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# When Industry Knocks: Ohio Department of Agriculture's Fight to Control Pollution Permits for Concentrated Animal Feeding Operations

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# WHEN INDUSTRY KNOCKS: OHIO DEPARTMENT OF AGRICULTURE'S FIGHT TO CONTROL POLLUTION PERMITS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS

ALEXIS WOODWORTH\*

## ABSTRACT

The Clean Water Act requires that a permit be obtained before discharging pollutants into bodies of water in the United States. In Ohio, these permits are issued by the Ohio Environmental Protection Agency. But in 2002, after growing pressure from agriculture lobbyists, the Ohio Legislature passed legislation to transfer permitting authority over industrial farms to the Ohio Department of Agriculture. To date, this transfer has not been approved by the United States Environmental Protection Agency. The U.S. EPA has demanded legislative and regulatory changes before it will grant the Ohio Department of Agriculture permitting authority. Concerned citizens and organizations have urged the U.S. EPA to deny the transfer, citing the Ohio Department of Agriculture's enforcement failures and the cozy relationship the agency has with the agricultural industry. Granting the Ohio Department of Agriculture permitting authority over industrial farms would create legislative, regulatory, and public interest conflicts. Further, it would take permitting authority away from the Ohio EPA, an agency already suitably regulating industrial farms under the Clean Water Act.

## CONTENTS

I. INTRODUCTION .....	600
II. BACKGROUND .....	604
A. <i>The Rise of Concentrated Animal Feeding Operations</i> .....	604
B. <i>The Clean Water Act and the National Pollution Discharge Elimination System</i> .....	607
C. <i>Ohio Senate Bill 141</i> .....	608
D. <i>Subsequent Efforts to Transfer Authority to ODA</i> .....	609
E. <i>Notice of Proposed Approval and Public Comments</i> .....	609
F. <i>Current State of Ohio's Request</i> .....	611
III. ODA LACKS THE LEGAL AUTHORITY, REGULATORY PLANS, AND PUBLIC INTEREST PROTECTIONS NECESSARY TO EFFECTIVELY REGULATE NPDES PERMITTING FOR CAFOS .....	611
A. <i>ODA's Statutory Authority</i> .....	611
1. <i>ODA Does Not Have the Statutory Authority to Regulate All Pollutants</i> .....	611

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2. ODA Improperly Attempts to Consider “Technical Feasibility” of Effluent Limitations.....	612
3. ODA’s Conflict of Interest Provision Does Not Meet Federal Standards .....	613
B. ODA’s Regulations .....	614
C. The Regulatory Capture of ODA .....	614
1. Defining Regulatory Capture .....	615
2. Carpenter and Moss’s Model for Diagnosing Regulatory Capture ..	616
3. ODA’s Intent, or Lack Thereof, to Shift Policy .....	620
4. Regulatory Capture and the Environmental Crises .....	621
IV. OHIO EPA IS A BETTER OPTION FOR REGULATING NPDES PERMITTING FOR CAFOS .....	622
V. CONCLUSION .....	623

## I. INTRODUCTION

In August of 2014, Toledo, Ohio made national news when half a million residents lost drinking water for three days.<sup>1</sup> Municipal officials instructed residents not to use the water for drinking, brushing teeth, or preparing food, and warned them that boiling the water would not make it safe.<sup>2</sup> Governor John Kasich declared a state of emergency, calling for the Ohio National Guard and state workers to transport safe water to residents.<sup>3</sup> With no certainty as to when the ban may be lifted, many residents resorted to waiting in lines at fire stations for bottled water.<sup>4</sup> Some drove to Michigan to find stores that had supplies of bottled water after local shops ran out.<sup>5</sup> Randy Nissen had driven to a friend’s home outside of the ban zone to fill every container he could with potable water.<sup>6</sup> *The New York Times* interviewed Nissen a day before the ban was lifted.<sup>7</sup> Nissen expressed a concern that, in retrospect, utterly eclipses the temporary panic of the ban: “I’m worried that when the water comes back on, everything will go back to the status quo, and no one will address the problems that caused this.”<sup>8</sup> Mr. Nissen’s fear was far from undue.<sup>9</sup>

<sup>1</sup> George Tanber, *Toxin Leaves 500,000 in Northwest Ohio Without Drinking Water*, REUTERS (Aug. 2, 2014), <https://www.reuters.com/article/us-usa-water-ohio/toxin-leaves-500000-in-northwest-ohio-without-drinking-water-idUSKBN0G20L120140802>.

<sup>2</sup> Alexandra Sifferlin, *Toledo’s Contaminated Water: Here’s What Went Wrong*, TIME (Aug. 4, 2014), <http://time.com/3079516/toledos-contaminated-water-heres-what-went-wrong/>; Emma G. Fitzsimmons, *Tap Water Ban for Toledo Residents*, N.Y. TIMES (Aug. 3, 2014), <https://www.nytimes.com/2014/08/04/us/toledo-faces-second-day-of-water-ban.html>.

<sup>3</sup> Tanber, *supra* note 1.

<sup>4</sup> Fitzsimmons, *supra* note 2.

<sup>5</sup> Tanber, *supra* note 1; Fitzsimmons, *supra* note 2.

<sup>6</sup> Fitzsimmons, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See James F. McCarty, *Harmful Algal Blooms Continue to Plague Lake Erie, Threaten Drinking Water, Fish, Pets*, CLEVELAND.COM (Aug. 30, 2017),

The drinking water crisis Toledo experienced that summer was the result of a harmful algal bloom that had grown near the city's water intake system in the Maumee Bay of Lake Erie.<sup>10</sup> The algae contained a neurotoxin called microcystin, which can cause illness or death in humans and animals.<sup>11</sup> Toledo Mayor D. Michael Collin lifted the municipal ban on drinking water after three days,<sup>12</sup> "but experts say harmful algal blooms that can turn tap water toxic and kill wildlife are becoming more common in coastal oceans and in freshwater across the United States and around the globe."<sup>13</sup>

The harmful algal bloom in the Maumee Bay is one of many to have affected Lake Erie in recent years.<sup>14</sup> In 2011, a then record-breaking harmful algal bloom reached from Toledo to Cleveland.<sup>15</sup> In 2015, an even larger bloom covered an area the size of New York City.<sup>16</sup> The growing concern for harmful algal blooms in Lake Erie represents a crisis occurring on a much larger scale.<sup>17</sup> Harmful algal blooms appear to be increasing in frequency,<sup>18</sup> with scientists pointing to climate change and fertilizer

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[http://www.cleveland.com/metro/index.ssf/2017/08/harmful\\_algal\\_blooms\\_continue.html](http://www.cleveland.com/metro/index.ssf/2017/08/harmful_algal_blooms_continue.html) ("Over the past decade, blue-green algal blooms, which sometimes turn toxic, have become an annual summer plague on Lake Erie."); Greta Jochem, *Algae Toxins in Drinking Water Sickened People in Two Outbreaks*, NPR (Nov. 9, 2017), <https://www.npr.org/sections/health-shots/2017/11/09/563073022/algae-contaminates-drinking-water> ("In the summer of 2017, blooms in [Lake Erie] were the third-largest ever recorded.")

<sup>10</sup> Sifferlin, *supra* note 2.

<sup>11</sup> Kenneth Kilbert et al., *Tools for Reducing Harmful Algal Blooms in Lake Erie*, 44 U. TOL. L. REV. 69 (2012); *Harmful Algae*, WOODS HOLE OCEANOGRAPHIC INST., <http://www.whoi.edu/redtide/home> (last visited Apr. 16, 2019). For more information, see generally *Taxonomic Reference List of Harmful Micro Algae*, IOC-UNESCO, <http://www.marinespecies.org/hab/> (last visited Apr. 16, 2019).

<sup>12</sup> See Jane J. Lee, *Driven by Climate Change, Algae Blooms Behind Ohio Water Scare Are New Normal*, NAT'L GEOGRAPHIC (Aug. 6, 2014), <https://news.nationalgeographic.com/news/2014/08/140804-harmful-algal-bloom-lake-erie-climate-change-science/>; Sifferlin, *supra* note 2.

<sup>13</sup> Lee, *supra* note 12.

<sup>14</sup> See Scott Surovjak, *Combatting Harmful Algal Blooms and Saving America's Waterways*, 78 OHIO ST. L.J. FURTHERMORE 1 (2017).

<sup>15</sup> Jim Erickson, *Record-Breaking 2011 Lake Erie Algae Bloom May Be Sign of Things to Come*, MICH. NEWS (Apr. 1, 2013), <http://www.ns.umich.edu/new/releases/21342-record-breaking-2011-lake-erie-algae-bloom-may-be-sign-of-things-to-come>.

<sup>16</sup> James F. McCarty, *Lake Erie Algal Bloom of Summer of 2015 Was a Record-Breaker, Scientists Say*, CLEVELAND.COM (Nov. 10, 2015), [http://www.cleveland.com/metro/index.ssf/2015/11/lake\\_erie\\_algal\\_bloom\\_of\\_summe.html](http://www.cleveland.com/metro/index.ssf/2015/11/lake_erie_algal_bloom_of_summe.html).

<sup>17</sup> See JENNIFER L. GRAHAM ET AL., CYANOBACTERIAL HARMFUL ALGAL BLOOMS AND U.S. GEOLOGICAL SURVEY SCIENCE CAPABILITIES 2–3 (U.S. Geological Survey 2016) (providing a United States map showing areas affected by harmful algal blooms and discussing the growing problem of harmful algal blooms); see also *Distribution of HABs in the U.S.*, WOODS HOLE OCEANOGRAPHIC INST., <http://www.whoi.edu/redtide/regions/us-distribution> (last updated Aug. 15, 2016).

<sup>18</sup> Lee, *supra* note 12; see also *Harmful Algal Blooms: Tiny Organisms with a Toxic Punch*, NAT'L OCEAN SERV., <https://oceanservice.noaa.gov/hazards/hab/welcome.html> (last visited Nov. 14, 2017) ("HABs have been reported in every U.S. coastal state, and their occurrence

runoff as major causes.<sup>19</sup> Studies indicate that harmful algal blooms in Lake Erie form “due to a combination of warm temperatures and excess nutrients, especially phosphorus.”<sup>20</sup> Increased levels of phosphorus and other nutrients in natural environments due to human activity is often referred to as “nutrient loading.”<sup>21</sup> Research suggests a main source of phosphorus loading into Lake Erie is waste from industrial farms, known as Concentrated Animal Feeding Operations (“CAFOs”).<sup>22</sup>

CAFOs, sometimes called factory farms,<sup>23</sup> are not synonymous with what one might envision when imagining a farm. Generally defined, a CAFO is an animal feeding operation with over 1,000 animal units.<sup>24</sup> CAFOs are subject to regulation by the United States Environmental Protection Agency (“U.S. EPA”) under the Clean Water Act.<sup>25</sup>

The Clean Water Act requires that a permit be obtained before discharging pollutants, including phosphorus from CAFO waste, into bodies of water.<sup>26</sup> In Ohio, these permits are issued by the Ohio Environmental Protection Agency (“Ohio

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may be on the rise. HABs are a national concern because they affect not only the health of people and marine ecosystems, but also the ‘health’ of local and regional economies.”).

<sup>19</sup> Lee, *supra* note 12.

<sup>20</sup> Kilbert et al., *supra* note 11, at 70 (citing JEFFREY M. REUTTER ET AL., LAKE ERIE NUTRIENT LOADING AND HARMFUL ALGAL BLOOMS: RESEARCH FINDINGS AND MANAGEMENT IMPLICATIONS 2 (2011)).

<sup>21</sup> See *Nutrient Loading*, ENVTL. LITERACY COUNCIL, <https://enviroliteracy.org/ecosystems/drivers-of-biodiversity-loss/nutrient-loading/> (last visited Apr. 16, 2019) (“Although nitrogen, phosphorus, and sulfur cycle naturally throughout the environment, an increase in levels of these particular pollutants, due to human activity, are occurring at concentrations which can put species at risk. Much of the increase is a result of various agricultural, industrial, and urban activities[.]”). It is also sometimes referred to as “nutrient pollution.” See *What Is Nutrient Pollution?*, NATL. OCEAN SERV., NATL. OCEANIC & ATMOSPHERIC ADMIN., DEP’T OF COMM., <https://oceanservice.noaa.gov/facts/nutpollution.html> (last visited Apr. 16, 2019) (“Nutrient pollution is the process where too many nutrients, mainly nitrogen and phosphorus, are added to bodies of water and can act like fertilizer, causing excessive growth of algae.”).

<sup>22</sup> Kilbert et al., *supra* note 11, at 72 (citing OHIO EPA, OHIO LAKE ERIE PHOSPHORUS TASK FORCE FINAL REPORT 11, at 73 (2010)); see also Christina Dierkes, *Ohio Phosphorus Task Force Releases Updated Report, Recommendations*, OHIO SEA GRANT (Nov. 13, 2013), <https://ohioseagrant.osu.edu/news/2013/002a7/ohio-phosphorus-task-force-releases-updated-report> (discussing updated report by Ohio Lake Erie Phosphorus Task Force II, issued in 2013); OHIO EPA ET AL., OHIO LAKE ERIE PHOSPHORUS TASK FORCE II FINAL REPORT (2013), [http://lakeerie.ohio.gov/Portals/0/Reports/Task\\_Force\\_Report\\_October\\_2013.pdf](http://lakeerie.ohio.gov/Portals/0/Reports/Task_Force_Report_October_2013.pdf).

<sup>23</sup> See Jan Larson McLaughlin, *Group Says Political Corruption, Not Algae Is Hurting Lake Erie*, BG INDEP. NEWS (June 8, 2017), <http://bgindependentmedia.org/group-says-political-corruption-not-algae-is-hurting-lake-erie/>.

<sup>24</sup> *Animal Feeding Operations (AFO) and Concentrated Animal Feeding Operations (CAFO)*, NAT’L RESOURCES CONSERVATION SERV., U.S. DEP’T OF AGRICULTURE, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo/> (last visited Apr. 16, 2019).

<sup>25</sup> 40 C.F.R. § 122.23(a) (2019).

<sup>26</sup> 33 U.S.C. § 1342(a)(1) (2017).

EPA”).<sup>27</sup> In 2002, after growing pressure from agriculture lobbyists,<sup>28</sup> Ohio passed legislation to transfer the authority to issue discharge permits to CAFOs from the Ohio EPA to the Ohio Department of Agriculture (“ODA”).<sup>29</sup> To date, the U.S. EPA has not approved this transfer,<sup>30</sup> as required by federal regulation.<sup>31</sup> ODA’s request for authorization remains pending.<sup>32</sup> ODA and the U.S. EPA have corresponded on several occasions since the Ohio legislation passed, with ODA repeatedly reiterating its request, and the U.S. EPA demanding legislative and regulatory changes before it will grant ODA authority.<sup>33</sup> As the federal and state agencies have squabbled,

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<sup>27</sup> OHIO REV. CODE ANN. § 903.08 (LexisNexis 2017); OHIO REV. CODE ANN. § 6111.03(R)(2) (LexisNexis 2017) (“[Powers of director of environmental protection] . . . This chapter authorizes the state to participate in . . . the national pollutant discharge elimination system . . . in accordance with the Federal Water Pollution Control Act.”).

<sup>28</sup> Mike Wagner & Ben Sutherly, *The Supersizing of America’s Livestock Farms*, DAYTON DAILY NEWS, Dec. 1, 2002, at A1; *see also* ENVTL. INTEGRITY PROJECT, GIVING AWAY THE FARM: WHY U.S. EPA SHOULD REJECT THE OHIO DEPARTMENT OF AGRICULTURE’S BID TO ADMINISTER THE CLEAN WATER ACT 28 (Oct. 2006).

<sup>29</sup> OHIO REV. CODE ANN. § 903.08.

<sup>30</sup> *Id.*; Region 5 Water, *Ohio CAFO Program*, U.S. ENVTL. PROTECTION AGENCY, <https://www3.epa.gov/region5/water/npdestek/odacafo.htm> (last updated Feb. 22, 2016).

<sup>31</sup> 40 C.F.R. § 123.62(c) (“States with approved programs must notify the EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) [procedures for revision of a State program] of this section.”).

<sup>32</sup> Region 5 Water, *supra* note 30.

<sup>33</sup> Letter from Bob Taft, Governor, State of Ohio to Mary A. Gade, Reg’l Adm’r, U.S. EPA, Region 5 (Dec. 28, 2006), [https://www.epa.gov/sites/production/files/2017-04/documents/oda\\_applicationw\\_bookmarks\\_0.pdf](https://www.epa.gov/sites/production/files/2017-04/documents/oda_applicationw_bookmarks_0.pdf) (submitting for approval application to transfer authority from Ohio EPA to ODA); Letter from Jo Lynn Traub, Dir., Water Division, U.S. EPA, Region 5 to Robert J. Boggs, Director, Ohio Department of Agriculture (Apr. 4, 2007), <https://www.epa.gov/sites/production/files/2017-04/documents/epaapril2007lettertooda.pdf> (addressing initial list of questions and concerns regarding land application and wastewater issues in Ohio’s application); Letter from Robert J. Boggs, Dir., ODA to Jo Lynn Traub, Dir., Water Division, U.S. EPA, Region 5 (June 22, 2007), [https://www.epa.gov/sites/production/files/2017-04/documents/oda-62207-ltr\\_0.pdf](https://www.epa.gov/sites/production/files/2017-04/documents/oda-62207-ltr_0.pdf) (addressing manure land application issues); Letter from Robert D. Tolpa, Acting Dir., Water Division, U.S. EPA, Region 5 to Robert J. Boggs, Dir., ODA (Nov. 8, 2007), [https://www.epa.gov/sites/production/files/2017-04/documents/epanov2007ltrtooda\\_0.pdf](https://www.epa.gov/sites/production/files/2017-04/documents/epanov2007ltrtooda_0.pdf) (requesting clarifications and revisions to portions of Ohio’s application); Letter from Robert J. Boggs, Dir., ODA to Lynn Buhl, Reg’l Adm’r, U.S. EPA, Region 5 (Sept. 4, 2008), <https://19january2017snapshot.epa.gov/www3/region5/water/npdestek/ODA/ODASept4ltrtoEPApart1.pdf> (providing proposed revisions to Ohio’s regulations and statutes to address concerns identified in EPA’s April and November 2007 letters); Letter from Kevin Elder, Exec. Dir., ODA to Lynn Buhl, Reg’l Adm’r, U.S. EPA, Region 5 (Sept. 22, 2008), <https://19january2017snapshot.epa.gov/www3/region5/water/npdestek/ODA/ODASept22ltrstoEPA.pdf> (providing corrections to enclosure sent with September 4, 2008 letter); Letter from Lynn Buhl, Reg’l Adm’r, U.S. EPA, Region 5 to Robert J. Boggs, Dir., Ohio Dep’t. of Agric. (Oct. 3, 2008), <https://19january2017snapshot.epa.gov/www3/region5/water/npdestek/ODA/O>

concerned citizens and organizations have urged the U.S. EPA to deny this transfer, citing ODA's enforcement failures and corrupt practices in the regulation of CAFOs.<sup>34</sup>

This Note analyzes ODA's request and concludes that the U.S. EPA should not grant ODA the authority to issue discharge permits for CAFOs due to ODA's inadequate statutory authority, its insufficient regulations, and the regulatory capture of the agency. Part II of this Note discusses CAFOs, the National Pollution Discharge Elimination System ("NPDES") of the Clean Water Act, and the legislative and political events in Ohio concerning the NPDES program for CAFOs. Part III illustrates the legislative, regulatory, and public interest conflicts raised by ODA's request for permitting authority. Finally, Part IV recommends an option that will satisfy the federal requirements of the NPDES program and best manage phosphorus loading into Lake Erie and other bodies of water in Ohio.

## II. BACKGROUND

### A. *The Rise of Concentrated Animal Feeding Operations*

In recent decades, livestock farming in the United States has morphed into an unprecedented industry as production has shifted from small, family owned farms to large, corporate-owned facilities.<sup>35</sup> Due to the efficiency of industrial farming, "since 1960, milk production has doubled, meat production has tripled, and egg production has quadrupled."<sup>36</sup> This growth is largely a result of "[n]ew technologies [that] have allowed farmers to reduce costs, which means bigger profits on less land and capital. The current agricultural system rewards larger farms with lower costs, which results in greater profit and more incentive to increase farm size."<sup>37</sup> As this system of

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H%20CAFO%20Boggs%20Oct%202008.pdf (informing ODA that its request is approvable, provided that revisions in the ODA's September 4, 2008 letter are adopted).

<sup>34</sup> *Transcript of Public Hearing on Ohio Department of Agriculture's Clean Water Program for Concentrated Animal Feeding Operations* 14–16, 17–19, 22–24, 25–27, 46–52, 57–66, 71–77, 78–81, 97–98 (Nov. 18, 2008), <https://www3.epa.gov/region5/water/npdestek/ODA/ODA111808.pdf>; Tom Henry, *Advocates Assert Ohio Department of Agriculture Lacks Legal Authority*, TOLEDO BLADE (June 7, 2017), <http://www.toledoblade.com/frontpage/2017/06/07/toledo-based-advocates-ohio-department-agriculture-issue-enforce-permits.html>; *Citizen's Petition to the U.S. EPA for Withdrawal of the CAFO National Pollutant Discharge Elimination System Program Delegation as well as the CAFO Permits to Install and Operate from the State of Ohio* (Nov. 9, 2011) (on file with author); McLaughlin, *supra* note 23.

<sup>35</sup> CARRIE HRIBAR, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 1 (Mark Schultz ed., 2010), [https://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

industrial farming grew in the mid-twentieth century,<sup>38</sup> federal agencies began to regulate the conglomerates, codifying them with the name “CAFOs.”<sup>39</sup>

CAFOs are “large concentrated AFOs,”<sup>40</sup> with the U.S. EPA defining AFOs as “agricultural enterprises where animals are kept and raised in confined situations.” “AFOs congregate animals, feed, manure and urine, dead animals, and production operations on a small land area.”<sup>41</sup> To be considered a CAFO, an AFO must have “more than 1,000 animal units (an animal unit is defined as an animal equivalent of 1,000 pounds live weight).”<sup>42</sup> To put this in perspective, under the federal definitions a facility is considered a CAFO when it has the “equivalent of 1,000 head of beef cattle, 700 dairy cows, 2,500 swine weighing more than 55 lbs[.], 125 thousand broiler chickens, or 82 thousand laying hens[.]”<sup>43</sup>

While the CAFO model of livestock farming comes with considerable benefits,<sup>44</sup> such as inexpensively feeding a growing population,<sup>45</sup> it also comes with significant

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<sup>38</sup> Carolyn Dimitri et al., *The 20th Century Transformation of U.S. Agriculture & Farm Policy*, ECON. RESEARCH SERV., U.S. DEP’T AGRIC. (2005), <https://ageconsearch.umn.edu/bitstream/59390/2/eib3.pdf>.

<sup>39</sup> CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33656, ANIMAL WASTE AND WATER QUALITY: EPA’S RESPONSE TO THE WATERKEEPER ALLIANCE COURT DECISION ON REGULATION OF CAFOs 3 (2011), <https://fas.org/sgp/crs/misc/RL33656.pdf>.

<sup>40</sup> NAT’L RESOURCES CONSERVATION SERV., *supra* note 24.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> HRIBAR, *supra* note 35, at 2 (“When properly managed, located, and monitored, CAFOs can provide a low-cost source of meat, milk, and eggs, due to efficient feeding and housing of animals, increased facility size, and animal specialization. When CAFOs are proposed in a local area, it is usually argued that they will enhance the local economy and increase employment. The effects of using local materials, feed, and livestock are argued to ripple throughout the economy, and increased tax expenditures will lead to increase[d] funds for schools and infrastructure.”).

<sup>45</sup> *Id.*; UNITED STATES CENSUS BUREAU, A LOOK AT THE 1940 CENSUS 4 (2010), [https://www.census.gov/newsroom/cspan/1940census/CSPAN\\_1940slides.pdf](https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slides.pdf) (showing growth in the United States population each year a census had been taken from 1940 to 2010, with continued growth projections through 2050).



consequences.<sup>46</sup> CAFOs create air pollution,<sup>47</sup> contribute significantly to global greenhouse gas emissions,<sup>48</sup> and are thought to be a leading cause for the development of antibiotic resistant illnesses.<sup>49</sup>

Out of the many concerns tied to the operation of CAFOs, “[t]he most pressing public health issue . . . stems from the amount of manure they produce.”<sup>50</sup> It is estimated that livestock animals in the U.S. produce as much as 1.2–1.37 billion tons of waste annually.<sup>51</sup> The problem with such a staggering amount of animal waste is that there is simply nothing to do with all of it.<sup>52</sup> While some manure can effectively be used for fertilizer,<sup>53</sup> the amount of waste produced by CAFOs far exceeds the amount that can be applied to the ground.<sup>54</sup> When manure is over-applied, “nutrients overwhelm the absorptive capacity of the soil, and either run off or are leached into

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<sup>46</sup> Michael Greger & Gowri Koneswaran, *The Public Health Impacts of Concentrated Animal Feeding Operations on Local Communities*, 33 *FAM. & COMMUNITY HEALTH* 373 (2010) (“[CAFOs] release a significant amount of contaminants into the air and water. Adverse health effects related to exposure to these contaminants among CAFO workers have been well-documented; however, less is known about their impact on the health of residents in nearby communities. Epidemiological research in this area suggests that neighboring residents are at increased risk of developing neurobehavioral symptoms and respiratory illnesses, including asthma.”); HRIBAR, *supra* note 35, at 7 (“Aside from the possibility of lowering air quality in the areas around them, CAFOs also emit greenhouse gases, and therefore contribute to climate change.”); ENVTL. INTEGRITY PROJECT, *supra* note 28, at 4–5 (“[Potential groundwater contamination by CAFOs] poses serious risks to human health. More than 150 pathogens found in livestock manure are associated with risks to humans, including the six human pathogens that account for more than 90 percent of food and waterborne diseases in humans. Manure-related microbes in water can cause severe gastrointestinal disease, complications and even death.”); Scott Weathers & Sophie Hermanns, *Open Letter on Industrial Animal Farming: To the Candidates for the Position of Director-General of the World Health Organization*, OPEN LETTER ON INDUS. ANIMAL FARMING, <https://openletteranimalfarming.com/welcome/> (last visited Apr. 16, 2019) (“Practices such as the constant low dosing of antibiotics an environmental pollution through animal waste make industrial animal farms the perfect breeding ground for antibiotic resistance by allowing transmission into the environment and nearby community. Several studies have found that the presence of antibiotic-resistant bacteria in livestock is closely associated with their presence in humans, and that decreases in antibiotic resistance have followed reductions in the usage of antibiotics in animals raised for food and humans.”).

<sup>47</sup> HRIBAR, *supra* note 35, at 5.

<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.* at 2 (“CAFOs manure contains a variety of potential contaminants. It can contain plant nutrients such as nitrogen and phosphorus, pathogens such as *E. coli*, growth hormones, antibiotics, chemicals used as additives to the manure or to clean equipment, animal blood, silage leachate from corn feed, or copper sulfate used in footbaths for cows.”).

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; Greger & Koneswaran, *supra* note 46, at 374.

the groundwater.”<sup>55</sup> In Ohio alone, CAFOs generate over ten million tons of manure every year, with “some individual facilities creating more waste than medium-sized cities.”<sup>56</sup>

*B. The Clean Water Act and the National Pollution Discharge Elimination System*

The principal federal legislation for regulating water pollution in the United States is the Clean Water Act of 1972, which governs the discharge of pollutants into surface waters of the United States.<sup>57</sup> Congress stated the objective of the Clean Water Act as “the restoration and maintenance of the chemical, physical, and biological integrity of the nation’s waters.”<sup>58</sup> The Clean Water Act applies to any discharge of a pollutant from a point source<sup>59</sup> into the navigable waters of the United States.<sup>60</sup> The Clean Water Act broadly defines “pollutant” to include various kinds of waste, including “agricultural waste discharged into water.”<sup>61</sup> The legislation defines “discharge,” in pertinent part, as “any addition of any pollutant to navigable waters.”<sup>62</sup>

The heart of the Clean Water Act is the National Pollution Discharge Elimination System (“NPDES”) program, which promulgates standards for issuing permits for the discharge of pollutants.<sup>63</sup> The NPDES program is defined as “the national program for issuing, modifying, revoking, and reissuing, terminating, monitoring, and enforcing permits, and imposing and enforcing pretreatment requirements [under the Clean

<sup>55</sup> HRIBAR, *supra* note 35, at 3.

<sup>56</sup> ENVTL. INTEGRITY PROJECT, *supra* note 28, at v.

<sup>57</sup> 33 U.S.C. § 1251(a) (2012); *see also History of the Clean Water Act*, U.S. EPA, <https://www.epa.gov/laws-regulations/history-clean-water-act> (last updated Aug. 8, 2017).

<sup>58</sup> 33 U.S.C. § 1251(a).

<sup>59</sup> *Id.* § 1362(14) (defining “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”).

<sup>60</sup> *See History of the Clean Water Act, supra* note 57.

<sup>61</sup> 33 U.S.C. § 1362(6) (stating “[t]he term ‘pollutant’ means 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. This term does not mean (A) ‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’ within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.”).

<sup>62</sup> *Id.* § 1362(12). Legislative history indicates that the term “navigable waters” is meant to be broadly defined. S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.) (stating “conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation . . . .”); *see also* 118 CONG. REC. 33,757 (1972) (statement of Rep. Dingell) (remarking that the definition “clearly encompasses all water bodies, including streams and their tributaries, for water quality purposes.”).

<sup>63</sup> 33 U.S.C. § 1342(a)(1)–(5).

Water Act].”<sup>64</sup> Discharging pollutants into waters of the United States without a permit, or contrary to the conditions of a permit, is illegal under the Clean Water Act.<sup>65</sup>

A pertinent feature of the NPDES program is the ability for states to administer state permit programs.<sup>66</sup> The NPDES provision states that “the Governor of each State desiring to administer its own permit program . . . may submit to the Administrator [of the U.S. EPA] a full and complete description of the program it proposes to establish and administer under State law.”<sup>67</sup> The provision further states that the U.S. EPA Administrator will approve state programs “unless he determines that adequate authority does not exist” to implement the state NPDES program in compliance with the Clean Water Act.<sup>68</sup> If a state wishes to alter to its permit program, it must resubmit for approval from the Administrator and follow federal procedures for program revisions.<sup>69</sup> In accordance with these federal standards, the U.S. EPA approved the State of Ohio to implement the NPDES program in 1974, with enforcement authority delegated to the Ohio EPA.<sup>70</sup>

### C. Ohio Senate Bill 141

In the 1990s, as industrial livestock farming grew substantially in Ohio,<sup>71</sup> factory farms gained political influence.<sup>72</sup> Lobbyists pushed for the transfer of regulatory authority over CAFOs to ODA.<sup>73</sup> This resulted in Ohio enacting Senate Bill 141,<sup>74</sup> which sought to give ODA the authority to regulate environmental permitting for CAFOs.<sup>75</sup> The framework of Senate Bill 141 consisted of three separate permits for CAFOs: (1) permits to install; (2) permits to operate; and (3) permits to discharge pollutants under the federal NPDES program.<sup>76</sup> Because NPDES permits are part of

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<sup>64</sup> 40 C.F.R. § 122.2 (2019).

<sup>65</sup> 33 U.S.C. § 1311(a) (stating “except as in compliance with this section [and others, including the national pollutant discharge elimination system], the discharge of any pollutant by any person shall be unlawful.”).

<sup>66</sup> *Id.* § 1342(b).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at (1)–(9).

<sup>69</sup> 40 C.F.R. § 123.62(b).

<sup>70</sup> U.S. EPA, PERMITTING FOR ENVIRONMENTAL RESULTS (PER), NPEDES PROFILE: OHIO (2005), [https://www3.epa.gov/npdes/pubs/ohio\\_final\\_profile.pdf](https://www3.epa.gov/npdes/pubs/ohio_final_profile.pdf).

<sup>71</sup> ENVTL. INTEGRITY PROJECT, *supra* note 28, at 1 (stating “[t]he number of CAFOs in [Ohio] more than tripled during the 1990s.”).

<sup>72</sup> See Laura A. Bischoff, *Ohio Farm Bureau Keeps Agribusiness at Forefront*, DAYTON DAILY NEWS, Dec. 2, 2002, at A6 (discussing the political influence of the lobbying group Ohio Farm Bureau, which has used its power to minimize regulations on farming).

<sup>73</sup> *Id.*; Wagner & Sutherly, *supra* note 28.

<sup>74</sup> Bischoff, *supra* note 72, at A6 (stating “[a]fter years of work, the agriculture industry persuaded the Ohio General Assembly and Gov. Bob Taft to shift regulation of large-scale animal farms from the Ohio EPA to the state Department of Agriculture.”).

<sup>75</sup> S.B. 141, 123d Gen. Assemb., Reg. Sess. (Ohio 2000).

<sup>76</sup> *Id.*

the Clean Water Act, transferring authority to issue them required approval by the U.S. EPA.<sup>77</sup> Ohio Senate Bill 141 was enacted in 2000,<sup>78</sup> yet the U.S. EPA had not approved ODA to regulate NPDES permits for CAFOs.<sup>79</sup> Although lacking NPDES permitting authority, ODA assumed authority to issue permits to install and permits to operate CAFOs in 2002.<sup>80</sup>

#### *D. Subsequent Efforts to Transfer Authority to ODA*

In 2006, Ohio Governor Bob Taft submitted ODA's CAFO program to the U.S. EPA for formal approval.<sup>81</sup> In his letter to the U.S. EPA, Governor Taft expressed confidence that "ODA possess[e] adequate authority to implement the proposed NPDES program, in accordance with the [Clean Water Act]."<sup>82</sup> In its response, the U.S. EPA expressed several concerns regarding land application of manure and wastewater issues in Ohio's plan that did not meet federal standards.<sup>83</sup> In expressing one such concern, the U.S. EPA stated its apprehension over Ohio's planned allowance for manure application, noting that it "will not minimize phosphorus movement to surface waters as required under [the Clean Water Act]."<sup>84</sup> In a later letter to ODA, the U.S. EPA expressed additional concerns, including that ODA did not appear to have the statutory authority necessary "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)."<sup>85</sup> The U.S. EPA's letter concluded, "these initial concerns must be resolved, or they may prevent [approval of] the revised program."<sup>86</sup>

#### *E. Notice of Proposed Approval and Public Comments*

On October 15, 2008, a Federal Register notice proposed to approve Ohio's application to transfer the NPDES program for CAFOs to ODA.<sup>87</sup> A public hearing on ODA's Clean Water Program for CAFOs was held on November 18, 2008, in Columbus, Ohio.<sup>88</sup> Comments at the hearing came from many different perspectives,

<sup>77</sup> 40 C.F.R. § 123.62 (2019) (detailing procedures for revision of state programs).

<sup>78</sup> Ohio S.B. 141.

<sup>79</sup> Region 5 Water, *supra* note 30.

<sup>80</sup> ENVTL. INTEGRITY PROJECT, *supra* note 28, at 2; OHIO REV. CODE ANN. §§ 903.02, 903.03 (LexisNexis 2017).

<sup>81</sup> Letter from Bob Taft to Mary Gade, *supra* note 33.

<sup>82</sup> *Id.*

<sup>83</sup> Letter from Jo Lynn Traub to Robert J. Boggs, *supra* note 33.

<sup>84</sup> *Id.*

<sup>85</sup> Letter from Robert Tolpa to Robert J. Boggs, *supra* note 33.

<sup>86</sup> *Id.*

<sup>87</sup> 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 Oct. 15, 2008).

<sup>88</sup> *Transcript of Public Hearing, supra* note 34, at 1.

including: local farmers; environmental activists; families living near CAFOs; and ODA itself.<sup>89</sup>

Comments in support of transferring authority to ODA<sup>90</sup> included claims that ODA demonstrated a “responsible manner in which [it] . . . responds to complaints”<sup>91</sup> and that federal rules for CAFOs are “not as stringent as ODA’s rules are under Ohio’s livestock permitting authority.”<sup>92</sup> There were two prominent themes that emerged in supportive comments: (1) “farmers do not want to be overregulated with the burden of having people breathing down [their] neck[s] over regulations”;<sup>93</sup> and (2) “ODA already has a working relationship with farmers.”<sup>94</sup>

Opposition to the transfer of authority came from many interested parties.<sup>95</sup> One such commenter claimed that “[t]he ODA has not seriously attempted to enforce its existing permit program.”<sup>96</sup> It has not staffed itself in a manner adequate for enforcement, and it does not have the political independence or the enforcement mentality equal to countering the environmental threat posed by modern industrial-scale agriculture.<sup>97</sup> Further criticism of ODA included that the agency had done “minimal enforcement work that consists almost entirely of merely notifying companies of their violations, with no effort to seek effective sanctions.”<sup>98</sup>

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<sup>89</sup> *Id.* at 8.

<sup>90</sup> Commenters that supported the transfer were mostly farmers and dairy and livestock producers, with such parties constituting 17 out of the 24 comments in support of the transfer. *Id.* at 19, 32, 35, 38–39, 44, 52, 55, 70, 78, 83–84, 88, 92, 94. The remaining commenters in support were mostly organizations and professionals having direct business ties to farmers: this included Ohio Farm Bureau Federation; a CAFO consultant; Ohio Pork Producers Council; a food animal veterinarian; and Ohio Cattlemen’s Association. *Id.* at 19, 29, 37, 41, 94. There was one commenter out of the 23 in support of the transfer who did not express economic affiliation with the agriculture industry. *Id.* at 77–78.

<sup>91</sup> *Id.* at 22.

<sup>92</sup> *Id.* at 30.

<sup>93</sup> *Id.* at 28, 30, 40–41, 45, 70, 92–93.

<sup>94</sup> *Id.* at 28, 37–38, 42, 83.

<sup>95</sup> Commenters that opposed the transfer included a number of private citizens, as well as representatives from Ohio Coastal Resource Management Group, Ohio Environmental Council, Acre (a grassroots group), the League of Women Voters of Perrysburg, and the Ohio Chapter of the Sierra Club. *Id.* at 14, 15, 16, 17, 23, 27–28, 30, 36, 48, 57, 59, 63, 69, 73, 77–78, 91, 97–98. There were a total of 14 comments opposing the transfer. *Id.*

<sup>96</sup> The commenter is referring to permits to install and permits to operate that are issued by ODA to CAFOs. *See* OHIO REV. CODE ANN. §§ 903.02, 903.03 (LexisNexis 2017).

<sup>97</sup> *Transcript of Public Hearing, supra* note 34, at 63.

<sup>98</sup> *Id.* at 64.

*F. Current State of Ohio's Request*

The U.S. EPA did not go through with a final rule approving Ohio's 2006 request to transfer authority to ODA to issue NPDES permits for CAFOs.<sup>99</sup> Since the 2006 request, the U.S. EPA has met Ohio with more requests for revisions and ODA has initiated further attempts at gaining approval.<sup>100</sup> The U.S. EPA's website states:

EPA's final decision on Ohio's request will be based on a determination of whether ODA has the legal authority, as well as the ability and resources, to administer the NPDES program for CAFOs, consistent with the Clean Water Act . . . . Our decision will also be based on comments that EPA has received on the proposal.<sup>101</sup>

III. ODA LACKS THE LEGAL AUTHORITY, REGULATORY PLANS, AND PUBLIC INTEREST PROTECTIONS NECESSARY TO EFFECTIVELY REGULATE NPDES PERMITTING FOR CAFOs

*A. ODA's Statutory Authority*

Ohio's legislation to transfer authority to ODA to regulate permits for CAFOs raises several concerns that were addressed by the U.S. EPA in letters to ODA.<sup>102</sup> This section focuses on three of these legislative weaknesses: (1) the legislation does not give ODA authority to regulate all pollutants; (2) ODA attempts to consider "technical feasibility" of effluent limitations, which federal law does not permit; and (3) ODA's conflict of interest provision is not as stringent as federal standards.

1. ODA Does Not Have the Statutory Authority to Regulate All Pollutants

One concern regarding ODA's statutory authority is that ODA does not have the authority to regulate all pollutants.<sup>103</sup> The term "pollutants" is defined by the Clean Water Act to encompass a wide range of organic and inorganic materials.<sup>104</sup> ODA's regulations claim to authorize ODA's director to regulate "pollutants," however, ODA's statutory authority under Ohio law appears to be limited to the regulation of manure, CAFO-related process/process-generated wastewater, and storm water.<sup>105</sup> Consequently, ODA is not authorized to regulate the full range of potential pollutants that may arise in the operation of a CAFO. In its comments to Ohio regarding this deficiency, the U.S. EPA noted, "Ohio will need to revise ODA's authority to enable

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<sup>99</sup> See Peggy Kirk Hall, *Couple Challenges Ohio's Transfer of CAFO NPDES Permit Authority in Federal Court*, OHIO ST. U. C. FOOD, AGRIC., & ENVTL. SCI. (Aug. 8, 2014), <https://farmoffice.osu.edu/blog-tags/cafo-permits>.

<sup>100</sup> See Letter from Robert Tolpa to Robert J. Boggs, *supra* note 33; Letter from Jo Lynn Traub to Robert J. Boggs, *supra* note 33.

<sup>101</sup> See Region 5 Water, *supra* note 30.

<sup>102</sup> See Letter from Jo Lynn Traub to Robert J. Boggs, *supra* note 33.

<sup>103</sup> Letter from Robert Tolpa to Robert J. Boggs, *supra* note 33.

<sup>104</sup> 33 U.S.C. § 1362(6) (2012).

<sup>105</sup> OHIO REV. CODE ANN. § 903.08 (LexisNexis 2017).

ODA to address such situations, or specify the State's current authority to do so."<sup>106</sup> The legislation has not been modified to address this discrepancy.<sup>107</sup>

The Clean Water Act states the Administrator shall approve state programs, "unless he determines that adequate authority does not exist to issue permits which apply, and ensure compliance with, any applicable requirements" of the Act.<sup>108</sup> The ODA's lack of authority to regulate the full range of pollutants controlled by the Clean Water Act shows that ODA's authority falls short. The U.S. EPA should find that ODA does not have sufficient legal authority to regulate NPDES permitting for CAFOs.

## 2. ODA Improperly Attempts to Consider "Technical Feasibility" of Effluent Limitations

Another concern regarding ODA's statutory authority is that the Ohio legislation improperly allows the Director of ODA to consider the "technical feasibility" of effluent limitations. "Effluent limitations" are restrictions on quantities, rates, and concentrations of pollution.<sup>109</sup> The Ohio legislation states, "[the Director of ODA] shall consider technical feasibility and economic costs and shall allow a reasonable period of time for coming into compliance with the permit."<sup>110</sup> In an attachment to its November 2007 letter to ODA, the U.S. EPA explains that considering the "technical feasibility" of effluent limitations is not a feature of the NPDES program delegated to the states.<sup>111</sup> This aspect of the program is controlled by federal standards that already

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<sup>106</sup> Letter from Robert D. Tolpa to Robert J. Boggs, *supra* note 33.

<sup>107</sup> OHIO REV. CODE ANN. § 903.08(A)(2) (stating "[o]n or after the date on which the United States environmental protection agency approves the state program submitted under division (A)(1) of this section, the authority to enforce terms and conditions of NPDES permits previously issued under division (J) of section 6111.03 or under section 6111.035 of the Revised Code for the discharging, transporting, or handling of storm water from an animal feeding facility or of pollutants from concentrated animal feeding operations is transferred from the director of environmental protection to the director of agriculture." As U.S. EPA noted in its correspondence with the ODA, it appears "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)."; Letter from Robert D. Tolpa to Robert J. Boggs, *supra* note 33.

<sup>108</sup> 33 U.S.C. § 1342(b).

<sup>109</sup> See Hannah Connor, *Lawsuit Fights Trump's Delay of Lifesaving Limits on Coal-plant Water Pollution*, CTR. FOR BIOLOGICAL DIVERSITY (Jan. 30, 2018), [https://www.biologicaldiversity.org/news/press\\_releases/2018/coal-plant-water-pollution-01-30-2018.php](https://www.biologicaldiversity.org/news/press_releases/2018/coal-plant-water-pollution-01-30-2018.php).

<sup>110</sup> OHIO REV. CODE ANN. § 903.08(G).

<sup>111</sup> Letter from Robert D. Tolpa to Robert J. Boggs, *supra* note 33 (stating "[f]or 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.").

account for “technical feasibility” and economic costs.<sup>112</sup> The U.S. EPA stated, “ODA would not be able to consider these factors further in establishing effluent limitations.”<sup>113</sup>

The Ohio legislation seeks to allow ODA to issue permits that may not apply the Clean Water Act’s effluent limitation standards, which are required by federal law.<sup>114</sup> The Clean Water Act establishes that “[t]he Administrator shall approve each [state] program unless he determines that adequate authority does not exist . . . to issue permits, which apply, and ensure compliance with . . . [the Clean Water Act’s effluent limitations].”<sup>115</sup> ODA improperly asserting authority to consider effluent limitations, outside of those promulgated by the Clean Water Act, is another reason the U.S. EPA should not transfer NPDES permitting authority to ODA.

### 3. ODA’s Conflict of Interest Provision Does Not Meet Federal Standards

ODA’s statutory authority raises an additional concern, in that its conflict of interest provision does not meet federal standards.<sup>116</sup> The Ohio Revised Code provides that no person may approve, nor be on a board that approves, NPDES permits if having received “a significant portion of income from any NPDES permittee or any applicant for a NPDES permit” during the past two years.<sup>117</sup> While this provision nearly matches the federal standard, slight differences in the language of Ohio’s provision create a large discrepancy.<sup>118</sup> The federal provision states that no person may approve, nor be on a board that approves, NPDES permits if having received “a significant portion of income *directly or indirectly* from permit holders or applicants” during the past two years.<sup>119</sup> Ohio’s provision omitting “directly or indirectly” may seem like a small alteration, but removing these words changes the implication of the law.

State permit programs “must be administered in conformance with” the federal conflict of interest provision.<sup>120</sup> Ohio’s less stringent conflict of interest provision clouds the federal law’s intent to be all encompassing. This opens the door to potential abuses. For example, a permitting authority may construe an “indirect” source of income from a permittee as inconsequential under Ohio law, though it would clearly create a conflict of interest under federal law. Ohio’s conflict of interest provision is not in conformance with federal law, providing yet another indication that the U.S. EPA should not grant ODA permitting authority.

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<sup>112</sup> 33 U.S.C. § 1311(b)(1)(A) (stating “[i]n order to carry out [objectives of the Clean Water Act] there shall be achieved . . . effluent limitations for point sources . . . which shall require the application of best practicable control technology currently available as defined by the Administrator [of the U.S. EPA].”).

<sup>113</sup> Letter from Robert D. Tolpa to Robert J. Boggs, *supra* note 33.

<sup>114</sup> *Id.*; 33 U.S.C. § 1311(b)(1)(A).

<sup>115</sup> *See* 33 U.S.C. § 1342(b)(1)(A) (stating that state permit programs must apply and insure compliance with Clean Water Act effluent limitations).

<sup>116</sup> *See* Letter from Robert D. Tolpa to Robert J. Boggs, *supra* note 33.

<sup>117</sup> OHIO REV. CODE ANN. § 903.081(A) (LexisNexis 2017).

<sup>118</sup> *Id.*; Requirements for Permitting, 40 C.F.R. § 123.25(c) (2018).

<sup>119</sup> 40 C.F.R. § 123.25(c).

<sup>120</sup> *Id.* § 123.25(a).



### B. ODA's Regulations

In its 2007 letter to ODA, the U.S. EPA expressed several concerns regarding ODA's program for the land applications of manure.<sup>121</sup> Among these was the concern that ODA's program "does not contain a setback applicable to manure application near downgradient structures,"<sup>122</sup> which is required by the federal regulations.<sup>123</sup> Setback provisions are designed to prevent runoff from the application of manure from reaching bodies of water.<sup>124</sup> ODA's standards for setbacks near downgradient structures have yet to be altered to comply with the federal regulations.<sup>125</sup>

Another major concern the U.S. EPA expressed was that ODA's plan implemented improper methods for applying manure on snow or frozen land.<sup>126</sup> The U.S. EPA stated, "[EPA] is concerned that ODA technical standards will not minimize movement of nutrients to waters of the United States as required by [the Code of Federal Regulations]."<sup>127</sup> These are just two examples of several issues the U.S. EPA raised, concerning ODA's standards for the land application of manure.<sup>128</sup> Because ODA's plan for the land application of manure does not ensure compliance with federal regulations, the U.S. EPA should deny ODA's request for NPDES permitting authority.

### C. The Regulatory Capture of ODA

A frequent theme in the 2008 public hearing on ODA's request for NPDES permitting authority was the notion that ODA has a good rapport with farmers.<sup>129</sup> Several Ohio farmers gave emphatic support for ODA's request, citing their positive

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<sup>121</sup> Letter from Jo Lynn Traub to Robert J. Boggs, *supra* note 33.

<sup>122</sup> *Id.*

<sup>123</sup> 40 C.F.R. § 412.4(c)(5) (stating that CAFOs may not apply manure, litter, or process wastewater "closer than 100 feet to any down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters.").

<sup>124</sup> *See id.* § 412.4(b)(1) (defining setback as "a specified distance from surface waters or potential conduits to surface waters where manure, litter, and process wastewater may not be land applied. Examples of conduits to surface waters include but are not limited to: Open tile line intake structures, sinkholes, and agricultural well heads.").

<sup>125</sup> OHIO ADMIN. CODE § 901:10-2-14(C)(3) (LexisNexis 2017) (stating "[a]ll land applications of manure shall comply with all restrictions contained in appendix A to this rule unless a compliance alternative is submitted and approved by the director . . . as a compliance alternative, the concentrated animal feeding operation . . . may demonstrate . . . [that] a soil . . . not prone to flooding in a particular county in which land applications of manure are planned . . ."). This section makes no mention of "any down-gradient surface waters," as specified in the federal regulation. § 412.4(c)(5).

<sup>126</sup> Letter from Jo Lynn Traub to Robert J. Boggs, *supra* note 33.

<sup>127</sup> Letter from Robert Tolpa to Robert J. Boggs, *supra* note 33.

<sup>128</sup> The enclosure to the April 4, 2007 letter also mentions concerns regarding "application of manure in excess of crop nutrient requirements" and "precipitation-related discharges when it rain is forecast to occur within 24 hours after an intended manure application event." Letter from Jo Lynn Traub to Robert J. Boggs, *supra* note 33, at 4.

<sup>129</sup> *See Transcript of Public Hearing, supra* note 34, at 28.

relationship with ODA as a reason the U.S. EPA should give its approval.<sup>130</sup> While it is understandable that farmers want to get along with the agency regulating their livelihood, this argument should not outweigh the serious concerns arising from ODA manifesting regulatory capture.

### 1. Defining Regulatory Capture

Regulatory capture occurs when “[a] regulator . . . is in a constant state of ‘being persuaded’: persuaded based on a persuader’s identity rather than an argument’s merits.”<sup>131</sup> This form of government failure is “evidenced by a body of commission decisions or non-decisions—about resources, procedures, priorities, and policies, where what the regulated entity wants has more influence than what the public interest requires.”<sup>132</sup> A common source of regulatory capture is the influence of lobbyists and interest groups, which lead to agencies being governed by individuals that are strongly influenced by, or are members of, the regulated industry.<sup>133</sup>

ODA has been criticized for its blatant capture by the agriculture industry.<sup>134</sup> Many of the individuals with leadership positions within ODA are lifelong farmers from farming families.<sup>135</sup> The director of ODA, David Daniels, is a farmer whose family has owned a 187-acre farm since the 1800s.<sup>136</sup> The assistant director, Tim Derickson,

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<sup>130</sup> *Id.* at 28, 37–38, 42, 83.

<sup>131</sup> Scott Hempling, “Regulatory Capture”: Sources and Solutions, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 23, 25 (2014); see also Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. 1, 2 (2010) (defining capture as a “shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public.”).

<sup>132</sup> Hempling, *supra* note 131, at 25.

<sup>133</sup> *Id.* at 28; see also Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 L.J. ECON. & ORG. 167, 178 (1990) (explaining capture as “the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs.”).

<sup>134</sup> See *Transcript to Public Hearing*, *supra* note 34, at 64.

<sup>135</sup> OHIO REV. CODE ANN. § 903.08 (LexisNexis 2017); Letter from Robert D. Tolpa to Robert J. Boggs, *supra* note 33; see also *Biography of Mark Bruce, Communication, Divisions Leadership*, OHIO DEP’T OF AGRICULTURE, <https://agri.ohio.gov/wps/portal/gov/oda/divisions/administration/divisions-leadership/person4> (last visited Apr. 16, 2019); *Biography of Dr. Nick Wagner, Meat Inspection, Divisions Leadership*, OHIO DEP’T OF AGRICULTURE, <http://www.agri.ohio.gov/divs/Leadership/> (last visited Apr. 16, 2019); *Biography of Kirk Hines, Soil & Water Conservation, Divisions Leadership*, OHIO DEP’T OF AGRICULTURE, <https://agri.ohio.gov/wps/portal/gov/oda/divisions/administration/divisions-leadership/kirk-hines-bio> (last visited Apr. 16, 2019).

<sup>136</sup> Gary Brock, *Ag Director Daniels Thankful for Ohio Farm Community*, SIDNEY DAILY NEWS (Nov. 27, 2016), <http://www.sidneydailynews.com/news/agriculture/53896/ag-director-daniels-thankful-for-ohio-farm-community>.

is also a lifelong farmer.<sup>137</sup> It is not difficult to conceive that administrators, who are members of the farming community, will empathize with disgruntled farmers who do not want stringent regulations disrupting their farming practices and complicating their compliance efforts.

While it is not inherently corrupt for an agency to show concern for the community it regulates, issues arise when the regulating body has direct connections and interests tied to the regulated industry. This is where regulatory capture occurs, opening the door to ominous consequences. “Capture can have deleterious effects on the regulatory system by promoting unnecessary and inefficient rulemaking and also by impeding efficient regulation that serves the public interest.”<sup>138</sup> In essence, the problems associated with regulatory capture can lead to a “government that fails to protect the public.”<sup>139</sup>

Ties between agencies and the industries they regulate are easily spotted by simple observation, but claims of regulatory capture raise a significant problem: capture is very difficult to prove.<sup>140</sup> Regulatory capture often becomes a diagnosis rooted in instinct, rather than evidence. These issues are addressed by Daniel Carpenter and David A. Moss in their volume devoted to the subject.<sup>141</sup> Carpenter and Moss note that one of the problems with claims that are not tied strongly enough to evidence is that the reaction is often fatalism: “[o]bservers of regulation are often quicker to yelp about the evils of capture than to think hard about how it might be prevented or mitigated, short of wholesale deregulation.”<sup>142</sup> Carpenter and Moss suggest that deregulation is not the answer<sup>143</sup> and offer a model for diagnosing capture,<sup>144</sup> as well as methods for preventing capture.<sup>145</sup>

## 2. Carpenter and Moss’s Model for Diagnosing Regulatory Capture

Carpenter and Moss offer a three-part analysis for finding capture. First, “[t]o claim capture, and argument ought to . . . provide a defeasible model of the public interest.”<sup>146</sup> In finding public interest, the authors suggest looking to the “goal for

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<sup>137</sup> *Biography of Assistant Director, Tim Derickson, Divisions Leadership*, OHIO DEP’T OF AGRICULTURE, <https://agri.ohio.gov/wps/portal/gov/oda/divisions/administration/divisions-leadership/tim-derickson-bio> (last visited Apr. 16, 2019).

<sup>138</sup> Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1341 (2013).

<sup>139</sup> DANIEL CARPENTER & DAVID MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 2–3 (2013).

<sup>140</sup> *See id.* at 3.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 5.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 60.

<sup>145</sup> *Id.* at 151.

<sup>146</sup> *Id.* at 60.

which the regulation was created,<sup>147</sup> and that the public interest is something “embodied in the people’s welfare.”<sup>148</sup>

Here, the public interest goals to examine are those which the Clean Water Act and NPDES permit program were created to address. Ironically, the inspiration for the Clean Water Act was sparked by an infamous blunder that occurred just a mile south of Lake Erie: the Cuyahoga River catching fire in 1969.<sup>149</sup> The incident on the Cuyahoga left a lasting impression and shifted national focus to the poor quality of the nation’s waters.<sup>150</sup> In 1972, the Clean Water Act was born, with the goal of eliminating the discharge of pollutants into navigable waters.<sup>151</sup> Next, Carpenter and Moss state that a regulatory capture argument should “show a policy shift away from the public interest and toward industry (special) interest.”<sup>152</sup> It is difficult to fully assess a policy shift under ODA, as ODA does not control NPDES permitting for CAFOs.<sup>153</sup> However, since 2002, ODA has controlled permits to operate and permits to install for CAFOs, while the Ohio EPA has continued to control NPDES permits for CAFOs.<sup>154</sup> A contrast in policy is illustrated by examining the manner in which the two agencies exercise their respective authority over CAFOs.

In its 2006 report, the Environmental Integrity Project found a large discrepancy between ODA’s enforcement history and the Ohio EPA’s.<sup>155</sup> The report found that “[a]s of July 31, 2006, ODA has engaged in 155 enforcement action, consisting of 64 warning letters, 75 notices of deficiency, 10 notices of hearing, 1 emergency order, and 5 final orders. On three occasions, ODA assessed monetary penalties, which were in the amount of \$200, \$700, and \$5,760.”<sup>156</sup> In its assessment of these figures, the Environmental Integrity Project stated, “[w]ith only three penalties assessed in four years—two in the negligible amounts of \$200 and \$700—multi-million dollar operations have little incentive to address problems proactively.”<sup>157</sup> The report discussed examples of CAFOs that have operated in violation of the Clean Water Act

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> The Honorable James L. Oberstar, *The Clean Water Act: 30 Years of Success in Peril*, DEMOCRATIC STAFF OF THE COMMITTEE ON TRANSP. & INFRASTRUCTURE 2–3 (Oct. 18, 2002), [http://lobby.la.psu.edu/\\_107th/117\\_Effluent\\_Limitation/Congressional\\_Statements/House/Success\\_In\\_Peril.pdf](http://lobby.la.psu.edu/_107th/117_Effluent_Limitation/Congressional_Statements/House/Success_In_Peril.pdf).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1.

<sup>152</sup> CARPENTER & MOSS, *supra* note 139, at 60.

<sup>153</sup> *See* Region 5 Water, *supra* note 30.

<sup>154</sup> *Supplemental Information*, OHIO ENVTL. PROT. AGENCY, <https://www.epa.ohio.gov/dsw/cafo/index#126567138-supplemental-information> (last visited Apr. 16, 2019).

<sup>155</sup> ENVTL. INTEGRITY PROJECT, *supra* note 28, at 10–13.

<sup>156</sup> *Id.* at 10.

<sup>157</sup> *Id.* at 20.

for years by not obtaining a permit, with data showing that “ODA has done little to back up threats it issues near the end of warning letters and notices of deficiencies.”<sup>158</sup>

The Environmental Integrity Project also examined the enforcement actions of the Ohio EPA, and while noting that the Ohio EPA has also “failed to keep pace with violators,”<sup>159</sup> found that the Ohio EPA had “assessed double the number of penalties and in amounts averaging \$16,786, or more than seven times ODA’s average penalty.”<sup>160</sup> Additionally, in the first seventeen months after ODA had assumed permitting authority for permits to install and permits to operate, “ODA issued only eight enforcement actions, two of which originated with [the Ohio EPA’s] revocation of Buckeye Egg Farm’s permits.”<sup>161</sup> In other words, one-fourth of the enforcement action ODA took was with the push of the Ohio EPA taking initial action. The report noted that “[a] similar lull in enforcement activity would pose far graver risks . . . [if there is] removal of [the Ohio EPA’s] remaining authority over CAFOs (a weakened safety net).”<sup>162</sup>

The Environmental Integrity Project’s report supports a finding that ODA’s weak enforcement efforts against CAFOs manifest a policy shift away from the public interest and toward the industry interest.

As insightful as it may be, the Environmental Integrity Project’s report is dated. A more recent study of the enforcement actions of the Ohio EPA and ODA would be more appropriate in analyzing each agency’s effectiveness in regulating CAFOs. However, such a study would prove immensely difficult to replicate. While the Ohio EPA maintains a database of records that is available to the public online,<sup>163</sup> ODA maintains an archaic method of record storage to which the public has encumbered, limited access.<sup>164</sup>

Examining the Ohio EPA’s recent records of enforcement actions requires nothing more than Internet access.<sup>165</sup> The Ohio EPA maintains a database on which any member of the public can search for and examine various types of enforcement actions, including Notices of Violation, Warning Letters, Investigation Reports, and a number of other documents.<sup>166</sup> A search for “Notice of Violation (NOV)” with the program category of “NPDES”, and keyword “farm,” displays hundreds of notices that have been issued to facilities for NPDES violations in recent years.<sup>167</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 12.

<sup>160</sup> *Id.* at 20.

<sup>161</sup> *Id.* at 21.

<sup>162</sup> *Id.*

<sup>163</sup> *eDocument Search*, OHIO ENVTL. PROT. AGENCY, <http://edocpub.epa.ohio.gov/publicportal/edochohome.aspx> (last visited Apr. 16, 2019).

<sup>164</sup> Telephone Interview with Tim Schirmer, Senior Staff Counsel for Ohio Dep’t of Agric. (Mar. 21, 2018) (Mr. Schirmer informed the author that records for enforcement actions are not kept online and are organized in physical file form by facility, not by document type.).

<sup>165</sup> *See* OHIO ENVTL. PROT. AGENCY, *supra* note 163.

<sup>166</sup> *Id.*

<sup>167</sup> *See id.*

By contrast, ODA's website is devoid of any such online database.<sup>168</sup> To make things more difficult, even if sought by public record request, ODA does not maintain any method of searching for data by enforcement action.<sup>169</sup> Public record requests to ODA reveal that "ODA typically maintains all records related to concentrated animal feeding operations by facility rather than by topic."<sup>170</sup> Thus, if one were to attempt to compile statewide data on ODA's enforcement relations with CAFOs, it would require individually requesting specific documents, one-by-one, from each of the hundreds of facilities in Ohio.

When contacted by phone, Timothy Schirmer, counsel for ODA, was not able to suggest any better method of document retrieval.<sup>171</sup> Mr. Schirmer confirmed that requests for information would have to be made by facility and by document type.<sup>172</sup> He further indicated that no compiled data could be found in ODA's annual report.<sup>173</sup> When questioned as to the approximate amount of Notices of Violation that are issued to CAFOs per year by ODA, Mr. Schirmer stated that he did not know, but would have to guess that around ten to fifteen were issued per year.<sup>174</sup>

There can be no question that the Ohio EPA demonstrates a higher degree of transparency than ODA in regard to enforcement actions against CAFOs. The Ohio EPA's online database empowers citizens to examine actions taken by the Ohio EPA and to hold the agency accountable. ODA not only lacks an online database, but also lacks any semblance of comprehensive record keeping. Putting NPDES permitting authority for CAFOs into the hands of ODA would diminish accountability and transparency to the public. This is another manifestation of a policy shift away from the public interest.<sup>175</sup> Transferring NPDES permitting authority to ODA would put Ohio citizens in the dark, while simultaneously increasing the ease with which industrial farms can keep their compliance failures hidden from public scrutiny, thereby shifting policy toward the industry interest.<sup>176</sup> This is, of course, assuming ODA will even enforce NPDES compliance to begin with.

Finally, Carpenter and Moss suggest that a regulatory capture argument must "show action and intent by the industry (special interest) in pursuit of this policy shift

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<sup>168</sup> See *Livestock Envtl. Permitting*, OHIO DEPT. OF AGRIC., <https://agri.ohio.gov/wps/portal/gov/oda/divisions/livestock-environmental-permitting> (last visited Apr. 16, 2019).

<sup>169</sup> Letter from Tim Schirmer, Senior Staff Counsel, Ohio Dep't of Agric. to Alexis Woodworth (Jan. 30, 2018) (on file with author); Letter from Tim Schirmer, Senior Staff Counsel, Ohio Dep't of Agric. to Alexis Woodworth (Mar. 13, 2018) (on file with author).

<sup>170</sup> Letter from Tim Schirmer, Senior Staff Counsel, Ohio Dep't of Agric. to Alexis Woodworth (Jan. 30, 2018) (on file with author).

<sup>171</sup> Telephone Interview with Tim Schirmer, *supra* note 164.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See CARPENTER & MOSS, *supra* note 139, at 60–61.

<sup>176</sup> *Id.*

sufficiently effective to have plausibly caused an appreciable part of the shift.”<sup>177</sup> The authors state that this can be demonstrated by lobbying efforts.<sup>178</sup>

Agricultural lobbyists pushed for the legislation to transfer NPDES authority from the Ohio EPA to ODA in the late 1990s and early 2000s.<sup>179</sup> As approval of the transfer remains pending, agricultural lobbyists continue to voice support for the transfer.<sup>180</sup> In its 2017 annual meeting, The Ohio Farm Federation, a prominent political action committee, took position on the issue, stating: “We urge that members of Ohio’s congressional delegation and the Governor work to ensure that NPDES delegation authority for large livestock farms is transferred from the Ohio EPA to the Ohio Department of Agriculture.”<sup>181</sup> In urging for the transfer, the group directly addressed Governor John Kasich, to whom the PAC made a campaign donation in 2016.<sup>182</sup>

### 3. ODA’s Intent, or Lack Thereof, to Shift Policy

Under Carpenter and Moss’s model for diagnosing regulatory capture, ODA does not escape scrutiny. However, ODA’s Director, David Daniels, has verbalized concerns for water quality,<sup>183</sup> conflicting with an assessment that the agency is intending to shift policy away from public interest.

When asked about ODA’s part in addressing water quality issues in Ohio, ODA Director David Daniels (“Director”) gave an assuring answer: “our producers and the ag community have stepped it up in a big way and want to work to find solutions to their contributions to the problems that are going on. We know that we have got a piece of this.”<sup>184</sup> Presumably, the Director’s intentions to address the agricultural community’s “piece” of the water quality problem are sincere. However, his stated intentions do not diminish the underlying interests of the agriculture industry, and by direct connection, of the Director himself. No matter how subconscious the motivations may be, the Director, his friends, family, and close associates are likely to benefit from the convenience and financial benefits of less stringent regulations on farming. In an article discussing the regulatory capture of the banking industry, Steven Davidoff Solomon discusses the subtle way in which regulatory capture can manifest: “[a]mong these people, there is no evil or nefarious plot to regulate in favor of the

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<sup>177</sup> *Id.* at 15.

<sup>178</sup> *Id.* at 62.

<sup>179</sup> Bischoff, *supra* note 72, at A6.

<sup>180</sup> OHIO FARM BUREAU FED’N, 2017 STATE POLICIES: RESOLUTIONS ON STATE ISSUES ADOPTED BY THE VOTING DELEGATES OF THE OHIO FARM BUREAU FED’N, 98TH ANNUAL MEETING 1 (2016).

<sup>181</sup> *Id.* at 84.

<sup>182</sup> *Ohio Farm Bureau: Contributions to Federal Candidates, 2016 Cycle*, CTR. FOR RESPONSIBLE POL., <https://www.opensecrets.org/orgs/recips.php?cycle=2016&id=D000023540> (last visited Apr. 16, 2019).

<sup>183</sup> Brock, *supra* note 136.

<sup>184</sup> *Id.*

banks. These men and women may believe they are doing their best, but their worldview is affected by the people they interact with.”<sup>185</sup>

Applying Solomon’s reasoning to ODA, the agency claiming that it has the public’s best interest in mind will not suffice to eliminate the influence the agriculture industry has on the agency’s leadership. The relationship between ODA and the agriculture industry may not display blatant conflicts of interest, “[b]ut the problem is that when you have regulators who are socially or ideologically captured, they may be unwilling to take more extreme steps with an industry or otherwise may act in subtle ways to affect it.”<sup>186</sup>

#### 4. Regulatory Capture and the Environmental Crises

Regulatory capture is believed to “figure significantly in the major human and environmental crises of our time.”<sup>187</sup> In Ohio, the environmental crisis facing Lake Erie and other surface waters in the state has caused growing concern over the power of the agricultural industry.<sup>188</sup> Many people have spoken out against ODA’s request to regulate NPDES permitting for CAFOs in large part because of the strong ties between ODA and the agriculture industry.<sup>189</sup>

ODA is a state agency that is unduly influenced by the interests of the agriculture industry; the very industry ODA wishes to watch over for water pollution. The concerns raised by ODA’s capture are exacerbated by ODA’s lack of a sufficient conflict of interest provision in the NPDES legislation, as discussed above.<sup>190</sup> The regulatory capture of ODA illustrates that the agency will be unable to effectively administer the NPDES program for CAFOs.

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<sup>185</sup> Steven David Solomon, *The Government’s Elite and Regulatory Capture*, N.Y. TIMES (June 11, 2010), <https://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/>.

<sup>186</sup> *Id.*

<sup>187</sup> CARPENTER & MOSS, *supra* note 139, at 2.

<sup>188</sup> See ENVTL. INTEGRITY PROJECT, *supra* note 28, at 1 (stating that factory farms “have an unprecedented impact on the environment, health, and society of neighboring rural communities and downstream cities. Moreover, the factory farm industry, and its political allies, leverage vast wealth and influence to undermine efforts at the federal, state, and local level to regulate factory farms effectively.”).

<sup>189</sup> McLaughlin, *supra* note 23 (quoting Mike Ferner, of Advocates for a Clean Lake Erie, “[The ODA is] allowing factory farms to proliferate and devastate Lake Erie . . . . This arrangement doesn’t just suggest a conflict of interest, it defines it. The ODA’s prime responsibility is to promote agriculture. No wonder Lake Erie is choking on animal waste.”); *Transcript of Public Hearing*, *supra* note 34, at 47–48 (comment by Vicki Askins: “What worries me the most is the apparent coziness between the CAFO developers and the ODA administration. The friendliness is unusual at best and dangerous at worst.”); *id.* at 60–61 (comment by unnamed party: “We need the EPA to stand between the interest of the department and the corporations and other citizens and our environment. If [the transfer occurs], it seems like having a wolf guard the henhouse.”).

<sup>190</sup> See discussion *supra* Part III.A.3.



#### IV. OHIO EPA IS A BETTER OPTION FOR REGULATING NPDES PERMITTING FOR CAFOs

Carpenter and Moss discuss several possible ways to prevent regulatory capture.<sup>191</sup> Among these are the notion of diverse and independent expertise, which in essence finds that “ambiguous information and a lack of expertise combine to prevent even the most benevolent regulators from creating policies that advance public welfare.”<sup>192</sup> This concept illustrates the issue with ODA—even if there is no intent to work against the public welfare, and even if the agency has “stepped it up in a big way”<sup>193</sup> to address water quality issues, the agency still has not demonstrated that it is a better option than the Ohio EPA for handling NPDES permits for CAFOs.

The Ohio EPA’s Division of Surface Water “ensures compliance with the Clean Water Act and works to increase the number of water bodies that can safely be used for swimming and fishing.”<sup>194</sup> The Division of Surface Water states that “the goal of Ohio’s surface water program—restoration and maintenance of Ohio’s water resources—reflects the national water quality objective in the Federal Clean Water Act (CWA), which is ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’”<sup>195</sup> The very mission of the division aligns with the objectives of the Clean Water Act.<sup>196</sup>

The self-proclaimed mission statement of ODA is “to protect Ohio citizens by ensuring the safety of the state’s food supply, to maintain the health of Ohio’s animals and plant life, and to create economic opportunities for Ohio’s farmers, food processors and agribusinesses.”<sup>197</sup> While commendable for including the health of Ohio’s animals and plant life, ODA’s mission statement notably lacks any mention of water quality.<sup>198</sup> Examining ODA’s various divisions reveals that while ODA created its Division of Soil and Water Conservation in 2016, the new division of the agency does not mention the Clean Water Act or ensuring water quality.<sup>199</sup>

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<sup>191</sup> CARPENTER & MOSS, *supra* note 139, at 458–64.

<sup>192</sup> *Id.*

<sup>193</sup> Brock, *supra* note 136.

<sup>194</sup> *Division of Surface Water*, OHIO ENVTL. PROT. AGENCY, <http://www.epa.ohio.gov/dsw/> (last visited Apr. 16, 2019).

<sup>195</sup> *About Us, Division of Surface Water*, OHIO ENVTL. PROT. AGENCY, <https://www.epa.ohio.gov/dsw/#113292722-about-us> (last visited Apr. 16, 2019).

<sup>196</sup> 33 U.S.C. § 1251(a) (2012) (stating “the objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”).

<sup>197</sup> *About Us*, OHIO DEP’T OF AGRIC., <https://agri.ohio.gov/wps/portal/gov/oda/home/about-us/about-us> (last visited Apr. 16, 2019).

<sup>198</sup> *See id.*

<sup>199</sup> *See Welcome to the Division of Soil and Water Conservation*, OHIO DEP’T OF AGRIC., <https://agri.ohio.gov/wps/portal/gov/oda/divisions/soil-and-water-conservation/home> (last visited Apr. 16, 2019).

The Ohio EPA has been enforcing the Clean Water Act for over forty years<sup>200</sup> and has a division devoted to surface water.<sup>201</sup> Meanwhile, ODA's Division of Soil and Water Conservation does not address the Clean Water Act.<sup>202</sup> The significance of the agencies' respective mission statements is illuminated by records showing the Ohio EPA takes enforcement actions against CAFOs for Clean Water Act violations at a much higher rate than ODA.<sup>203</sup> The Ohio EPA has demonstrated a commitment to enforcing the Clean Water Act. Meanwhile, ODA has demonstrated that it "has not seriously attempted to enforce its existing permit program."<sup>204</sup>

#### V. CONCLUSION

The growing number of harmful algal blooms in Lake Erie and other surface waters in Ohio makes the issue of controlling water pollution more pertinent than ever.<sup>205</sup> The Clean Water Act is federal legislation designed to control water pollution, making it "unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained."<sup>206</sup> ODA does not have the statutory authority to regulate NPDES permitting for CAFOs that is required by the Clean Water Act.<sup>207</sup> Despite repeated requests by the U.S. EPA, and many years to resolve discrepancies, ODA has been unable to remedy their legislative shortcomings.<sup>208</sup> The U.S. EPA has also instructed ODA to revise several of its regulations for CAFO permitting, a task which ODA has only partially completed.<sup>209</sup> A state's regulations must be as stringent as the federal standards of the NPDES program to meet the federal requirements for permitting.<sup>210</sup> In addition to legislative and regulatory shortcomings, ODA also

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<sup>200</sup> PERMITTING FOR ENVIRONMENTAL RESULTS (PER), NPDES PROFILE: OHIO, *supra* note 70.

<sup>201</sup> *Division of Surface Water*, *supra* note 194.

<sup>202</sup> *See Soil and Water Conservation*, *supra* note 199.

<sup>203</sup> ENVTL. INTEGRITY PROJECT, *supra* note 28, at 20.

<sup>204</sup> *Transcript of Public Hearing*, *supra* note 34, at 63.

<sup>205</sup> *See GRAHAM ET AL.*, *supra* note 17, at 2 (stating "Cyanobacterial harmful algal blooms (CyanoHABs) are increasingly a global concern because CyanoHABs pose a threat to human and aquatic ecosystem health and cause economic damages . . . . Chronic CyanoHABs have been reported throughout the United States, and cyanotoxins have been implicated in human and animal illness and death in at least 43 States.").

<sup>206</sup> *Summary of the Clean Water Act, Laws & Regulations*, U.S. EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last updated on Apr. 16, 2019).

<sup>207</sup> *See discussion supra* Part III.A.1.

<sup>208</sup> *See Region 5 Water*, *supra* note 30.

<sup>209</sup> *See discussion supra* Part III.B.

<sup>210</sup> 40 C.F.R. § 123.25(a) (2019) ("All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements.").

exhibits regulatory capture.<sup>211</sup> While regulatory capture is not illegal, analysts have pointed to its detrimental effect on regulatory schemes.<sup>212</sup>

The Ohio EPA's Division of Surface Water is designed for implementation of the Clean Water Act.<sup>213</sup> The Ohio EPA has also demonstrated more serious enforcement efforts than ODA has regarding CAFOs.<sup>214</sup> The transfer of authority to ODA would create an outlier in the state, as the Ohio EPA regulates NPDES permitting for all other industries.<sup>215</sup> This attempted transfer is for the comfort and convenience of industrial farms and demonstrates no tangible public interest.

The Clean Water Act provides that, if a state agency is unable to properly administer the NPDES program, then the Administrator should deny the agency the authority to do so.<sup>216</sup> ODA has demonstrated that it does not have the requisite authority, plans, interests, or goals consistent with the Clean Water Act and the NPDES program. Allowing such a transfer would not only affect the regulatory success of the Clean Water Act, but also sets a dangerous precedent for Ohio. In the 2008 public hearing concerning ODA's request for permitting authority, a commenter from the Ohio Environmental Council poignantly stated: "there are other industries knocking at the door wanting to move permitting authority over water quality . . . to agencies that they work better with. I'm not sure if we all are ready for the domino effect that can occur."<sup>217</sup>

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<sup>211</sup> See discussion *supra* Part III.C.

<sup>212</sup> *Id.*

<sup>213</sup> *Division of Surface Water*, *supra* note 194.

<sup>214</sup> See discussion *supra* Part IV.

<sup>215</sup> See PERMITTING FOR ENVIRONMENTAL RESULTS (PER), NPDES PROFILE: OHIO, *supra* note 70.

<sup>216</sup> 33 U.S.C. § 1342(b) (2012).

<sup>217</sup> *Transcript of Public Hearing*, *supra* note 34, at 19.