



# **Model National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement**

**U.S. Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
Office of Compliance  
Washington, DC 20460**

**August 2012**

**Model National Pollutant Discharge Elimination System (NPDES)**

**Memorandum of Agreement**

**Between the State of [Name] Department of [Name]**

**and**

**U.S. Environmental Protection Agency, Region [ ]**

**August 30, 2012**

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Note to Users

Sections 304(i) and 402(b), (c), (d), (e), (f) and (n) of the Clean Water Act (CWA) contain statutory provisions for state National Pollutant Discharge Elimination System (NPDES) programs. EPA issued regulations, currently contained in 40 CFR Part 123, that implement these statutory provisions. Pursuant to Section 402(b) of the CWA and the implementing regulations at Sections 123.1 and 123.21, there are five required components of a state's submission to obtain EPA authorization. These documents include: a letter from the Governor or the appropriate Tribal leader in the case of tribes; a complete program description; an Attorney General's statement; a Memorandum of Agreement (MOA); and copies of all of the applicable state statutes and regulations. In addition, EPA generally has additional agreements with each state including but not limited to state/EPA agreements and grant work plans. The regulations at 40 CFR §123.24(a) require that the MOA be executed between the director of a state NPDES program and the EPA Regional Administrator (RA). Memoranda of Agreement have been established for each approved program, some as early as the 1970s, with the most recent being Alaska's in 2008. The NPDES MOAs are the principal agreements between the Environmental Protection Agency (EPA) and authorized states in the interactions between the EPA and the states on behalf of the NPDES program.

On July 29, 1986, EPA issued the *NPDES State Program Guidance* that discussed the then applicable provisions of NPDES state programs and provided model provisions, including a model MOA. The purpose of this document is to provide an updated model for MOAs between states and EPA that complies with current NPDES program approval requirements.

On October 15, 2009, the Agency issued a Clean Water Act Action Plan (CWA Action Plan); on June 22, 2010, the Offices of Enforcement and Compliance Assurance and Water issued the Interim Guidance to Strengthen Performance in the NPDES Program. As stated in the transmittal memo of June 22, 2010 to regions and states, for the Interim Guidance called for initiation of "actions outlined in the Clean Water Act (CWA) Action Plan aimed to focus our NPDES planning and resources on the most significant sources of water quality impairment and ensure consistent enforcement across states that maintains a fair and level playing field for the regulated community and all Americans."

One of the major tenets of the CWA Action Plan is strengthening oversight of state NPDES programs and, more generally, to improve the performance of both the EPA and state NPDES permitting and enforcement efforts.<sup>1</sup> Part of the effort to improve the operation of state NPDES programs is to assess the status of the state programs, including the MOAs. Some MOAs date from initial authorization in the mid-1970s and may not be consistent with current requirements, may lack important components that have been added to the program, or, for some reason, have provisions that may restrict EPA or state actions. In order to ensure that the MOAs

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<sup>1</sup> The effort to undertake a review of existing MOAs is also a component of the Agency's response to recommendations by the EPA Office of Inspector General (OIG) in September 2010 to review NPDES MOAs and update as necessary.

do not provide a significant impediment to effective NPDES programs, the EPA believes it is timely to initiate these reviews.

The NPDES program MOAs will be reviewed by each state and EPA regional office at least once every four years in accordance with the four year cycle for integrated oversight activities envisioned under the CWA Action Plan. The cycle provides that each state and EPA region will undergo an integrated NPDES Permit Quality Review and State Review Framework enforcement oversight review at least once every four years. In developing the review criteria and checklist, both of which are attached to this document, it is the EPA's intent that these serve as useful tools for both the states and regional offices in their reviews of existing MOAs. The NPDES MOA review for each state may be conducted concurrently or before the integrated review process. Problematic MOAs identified during the first four year cycle should be updated by September 2017.

MOAs must meet the requirements of 40 CFR §123.24 and should contain provisions outlining long term state and federal responsibilities. This model provides an example of language recommended to be used by states and regions when creating or revising an NPDES program MOA. The majority of the provisions mirror the federal regulations and thus would meet the substance of the regulatory requirements.<sup>2</sup> It is also consistent with EPA policy and guidance and covers base program requirements. The MOA is part of the overall relationship between EPA and the State. EPA intends to collaborate with the State on any decision to revise the MOA. This document is not itself legally binding or enforceable. Regulation cites inform the evaluation – state programs need to be no less stringent than the applicable federal program, but do not need to track the language of the applicable federal regulations exactly.

Based on the review, any MOA that prohibits the effective implementation of the program should be revised as necessary. In general, the criteria<sup>3</sup> for identifying MOAs that may need revision would include those for which the answer to any of these five criteria is “no.”

- The MOA meets the requirements of 40 C.F.R. §123.24;
- The MOA is consistent with the regulations and statute;
- The MOA accurately documents program authorities or jurisdictions that are all supported by state law or policy;

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<sup>2</sup> At the time this document is being issued, the EPA is planning to propose revisions to its NPDES regulations to require electronic reporting of much of the information currently required by 40 CFR §123.45 to be submitted by permitted sources and approved states, and to propose revisions to the base NPDES regulations dealing with various permit provisions. When such regulations are final, the EPA and states will be expected to review the relevant provisions of the MOA to ensure conformance to new requirements, consistent with the requirements of 40 CFR §123.62 on modification of state programs.

<sup>3</sup> The criteria, as listed, are not in priority order.

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- The MOA includes all critical sections and program components that reflect the federal requirements for both permitting and enforcement programs and that are within the scope of the approved program; for example, pretreatment, stormwater, CAFO, as well as permit issuance, data systems, compliance monitoring, and enforcement, as applicable; and
- The MOA does not limit the EPA authorities to review NPDES permits, conduct compliance monitoring or investigations, initiate enforcement, or issue permits in an appropriate manner.

It is important to emphasize that the EPA does not believe that every MOA needs revision, nor does the EPA intend for every MOA to mirror the model. The EPA's goal is to collaborate with individual states to identify and correct those MOAs that prohibit or hinder the effective implementation of the NPDES program. In our discussions with an individual state, it may be possible to find solutions to address any problems through use of other written binding agreement such as state/EPA agreements, grant work plans, and or a supplemental Attorney General's statement.

Based on the review, any MOA that may hinder or prevent the effective implementation of the program should be revised as necessary. For each of these MOAs, the EPA anticipates engaging the state in a process to revise the MOA as necessary and the revisions process will be conducted using the procedures in the NPDES regulations for program modification. The model MOA may be useful in developing new MOAs or an MOA modification.

As noted above, the EPA will work with the states to review existing MOAs in order to identify MOAs that pose legal or practical barriers to program implementation for the EPA and the state, based on the criteria. If an MOA is found to be deficient based on the above criteria, the EPA and the state should revise the MOA as necessary. Note, however, that the criteria, checklist and model MOA are intended solely as guides to the provisions that should be included in an MOA, as well as for use by states and tribes seeking NPDES program authorization in the future, but they do not need to be matched word for word.

This document, and the review criteria and checklist are not themselves legally binding or enforceable. Use of the model is not required. Nothing in this document substitutes for statutory or regulatory provisions, which set forth the legally binding and enforceable requirements, as applicable. The model may be subject to change due to new or updated policies, guidance, regulations or statute. The permitting, compliance and enforcement programs have numerous guidance and policy documents that may inform both the EPA and the state in their interactions for the NPDES program in the state; some of the primary documents are contained in Appendix 1. Users should account for any changes when using this document to revise a NPDES MOA. Questions regarding this document should be directed to the EPA's Office of Wastewater Management in the Office of Water and the Office of Compliance in the Office of Enforcement and Compliance Assurance.

## Model Memorandum of Agreement

### I. Introduction

This Memorandum of Agreement (hereinafter, MOA)<sup>4</sup> sets forth the terms, conditions, agreements between the parties for carrying out the responsibilities and procedures as required by 40 Code of Federal Regulations (CFR) § 123.24<sup>5</sup> for how the National Pollutant Discharge Elimination System (NPDES) program will be administered by the State of X, through [State agency] (hereinafter, State) and subject to oversight by Region Z of the United States Environmental Protection Agency (hereinafter, EPA or Region Z). The NPDES program may include, but is not limited to, [itemize those components of the State's program]. The intent is for this MOA to supersede all applicable previous MOAs or MOA amendments between the State and EPA [as itemized below]. If the EPA Regional Administrator (RA) determines that any provision of this agreement does not conform to the requirements of Sections 304(i) and 402(b), (c), (d), (e) and (f) of the federal Clean Water Act (hereinafter, the CWA), 33 U.S.C. §§ 1314(i), 1342(b), (c), (d), (e) and (f), or to the requirements of 40 C.F.R. Parts 122-125, or other applicable federal regulations, the Regional Administrator will notify the State Director<sup>6</sup> of the need to revise this agreement, or other parts of the authorized program to be consistent with the currently applicable federal statutes and regulations, and may propose revisions or modifications as part of the notice (40 CFR §123.62).

The State Director and the Regional Administrator hereby agree to maintain a high level of communication, cooperation and coordination between the State and EPA in a partnership to ensure successful and effective administration of the NPDES program. In this partnership, EPA will provide to the State technical and other assistance on permit, compliance and enforcement matters when requested, as appropriate and necessary, and as funding allows. Exchange and submittal of information should be encouraged electronically when possible and appropriate.

The State will administer an NPDES program in accordance with the CWA Sections 304, 307, and 402, this MOA, applicable State legal authority, and the annual State grant Program Plan (State grant Workplan)<sup>7</sup>, consistent with applicable federal requirements. These mechanisms, along with the annual work planning process allow the states and EPA to work together to strategically direct resources toward the most important issues. The State has the primary responsibility to establish the State NPDES program priorities that are consistent with national NPDES goals and objectives to the extent practicable.

The strategies and priorities for issuance, compliance monitoring and enforcement of permits (against both unpermitted and permitted facilities) established in this MOA, may be set forth in more detail in the State grant Workplan, or a State/EPA Enforcement Agreement signed by the State Director and the Regional Administrator and/or persons delegated appropriate authority. This MOA, the State grant Workplan, and any other State/EPA agreement(s) regarding the NPDES program should be consistent with this MOA. However, in the event of any conflict or inconsistency, this agreement will control, consistent with 40 CFR §123.24(c).

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<sup>4</sup> 40 CFR §§123.24(a) and (c)

<sup>5</sup> Any regulations cited in the MOA are the regulations in effect at the time the MOA or MOA revision is signed."

<sup>6</sup> "State Director" is defined in 40 CFR §122.2.

<sup>7</sup> In many cases, EPA and the State use the grant workplan to agree on program priorities. The grant workplan may also be called a state workplan or state 106 workplan.

[If the State has been approved for a phased program under CWA §402(n), the schedule for the phases should be in the MOA. If the State has been approved for a partial program under CWA §402(n), the scope of the State’s approval should be clearly spelled out in the MOA.]

## II. Scope of Approval

The State Director and the Regional Administrator agree that the State has been granted approval to administer the NPDES permitting, compliance, and enforcement programs for the following classes and classes of permits and discharges: (e.g., individual and general permits, federal facilities, pretreatment, stormwater programs, etc.) The State does not have NPDES Program approval for [itemize for specific State -- (1) facilities located in Indian country (defined in 40 CFR §122.2),<sup>8</sup> (2) facilities operating outside State waters (generally all offshore facilities that are at least three miles offshore), or for (3) biosolids (sewage sludge) use and disposal permitting, compliance, or enforcement (unless specifically approved, or as provided by CWA section 405(f)) as part of the State NPDES Program.] [If authority split between different State agencies, refer to the other agency.]

The State will implement the State NPDES Program in accordance with CWA §§304(i) and 402 and in accordance with 40 CFR Part 123. EPA will continue to be the permitting authority for Indian Country, those parts of the NPDES program the State has not been approved for, and will be the decision-maker on certain variance requests. In any event, EPA maintains concurrent authority with the State to address noncompliance issues and to take enforcement actions. The State will be responsible for the following when approved: accepting applications; drafting permits and fact sheets; public notice and review of draft permits; preparing a response to comments; issuing permits; conducting inspections, audits, and reviews of various reports; and initiation and completion of enforcement actions.

This MOA sets forth procedures under which the EPA and the State will coordinate their actions and share information regarding all matters, consistent with their respective legal obligations and authorities, in the administration of the NPDES program. Nothing herein will be construed as expanding the respective authority of either agency or as requiring or approving the State to implement or administer any federal law, other than those portions of the CWA that the EPA has approved the State to implement and administer.

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<sup>8</sup> There are very limited circumstances where the State has received approval to regulate facilities in Indian Country and it is based on very specific provisions of federal law. See Maine NPDES authorization in 2003 and 2012.

### III. Effect of MOA

Nothing in this MOA limits the State's<sup>9</sup> authority to take action under State law.

Nothing in this MOA limits EPA's authority to take action under federal law, or requires it to take any action at any time.

Nothing in this MOA constitutes or creates any rights or valid defenses to regulated parties in violation of any environmental statute, regulation, or permit, including, without limitation, any defense to an enforcement action taken by the State or EPA.

Nothing in this agreement establishes an agency relationship or privity between EPA and the State.

No waiver of sovereign immunity is implied or assumed in this agreement.

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<sup>9</sup> This provision includes any action or authority under local law.

#### IV. State Responsibilities

The State will exercise its legal authority contained in its State regulations and statutes and, to the maximum extent possible, maintain the resources required to carry out all aspects of the approved NPDES and Pretreatment Programs [revised to reflect individual State status]. The State program approved to implement the NPDES program pursuant to the requirements of the CWA is implemented through the State NPDES Program adopted under [cite State code chapters, titles, sections, etc., or have an appendices as necessary for the State legal authority to carry out the requirements of permitting (40 CFR §123.25), compliance evaluation programs (40 CFR § 123.26), enforcement authority (40 CFR §123.27), Pretreatment Program (40 CFR § 403.10), etc.].<sup>10</sup>

EPA and the State may agree on use of electronic communications for much of the communication specified in this MOA.

In accordance with the priorities and procedures established in this MOA and/or as described in the State grant Workplan or other binding agreement between EPA and the State, the State will:

1. Create and maintain the legal authority and, to the maximum extent possible, to secure the resources required to carry out all aspects of the State NPDES and Pretreatment programs [revised to reflect individual State status], including revisions to State program legal authorities, in accordance with 40 CFR Parts 123 and 403.
2. Administer the authorized program, including receipt of permit applications, issuance or denial of NPDES permits, and providing compliance and enforcement activities in compliance with all applicable federal laws.
3. Issue and administer general permits, in accordance with State requirements consistent with 40 CFR §122.28, to the extent the State issues general permits.
4. Ensure that EPA is kept fully informed and up-to-date regarding:
  - a. Draft and final policy and program development documents related to the State NPDES program and Pretreatment program;
  - b. Draft, proposed, and final statutes, rules and/or regulations related to the State NPDES program and Pretreatment program;
  - c. New case law, settlement agreements, and remands of regulations related to the State NPDES program and Pretreatment program; and
  - d. Draft, proposed and final technical guidance and policies which pertain to the State NPDES program and Pretreatment program.

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<sup>10</sup> 40 CFR §§ 123.24(b)(1), (2) (3) and (5).

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5. Ensure that any proposed revision of the State NPDES Program or Pretreatment program is submitted to EPA for approval pursuant to 40 CFR §123.62(b).
6. Revise the State NPDES and Pretreatment program as needed to conform to new federal regulations, including revisions to state regulations, within one year of the date of promulgation of the new federal regulations as provided in 40 CFR §122.62 (e). However, if the State is required to amend or enact a statute in order to make the required revision, the revision must be made within two years of the date of promulgation of the new federal regulations, as provided in 40 CFR §§123.62(e) and 403.18.
7. Process NPDES permit applications in a timely manner and propose to issue, reissue, modify, terminate, deny or revoke and reissue State NPDES permits consistent with 40 CFR Parts 122 and 123.
8. Develop and maintain a Continuing Planning Process document per CWA §303(e) and 40 CFR §130.5. Activities to maintain current planning processes may be identified in the applicable grant agreement.
9. Comprehensively evaluate and assess facility compliance with enforceable documents including permits, administrative orders, consent orders, court orders, and any applicable enforcement actions which deal with NPDES and Pretreatment issues including compliance with effluent limitations reporting, best management practices, compliance schedules, and operation and maintenance.
10. Maintain a vigorous program of taking timely and appropriate enforcement actions for NPDES permit violations, unpermitted discharges, and Pretreatment Program violations in accordance with State statutes and regulations, and consistent with federal NPDES requirements. The State agrees to review the EPA's national and regional policies and guidance when adopting corresponding or related State policies and guidance and agrees to adopt State policies or guidance that are consistent with the CWA and applicable federal regulations. In the absence of State policies and guidance, the State agrees to consider implementing EPA's policy and guidance.
11. Maintain an effective program to carry out the Pretreatment responsibilities in accordance with 40 CFR §§403.8(f) and 403.10(e) and (f), to the extent the State has pretreatment approval.
12. Maintain information which must be easily accessible to EPA, for program evaluation for each NPDES permit and for each significant industrial user (SIU) for which the State is the control authority for a minimum of the previous five years or until such permit is reissued; this includes, but is not limited to the minimum data requirements into national databases. [Region and State may clarify the longer requirements for enforcement actions.] This information will also be available to the public as provided by section 308(b) of the Clean Water Act, except to the extent it is enforcement confidential. Where applicable, such files must include, at a minimum, copies of:

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- a. permit application, including attachments;
- b. proposed permit and/or current final issued permit, or final order of denial;
- c. fact sheet or statement of basis, including effluent data;
- d. draft permit submitted for public notice and comment;
- e. public notice;
- f. timely public comments received in writing, orally at a public hearing, and the State's response to comments;
- g. annual reports from permittees, if required;
- h. the rationale, if not included in the fact sheet, which details the permit limit calculations and development. The rationale will include both the technology and the water quality basis for the draft or proposed permit;
- i. all discharge monitoring reports (DMRs), including whole effluent toxicity (WET), toxicity reduction evaluation (TRE), and in-stream sampling requirements;
- j. studies supporting permit limits (e.g., wasteload allocation, total maximum daily load, site specific analysis, and in-stream sampling data);
- k. all relevant inspection reports and compliance information;
- l. all enforcement related documents for both formal and informal actions, including penalty calculation, assessment and collection;
- m. relevant Compliance Schedule Reports;
- n. stormwater related documents, including stormwater management plans and pollution prevention plans received by the State;
- o. For combined sewer overflow (CSO) communities, the long term control plan (LTCP), and any other documentation related to compliance with the CSO provisions of the permit and documentation related to discharges from the CSOs;
- p. Information regarding any bypass events and/or sanitary sewer overflows (SSOs);

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- q. requests for hearings, motions, for reconsideration and rehearing, and any order issued by the State;
  - r. all pretreatment related documents, including the permittee's pretreatment program and annual report, as applicable;
  - s. concentrated animal feeding operation (CAFO) related documents submitted by the CAFO to the State; and
  - t. other pertinent information and correspondence.
13. Submit to EPA the information described in this MOA, the State grant Workplan and applicable portions of 40 CFR Parts 123 and 403. Additionally, upon request by EPA, the State will submit specific information and allow access to any files necessary for evaluating the State's administration of the NPDES and pretreatment programs within a time-frame agreed upon by EPA and the State.
  14. Ensure that the conditions of the draft permit are written to achieve applicable water quality requirements of all affected or downstream States and Indian Tribes, and that all affected States and Indian Tribes are, at a minimum, provided timely notice of such draft permit and any other information requested per 40 CFR §122.44(d)(4).
  15. Input or ensure reporting for all regulatory nationally required data elements for all NPDES regulated facilities (e.g., non-majors, majors, stormwater, pretreatment (SIUs where the State is the control authority), and CAFOs) into the national NPDES database, as provided under 40 CFR §123.26(e)(4).
  16. Make available to EPA any information obtained or used by the State under the State's NPDES and pretreatment Programs upon request without restriction due to claims of confidentiality unless otherwise required by law. The State will determine if information submitted by an applicant under a claim of confidentiality is confidential (i.e., confidential business information) in accordance with state law and identify the material accordingly. EPA will be informed of any confidential information that is transmitted to EPA. EPA will treat such claims as confidential in accordance with 40 CFR Part 2, Subpart B and 40 CFR §§122.7 and 403.14.

## V. EPA Responsibilities

1. EPA will provide, to the maximum extent possible, funding to the State to support the State's responsibilities under the NPDES program, including providing formal training in permit writing, compliance inspections, and enforcement, subject to the availability of appropriated funds and EPA authority. As required by the Anti-Deficiency Act, 31 USC §§1341 and 1342, all commitments made by EPA in this MOA are subject to the availability of appropriated funds. Nothing in this MOA, in and of itself, obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with Agency budget priorities.
2. EPA will oversee the State administration of the NPDES program on a continuing basis for consistency with the CWA, State law or rules, this MOA, the State grant workplan, [as a matter of practice, the grant workplan is sometimes used to discuss priorities and areas of focus] and all applicable federal regulations. In addition, EPA may consider as a part of its assessment, comments from dischargers, potentially affected Tribal governments, the public, and federal and local agencies concerning the State administration of its NPDES program. Any such comments considered by EPA will be brought to the attention of the State by written correspondence, if the commenting party has not previously communicated with the State.
3. EPA will provide appropriate assistance in obtaining retrievals from, and training for, the entry and use of information into the Permits Compliance System (PCS) or the Integrated Compliance Information System for the Clean Water Act National Pollutant Discharge Elimination System (ICIS-NPDES), whichever is currently being used, hereafter ICIS, (the successor database to the PCS), or their successors. After initial ICIS-NPDES training by EPA Headquarters, additional support will be provided to the State upon request and as resources allow. Changes in ICIS-NPDES procedures will be provided to the State sixty (60) calendar days in advance of such change, if possible.
4. EPA will ensure that the State is kept fully informed, in an easily accessible and up-to-date, to the fullest extent allowable, subject to applicable confidentiality considerations, regarding:
  - a. Draft and final policy and program development documents related to NPDES and Pretreatment;
  - b. Draft, proposed, and final regulations related to NPDES and Pretreatment; and
  - c. Draft, proposed and final technical guidance and policies which pertain to NPDES and Pretreatment.
5. EPA will review and comment on draft permits, proposed permits, Pretreatment Program actions, and any future NPDES or Pretreatment Program modifications in a timely manner. EPA will work with the State to impose pretreatment conditions on SIUs when the State has not received Pretreatment program approval.

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6. EPA will provide technical assistance regarding the interpretation of regulations and guidance for the development of draft and proposed permits.
7. EPA will conduct timely and appropriate enforcement and compliance monitoring activities within the State, as appropriate.
8. Provide the State with copies of inspection reports and formal enforcement actions, as appropriate.
9. Input all required data into EPA's national CWA NPDES database for the facilities EPA retains authority over or where EPA takes federal action. EPA retains authority, unless the State is expressly approved, for all NPDES activity in Indian Country.
10. Issue decisions on variance requests for which the CWA retains authority for EPA to issue the decision.
11. EPA and the State may agree on use of electronic communications for much of the communication specified in this MOA.
12. Nothing in this MOA will be construed to limit EPA's authority to take action under the CWA, including but not limited to sections 307, 308, 309, 311, 402, and 504.

## VI. Jurisdiction, Permit Issuance and Review<sup>11</sup>

The State NPDES Program is approved (subject to EPA's oversight and enforcement authority pursuant to CWA §§ 304(i) and 402(d) and (i) to perform permitting, compliance, and enforcement activities of the State's NPDES Program, including, but not limited to, [the Stormwater Program, Pretreatment Program, CAFO program, and federal facilities – need to revise to reflect the approved program for each State]. EPA will transmit and receive information regarding the State's NPDES Program in accordance with 40 CFR §§123.41, 123.42, and 123.43.

The State is responsible for drafting, providing public notice, issuing, modifying, reissuing, revoking, denying, and terminating permits in accordance with this MOA, the CWA, the regulations promulgated thereunder at 40 CFR Part 122 and 123, and applicable State statutes and rules.

1. The State must:
  - a) Assume permitting, compliance, and enforcement obligation for facilities, in its jurisdiction with the exception of: [itemize for State -- Indian country (except to the extent the State has specifically been approved to operate the NPDES program in Indian country), outside State waters (3 miles offshore), and the federal biosolids program].
  - b) Evaluate and determine compliance for facilities subject to the State's NPDES program.
  - c) Enforce state law and State permits at facilities with EPA-issued NPDES permits, except for those in Indian Country.
2. In its NPDES permits, the State may include permit requirements from State statutes, rules, and policies on biosolids and other state programs beyond the scope of the federal NPDES program. The State will ensure no permit or fact sheet references federal biosolids regulations, standards, or requirements of non-approved programs, other than language approved by EPA.
3. EPA will retain permitting, compliance, and enforcement authority for facilities located in Indian Country (except as otherwise noted) and facilities operating outside state waters (three miles offshore). EPA may also retain authority over federal biosolids permitting, compliance, and enforcement.
4. EPA is responsible for processing all appeals, modifications requests, and variance requests pertaining to permits issued by EPA and over which EPA retains authority. EPA will copy the State on all correspondence and permitting decisions, except for permits EPA has jurisdiction over, including those in Indian country.
5. The State and EPA are encouraged to coordinate permitting, compliance monitoring, and enforcement activities for those industries and permits where the agencies have dual jurisdiction, including those cases where the State is not approved to operate the pretreatment program. The coordination outlined in other sections of this agreement may be expanded in other formal agreement(s). EPA may not defer to the State on any EPA statutory or regulatory authority, obligation, duty, or procedure including permitting, compliance, and enforcement.

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<sup>11</sup> 40 CFR §§123.24(d) and (e).

6. If an EPA objection over a state proposed NPDES permit is not resolved in the timeframes set forth in EPA's regulations (40 CFR §123.44), then EPA assumes exclusive Clean Water Act permitting, compliance, and enforcement authority for that facility, pursuant to federal law. (CWA §§402(d)(2) and (4)) At the end of the permit term of the permit issued by EPA, the State will be responsible for issuing the next permit, and EPA will transfer the files back to the State.

7. Upon request, EPA will assist the State in ensuring compliance at federal facilities as resources allow.

#### **A. Receipt of New Permit Applications and NOIs by the State**

Within thirty (30) calendar days after receipt of a complete permit application or notice of intent for coverage under an NPDES general permit, the State will enter all required information directly into ICIS-NPDES/PCS or transfer this information electronically from the State data management system to ICIS-NPDES/PCS or its successor, in accordance with 40 CFR § 123.26(e)(4).

#### **B. EPA Permits**

EPA will input all required data into EPA's national CWA NPDES database for the facilities EPA retains authority over, and coordinate with the State on CWA section 401 certification.

#### **C. Permit Issuance**

If the State's final determination is to issue the permit, the permit will be forwarded to the permit applicant, along with a transmittal letter conveying the State's decision. A copy of the final issued permit and fact sheet will be transmitted to EPA.

#### **D. Notice to Deny**

If the State's final determination is to deny the permit, notice of intent to deny must be given to EPA and the applicant in accordance with applicable State rules and NPDES regulations.

#### **E. Permit Reissuance**

All expiring State NPDES permits for which timely and complete permit renewal applications have been submitted should be reissued on or before their expiration date. If such timely reissuance is not possible the permit is administratively continued beyond its expiration date, if allowed by State law, but in no event will the expired permit be modified. An administratively extended permit remains in effect and enforceable until such time as the State permit is reissued. EPA may periodically request from the State the status of such permits.

In accordance with State regulation, a federally-issued NPDES permit in effect at the

time EPA approves the State NPDES Program continues in effect and becomes an State permit in accordance with the transfer schedule identified in the MOA (this is only for new authorizations).

#### **F. EPA Review of Draft and Proposed Permits, Permit Modifications, and Permit Revocations and Suspensions**

The State may consult with EPA for informal review of permit documents prior to issuing any permit or permit modification for public notice to ensure that the permit will comply with the federal Clean Water Act. The State must transmit to EPA appropriate portions of working documents in connection with these consultations. During informal review of a permit, EPA may request to review the proposed final permit.

EPA may review and comment on draft permits, permit modifications, and revocations and reissuances rather than proposed final permits. Draft permit and proposed permit are defined in 40 CFR §122.2. Where EPA has chosen to review and comment on draft permits rather than proposed final permits, a proposed final permit need not be prepared by the State and transmitted to EPA for review unless (1) the State proposes to issue a permit which differs from the draft permit reviewed by EPA, (2) EPA has objected to the draft permit, (3) there is significant public comment, or (4) EPA requests in writing to review the proposed final permit.

The State will not proceed to issue a permit if there are unresolved EPA objections to the permit.

For the purposes of this Section, EPA's review of permit modifications, revocations and reissuances, will follow the same procedures as outlined for the review of a draft individual permit or draft general permit, as appropriate.

The State will notify EPA of draft individual permits available for public review. EPA and the State may agree on a different process and/or categories of permits, and EPA is not required to review all submitted permits. The State and EPA can agree on the method of submission, format, etc. At EPA's request, the State will transmit to EPA one copy of the complete permit application, the public notice, the draft individual permit, the fact sheet associated with the draft permit, and an Ocean Discharge Criteria Evaluation pursuant to 40 CFR §125.122(b), if applicable, for formal review. Upon request by EPA, the State will provide EPA with copies of documents related to or supporting the draft permit.

Within [to be agreed upon by the State and EPA in the MOA] days of EPA's receipt of a draft individual permit, the Regional Administrator or designee will send to the State written comments on, objections to, or recommendations with respect to the draft permit. However, EPA reserves the right to take up to a total of ninety (90) calendar days to provide comments on, objections to, or recommendations with respect to the draft permit, provided that EPA notifies the State in writing within [the time period agreed upon by the State and EPA in the MOA] that it wishes to take up to ninety (90) calendar days to do so.

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A notification of objection to a draft individual permit by EPA during the initial [this is subject to agreement between EPA and the State] day period need only set forth the general nature of the objection(s) pursuant to 40 CFR §123.44. If a general objection is filed within the [ ] day period, EPA will have the remainder of ninety (90) calendar days from the date EPA received the draft permit to supply specific grounds for objection. Notwithstanding the foregoing, EPA and the State may mutually agree to extend EPA's review time on a particular draft permit to the full ninety (90) calendar days without filing a general objection during the initial period. Nothing in this agreement waives EPA's right to submit a general objection to the draft permit and request the full ninety (90) calendar days to review a draft permit to provide a specific objection. EPA will also send a copy of any comments, objections, or recommendations on a draft individual permit to the permit applicant. Submission of a revised draft permit restarts the review process and refreshes the timeframe for review under this MOA.

The State may proceed with the permit issuance process if:

- a) the RA or designee does not make objections in writing or extend its review time as provided above within [ ] days of receipt of the draft individual permit; and
- b) no significant public comment on the draft permit is received during the public review period.

At the time a draft general permit is available for public review, the State must transmit to the RA or designee one copy of the public notice, draft general permit, the fact sheet associated with the draft general permit, and an Ocean Discharge Criteria Evaluation, if applicable, for formal review. Within ninety (90) calendar days of EPA's receipt of a draft general permit, the RA or designee may submit in writing to the State comments upon, objections to, or recommendations with respect to the draft general permit. If EPA does not object to the draft general permit in writing within ninety (90) calendar days of receipt and no significant public comment on the general permit is received during the public review period, then the State may proceed to issue the general permit. If significant public comment is received, the State will develop responses to those comments, including changes to the permit, and provide EPA a new draft permit, according to the procedures specified above.

In the event EPA files a general objection to a draft individual or general permit, EPA will have ninety (90) calendar days from the date of EPA's receipt of the most recent complete draft permit to submit in writing to the State the specific grounds for objection, including:

- a) A Statement of the reason for the objection (including the section of the CWA or regulations that support the objection -- EPA's objection to the issuance of a proposed final permit must be based upon one or more of the grounds listed in 40 CFR §123.44(c); and
- b) the actions that must be taken by the State to eliminate the objection (including the effluent limitations and conditions that the permit would include if it were issued by EPA).

Prior to notifying the State of an objection based upon any of the grounds set forth in 40 CFR §123.44(c), EPA:

- a) must consider all data transmitted pursuant to 40 CFR §123.43,

- b) may, if the information provided is inadequate to determine whether the draft permit meets the guidelines and requirements of the CWA, request the State to transmit to EPA the complete record of the permit proceedings before the State, or any portions of the record that EPA determines are necessary for review. If this request is made within [ ] days of receipt of the State's submittal under 40 CFR §123.43, it will constitute an interim objection to the issuance of the permit, and the full period of time specified in this Section, as appropriate, for EPA's review will recommence when EPA has formally received all of the requested information, and
- c) in its discretion, afford to the public an opportunity to comment on the basis for the objection.

Within ninety (90) calendar days of receipt by the State of an objection by EPA, the State or any interested person may request that a public hearing be held by EPA on the objection in accordance with 40 CFR §§123.44(e) and (f). If the hearing is requested by the State, EPA must hold the hearing. Following the public hearing, EPA must reaffirm the original objection, modify the terms of the objection, or withdraw the objection and must notify the State of the decision.

If the State does not submit a revised permit that meets EPA's objections within ninety (90) calendar days of the notice of objection (or thirty (30) calendar days following EPA's reaffirmation of the original objection or modification of the objection following a public hearing on the objection), EPA may issue the permit. Following the issuance of an EPA-issued permit and its permit cycle, authority to reissue the permit reverts to the State.

As agreed in this MOA, EPA and the State may agree to a process for EPA to review any submission of a notice of intent (NOI) to be covered under a general permit. The State should provide a copy of the NOI to EPA within [ ] days of EPA's request. Within [ ] days after receipt of the application for coverage, EPA may notify the State of any formal objections to the applicant's suitability for coverage under the general permit and request issuance of an individual permit as provided by 40 CFR §122.28(b)(3).

Following the close of the public comment period on a draft permit, a new draft permit may be prepared or proposed final permit will be prepared, a response to comments developed, and the fact sheet revised as appropriate to reflect the proposed final permit. The State may issue the permit without further review by EPA unless:

- a) The proposed final permit differs from the draft permit reviewed by EPA (unless the changes are insignificant, and EPA agrees that additional review is not needed);
- b) EPA has objected to such draft permit as outlined in this Section;
- c) Significant public comments have been received; or
- d) EPA requests in writing to review the proposed final permit.

If any exceptions listed in subparagraphs a through d above occur, then the State will send to EPA one copy of the proposed final permit, copies of the written public comments received, including hearing records, and a response to comments prepared under the State's regulations. EPA may comment upon, object to, or make recommendations to the proposed final permit pursuant to the process set forth in this Section above.

A copy of the final issued permit with authorizing signature and date, fact sheet revised to reflect the issued permit, response to comments, and Ocean Discharge Criteria Evaluation, if applicable, must be transmitted to EPA. This may be done electronically.

Subject to waivers of permit reviews, and annual agreement between EPA and the State, the State must notify EPA whenever it intends to terminate or revoke and reissue an effective State NPDES permit or NOI coverage by general permit. The State must transmit to EPA a copy of any permit that it proposes to modify or revoke and reissue with the proposed changes and comments from downstream States and Indian Tribes clearly identified. The procedures in this section must be followed with respect to modifications by the State of any issued permit and, for purposes of this MOA, each permit proposed to be modified must follow the same procedures as a new permit, except for permits that undergo minor modifications, as described in the State's approved program.

### **G. Public Participation**

1. The State will give public notice in accordance with 40 CFR §§ 124.10 (c), (d) and (e) whenever a draft permit has been prepared under 40 CFR § 124.6(d) or a hearing has been scheduled pursuant to 40 CFR § 124.12.
2. Public notice of the preparation of a draft permit will allow at least thirty (30) calendar days for public comment, and public notice of a public hearing, if one is determined to be appropriate, will be given at least thirty (30) calendar days before the hearing.
3. The State will make available to the public all permit applications, draft permits (individual and general), public notices, applications, fact sheets or Statements of basis, proposed final permits, and final issued permits, effluent data, inspection reports and other documents pertaining to the NPDES program (except information claimed and/or determined to be confidential in accordance with 40 CFR §122.7, or analogous State law).
4. The State will prepare and distribute copies of all public notices and fact sheets in accordance with State regulations; consistent with federal regulations found in 40 CFR §124.8 and 40 CFR §124.10. Unless otherwise waived by the specific organization, in addition to the general public notice described in 40 CFR § 124.10(d)(1), the State will provide to the following organizations, a copy of the fact sheet or any comparable rationale, permit application (if any) and draft permits (if any) associated with the notice:
  - a. U.S. Army Corps of Engineers;
  - b. U.S. Fish and Wildlife Service (F&WS) and the National Marine Fisheries Service (NMFS) (the Services);

- c. Other appropriate State and federal agencies;
  - d. Adjacent States and Indian Tribes (for permits which have the potential to affect them or the State or Tribe have expressed interest);
  - e. The State Historical Preservation Officer (SHPO).
5. All NPDES major permits and general permits will be publicly noticed in a manner constituting legal notice to the public under State law, in accordance with 40 CFR §124.10(c)(3).
  6. The State will provide an opportunity for judicial review in State court of the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process in accordance with 40 CFR §123.30.
  7. The public notice and comment procedures required by the State's statute or rule will be followed with respect to all permit modifications to final issued permits, except for minor permit modifications as provided in 40 CFR §122.63. Public notice of the permit modification application will be given in the same manner as for initial permit applications.

#### **H. Waiver of Permit Review by EPA**

On an annual basis, the State will transmit to EPA an annual Permit Issuance Plan, that may be part of the State grant Workplan, that will identify the permits the State intends to issue during the upcoming year; EPA and the State may agree to revisions to this Plan, as appropriate. EPA [waives / does not waive] the right to review, object to, or comment on the sufficiency of preliminary draft permits, draft permits, proposed final permits (to the extent that they must be submitted to EPA), and final (issued) permits for all discharges or proposed discharges, with the exceptions of the categories described below. By regulation, EPA may not waive review of:

- a. discharges into the territorial sea;
- b. discharges that may affect the waters of another state or Indian lands;
- c. discharges proposed to be regulated by general permits;
- d. discharges from Publicly Owned Treatment Works (POTWs) with a daily average discharge that exceeds one million gallons per day (MGD);
- e. discharges of uncontaminated cooling water with a daily average discharge that exceeds 500 MGD;
- f. discharges from any major discharger or discharges from any discharger within any of the industrial categories listed in Appendix A to 40 CFR Part 122;
- g. discharges from any other sources with a daily average discharge that exceeds 0.5 MGD, except that EPA may waive review of permits for discharges of non-process wastewater regardless of flow;

EPA also does not waive review of the following:

- a. [placeholder for other category/categories that a particular Region might not want to waive]

As noted above, the regulations do not allow EPA to waive its right to review applications or NOIs from primary industry categories, including coal mining facilities, whether they are major or non-major dischargers. EPA reserves the right to unilaterally terminate the waivers in this Section, in whole or in part, at any time. Any such termination will be made in writing to the State.

The foregoing waiver does not authorize the issuance of permits which do not comply with applicable provisions of federal laws, regulations, effluent guidelines, State statutes, or State rules. The waiver will not relinquish the right of EPA to ask the State for review of any action or inaction. The State will supply EPA with a copy of all final permits (see MOA Section VIII.A.7).

### **I. Discharger List**

The State and EPA will input current data into EPA's national CWA NPDES database for all major and non-major facilities for which they are responsible (i.e., those agreed upon in a PPA, Compliance Monitoring Strategy (CMS) plan, etc.).

When EPA expands its current provisions for input of data into EPA's CWA NPDES database, the State will comply with new regulations.

A domestic major facility is a facility classified by the State or EPA (40 CFR §122.2) as a major discharger based on a design treatment plant flow of at least 1.0 MGD, an approved Pretreatment Program, a high potential for violation of water quality standards, or poses a potential or actual threat to human health or the environment.

A nondomestic major facility is a facility classified by the State or EPA (40 CFR §122.2) as a major facility based on the State *NPDES Permit Rating Work Sheet* that is based on EPA's NPDES Permit Rating Work Sheet, plus any additional dischargers that, at this discretion of the State or EPA, should be classified as a major due to a high potential for violation of water quality standards and/or a history of chronic violations.

### **J. Administrative or Court Action**

If the terms of any permit, including any permit for which review has been waived by EPA, are affected in any manner by an administrative or court action, the State must immediately transmit to EPA a copy of the permit in a timely manner, with changes identified. EPA will then have ninety (90) calendar days from receipt of the revised permit to review, comment on, or make written objections to the changed permit pursuant to CWA Section 402(d).

### **K. Variances**

Consistent with time limitations contained in the most recently amended CWA, the State must conduct an initial review of all requests for fundamentally different factors, and for variances under sections 301(c), (g), (i), (k), and 316(a) of the CWA.

With regard to sections 301(i) and (k) and 316(a) variances, the State may deny or approve the request. The State must send a copy of the determination to the requester and EPA.

With regard to fundamentally different factors and section 301(c) and (g) variances, and section 302 of the CWA modifications, the State may deny the request, and such determination will be forwarded to the requester and EPA. If the State determines that factors do exist that may warrant such a variance, it will send the request and recommendations to EPA. If EPA denies a variance request, the State must so notify the requester. If EPA approves a variance request, the State must prepare a draft permit factoring in the variance.

#### **L. Appeals**

The State will provide EPA with a copy of all judicial, administrative law decisions, as well as any formal settlement agreements that the State enters into, that impact the State's ability to implement the State NPDES Program in accordance with federal requirements.

*Stay of Permit.* When the State makes a determination to stay a permit, in whole or in part, the State will notify EPA.

## VII. Pretreatment Program <sup>12</sup>

### A. General

This Section defines the State and EPA responsibilities to establish, implement, and enforce the National Pretreatment Program, pursuant to the State regulations, CWA §307 and CWA §402. The State will apply and enforce the pretreatment regulations as required by 40 CFR Part 403, and EPA will oversee State's Pretreatment Program operations consistent with 40 CFR Part 403 regulations and this agreement. Terms in this Section are defined in 40 CFR §403.3, unless otherwise noted.

As the State issues, reissues, or modifies permits in accordance with Section VI of this agreement, the State will include appropriate pretreatment conditions in those issued, reissued, or modified permits. Appropriate pretreatment conditions include, but are not limited to, the following: required compliance with 40 CFR Part 403 and corresponding State law, Approved POTW Pretreatment Program requirements, submission of a technical evaluation of the need to revise local limits within a specified period and based in part on monitoring over the previous NPDES permit period, and at least semi-annual monitoring of influent, effluent, and biosolids for specific pollutants of concern which may be received from Industrial Users of the POTW.

The State will serve as: a) the "Control Authority" for those industrial users who introduce pollutants into a POTW which has not been approved to have a Pretreatment Program, or where the State assumes that authority pursuant to 40 CFR §403.10(e), and therefore implements the Control Authority responsibilities in 40 CFR Part 403 and the State will serve as the "Approval Authority" for an Approved POTW Pretreatment Program.

EPA retains authority over facilities in Indian Country, unless EPA has specifically approved the State to operate the Pretreatment Program over those facilities.

If the State does not have a Pretreatment Program approved by EPA, EPA will retain authority over facilities in the State, and the State will work with EPA to ensure enforcement Pretreatment Standards and Requirements in the State.

### B. Program Responsibility, Including Permitting, Compliance Monitoring and Enforcement

The State will fully implement its approved Pretreatment Program including the following responsibilities:

- a. Enforce as appropriate against discharges prohibited by State statute and regulations, and 40 CFR §403.5.
- b. Identify and regulate Significant Industrial Users (SIUs) and non-significant Industrial Users (IUs) who introduce pollutants into a POTW without an approved pretreatment program. If the State runs the pretreatment program in lieu of local

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<sup>12</sup> 40 CFR §403.10(g)(3).

authorities, the State will assure full implementation of the program. 40 CFR §§403.10(e).

- c. Seek civil and criminal penalties and injunctive relief (including a temporary restraining order), as appropriate, for noncompliance by a POTW with pretreatment conditions incorporated into the POTW permit and for noncompliance with National Pretreatment Standards and Requirements by Industrial Users (IUs), as set forth in 40 CFR §§403.8(f)(1)(vi), 403.10(f)(iv) and 403.5(c).
- d. Where the State has not elected to assume the role of a Control Authority, review, approve, or deny a POTW Pretreatment Program in accordance with the procedures at 40 CFR §§403.8, 403.9 and 403.11. Review and approve program modifications, as specified in 40 CFR §403.18.
- e. Where the State has not elected to assume the role of a Control Authority, incorporate approved POTW Pretreatment Program conditions in a NPDES permit issued to a POTW, as required in 40 CFR §403.8 and CWA §402(b)(8); require compliance by a POTW with the incorporated NPDES permit conditions; and require compliance by IUs with National Pretreatment Standards and Requirements.
- f. Where the State has not elected to assume the role of a Control Authority, require approved POTW Pretreatment Programs to develop and enforce local limits, as necessary, as set forth in 40 CFR §403.5(c).
- g. Where the State has elected to assume the role of a Control Authority, develop and enforce local limits, when required by regulation or necessary, including best management practices as necessary, where there are categorical users discharging to a POTW without an approved Pretreatment Program.
- h. Require submission of reports from approved POTW Pretreatment Programs and Industrial Users, as outlined in 40 CFR §403.12.
- i. Evaluate and assist continuing compliance:
  - i. of a POTW with pretreatment conditions incorporated into the POTW permit through review of monitoring reports submitted to the State by the POTW, as required by 40 CFR §403.12;
  - ii. of industrial users where the State is the control authority; and
  - iii. by IUs with National Pretreatment Standards through the review of self-monitoring reports submitted to the POTW or to the State by the IUs, as required by 40 CFR §403.12.
- j. Carry out inspection, surveillance, and monitoring procedures that will determine, without relying solely on self-monitoring information supplied by the POTW,

compliance or noncompliance by the POTW with pretreatment conditions incorporated into the POTW permit.

- k. Carry out inspection, surveillance, and monitoring procedures that will determine, without relying solely on self-monitoring information supplied by the Significant Industrial Users (SIUs) compliance or noncompliance.
- l. As specified in this agreement, review and recommend approval or denial to EPA of requests for Fundamentally Different Factors variances submitted by an IU in accordance with the criteria and procedures set forth in 40 CFR §403.13 and enforcement-related conditions in the POTW's NPDES permit.
- m. Review and, as appropriate, approve POTW requests for authority to modify categorical pretreatment standards to reflect removal of pollutants by a POTW, in accordance with 40 CFR §§403.7, 403.9, and 403.11.
- n. Analyze influent and effluent of a POTW to identify, without relying solely on self-monitoring information supplied by the POTW, compliance or noncompliance with pollutant removal levels set forth in the POTW's NPDES permit.
- o. Investigate evidence of violations of pretreatment conditions set forth in the POTW permit by taking samples and acquiring other information, as needed.

**C. National Pretreatment Standards Categorical Standards, 40 CFR §403.6(a)**

Pursuant to 40 CFR §403.6(a), the State must review requests from IUs for industrial category or subcategory determinations received within sixty (60) calendar days after the effective date of a National Pretreatment Standard for a subcategory under which an IU believes itself to be included or prior to discharge from an existing IU which adds or changes a process or operation which may be included in a subcategory, or prior to discharge from an IU which is a new source. The State will prepare a written determination and justification as to whether the IU does or does not fall within that particular subcategory. The State must forward its findings, a copy of the request, and necessary supporting information to EPA for concurrence. If EPA does not modify or object to the State's proposed findings within sixty (60) calendar days after receipt thereof, the State will take agency action to approve or deny the request.

**D. Removal Credits and Net Gross, 40 CFR §§403.7, 403.11, 403.15**

Pursuant to 40 CFR §403.7, the State must review and approve a POTW application for removal credits for IUs who are or may be subject to National Pretreatment Standards in the future. State findings, the application, and supporting information must be submitted by the State to EPA for review. No removal credits request must be approved by the State if, during the thirty (30) calendar day (or extended) evaluation period provided for in 40 CFR §403.11(b)(1)(ii) and any hearing held pursuant to 40 CFR §403.11(b)(2), EPA objects in writing to the approval of such a submission, per 40 CFR §403.11(d).

If the State receives a request for a net/gross adjustment of applicable categorical standards in accordance with 40 CFR §403.15, the State will forward the application to EPA for a determination. Once this determination has been made, EPA will notify, in writing, the applicant and the applicant's POTW and provide reasons for the determination and any additional monitoring requirements EPA deems necessary.

**E. Variances from Categorical National Pretreatment Standards for Fundamentally Different Factors (FDF), 40 CFR §403.13**

Pursuant to 40 CFR §403.13, the State will make an initial finding on all requests from IUs for variances from categorical National Pretreatment Standards for fundamentally different factors (FDFs), and in cases where the State supports the variance, submit its findings, the FDF request, and supporting information to EPA for concurrence. The State will not grant a FDF request until written concurrence has been received from EPA. The State may deny requests for FDF without EPA concurrence.

**F. Effective Integration of Pretreatment Enforcement Activities into the State NPDES Program**

The State's pretreatment enforcement response procedures and time frames will be adequate and timely to evaluate and assure compliance. Response procedures include reporting all regulated POTWs (including minor POTWs with approved POTW Pretreatment Programs) on the required noncompliance reports. The procedures will include taking appropriate enforcement action including when a POTW fails to submit approvable Pretreatment Programs, has violations of pretreatment requirements, or the POTW fails to submit timely reports.

The State will initiate appropriate enforcement action against an approved POTW Pretreatment Program for failure to adequately enforce its IU control mechanisms. The State will ensure that approved POTW Pretreatment Programs comply with the public participation requirements of 40 CFR Part 25 in the enforcement of National Pretreatment Standards and Requirements and comply with enforcement procedures of Section XI. These procedures must include provision for at least annual public notification in a newspaper(s) of general circulation that provide reasonable public notice within the jurisdiction(s) served by the POTW of IUs that, at any time during the previous 12 months, were in significant noncompliance with applicable pretreatment requirements, in 40 CFR §403.8(f)(2)(viii).

Where the State assumes the role of Control Authority, the State will be directly responsible to have the procedures in place for categorical and significant non-categorical IUs in accordance with 40 CFR §§403.8(f)(2) and 403.10(f)(2)(i). The State must exercise its enforcement procedures to enforce against violations of the Pretreatment Program Standards and Requirements.

The State will take appropriate action against an Approved POTW Pretreatment Program that is in noncompliance with 40 CFR Part 403. Noncompliance includes, but is not limited to:

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- a) Failure to meet milestones in enforceable schedules for submitting a required local Pretreatment Program,
- b) Violations of IU or POTW permit conditions,
- c) Other provisions and criteria that are identified as SNC for failure of a POTW to implement its Pretreatment Program, see:  
[http://www.epa.gov/npdes/pubs/1990\\_potw\\_noncompliance\\_guidance.pdf](http://www.epa.gov/npdes/pubs/1990_potw_noncompliance_guidance.pdf), and
- d) Delinquent reports from IUs or Approved POTW Pretreatment Reports.

## **VIII. Reporting and Transmittal of Information**

### **A. State to EPA**

The State should provide EPA with all of the following documents according to the timelines provided. In many cases, documents and other program information can be transmitted electronically. [Note: EPA is developing a proposed rule to revise the regulations governing the submission of NPDES program information from regulated facilities and States to obtain such information electronically. If such regulations are finalized, EPA and States shall modify the following provisions to conform to any applicable regulatory requirements.]

1. State CWA §401 certification of NPDES permits that EPA retains legal jurisdiction over that discharge to state waters: Draft certification before public notice; final certification on or before permit issuance.
2. One copy of all permit applications and permit modifications; draft permits and permit modifications, including fact sheets; Ocean Discharge Criteria Evaluation, if applicable; and as applicable, new source/new discharger determination, except those for which EPA has waived review: When received and/or when transmitted to application and/or placed on public notice.
3. One copy of an applicant's NOI to be covered by a general permit: As agreed to between the State and EPA in the State's grant Workplan.
4. One copy of all State NPDES-related public notices: Upon issuance.
5. Written comments received, hearing records, the State's response to comments on draft permits, proposed final permits, and revised fact sheet to reflect changes to the proposed final permit (if applicable) for which EPA has waived review: Upon completion of the document by the State.
6. One copy of the proposed final permit and revised fact sheet to reflect changes to the proposed final permit, if applicable, except those permits EPA waived review of, or EPA has reviewed and approved a draft permit that has not changed as a result of public comment: Upon completion of the document by the State.
7. One copy of all final issued permits, including all minor and major modifications: When issued.
8. An annual list of facilities scheduled for a compliance inspection, including the inspection dates: Annually as established in the State grant Workplan and/or CWA CMS: Upon approval.
9. Proposed revisions to the schedule of compliance inspections: As negotiated and approved.

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10. Copies of inspection reports and transmittal letters of inspection reports for facilities authorized to discharge under the State NPDES program (majors and minors): Upon request by EPA.
11. Input or electronic transfer of all required data into the national data base, including, as applicable, the requirements of any electronic submissions requirements established by EPA by regulation, information submitted electronically by POTWs or IUs to the State, as well as information necessary to enable EPA to prepare:
  - a. narrative reports for major permittees, as specified in 40 CFR §123.45(a): Within 14 days of receipt of report by permitting authority.
  - b. a statistical summary report on the number of major permittees with two or more violations, as specified in 40 CFR §123.45(b): Semiannually at time of first and third quarter QNCR.
  - c. a statistical summary report on all non-major dischargers listing the number of instances noncompliance, enforcement actions, and extensions of compliance deadlines, as specified in 40 CFR §123.45(c): Annually, by November 30.
  - d. statistical information not otherwise included above (e.g., quarterly, semi-annual and annual reports) in accordance with 40 CFR 123.45.
12. Copies of all enforcement actions ranging from warning letters or Notices of Violations to administrative and judicial actions for major and non-major facilities: Upon request by EPA.
13. Copies of the correspondence to carry out the Pretreatment Program, including:
  - a. Categorical pretreatment determinations: Upon issuance.
  - b. Initial removal credit determinations: Upon issuance.
  - c. Initial determinations on pretreatment FDF: Upon issuance.
  - d. Net gross: Upon issuance.
14. When the State is the control authority, pretreatment program approvals or modifications, copies of inspection reports of SIUs, reporting results from SIUs, noted SIU violations, and enforcement action against SIUs: Upon request by EPA.
15. Identification of any revisions to the State NPDES Program necessary to preserve compliance with new or revised federal NPDES Program requirements and a timetable for completing such revisions: No later than annually in discussions between the State and EPA on the State grant Workplan.
16. Notification of any State agency, legislative, or court action that may affect the State NPDES program: Within 10 days of when the State becomes aware.
17. Copies of court decisions/actions affecting the permit issuance, compliance, and the State enforcement process: Within 15 days of receipt by the State.

18. Information of any situation posing a substantial endangerment to the health, welfare, or the environment resulting from the actual or threatened direct or indirect discharge of pollutants into waters of the United States: Immediately.

## **B. EPA to the State**

EPA should provide the State with all of the following documents according to the timelines provided.

1. Notification of citizen complaints: Upon receipt.
2. Draft and final or revised EPA regulations that affect NPDES programs. Upon issuance.
3. Draft and final or revised EPA guidance related to NPDES program implementation. Upon issuance.
4. Copies of information pertaining to dischargers EPA retains jurisdiction over: When received from applicant or permit and/or public notice issued by EPA.
5. Other information related to permits under EPA jurisdiction: Upon request.
6. EPA will discuss the inspections it intends to conduct independently as negotiated in the annual grant agreement with the State: Upon request.
7. EPA will discuss the proposed revisions to the schedule of compliance inspections: As revisions occur.
8. Copies of approval of a Pretreatment Program for a municipality under its jurisdiction: As issued.
9. Notification to the State of observed deficiencies resulting from EPA oversight inspections: As performed.
10. Copies of all inspection reports and transmittal letters for NPDES facilities, excluding those that EPA considers enforcement confidential: Upon request.
11. Copies of all final enforcement actions against violators, including warning letters, notices of violation, administrative orders, judicial filings, and settlements: Upon request.
12. Notification of the commencement of federal civil enforcement actions: Immediately.
13. Draft and final reviews of the State NPDES Program, including the Pretreatment Program: As performed.
14. Copies of court decisions/actions affecting the permit issuance, compliance, or enforcement processes: Within 15 days of receipt by EPA.

**C. Transfer of Files from EPA to State upon Subsequent Program Approval**

Upon approval of any subsequent NPDES Program modification for additional NPDES Program coverage by the Regional Administrator, EPA will immediately deliver to the State all project files for pending permit applications proposed for issuance/reissuance. Project files will include all relevant information including but not limited to, application forms, correspondence, draft permits, public notices, fact sheets, statements of basis, and any other documents relating to the pending permit. EPA will ensure all project files are complete prior to delivery to the State.

EPA will deliver files for all other permits to the State in accordance with a mutually agreed upon schedule. Files will contain all relevant information pertaining to the issuance of the permit as well as copies of all DMRs, all compliance reports, all enforcement actions, and other pertinent information and correspondence. EPA will ensure all files are complete prior to delivery to the State.

## IX. Review of New or Revised State Rules, Regulations or Statutes

In accordance with 40 CFR §§ 123.62(a) and/or 403.10, either EPA or the State may initiate a revision to the NPDES and pretreatment program. The State and EPA will keep each other fully informed of any proposed modifications to its statutory or regulatory authority, forms, procedures, or priorities. EPA and the State will work together to ensure the State NPDES program is consistent with any applicable regulatory revisions, including any final regulations governing the electronic submission of NPDES information from states or regulated facilities.

The state will ensure that any proposed revision to the State NPDES Program is submitted to EPA for approval pursuant to 40 CFR §123.62(b).

1. Revision of the State's program will be accomplished in conformance with 40 CFR 123.62(b) as follows:
  - a. The State will submit to EPA's Regional Administrator a modified program description, an Attorney General's Statement, Memorandum of Agreement, or any such other documents, as EPA determines to be necessary under the circumstances after consultation with the State. EPA will determine if the proposed revision is substantial or non-substantial.
  - b. If EPA determines that the proposed revision is substantial, EPA will issue public notice of the proposed revision and provide an opportunity to comment for a period of at least thirty (30) calendar days. The public notice will also provide an opportunity to the public to request a public hearing.
  - c. The Regional Administrator will approve or disapprove program revisions based on the requirements of 40 CFR Part 123 and of the CWA. Notice of approval of a substantial change will be published in the Federal Register. A program revision will become effective upon the approval of the Regional Administrator.
  - d. If EPA determines the revision to be non-substantial, notice of approval may be given by letter from the Regional Administrator to the State.
  - e. In order to conform with new or revised promulgations of federal regulations, the State must revise its program within one (1) year of promulgation of the new or revised federal regulations, unless the State must amend or enact a statute to make the required revision or if a State legislative process must be completed, in which case such revision will take place within two (2) years under 40 CFR §123.62(e).
  - f. The State will provide proposed revisions to EPA in a timely manner in consideration of the date the State needs to have EPA's review completed. After conducting a preliminary review of the State's proposed revision,

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EPA will provide to the State an estimated schedule for completing its review. The estimated review schedule will depend on the complexity of the proposed revision. EPA will, thereafter, provide the State with quarterly updates, as appropriate, regarding the status of its review.

2. The State must notify EPA whenever it proposes to transfer all or any 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 given approval by the Regional Administrator under 40 CFR §§ 123.62(b) and (c).
3. Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to the State's program, the Regional Administrator may request, and the State will provide, a supplemental Attorney General's Statement, program description, or other documents or information as are necessary and as provided under 40 CFR §123.62(d).

## **X. Compliance and Evaluation Program<sup>13</sup>**

### **A. Implementation of Schedules and Conditions**

As provided by 40 CFR §123.26(a), the State will track the submission of all documents required pursuant to permit conditions or schedules, or any applicable administrative or judicial enforcement actions. In order to determine a discharger's compliance status, the State will conduct a timely and substantive review of all such submitted documents and consider enforcement action in the event a required document is not submitted in a timely manner, is otherwise inadequate, or identifies noncompliance.

### **B. Compliance Monitoring and Evaluation**

The State agrees to maintain an effective compliance monitoring and evaluation program. For purposes of this MOA, the term "compliance monitoring and evaluation" will refer to all efforts to assess whether NPDES regulated entities are in compliance with laws and regulations constituting the State NPDES program, including any permit condition or limitation, any compliance schedule, any pretreatment standard or requirement, or any previous administrative or judicial enforcement action.

1. Discharges endangering public health will receive immediate and paramount attention.
2. The State will operate a timely and effective compliance monitoring system to assess and track compliance by dischargers with their permit conditions (e.g., effluent limits and compliance schedules) and any applicable enforcement action.
3. The State will directly enter or upload the compliance monitoring and evaluation data into the NPDES national database on a schedule as required in national policy, annual State grant Workplan, or in any applicable regulations governing submission of NPDES information from regulated entities or States. The current national policy is the EPA 1985 PCS Policy (as amended) and the Integrated Compliance Information System (ICIS) Addendum to the Permit Compliance System (PCS) Policy.
4. When EPA promulgates new reporting data requirements, the State will adhere to those requirements and ensure that required NPDES information is provided to EPA in a timely, accurate and complete manner.
5. Compliance monitoring will focus on the most important NPDES point sources of water quality impairment and the most serious violations. EPA's *NPDES Compliance Monitoring Strategy for the Core Program and Wet Weather Sources* (October 17, 2007), hereafter NPDES CMS, specifies inspection frequency goals for the NPDES program and available flexibilities that EPA and states may use in negotiating inspection commitments. The negotiated State grant Workplan and/or approved annual State NPDES CMS should be based on these goals and guidance.

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<sup>13</sup> 40 CFR §§123.24(b)(4) and 123.26.

6. All compliance monitoring and evaluation activities will be undertaken in such a manner that will lead to timely, appropriate and effective follow-up response (e.g., informal action or formal enforcement actions consistent with applicable Enforcement Response Policies (ERP)).
7. The State will maintain complete records of all material relating to the compliance status of dischargers within the State's jurisdiction, including Compliance Schedule Reports, DMRs, Compliance Inspection Reports, any other reports that permittees may be required to submit under the terms and conditions of a State permit or an approved pretreatment program (when applicable), and documents related to any administrative or judicial enforcement action. Records will be maintained according to applicable federal records schedules.

### **C. Compliance Review**

The State will require all NPDES permittees to use State approved DMR formats which are consistent with, at a minimum, federal DMR formats. Pursuant to 40 CFR §123.26, the State will conduct timely and substantive reviews and maintain complete records of all material relating to the compliance status of a State NPDES permittee, including DMRs, Compliance Schedule Reports, Compliance Inspection Reports, enforcement documents, and any other reports that a permittee may be required to submit under the terms and conditions of a State NPDES permit, state certification of an NPDES permit, approved Pretreatment Program (when applicable), state administrative action, or state court order. The State will evaluate a permittee's compliance status based on the review of material submitted, as well as results of a site inspection, if conducted. The evaluation will take into account frequency, severity, circumstances, and analytical error to determine the appropriate enforcement response to noncompliance. The state will provide periodic non-compliance reports to EPA.

1. For all major dischargers and those other dischargers or types of dischargers identified in the annual State grant Workplan or approved annual State NPDES CMS, the State will ensure that monitoring and evaluation data are entered directly into ICIS-NPDES. Data entry and accuracy rates will be as established in EPA's current national data system policy and guidance or in any applicable regulations governing submission of NPDES information from regulated entities or States. The state must provide information necessary to determine if:
  - a. any required self-monitoring reports (including DMRs or other reports required to be submitted pursuant to a permit or an applicable administrative or judicial enforcement action) are submitted on time;
  - b. the submitted reports are complete; and
  - c. the permit conditions (e.g., effluent limits and compliance schedules) or requirements of an applicable administrative or judicial enforcement action are met.
2. The State's timely and substantive review of all such reports received and all independently gathered information to evaluate the discharger's compliance status will be

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uniform and consistent with the Enforcement Management System (EMS) as referenced in Section X.F, or in any subsequent national guidance and policy issued by EPA.

3. DMR forms or electronic versions thereof, for any monitoring data required by an NPDES permit (or the NPDES portion of a State permit), will be consistent with the requirements of 40 CFR §122.2.
4. Pursuant to 40 CFR §122.2, EPA may object in writing to deficiencies in reporting forms used by permittees or the State. The State will ensure that deficiencies identified by EPA are adequately addressed.
5. The state will report single-event violations (SEV) information from inspections consistent with applicable federal policy or regulation.
6. For all major dischargers subject to regulation under Section 402 of the CWA, the State will submit noncompliance and program reports as required by 40 CFR §123.45, or other applicable federal regulations. The State will utilize ICIS-NPDES to produce the automated QNCR with hand-written annotations, if necessary. EPA agrees to provide assistance in generating these automated QNCRs.
7. On a quarterly basis, EPA will generate for the State's review a list (e.g., the Watch List) of facilities that appear to be in non-compliance based on certain EPA selection criteria. The State will confer with EPA concerning data correction, if applicable, and/or the appropriate enforcement response for these facilities. The State will advise EPA if the State has already initiated enforcement.
8. EPA will, through the State Review Framework, review ICIS-NPDES data against source documents (DMRs, inspection records, enforcement actions, etc.) to verify the accuracy of the ICIS-NPDES data and the QNCRs.
9. In accordance with 40 CFR §123.26(b)(4), the State will maintain procedures for receiving and ensuring proper consideration of information about alleged violations submitted by the public.
10. The state will submit noncompliance and program reports for, but not limited to, non-major NPDES permittees as required by 40 CFR §123.45, or other applicable federal regulations.
11. 40 CFR §123.45(c) requires the submission of an Annual Noncompliance Report (ANCR) containing information including, but not limited to the number of non-major NPDES permittees reviewed, the number of non-major discharges in noncompliance, the number of enforcement actions, and number of permit modifications extending compliance deadlines. EPA will generate the ANCR annually from ICIS-NPDES and provide the draft to the State by the last day of February for review and submission.

12. EPA and the State will modify this MOA to conform to any applicable regulations governing submission of NPDES information from regulated entities or States.
13. EPA will provide the State notification of citizen complaints through a phone call, email message, or copy of the written complaint.

#### **D. Facility Compliance Inspections**

The State will conduct field activities to determine the status of compliance with permit and pretreatment requirements, including sampling and non-sampling inspections. The different types of compliance inspections will be conducted in accordance with EPA's most recent NPDES Compliance Inspection Manual, 40 CFR §123.26(d), and EPA's most recent Clean Water Act CMS, and all current grant agreements.

1. General Procedures: In accordance with the requirements contained in 40 CFR §123.26, the State will maintain and implement an inspection and surveillance program to determine the compliance status of dischargers independent of information supplied by dischargers.
  - a. The State and EPA will develop, as part of the State grant Workplan and in accordance with the CWA CMS, an inspection plan of individual dischargers proposed to be the subject of compliance audits and inspections for the coming year (October through September).
  - b. The State will have procedures to receive information from the public.
  - c. Information will be made available to the public about inspections and violations.
  - d. The State will have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of regulated entities.
  - e. State agents conducting compliance evaluations will have the authority to enter premises subject to regulation. Inspections will be conducted in such a way that will produce admissible evidence in an enforcement proceeding or in court.
  - f. EPA and the State may mutually agree to amend the inspection plan in recognition of changing priorities and circumstances during the year.
  - g. Unless otherwise agreed to by EPA in writing, the State will conduct agreed upon compliance inspections.
  - h. The State will give EPA adequate notice and opportunity to participate with the State in its inspection activities, to the extent practicable.
  - i. EPA or the State may determine that additional inspections are necessary to assess compliance.
  - j. If EPA makes a determination that additional inspections are necessary or appropriate, EPA will notify the State of such determination and may perform the inspections alone or jointly with the State or may request that the State conduct those inspections.
  - k. EPA will keep the State fully informed of its plans and the results of any inspections. Pursuant to 40 CFR §123.24(b)(4)(i), EPA as a general rule will provide the State at least seven (7) calendar days notice before a joint or independent inspection is conducted. EPA retains the ability to conduct inspections without notice.

2. Reporting Schedules: The state will enter inspection information into ICIS-NPDES or PCS. It will do so in accordance with and on a schedule established in the PCS policy or the ICIS Addendum to the Appendix of the 1985 PCS policy statement (a.k.a., Water Enforcement National Data Base (WENDB) equivalent), State Grant Workplan, or any regulations governing the submission of data and information to EPA. The State will ensure data entry of required inspection information, including SingleEvent Violations of the CWA's NPDES requirements that are documented during a compliance inspection, reported by the facility, or determined through other compliance monitoring methods, as well as violations detected that will cause the facility to be in significant non-compliance (SNC).
3. Inspections: The State and EPA will, as part of the State grant agreement and State NPDES CMS, define the scope of compliance inspections to be undertaken by the State. For the purposes of this agreement, a "compliance inspection" includes, but is not limited to: a compliance evaluation, compliance sampling, performance audit, biomonitoring, toxic sampling, diagnostic, reconnaissance, follow-up, construction site and industrial facility stormwater, combined sewer overflow, sanitary sewer overflow, CAFO inspections, audits, aerial photography, case follow up, and pretreatment program inspections. In addition:
  - a) As negotiated in the State grant Workplan, the State must give EPA adequate notice and opportunity to participate in its scheduled inspection activities.
  - b) As agreed to in the grant agreement, the State will inform EPA of the inspections it has scheduled for the coming year. The State will update ICIS-NPDES with inspection and enforcement results for inspections the State conducts.
  - c) EPA retains the right to perform inspections of any permittee at any time. EPA as a general practice will notify the State to give it an opportunity to participate and will otherwise keep the State informed of its plans and results. EPA retains the ability to conduct inspections without notice.
  - d) For inspections conducted by EPA, or enforcement actions taken by EPA, EPA will input the data into ICS-NPDES and provide the inspection and enforcement information to the State to enter the data into a State database.
  - e) All inspection reports will be thoroughly reviewed by the State to determine what, if any, enforcement action will be initiated. The State will forward copies of inspection reports to EPA upon request. Where an audit or inspection is conducted solely by EPA, a copy of the audit or inspection report will be forwarded to the State within sixty (60) calendar days after the inspection.
  - f) Any changes or additions to the definition of a "compliance inspection" will be incorporated as appropriate into the commitments of an approved negotiated CWA CMS.
4. Inspection Schedules: The State and EPA will develop targets in grant agreements and State Clean Water Act CMS Plan to address the most significant water quality problems and most serious noncompliance. Plans will include a list of the compliance inspections to be performed annually by the State. The targets may be modified with the concurrence of the State and EPA. The State may revise inspection schedules in the future in response to revisions made to EPA's NPDES CMS and in accordance with Federal and State

program direction and priorities. EPA and the State agree that inspection schedules are enforcement confidential. Both agencies agree to maintain their confidentiality using available legal authorities, to inform each other of any requests for their disclosure, and to coordinate with each other in responding to any such requests. EPA and the State retain the right to withhold its respective inspection schedules in the event of any disclosure.

#### **E. Compliance Tracking**

In accordance with the State NPDES Program Description, this agreement, and as required in 40 CFR §123.26, the State must operate a compliance tracking system so that staff will be capable of determining that:

- a) Self-monitoring reports required by permit and/or pretreatment management requirements are submitted in a timely manner;
- b) Submitted reports are complete and accurate; and
- c) Permit conditions and/or pretreatment management requirements (when applicable) are met

The State's compliance program will track the submittal of all reports on date-related permit conditions or other schedules in effect pursuant to the permit (e.g., required reports, Notices of Violation, Administrative Orders, Consent Agreements, and court orders). The State must conduct a timely and substantive review of all date-related permit conditions and reports and consider possible enforcement actions for failure to submit required reports.

EPA will be responsible to enter data into EPA's national CWA NPDES database for the facilities it retains authority over e.g., facilities in Indian Country.

#### **F. Enforcement Management System**

Within one hundred and twenty (120) calendar days of the execution of this MOA or as otherwise established in the State grant Workplan and State Clean Water Act CMS, the State agrees to submit to EPA for review and comment a current Enforcement Management System (EMS), or verify that the existing documents EPA has on record are current and in effect. The EMS is a document outlining procedures, policies, timelines, etc., to be used by the State in conducting official business (e.g., inspections, tracking and evaluating compliance enforcement actions, assessment of penalties, etc.). Such procedures and policies with respect to compliance and enforcement should take into consideration EPA's current NPDES national enforcement guidance and policies and should include application of criteria for screening the significance of violations, procedures and time frames for selecting appropriate initial and follow-up response options to identified violations, and procedures for maintaining a chronological summary of all violations. The State agrees to implement its EMS. The State agrees to submit any changes to its EMS to EPA for review and comment upon request.

#### **G. Miscellaneous Compliance Activities**

1. Information Requests: Whenever EPA or the State requests information from the other concerning a specific discharger and the requested information is not available from the

files, that information will be researched and provided to the requesting agency within a reasonable time.

2. **Laboratory Quality Assurance:** The State will plan, initiate, and maintain a program as provided in the State grant Workplan and State Clean Water Act CMS to ensure that laboratories working for the State's permitted dischargers follow approved quality assurance protocols.
3. **Emergency Pollution Incidents:** EPA and the State agree to immediately notify each other by telephone or through a mutually agreed upon emergency response protocol, upon receipt by EPA or the State, of any information concerning a situation which in its opinion poses an actual or threatened pollution incident that may result in endangerment to human health or the environment. The State agrees to ensure that all potentially affected downstream drinking water intake facilities are notified of the situation (including notification across state lines when applicable) so that they can take appropriate actions to minimize a risk to the public. [Insert appropriate state and federal emergency contact information here]
4. **Citizen Complaint and Follow-up:** The State must maintain procedures to receive and ensure proper consideration of information submitted by the public about alleged State NPDES Program violations and maintain a system to track and evaluate the complaints received from the public (40 CFR §123.26(b)(4)). Public complaints received by EPA will be referred to the State as soon as reasonably possible. The State must maintain either a physical or electronic record of the initial contact, assignment, investigation, and final disposition of State NPDES-related complaints received from the public. This record will be made available to EPA and the public pursuant to applicable state and federal law. Complaints received by the State or referred to the State by EPA under anonymity or confidentiality will be handled in accordance with the State Public Records Act. EPA and the State agree to closely coordinate follow-up of such complaints. The State will maintain provisions providing for public participation in enforcement actions consistent with the requirements of 40 CFR §123.27(d).

## **XI. Enforcement<sup>14</sup>**

### **A. Timely and Appropriate Enforcement**

1. The federal regulations at 40 CFR §123.27 establish the minimum requirements (*i.e.*, remedies, penalties/fines, public participation) for enforcement authority for a State administering the NPDES program.
2. EPA and State NPDES enforcement program guidance and policies describe agency goals and expectations for what constitutes timely and appropriate enforcement action. [EPA’s 1989 “NPDES Enforcement Management System (EMS)” and “Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations” (May 29, 2008)]
3. The State is responsible for commencing and completing timely and appropriate enforcement actions against dischargers in violation of the laws and regulations constituting the State NPDES program, including any permit conditions or limitations, compliance schedules, pretreatment standards or requirements, or previous administrative or judicial enforcement actions. This responsibility encompasses violations detected through any means including the compliance monitoring activities set forth in this agreement.
4. EPA considers a State enforcement action to be timely and appropriate if it:
  - a. Reflects the nature and severity of the violations and the overall degree of noncompliance and results in a return to compliance by the violator (EPA’s 1989 EMS and May 29, 2008 “Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations”);
  - b. Seeks or imposes, where appropriate, penalties that consider the factors set forth in Sections 309(d) and 309(g)(3) of the CWA, meet the requirements of 40 CFR §123.27, and are consistent with the State’s or EPA’s penalty policy, criteria, and/or procedures;
  - c. Seeks injunctive relief for continuing noncompliance to return the discharger into compliance within a reasonable time frame. The injunctive relief should be accompanied by an appropriate, specified schedule containing interim milestones necessary to measure progress towards the final compliance date and goals;
  - d. Is commenced and completed taking into account the recommendations in the most recent EPA guidance and policy; and
  - e. Is consistent with other provisions of this MOA.

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<sup>14</sup> 40 CFR §123.24(b)(4).

5. The State should pursue compliance and enforcement procedures that are consistent with EPA's current NPDES guidance and policies. These include, but are not limited to, procedures associated with: violation detection, prioritization of violations (*e.g.*, identification of significant noncompliance or other serious violations), determination of an appropriate initial response, escalation of enforcement in response to continuing noncompliance, provisions for public participation in the enforcement process, documentation of any action taken/not taken and of the return to compliance, and entry of enforcement data into EPA's national data system.
6. The federal regulations at 40 CFR §123.27(a)(1) require the State to have enforcement authority for remedies (*e.g.*, an administrative cease and desist order or the ability to seek a temporary restraining order) to immediately and effectively restrain any person engaging in any unauthorized activity that is endangering or causing damage to public health or the environment. Pursuant to EPA's 1986 NPDES State Program Guidance (Volume Two), the State agrees to immediately notify EPA of any situation posing a substantial endangerment to health, welfare, or the environment resulting from the actual or threatened direct or indirect discharge of pollutants into waters of the State. For violations which present imminent and substantial endangerment to the health, safety, or welfare of the public or the environment, EPA expects the State to take timely and appropriate enforcement action. Such action should be taken as soon as possible after the State or EPA makes a determination that the condition or activity is of a nature which, if not abated, may pose an imminent and substantial endangerment as described by Section 504 of the CWA.
7. Copies of all enforcement actions (including informal actions, formal actions, and/or penalty actions) issued against all dischargers shall be retained and submitted to EPA upon request pursuant to 40 CFR §123.24(b)(3) and 40 CFR §123.41(a).
8. In accordance with 40 CFR §123.24(b)(3) and 40 CFR §123.41(a), the State will retain and allow EPA to review reports, documents, and other information relevant to enforcement of its NPDES program. Examples of relevant information include documentation of: appropriate initial and follow up response and enforcement actions; enforcement actions that clearly define what the discharger is expected to do by a reasonable date certain, including any schedule which contains interim milestones necessary to measure the progress towards final compliance; and any assessment and collection of a civil penalty, when appropriate. Penalty records should include penalty calculations and their rationales.
9. The State will maintain provisions providing for public participation in enforcement actions consistent with the requirements of 40 CFR §123.27(d).

#### **B. Penalty Calculation, Documentation and Collection**

The State will assess or sue to recover civil penalties and criminal fines, as appropriate and in accordance with Section 309 of the CWA, the federal regulations at 40 CFR §123.27(a), (b), and (c), and any applicable State regulations for noncompliance with the NPDES and/or

Pretreatment Programs. EPA encourages States to institute civil administrative penalty authority. States are also strongly encouraged to use EPA's settlement penalty policy and procedures or to employ a written State policy, criteria, and/or procedures for assessing appropriate penalties in accordance with the statute and the regulations that are otherwise consistent with the requirements of the CWA.

1. Penalty Calculation: States are encouraged to calculate penalties consistent with applicable regulations and State or EPA policy and guidance (e.g., EPA's 1995 Interim CWA Settlement Penalty Policy).
  - a. EPA's settlement penalty policy recommends that penalty calculations begin with estimating the statutory maximum penalty to determine the potential maximum penalty liability of the discharger.
  - b. Penalty calculations should, at a minimum, consider two components: the economic benefit of noncompliance and an additional appropriate amount reflecting the seriousness of the violations, (i.e., a gravity component).
  - c. If State statutory authority does not expressly authorize recovery of economic benefit, the State should make reasonable efforts to calculate economic benefit in order to recover it in negotiations or litigation.
  - d. In calculating economic benefit, EPA encourages the use of EPA's BEN computer model or another reliable methodology, and to document the assumptions it uses and how the assumptions are applied in specific cases.
  - e. EPA expects settlement penalties to be for more than the amount of economic benefit of noncompliance (where it is possible to calculate it) unless the violator demonstrates an inability to pay, a compelling public concern exists, there are litigation-related reasons, or the total amount of economic benefit exceeds a State's maximum penalty cap. State settlement penalties should be above and beyond the costs to violators to return to compliance, as compliance costs are not penalties.
  - f. State penalty calculations should document the basis for the penalty and the rationale for any penalty adjustments.
  - g. The State should maintain penalty records in the most convenient format for administration of the State programs and accessible to EPA.
  - h. The State should provide, upon request, either a copy of its settlement penalty policy, criteria, and/or procedures to EPA (pursuant to 40 CFR §123.24(b)(3), 40 CFR §123.41(a), and EPA's 1986 NPDES Program Guidance), or should create a State settlement penalty policy within six months of the effective date of this MOA.
2. Penalty Collection Recommendations:
  - a. Collect assessed penalties and document all efforts to collect such penalties.
  - b. Have systems in place for documenting payment of penalties with corresponding documentation in the case files.
  - c. Verify all penalty collections through appropriate documentation, e.g., via cancelled checks, official correspondence, or notes to the case files.
  - d. Do not allow penalty installment payments, except as necessary by a documented inability to pay, and require interest payments on any delayed penalty payment.
  - e. Where a settlement allows for a series of payments, provide documentation for all dates that have passed.

### **C. EPA Actions**

EPA partners with States to enforce environmental statutes and regulations. There are many instances where federal resources, expertise and authorities can be critical to achieving a comprehensive and effective resolution of violations.

Examples of instances where direct federal action is appropriate include, but are not limited to, the following:

- (a) a State or local agency requests EPA action;
- (b) a State or local enforcement response is not timely and appropriate;
- (c) national precedents (legal or program) are involved;
- (d) there has been a violation of an EPA order or consent decree;
- (e) federal action would support the broader national interest in deterring noncompliance; and
- (f) a demonstrated lack of State performance in enforcing State and EPA laws and rules.

Factors EPA will consider in deciding whether to take direct enforcement in the above type cases include:

- (a) cases specifically designated as nationally significant (e.g., significant noncompliers; explicit national or regional priorities);
- (b) significant environmental or public health damage or risk involved;
- (c) significant economic benefit gained by the violator;
- (d) interstate issues;
- (e) repeat patterns of violations and violators; and
- (f) long standing state performance issues.

Pursuant to Sections 309(a)(3) and (b) and 402(i) of the CWA, EPA may take direct enforcement action as the Agency deems necessary. EPA generally will consult with and provide the State with advance notice prior to taking a direct federal action. This notice can be written, electronic (email), or by a telephone call. EPA and the State will provide each other, upon request, with copies of any enforcement actions taken. Early and full communication and coordination between EPA and the State, (e.g., early notification of inspections, the basis of and intent for enforcement actions prior to initiation of any action, and other information sharing) have proven very effective in resolving compliance and enforcement matters. The parties to this agreement recognize that issues of imminent and substantial endangerment and criminal cases may present special circumstances and may not permit the same level of pre-filing coordination.

### **D. Attorney General Involvement**

The State will establish procedures for routine coordination on enforcement cases between the State and the appropriate legal resources within the State such as the State Office of General Counsel and/or the State Attorney General, including notification of proposed enforcement actions and general time frames for actions from case referral to filing.

## **XII. EPA's Oversight and Enforcement Authority**

In accordance with 40 CFR §123.24(a), this agreement does not restrict or limit EPA's oversight and enforcement authorities under the CWA. Any discussion of EPA or State roles and responsibilities is intended to guide EPA and State personnel to effectively administer the NPDES program, but is not meant to make the State EPA's agent for purposes of enforcement or to restrict or limit EPA's direct enforcement authority under the CWA. Thus, EPA reserves the right to inspect federally regulated permittees or to bring federal enforcement action under the CWA in response to any violation of the CWA.

If EPA determines that the State has not taken timely enforcement action against a violator and/or that the enforcement action has not been appropriate, EPA may proceed with any or all enforcement options available under CWA §309, administrative, civil and/or criminal.

EPA generally will notify the state of its pending federal civil enforcement action prior to commencement. Notwithstanding the above, nothing will be construed as limiting EPA's authority under CWA §309 and 40 CFR §503.

This agreement does not create any rights in law or equity for any person not a party to this agreement. Any failure by EPA or the State to follow any provision(s) of this agreement will not affect the validity of any inspection or enforcement action and will not constitute a defense to any violation of the CWA.

The State may request EPA to initiate federal enforcement action when the State has been unable to achieve compliance through State remedies. The State may request EPA to participate in conferences and/or discussions in the pursuit of enforcement actions against a federal facility which may lead to formal filing of an enforcement action by the State against a federal facility. EPA may also initiate direct action if performance reviews demonstrate a lack of state enforcement response to violations.

EPA will coordinate with the State, as necessary and appropriate, on EPA's off-shore, section 301(h), and biosolids permitting, compliance and enforcement activities through the permit and inspection planning processes, and will provide a copy to the State when EPA issues an enforcement document.

### **XIII. Program Review<sup>15</sup>**

The State and EPA are responsible for ensuring that the State NPDES program is consistent with all requirements of the MOA, the State grant Workplan, CWA CMS, the EMS and applicable sections of 40 CFR Parts 122-125, 140 and 403 .

To ensure that these requirements are fulfilled, EPA will:

1. Review the information transmitted to the State to ensure that all the requirements of this MOA are met.
2. Meet with the State officials at least annually, as funds allow, to assess data management processes, permit processing, compliance monitoring, and enforcement procedures, including both manual and automated data processing.
3. Periodically examine in detail the State files and documentation of selected dischargers to determine whether:
  - a. Permits are processed and issued consistently with federal requirements;
  - b. Capability exists to discover permit violations when they occur;
  - c. The State's compliance reviews are timely;
  - d. Inspections are being conducted properly and coverage is appropriate;
  - e. Violations are identified and reported;
  - f. Data is accurate and entered into PCS/ICIS-NPDES in a timely manner;
  - g. The State's enforcement actions are timely, appropriate and effective;
  - h. Penalties are assessed correctly and collected; and
  - i. The State's public participation policies, practices, and procedures are satisfactory.
4. Implement the State Review Framework and the Permit Quality Review, making reports, findings and recommendations publicly available.
5. Determine the need for (and to hold) public hearings on the State NPDES program pursuant to CWA section 402(c)(3).

The State will notify the Regional Administrator and will transmit the text of any change to EPA for review and approval pursuant to 40 CFR §123.62(b) prior to taking any action to propose or effect any amendment, rescission, or repeal of any statute, rule, or directive which has been approved by EPA in connection with the State NPDES program; any action to modify program approval documents (e.g., MOA, Program Description or Attorney General's/Independent Counsel's Statement); or any action to transfer all or any part of the approved State NPDES program to another State agency or instrument,

The State will keep EPA fully informed of any program modification, court action, legislation or legislative directive which acts to amend, rescind or appeal any part of its authority

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<sup>15</sup> 40 CFR §123.24(b)(6).

to administer the NPDES program or which substantially impairs the State's ability to administer or to otherwise maintain compliance with NPDES program requirements.

If an amendment, rescission, or repeal of any statute, rule, directive, or policy for or by the State occurs for any reason, including action of the State Legislature or a court, the State must within ten (10) days of such event notify the Regional Administrator and must transmit a copy of the text of such revision to the Regional Administrator.

If there are revisions to the CWA and the regulations that implement it, the State must seek any amendments to its statutes, rules, or program authorization necessary to preserve and maintain compliance with NPDES program requirements within the shortest reasonable time frame, but in no event longer than the time frames set out in 40 CFR §123.62(e). During the negotiation of the grant agreement, the State and EPA must discuss the status and schedule of necessary revisions to the State's NPDES Program that are required as a result of any changes to the CWA and the regulations promulgated there under, as well as related guidance documents.

**XIV. Term and Termination of the MOA**

This MOA will be reviewed periodically by EPA and the State, and revised as appropriate. In no event, will this review occur any less frequently than every four years, starting from the date of execution of this agreement.

Either EPA or the State may, at any time, initiate an action to modify the MOA pursuant to 40 CFR §123.62 and the following guidelines:

1. No modification to this MOA will become effective without the written concurrence of both parties; and
2. Any revisions or modifications to this MOA, must be in writing and must be signed by the State Director and the Regional Administrator.

**XV. Approval and Effective Date of the MOA**

This MOA will take effect on the date of execution by the last signatory. If the Regional Administrator determines that any provision of this MOA does not conform to the requirements of the CWA, to the requirements of 40 CFR Parts 122-125, or to any other applicable federal regulations, the Regional Administrator will notify the State, in writing, of any proposed revision or modification which must be made to this MOA. Any revision or modification of this MOA will take effect on the date of execution by the last signatory.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Name  
Title  
State of X

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Name  
Regional Administrator  
U.S. Environmental Protection Agency, Region X

Appendix 1  
Existing National NPDES Policy/Guidance (Partial List)

NPDES Permit Writer's Manual (273pp, PDF, 3.7MB) - Future updates to this document may be available [here](#).

PCS Quality Assurance Guidance Manual (167pp, PDF, 5.5MB)

PCS Policy Statement (Original Without Amendments) (12pp, PDF, 781KB)

CWA NPDES – Integrated Compliance Information System and Permit Compliance System (2pp, PDF, 988KB) and the ICIS Addendum Data Elements Attachment (XLS, 62KB)

NPDES Compliance Inspection Manual

CWA NPDES Compliance Monitoring Strategy (2007) (28pp, PDF, 368KB)

National Pollutant Discharge Elimination System State Program Guidance (1986)

Memorandum from A. James Barnes, Deputy Administrator, “Revised Policy Framework for State/EPA Enforcement Agreements,” August 25, 1986

1984 Policy on Civil Penalties (GM-21)

Memorandum from Steven A. Herman, Assistant Administrator, “Revised Interim Clean Water Act Settlement Penalty Policy,” February 28, 1995

BEN User's Manual

Memorandum from Steven A. Herman, Assistant Administrator, “Final Supplemental Environmental Projects Policy,” April 10, 1998

CWA NPDES Enforcement Management System (1989) (381pp, PDF, 12.9MB)

September 21, 1995 Memo from Steve Herman Extending SNC definition for non-monthly average limits (6pp, PDF, 334KB)

Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations (5/29/08) (3pp, PDF, 180KB)

CWA Inspection Conclusion Form with Single Event Violation Table (April 2006) (8pp, PDF, 340KB)

Majors Rating Sheet -- EPA Guidance for Evaluating and Designating CWA NPDES Facilities as Majors (45pp, PDF, 3.3MB)

**Wet Weather SNC Policy for EPA Regions (Guidance issued does not apply to states, but can be adopted voluntarily)**

**Cover Memo Transmitting WW SNC Policy to the Regions (10/23/07)** (2pp, PDF, 430KB)

**Attachment 1 - WW SNC Policy** (20pp, PDF, 962KB)

**Attachment 2 - Discussion of State Comments** (3pp, PDF, 159KB)

**Attachment 3 - Discussion of Next Steps for WWSNC, CMS, and ICIS-NPDES Rulemaking** (4pp, PDF, 207KB)

**PCS Single Event Data Entry Guide** (46pp, PDF, 1.2MB)

**Data Entry Technical Update for PCS Single Event Violations (in regard to entering lead agency and violation end dates)** (5pp, PDF, 23KB)

**Single Event Violations - Data Entry Requirements Memo to EPA Regions (10/15/08)** (9pp, PDF, 3.2MB)

**ICIS-NPDES Single Event Violation Guide (10/15/08)** (30pp, PDF, 246KB)

**Single Event Violation and Wet Weather SNC Data Entry Flow** (JPG, 120KB)