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THE PROGRAM DESCRIPTION AND
THE MEMORANDUM OF AGREEMENT

A. Background on the Program Description and the Memorandum of Agreement

(1) Program Description

Section 402(b) of the CWA requires a State requesting NPDES authority to "submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law . . ." A program description must also be submitted for many program modifications, including whenever the State seeks to add a new program component. Section 304(i) of the CWA requires the Administrator to promulgate guidelines specifying the minimum requirements for a State program under section 402, including requirements for uniform national forms, monitoring and reporting, funding, manpower, and personnel. EPA has promulgated these guidelines in 40 CFR Parts 123 and 403 for the NPDES and pretreatment programs.

The program description is the primary mechanism by which the State explains how it intends to administer the NPDES program. While the regulations largely define the State's intended implementation, they cannot describe the State processes and policies, such as how the State plans to structure its enforcement program. The minimum elements

which must be included in the NPDES program description are set out in 40 CFR 123.22. These components include:

- a narrative description of the scope, structure and processes of the State program;
- a description of the organization and structure of the State Agency or Agencies which will be administering the program, including:
 - organization charts;
 - a description of the State Agency and staff who will carry out the program. This description should indicate the number, occupation and general duties of the employees though it need not include a complete job description for each employee;
 - an itemized account of the anticipated program costs for the first two years including the cost of program personnel and administrative and technical support;
 - a discussion of the amount and sources of funding that will be used to establish and administer the program for its first two years.
- A description of applicable State permitting, administrative, and judicial review procedures;
- Copies of the permit application and reporting forms which the State intends to use, except that if the State intends to use uniform national forms, it need only indicate its intention, and is not required to submit copies; and
- A complete description of the State's compliance tracking and enforcement programs.

Pretreatment program submissions also must contain a program description (in requests for full program approval, this would be part of the NPDES description). The pretreatment regulations at 40 CFR 403.10(f)(2) set out the procedures that States seeking approval of pretreatment programs must

have in place prior to program approval. These procedures must be described in the program description.

These procedures include the following:

- * Procedures for identifying POTWs required to develop pretreatment programs and for identifying industrial users of cities that do not have local programs;
- * Procedures for technical and legal assistance to POTWs;
- * Process for developing compliance schedules for local program development;
- * Procedures for sampling and analyzing POTW influent, effluent, and sludge;
- * A system to investigate violations of pretreatment conditions in the POTW permit;
- * Review and approval processes for local program and removal credits requests; and
- * Procedures for reviewing Fundamentally Different Factors variance requests.

Each of these are explained in more detail below. This Chapter also describes other information that must be included in the program description.

(2) Memorandum of Agreement

The federal regulations require that State program submissions include a Memorandum of Agreement (MOA) between the Director of the State program and the Regional Administrator (see, 40 CFR 122.21(a)(4) and 123.24). The MOA is not required by the CWA. However, due to the technical and legal complexity of a State program, agreements between the State and EPA concerning program responsibilities are necessary. The NPDES regulations, therefore, require an MOA that consolidates all of the agreements rather than having them scattered in a variety of formats and locations.

The MOA is a critical element of a State program during the initial approval and start up of the State program, as well as ongoing program operation. It serves as a benchmark for program responsibilities and oversight. However, the MOA sets out broad, long-term program commitments. Specific agreements covering annual performance should be placed in other documents. These additional agreements must be consistent with the MOA.

The contents of MOA's are prescribed in 40 CFR 123.24, and include the following items:

- Provisions for the prompt transfer of pending permit applications and other information relevant to program operation, from EPA to the State agency;
- Provisions specifying the classes of permit applications, draft permits, and proposed permits to be sent to the Regional Administrator for review, comment, and where applicable, objection. The MOA should also specify the extent to which EPA will waive its right to review and object to State-issued permits under CWA sections 402(d-f). Note that 40 CFR 123.24(d) specifies certain classes of permits for which review may not be waived, and procedures to be followed for waiver;
- Provisions specifying the frequency and content of reports and other information which the State is required to submit to EPA. These procedures must implement the requirements of 40 CFR 123.43, governing transmission of information to EPA;
- Provisions addressing the State's compliance monitoring and enforcement program, including the coordination of compliance activities by the State and EPA and procedures to assure the coordination of enforcement activities;
- Provisions, where appropriate, for joint processing of permits for facilities or activities which require permits from both EPA and the State under different programs (see, 40 CFR 124.4); and
- Procedures for modification of the MOA.

In addition, the MOA should contain other provisions outlining the State and Federal responsibilities for administering the NPDES program. States and Regions should use the Model MOA set out in Volume 2.

B. Purpose and Contents

The program description and MOA, taken together, should explain program operation and clearly define the respective roles of EPA and the State, so that by examining these two documents EPA or the public can fully understand how the program will be run. Some overlap between the content of the two documents is expected since both address areas such as compliance monitoring, enforcement, permit issuance, and transfer of information. However, the two documents have different long term roles. The program description provides a narrative explanation of program administration, which is needed to explain the State's program at program approval and whenever modifications occur. The MOA is designed to be a long-term outline of these programmatic duties in the form of a binding contractual-type agreement between EPA and the State. It establishes the parameters for ongoing program administration. In addition, the MOA is a part of the program submission; MOA revisions must follow program modification procedures. (Since the MOA sets out these commitments in fairly general terms and since revisions are treated as program modifications the MOA is not suited for establishing day-to-day program

commitments or goals. These specific annual commitments are negotiated in the annual section 106 work plans. A more detailed discussion of these annual State/EPA Agreements may be found in Chapter 6.)

To the extent possible, we have attempted to delineate which commitments and descriptions must be included in each of these documents. However, there is no clear line between the two documents. If there are questions as to the proper location for certain elements, EPA and the State should look to the roles of each document to determine the preferred location, or should include the description in both.

(1) NPDES Authority

(a) Program Description

The program description explains the State's plans for operating the program. While the statutes and regulations establish the program's structure, many details of the State's plan cannot be answered solely by reviewing legal authority. The program description should describe routine administrative procedures and delineate the organization, operation, budget and funding sources of the State Agency. A detailed, carefully drafted program description is indispensable to EPA during the Agency's evaluation of a State submission. It also will reduce the amount of time necessary for EPA to review the submission by answering questions and clarifying issues that arise elsewhere in the submission. States seeking NPDES authority or modifying an existing NPDES program should prepare a program description that outlines the State's intent as fully as possible.

The program description of a State seeking full NPDES program approval must also encompass the State's pretreatment program, federal facilities authority and, if the State so desires, a general permit program. The pretreatment program may be described in a separate section, or as an integral part of the NPDES program. Normally, a program description will not be required of NPDES State simply seeking to extend its NPDES authority to include federal facilities.

(i) State Organization and Resources

(a) Organization and Structure

One important section of the program description, frequently not given enough attention, is the organization of the agency or agencies responsible for program administration. The program description should indicate the name of the agency or agencies involved, and the position each holds in the overall State governmental hierarchy. The submission should indicate the individual or entity to which the State Director reports. In addition, the submission should identify and indicate the scope and function of any advisory body which exerts some influence or contributes to policy development or decision-making regarding NPDES matters, and any other State offices that play a role in the administration of the NPDES program such as the Attorney General's office, and wildlife, natural resources, and coastal zone management offices.

The program description must clearly delineate the jurisdiction of the agency or agencies involved in the program. If

the State intends to have more than one agency responsible for the program, each agency must have clearly defined jurisdiction over a class of activities. Thus, a State may divide program administration by having one agency responsible for administration of the NPDES program for direct dischargers, and another responsible for the administration of the pretreatment program, or by having one agency with statewide jurisdiction over a special class of dischargers (such as oil and gas producers), while a second agency administers the program for all other dischargers. The division of responsibilities between the agencies and their procedures for coordination must be clearly set forth. In addition, it is highly recommended that one agency be designated a lead agency to facilitate communications between the State and EPA.

The program description must contain an organization chart for the agency or agencies which will be implementing the program(s). The discussion of organization and structure should track the organizational chart, discussing the division of functions and responsibilities in each office down to the branch section level or its equivalent.

The State must clearly describe which offices within the agency(s) will be responsible for administering different aspects of the program. For example, if a State has a Permits Section and a Compliance Section, the State should indicate which would be responsible for pretreatment activities. The State should also describe the procedures for coordination between the various groups. In the case of a State with

multiple agencies involved, this discussion should clearly explain the division of duties and detail the coordination and any overlap of responsibilities between the agencies.

(b) Resources and Funding

The CWA requires that States have adequate resources, including sufficient funding, and qualified personnel, before being approved to administer the NPDES program. The State must be able to show that it has the resources to operate the program as described.

The State agency must project its resource needs for the first two years of program administration. These resource needs should be set out in the form of a workload analysis. This analysis must address each component of the program (e.g., compliance monitoring, enforcement, permitting, and application processing) and translate the program functions into work-years or FTE's (full time employees). The State should use a reasonable estimate of the time necessary to perform each function and the number of times it will be necessary to perform each function. (For example, if the State estimates that permits for 40 industrial majors will be issued in the next two years and that each will require 30 work-days, then the State's estimated workload for this activity is 1200 work-days or 5.5 work-years. To the extent possible, the State should base its estimates of workload on the actual program needs in the next two years (e.g., number of permits to be issued, etc.). Where these numbers are less than the historical norm the State should use estimates closer to the average workload. In some cases, EPA may request the State to

explain the basis for its workload estimates.

The State must also describe staffing levels and relate these staff to the workloads identified through the workload analysis. There should be no double counting of available personnel (i.e., one person should not be identified as devoting a full workyear to two different program functions). Personnel splitting time between two or more functions must be clearly identified. The State must also identify persons who may be working in other programs part-time. Additional assistance from other offices must also be identified. For example, if technical expertise or legal support from other offices is required, the State must account for these arrangements and personnel allocations.

The State should clearly identify and staffing shortfalls and explain how they can be handled without impairing program performance. In reviewing these workload estimates, EPA will consider the overall State workload and the State's plan for program implementation to determine the adequacy of the State staff. State staffing and resources must be adequate to implement the State program; EPA will carefully review any staffing shortfalls to determine whether the State can implement the described program.

In addition to this workload analysis, the discussion of resources must contain an itemized listing of the expected costs of program establishment and operation, including the cost of administrative and technical support. Submissions received in

the past have frequently failed to provide sufficient detail of expected costs. It is critical that States seeking approval show realistic, detailed cost estimates for establishment and operation of the State program. This realistic cost evaluation is a good indication that the State has carefully planned its program and is aware of the complexities of program establishment and operation.

Once all of the program expenditures have been identified, the State must demonstrate its ability to fund the program. This requires a listing of financial sources, including federal grants such as the section 106, 205(g) and 205(j) funds.* The State agency should also indicate any restrictions or limitations upon the use of these Federal funds. It is suggested that this information be presented in the form of a balance sheet or two year budget. Any discrepancies between the total estimated funds and the total estimated costs of operating the program should be reconciled by the State.

There are no uniform numbers as to what will constitute adequate funding, given the wide variation in the size and complexity of State water pollution control programs. Instead, determinations of adequacy must be made on a case-by-case basis, taking into account not only the size of the State program, but also types and numbers of industries located in the State.

*/ During its discussion of funding sources, the State should indicate whether the stated appropriations are proposed, or whether they have actually been approved by the State legislature.

The State also must identify the qualifications, training, and work experience required of its personnel administering the program. Positions and their qualifications must be identified by program function (e.g., permitting, compliance, enforcement, and pretreatment). Although States are not required to submit actual position descriptions for each position, such descriptions are helpful to EPA. In addition, the State must describe general minimum qualifications (academic and/or experience) required for personnel in each program area. The program description should delineate whether these positions have actually been filled, or if not, when they are scheduled to be filled. The State's specific needs should be considered in establishing minimum qualifications for program staff. For example, if a particular industry is a major part of the workload, knowledge of that industry may be crucial. Thus, in a State with many chemical manufacturers, personnel with chemical engineering and/or toxicology expertise probably would be required.

Adequate and qualified personnel are obviously an essential element of a State program. Since the NPDES regulations must be applied nationally, they contain only generic criteria for staffing and personnel qualifications. This provides the flexibility necessary to deal with the varied conditions among States (e.g., number, type, and complexity of permittees and/or indirect dischargers, water quality problems, extent of noncompliance, etc.). Although tailored to the State's individual circumstances, the description must be both comprehensive and detailed.

(ii) Scope and Program Procedures

The major part of the program description is a discussion of State's procedures and policies. To provide perspective on the program, the description should provide general background information addressing the size of the program, the number of dischargers to be regulated (list if possible), any pre-existing State discharge permit programs and their relationship to the NPDES program. The State should also outline the nature and extent of any NPDES activities that the State has been carrying out in conjunction with the Region prior to approval. For example, some unapproved States assist in the development of draft permits, or participate jointly with EPA in the inspection of dischargers. In addition, the program description should briefly discuss the relationship between the proposed NPDES program and related State water programs, such as groundwater protection, if any.

The narrative should call attention to any features of the proposed program that are not required under Federal law, and areas where the State has chosen to be more stringent than the Federal requirements. The State should also discuss the interrelationship between the NPDES program and the State's water quality requirements (i.e., how the State water quality standards will be incorporated into NPDES permits and how the State will address variances from these standards. Note, however, that the State may not allow variances except where authorized by the CWA).

Most importantly, the State must clearly set out the procedures that it intends to follow in implementing and administering the program. This discussion must explain how the State intends to fulfill its permit issuance responsibilities. For example, it must explain who is to be regulated and how that task is to be carried out, including public involvement in the process. The State also should include a discussion of permit issuance priorities. In explaining the State's procedures, the submission must clearly indicate which office(s) of the State agency will be responsible for each function.

State administration of the NPDES program may be divided into four basic elements as follows:

- Application process (including any preapplication procedures and new source requirements);
- Permit development and issuance;
- Compliance monitoring; and
- Enforcement.

The submission must explain the permit process in step-by-step detail. The State should explain its procedures for requiring permit applications, including for the submission of renewal applications by dischargers currently operating under permits, and the information to be required of applicants. To the extent the information is different from that required on NPDES application forms, the State should explain the differences. The State should also explain any special application procedures under the program. If different types of sources are subject to

different application requirements or procedures, these should also be explained (e.g., State NEPA requirements applicable to new sources).

The State next must describe both the administrative procedures used to review and act upon permit applications and any scientific or technical evaluations to be performed at the outfall(s). The procedures utilized to develop draft permits must be clearly stated. These procedures may appear as a chart or a list if expedient. In any case, the reader should be able to follow the steps of permit development based upon the material provided. The description must discuss the derivation of permit conditions, including effluent limitations, water quality standards and any applicable pretreatment, toxic or sludge-related requirements in as much detail as possible. The State should specify any policies related to the imposition of certain types of limits, such as limits on toxic pollutants. In addition, the narrative should discuss the State's mechanism for developing monitoring requirements and other specific permit conditions. In describing development of the draft permit, States should also discuss their use of fact sheets and when these will be prepared. The federal rules do not require that States use fact sheets in all instances. Furthermore, special considerations for particular classes of dischargers such as POTW's, animal feedlots, silvicultural activities, and storm water discharges or separate storm sewers should be detailed. Finally, any other State-imposed requirements, such as construction permits

for new sources, which impact the permit issuance processes should also be explained.

Along with the permit development procedures, the State should describe those classes of discharges which will not be required to have NPDES permits. Of course, the State may not exclude any dischargers from permitting requirements that are not similarly exempted in the federal regulations.

After the application and permit development processes have been discussed, the narrative should provide a detailed explanation of the proposed permit issuance (public notice and comment) process, including the procedure for requesting and conducting public hearings. The description should specify who may comment upon permits and request hearings. The submission also must elaborate on EPA's role in reviewing State permits. Finally, the State must describe administrative and judicial review of decisions by the permitting authority, including which parties may challenge the permit decision.

The program description should also address the circumstances and procedures under which the State will transfer, modify, revoke and reissue, or terminate permits and which (if any) of the variances authorized under the CWA it intends to allow. The text should indicate the State's variance policies, as well as outlining the procedures for responding to variance requests. Additionally, the State should specify which office will be handling such requests.

Once the State has described the operation of its permit issuance process, it must delineate its proposed strategy for compliance monitoring. State compliance monitoring programs must have procedures for evaluating self-monitoring reports submitted by permittees to determine whether the discharger is in compliance with applicable requirements. In addition, States must have procedures for determining compliance by permittees independent of the discharger's self-monitoring. States must be capable of carrying out comprehensive surveys to ascertain noncompliance, have procedures to verify the accuracy of sampling and monitoring reports submitted by permittees, and ensure that reports indicating noncompliance are followed up. (See, 40 CFR 123.26 and 123.45). State programs also must have provisions for responding to complaints submitted by citizens. The program description must outline these procedures. The State should also describe the standard monitoring, recordkeeping, and reporting requirements to be included in State permits.

The State's description also should indicate the projected scope and frequency of inspections and outline the State's inspection priorities. At a minimum, State compliance monitoring programs must provide for annual inspection of all major dischargers.

The narrative must address the State's procedures for resolving identified violations. This strategy includes a discussion of the State's informal and formal enforcement remedies, strategy and policies, accompanied by an explanation

of the circumstances which must be present for the State to abandon informal efforts and resort to formal enforcement actions. The State should describe any procedures that must be followed in taking enforcement actions. Limitations and restrictions governing the use of these remedies, if any, must be disclosed. Thus, if State law requires that certain actions be taken prior to initiating enforcement actions, these must be explained in the program description. The discussion on the proposed enforcement program must include a synopsis of the relationship and coordination between the permitting office, the inspecting/compliance office, and State legal officials (e.g., the Attorney General's office). Finally, the enforcement discussion should address provisions made to ensure the public's right to participate in and have adequate notice of enforcement actions, as specified by 40 CFR 123.27(d). (These requirements are discussed in the statutory and regulations Chapters.)

The State must also address procedures regarding the transfer and protection of information. Specifically, the text should describe how the State will make all permits, permit applications and effluent data available to the public. The State shall describe what information may be deemed confidential. Furthermore, the program description must address issuance of the annual report on the NPDES program, as required by 40 CFR 123.45(b), as well as the State's involvement, or intention to become involved in the national computerized permit tracking system (Permit Compliance System). Moreover, the State should discuss its continuing planning process, as mandated by section

303(e) of the CWA, and address elements listed at 40 CFR 35.1500 et seq., including State priorities, water quality assessment and further planning responsibilities.

Finally, the program description must indicate that the State intends to update its program to be consistent with the changes in the federal NPDES program. The State should explain when and how the State will revise its program following changes to federal requirements. This is particularly important in instances in which the State has incorporated federal authorities by reference. This discussion should include the State's plans for a periodic self-analysis of its legal authorities and program effectiveness, as well as future intentions to expand of the State's program (i.e., plans to seek general permit authority).

(iii) State Program Forms

The permitting authority must provide copies of the permitting, application, and reporting forms that it intends to use, unless the State intends to use the uniform national forms. State forms must request the same basic information as is mandated by the EPA forms. States are encouraged to use EPA's national forms, and may modify them by substituting the State Agency's own letterhead in place of EPA's. States may attach additional forms to obtain more information. Copies of the national forms are included in the Models provided in Volume Two. Note that all State programs must use EPA's Discharge Monitoring Report (DMR) forms. A State planning to use EPA's forms need only indicate its intentions.

(b) Memorandum of Agreement

The MOA establishes the basis for cooperation and coordination between the State and EPA and for ensuring that the program is administered in an effective manner consistent with federal objectives and requirements. The MOA defines the State/EPA relationship and denotes the responsibilities of each party. It charts the procedures EPA and the State will follow in carrying out these various responsibilities and generally defines the manner in which the NPDES program will be administered. The MOA should also be used to clarify procedures where needed.

An MOA must be signed by the Director of the State agency and the appropriate EPA Regional Administrator (RA). The RA must receive the prior concurrence of the Director of the Office of Water Enforcement and Permits and the Associate General Counsel for Water, EPA Headquarters for any new program or substantial revisions (see, Chapter Two, above. Note that nonsubstantial MOA revisions also must be submitted to EPA Headquarters in advance to assure whether they should be deemed substantial.).

The contents of the Memorandum of Agreement are described below. EPA has developed a model MOA for use in State program which embodies normal State/EPA allocation of responsibility (See Volume 2 of the guidance). It is recommended that States use the model and revise it as necessary for the particular

program, generally by adding additional items. It is unlikely that commitments in the model would be deleted or modified, except where the State does not perform a particular program aspect (e.g., general permits).

The MOA should begin with a statement of the basis and implications of the Agreement. For example, both parties must indicate their intentions to be bound by its terms. The MOA must affirm that the State program will be managed in accordance with State and federal statutes, regulations, policies, guidance, the annual section 106 work plan and the State/EPA Enforcement Agreement (if separate from the MOA). The MOA may also acknowledge the State's right to be more stringent than the federal requirements. If the MOA is being updated or revised, it should include a provision explaining the relationship with the previous agreement (i.e., it must indicate whether it supercedes or supplements the prior document).

The main body of the MOA consists of a listing of the responsibilities and procedures which will be used to ensure coordination and cooperation between the State and EPA. The reader should consult Chapters Three and Four for more details on the legal requirements for implementing each task.

The State/EPA obligations are frequently divided according to program function, as follows:

(1) Permit Review and Issuance

- * Transmission of permit files from EPA to State Agency;

- Suspension of EPA's permitting activities;
- Transfer of permit appeals cases to State Agency (optional);
- Transmission of pending applications, draft permits, public notices, and final permits, to EPA, including general permits if applicable, for its review and comment, including objection;
- Transmission of non-minor permit modifications to EPA for its review and comment/objection;
- Designation of permits waived by EPA, if any, and caveat allowing EPA to terminate waiver, or portion thereof, at any time. These should include a discussion of the procedures for review of and objection to State permits. Where EPA and the State agree that EPA will comment upon draft permits, the MOA should specify that all regulatory procedures normally applicable to proposed permits will apply to draft permits (see 40 CFR 123.44);
- Establishment of a major facilities list;
- Procedures for determining new source evaluations;
- Transmission of a monthly list of permits issued by the State;
- Procedures for evaluating variance requests under sections 301(c), (g), (h), and FDFs;
- Procedures for ensuring public involvement in permit review and issuance process; and
- A statement requiring permit information to be packaged in such a manner as to be easily adapted into the PCS data base.

(2) Enforcement Management System (EMS)

- State commitment to review permittee's monitoring reports and investigate complaints made by EPA and the public;
- State commitments to conduct inspections, including joint inspections with EPA;
- Affirmation that EPA and State will hold periodic enforcement conferences to determine priorities;

- * State commitment to bring timely and appropriate enforcement actions as required in State/EPA Enforcement Agreements;
- * State commitment to provide EPA with notice of proposed enforcement settlements, (See, 40 CFR 123.27(d)(2)(iii) (optional));
- * Joint commitment to immediately notify the other party of situations creating a substantial endangerment to the public health or welfare, due to an actual or threatened direct discharge of pollutants;
- * Statement acknowledging EPA's ability to conduct inspections and bring enforcement actions in the State (including section 504 emergency powers);
- * EPA commitment to provide the State Agency with annual joint inspections list;
- * EPA commitment to provide State with reports of all EPA (Regional Office) inspections in the State; and
- * EPA commitment to provide the State with prior notice, and copies of all enforcement actions brought in the State.

(3) Financial Assistance

- * Procedures for developing the annual 106 work plan and performance-based grants policy, if applicable;
- * The MOA should note that the State shall undertake revisions to the MOA whenever the State or EPA determine the need for such revisions, since the MOA cannot be overridden by other State/EPA agreements;

(4) Confidentiality

- * Procedures for treating confidential claims of trade secret information (except with respect to permit applications, permits, and effluent data);

(5) Program Oversight

- * EPA commitment to audit or review State program performance, including permit quality reviews (PQR's) where appropriate, and to provide the State Agency with a copy of EPA's analysis;

- * State commitment to seek legislation and promulgate regulations as necessary to preserve and maintain consistency and compliance with federal requirements;
- * Procedures for updating and revising State regulations, including any incorporation of EPA regulations by reference, whenever federal rules are revised (unless the federal rules become less stringent) (see Chapter Four, above);
- * State commitment to provide EPA with draft proposals for statutes, regulations, policies, etc., for its review and comment prior to their adoption; and
- * State commitment to advise EPA of any plans to transfer or split NPDES responsibilities to another State Agency, or Agencies.

(6) Effective Date

The MOA should designate the Agreement's effective date if different from the date of the signatures.

(7) Amendment

Finally, an NPDES program MOA must designate procedures for amending, updating, and revising the document, including the need to public notice substantial revisions which are part of a program modification.

(2) Pretreatment Program

(a) Program Description

Pretreatment authority must be sought by any State seeking NPDES authority. Under the CWA Amendments of 1977 existing NPDES States also are required to seek pretreatment authority (see, section 54(c), P.L. 95-217, 91 Stat. 1591). The pretreatment program description may either be combined with the basic NPDES program description or drafted as a separate document.

The essential elements of the pretreatment program description are the same as those for the NPDES document. The pretreatment program description must address the scope and program procedures of the proposed program and the organization and structure of the State agency responsible for administering the program. It must include the number, occupations and duties of the employees; an itemized account of the anticipated costs of operating the program; a discussion of the sources of the funding, and a detailed description of the State's compliance tracking and enforcement programs, including a discussion of administrative and judicial remedies and authority.

(1) State Organization and Resources

The discussion of a State agency's organization and resources for the pretreatment program is very similar to that of the NPDES program, discussed above at Part B(1)(a)(i). The pretreatment program description should spell out the structure and division of duties between the agency or agencies administering the program. The State should provide organizational charts which designate the program responsibilities in the various offices, divisions, or branches of the agency.

The discussion of resources again should follow a similar scope and format as that discussed above for the NPDES program at Part B(1)(a). When considering program approval, EPA will be particularly concerned with assuring itself that the State's funding and staffing are adequate to meet the program's requirements. The cost estimates and sources of funding should be

clear and detailed, and the sources of funding should equal the amount of estimated costs. A workload analysis also must be included (see, Model Program Description, Volume Two), and realistic, carefully developed staffing information should be provided. For example, pretreatment programs must have personnel capable of reviewing POTW programs, baseline monitoring reports, industrial user surveys, adequacy of local ordinances, local limits and removal credit requests. Finally, as with the NPDES description, detailed information on each of the pretreatment positions must be provided, including required experience or qualifications.

(2) Scope and Program Procedures

As with the NPDES program description, the pretreatment description must explain how the program is to be implemented. The State must fully explain how it intends to administer the program. In addition, the State must discuss the procedures it intends to use in performing the tasks outlined in 40 CFR 403.10(f)(2). These required procedures are discussed below.

The State must generally describe the scope of the proposed program and the State's strategy for program implementation. Specifically, the discussion must indicate whether the State has elected to place the primary responsibility for regulating Industrial Users (IU's) on POTWs, whether the State Agency will implement the pretreatment requirements itself, or whether the State adopts a bifurcated approach with some POTWs (such as those with more industrial flow)

developing local programs while the State regulates the remainder of IUs through permits and/or regulations. If this latter approach is selected, the program description must fully discuss both the POTW and State components of the proposed regulatory scheme. If the State intends to require POTWs to develop local programs, the State must describe the criteria for selecting which cities will be required to develop programs and how the State will regulate IUs in cities that do not develop programs. The description should indicate the number of cities required to develop programs as well. This discussion should also address how these cities were identified and how new cities will be identified and notified of program development requirements. Finally, the State should discuss the imposition of compliance schedules in NPDES permits requiring local program development.

If the State intends to regulate any IUs directly, the submission must discuss how these IUs will be identified and notified of pretreatment requirements. The State must also describe the mechanism by which these dischargers will be regulated. If no IUs will be regulated directly, the State need only address its plans and procedures for oversight of local POTW program administration to insure that all IUs are identified and regulated.

The regulatory authority, be it the POTW or the State, must carry out industrial waste surveys to ascertain the

nature and content of industrial discharges to POTWs. Plans for the distribution and analysis of these surveys should be discussed in the program description. The State should also provide an explanation of its ability to keep track of indirect discharges commencing in the future.

If the State has elected to have POTW's develop local programs, the program description must clearly explain the criteria and procedures to be followed in approving local programs. Where local program administration is to be handled by the State agency, it should indicate the requirements the State will impose on POTWs. The program description should also detail the public participation provisions for local program approvals, as well as the requisite legal and programmatic considerations mandated by 40 CFR 403.8(f). In particular, the narrative should carefully describe the policies and criteria to be applied in the review of POTW legal authorities. As part of its review of POTW requests for program approval, the approval authority (i.e., the State) must independently evaluate the legal authorities which the POTW intends to use to implement its program. The State must describe who will be conducting such reviews and must commit to a conduct a complete and independent review of local authorities.

The narrative should set out the State's legal and technical assistance program for the development and implementation of local programs. This includes providing model ordinances, developing local limits, and evaluating compliance. In addition,

the submission should clearly explain the State's role in providing other assistance to POTWs, including legal and financial aid. If the State is currently assisting EPA in the administration of the State pretreatment program, the State's duties and responsibilities should be explained, and any other pretreatment related activities underway should be noted.

The document also should explain the State's policy and procedures for processing requests for category determinations, fundamentally different factors variances (FDF), revisions to categorical pretreatment standards (removal credits), and net/gross adjustments to categorical pretreatment standards. This should include a discussion of any public participation requirements and a description of the review process for each of these actions.

The State must discuss its program for compliance monitoring. In many respects, this program is comparable to the NPDES compliance monitoring program (see Part B(1)(a), above*). The scope of the program should also be comparable to that of the federal pretreatment program. The State must clearly delineate how it intends to review IU reports and determine appropriate responses. States must have procedures for evaluating compliance by IUs, even where the POTW has an approved pretreatment program. In these instances, the State may rely upon the POTW, but must

*/ In the case of a joint NPDES/pretreatment program submission, the State need only describe pretreatment enforcement options to the extent that they differ from the State's NPDES enforcement program.

describe how it intends to oversee the local program and periodically conduct independent evaluations of IU reports to determine compliance.

The State must also describe its process for determining, independent of information supplied by POTWs or industrial users, whether the POTW and industrial users are in compliance with conditions incorporated into the POTW permit and pretreatment requirements imposed on the IU. The submission should elaborate on the nature and frequency of reporting requirements to be imposed upon POTWs and industrial users. It is also essential for the State to address its program for compliance inspections of both POTWs and industrial users, including regularly scheduled inspections as well as random or spot checks. States may rely on approved POTWs for some inspections, but must conduct an independent inspection program.

The State must also describe its enforcement program. This discussion should also explain the State Agency's back-up enforcement authority for those situations where a POTW cannot or will not properly enforce against an industrial user. This back-up authority must be available against both POTWs and IUs.

States with very detailed, self-implementing statutory authority need not promulgate pretreatment regulations (see, Chapter 4, Part B(2)). If a qualified State chooses the option of not promulgating regulations, the pretreatment portion of its program description must fully detailed explain

how the State will implement each and every provision of the federal pretreatment regulations as enforceable requirements. EPA does not expect that many States will qualify for program approval without detailed regulations.

(b) Memorandum of Agreement

An NPDES program submission (or existing NPDES States seeking pretreatment authority) will need to submit an MOA which addresses pretreatment responsibilities. In the case of existing MOA's, the reviewer should examine the language very carefully to ascertain that it contains no restrictions on the State's ability to assume pretreatment authority.

The MOA must define State and EPA responsibility in carrying out the establishment and enforcement of the pretreatment requirements for new and existing POTWs and indirect dischargers, under sections 307(b) and (c) of the CWA. The MOA should indicate that the State is responsible for enforcing the general and specific prohibited discharges; reviewing, approving and overseeing POTW programs (subject to EPA review and possible objection); incorporating local POTW program conditions into NPDES permits (unless the State is administering the local programs, in which case responsibility will lie with the State to regulate directly all indirect dischargers); and reviewing and approving modifications to categorical standards reflecting POTW pollutant removal. As with the basic NPDES program, the pretreatment MOA should generally indicate State procedures for carrying out monitoring and inspections of both POTWs and

indirect dischargers. These procedures must enable the State to independently verify data reported by POTWs and indirect dischargers.

The MOA must include a brief discussion of the State's procedures for reviewing IUs' requests for category determinations (see, 40 CFR 403.6), including provisions allowing an appeal of the State's decision to EPA. The MOA must also specifically provide that no POTW program, or request for authority to grant removal credits, shall be approved if EPA's Regional Water Management Division Director objects during the evaluation period (see, 40 CFR 403.11(d)).

If the State wishes to allow IUs to request fundamentally different factors variances (FDF's), and net/gross adjustments, the MOA must note the basic policy and procedures for responding to these requests. The MOA should indicate that the State may deny FDF requests (if State law so allows) or recommend approval of the request to EPA, which is responsible for final decisions. It should also contain provisions for EPA review and actions on net/gross requests. Finally, the pretreatment MOA should provide that nothing in the MOA is intended to affect any pretreatment requirement established under State or local law, except that EPA may take action if State or local requirements are less stringent than federal law.

(3) Federal Facilities

(a) Program Description

The program description must, of course, address the State's regulation of federal facilities.* In many cases, this will simply entail indicating that the permitting of federal facilities was taken into account in developing funding and staffing estimates and that federal facilities will be handled similarly to all other direct discharges. However, if the State intends to follow any unique or special procedures with regard to permitting federal facilities (or dealing with indirect discharging federal facilities), these should be described. It is also helpful for the State to provide a listing of federal facilities within its jurisdiction.

(b) Memorandum of Agreement

Special attention should be paid to language relating to federal facilities authority in the MOA, particularly where an existing NPDES State is revising its program. To be acceptable for federal facilities authority, the MOA cannot restrict State authority with regard to regulation of, or enforcement against, federal facilities. Since prior to the 1977 Amendments, States were not authorized to regulate federal facilities, many MOAs for States approved before 1977 specifically prohibit State regulation of such sources under the NPDES program. Where the MOA limits the State's authority over federal facilities, it

*/ The 1977 CWA amendments require approved NPDES States to seek federal facilities authority. See Memorandum on the Transfer of Authority Over Federal Facilities to NPDES States, (Nov. 28, 1978), contained in Volume II.

must be modified at the time the federal facilities authority request is approved. Among other provisions, the MOA should note that EPA reserves the right to enter and inspect federal facilities.

(4) General Permit Authority

Unlike pretreatment and federal facilities authority, general permit authority is an optional program and need not be contained in an NPDES submission. However, if States choose to issue such permits, EPA requires a program description and MOA modification to be included in all submissions requesting general permit authority.

(a) Program Description

The State must generally describe how it intends to administer its general permit program, including under what circumstances general permits are to be issued. It is important for the State to clearly set out its general permit strategy so that reviewers can determine whether it is consistent with the CWA. This includes specifying the classes of dischargers the State intends to permit (a list of general permits the State plans to develop will be invaluable to EPA personnel reviewing the program application), along with any restrictions on general permit coverage (such as discharger size or industry category) the State is imposing on itself.

The State must detail the procedures it will utilize to ascertain which dischargers are covered under a given general permit, as well as providing the approximate number of dischargers it intends to include under each permit, if known. Procedures for notifying dischargers of their eligibility for coverage under a general permit should also be indicated.

Furthermore, the document must discuss the public participation procedures for general permit issuance (these are required by 40 CFR Part 124). For example, the State must indicate whether it will provide public notice when a discharger, already regulated under an individual NPDES permit, requests coverage under a general permit and seeks to have its individual permit revoked.

The general permit program description should indicate staffing or resource implications of program approval. For example, general permits may free up some NPDES staffing and resources which may be redirected toward other areas of the program.

(b) Memorandum of Agreement

The MOA must detail the interrelationship between EPA and the State. Specifically, the document must address EPA review and comment/objection procedures for State general

permits since they are different from EPA review of individual NPDES permits.*

In the case of an NPDES State seeking to modify its program by adding general permit authority, the existing MOA must be revised if it contains language limiting its applicability to individual permits, or lacks a discussion on EPA review and comment/objection of State general permits.

*/ General permits must be reviewed by the Director of the Office of Water Enforcement and Permits, EPA Headquarters, before they may be issued by the State agency (see, 40 CFR 123.43(b), 123.44(a)(2), and 123.45(i)).