

### § 123.23

Tribe. To the maximum extent practicable, this should include a Memorandum of Agreement negotiated between the State and the Indian Tribe addressing the arrangements for such transfer.

[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; 59 FR 64343, Dec. 14, 1994; 63 FR 45122, Aug. 24, 1998]

### § 123.23 Attorney General's statement.

(a) Any State that seeks to administer a program under this part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under §123.22 and to meet the requirements of this part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

NOTE: EPA will supply States with an Attorney General's statement format on request.

(b) If a State (which is not an Indian Tribe) seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) The Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under §122.28.

[48 FR 14178, Apr. 1, 1983, as amended at 58 FR 67981, Dec. 22, 1993]

### 40 CFR Ch. I (7-1-03 Edition)

### § 123.24 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1)(i) Provisions for the prompt transfer from 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 (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

NOTE: For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.

(ii) Where a State has been authorized by EPA to issue permits in accordance with §123.23(b) on the Federal Indian reservation of the Indian Tribe seeking program approval, 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.

## Environmental Protection Agency

## § 123.24

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of §123.43.

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs. (See §124.4.)

NOTE: To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.

(6) Provisions for modification of the Memorandum of Agreement in accordance with this part.

(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

§ 123.25

40 CFR Ch. I (7-1-03 Edition)

(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]

§ 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), and (m)–(p), and (q)—(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) Section 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);
- (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, and I 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?); and
- (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?).

NOTE: 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