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40 CFR Ch. I (7–1–18 Edition)

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

NOTE: Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.

(d) The Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under section 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain “classes or categories” of permits, no waiver of review may be granted for the following classes or categories:

- (1) Discharges into the territorial sea;
- (2) Discharges which may affect the waters of a State other than the one in which the discharge originates;
- (3) Discharges proposed to be regulated by general permits (see § 122.28);
- (4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;
- (5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;
- (6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in appendix A to part 122;
- (7) Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

(e) Whenever a waiver is granted under paragraph (d) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator 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 EPA with copies of final permits.

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 18784, May 2, 1989; 58 FR 67981, Dec. 22, 1993; 63 FR 45122, Aug. 24, 1998; 80 FR 64099, Oct. 22, 2015]

§ 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

- (1) § 122.4—(Prohibitions);
- (2) § 122.5(a) and (b)—(Effect of permit);
- (3) § 122.7(b) and (c)—(Confidential information);
- (4) § 122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r)—(Application for a permit);
- (5) § 122.22—(Signatories);
- (6) § 122.23—(Concentrated animal feeding operations);
- (7) § 122.24—(Concentrated aquatic animal production facilities);
- (8) § 122.25—(Aquaculture projects);
- (9) § 122.26—(Storm water discharges);
- (10) § 122.27—(Silviculture);
- (11) § 122.28—(General permits), *Provided* that States which do not seek to implement the general permit program under § 122.28 need not do so.
- (12) § 122.41 (a)(1) and (b) through (n)—(Applicable permit conditions) (Indian Tribes can satisfy enforcement authority requirements under § 123.34);
- (13) § 122.42—(Conditions applicable to specified categories of permits);
- (14) § 122.43—(Establishing permit conditions);
- (15) § 122.44—(Establishing NPDES permit conditions);
- (16) § 122.45—(Calculating permit conditions);

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- (17) § 122.46—(Duration);
- (18) § 122.47(a)—(Schedules of compliance);
- (19) § 122.48—(Monitoring requirements);
- (20) § 122.50—(Disposal into wells);
- (21) § 122.61—(Permit transfer);
- (22) § 122.62—(Permit modification);
- (23) § 122.64—(Permit termination);
- (24) § 124.3(a)—(Application for a permit);
- (25) § 124.5 (a), (c), (d), and (f)—(Modification of permits);
- (26) § 124.6 (a), (c), (d), and (e)—(Draft permit);
- (27) § 124.8—(Fact sheets);
- (28) § 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)—(Public notice);
- (29) § 124.11—(Public comments and requests for hearings);
- (30) § 124.12(a)—(Public hearings); and
- (31) § 124.17 (a) and (c)—(Response to comments);
- (32) § 124.56—(Fact sheets);
- (33) § 124.57(a)—(Public notice);
- (34) § 124.59—(Comments from government agencies);
- (35) § 124.62—(Decision on variances);
- (36) Subparts A, B, D, H, I, J, and N of part 125 of this chapter;
- (37) 40 CFR parts 129, 133, and subchapter N;
- (38) For a Great Lakes State or Tribe (as defined in 40 CFR 132.2), 40 CFR part 132 (NPDES permitting implementation procedures only);
- (39) § 122.30 (What are the objectives of the storm water regulations for small MS4s?);
- (40) § 122.31 (For Indian Tribes only) (As a Tribe, what is my role under the NPDES storm water program?);
- (41) § 122.32 (As an operator of a small MS4, am I regulated under the NPDES storm water program?);
- (42) § 122.33 (If I am an operator of a regulated small MS4, how do I apply for an NPDES permit? When do I have to apply?);
- (43) § 122.34 (As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?);
- (44) § 122.35 (As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?);

(45) § 122.36 (As an operator of a regulated small MS4, what happens if I don't comply with the application or permit requirements in §§ 122.33 through 122.35?); and

(46) 40 CFR part 3 (Cross-Media Electronic Reporting Regulation) and 40 CFR part 127 (NPDES Electronic Reporting Requirements).

(47) For a Great Lakes State, § 122.38.

NOTE TO PARAGRAPH (a): Except for paragraph (a)(46) of this section, States need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of parts 122 and 124. See, for example, §§ 122.5(d) (continuation of permits) and 124.4 (consolidation of permit processing) of this chapter.

For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.41 of this chapter or by requiring more prompt notice of an upset.

(b) State NPDES programs shall have an approved continuing planning process under 40 CFR 130.5 and shall assure that the approved planning process is at all times consistent with the CWA.

(c) State NPDES programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this paragraph:

(i) *Board or body* includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) *Significant portion of income* means 10 percent or more of gross personal income for a calendar year, except that it

means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) *Permit holders or applicants for a permit* does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) *Income* includes retirement benefits, consultant fees, and stock dividends.

(2) For the purposes of paragraph (c) of this section, income is not received “directly or indirectly from permit holders or applicants for a permit” when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

[48 FR 14178, Apr. 1, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 123.25, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 123.26 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall implement and maintain:

(1) An automated, computerized system which is capable of identifying and tracking all facilities and activities subject to the State Director’s authority and any instances of noncompliance with permit or other program requirements (*e.g.*, identifying noncompliance with an automated, computerized program to compare permit limits to reported measurements). State programs must maintain a management information system which supports the compliance evaluation activities of this part

(*e.g.*, source inventories; compliance determinations based upon discharge monitoring reports, other submitted reports, and determinations of non-compliance made from inspection or document reviews; and subsequent violation notices, enforcement actions, orders, and penalties) and complies with 40 CFR part 3 (Cross-Media Electronic Reporting Regulation) and 40 CFR part 127 (NPDES Electronic Reporting Requirements). State programs may use EPA’s national NPDES data system for their automated, computerized system;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or non-compliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data;

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information; and

(iv) Protect surface waters and public health.

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the Public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(c) The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in