



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

***Hotline Report:
Ensuring clean and safe water***

EPA Region 5 Needs to Act on Transfer Request and Petition Regarding Ohio's Concentrated Animal Feeding Operation Permit Program

Report No. 19-N-0154

May 15, 2019



Report Contributors:

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Abbreviations

CAFO Concentrated Animal Feeding Operation
CFR Code of Federal Regulations
EPA U.S. Environmental Protection Agency
NPDES National Pollutant Discharge Elimination System
OIG Office of Inspector General
U.S.C. United States Code

Cover Photo: A CAFO with dairy cattle. (U.S. Department of Agriculture, Natural Resources Conservation Service photo)

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At a Glance

Why We Did This Project

The U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG) received a hotline complaint about the status of Ohio's request to EPA Region 5 for approval to transfer the Concentrated Animal Feeding Operation (CAFO) portion of its National Pollutant Discharge Elimination System (NPDES) permit program from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture.

Based on the complainants' concerns, the OIG identified the following questions for review:

1. Has EPA Region 5 given approval for Ohio's NPDES CAFO permit program transfer?
2. What actions has EPA Region 5 taken in response to a November 2011 citizen petition regarding withdrawing Ohio's CAFO permit program?

This report addresses the following:

- *Ensuring clean and safe water.*

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EPA Region 5 Needs to Act on Transfer Request and Petition Regarding Ohio's Concentrated Animal Feeding Operation Permit Program

What We Found

EPA Region 5 has not made a decision regarding Ohio's NPDES CAFO permit program transfer request. The most recent request was made in 2015. Regulations per 40 CFR § 123.62 specify the process by which states may transfer all or part of their NPDES program from one state agency to another. However, these regulations do not establish timelines for the EPA to review and approve or disapprove such requests.

EPA Region 5's lack of timely decisions on program transfer requests and petitions leaves state programs without clarity and petitioners unaware of petition status.

We found that although EPA Region 5 began an informal investigation of the allegations raised in the citizen petition to commence withdrawal proceedings, more than 8 years after the 2011 submission the region still had not made a determination about the petition. When the EPA receives a citizen petition for withdrawal, it may conduct a review of the allegations to determine whether cause exists to prompt withdrawal proceedings per 40 CFR §123.64(b)(1), but the regulations impose no timeline for action.

Recommendations and Planned Agency Corrective Actions

We recommend that the Region 5 Regional Administrator issue decisions regarding (1) Ohio's request to transfer its NPDES program with respect to CAFOs from the Ohio EPA to the Ohio Department of Agriculture and (2) the citizen petition to withdraw Ohio's NPDES CAFO program and related permitting authority. EPA Region 5 agreed with the OIG recommendations, and the recommendations are resolved with corrective actions pending. Region 5 officials already have begun to take corrective actions to address the recommendations and plan to complete them by March 31, 2020.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

May 15, 2019

MEMORANDUM

SUBJECT: Hotline Report:
EPA Region 5 Needs to Act on Transfer Request and Petition Regarding
Ohio's Concentrated Animal Feeding Operation Permit Program
Report No. 19-N-0154

FROM: Charles J. Sheehan, Deputy Inspector General

A handwritten signature in blue ink that reads "Charles J. Sheehan".

TO: Cathy Stepp, Regional Administrator
EPA Region 5

This is our report on the subject assignment conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The project number for this assignment was OA&E-FY19-0038. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

The EPA Region 5 Regional Administrator is responsible for the issues discussed in this report.

In accordance with EPA Manual 2750, your office provided acceptable corrective actions and milestone dates in response to OIG recommendations. All recommendations are resolved and no final response to this report is required. However, if you submit a response, it will be posted on the OIG's website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at www.epa.gov/oig.

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Purpose

The U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG) initiated this project to address a July 2018 hotline complaint regarding the state of Ohio's National Pollutant Discharge Elimination System (NPDES) program implementation for Concentrated Animal Feeding Operations (CAFOs). The hotline complainants expressed concerns regarding the Ohio Governor's request to EPA Region 5 to approve the transfer of the CAFO portion of the NPDES permit program to the Ohio Department of Agriculture. Currently, the EPA authorizes the Ohio Environmental Protection Agency (Ohio EPA) to oversee the NPDES program, including CAFOs. The complainants also asked the OIG to determine the status of an associated citizen petition requesting that the EPA withdraw approval of Ohio's NPDES program with respect to CAFOs.

Based on the complainants' concerns, the OIG identified the following questions for review:

1. Has EPA Region 5 given approval for Ohio's NPDES CAFO permit program transfer to the Ohio Department of Agriculture?
2. What actions has EPA Region 5 taken in response to the November 2011 citizen petition regarding Ohio's CAFO permit program?

Background

The EPA granted the Ohio EPA authorization to administer the NPDES program in 1974. In 2006, the Ohio Governor submitted a transfer request to EPA Region 5 pursuant to 40 CFR § 123.62. In that transfer request, the Governor asked that EPA Region 5 allow the Ohio Department of Agriculture to administer the part of the NPDES program pertaining to CAFOs and discharges of stormwater resulting from industrial and construction activity at animal feeding operations. Under this plan, the Ohio EPA would continue to oversee all other portions of the NPDES program. According to EPA Region 5 staff, this 2006 transfer request lacked required information and EPA Region 5 had to request more documentation.



A dairy CAFO. (EPA OIG photo)

In 2015 the Ohio Governor submitted a second request.¹ This request reflected statutory and regulatory revisions the Ohio legislature implemented between 2009 and 2014 in an effort to conform its proposed NPDES program with applicable federal requirements. The request proposed two new Memorandums of Agreement—one between state agencies and the other between the state of Ohio and EPA Region 5. The request also included

¹ The Governor officially withdrew the 2006 request in May 2017.

a new program description and a new statement of legal authority from the Ohio Attorney General.

In a separate but related matter, in 2011, three Ohio residents submitted a petition to EPA Region 5 to withdraw Ohio's NPDES program for CAFOs. The petitioners expressed a range of concerns regarding Ohio's oversight of CAFO discharges and related activities. To date, EPA Region 5 has not formally addressed this petition.

Responsible Office

The EPA Region 5 Regional Administrator is responsible for the issues discussed in this report.

Scope and Methodology

We conducted our work from November 2018 through March 2019. During that time, we interviewed EPA Region 5 and headquarters staff involved with both the Ohio transfer request and the citizen petition. We reviewed EPA Region 5 documents related to both issues. We did not review Ohio's NPDES CAFO program or its permits. We did not conduct this assignment in accordance with generally accepted government auditing standards.

Results

Ohio NPDES Transfer Request

EPA Region 5 has not made a decision regarding the Ohio transfer request. The EPA regulation, 40 CFR § 123.62, specifies the process by which states may seek to transfer all or part of their NPDES program from one state agency to another. While EPA regulations expressly establish timelines for numerous regulatory actions in the context of state NPDES program administration, they do not establish timelines for the EPA to review and approve or disapprove transfer requests.² Despite the absence of regulatory time frames, long-term delay is not a viable option. The Administrative Procedure Act requires that agencies move to conclude matters presented to them "within a reasonable time."³

According to EPA Region 5 staff, since Ohio submitted its amended 2015 transfer request, EPA Region 5 has had regular and frequent communication with the state about information needed to reach a determination. Further, EPA Region 5 staff reported they have faced several challenges inhibiting them from coming to a timely determination. Some of these include the 2008 CAFO regulatory revisions

² 40 CFR § 123.61.

³ 5 U.S.C. § 555(b).

and EPA Region 5 staff turnover that has limited the resources available to review the request.

Citizen Petition

We found that although EPA Region 5 began an informal investigation of the allegations raised in the 2011 citizen petition, the region still has not officially responded to the petition (more than 8 years after the submission). When the agency receives a citizen petition for withdrawal under 40 CFR § 123, the EPA may conduct an informal investigation of the allegations to determine whether cause exists to prompt withdrawal proceedings,⁴ but the regulations impose no timeline on the Administrator to respond to the petition.

Conclusion

EPA Region 5's delay in timely addressing these two matters has created uncertainty for the state and the regulated community. According to EPA Region 5 staff, public interest in the citizen petition and transfer request has resulted in additional work to address Freedom of Information Act requests, a civil action initiated by citizens pursuant to Section 505 of the Clean Water Act, and a subsequent appeal related to the proposed transfer.

EPA Region 5 has allowed years to lapse without a determination on Ohio's transfer request or to address the citizen petition. We believe that the region's longstanding delay on these issues has impacted federal and state oversight and has created regulatory uncertainty with respect to CAFOs in the state of Ohio.

Recommendations

We recommend that the Regional Administrator, EPA Region 5:

1. Issue a decision regarding Ohio's request to transfer from the Ohio Environmental Protection Agency to the Ohio Department of Agriculture its National Pollutant Discharge Elimination System program with respect to Concentrated Animal Feeding Operations and other elements of the program.
2. Issue a decision regarding the citizen petition to withdraw Ohio's National Pollutant Discharge Elimination System program with respect to Concentrated Animal Feeding Operations and related permitting authority.

⁴ 40 CFR § 123.64(b)(1).

Agency Response and OIG Evaluation

On April 4, 2019, the OIG issued a memorandum to Region 5 documenting its findings and recommendations. On April 18, 2019, the Regional Administrator, Region 5, provided comments in response to the OIG's memorandum. Region 5 officials concurred with the two OIG recommendations and provided planned actions and completion dates. These actions include discussions between EPA and Ohio representatives regarding Ohio's proposed NPDES transfer request resulting in a decision regarding the transfer request and providing a written response to the citizen petition to withdraw.

Since this review commenced, Region 5 officials have begun to address the OIG's recommendations. Region 5 staff met with Ohio EPA and Department of Agriculture representatives on March 21, 2019, to discuss these issues. On April 16, 2019, the EPA and Ohio began biweekly calls to discuss the transfer request.

The recommendations are resolved with corrective actions pending. Region 5 plans to complete the corrective actions by March 31, 2020. The agency's full response is in Appendix A.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS

Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Potential Monetary Benefits (in \$000s)
1	3	Issue a decision regarding Ohio's request to transfer from the Ohio Environmental Protection Agency to the Ohio Department of Agriculture its National Pollutant Discharge Elimination System program with respect to Concentrated Animal Feeding Operations and other elements of the program.	R	Regional Administrator, EPA Region 5	12/31/19	
2	3	Issue a decision regarding the citizen petition to withdraw Ohio's National Pollutant Discharge Elimination System program with respect to Concentrated Animal Feeding Operations and related permitting authority.	R	Regional Administrator, EPA Region 5	3/31/20	

¹ C = Corrective action completed.

R = Recommendation resolved with corrective action pending.

U = Recommendation unresolved with resolution efforts in progress.

Agency Response




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

APR 18 2019

MEMORANDUM

SUBJECT: Response to the April 4, 2019, Office of Inspector General's Draft Report, "Hotline Concerns over EPA Region 5's Response to the Transfer Request and Citizen Petition Regarding Ohio's National Pollutant Discharge Elimination System Program for Concentrated Animal Feeding Operation"

FROM: Cathy Stepp, Regional Administrator,
EPA Region 5 

TO: Khadija Walker, Acting Director
Water Directorate
Office of Inspector General

Thank you for the opportunity to respond to issues and recommendations presented in the Office of Inspector General (OIG) Draft Report (Project No. OA&E-FY19-0038) regarding hotline concerns regarding: (1) a request from the State of Ohio to transfer the portion of its National Pollutant Elimination System Program (NPDES) program pertaining to concentrated animal feeding operations (CAFOs) and discharges of stormwater resulting from industrial activity and construction activity at animal feeding operations, from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA), and (2) a citizen petition requesting EPA to withdraw the CAFO NPDES delegation from Ohio, as well as Ohio's permit-to-install and permit-to-operate program for CAFOs. As requested in your April 4, 2019 memorandum, below is my written response to the findings and recommendations in your draft report. This response provides concurrence with the recommendations, addresses the factual accuracy of the draft report, indicates planned completion dates for the recommendations, and identifies corrective actions that have already been initiated and additional actions that have been planned to move toward final action on both matters.

Response to Recommendations:

Region 5 concurs with the two recommendations included in the Draft Report.

Region 5 recommends that the first recommendation be edited to reflect that ODA is seeking to administer the portion of the NPDES program pertaining to discharges of stormwater resulting from industrial activity and construction activity at animal feeding operations in addition to the portion of the program pertaining to CAFOs.

Clarifying Information Regarding the Report Findings:

Region 5 offers the following comments regarding the findings in the draft report.

1. The Draft Report does not convey that the Governor of Ohio has submitted two separate and distinct requests to transfer a portion of the NPDES program from Ohio EPA to ODA. The first request was dated December 28, 2006 (2006 Request) and the second request was dated July 8, 2015 (2015 Request).

The 2015 Request incorporated work Ohio conducted between 2009 and 2014 to enact and adopt statutory and regulatory revisions in an effort to conform its proposed NPDES program with the applicable federal requirements. In addition to the statutory and regulatory updates, the 2015 Request also includes new Memoranda of Agreement (MOA) between state agencies, a new proposed MOA between the State of Ohio and Region 5, a new program description, and a new statement of legal basis from the Ohio Attorney General. Region 5 is currently reviewing the 2015 Request to determine whether the request represents a complete NPDES program as the Governor withdrew the 2006 Request by letter dated May 18, 2017. Therefore, no further action will be taken by Region 5 on the 2006 Request.

2. The first paragraph of the *Background* section of the Draft Report states: “Ohio EPA asked that EPA Region 5 allow the Ohio Department of Agriculture to administer the part of the NPDES program pertaining to CAFOs.” Both the 2006 and 2015 Requests for EPA approval of the transfer were made by the Governor of Ohio, not Ohio EPA. Also, ODA is seeking to administer the portion of the NPDES program pertaining to discharges of stormwater resulting from industrial activity and construction activity at animal feeding operations, in addition to the portion of the program pertaining to CAFOs.

3. Regarding the bulleted list of challenges identified in the *Results* section of the Draft Report, the following comments are offered.

- The first bullet is accurate with regard to the 2006 Request. Regarding the 2015 Request, Region 5 is re-engaging in discussions with ODA to inform Region 5’s decision.
- The second bullet does not fully explain the revisions or circumstances which led to Ohio’s submission of a new request. Specifically, this does not clarify that the 2015 Request incorporated work Ohio conducted between 2009 and 2014 to enact and adopt statutory and regulatory revisions in an effort to conform its proposed NPDES program with the applicable federal requirements.

- The third bullet is accurate with regard to the 2015 Request. The third bullet is not applicable to the 2006 Request.

4. In the first sentence of the second paragraph of the *Citizen Petition* section, it is stated that Region 5 has decided to answer the citizen petition “after” the region resolves the transfer request. Although there is some common subject matter, Region 5 considers the 2015 Request and the citizen petition to be two separate matters, and action on one is not necessarily dependent upon action on the other. The current schedule for both matters is described below.

5. In the last sentence of the second paragraph of the *Citizen Petition* section, it is stated that “public interest in the citizen petition and transfer request has resulted in additional regional work with Freedom of Information Act requests and meetings between the agency and the state.” Region 5 agrees that public interest has resulted in additional regional work with Freedom of Information Act requests; however, Region 5 is not aware of public interest significantly causing additional meetings between the agency and the state. It should be noted in the Draft Report that a civil action commenced by citizens pursuant to Section 505 of the Clean Water Act, and a subsequent appeal, related to the proposed transfer, resulted in additional work and delays. EPA and the State of Ohio worked on that matter from late 2014 to early 2016.

Planned Action and Completion Dates:

The first recommendation included in the Draft Report is for Region 5 to issue a decision regarding Ohio’s request to transfer. The following are the actions Region 5 plans to take and planned completion dates.

- Discussion between EPA and Ohio via phone calls or meetings. These discussions will help inform EPA’s decision on whether ODA’s proposed program conforms with applicable federal requirements. The planned completion date is dependent on Ohio clarifying and making a final decision in a timely manner on how its program would be structured. *Planned completion date: September 2019*
- Region 5 correspondence to ODA transmitting what additional steps Ohio, if any, must make to conform with applicable federal requirements. *Planned completion date: December 2019*
- Due to the ongoing discussions, as well as issues that could arise as a part of the public participation process required if EPA makes a preliminary decision to approve the transfer, it is not possible to project with certainty a final action date on Ohio’s program transfer request.

The second recommendation included in the Draft Report is for Region 5 to issue a decision regarding the citizen petition to withdraw. The following are the actions Region 5 has identified for completion to reach a final decision. Planned completion dates, based upon current workforce planning, are identified for all EPA actions.

- Region 5 completes informal investigation. *Planned completion date: October 2019*
- Region 5 consultation with Office of Regional Counsel (ORC), Office of Water (OW) and Office of General Counsel, and if appropriate, Office of Enforcement and

Compliance Assurance, on outcome of informal investigation. *Planned completion date: January 2020*

- Region 5 response to citizen petition to withdraw. *Planned completion date: March 2020*

Corrective Actions Already Initiated:

With regard to the 2015 Request, representatives from OW, Region 5 Office of the Regional Administrator, Region 5 Water Division, and ORC met with representatives from Ohio EPA and ODA on March 21, 2019 to discuss the process to move forward on the 2015 Request. Since this meeting, two staff level conference calls have been held to discuss logistics of future discussions and the process for sharing information between EPA and Ohio. Bi-weekly calls between EPA and Ohio to discuss questions identified during EPA's review of the 2015 Request began on April 16, 2019.

With regard to the citizen petition, Region 5 will resume work to complete its informal investigation in accordance with the planned completion dates above.

Contact Information:

If you have any questions regarding this response, please contact Russ Rasmussen at (312) 886-7535.

cc: Eric Levy, RMD-OC, MF-10J

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