# ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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BRUCE RAUNER, GOVERNOR ALEC MESSINA, ACTING DIRECTOR


## MEMORANDUM

**DATE:** July 5, 2016

**TO:** Bureau of Water/Permit Section Manager

**FROM:** John Kim, Chief Legal Counsel and Ethics Officer JK

**RE:** Requirements for NPDES Permits – 40 CFR 123.25(c)
Agency Compliance Measures

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## Background

A question has been raised as to whether the Illinois Environmental Protection Agency ("Illinois EPA"), by virtue of Acting Director Alec Messina's previous employment, may not be in compliance with Section 123.25 of Title 40 of the Code of Federal Regulations (40 CFR 123.25).

That Section sets forth requirements for permitting as applicable to State programs which implement the federal National Pollutant Discharge Elimination System ("NPDES") permit program. Illinois, like many other states, implements the NPDES permit program on behalf of the federal government by delegation. Section 123.25(c) states:

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

The phrase "board or body" includes any individual, including the Director, who has or shares authority to approve all or portions of NPDES permits. A "significant portion of income" means 10 percent or more of gross personal income for a calendar year.

Acting Director Messina began employment with the Office of the Governor on January 20, 2015. Immediately prior to that employment, he was the Executive Director of the Illinois Environmental Regulatory Group ("IERG"). As the Executive Director, his salary was paid for in large part (i.e., more than 10 percent) by dues from members of IERG. Many of those IERG members are NPDES permit holders. Therefore, his previous employment and its compensation fall within the relevant provisions of Section 123.25(c).

## Section 123.25(c)

The Illinois EPA has conducted research on 40 CFR 123.25(c) in response to the question posed. Based on such research, as well as a plain reading of Section 123.25(c), the intent of this Section seems to be to prevent any conflict of interest that may arise if a body, board, or individual with

recent financial ties to NPDES permit holders is involved with approving all or portions of the NPDES permits issued by a State program.[1]

**Current Illinois EPA Practice**

Section 39(b) of the Environmental Protection Act (415 ILCS 5/39(b)) provides the authority for the Illinois EPA to implement its NPDES permit program. Of note is that Section 39(b) states that it is the Agency (i.e., the Illinois EPA), not the Illinois EPA's Director, that issues NPDES permits. The manner in which the Illinois EPA handles NPDES permit applications is as follows. The historic and current practice upon receipt of an NPDES permit application is centered in the Illinois EPA's Bureau of Water ("Bureau").

Once an application is logged for tracking, it is assigned to a permit reviewer who performs the overall review and drafting of the NPDES permit. The permit reviewer interacts directly with the applicant and serves as the Illinois EPA's primary point of contact. The permit reviewer will also work internally with their supervisor up to the Bureau's Permit Section Manager. The Illinois EPA requires that the Permit Section Manager be a licensed Professional Engineer, consistent with and reflective of the overall technical nature of the permit application and its review. The Permit Section Manager's day to day duties include, among other things, issuance, modifications, or re-issuance of NPDES permits.

If the permit reviewer determines that all application requirements have been met, the permit reviewer will prepare a draft NPDES permit for Unit Manager/Section Manager review and approval. Once the Permit Section Manager has approved the draft, he or she will sign the final permit decision letter. This process does not involve any direct review and approval by the Director.

**Response**

Based upon the language and intent of 40 CFR 123.25(c), as well as the current practice utilized by the Bureau when acting on NPDES permit applications, the Illinois EPA's position is that it is and will remain in compliance with Section 123.25(c). The Illinois EPA's Bureau of Water, not its Director, is responsible for the review and decision on all parts of NPDES permit applications. The Director does not conduct any approval of all of or portions of NPDES permits, therefore the prohibition in Section 123.25(c) is not applicable to the Illinois EPA's Director as part of its State program.

However, out of an abundance of caution, to ensure compliance with 40 CFR 123.25(c), and to answer any questions surrounding the State's NPDES permit program, the Illinois EPA will commit to taking the following steps.

1. Acting Director Messina will not be involved in any discussions, decisions, or other review steps as part of the Illinois EPA's NPDES permit approval process. This

[1] The language of Section 123.25(c) contemplates that a State program involves a board or other body that approves NPDES permits. In Illinois, the Illinois EPA is the state agency charged with the implementation of the State's program.

prohibition will include any parts of the NPDES permit approval process, including but not limited to discussions and decisions on whether to hold hearings on pending NPDES permit applications, portions or conditions of possible NPDES permits, issues associated with NPDES permit applications, or responsiveness summaries generated as a result of hearings.

2. The Illinois EPA's Bureau of Water will continue to process and issue decisions on NPDES permit applications as it has in the past. This will be done through the normal review process involving a permit reviewer, supervisor(s), Permit Section Manager, and Bureau Chief. To the extent needed, legal counsel will be provided to Bureau staff.
3. If issues or decisions related to an NPDES permit application need review or input beyond the Bureau Permit Section Manager, the Bureau will involve the Illinois EPA's Deputy Director.
4. These steps will continue in effect until January 20, 2017, which is the end of the two year window described in Section 123.25(c).

It is the policy and practice of the Illinois EPA to adhere strictly and vigorously to all applicable requirements imposed upon it, including those set forth in 40 CFR 123.25(c) as well as any related ethical concerns. While the Illinois EPA believes its current practices already attain compliance with Section 123.25(c), the formalized steps above will further guarantee compliance.

This content of this memorandum will be distributed members of the Bureau of Water permit section for immediate implementation.