



Checklist

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

August 2012

Checklist -- August 2012

Note to users: This checklist is intended as a tool to aid the EPA and states in their review and evaluation, and if necessary revision, of Memoranda of Agreement (MOAs) between the EPA and authorized states for the National Pollutant Discharge Elimination System (NPDES) Program. The NPDES MOA is the principal agreement in the interaction between the EPA and the States to implement the NPDES program. The criteria are based on the elements of the MOA that are key for ensuring effective interaction between the Region and State in implementation of the NPDES program to protect public health and the environment. MOAs that fail to reflect these key elements may be problematic in that such MOAs may prohibit the effective implementation of the State's NPDES program performance. As a result, in some cases, these MOAs may need to be revised or amended. The MOA is part of the overall relationship between the 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.

PART A. OVERALL CRITERIA – A NEGATIVE ANSWER INDICATES POTENTIAL PROBLEMS		
Any one “no” response should prompt further discussion between the EPA and the State		
Y/N/NA	CRITERIA (NOT IN PRIORITY ORDER)	ADDITIONAL INFORMATION
	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.	
	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.	
	The MOA does not limit EPA authorities to review NPDES permits, conduct compliance monitoring or investigations, initiate enforcement, or issue permits, in an appropriate manner.	

Bold Citation: EPA regulations require these elements to be in each MOA

Underlined citation and text: Recommended to be included in the MOA

Italic citation and text: Required for State Program Approval; recommended to be included in the MOA

An asterisk (*) next to the items in this checklist denotes that the requirements/provisions are not applicable to all State MOAs.

Checklist -- August 2012

PART B. DETAILED CRITERIA				
	Y/N/ NA	CITATION	ELEMENTS	ADDITIONAL INFORMATION
GENERAL PROVISIONS				
1. General Provisions				
1 a.1.		40 CFR § 123.24(a)	The MOA has been executed by the State Director and the Regional Administrator (RA) and approved by the Administrator	
1 a.2.			The MOA has no provisions restricting the EPA's statutory oversight responsibility.	See e.g., CWA § 402(c); 40 CFR § 123.41(a)
1 b		§123.24(c)	The MOA, annual program grant and any State/EPA agreement are consistent.	May be appropriate to cross reference specific grants and agreements MOA controls if there is conflict with other agreements
1c *		<i>§123.1(g)(2)</i>	The MOA should include provisions describing the scope of the State's NPDES program; including a description of the regulated facilities and the schedule for the phases of a partial and phased program under CWA §402(n), where appropriate.	May be appropriate to cross reference other documents that contain the information.
1d		§123.24(b)(6)	The MOA includes provisions for modification of the MOA.	"If the MOA is being updated or revised, the revised or updated MOA should include a provision explaining its relationship to the previous agreement, i.e., it must indicate whether it supersedes or supplements the prior document." 1986 Program Guidance at 5-21.
1e		<i>CWA §309, 402(i)</i>	Provisions describing that the EPA may take direct federal enforcement action as it deems necessary.	§ 402(i) provides that nothing in this section shall be construed to limit the authority of the EPA to take enforcement action under § 309. the EPA generally will consult with and provide the State with advance notice when taking a direct federal enforcement action.
1f*		40 CFR 403.10(g)(3)	If the State has been approved to administer a Pretreatment program, the MOA contains provisions necessary to implement the requirements of Part 403; should include provisions indicating that the State will provide the EPA with copies of the correspondence to carry out the Pretreatment Program; see 3h below.	The 1986 Program Guidance provides details on how a State's Pretreatment Program can be reflected in an MOA. See pgs. 5-31-5-32

Checklist -- August 2012

GENERAL PROVISIONS				
1. General Provisions, cont.				
1 g*		§123.24(b)(1)(ii)	<p>In instances where the EPA has authorized the state to issue permits on the Federal Indian reservation of an Indian Tribe seeking program approval under §123.23(b), the MOA includes provisions describing how the transfer of pending permit applications, permits, and any other information relevant to the program operation not already in the possession of the Indian Tribe (support files for permit issuance, compliance reports, etc) will be accomplished.</p>	<p>Applicable to new programs. Information-sharing regulations at §123.41-43 (above) apply to this section as well. State authority to issue permits on Federal Indian reservations is very limited.</p>

Checklist -- August 2012

REPORTING AND TRANSMISSION OF INFORMATION: TRANSMISSION OF FILES FROM THE EPA TO STATE AND FROM STATE TO THE EPA				
2. Information transfer from the EPA to an approved state program				
2 a *		<p>§123.24(b)(1)(i) §123.42</p>	<p>The MOA provides for prompt transfer from the EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director. The MOA will provide procedures to ensure that the State will not issue a permit on the basis of any application deemed incomplete or otherwise deficient by the RA unless the State receives information sufficient to correct the deficiency.</p>	Applicable to new programs
2b		<p>§123.24(b)(1)(i) §123.42(a)</p>	<p>If existing permits are transferred from the EPA to the State for administration, the MOA specifies a procedure for transferring the administration of these permits. When existing permits are transferred to the State Director, relevant information includes support files for permit issuance, compliance reports, and records of enforcement actions.</p>	
2c		<p><i>§123.41(b)</i></p>	<p>The MOA provides that the EPA shall furnish to a State with an approved program the information in its files not submitted under a claim of confidentiality, which the State needs to implement its approved program.</p>	<p>The EPA shall also furnish information submitted under a claim of confidentiality which the State needs to implement its program, subject to conditions in 40 CFR Part 2.</p>

Checklist -- August 2012

REPORTING AND TRANSMISSION OF INFORMATION: TRANSMISSION OF FILES FROM THE EPA TO STATE AND FROM STATE TO THE EPA				
3. Information transfer from State to the EPA				
3 a		§ 123.24(b)(2)	The MOA specifies classes and categories of permit applications, draft permits, and proposed permits that the State will send to the RA for review, comment, and where applicable, objection. Classes and categories must include those for which waivers of review, comment and possible objection are not available under §123.24(d).	Such categories may include: <ul style="list-style-type: none"> • CAFOs (§122.23(a)) • POTWs (122.1(b)(2)) • New sources or new dischargers (§122.29(d)(5)) • Small and Large MS4s (§122.26) • Additional conditions applicable to specified categories of NPDES permits (§122.42).
3b		<i>§ 123.41(a)</i>	The MOA provides that any information obtained or used in the administration of a State program shall be available to the EPA upon request without restriction.	If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to the EPA when providing information under this section. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with the regulations in 40 CFR Part 2. If the EPA obtains from a State information that is not claimed to be confidential, the EPA may make that information available to the public without further notice.
3c		§123.43(a)	The MOA contains procedures for transfer to the RA of copies of permit program forms and any other relevant information.	
3d.1		§123.43(a)(1)	The MOA provides for prompt transmission to the RA of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under §123.24(d).	
3d.2			The MOA provides for transmission to the EPA of copies of permit applications for which permit review has been waived, whenever requested by the EPA.	

Checklist -- August 2012

REPORTING AND TRANSMISSION OF INFORMATION: TRANSMISSION OF FILES FROM THE EPA TO STATE AND FROM STATE TO THE EPA				
3. Information transfer from State to EPA, cont.				
3e.1		<i>§123.43(a)(2)</i>	The MOA provides for prompt transmission to the RA of notice of every action taken by the State agency related to the consideration of any permit application or general permit, including a copy of each proposed or draft permit and any conditions, requirements, or documents which are related to the proposed or draft permit or which affect the authorization of the proposed permit, except those for which permit review has been waived under §123.24(d).	
3e.2			The MOA provides for transmission to the EPA of copies of notices for which permit review has been waived, whenever requested by the EPA.	
3f		<i>§123.43(a)(3)</i>	The MOA provides for transmission to the RA of a copy of every issued permit following issuance, along with any and all conditions, requirements, or documents related to or affecting the authorization of the permit.	
3g		<i>§123.43(c)(1)</i>	The MOA provides for transmission by the State Director to the EPA of notices from publicly owned treatment works under §122.42(b) and 40 CFR part 403, upon request of the RA	

Checklist -- August 2012

REPORTING AND TRANSMISSION OF INFORMATION: TRANSMISSION OF FILES FROM THE EPA TO STATE AND FROM STATE TO THE EPA				
3. Information transfer from State to EPA, cont.				
3h *		40 CFR 403.10(g)(3)	<p>If the State has been approved to administer a Pretreatment program, the MOA contains provisions necessary to implement the requirements of Part 403. The MOA should include provisions indicating that the State will provide the EPA with copies of the correspondence to carry out the Pretreatment Program, including:</p> <ul style="list-style-type: none"> 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. <p>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 the EPA.</p>	<p>The 1986 Program Guidance provides details on how a State's Pretreatment Program can be reflected in an MOA. See pgs. 5-31-5-32</p>

Checklist -- August 2012

REPORTING AND TRANSMISSION OF INFORMATION: TRANSMISSION OF FILES FROM THE EPA TO STATE AND FROM STATE TO THE EPA				
3. Information transfer from State to EPA, cont.				
3i		<i>§123.43(c)(2)</i>	<p>The MOA provides for transmission to the EPA of a copy of any significant written comments pursuant to the public notice of a draft permit and a summary of any significant comments presented at any hearing on any draft permit, except those comments regarding permits for which permit review has been waived under §123.24(d) and for which the EPA has not otherwise requested receipt, if:</p> <ul style="list-style-type: none"> (i) the Regional Administrator requests this information; (ii) the proposed permit contains requirements significantly different from those contained in the tentative determination and draft permit; or (iii) significant comments objecting to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice. 	
3j		123.24(b)(3)	<p>The MOA includes provisions specifying the frequency and content of compliance and inspection reports, documents and other information which the State is required to submit to the EPA. The MOA should specify how this information will be collected and provided to the EPA, e.g., the annual list will be provided in the workplan.</p>	<p>Examples of information for the State to provide to the EPA should include:</p> <ul style="list-style-type: none"> • annual list of facilities scheduled for a compliance inspection, including the inspection dates and proposed revisions to the schedule (as negotiated and approved). The process for providing this list can be established in the state grant workplan and/or other NPDES annual program plans or enforcement agreements. When this information is in the state grant workplan or other agreement,, include cross references where these provisions are in the MOA. • copies of inspection reports and transmittal letters of inspection reports for facilities authorized to discharge under the State NPDES program (majors and non-majors), as well as copies of all enforcement actions ranging from warning letters or Notices of Violations to administrative and judicial actions for major and non-major facilities when requested by the EPA.

Checklist -- August 2012

JURISDICTION, PERMIT ISSUANCE AND REVIEW				
4. Permit Issuance and EPA Review				
4 a		§123.24(b)(5)	Consistent with 124.4, where appropriate, the MOA includes provisions for joint processing of permits by the State and the EPA for facilities or activities that require permits from both the EPA and the State under different programs.	<p>Note in § 123.24(b)(5): States are encouraged to enter into joint processing agreements with the EPA for permit issuance, and are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs/activities.</p> <p>§124.4: Consolidation of permit processing is permitted (but not required) whenever a facility or activity requires a permit under more than one of the statutes covered by §124.4 (RCRA, UIC, PSD, NPDES).</p>
4b		§123.24(d)	If the RA and the State have agreed to waive the EPA's right to review, object to, or comment upon State-issued permits under CWA §§402(d)(3), (e), or (f), the MOA includes provisions specifying the extent to which the EPA will waive its right to review, object to, or comment upon State-issued permits.	Waivers must be consistent with the limitations on waivers set forth in 123.24(d).
4c		§123.24(d)(1)-(7)	The MOA does not include a waiver of review for the classes or categories of discharges listed in this section.	See also §123.24(b)(2) – MOA shall specify classes and categories of permit applications, draft permits, and proposed permits to be submitted to RA for review, comment and possible objection.
4 d.		§123.24 (e)	<p>If a waiver is granted under section 123.24(d), the MOA must include two statements:</p> <ol style="list-style-type: none"> 1. A statement that the RA retains the right to terminate the waiver as to future permit actions, in whole or in part at any time by sending the State Director written notice of termination; and 2. A statement that the State shall supply the EPA with copies of final permits. 	
4e		§123.42(b)	The MOA contains procedures to ensure that the State Director will not issue a permit on the basis of any application received from the RA which the RA identifies as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.	

Checklist -- August 2012

JURISDICTION, PERMIT ISSUANCE AND REVIEW				
4. Permit Issuance and EPA Review, cont.				
4f		<i>§123.43(b)</i>	The MOA provides that, if the State intends to waive any of the permit application requirements of §122.21(j) or (q) for a specific applicant, the Director must submit a written request to the RA, no less than 210 days prior to permit expiration, including the State's justification for granting the waiver.	

Checklist -- August 2012

JURISDICTION, PERMIT ISSUANCE AND REVIEW				
5. Permit Objection and Public Participation				
5 a		§123.44	The MOA provides a period of time (up to 90 days from receipt of proposed permits) during which the RA may make general comments upon, objections to, or recommendations with respect to proposed permits.	<ul style="list-style-type: none"> • The EPA may provide specific objections within the 90 day period even if the MOA specifies a shorter review period as long as a general objection is filed within the MOA-specified review period. • Regardless of review time specified in MOA, the EPA has 90 days to make comments, objections or recommendations with respect to general permits. • If the MOA provides that the EPA reviews “draft” rather than “proposed” permits, the MOA provisions must be consistent with the applicable portions of 123.44(a)-(h) and with 123.44(j).
5 b		§123.30	The MOA has provisions indicating that judicial review under the State law is sufficient to provide for, encourage, and assist public participation; and does not indicate that the State narrowly restricts the class of persons who may challenge the approval or denial of permits.	Does not apply to Indian Tribes
5 c		123.26(b)(4); 123.27(d)(2)(i)	The MOA has provisions regarding expectations for reports of violations from the public and follow-up.	

Checklist -- August 2012

JURISDICTION, PERMIT ISSUANCE AND REVIEW				
6. Reporting and Coordination				
6 a			The MOA includes provisions specifying the frequency and content of required reports, documents, and other information that the State is required to submit to the EPA.	Information-sharing regulations at §123.41-43 (above) also apply to this section.
6 b		§123.24(b)(3)	The MOA provides that the State shall allow the EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program.	<u>For example, in permitting, the MOA provides how the EPA and the State will interact in permit review. In enforcement, the MOA provides that the State submit for review and comment its Enforcement Management System (EMS) upon request. The State agrees to submit any significant changes to its EMS to the EPA upon request.</u>

Checklist -- August 2012

COMPLIANCE, EVALUATION AND ENFORCEMENT				
7. General Provisions				
7 a		§123.24 (b)(4)(i)	The MOA includes provisions for coordination of compliance monitoring activities by the State and by the EPA.	May be appropriate to cross reference other documents here
7 b		§123.24 (b)(4)(ii)	The MOA includes procedures to assure coordination of enforcement activities. <u>Such MOA provisions should ensure timely and appropriate enforcement and set forth the roles and responsibilities of the state and the EPA for timely and appropriate enforcement consistent with the EPA's current NPDES national guidance and policies.</u>	<p>The EPA's 1989 NPDES Enforcement Management System and May 29, 2008 OCE/OC Memorandum, "Clarification of NPDES EMS Guidance on Timely and Appropriate Response to Significant Noncompliance Violations" provides details on enforcement program performance expectations.</p> <p>August 25, 1986 Memorandum from A. James Barnes, Deputy Administrator, "Revised Policy Framework for State/EPA Enforcement Agreements," also provides guidance on timely and appropriate enforcement response.</p>
7 c		§123.24 (b)(4); §123.26, 123.27	<i>The MOA describes how the State will comply with each of the requirements for compliance and evaluation programs in 123.26 as well as with each of the requirements for enforcement authority in 123.27; including provisions for penalty calculation, documentation and collection.</i>	<p>The EPA's expectation is that MOA review will consider each individual provision included in 40 CFR §123.26 and 40 CFR §123.27 and that states will implement their compliance evaluation and enforcement programs consistent with statutory and regulatory requirements; with all current grant and other agreements; and with current State and EPA CWA/NPDES guidance.</p> <p>The State is expected to calculate penalties in accordance with the factors in Section 309 of the CWA and the remedies specified in 40 CFR 123.27 (a), (b), & (c). The State is encouraged to calculate penalties consistent with applicable State regulation and/or State/EPA policy and guidance, and should, at a minimum, recover economic benefit and a gravity component. State should provide a copy of its settlement policy, criteria, and/or procedures to the EPA. State penalty records should be maintained and accessible to the EPA.</p> <p>Cross reference to other documents, e.g., program description and/or Attorney General's Statement, as needed.</p>

Checklist -- August 2012

COMPLIANCE, EVALUATION AND ENFORCEMENT				
8. Inspections				
8 a		§123.26(d)	<p><i>The MOA provides that the state will conduct investigatory inspections, take samples and gather other information in a manner (e.g., using proper “chain of custody” procedures) that will produce evidence admissible in a court proceeding or in court.</i></p>	<p><u>Provision should specify that facility compliance inspections will be conducted in accordance with the EPA's most recent NPDES Compliance Inspection Manual, the EPA's most recent NPDES CMS, 40 CFR 123.26(d) and all current grant agreements. Provisions Include data entry of necessary inspection information, including Single Event 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), into ICIS-NPDES/PCS in accordance with and on a schedule established in the PCS Policy Statement or 4/30/07 Draft ICIS-NPDES policy statement, State grant Workplan, or any regulations governing the submission of data and information to the EPA.</u></p>

Checklist -- August 2012

COMPLIANCE, EVALUATION AND ENFORCEMENT				
9. Compliance Monitoring and Evaluation				
9 a		123.26	<i>The MOA provides that State will meet all of the requirements for compliance evaluation programs..</i>	<p><u>The program elements include: immediate attention for discharges endangering public health, upload of compliance monitoring and evaluation data into the NPDES national database on a schedule as required, assess and track compliance by dischargers with their permit conditions and any applicable administrative or judicial enforcement action, maintain complete records according to applicable federal records schedules, and should be consistent with most recent State or EPA compliance monitoring and enforcement guidance and policy (e.g., the EPA's compliance monitoring and enforcement national guidance and policy (e.g., NPDES CMS, CWA Settlement Penalty Policy, NPDES EMS)</u></p>

Checklist -- August 2012

OTHER ELEMENTS				
10. Other Recommended Provisions				
10 a		<u>Ability to Implement</u>	<u>The MOA provides that the State agrees to provide the EPA with all judicial, administrative law decisions as well as any formal settlement agreements that the State enters into would impact the State's ability to implement the State NPDES program.</u>	<u>This includes (1) 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), (2) copies of court decisions/actions affecting the permit issuance, compliance, and the State enforcement process (within 15 days of receipt by the State), and (3) decisions to stay a permit, in whole or in part. In addition, the MOA should require that the State provide the EPA with any permit that is affected by an administrative or court action.</u>
10 b		<u>Term & Termination</u>	<u>Provisions describing the term and termination of the MOA.</u>	