a general permit by rule for CAFOs. However, some of the language in OAC 901:10-4-05, in particular the reference to "this permit" in the introductory paragraph, gives the appearance that ODA is attempting to establish a general permit-by-rule. If ODA intends for OAC 901:10-4-05 to establish an NPDES general permit-by-rule, then the Department will need to submit the rule to the Region for review under the CWA § 402(d) and 40 CFR 123.44 subsequent to any EPA, Region 5, approval of the present revision to the Ohio NPDES program. If it is not ODA's intent to establish a permit-by-rule for CAFOs, reference to "this permit" should be removed from OAC 901:10-4-05. Please clarify ODA's intent regarding a potential general permit-by-rule.

19. Response to complaints. Among other duties, 40 CFR 123.27(d) creates an obligation for a state implementing an NPDES program to investigate all complaints and to not oppose permissive intervention where authorized by statute or rule, or to provide for intervention as of right in civil or administrative actions by any citizen having an interest which is or may be adversely affected. In addition, 123.26(b)(4) requires states to have a process for consideration of publicly submitted information regarding violations. Under ORC 903.15(B), as well as OAC 901:10-5-01(B)(1) and (C), ODA appears to only be obligated to investigate complaints from persons aggrieved or adversely affected by an alleged nuisance, and only to investigate whether or not a CAFO owner or operator is in compliance with a permit. These provisions will need to be revised to ensure that ODA's obligation to investigate complaints is not limited to those made by persons who can show they have been aggrieved or adversely affected, and that it has full authority to investigate a complaint that may result in a finding of an unpermitted discharge.

20. Draft permits. 40 CFR 124.6(d) specifies elements that must be included in draft permits, including those drafted by state permitting authorities. ODA's regulations do not appear to address draft permit content. The State regulations will need to be revised to ensure that draft permits contain the elements required by the federal regulations.

21. 40 CFR 124.10(d)(iv) requires that the name, address and telephone number of a person from whom interested persons may obtain further information (including copies of the draft permit or draft general permit, as well as a statement of basis or fact sheet and the application) be included in a public notice. The state provision regarding the contents of public notice, OAC 901:10-6-02(A)(1), includes similar language, but refers to the location where records are located and may be inspected and copied. Under the federal provision, interested persons are able to request permit-related information without having to travel to the place it is maintained. Please clarify whether the public has similar ability to access permit-related information under the state provision. If not, this provision will need to be revised consistent with the federal requirement.

22. Additionally, it appears that some of the requirements in 40 CFR 124.10(d)(v) are absent from the Ohio requirements regarding public notices. Section 124.10(d)(v) requires the inclusion of a statement of procedures to request a hearing, the time and place that any hearing will be held, and other procedures by which the public may participate in the final permit decision. Such provision will need to be added to ODA's regulations to ensure that public notices will include the information required under the federal regulations.

23. Public Notice of permit actions and public comment period. 40 CFR 124.10(c)(iii) requires permitting authorities to provide public notice by mail to federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, etc. OAC 901:10-6-03(C) states that public notice regarding permit actions will be provided to state, interstate, federal and local government agencies *with jurisdiction over waters that may be affected by the discharge to waters of the State* [emphasis added]. Please provide clarification as to whether notice will be provided to the agencies within the scope and to the extent required by the federal requirements. In any event, ODA should remove the above highlighted language when it updates its regulations to incorporate revisions to the federal regulations, and replace it with language consistent with 124.10(c)(iii).

24. Response to public comments. Under 40 CFR 124.17, NPDES permitting authorities must consider and respond to comments submitted during a public comment period or during any hearing. The Statement of Legal Authority indicates on page 99 that OAC 901:10-6-04(J) requires a responsiveness summary for all public noticed permits, but OAC 901:10-6-04(J) deals with public meetings, and only appears to require a report on comments received during such public meetings. ODA will need to revise its regulations to ensure that a response to comments is required for all public noticed permits, or clarify which provision requires such a response in the event a public hearing is not held.

C. <u>ODA-EPA Memorandum of Agreement (MOA)</u>

1. Regulation of AFOs/CAFOs discharging to POTWs. Pages 2-3 of the MOA indicate that Ohio EPA will retain jurisdiction for CAFO's discharging to Publicly Owned Treatment Works (POTW). Page 85 of the Statement of Legal Authority specifies that authority for POTWs will continue to reside with Ohio EPA, and that "any facility or operation subject to chapter 903 of the Revised Code that introduces manure, including process wastewater, into a publicly owned treatment works must comply with 40 CFR part 403 and chapter 6111 of the Revised Code and rules promulgated thereunder." This language suggests, but does not specifically state, which agency would regulate discharges from CAFOs to POTWs. Please provide clarification as to which agency has the authority and responsibility for regulating such operations.

2. Proposed permits, page 11. We had previously commented that this section should replace the term "draft" with "proposed" permits. Upon further consideration, we now believe that use of both terms is appropriate, and so withdraw that previous comment. We do, however, have an additional comment. Specifically, the revised language states that "U.S. EPA will, within 45 days after receipt of the draft or proposed individual permits..." This language could limit EPA's timeframe to object to draft permits to 45 days, which is less than the 90 days we otherwise have under the regulations and other sections of the MOA. Please revise this language to clarify that EPA will continue to have 90 days to review and object to draft permits as specified under section III.C.2 and III.C.3 of the MOA.

D. <u>Program Description</u>

Criminal investigation. ODA's criminal enforcement authority is at ORC 903.99. The MOA with EPA Region 5 commits ODA to implement an enforcement program, including a compliance assessment program, which enables ODA to take timely and effective enforcement for violations. The program description and organizational chart/position descriptions indicate that ODA has four livestock inspectors, and that through the Livestock Environmental Permitting Program Executive Director, ODA can refer criminal cases to the Attorney General's office. Please clarify whether ODA staff would include a criminal investigator, and if not, who would be assigned if there is a potential criminal issue.

II. Concern Regarding Land Application of Manure or Litter

Surface application of manure or litter on snow or frozen soil. Paragraph (G) in rule 901:10-2-14 contains ODA's technical standards for application of manure, litter, and process wastewater on snow or frozen soil. EPA, Region 5, understands that the standards in paragraph (G) apply in addition to the technical standards expressed elsewhere in rule 901:10-2-14. Pages 46 through 48 of the Program Description describe enforcement procedures that ODA will implement when a CAFO fails to comply with the rules applicable to manure, litter, and

process wastewater application on snow or frozen soil. However, since the procedures in the Program Description will not apply to a CAFO that is not subject to enforcement, they do not establish technical standards for nutrient management as required by 40 CFR 123.36.

Appendix L in EPA's *Managing Manure Nutrients at Concentrated Animal Feeding Operations* (EPA-821-B-04-006, August 2004) contains winter spreading technical guidance. EPA, Region 5, used Appendix L to evaluate the ODA technical standards to determine the degree to which they affect the movement of nutrients and manure pollutants in runoff from melted snow where waters of the United States are downslope from a land application area and a crop will not be grown in the winter or nutrients need not be supplied in that season to grow a winter crop. For the purpose of step 1 in Appendix L, EPA established 18 pounds per acre as a "standard" for the mass of total nitrogenous (and carbonaceous) biochemical oxygen demand (BOD) that would be permitted in runoff from one inch of precipitation[3]. For the purpose of step 3, we established antecedent moisture condition III and 3° C as the design conditions for soil moisture and temperature, respectively. Based on the evaluation, EPA, Region 5, is concerned that the ODA technical standards will not minimize movement of nutrients to waters of the United States, as required by 40 CFR 123.36, when dairy, layer, or broiler manure or litter is surface applied on snow or frozen soil under the circumstances identified in the Attachment.

III. Technical corrections – ODA should address the following when it updates its regulations to incorporate the revised federal regulations.

1. In OAC 901:10-2-14(C)(1)(e), "avoid" was not changed to "preclude" in the version of the rules we were provided, as ODA indicated it had done.

2. OAC 901:10-3-04 should cite "(II)", not "(HH)"

3. OAC 901:10-3-08 (B)(6): This section appears to be the equivalent requirement to section 124.62(b)(2) of the federal regulations. However, this provision cites to Section 301 of the CWA instead of Section 302(b)(2) of CWA, which is the section that applies to the modifications of effluent limitations and is cited in 124.62(b)(2). This citation should be corrected when ODA revises its regulations to incorporate revisions to federal regulations.

4. OAC 901:10-3-10 does not include a provision similar to 122.41(l)(4)(iii), which requires that calculations for all limitations that require averaging of

3 Eighteen pounds per acre is the product of 160 milligrams per liter total BOD times the volume of water, 13,650 gallons, that will runoff an acre of land after one inch of water has been applied to Hydrologic Soil Group D soils under good hydrologic and saturated soil moisture conditions. One hundred sixty milligrams per liter is the concentration of total BOD that publicly-owned treatment works would need to meet on a maximum daily basis if they are to have a reasonable chance of achieving secondary treatment standards on a monthly average basis.

measurements use the arithmetic mean unless otherwise specified by the Director in the permit.

5. OAC 901:10-3-10(J)(1) Monitoring and records. Unlike the federal requirement regarding representativeness of samples at 122.41(i)(4), the State provision includes the qualifier "records of" before "samples and measurements," which potentially shifts the requirement for representativeness from the sample to the sampling records, and makes the requirement more limited in coverage than the federal requirement. The term "records of" should be deleted when ODA revises its rules to incorporate revisions to the federal regulations.

Attachment
Circumstances under which Surface Application of Manure or Litter on Snow or Frozen Soil is a Cause for Concern

Land Slope Greater Than Zero But Less Than or Equal to Six Percent

1. Dairy, layer, or broiler manure or litter applied on Hydrologic Soil Group (HSG) D soils.
2. Dairy manure applied on HSG C soils.
3. Layer or broiler manure or litter applied on HSG C soils where the former crop was a row crop or small grain.
4. Dairy manure applied on HSG B soils where the former crop was a row crop.

Land Slope Greater Than Six Percent

1. Dairy manure applied on HSG D soils.
2. Dairy manure applied on HSG C soils where the former crop was a row crop or small grain.