# *NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MEMORANDUM OF AGREEMENT BETWEEN THE COMMONWEALTH OF KENTUCKY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 4*

## Section I. Introduction

This Memorandum of Agreement (hereinafter, MOA) establishes policies, responsibilities and procedures pursuant to 40 Code of Federal Regulations (C.F.R.) Part 123 and sets forth procedures for how the National Pollutant Discharge Elimination System (NPDES) program will be administered by the Commonwealth of Kentucky, Environmental and Public Protection Cabinet (hereinafter, Cabinet, Commonwealth or State) and reviewed by Region 4 of the United States Environmental Protection Agency (hereinafter, EPA or Region 4). All additional agreements between the Commonwealth and EPA are subject to review by the Regional Administrator of the U.S. Environmental Protection Agency, Region 4 (hereinafter, the Regional Administrator), and the Secretary of the Cabinet (hereinafter, the Director). If the Regional Administrator determines that any provision of any agreement does not conform to the requirements of Section 402(b) of the Federal Clean Water Act (hereinafter, the CWA), 33 U.S.C. 1251 et. seq., or to the requirements of 40 C.F.R. Parts 122-125, or other applicable federal regulations, the Regional Administrator shall notify the Director of any proposed revisions or modifications which must be in such agreements.

The Director and the Regional Administrator hereby agree to maintain a high level of cooperation and coordination between the Cabinet and EPA staffs in a partnership to ensure successful and effective administration of the NPDES program. In this partnership, EPA will provide to the Commonwealth technical and other assistance on permit, compliance and enforcement matters when requested, as appropriate and as funding allows.

The Commonwealth will administer an NPDES program in accordance with CWA Section 402, this MOA, Chapter 224 of the Kentucky Revised Statutes (KRS) and Chapter 5 of Title 401 of the Kentucky Administrative Regulations (KAR), and the annual State Section 106 Program Plan (State 106 Workplan). The Cabinet has the primary responsibility to establish the State NPDES program priorities that are consistent with national NPDES goals and objectives. This agreement does not establish an agent relationship between EPA and the State, and no waiver of sovereign immunity is implied or assumed by this agreement.

The strategies and priorities for issuance, compliance monitoring and enforcement of permits, as established in this MOA, may be set forth in more detail in the State 106 Workplan, a Performance Partnership Agreement (PPA), or a State/EPA Enforcement Agreement signed by the Director and the Regional Administrator. This MOA, the State 106 Workplan, the PPA, and any other State/EPA agreement(s) regarding the NPDES program shall not be in conflict.

Either the Director or the Regional Administrator may initiate an action to modify this MOA at any time. However, before this MOA may be modified, any revisions must be in writing and signed by the Director and the Regional Administrator. It is recognized that organizational changes may occur at federal or state levels as programs evolve. The parties agree that should the contact information contained herein require revision as a result of organizational changes, this document shall remain in full force and effect without the need for modification. Rather, it is agreed that should either party make organizational change(s) that affects the contact information contained herein, revisions to the contact information shall be accomplished through written notification to the other party within thirty (30) days after such organizational change occurs.

## Section II. Scope of Authorization

The Director and the Regional Administrator agree that the Commonwealth has been granted authorization to administer the NPDES permitting, compliance, and enforcement programs. The Commonwealth does not exercise jurisdiction over federally-recognized Indian Tribal lands and will not be seeking such authority. Further, the Commonwealth is not currently authorized for a federal biosolids management program as part of the NPDES program.

### Review of New or Revised State Rules, Regulations or Statutes

Either EPA or the State may initiate a revision to the NPDES program. The State and EPA shall keep each other fully informed of any proposed modifications to its statutory or regulatory authority, forms, procedures, or priorities.

1. Revision of the State's program shall be accomplished as follows:

    a. The State shall submit to EPA's Regional Administrator a modified program description, a statement by the Cabinet's Office of Legal Services, Memorandum of Agreement, or any such other documents, as EPA determines to be necessary under the circumstances after consultation with the Commonwealth. EPA will determine if the proposed revision is substantial or non-substantial.

    b. If EPA determines that the proposed revision is substantial, EPA shall issue public notice of the proposed revision and provide an opportunity for the public to comment for a period of at least thirty (30) days. The public notice will also provide an opportunity for the public to request a public hearing.

    c. The Regional Administrator will approve or disapprove program revisions based on the requirements of 40 C.F.R. Part 123 and the CWA. Notice of approval of a substantial change shall be published in the Federal Register. A program revision shall become effective upon the approval of the Regional Administrator.

d. If EPA determines the revision to be non-substantial, notice of approval may be given by letter from the Regional Administrator to the Governor or his/her designee.

e. In order to conform with new or revised promulgation(s) of federal regulations, the State must revise its program within one year of promulgation of the new or revised federal regulations, unless the State must amend or enact a statute to make the required revision or if a State legislative process must be completed, in which case such revision shall take place within two (2) years. [See 40 C.F.R. Part 123.62(e)]

f. The State will provide proposed revisions to EPA in a timely manner in consideration of the date the State needs to have EPA's review completed. After conducting a preliminary review of the State's proposed revision, EPA will provide to the State an estimated schedule for completing its review. The estimated review schedule will depend on the complexity of the proposed revision. EPA will, thereafter, provide the State with quarterly updates, as appropriate, regarding the status of its review.

2. The State must notify EPA whenever it proposes to transfer all or any part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until given approval by the Regional Administrator under 40 C.F.R. Parts 123.62(b) and (c).

3. Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to the State's program, he may request, and the State shall provide, a supplemental statement by the Cabinet's Office of Legal Services, program description, or other documents or information as are necessary.

## Section III. General Provisions

The State program authorized to implement the NPDES program pursuant to the requirements of the CWA is the KPDES permitting program adopted under KRS 224.16-050 of the Kentucky Revised Statutes and implemented by KRS Chapter 224 and Title 401, Chapter 5, of the Kentucky Administrative Regulations.

### A. Commonwealth Responsibilities

In accordance with the priorities and procedures established in this MOA and the State Workplan, the Cabinet will:

1. Create and maintain the legal authority and, to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program, including revisions to State program legal authorities as provided for at 40 C.F.R. Part 123.

2. Ensure, to the extent possible, that EPA is kept fully informed and up-to-date regarding:

   a. Draft and final policy and program development documents related to the State NPDES program;

   b. Draft, proposed, and final statutes, rules and/or regulations related to the State NPDES program;

   c. New case law, settlement agreements, and remands of regulations related to the State NPDES program; and

   d. Draft, proposed, and final technical guidance and policies which pertain to the State NPDES program.

3. Ensure that any proposed revision of the State NPDES Program is submitted to EPA for approval pursuant to 40 C.F.R. § 123.62(b).

4. Process in a timely manner and propose to issue, reissue, modify, terminate, or deny Commonwealth NPDES permits to the following categories of applicants as specified in 40 C.F.R. Parts 122 and 123:

   a. Industrial, federal facilities, commercial, mining and silvicultural dischargers;

   b. Concentrated animal feeding operations and concentrated aquatic animal production facilities;

   c. Domestic wastewater treatment facilities, including publicly owned treatment works and privately owned treatment works; and

   d. Storm water dischargers, including municipal separate storm sewer systems (MS4s), and industrial storm water only dischargers.

5. Comprehensively evaluate and assess compliance with permit conditions (e.g., effluent limits and compliance schedules) and any applicable enforcement action as outlined in Section V of this MOA.

6. Maintain a vigorous program of taking timely and appropriate enforcement actions in accordance with State statutes, the CWA, 40 C.F.R. § 123.27, and as outlined in Section VI of this MOA.

7. Maintain an effective program to carry out the pretreatment responsibilities outlined in Section VII of this MOA.

8. Maintain an adequate public file(s), which must be easily accessible to EPA, for program evaluation for each permittee. Where applicable, such files must include, at a minimum, copies of:

   a. permit application;

   b. currently issued permit;

   c. fact sheet or statement of basis;

   d. draft permit submitted for public notice and comment;

   e. proposed permit when prepared;

   f. timely public comments received orally at a public hearing or in writing;

   g. final permit or final order of denial;

   h. relevant discharge monitoring reports (DMRs), including whole effluent toxicity (WET), toxicity reduction evaluation (TRE), and in-stream sampling requirements;

   i. studies supporting permit limits (e.g., wasteload allocation, total maximum daily load, site specific analysis, and in-stream sampling data);

   j. any relevant inspection reports;

   k. any relevant enforcement actions;

   l. relevant Compliance Schedule Reports;

   m. storm water related documents, including storm water management plans and pollution prevention plans received by the Commonwealth;

   n. requests for hearings, motions for reconsideration and rehearing, and any order issued by the Commonwealth;

   o. all pretreatment related documents, including the permittee's pretreatment program and annual report, as applicable;

   p. concentrated animal feeding operation (CAFO) related documents, including nutrient management plans, if required by federal regulations; and

   q. other pertinent information and correspondence.

9. Submit to EPA the information described in this MOA, the State 106 Workplan and applicable portions of 40 C.F.R. Part 123. Additionally, upon request by EPA, the Cabinet shall submit specific information and allow access to any files necessary for evaluating the Commonwealth's administration of the NPDES program.

10. Ensure that the conditions of the draft permit are written in compliance with the applicable water quality standards of all affected states, and that all affected states are, at a minimum, provided timely notice of such draft permit and any other information requested per 40 C.F.R. § 122.44(d)(4).

**B. EPA Responsibilities**

1. EPA will commit, to the maximum extent possible, funding to the Commonwealth to support the Commonwealth's responsibilities under the NPDES program.

2. Where no effective effluent guidelines or standards exist for a discharge, EPA is responsible for transmitting to the Commonwealth technical information to assist in writing permit terms and conditions (e.g., contractor reports, draft development documents, and available permits and effluent data from similar facilities). Such information, if available, will be provided within thirty (30) calendar days of a request by the Commonwealth.

3. As outlined in Sections V, VI, and IX of this MOA, EPA will oversee the Cabinet's administration of the NPDES program on a continuing basis for consistency with the CWA, State law or rules, this MOA, the State 106 Workplan, and all applicable federal regulations. In addition, EPA may consider as a part of its assessment, comments from dischargers, the public, and federal and local agencies concerning the Commonwealth administration of its NPDES program. Any such comments considered by EPA will be brought to the attention of the Commonwealth by written correspondence, if the commenting party has not previously communicated with the Commonwealth. Any information obtained or used by the Commonwealth under the NPDES program shall be available to EPA, upon request, without restriction due to claims of confidentiality. If the information has been submitted to the Commonwealth under a claim of confidentiality, the Commonwealth shall inform EPA of that claim. Information claimed confidential which is used to develop permit conditions will be treated in accordance with 40 C.F.R. Part 2, Subpart B and 40 C.F.R. § 122.7.

4. Contingent on available EPA resources, EPA agrees to provide formal training courses in permit writing, compliance inspections, and enforcement.

5. EPA will provide assistance in obtaining retrievals or entering information into the Integrated Compliance Information System for the Clean Water Act National Pollutant Discharge Elimination System (ICIS-NPDES), either of which is

currently being used, hereafter, ICIS, (the successor database to the Permit Compliance System (PCS)). After initial ICIS-NPDES training by EPA Headquarters, additional support will be provided to the Commonwealth upon request and as resources allow. Changes in ICIS-NPDES procedures will be provided to the Commonwealth thirty (30) calendar days in advance of such change, if possible.

**C.** Nothing in this MOA shall be construed to limit EPA's authority to take action under Sections 308, 309, 311, 402, 504, or any other sections of the CWA.

**D.** Nothing in this MOA shall be construed to constitute or create any rights or valid defenses to regulated parties in violation of any environmental statute, regulations, or permit, including, without limitation, any defense to an enforcement action taken by the Commonwealth or EPA.

## Section IV. Permit Review and Issuance

The Commonwealth is responsible for drafting, providing public notice, issuing, modifying, reissuing, denying, and terminating permits in accordance with Sections III and IV of this MOA, 40 C.F.R. Parts 122-123, and any other applicable regulations.

### A. Receipt of New Permit Applications by the Commonwealth

Upon receipt of a completed permit application or notice of intent for coverage under an NPDES general permit, the Commonwealth will enter all required information directly into ICIS-NPDES or transfer this information electronically from the Cabinet's data management system to ICIS-NPDES, consistent with the schedule and commitments in the current MOA.

### B. EPA Review of Draft and Proposed Permits, Permit Modifications, and Permit Revocations and Reissuances

1. EPA's initial review will be of draft permits rather than proposed permits. For purposes of this document, a "draft permit" is the permit prepared for public notice and comment indicating the Cabinet's tentative decision to issue, deny, modify, revoke and reissue, terminate or reissue a permit. A "proposed permit" is the permit as prepared following the close of the public notice and comment period and sent to EPA prior to issuance as a final permit by the Cabinet. A proposed permit need not be prepared by the Cabinet and transmitted to EPA for review unless necessary under Paragraph B.6 below.

2. EPA will review all draft State NPDES program permits, permit modifications and revocations and reissuances for those discharges identified in Paragraph C.1.a-k below. No later than the date the draft permit is available for public notice, the Cabinet will send to the Region 4, Chief, NPDES and Biosolids Permits Section, one (1) copy of the public notice, the draft permit, the application, the fact sheet or statement of basis associated with the draft permit, and notices of public hearings. When applicable, the submittal must be

accompanied by a new source/new discharger determination and, if necessary, an antidegradation review for new or expanded discharges.

3. Except as set out in Subparagraph B.4. below, within thirty (30) calendar days of the date a copy of a draft permit and attachments is received by the Region 4, Chief, NPDES and Biosolids Permits Section, EPA may provide to the Cabinet written comments on, recommendations with respect to, or objections to the issuance of the draft permit. If EPA does not provide any of the above during this timeframe, the Cabinet may proceed under Paragraph B.6 below. A written objection by EPA during this initial thirty (30)-day period need only set forth the general nature of the objection(s). If a general objection is provided within this thirty (30)-day period, EPA shall have the remainder of the ninety (90) days from the date EPA received the draft permit to supply written specific grounds for objection. Notwithstanding the foregoing, EPA may extend its review time on a particular permit to the full ninety (90) days, without providing a written general objection in the initial thirty (30)-day period, by so notifying the Cabinet in writing. A copy of all written comments, recommendations or objections provided to the Cabinet will also be sent by EPA to the permit applicant.

4. If the initial permit information supplied by the Commonwealth under Paragraph B.2 above is inadequate to determine whether the draft permit meets CWA guidelines, regulations, and requirements, EPA may request the Commonwealth to transmit to EPA the complete record of the permit proceedings before the State, or any portions of the record that EPA determines are necessary for review. If this request is made within thirty (30) calendar days of receipt of the State submittal under Paragraph B.2 above, it will constitute an "interim objection" under 40 C.F.R. § 123.44(d)(2) and the full period for EPA review specified in this MOA shall recommence when the requested information is received by EPA.

5. All EPA comments and objections must be considered by the Cabinet along with any other public comments received on the draft permit. If EPA does not respond within thirty (30) calendar days of its receipt of the draft permit (or in the case of general permits, ninety (90) calendar days) or exercise its right to the full ninety (90) day review period, the Cabinet may take this absence of a response as concurrence with the draft permit and the Cabinet need not prepare a proposed permit and transmit it to EPA for review, except as provided in Paragraph B.6 below.

6. Following expiration of the period for public comment, a proposed permit will be drafted. The Cabinet may assume EPA has waived its review of the proposed permit and may issue the final permit without further review by EPA, unless

   a. the Cabinet proposes to issue a permit which significantly differs from the draft permit as reviewed by EPA;

   b. EPA has provided objections to the draft permit;

c. significant comments objecting to the tentative determination and draft permit have been presented at hearing or in writing pursuant to the public notice; or

d. there were significant issues raised by a state which may be affected by the discharge.

In such a case, the Cabinet will not issue the permit and will send to Region 4, Chief, NPDES and Biosolids Permits Section, a copy of the proposed permit for review in accordance with 40 C.F.R. § 123.44. Along with the copy of the proposed permit, the Cabinet also will transmit: comments and recommendations of any affected state; the Cabinet's response to any such comments or recommendations; significant written comments submitted pursuant to the public notice of the draft permit; a summary of any significant comments presented at any hearing on the draft permit; and the response to comments prepared under 40 C.F.R. § 124.17 and 401 KAR 5:075. EPA will, within fifteen (15) business days of the date the proposed permit and accompanying material were received, notify the Cabinet and the permit applicant of any general objections EPA has to the proposed permit or that it is extending the EPA review time on the proposed permit to the full ninety (90) calendar days to provide specific objections. If EPA does not, within this initial fifteen (15) day period, either notify the Cabinet that it has objections to the permit or that it is extending the EPA review time to ninety (90) days, then the Cabinet may issue the proposed permit as final.

7. Pursuant to 40 C.F.R. §§ 123.44(a) and (b), in the event EPA files a "general objection" to a "draft" or "proposed" permit, EPA shall have ninety (90) calendar days from the date the draft or proposed permit was received by EPA to supply the specific grounds for the objection. The specific grounds for the objection shall include the reasons for the objection, including the sections of the CWA or regulations which support the objection, and the actions that must be taken to eliminate the objection, including, if appropriate, the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator. The EPA objection must be based upon one or more of the criteria identified in 40 C.F.R. § 123.44(c). If the Cabinet fails to either request a hearing on the EPA objection or resubmit a permit revised to meet any specific objection on a proposed permit within ninety (90) calendar days of receipt of the objection, exclusive authority to issue the permit passes to EPA for one permit term. Any requests for a hearing on the objection and the procedure for resolving any objection shall be governed by 40 C.F.R. § 123.44.

8. Upon issuance of any NPDES permit for major dischargers, MS4s, CAFOs, general permits, for a discharger within any of the industrial categories listed in Appendix A to 40 C.F.R. Part 122, or for any other discharger listed in Section C.1.a-k below, the Cabinet will send to Region 4, Chief, NPDES and Biosolids Permits Section, one copy of the issued permit and associated documentation. All other final permits shall be available to EPA as requested.

9. If the final determination is to deny any permit listed in Paragraph B.8 above, a copy of the notice of the intent to deny shall be given to the Region 4, Chief, NPDES and Biosolids Permits Section, and to the applicant in accordance with applicable Commonwealth statutes and regulations and NPDES regulations.

10. In the case of general permits, EPA shall have ninety (90) calendar days from the date of receipt of the draft general permit to comment on, make recommendations with respect to, or provide written specific grounds for an objection to the general permit.

11. EPA may request to review any applicant's notice of intent (NOI) to be covered under a general permit, subject to the Cabinet's authority under 401 KAR 5:055. EPA will, within ten (10) business days after receipt of the NOI, notify the Cabinet in writing of any formal objection, and the reason(s) for such objection, to the applicant's suitability for coverage under the general permit.

12. The lowest levels at which EPA correspondence under this Section shall be signed and received are as follows:

    a. comments or recommendations letters shall be signed by the EPA NPDES State Coordinator and transmitted to the State's NPDES Permitting Program Manager;

    b. letters extending EPA's review time to the full ninety (90) days shall be signed by the EPA NPDES Permits Branch Chief and transmitted to the Director; and,

    c. all objection letters shall be signed by the EPA Water Management Division Director and transmitted to the Director.

## C. Waiver of Permit Review by EPA

1. Except as hereafter expressly provided, EPA waives the right to comment on or object to the sufficiency of permit applications, draft permits, proposed final permits, and finally adopted permits for any existing discharges or proposed discharges with the EXCEPTION of the following:

    a. discharges which may affect the waters of another state and Indian Lands,;

    b. discharges proposed to be regulated by general permits, including storm water and CAFO dischargers (see 40 C.F.R. § 122.28); applicable only to review of draft, proposed, and final permits (not applicable to notices of intent [NOIs]);

    c. discharges from publicly owned treatment works (POTWs) with a daily average permitted discharge of at least 1.0 million gallons per day (MGD);

d. discharges from any major discharger or a discharger within any of the twenty-one (21) industrial categories listed in Appendix A to 40 C.F.R. Part 122 for which the permit covers a wastewater source subject to a promulgated effluent guideline;

e. discharges of process wastewater with an average discharge exceeding 0.5 MGD;

f. discharges from POTWs required to have a pretreatment program (40 C.F.R. Part 403);

g. discharges from CAFOs, not including NOIs;

h. discharges from MS4s, not including NOIs;

i. discharges of uncontaminated cooling water with a daily average discharge exceeding 500 MGD;

j. discharges proposed to be regulated in identified regional and/or national priorities; e.g., watersheds; a list of permits will be provided to the State only if the discharge type is not otherwise listed in Section IV.C of this MOA; and

k. discharges from any discharger for which the permit incorporates pollutant trading. Pollutant trading shall be developed within the framework of EPA's 2003 Water Quality Trading Policy, or any subsequently revised national policy. Pollutant trading does not include reallocation of existing loads.

2. EPA also waives the right to review the following:

a. a modification of any permit for which the right to review the original permit was waived by EPA (unless the modification would put the permit in one of the categories in Section IV.C.1.); or

b. a modification of any permit which qualifies as a minor modification under 40 C.F.R. § 122.63.

3. EPA reserves the right to terminate the waivers in Paragraphs C.1 and 2 above, in whole or in part, at any time prior to a permit becoming final. Any such termination and the reasons therefore shall be sent in writing to the Cabinet.

4. The foregoing waivers shall not be construed to authorize the issuance of permits which do not comply with applicable provisions of federal or State laws, rules, regulations, or effluent guidelines, nor to relinquish the right of EPA to petition the

Cabinet for review of any action or inaction because of violation of federal or State laws, rules, regulations, or effluent guidelines.

**D. Public Participation**

1. The Cabinet shall give public notice in accordance with 40 C.F.R. Sections 124.10 (c), (d) and (e) whenever a draft permit has been prepared under 40 C.F.R. Section 124.6(d) or a hearing has been scheduled pursuant to 40 C.F.R. Section 124.12.

2. Public notice of the preparation of a draft permit shall allow at least thirty (30) days for public comment, and public notice of a public hearing, if one is determined to be appropriate, shall be given at least thirty (30) days before the hearing.

3. Draft permits, public notices, applications and fact sheets or statements of basis will be made available to any party upon request and upon payment of any applicable State duplicating fees.

4. Unless otherwise waived by the specific organization, in addition to the general public notice described in 40 C.F.R. Section 124.10(d)(1), the will provide to the following organizations, a copy of the fact sheet or any comparable rationale, permit application (if any) and draft permits (if any) associated with the notice:

   a. U.S. Army Corps of Engineers;

   b. U.S. Fish and Wildlife Service (the Service);

   c. Other appropriate state and federal agencies;

   d. Adjacent states and Indian Tribes (only for permits which affect them);

   e. Major Commands of the Department of Defense (DOD) (only for DOD permits); and

   f. The State Historical Preservation Officer (SHPO).

5. All NPDES major permits and general permits shall be publicly noticed in a manner constituting legal notice to the public under State law, in accordance with 40 C.F.R. § 124.10(c)(3).

6. The Cabinet shall provide an opportunity for judicial review in State court of the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process in accordance with 40 C.F.R. § 123.30.

## E. State and Federal Agency Coordination: Endangered Species Act

EPA and the Commonwealth agree to the following process to address issues involving federally-listed species and designated critical habitats, relative to issuance of NPDES permits.

1. The Cabinet will provide notice and copies of draft permits to the U.S. Fish and Wildlife Service (the Service), unless otherwise waived in accordance with

   Section D.4. The Cabinet understands that it may receive information from the Service on federally-listed species and designated critical habitats in the Commonwealth, with special emphasis on aquatic or aquatically-dependent species. Also, EPA will share with Cabinet information on permits that may raise issues regarding impacts to federally-listed species or designated critical habitats.

2. The Cabinet will consider issues raised by the EPA or the Service regarding federally-listed species or designated critical habitats. If EPA has concerns that an NPDES permit is likely to have more than a minor detrimental effect on federally-listed species or designated critical habitat, EPA will contact the Cabinet to discuss identified concerns.

3. If the Cabinet is unable to resolve issues raised by the Service involving detrimental effects of an NPDES permit on federally-listed species or designated critical habitat, and if the Service have contacted EPA, EPA intends to work with the Cabinet to remove or reduce the detrimental effect. EPA will coordinate with the Cabinet and the Service to ensure that the permit will comply with all applicable water quality standards, which include narrative criteria prohibiting toxic discharges, and will discuss appropriate measures protective of federally-listed species and designated critical habitat.

4. EPA will provide the Service with copies of any comments it provides to the Cabinet on issues related to federally-listed species or designated critical habitat.

5. The Cabinet will comply with applicable federal laws in accordance with 40 C.F.R. §124.59.

## F. Issuance of Permits or Notice of Intent to Deny for all Permit Categories in Section C.1.a-k.

1. If the final determination is to issue the permit, the final permit will be forwarded to the permit applicant, along with a transmittal letter notifying the applicant that the permit is being issued. Copies of all issued permits, identified in Section C.1.a.-k., will be forwarded to EPA.

2. If the final determination is to deny the permit, notice of intent to deny shall be given to the Region 4, Chief, NPDES and Biosolids Permits Section, and to the applicant in

accordance with applicable Commonwealth statutes and regulations and NPDES regulations.

## G. Suspension or Revocation of Permits for all Permit Categories in Section C.1.a-k.

When the Cabinet makes a determination to suspend or revoke a permit, in whole or in part, EPA will be notified.

## H. Major Discharger List

There shall be included as part of the State 106 Workplan a list of what constitutes a major discharger. Currently, the State 106 Workplan includes an industrial major discharger list and a municipal major discharger list. The industrial major discharger list shall include those facilities and Phase 1 MS4[1] dischargers, mutually defined by the Cabinet and EPA as major dischargers based on a point rating worksheet or applicable definitions plus any additional industrial dischargers whose discharges, in the opinion of the Cabinet or EPA, have a high potential for violation of water quality standards. The municipal major discharger list shall include those facilities mutually defined by the Cabinet and EPA as major municipal discharges based on a design domestic treatment plant flow of at least 1.0 MGD, case-by-case exclusions due to actual discharge flows to surface waters may be considered.

[1] Phase 1 MS4s are defined by the lists in 40 C.F.R. Part 122.26 Appendices F, G, H and I.

## I. Administrative or Court Action

If the terms of any permit, including any permit for which review has been waived by EPA, are affected in any manner by an administrative or court action, the Cabinet shall timely transmit a copy of the permit, with changes identified to the EPA and shall allow thirty (30) calendar days for EPA to review, comment on, or make written objections to the changed permit pursuant to CWA Section 402(d).

## J. Technology-Based Variances

The Cabinet will conduct an initial review of all requests for Fundamentally Different Factors (FDF) variances, for variances under CWA Sections 301(c), (g), and (k), and 316(a), and for modifications to federal effluent limitations established under CWA Section 302, i.e., technology-based variances, and shall either approve or deny such requests. As needed, EPA will provide technical assistance to the Cabinet to evaluate the variance request.

1. If the Cabinet denies a request for a technology-based variance under CWA Sections 301c or (g), Section 302, or for FDFs, such determination shall be forwarded to the applicant and EPA.

2. If the Cabinet approves a technology-based variance (approval), the request, all accompanying documentation, and the Cabinet's approval shall be sent to EPA. EPA will provide quarterly updates regarding the status of its review of each submitted request to the Cabinet, until a final decision is made.

3. If EPA denies the Cabinet's approval, EPA will notify the Cabinet, who will notify the applicant. No technology-based variance may be included in an NPDES permit unless the Cabinet's approval has been signed-off by EPA. If EPA concurs with the Cabinet's decision, EPA will notify the Cabinet, who will prepare a draft permit factoring in the approval.

4. The Cabinet may continue processing the permit application while awaiting EPA's review and decision on the variance request. If the Cabinet proposes to issue the permit prior to EPA's decision, the permit must be drafted with the technology-based limits from which the applicant has requested a variance. If EPA approves the variance, the permit may be modified to incorporate the variance.

5. Approval by the Cabinet and by EPA for a given technology-based variance is only valid for the current permit term. Upon permit renewal, the technology-based variance must be reapplied for and reviewed once again by both the Cabinet and by EPA.

## K. Variances or Other Changes to Water Quality Standards Specific to a Permit

The Cabinet will conduct an initial review of all requests for variances or other changes to water quality standards specific to a permit, allowed under CWA Section 303(c) and 40 C.F.R. Part 131, and either deny the request or adopt the variance. Examples of other changes to water quality standards include site-specific criteria, criteria changed based on recalculation procedures, and criteria changed based on a combination of recalculation procedures and Water-Effects Ratios (WERs). Examples that are not changes to water quality standards include mixing zones and WERs that are not in combination with a recalculation procedure. As needed, EPA will provide technical assistance to the Cabinet to evaluate the variance request.

1. If the Cabinet denies a request for a variance or other changes to water quality standards specific to a permit, such determination shall be forwarded to the applicant and EPA.

2. If the Cabinet adopts a variance or other change to water quality standards specific to a permit (adoption), the request, all accompanying documentation, and the Cabinet's adoption (i.e., the revised standard) shall be sent to the EPA's Standards, Monitoring, and TMDL Branch for review. (See 40 C.F.R. Sections 131.6 and 131.20(c) for the requirements for this submittal) The CWA requires that EPA approve changes to water quality standards within sixty (60) days and disapprove them within ninety (90) days. EPA will provide quarterly updates regarding the status of its review of the adoption to the Cabinet, until a final decision is made.

3. If EPA disapproves the adoption, EPA will notify the Cabinet, who will notify the applicant. If EPA approves the adoption, EPA will notify the Cabinet, who will prepare a draft permit factoring in the adoption. No effluent limitations based on a variance or other change to water quality standards may be included in an NPDES permit unless the variance or other change to standards has been approved by EPA. One exception to this is the case where the revised standard results in a more stringent criterion and effluent limitation than the previously applicable water quality standard.

4. The Cabinet may continue processing the permit application while awaiting EPA's review and decision on the revised standard. If the Cabinet proposes to issue the permit prior to EPA's decision, the permit must be drafted with the effluent limits necessary to achieve the existing water quality standard(s) from which the applicant has requested a variance. If EPA approves the revised standard, the permit may be modified to incorporate that standard. Any variance from water quality standards specific to a permit must be re-evaluated by the Cabinet at each triennial review of water quality standards. [See 40 C.F.R. Section 131.20(a).]

## Section V. Compliance Monitoring and Evaluation Program

The Commonwealth agrees to maintain an effective compliance monitoring and evaluation program. For purposes of this MOA, the term "compliance monitoring and evaluation" shall refer to all efforts to assess whether all dischargers are in full compliance with laws and regulations constituting the Commonwealth's NPDES program, including any permit condition or limitation, any compliance schedule, any pretreatment standard or requirement, or any previous administrative or judicial enforcement action. Discharges endangering public health shall receive immediate and paramount attention. The Commonwealth will operate a timely and effective compliance monitoring system to monitor and track compliance by dischargers with their permit conditions (e.g., effluent limits and compliance schedules) and any applicable enforcement action. The Commonwealth will directly enter or upload the compliance monitoring and evaluation data on a schedule as required in the State 106 Workplan into ICIS-NPDES. Compliance monitoring shall focus on major dischargers and those other dischargers or types of dischargers identified in the State 106 Workplan in accordance with the priorities and time frames for compliance tracking as established in this MOA and as further delineated in the State 106 Workplan. All compliance monitoring and evaluation activities shall be undertaken in such a manner that, if the situation requires, will lead to timely, appropriate and effective enforcement actions as outlined in Section VI. As indicated in Section III.A. of this MOA, the Commonwealth shall maintain complete records of all material relating to the compliance status of dischargers within the Commonwealth, including Compliance Schedule Reports, DMRs, Compliance Inspection Reports, any other reports that permittees may be required to submit under the terms and conditions of a Commonwealth permit or an approved pretreatment program (when applicable), and documents related to any administrative or judicial enforcement action.

### A. Schedule Dates

The Commonwealth will track the submission of all documents required pursuant to permit conditions or schedules, or any applicable administrative or judicial enforcement actions. In order to determine a discharger's compliance status, the Commonwealth will conduct a timely and substantive review of all such submitted documents and consider enforcement action in the event a required document is not timely submitted or is otherwise inadequate.

## B. Review of Self-Monitoring Information and Other Compliance Reports

1. For all major dischargers and those other dischargers or types of dischargers identified in the State 106 Workplan, the Commonwealth update ICIS-NPDES in accordance with sub-paragraph B.3 below with the information necessary to determine if:

   a. any required self-monitoring reports (including DMRs or other reports required to be submitted pursuant to a permit or an applicable administrative or judicial enforcement action) are submitted on time;

   b. the submitted reports are complete; and

   c. the permit conditions (e.g., effluent limits and compliance schedules) or requirements of an applicable administrative or judicial enforcement action are met.

2. The Commonwealth will conduct a timely and substantive review of all such reports received and all independently gathered information to evaluate the discharger's compliance status. This evaluation will be uniform and consistent with the Enforcement Management System (EMS) as referenced in Section V.E.

3. The Commonwealth will ensure that monitoring and evaluation data are entered directly into ICIS-NPDES or into a data management system which is uploaded into ICIS-NPDES. Data entry and accuracy rates will be as established in the State 106 Workplan.

4. DMR forms or electronic versions thereof, for any monitoring data required by an NPDES permit (or the NPDES portion of a Commonwealth permit), shall be consistent with the requirements of 40 C.F.R. § 122.2.

5. Pursuant to 40 C.F.R. § 122.2, EPA may object in writing to deficiencies in reporting forms used by permittees or the Commonwealth. The Commonwealth will ensure that deficiencies identified by EPA are adequately addressed.

6. For all major dischargers subject to regulation under Section 402 of the CWA, the Commonwealth will submit, on a quarterly basis, an automated Quarterly Noncompliance Report (QNCR) with appropriate annotations for all instances of non-compliance as set forth in 40 C.F.R. § 123.45. The QNCR shall include the information set forth in 40 C.F.R. § 123.45 including:

a. Facility name, location, and permit number;

b. Description and date history of each noncompliance;

c. Description of and dates of actions by the Commonwealth to obtain compliance;

d. Current compliance status (including date of resolution or return to compliance if it has occurred); and

e. Mitigating circumstances.

The Commonwealth agrees to utilize ICIS-NPDES to produce the automated QNCR with hand-written annotations, if necessary. EPA agrees to provide assistance in generating these automated. Per 40 C.F.R. § 123.45(d), the Commonwealth shall submit the QNCR on November 30th, February 28th, May 31st, and August 31st of each year. Dates are dependent upon ICIS-NPDES.

7. On a quarterly basis, EPA will generate for the Commonwealth's review a list (e.g., the Watch List) of facilities which appear to be in non-compliance based on certain EPA selection criteria. The Commonwealth will confer with EPA concerning data correction, if applicable, and/or the appropriate enforcement response for these facilities. The Commonwealth will advise EPA if the Commonwealth has already initiated enforcement.

8. EPA will from time to time review ICIS-NPDES data against source documents (DMRs, inspection records, enforcement actions, etc.) to verify the accuracy of the ICIS-NPDES data and the QNCRs.

9. In accordance with 40 C.F.R. § 123.26(b)(4), the Commonwealth shall maintain procedures for receiving and ensuring proper consideration of information about alleged violations submitted by the public.

10. 40 C.F.R. § 123.45(b) requires the submission of a Semi-Annual Statistical Summary Report (SSSR) containing information concerning the number of major dischargers with two (2) or more violations of the same monthly average limitation within a six (6) month period. EPA will generate the SSSR from ICIS-NPDES bi-annually for the periods ending June 30th and December 31st and provide the draft to the Commonwealth on August 31st and February 28th, respectively, for review and submission.

11. 40 C.F.R. § 123.45(c) requires the submission of an Annual Non-compliance Report (ANCR) containing information concerning the number of non-major discharges in non-compliance. EPA will generate the ANCR annually from ICIS-NPDES and provide the draft to the Commonwealth by the last day of February for review and submission.

12. EPA shall provide the Commonwealth notification of citizen complaints through a phone call, email message, or copy of the written complaint.

## C. Facility Inspections

1. Types
The different types of compliance inspections are described in the Foreword of the latest edition of EPA's *NPDES Compliance Inspection Manual.* The manual may be found at EPA's website.

2. General Procedures
In accordance with the requirements contained in 40 C.F.R. § 123.26, the Commonwealth shall maintain and implement an inspection and surveillance program to determine the compliance status of dischargers independent of information supplied by dischargers. The Commonwealth and EPA will develop, as part of the State 106 Workplan, an inspection plan of individual major dischargers proposed to be the subject of compliance audits and inspections and a projection of the number of minor dischargers to be inspected for the coming year (October through September). The inspection plan is a living document and may be amended at any time dependent on priorities of and in consultation with EPA and the Commonwealth.
Unless otherwise agreed to by EPA in writing, the Commonwealth shall conduct compliance inspections as provided for in the State 106 Workplan. The Commonwealth will give EPA adequate notice and opportunity to participate with the Commonwealth in its inspection activities. EPA or the Commonwealth may determine that additional inspections are necessary to assess compliance. If EPA makes a determination that additional inspections are necessary or appropriate, EPA shall notify the Commonwealth of such determination and may perform the inspections alone or jointly with the Commonwealth or may request that the Commonwealth conduct those inspections. EPA will keep the Commonwealth fully informed of its plans and the results of any inspections. Pursuant to 40 C.F.R. §123.24(b)(4)(i), EPA will normally provide the Commonwealth at least seven (7) calendar days notice before a joint or independent inspection is conducted.

3. Reporting Schedule
The Commonwealth will ensure data entry of necessary inspection information, including violations detected which will cause the facility to be in Significant Non-Compliance (SNC), into ICIS-NPDES in accordance with and on a schedule established in the State 106 Workplan. All inspection reports will be thoroughly reviewed by the Commonwealth to determine what, if any, enforcement action (as outlined in Section VI of this MOA) shall be initiated. The Commonwealth will forward copies of inspection reports to EPA upon request. Where an audit or inspection is conducted solely by EPA, a copy of the audit or inspection report will be forwarded to the Commonwealth within sixty (60) calendar days after the inspection or at the time it is transmitted to the audited or inspected facility.

4. Biomonitoring Inspections

Except as otherwise set forth in the State 106 Workplan, the Commonwealth shall have the ability to conduct biomonitoring inspections, have them conducted through designated contractors, or have an equivalent program to independently verify a discharger's compliance with the WET requirements of its permit.

## D. Miscellaneous Compliance Activities

1. Information Requests
   Whenever EPA or the Commonwealth requests information from the other concerning a specific discharger and the requested information is not available from the files, that information will be researched and, if possible, provided to the requesting agency within a reasonable time.

2. Laboratory Quality Assurance
   The Commonwealth will plan, initiate, and maintain a program as provided in the State 106 Workplan to ensure that laboratories doing work for the Commonwealth permitted dischargers follow approved quality assurance protocols.

3. Emergency Pollution Incidents
   EPA and the Commonwealth shall immediately notify each other by telephone or through a mutually agreed upon emergency response protocol upon receipt by EPA or the Commonwealth of any information concerning a situation which in its opinion poses an actual or threatened pollution incident that may result in endangerment to human health or the environment. The Commonwealth shall also ensure that all potentially affected downstream drinking water intake facilities are notified of the situation (including notification across state lines when applicable) so that they can take appropriate actions to minimize risk to the public. The Commonwealth shall be notified at (800) 928-2380. These numbers are staffed by the Kentucky Environmental Response Team and Division of Emergency Management. The EPA shall be notified by telephone at (404) 562-8700 (Region 4 Emergency Response Section/Waste Management Division) or (800) 424-8802 (National Response Center, Washington, DC).

## E. Enforcement Management System (EMS)

Within one-hundred and twenty (120) calendar days of the execution of this MOA or as otherwise established in the State 106 Workplan, the Commonwealth shall submit to EPA for review and comment a current EMS, which is otherwise known by the Commonwealth as EMS. The EMS is a document outlining procedures, policies, etc., to be used by the Commonwealth in conducting official business (e.g., inspections, enforcement actions, assessment of penalties, etc.). Such procedures and policies with respect to enforcement shall be consistent with EPA's "Enforcement Response Guide" for the NPDES program and shall include application of technical review criteria for screening the significance of violations, procedures and time frames for selecting appropriate initial and follow-up response options to identified violations, and procedures for maintaining a chronological summary of all violations. The Commonwealth shall implement the EMS. The

Commonwealth agrees to submit any changes to the EMS to the EPA Region 4, Water Programs Enforcement Branch for review and comment.

## Section VI. Enforcement

### A. Timely and Appropriate Enforcement Responsibility

1. The Commonwealth is responsible for commencing and completing timely and appropriate enforcement action (as set forth in this Section) against dischargers in violation of the laws and regulations constituting the State NPDES program, including any permit conditions or limitations, compliance schedules, pretreatment standards or requirements, or previous administrative or judicial enforcement actions. This responsibility encompasses violations detected through any means including, without limitation, the compliance monitoring activities set forth in Section V above.

2. A Commonwealth enforcement action shall be considered timely and appropriate if it:

   a. Addresses all identified violations of the laws and regulations constituting the State NPDES program and Sections 301, 302, 306, 307, 308, 318, 402, or 405 of the CWA including, without limitation, discharging without a required permit and violations of effluent limitations, pretreatment standards and requirements, compliance schedules, all other permit conditions, or any previous administrative or judicial enforcement action;

   b. Seeks or imposes, where appropriate, penalties consistent with 40 C.F.R. § 123.27 and the factors set forth in Sections 309(d) and 309(g)(3) of the CWA;

   c. Adequately addresses the injunctive relief necessary to bring the discharger back into compliance within a reasonable period of time and pursuant to an appropriate schedule which contains interim milestones necessary to measure the progress towards a final compliance date;

   c. Is commenced and completed within the time frames set forth in this Section VI.A; and

   e. Is consistent with the other provisions of this Section VI.A.

3. In the case of a violation by a major discharger, or other dischargers or types of dischargers identified in State 106 Workplan, or for a violation that would cause a facility to be in SNC, the Commonwealth will determine within thirty (30) days the appropriate initial response to the violation. Where the Commonwealth has determined an enforcement action is appropriate, it shall commence such appropriate enforcement action within thirty (30) calendar days of its determination of the initial response. This response shall be documented in the compliance and/or enforcement

file within sixty (60) days of identification of the violation. It is recognized that a definition for SNC has not been developed for conventional minors, storm water, CAFOs, Sanitary Sewer Overflows (SSOs) or Combined Sewer Overflows (CSOs). Therefore, as definitions for SNC are developed for these categories, the timelines for initial response will be established in the State 106 Workplan. The date of identification of the violation is the point at which the Commonwealth enforcement staff learns of the violation. The Commonwealth shall make every effort to pursue and complete all the enforcement actions its takes within a reasonable amount of time.

4. Enforcement actions determined to be appropriate by the Commonwealth with respect to any violations other than those identified in the Paragraph A.3 above, while generally given lower priority, should be commenced and completed within a reasonable amount of time.

5. If an initial response action by the Commonwealth proves not to be effective in bringing the discharger into compliance within the required or a reasonable time period, timely and appropriate enforcement action requires that the Commonwealth or EPA shall follow up with other, more significant enforcement mechanisms to achieve timely and appropriate compliance.

6. For violations which present an imminent and substantial endangerment to the health, safety, or welfare of the public or to the environment of the State, the Commonwealth shall take timely and appropriate enforcement action to effect the immediate correction of the violation which may include, but not be limited to, a complaint for injunctive relief under Civil Rule 65 of the Kentucky Rules of Civil Procedure or an immediate final order pursuant to Kentucky Revised Statute 224.10-410. Such action shall be taken as soon as possible after the Commonwealth or EPA makes a determination that the condition or activity is of a nature which, if not abated, may pose an imminent and substantial endangerment to the health, safety, or welfare of the public (when appropriate, such action should be taken within ten (10) calendar days from the initial notification to the Commonwealth of the condition or activity).

7. Copies of all formal enforcement and penalty actions issued against all dischargers shall be submitted to EPA upon request.

8. In accordance with 40 C.F.R. § 123.24(b)(3), the Commonwealth shall retain records that demonstrate that its enforcement procedures result in: appropriate initial and follow-up response and enforcement actions that are applied in a uniform and timely manner; enforcement actions that clearly define what the discharger is expected to do by a reasonable date certain pursuant to an appropriate schedule which contains interim milestones necessary to measure the progress towards final compliance; and the assessment of a civil penalty, when appropriate, based on the consideration of factors set forth in Sections 309(d) and 309(g)(3) of the CWA, or factors established in a State penalty policy consistent with Sections 309(d) and 309(g)(3) of the CWA,

and in an amount appropriate to the violation. Such records would include penalty calculations and/or penalty rationale.

## B. EPA Actions

1. The *Revised Policy Framework for State/EPA Enforcement Agreements*, signed by then Deputy Administrator A. James Barnes on August 25, 1986 (the 1986 Policy), sets forth the expectations for the working relationship between EPA and states in the compliance and enforcement program. It outlines a "no surprises" approach to partnering with states to enforce environmental statutes and regulations. The policy identifies some criteria and examples of instances when it makes sense for EPA to play a major role, and where federal resources, expertise and authorities can be critical to achieving a comprehensive and effective resolution of violations. Examples of instances where direct federal action is appropriate include the following: (a) a state or local agency requests EPA action; (b) a state or local enforcement response is not timely and appropriate; (c) national precedents (legal or program) are involved; (d) there has been a violation of an EPA order or consent decree; and (e) federal action would support the broader national interest in deterring noncompliance. Factors EPA will consider in deciding whether to take direct enforcement in the above type cases include: (a) cases specifically designated as nationally significant (e.g., significant noncompliers; explicit national or regional priorities); (b) significant environmental or public health damage or risk involved; (c) significant economic benefit gained by the violator; (d) interstate issues; and (e) repeat patterns of violations and violators.

2. EPA will verify and determine the timeliness and appropriateness of Commonwealth enforcement actions. In instances where EPA determines that the Commonwealth has not commenced or has not completed a timely or appropriate enforcement action for violations by any discharger in accordance with Section VI.A, above, EPA may proceed with any or all enforcement options available under the CWA against the discharger in violation.

3. Pursuant to Section 309(a)(3) of the CWA, EPA may take direct enforcement action as necessary. EPA generally will provide the State with advance notice at an appropriate management level prior to taking a direct federal action. This notice can be written, electronic (email), or by a telephone call. EPA will provide and the State will provide, upon request, each other with copies of any enforcement actions taken. Early and full communication and coordination between EPA and the State, (e.g., early notification of inspections, the basis of and intent for enforcement actions prior to initiation of any action, and other information sharing) have proven very effective in resolving compliance and enforcement matters. The parties to this agreement recognize that issues of imminent and substantial endangerment and criminal cases may present special circumstances and may not permit the same level of pre-filing coordination.

**C. Appropriate Involvement of the Commonwealth Office of Legal Services**

The Commonwealth will establish procedures for routine coordination on enforcement cases between the Commonwealth and the appropriate legal resources within the State such as the Commonwealth Office of Legal Services, including notification of proposed enforcement actions and general time frames for actions from case referral to filing.

**D.** Nothing in this agreement should be construed to constitute or create a valid defense to regulated parties in violation of environmental statues, regulations, or permits.

## Section VII. Pretreatment

This Section is intended to supplement the requirements of the other Sections of this MOA so as to define the Commonwealth and EPA responsibilities for establishment and enforcement of the National Pretreatment Program under Sections 307(b) and (c) and 402 of the CWA and EPA policies and guidance. To the extent the specific requirements set forth below are inconsistent with requirements in other Sections of this MOA, the specific requirements in this Section shall control.

**A. General Program**

The Commonwealth has primary responsibility for ensuring:

1. Enforcement against sources introducing pollutants prohibited by 40 C.F.R. § 403.5;

2. Application and enforcement of Chapter 224 of the Kentucky Revised Statutes and Chapter 5 of Title 401 of the Kentucky Administrative Regulations (KAR) and the National Categorical Pretreatment Standards (NPS) established by EPA in accordance with Section 307 of the CWA;

3. Incorporation of POTW Pretreatment Program conditions in permits issued to POTWs as required in the Kentucky Revised Statutes and Chapter 5 of Title 401 of the Kentucky Administrative Regulations (KAR) to be in conformance with Section 402(b)(8) of the CWA and 40 C.F.R. § 403.8;

4. Review and, as appropriate, approval of POTW requests for authority to modify categorical pretreatment standards to reflect removal of pollutants by a POTW in accordance with 40 C.F.R. §§ 403.7, 403.9, and 403.11 and enforcement of related conditions in the municipal permit; and

5. POTW Pretreatment Programs comply with requirements specified in 40 C.F.R. § 403.8 and the POTW's Commonwealth permit.

## B. Permitting

1. The Commonwealth shall control through permits, all significant IUs which do not discharge to an approved POTW program which issues a permit. The Commonwealth shall issue these permits in accordance with 40 C.F.R. § 403.8 and consistent with EPA's *Industrial User Permitting Guidance Manual* (September 1989). The Commonwealth will issue, reissue, or modify permits according to the procedures outlined in Section IV of this MOA.

2. Section 403.6(a) NPS Categorical Standards. The Commonwealth shall review requests from IUs for industrial category or subcategory determinations received within sixty (60) calendar days after the effective date of a national pretreatment standard (NPS) for a subcategory under which an IU believes itself to be included and prepare a written determination and justification as to whether the IU does or does not fall within that particular subcategory. The Commonwealth shall forward its findings together with a copy of the request and necessary supporting information to the EPA, Region 4 Water Programs Enforcement Branch Chief for concurrence. If EPA does not modify or object to the Commonwealth proposed findings within sixty (60) calendar days after receipt thereof, the Commonwealth may take action approving or denying the request.

3. Section 403.7 Removal Credits. The Commonwealth shall review POTW applications for removal credits for IUs who are or may be subject in the future to NPS. The Commonwealth findings together with application and supporting information shall be submitted to the EPA, Region 4 Water Programs Enforcement Branch Chief for review. No removal credits request shall be approved by the Commonwealth if, during the thirty (30) calendar days (or extended) evaluation period provided for in 40 C.F.R. § 403.11(b)(1)(ii) and any hearing held pursuant to 40 C.F.R. § 403.11(b)(2), the EPA objects in writing to the approval of such a submission.

4. Section 403.13 Variances from Categorical NPS for Fundamentally Different Factors (FDF). The Commonwealth shall make an initial finding on all requests from IUs for variances from categorical NPS for FDF and, in cases where the Commonwealth supports the variance, shall submit its findings together with the request and supporting information to the EPA Region 4 Water Programs Enforcement Branch Chief for a final review. The Commonwealth will not grant a FDF request until written concurrence has been received from EPA. The Commonwealth can deny requests for FDF without EPA review.

## C. Compliance Monitoring

1. The Commonwealth shall carry out independent inspection and surveillance procedures to determine compliance or noncompliance by the POTW with pretreatment conditions incorporated into their permit. The Commonwealth also will carry out inspections and surveillance procedures to determine, independent of

information supplied by the IUs, whether a representative sample of the IUs are in compliance with the NPS. Upon request, the Commonwealth will provide EPA copies of any notice received from a POTW that relates to a new or changed introduction of pollutants to the POTW. The Commonwealth shall carry out independent inspection, surveillance and monitoring procedures in accordance with 40 C.F. R. § 403.8 which will determine compliance or noncompliance with pretreatment conditions in IU permits issued by the Commonwealth.

2. The Commonwealth will conduct monitoring of approved local pretreatment programs to ensure POTWs implement the program consistent with the *Pretreatment Compliance Monitoring and Enforcement Guidance* (EPA, September 1986).

3. The Commonwealth will develop procedures and time frames for reviewing monitoring reports, including reports submitted by POTWs and semi-annual reports submitted by categorical and significant non-categorical IUs in areas without local programs; establishing and maintaining a complete inventory of POTWs with pretreatment programs; and conducting annual audits or inspections or equivalent review of program elements of POTWs with approved programs, including a sample of IUs in the POTW, consistent with State 106 Workplan commitments.

4. The Commonwealth also shall have a plan for completing an inventory of all categorical and significant non-categorical IUs.

5. The Commonwealth, as the Control Authority, will establish procedures and time frames for effective monitoring of IUs of POTWs consistent with 40 C.F.R. §§ 403.8(f) and 403.10(e). Included shall be procedures and time frames for reviewing monitoring reports including reports submitted by categorical and significant IUs.

6. The Commonwealth shall also keep an updated inventory of all categorical users and significant IUs which it permits. The Commonwealth, as the Control Authority, is responsible for inspecting and sampling IUs at least once per year consistent with 40 C.F.R. § 403.8(f)(2)(v).

7. The Commonwealth shall provide EPA with the following information concerning Significant Industrial Users (SIUs) which it permits, as well as any other information required by the State 106 Workplan:

   a. An annual report of implementation;

   b. A pretreatment facility inspection and sampling plan;

   c. A quarterly noncompliance report for all SIUs to include:

      (1) facility name;

(2) location and permit number;

(3) description and date history for each noncompliance;

(4) description of Commonwealth actions and dates of Commonwealth actions to obtain compliance;

(5) current compliance status, including date of resolution or return to compliance date; and

(6) mitigating circumstances.

## D. Enforcement

1. The Commonwealth will have enforcement response procedures and time frames for permitted IUs consistent with the *Pretreatment Compliance Monitoring and Enforcement Guidance* and the *Guidance for Reporting and Evaluating POTW Noncompliance with Pretreatment Implementation Requirements* (EPA, September 1989). This includes reporting all the Commonwealth regulated POTWs (including minor POTWs with approved pretreatment programs) on the QNCR when reportable noncompliance (RNC) and SNC criteria are met. These procedures will include initiating appropriate enforcement action where POTWs fail to submit approvable pretreatment programs, have violations of State pretreatment requirements, or fail to submit timely reports. The Commonwealth also will have procedures for evaluating whether POTWs are initiating appropriate enforcement responses to violations by IUs. Where POTWs are not the primary control authorities, the Commonwealth is directly responsible for having these procedures in place for categorical and significant non-categorical IUs in accordance with 40 C.F.R. § 403.8(f)(2). These procedures will be reviewed annually.

2. The Commonwealth will initiate enforcement action against permittees with pretreatment programs that are in SNC, as a result of: failure to meet milestones in enforceable schedules for submitting required local pretreatment programs; violations of effluent limits; and delinquent POTW pretreatment reports. Enforcement actions against these POTWs will be taken consistent with the criteria and time frames for the Commonwealth program. The Commonwealth also will initiate enforcement actions against POTWs for failure to adequately implement the pretreatment program or enforce against their IUs and will initiate IU enforcement actions where necessary, generally in conjunction with enforcement against the responsible POTW that is failing to enforce or as part of an overall strategy to bolster a local program. The Commonwealth will ensure that POTWs provide, at least annually, public notification of significant violations in a newspaper(s) of general circulation that provide that meaningful public notice within the jurisdiction(s) serviced, in accordance with 40 C.F.R. § 403.8(f)(2).

3. The Commonwealth will ensure that, at least annually, significant violations by permitted IUs are public noticed in accordance with 40 C.F.R. § 403.8(f)(2).

## Section VIII. Transfer of Files from EPA to State upon Subsequent Program Authorization

Upon approval of any subsequent NPDES Program modification for additional NPDES Program coverage by the Regional Administrator, EPA will immediately deliver to the Commonwealth all project files for pending permit applications proposed for issuance/reissuance. Project files shall include all relevant information including but not limited to, application forms, correspondence, draft permits, public notices, fact sheets, statements of basis, and any other documents relating to the pending permit. EPA will ensure all project files are complete prior to delivery to the Commonwealth.

EPA will deliver files for all other permits to the Commonwealth in accordance with a mutually agreed upon schedule. Files shall contain all relevant information pertaining to the issuance of the permit as well as copies of all DMRs, all compliance reports, all enforcement actions, and other pertinent information and correspondence. EPA will ensure all files are complete prior to delivery to the Commonwealth.

## Section IX. Program Review

The Commonwealth and EPA are responsible for ensuring that the State NPDES program is consistent with all requirements of this MOA, the State 106 Workplan, and applicable sections of 40 C.F.R. Parts 122-125 and 40 C.F.R. Parts 140 and 403.

**A.** To ensure that these requirements are fulfilled, EPA shall:

1. Review the information transmitted to the Commonwealth to ensure that all the requirements of Section VIII of this MOA are met.

2. Meet with the Commonwealth officials annually, as funds allow, to observe the data handling, permit processing, compliance monitoring, and enforcement procedures, including both manual and automated data processing.

3. Examine in detail the Commonwealth files and documentation of selected dischargers to determine whether:

   a. Permits are processed and issued consistent with federal requirements;

   b. Easy capability exists to discover permit violations when they occur;

   c. The Commonwealth compliance reviews are timely; and

   d. The Commonwealth enforcement actions are timely, appropriate and effective. These detailed file audits shall be conducted by EPA in the

appropriate Commonwealth office annually, as funds allow. The Commonwealth shall be notified thirty (30) calendar days in advance of the audit so that appropriate Commonwealth officials may be available to discuss individual circumstances and problems with EPA. A copy of the audit report shall be transmitted to the Commonwealth when available.

4. Implement the requirements of the State Review Framework. EPA, in concert with the Environmental Council of States (ECOS), has developed a State Review Framework that evaluates the performance of state enforcement programs. The Framework has a suggested menu of potential benefits that may be negotiated with a state that has demonstrated adequate performance, and a suggested menu identifying enhanced oversight that a region might conduct when state performance needs to be improved. This negotiation may result in more or less EPA/State interaction regarding the State's enforcement program in the future. Until the State has undergone the first review cycle of the Framework, and until that review results in an agreement between EPA and the State to a different approach, the enforcement program review will be conducted as outlined in Section IX.1.a., b, and c above. In the year the initial review is conducted, EPA will avoid duplication with the overall NPDES program review.

5. Determine the need for (and to hold) public hearings on the State NPDES program.

**B.** Prior to taking any action to propose or effect any amendment, recission, or repeal of any statute, rule, or directive which has been approved by EPA in connection with the State NPDES program; any action to modify program approval documents (e.g., MOA, Program Description or Attorney General's/Independent Counsel's Statement); or any action to transfer all or any part of the approved State NPDES program to another State agency or instrument, the Commonwealth shall notify the Regional Administrator and shall transmit the text of any such change to the EPA Region 4 NPDES and Biosolids Permits Section for review and approval pursuant to 40 C.F.R. § 123.62(b). The Commonwealth shall keep EPA fully informed of any proposed modification or court action which acts to amend, rescind or appeal any part of its authority to administer the NPDES program. EPA acknowledges that the Commonwealth has no veto authority over acts of the State legislature and, therefore, reserves the right to initiate procedures for withdrawal of the State NPDES program approval in the event that the State legislature enacts any legislation or issues any directive which substantially impairs the Commonwealth ability to administer the NPDES program or to otherwise maintain compliance with NPDES program requirements.

**C.** A permittee shall obtain the approval of the Regional Administrator pursuant to 40 C.F.R. Part 136 before seeking authority from the Commonwealth for the use of any alternative test method under 401 KAR 5:029, 5:057, 5:060, or 5:065, that has not already been approved by EPA for sampling/analyzing the quality of the discharge from a facility permitted under Chapter 5 of Title 401 of the KAR.

## Section X. Computations of Time

In computing any period of time prescribed by this MOA, the day from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which case the period extends until the next day which is not a Saturday, Sunday or legal holiday.

## Section XI. Approval and Effective Date of MOA

This MOA shall take effect on the date of execution by the last signatory. If the Regional Administrator determines that any provision of this MOA does not conform to the requirements of the CWA, to the requirements of 40 C.F.R. Parts 122-125, or to any other applicable federal regulations, the Regional Administrator shall notify the Commonwealth, in writing, of any proposed revision or modification which must be made to this MOA. Any proposed revision must be in writing and signed by the Director and the Regional Administrator before it becomes effective.

FEB 14, 2008
DATE

ROBERT D. VANCE
Secretary
Environmental and Public Protection Cabinet
Commonwealth of Kentucky

MAR 10 2008
DATE

J. I. PALMER, JR.
Regional Administrator
U.S. Environmental Protection Agency, Region 4