

**MEMORANDUM OF AGREEMENT**

**Nebraska Department of Environmental Quality**

**And The**

**U.S. Environmental Protection Agency**

**National Pollution Discharge Elimination System**

**And**

**Pretreatment Program**

**February 7, 2019**

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**APPENDIX A – Agency Responsibilities**

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## I. PURPOSE

The purpose of the Memorandum Of Agreement, hereafter "MOA", is to establish policies, responsibilities and procedures pursuant to the Federal Water Pollution Control Act, or Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, and Title 40 of the Code of Federal Regulations (40 CFR) Part 123 and Parts 403-471 for program commitments between the Nebraska Department of Environmental Quality (NDEQ) and the U.S. Environmental Protection Agency, Region 7 (EPA) for the administration of the National Pollutant Discharge Elimination System (NPDES) and Pretreatment Programs by the NDEQ. This MOA shall constitute the agreement between the NDEQ and the EPA. This MOA is intended to address the administration of the NPDES program and is not intended to address criminal investigatory proceedings.

On June 12, 1974, the Administrator of the EPA approved the State of Nebraska's NPDES program pursuant to the authority of Section 402(b) of the CWA, 33 U.S.C. § 1342(b). As part of the approval, the Administrator approved a MOA between the Regional Administrator of the EPA, Region 7, and the Director of the Nebraska Department of Environmental Control, now the NDEQ, which was signed on September 19, 1973. This MOA established policies, responsibilities, and procedures for the NDEQ's participation in the NPDES program. The parties agree that a new MOA should replace the original MOA. Therefore, the parties enter into this MOA, which upon approval by the Regional Administrator and the Director, shall supersede the original MOA.

Each of the parties has a responsibility to assure that the NPDES and Pretreatment Program requirements are met. The Director and the Regional Administrator agree to maintain a high level of cooperation and coordination between the NDEQ and the EPA staffs in a partnership to assure successful, effective and efficient administration of the NPDES and Pretreatment Program. They further agree that the principles of Cooperative Federalism shall be used, thereby allowing good implementation of the federal government's policies and plans, by allowing the states to modify their annual/biannual partnership planning and grant (e.g. PPG) documents to address local conditions. Meetings will be scheduled periodically between the NDEQ and the EPA to review specific operating procedures, resolve problems, or discuss, mutual concerns involving the NPDES and Pretreatment Program.

The strategies for issuance, compliance monitoring, and enforcement of permits, as established by this MOA, may be set forth in more detail in the NDEQ CWA Section 106 program grant and other NDEQ/EPA agreements. The CWA Section 106 program grant document contains terms and conditions consistent with the CWA and its implementing regulations regarding appropriate use of grant funds. The NDEQ CWA Section 106 program grant may identify NDEQ's specific commitments in a given grant year based on financial considerations. This MOA and the NDEQ CWA Section 106 program grant should be consistent with each other; however, responsibilities of the NDEQ in administering the NPDES and Pretreatment Programs may extend beyond activities covered under the Section 106 program grant. The NDEQ CWA Section 106 program

grant and other NDEQ/EPA agreements should be consistent with this MOA. The MOA controls in case of conflict.

## **II. SCOPE OF AUTHORIZATION**

The NDEQ and the EPA agree that the NDEQ has authority to administer the NPDES permitting, compliance monitoring and enforcement activities (including federal facilities), and Pretreatment activities in Nebraska in accordance with the CWA and its implementing regulations. The NDEQ does not administer the NPDES or Pretreatment Programs in federally recognized Indian Tribal lands. The NDEQ has authority to regulate discharges from point sources including, but not limited to, publicly owned treatment works (POTWs) and privately-owned treatment works, industrial sources, concentrated animal feeding operations (CAFOs), stormwater associated with industrial activity (including construction stormwater), and discharges of stormwater from municipal separate storm sewer systems. The NDEQ also has primary responsibility for implementing the Pretreatment Program, authorized November 7, 1984, the Federal Facilities Program, authorized November 2, 1979, and the General Permits Program, authorized February 24, 1989.

This MOA sets forth procedures under which the EPA and the NDEQ will coordinate their actions and share information regarding civil matters, consistent with their respective legal obligations and authorities, in the administration of the CWA. Nothing herein shall be construed as expanding the respective authority of either agency or as requiring or authorizing the NDEQ to implement or administer any federal law, including the Endangered Species Act, other than those portions of the CWA that the EPA has authorized the NDEQ to implement and administer.

## **III. STATE AND FEDERAL RESPONSIBILITIES**

The NPDES and Pretreatment Programs administered by the NDEQ, equivalent to applicable provisions of the CWA and its implementing regulations, are implemented through the Nebraska Environmental Protection Act, as amended, R.R.S. Neb. Sections 81-1502 to 81-1532, and the Livestock Waste Management Act, R.R.S. Neb. Sections 54-2416 to 54-2438.

### **A. NDEQ Responsibilities**

The NDEQ shall exercise the legal authority through the NDEQ regulations and the State statutes required by the CWA and, to the maximum extent possible, maintain the resources required to carry out all aspects of the authorized NPDES and Pretreatment Programs. For a complete list of NDEQ responsibilities see Appendix A. The legal authority to carry out the requirements of permitting (40 CFR § 123.25), for compliance evaluation programs (40 CFR § 123.26), for enforcement authority (40 CFR § 123.27), and for the Pretreatment Program (40 CFR § 403.10) is described in more detail in the Attorney General's Statements dated September 19, 1973 and January 11, 1983 (permitting and Pretreatment Program, respectively).

## **B. EPA Responsibilities**

The EPA shall, to the maximum extent possible, provide funding to the NDEQ to support the authorized NPDES and Pretreatment Programs and oversee the NDEQ's administration of the NPDES and Pretreatment Programs for consistency with the CWA, this MOA, any applicable NDEQ/EPA agreements, the CWA Section 106 program grant and all applicable federal regulations. A complete list of the EPA responsibilities is included in Appendix A of this document.

## **IV. PERMIT PROCESSING, REVIEWING AND ISSUANCE**

The NDEQ is responsible for drafting permits, ensuring public notice, providing the opportunity for public comment and hearings, issuing permits, amending (modifying), renewing (reissuing) and denying and revoking (terminating) permits in accordance with applicable State statutes, rules, and this MOA and consistent with federal statutes and rules.

### **A. Administrative Review of Applications**

The NDEQ shall be responsible for the administrative review of all NPDES permit applications within the NDEQ's jurisdiction. The NDEQ will make completeness determinations and inform applicants if additional information is required. Appropriate application information will be transmitted to a national database as required by the EPA's mandatory data requirements.

### **B. Permit Development**

A draft permit will be developed by the NDEQ in accordance with State statutes and rules after an application is determined to be complete and consistent with federal statutes and rules.

Technology based effluent limits in NPDES permits for non-POTW dischargers will be at least as stringent as applicable Effluent Guidelines and Standards specific in 40 CFR Chapter I, Subchapter N. Permit requirements will be based on best professional judgment, in accordance with 40 CFR § 125.3, when specific Effluent Guidelines and Standards regulations do not apply to a particular discharge. Technology limits for POTWs will at a minimum reflect the secondary treatment definition found in 40 CFR Part 133.

Water quality based effluent limitations will be included in NPDES permits when needed to ensure compliance with State water quality standards approved by the EPA. All final limitations in an NPDES permit will be consistent with any approved Total Maximum Daily Load (TMDL). Endangered species concerns will be addressed through interagency coordination.

The NDEQ will include standard conditions and special conditions in NPDES permits, as required by 40 CFR § 123.25.

**C. EPA Review of Draft and Proposed Permits, Permit Revocations and Activities Authorized by Rule**

1. The EPA waives the review of draft and proposed permits except for the following categories:
  - a. Discharges that may affect the waters of an adjacent state(s) or Indian country;
  - b. Discharges from POTWs with daily average flows of 1.0 million gallons per day (MGD) or greater;
  - c. Discharges from POTWs with approved Pretreatment Programs;
  - d. Discharges of cooling water that exceed a daily average of 500 MGD;
  - e. Discharges from all designated “Major” facilities (as defined in 40 CFR § 122.2);
  - f. Discharges from all primary industry categories, as listed in 40 CFR Part 122, Appendix A but only to the extent that the discharge is subject to federal Effluent Guidelines and Standards in 40 CFR Chapter I, Subchapter N;
  - g. Discharges from other non-POTW sources with permitted daily average flows of 0.5 MGD or greater, except for those facilities that discharge only non-process wastewater;
  - h. Permits for municipal separate storm sewer systems (MS4s);
  - i. Permits for Combined Sewer Overflows (CSO) communities;
  - j. Permits for POTWs that in any manner authorize or require monitoring of discharges from any point in the collection system prior to the headworks of the wastewater treatment plant. This would include, but not be limited to, permits for systems with sanitary sewers, or satellite treatment facilities;
  - k. All general permits, or authorizations by rule;
  - l. All permits EPA has requested to review consistent with paragraph 3 below; and,
  - m. Permits for CAFOs that use alternative technology.
2. The EPA waives review of permit modifications which are considered minor modifications.
3. Upon written notice and request, the EPA retains the right, per 40 CFR § 123.43, to review any NPDES draft permit proposed to be issued by the State. The EPA retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time per 40 CFR § 123.24.
4. Any waiver of EPA review shall not be construed to authorize the issuance of a permit by the NDEQ that does not comply with applicable provisions of federal or State statutes, rules, regulations or effluent guidelines.
5. Where the EPA review is not waived, the EPA agrees to review draft permits rather than proposed permits. For purposes of this MOA, a draft permit is a document indicating the NDEQ’s tentative recommendation to issue or deny, amend, revoke, or renew a permit. Such draft permits are subject to public notice. For purposes of this MOA, a proposed permit means an NPDES permit prepared after the close of public notice, a public meeting, or a contested case hearing. If the NDEQ proposes to issue a permit which is substantively different from the draft permit submitted for the EPA review, the NDEQ Director shall transmit the new proposed permit to the EPA. The EPA shall have the right to comment further upon, object to, or make recommendations with respect to the new proposed permit.
6. The NDEQ will notify the EPA of the availability of the draft permit package, concurrent with the beginning of the public notice period using the NDEQ Enterprise Content

Management (ECM) System or its successor for permits for which the EPA has not waived review.

7. The permit package to be submitted to the EPA for review of either draft or proposed permit for which the EPA has not waived review shall include:
  - a. Draft or proposed permit;
  - b. Public notice, as applicable;
  - c. Permit application and all information submitted by the applicant relating to the draft or proposed permit, as applicable;
  - d. Fact sheet or Statement of Basis;
  - e. New Source determination, if applicable, and
  - f. Water quality standards variance request and response, if applicable.
8. The EPA may provide written comments, objections or recommendations to draft permits, in accordance with 40 CFR § 123.44, within thirty (30) days from its receipt of a draft or proposed permit, or the end of the public notice period, whichever is later, unless an interim objection is filed by the EPA (see paragraph 10, below). If, within this thirty (30) day period, a general objection to a draft or proposed permit is made, the EPA will then have ninety (90) days from receipt of the draft permit to submit specific objections. For a general permit, the EPA will have ninety (90) days from its receipt of the draft or proposed permit for its review.
9. Where the EPA has objected to a draft or proposed permit, the EPA will set forth in writing its objection(s), all citations to the CWA, and specific federal regulations that support the objection(s). The EPA shall also include the specific action that the NDEQ must take to satisfy the objection.
10. The EPA shall consider all data transmitted in the permit package and may request all or portions of the information in the NDEQ's files for review if the EPA determines that the information provided by the NDEQ is inadequate to determine whether the proposed permit meets the guidelines and requirements of the CWA. If a request for additional file information is made within thirty (30) days of receipt of the draft or proposed permit package, such request will be considered an interim objection. After receipt by the EPA of the requested material, or a notification that the NDEQ does not have the requested material, or a notification that the NDEQ has no further response to the request for additional information; the full period of time for the EPA's review under 40 CFR § 123.44 and this MOA will recommence.
11. The procedures for the EPA's notice to the NDEQ and the permit applicant of any EPA comment, objection or recommendation regarding a draft or proposed permit, for the NDEQ's response to an EPA objection to a draft or proposed permit, for requesting and conducting a public hearing regarding an objection by the EPA to a draft or proposed permit, and for the EPA action following such public hearing are set forth in 40 CFR § 123.44.
12. Exclusive authority to issue the permit for one permit term shall pass to the EPA if the NDEQ does not resolve the EPA's specific objection within ninety (90) days from receipt of the objection, unless a public hearing is requested within the ninety (90) days and the Regional Administrator determines that a hearing will be held.
13. The NDEQ shall transmit copies of significant comments received during the public comment period and recommendations from states, or federally established Indian Tribes,

whose waters may be affected by the issuance of the permit, and responses to these comments and recommendations to the EPA, limited to permits for which the EPA has not waived review.

14. Each permit proposed to be modified shall be considered a new draft permit and subject to public notice, unless it is a minor modification, as defined in 40 CFR § 122.63.
15. The EPA shall be notified whenever the NDEQ proposes to deny or revoke any permit for which the EPA has not waived review.
16. The NDEQ shall transmit, or otherwise make available to the EPA through the NDEQ ECM System or its successor, copies of every permit for which the EPA has not waived its review, following issuance, along with any and all conditions, requirements or documents which are related to or affect the authorization of the permit to the EPA.
17. If the terms of any permit are affected in any manner by court action or an administrative appeal, the NDEQ shall transmit to the EPA a copy of the amended permit.

#### **D. Public Participation**

The NDEQ shall provide public notice of new permits, renewals, and modifications (except minor modifications as described at 40 CFR § 122.63) and public hearings regarding a draft permit. The public notice shall be sent concurrently to the EPA, the U.S. Fish and Wildlife Services (USFWS), the Advisory Council on Historical Preservation, the State Historical Preservation Office, any affected state or federally established Indian tribe, the U.S. Army Corps of Engineers, any industrial user identified in the permit application of a publicly or privately owned treatment works, the designated 208 planning agencies, and other persons who request notice, or who are otherwise on the NDEQ mailing list, or who NDEQ considers may be affected, for all permits for which such notice has not been waived. The NDEQ shall provide an opportunity for judicial review of the final approval or denial of permits consistent with 40 CFR § 123.30 that is sufficient to provide for, encourage, and assist public participation in the permitting process. The NDEQ will also provide a copy of the draft permit, fact sheet or statement of basis, and the permit application to the EPA, and agencies and individuals listed above, for all permits for which such notice or copies have not been waived.

The public notice for draft permits shall set a deadline in which to file public comments or requests for public meetings or hearings. The public comment period for draft permits shall not be less than thirty (30) days.

### **V. COMPLIANCE EVALUATION AND PERMIT ENFORCEMENT**

#### **A. Background**

As stated earlier, the NDEQ has been authorized by the EPA to administer the NPDES program and retain lead responsibility under the CWA in the State with respect to sources, activities, and facilities within the NDEQ's jurisdiction. The EPA retains responsibility under Section 402 of the CWA for oversight of the NPDES program in Nebraska in order to ensure adherence to federal statutory and regulatory requirements implementing the CWA. This section of the MOA

addresses the portion of the NPDES program that includes compliance evaluation and enforcement at NPDES regulated facilities.

### **B. Compliance Review**

The NDEQ shall conduct timely and substantive reviews and keep complete records of all material relating to the compliance status of entities subject to regulation under the NPDES program, including but not limited to, Compliance Schedule Reports, Discharge Monitoring Reports, Compliance Inspection Reports, and any other reports that entities may be required to submit under the terms and conditions of an NPDES permit, administrative order or judicial enforcement action. The NDEQ shall maintain records of information submitted by the public concerning potential violations by entities subject to regulation and records of the NDEQ's follow-up.

The NDEQ shall operate a system to determine if:

1. The self-monitoring reports required by permits are submitted;
2. The submitted reports are timely, complete and accurate; and
3. The permit conditions or requirements of an applicable administrative or judicial enforcement action are met.

At a minimum, the NDEQ will transmit the required data into the national database for NPDES permittees within thirty (30) days from receipt of the data. The NDEQ will use procedures that ensure data accuracy and that are consistent with the EPA NPDES data management program.

The NDEQ shall initiate appropriate actions, including enforcement, whenever an entity's required performance is not achieved or when reports are not received.

The NDEQ shall electronically submit timely, accurate and complete data to the EPA required by 40 CFR § 123.45.

### **C. Compliance Evaluations**

The NDEQ shall conduct activities to determine the status of compliance with state and federal CWA requirements, including sampling and non-sampling inspections at NPDES regulated facilities consistent with 40 CFR §123.26 and the NDEQ CWA Section 106 program grant.

Inspection procedures will be in accordance with the NDEQ's standard operating procedures and the NDEQ's Enforcement Manual. For purposes of this MOA, the term "compliance inspection" may include, but is not limited to, compliance evaluation inspections, performance audits, compliance sampling inspections, biomonitoring inspections, complaint investigations, and investigations of reported discharges that potentially endanger public health.

The EPA retains the right to perform compliance inspections of any facility defined as a point source including NPDES permitted facilities to determine compliance with the CWA; however, the EPA will generally notify the NDEQ of the inspection to give the NDEQ an opportunity to

participate and will otherwise keep the NDEQ informed of its plans and results. The EPA and the NDEQ may participate in joint compliance inspections as they are needed. The EPA will conduct oversight inspections in order to assess the effectiveness of the NDEQ activities.

Reports on compliance inspections for major permittees shall be available for review by the NDEQ and the EPA, as appropriate. The NDEQ's inspection reports will be submitted to the EPA upon request in accordance with Section VII of this MOA. The NDEQ shall thoroughly review each report to determine what, if any, enforcement action should be initiated, as outlined in Section D, below.

#### **D. Enforcement Response**

The CWA Section 309 authorizes the EPA, or NPDES Program authorized states, to respond to unpermitted discharges, violations of the CWA, and NPDES violations by initiating appropriate enforcement action(s). The EPA and the NDEQ hold concurrent authority to initiate enforcement actions for violations of the CWA consistent with Sections 309 and 401(i) of the CWA. The NDEQ shall have primary responsibility for enforcing the CWA in Nebraska, except for enforcement actions associated with violations from inspections where the EPA was the lead agency or as otherwise agreed to by the NDEQ and the EPA. Nothing in this MOA shall be construed to limit the authority of the EPA to take enforcement action pursuant to Section 309 of the CWA.

1. The NDEQ shall be responsible for taking timely and appropriate action in accordance with 40 CFR §123.27 against persons in violation of NPDES program requirements (illegal discharges, effluent limitations, Pretreatment requirements, compliance schedules, reporting requirements, and other permit conditions) and previous administrative or judicial enforcement actions. If the EPA determines that the NDEQ has not initiated timely and appropriate enforcement action against a violator, the EPA may proceed with any or all of the enforcement options available under Section 309 of the CWA with appropriate notice to and consultation with the NDEQ.
2. The NDEQ will not adopt State policies or guidance that would conflict with the CWA or applicable federal regulations or limit the NDEQ's ability to implement the NPDES program.
3. The NDEQ will develop and maintain written enforcement procedures that establish at a minimum:
  - a. A process for determining the appropriate level of action for specific categories of violation;
  - b. Procedures for preparing and maintaining accurate and complete documentation that can be used in future formal enforcement actions; and
  - c. The timeframes for escalating enforcement responses where the noncompliance has not been resolved.
4. The NDEQ shall be able to demonstrate that its enforcement response procedures result in:
  - a. Appropriate initial and follow-up enforcement actions that are applied in a timely manner;

- b. Formal enforcement actions, when appropriate, that require actions to achieve compliance, specify a timetable, contain consequences for noncompliance that are independently enforceable and that subject the violator to adverse legal consequences for noncompliance;
- c. The assessment of an administrative or judicial penalty, when appropriate (administrative penalties will be developed based upon the authority of the Nebraska Environmental Protection Act, as amended R.R.S. Neb. Sections 81-1501 to 81-1532, and the Livestock Waste Management Act, R.R.S. Sections 54-2416 to 54.2438) and the amount appropriate to the violation, which shall account for economic benefit and gravity of the violation, including the collection of penalties; and
- d. Compilation of complete and accurate records that can be used in future enforcement actions.

## **VI. PRETREATMENT PROGRAM**

### **A. Program Requirements**

The NDEQ shall administer and implement all applicable Pretreatment Regulations as required in 40 CFR Part 403, and any National Pretreatment Standards established by the EPA in accordance with Sections 307(b) and (c) of the CWA. The EPA will provide oversight of the NDEQ Pretreatment Program consistent with Pretreatment regulations and this MOA.

- 1. The NDEQ will serve as:
  - a. The Approval Authority and the Control Authority, as defined by the General Pretreatment Regulations, 40 CFR Part 403.
- 2. The NDEQ has primary responsibility for:
  - a. Enforcement against prohibited discharges;
  - b. Application and enforcement of national categorical Pretreatment standards and local POTW limitations;
  - c. Ensuring development and enforcement of local limits, as necessary;
  - d. Requiring industrial reports from Significant Industrial Users (SIUs);
  - e. Reviewing, approving, and coordinating with the EPA on any requests pursuant to Fundamentally Different Factors as applied to promulgated Categorical Standards. NDEQ shall conform to procedures specified in 40 CFR § 403.13; and
  - f. Reviewing, approving, and coordinating with the EPA on all Net/Gross allowances as detailed at 40 CFR § 403.15. Net/Gross allowances shall be made available to the EPA for review prior to issuance.

### **B. Pretreatment Program Activities**

- 1. The program will be administered in accordance with the program description contained in the State's request for EPA approval to administer the Pretreatment Program as part of the NPDES permit program, or as amended by the NDEQ and approved by the EPA, and in accordance with the NDEQ rules and regulations governing the NDEQ Pretreatment Program.

2. Reporting requirements covering State implementation activities including SIU compliance status information for the Pretreatment Program, will be delineated in the annual work plan.
3. The NDEQ will apply and enforce all applicable Pretreatment regulations as required by 40 CFR Part 403. The EPA will oversee the NDEQ Pretreatment Program operations consistent with 40 CFR Part 403 and this MOA.
4. The NDEQ shall perform inspections, surveillance and monitoring activities which will determine, independent of information provided by each SIU, compliance or noncompliance by the SIU with Pretreatment requirements incorporated into the SIUs Control Mechanism.
5. Requests for Categorical Determination. The NDEQ shall review requests for determinations of whether the industrial user does or does not fall within a particular industrial category or subcategory in accordance with 40 CFR § 403.6(a). The NDEQ will make a written determination for each request stating the reasons for the determination. The NDEQ shall then forward its findings, together with a copy of the request and any necessary supporting information, to the EPA Region 7 Water Wetlands and Pesticides Division Director for concurrence. The EPA Region 7 Water Wetlands and Pesticides Division Director may waive receipt of these determinations as specified in 40 CFR § 403.6(a)(4)(ii). If the EPA Region 7 Water Wetlands and Pesticides Division Director does not modify the NDEQ decision within sixty (60) days after receipt thereof, the NDEQ findings are final. The EPA will send a copy of any final determination or concurrence to the requester and the NDEQ.
6. The NDEQ and the EPA will communicate, through the CWA Section 106 or other appropriate State planning process, commitments and priorities for program implementation including commitments for inspections of industrial users.

### **C. Pretreatment Program Review**

The EPA shall review and comment on any reports submitted by the NDEQ in accordance with requirements of the annual work plans.

### **D. Other Provisions**

Nothing in this MOA is intended to affect any Pretreatment requirement, including any standards or prohibitions established under Nebraska or local law, as long as the NDEQ or local requirements are not less stringent than any requirements set forth in the National Pretreatment Program, or other applicable requirements or prohibitions established under the CWA or federal regulations.

## **VII. TRANSMITTAL OF INFORMATION**

Information obtained or used in the administration of the NDEQ NPDES and Pretreatment Programs shall be available to the EPA upon request without restriction, provided that arrangements have been made between the agencies which ensure that such transmittal will not constitute a waiver of attorney-client or attorney work product privileges as to any other party. The NDEQ and the EPA agree to transmit information in accordance with the schedules listed in Appendix B. The EPA shall furnish to the NDEQ all information in its files to implement its

approved program as specified in 40 CFR § 123.41(b). If information has been submitted to the NDEQ under a claim of confidentiality, the NDEQ must submit that claim to the EPA when providing information. The EPA shall furnish to the NDEQ information submitted to the EPA under a claim of confidentiality, which the NDEQ needs to implement its approved program, subject to the conditions in 40 CFR Part 2 and 40 CFR § 122.7(b), or analogous state law. The NDEQ and the EPA will deny all claims of confidentiality for effluent data, permit applications, permits, and the name and address of any permittee in accordance with 40 CFR § 122.7(b).

## **VIII. NPDES PROGRAM REVIEW**

The NDEQ and the EPA are responsible for assuring that Nebraska's NPDES program is consistent with all requirements of this MOA, the annual work plan, and applicable sections of the CWA and the regulations promulgated thereunder. To fulfill this responsibility, the EPA shall conduct a Program Review to examine in detail the NDEQ files and documentation to ensure implementation of the NPDES and approved Pretreatment Programs.

In the event the EPA determines that elements of the NDEQ's NPDES Program are in any way deficient and/or inconsistent with this MOA, or applicable federal and State regulations and/or statutes, the EPA shall notify the NDEQ of these inconsistencies or other deficiencies. Procedures for review of state programs are set forth in Section 402 (c) of the CWA and 40 CFR Part 123, Subpart D.

## **IX. AMENDMENTS TO BE APPROVED BY EPA**

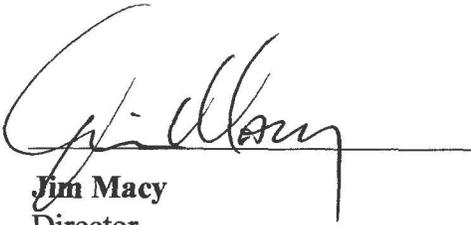
1. The NDEQ will keep the EPA fully informed of any proposed modifications regarding its basic statutory or regulatory authority, its forms, procedures, or policies.
2. If an amendment, revision, or repeal of any statute or regulation shall occur for any reason, including action by the NDEQ, federal legislature or a court, the affected agency shall be notified as soon as possible of such event and a copy of the text of such revision will be transmitted to the designated official of the affected agency.
3. Revision of a state program shall be accomplished in accordance with 40 CFR § 123.62(b).

Prior to the approval by the NDEQ of any test method as an alternative to those specified as required for NPDES permitting, the NDEQ shall obtain the approval from the EPA. The EPA shall review and respond to requests for alternative test methods as soon as possible.

## **X. APPROVAL AND EFFECTIVE DATE OF THE MOA**

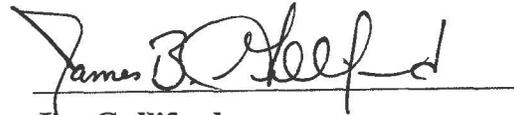
1. This MOA may be modified only by the written consent of both parties; however, either the EPA or the NDEQ may initiate an action to modify this MOA at any time.
2. This MOA shall be reviewed by the EPA and the NDEQ and revised as appropriate.
3. Time frames stated in Appendix B of this MOA may be changed by the written consent of the NDEQ and the EPA.

4. Any revisions or modifications to this MOA must be in writing and must be signed by the NDEQ Director and the EPA Regional Administrator.
5. Nothing in this MOA shall be construed to limit the authority of the EPA pursuant to the applicable sections of the CWA.
6. Nothing in this MOA shall be construed to constitute or create a valid defense for regulated parties in violation of National or State environmental statutes, regulations or permits.
7. This MOA shall become binding when signed by both parties.



**Jim Macy**  
Director  
Nebraska Department of Environmental Quality

Dated: 2-12-19



**Jim Gulliford**  
Regional Administrator  
U.S. EPA, Region 7

Dated: 2/20/19

# **APPENDIX A**

## **AGENCY RESPONSIBILITIES**

**The NDEQ shall:**

1. Process all incoming applications for new, modifications to existing, and reissuance and revocations of NPDES permits, including:
  - a. Non-domestic wastewater discharges, including industrial, federal facilities, commercial, silviculture, CAFOs, and concentrated aquatic animal production activities;
  - b. Domestic wastewater discharges, including POTWs and privately-owned treatment works; and
  - c. Stormwater discharges regulated under NPDES, including municipal separate storm sewer systems and stormwater associated with industrial activities.
2. Evaluate and assess compliance, consistent with 40 CFR §123.26 and the NDEQ CWA Section 106 program grant, with State issued enforceable documents including permits, administrative orders, consent orders, and court orders which deal with NPDES and Pretreatment issues including compliance with effluent limitations, reporting, compliance schedules, and proper operation and maintenance.
3. Maintain an effective enforcement program by taking timely and appropriate actions for NPDES permit violations, unpermitted discharges, and Pretreatment Program violations in accordance with Nebraska statutory and regulatory authority, and consistent with 40 CFR § 123.27, federal NPDES requirements, and the CWA. The NDEQ agrees to review the EPA's national and regional policies and guidance when adopting corresponding or related State policies and guidance and will not adopt State policies or guidance that are inconsistent with the CWA and applicable federal regulations.
4. Maintain adequate file information relating to each NPDES permit. This information will be readily available to the EPA and shall include the following information:
  - a. Permit application;
  - b. Proposed permit and/or current final issued permit, or final order of denial;
  - c. Draft permit submitted for public notice;
  - d. Public notice;
  - e. Written public comments and documentation of oral comments made and their content, and the NDEQ's response to comments;
  - f. Fact sheet or statement of basis, including supporting documentation;
  - g. Inspection reports and compliance information;
  - h. The rationale, if not included in the fact sheet, which details the permit limit calculations and development. The rationale shall include both the technology and the water quality basis for the draft or proposed permit;
  - i. Enforcement related documents for both formal and informal enforcement actions;
  - j. Compliance schedule reports;
  - k. Discharge monitoring reports, including whole effluent toxicity (WET), toxicity reduction evaluation (TRE) and toxicity identification evaluation (TIE) information, and in-stream sampling results where applicable;
  - l. Documents related to the Pretreatment Program, including local limits calculations, Pretreatment inspection reports and periodic compliance reports from SIUs.

- m. For combined sewer overflow (CSO) communities, the long-term control plan (LTCP), any other documentation related to compliance with the CSO provisions of the permit and documentation related to discharges from the CSOs;
  - n. Information regarding any bypass events or sanitary sewer overflows (SSOs);
  - o. CAFO related documents, including nutrient management plans, if required by federal regulations;
  - p. Requests submitted to the NDEQ for hearing, motions for reconsideration and rehearing, and any order issued regarding a permit appeal or challenge; and
  - q. Other information, memoranda, and correspondence pertinent to the NPDES permit.
5. Make available to the public all permit applications, permits, effluent data, inspection reports and other documents pertaining to the NPDES program (except information claimed and/or determined to be confidential in accordance with 40 CFR Part 2, or analogous state law).
  6. Issue and administer general permits, in accordance with 40 CFR § 122.28.
  7. Transmit all required permit, compliance, and enforcement data into a national database as required and in accordance with 40 CFR § 123.26(e)(4).
  8. Submit to the EPA the information described in the CWA Section 106 program grant between the NDEQ and the EPA or other related NDEQ/EPA agreements and submit information specified in applicable portions of 40 CFR Part 123. Additionally, upon request by the EPA, the NDEQ shall submit information and allow access to files for evaluating the NDEQ's administration of the NPDES program.
  9. Provide timely, accurate and complete data to the EPA in compliance with 40CFR 40 CFR § 123.45.
  10. Maintain an approved Continuing Planning Process (CPP) in accordance with 40 CFR § 123.25(b) and § 130.5. A separate document describing how Nebraska water quality standards are implemented must be maintained consistent with 40 CFR § 130.5(b)(6). This document shall be revised, as necessary, with the triennial review of the Nebraska surface water quality standards and as needed between standards revisions.
  11. Assess or sue to recover civil penalties and criminal remedies, as appropriate and in accordance with 40 CFR § 123.27 and the NDEQ Enforcement Manual, to address noncompliance with the NPDES and/or Pretreatment Programs and take whatever steps are necessary to ensure a return to compliance within the shortest time possible.
  12. Ensure new federal NPDES and Pretreatment Program regulations are incorporated into state regulations in accordance with 40 CFR § 123.62 (e), within one year of federal promulgation or within two (2) years if a state statute must first be enacted.
  13. Ensure, to the extent possible, that the EPA is kept fully informed and up-to-date regarding:
    - a. Draft and final policy and program development documents related to the NPDES and Pretreatment programs, including revisions to such documents;
    - b. Draft, proposed and final statutes and regulations related to the NPDES and Pretreatment programs;
    - c. New case law, settlement agreements, and remands of state regulations related to the NPDES and Pretreatment programs;
    - d. Draft, proposed and final technical guidance and policies which pertain to the NPDES and Pretreatment programs; and

- e. Draft and final NPDES and Pretreatment forms and the Enforcement Management System.
- 14. Ensure that any proposed revision to the State NPDES Program is submitted to the EPA for approval pursuant to 40 CFR § 123.62(b).
- 15. Administer the NPDES and Pretreatment Programs in compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, 42 USC § 2000d, *et seq.* Ensure that all public comments regarding such compliance that are received in accordance with Environmental Protection Commission rules will be considered, responded to, and acted upon appropriately.

**The EPA shall:**

1. Ensure that the NDEQ is kept fully informed and up-to-date, to the fullest extent allowable, regarding:
  - a. Draft and final policy and program development documents related to NPDES and Pretreatment;
  - b. Draft, proposed, and final regulations related to NPDES and Pretreatment; and
  - c. Draft, proposed and final technical guidance and policies which pertain to NPDES and Pretreatment.
2. Provide the NDEQ with a timely opportunity for meaningful involvement and input in developing and establishing federal or Regional NPDES and Pretreatment Program policies, rules, strategies, and guidance, as appropriate and practical.
3. Review and comment on draft permits, proposed permits, water quality standards variance requests, Pretreatment Program actions, and any future NPDES or Pretreatment Program modifications in a timely manner in accordance with Sections IV and VI, as applicable, of this MOA.
4. Prepare and publish the NPDES noncompliance report (NNCR) as required by 40 CFR § 123.45.
5. Oversee the NDEQ's administration of the NPDES and Pretreatment Programs for consistency with the CWA, this MOA, any applicable NDEQ/EPA agreements, the CWA Section 106 program grant and all applicable federal regulations. As part of its assessment of the NPDES and Pretreatment Programs, the EPA shall consider permits, reports, and enforcement actions submitted by the NDEQ and may also consider comments from permittees, the public, and federal and local agencies concerning the NDEQ's administration of the NPDES and Pretreatment Programs. The EPA shall promptly transmit to the NDEQ substantial or unresolved comments that the EPA receives from permittees, the public, and federal and local agencies.
6. Provide technical assistance regarding the interpretation of regulations and guidance for the development of draft and proposed permits.
7. Develop annually a Compliance Monitoring Strategy (CMS) in collaboration with the NDEQ that establishes numerical objectives for the NDEQ and the EPA to conduct inspections, audits, and investigations across the various categories of entities subject to NPDES

regulation. The annual CMS should specify the apportionment of the NDEQ and the EPA compliance monitoring resources in accordance with priorities of the two agencies.

8. In accordance with Section V. of this MOA, conduct independent, timely, and appropriate enforcement and compliance monitoring activities within the state of Nebraska.
9. Provide the NDEQ with a list of facilities the EPA proposes to inspect during each fiscal year and seek the NDEQ input on appropriate EPA inspection targets.
10. Provide the NDEQ with copies of all inspection reports and formal enforcement actions.

**APPENDIX B**

**SUMMARY OF TRANSMITTALS**

**Summary of Transmittals from the NDEQ to the EPA**

<b>DESCRIPTION OF TRANSMITTAL</b>	<b>FREQUENCY OF TRANSMITTAL</b>
1. For all permits for which the EPA has not waived automatic right of review, the NDEQ shall notify the designated EPA contact(s) that a copy of the public notice, application, draft permit, or permit modification and the Fact Sheet are available through the NDEQ ECM System, or any successor system.	At time of public notice.
2. For all permits for which the EPA has not waived automatic right of review, a copy of any proposal for decision or settlement agreement in principle that resolves an appeal of said permit.	When such agreement is made, but with adequate time for the EPA to comment before agreement is effective.
3. For all permits for which the EPA has not waived automatic right of review, a copy of any administrative or court decision/actions affecting permit authorization.	Within 15 days of receipt by the NDEQ.
4. A copy of every major facility NPDES permit and modification, draft and final general permit and every draft and final permit that proposes to approve a Pretreatment Program modification.	As issued.
5. For all permits for which the EPA has waived automatic right of review, the NDEQ shall notify the designated EPA contacts that copies of the draft permit, final permit, or other documents related to the permit are available through the NDEQ ECM System.	Within 10 days of request by the EPA.
6. Provide an update or correct NPDES data submissions in EPA's national NPDES data system for events that occurred within that calendar quarter covered by the NNCR as required by 40 CFR § 123.45.	Within 45 days from the end of each quarter.

<b>DESCRIPTION OF TRANSMITTAL</b>	<b>FREQUENCY OF TRANSMITTAL</b>
7. Copies of public notices for Pretreatment removal credits.	Concurrent with the public notice.
8. If NDEQ takes an action on a variance request identified in 40 CFR § 124.62, it shall forward the information specified in 40 CFR § 124.62 for that particular type of variance to the Regional Administrator.	At time of State action on the variance request. (See 40 CFR § 124.62 for the procedures on variances.)
9. Copies of final enforcement orders and judicial actions.	Within 10 days of the effective date.
10. Provide the EPA with all State NPDES and Pretreatment Program policies, rules, forms, strategies and guidance, including but not limited to policies for waste load allocations, mixing zones, permit derivation methods, and the Enforcement Management System. As appropriate and practical, provide the EPA with a timely opportunity for meaningful involvement and input in developing, establishing, and revising all such policies, rules, strategies and guidance.	As developed, revised, and established.
11. Summary report of the compliance status of each Pretreatment SIU	March 1 <sup>st</sup> and September 1 <sup>st</sup> of each calendar year.

**Summary of Transmittals from EPA to NDEQ**

<b>DESCRIPTION OF TRANSMITTAL</b>	<b>FREQUENCY OF TRANSMITTAL</b>
1. Written comments, recommendations, interim objections, and general objections to draft or proposed permits.	Within 30 days from receipt of the draft or proposed permit and 90 days from the receipt of the proposed general permit.
2. Specific written objection(s) to draft or proposed permits, along with CWA and federal regulation citations supporting the objection, and specific actions the NDEQ must take to satisfy the objection(s).	Within 30 days from receipt of the draft or proposed permit, and 90 days from the receipt of the proposed general permit, unless a general objection has been made. If a general objection has been made, the EPA will have 90 days from the receipt of the draft or proposed permit to transmit the specific objection.
3. Written withdrawal of the EPA's objection to a permit, following receipt from the NDEQ of a draft permit and letter specifying all the EPA requirements have been met.	After the EPA review is concluded.
4. Written comments or objections to a Proposal for Decision (PFD) by an administrative law judge.	Within 30 days from receipt of the PFD.
5. Notification that the EPA enforcement actions are finalized/terminated.	Upon occurrence.
6. Copies of the EPA compliance inspection reports for the EPA inspections in the state.	Within 60 days from the date of inspection report completion.
7. Copies of final enforcement orders and judicial actions.	Within 10 days of the effective date.
8. Decisions on requests for the EPA approval of variances that have been forwarded or submitted by the NDEQ.	At the time of decision.
9. Prepare the NNCR as required at 40 CFR § 123.45	Quarterly and Annually

## **Appendix C**

### **NPDES Electronic Reporting Rule Requirements**

The transition from paper-based to electronic reporting will require close coordination and cooperation between the EPA and authorized NPDES programs. Accordingly, the final NPDES Electronic Reporting Rule added new language to the EPA's Memorandum of Agreement regulations (40 CFR 123.24) to ensure that authorized NPDES programs are fully and correctly implementing NPDES electronic reporting and data sharing requirements (see 22 October 2015; 80 FR 64064).

The Memorandum of Agreement between the United States Environmental Protection Agency, Region 7 (hereinafter the EPA) and the NDEQ shall hereby include the NDEQ responsibilities for implementation of the NPDES Electronic Reporting Rule (40 CFR part 127) as follows.

#### Electronic Reporting and Data Sharing Requirements

1. Any information obtained or used in the administration of a NDEQ program shall be available to the EPA upon request without restriction. This includes the timely data transfers in compliance with all requirements of 40 CFR parts 3 and 127 (including all the data elements in appendix A to part 127). If the information has been submitted to the NDEQ under a claim of confidentiality, the NDEQ must submit that claim to the EPA when providing information under this section. Any information obtained from the NDEQ and subject to a claim of confidentiality will be treated in compliance with the regulations in 40 CFR part 2. If the EPA obtains information from the NDEQ which is not claimed to be confidential, the EPA may make that information available to the public without further notice.
2. The NDEQ has the responsibility for the information that they electronically transfer to the EPA. Therefore, the NDEQ will use reasonable quality assurance and quality control procedures to ensure the quality of the NPDES information (see 40 CFR 127.22). These electronic data transfers to the EPA will be timely, accurate, complete, and consistent (see 40 CFR 127.23) and compliant with the EPA's Cross-Media Electronic Reporting Rule (40 CFR 3).
3. The NDEQ will electronically transfer the minimum set of NPDES data to the EPA (see appendix A to part 127) on a timely schedule (i.e., within 40 days of the completed activity or within 40 days of the receipt of a report from an NPDES permittee, facility, or entity). For example, the data regarding a NDEQ inspection of an NPDES-regulated entity that is finalized by the state on October 5th will be electronically transferred to the EPA no later than November 14th of that same year (e.g., 40 days after October 5th). See 40 CFR 127.26(d). The minimum set of NPDES data includes:
  - a. The "Core NPDES Permitting, Compliance, And Enforcement Data [40 CFR parts 122, 123, 403, 503]" as identified as NPDES Data Group 1 in Tables 1 and 2 in appendix A to part 127.
  - b. NPDES information (NPDES Data Groups 2 through 10 in Tables 1 and 2 in Appendix A to part 127) from NPDES permittees, facilities, and entities subject to part 127 [see 40 CFR 127.1(a)] where the NDEQ is the initial recipient [as identified in 40 CFR 127.27, and as defined in 40 CFR 127.2(b)].

This includes NPDES information from NPDES permittees, facilities, and entities that received a waiver from electronic reporting (see 40 CFR 127.15).

Data elements that are required to be submitted electronically to the EPA by the NDEQ are identified in appendix A to 40 CFR 127.

The NDEQ must electronically transfer all NPDES data that supports electronic reporting (e.g., permitting, compliance monitoring, compliance determinations, and enforcement activities) to the EPA's national NPDES data system three months prior to the electronic reporting start dates in Table 1 in §127.16(a) and maintain updates thereafter. These electronic data transfers must be timely, accurate, complete, and consistent (see §127.23). See 40 CFR 127.26(c).

4. The EPA regulations detail the procedure for determining the initial recipient of NPDES program data (see 40 CFR 127.27). The NDEQ will follow this procedure. An authorized NPDES program can elect to be the initial recipient for one or more NPDES Data Groups. In general, the process for identifying the initial recipient is provided below.
  - a. The NDEQ will notify the EPA by 19 April 2016 if it wishes the EPA to be the initial recipient for a particular NPDES data group.
  - b. If the NDEQ initially elects for the EPA to be the initial recipient for one or all of the NPDES data groups, it may at a later date seek the EPA approval to change the initial recipient status for one or all of the NPDES data groups from the EPA to the NDEQ. To make this switch, the NDEQ will send a request to the EPA. This request must identify the specific NPDES data groups for which the NDEQ would like to be the initial recipient of electronic NPDES information, a description of how its data system will be compliant with 40 CFR parts 3 and 127, and the date or dates when the state will be ready to start receiving this information. After the EPA approval of the request, the EPA will update the initial recipient list and will publish the revised initial recipient listing on its Web site and in the Federal Register.
  - c. The NDEQ can initially elect to be the initial recipient for one or all of the NPDES data groups and then at a later date request that the EPA become the initial recipient for one or all of the NPDES data groups. To make this switch, the NDEQ will send a request to the EPA. After coordination with the state, the EPA will update the initial recipient list and will publish the revised initial recipient listing on its Web site and in the Federal Register.

If the NDEQ fails to maintain all the requirements in part 3 and 127 or does not consistently maintain timely data transfers, the EPA will become the initial recipient of electronic NPDES information from NPDES-regulated entities [See 40 CFR 127.27(d)]. After coordination with the NDEQ, the EPA will update the initial recipient list and will publish the revised initial recipient listing on its Web site and in the Federal Register.

5. The NDEQ will update their electronic data system to electronically collect the minimum set of NPDES data and facilitate compliance with 40 CFR 127 (including 40 CFR 127.22 and 127.23) and 40 CFR part 3. The NDEQ's electronic data system

will facilitate electronic reporting from NPDES permittees, facilities, and entities subject to NPDES electronic reporting requirements [see 40 CFR 127.1(a)] in compliance with the start dates in Table 1 in 40 CFR 127.16(a). The NDEQ may elect to use the EPA's national NPDES data system (and related Internet services and applications) for their electronic data system. See 40 CFR 127.26(b).

#### Process for Approving and Issuing Electronic Reporting Waivers

6. Under 40 CFR 127.15, an NPDES permittee, facility, or entity subject to NPDES electronic reporting may seek a temporary or permanent waiver from electronic reporting. Permanent waivers are only available to facilities and entities owned or operated by members of religious communities that choose not to use certain modern technologies (e.g., computers, electricity). The NDEQ will review the temporary or permanent waiver requests that they receive and either approve or reject these requests within 120 days. The NDEQ will provide the permittee, facility, or entity with notice of the approval or rejection of their temporary or permanent waiver request from electronic reporting. The NDEQ will electronically transfer to the EPA the minimum set of NPDES data (as specified in appendix A to 40 CFR 127) that they receive from permittees, facilities, or entities with a waiver from electronic reporting in accordance with 40 CFR 127 (including 40 CFR 127.22 and 127.23) and 40 CFR part 3. The NDEQ will submit an updated waiver approval process to the EPA every five years. The EPA will inform the NDEQ if the waiver approval process is adequate. See 40 CFR 127.26(i).
7. Episodic waivers from electronic reporting may be granted by the NDEQ or the initial recipient to NPDES permittees, facilities, and entities [see §127.15(d)]. The NDEQ or initial recipient granting an episodic waiver must provide notice, individually or through means of mass communication, regarding when such an episodic waiver is available, the facilities and entities that may use the episodic waiver, the likely duration of the episodic waiver, and any other directions regarding how facilities and entities should provide the minimum set of NPDES data (as well as other required information in compliance with statutes, regulations, the NPDES permit, another control mechanism, or an enforcement order) to the NDEQ or the initial recipient. No waiver request from the NPDES permittee, facility or entity is required to obtain an episodic waiver from electronic reporting. The NDEQ or initial recipient granting the episodic waiver will determine whether to allow facilities and entities to delay their electronic submissions for a short time (i.e., no more than 40 days) or to send hardcopy (paper) submissions.

#### NPDES Program and Permitting Requirements for Electronic Reporting

8. The NDEQ will update their NPDES programs to implement 40 CFR part 127. See 40 CFR 123.62(e) and 127.26(e).
9. All NPDES permits issued by the NDEQ will contain conditions requiring compliance with the electronic reporting requirements in 40 CFR part 3, 40 CFR 122.22, and part 127. See 40 CFR 127.26(f).

10. The NDEQ will submit an implementation plan to the EPA for review. The EPA will inform the NDEQ if the implementation plan is adequate. This plan must provide enough details (e.g., tasks, milestones, roles and responsibilities, necessary resources) to clearly describe how the program will successfully implement this part (including a description of their electronic reporting waiver approval process); however, this plan does not include electronic reporting of Discharge Monitoring Reports or Forms Provided or Specified by the Director (DMRs) [40 CFR 122.41(l) (4)]. These implementation plans must be submitted to the EPA by December 21, 2016 for the EPA review. See 40 CFR 127.26(h).