

U.S. Environmental Protection Agency
Washington, D.C. 20460

GENERAL PERMIT PROGRAM GUIDANCE

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014*

Office of Water
Office of Water Enforcement and Permits
Permits Division (EN-336)

February 1988

TABLE OF CONTENTS

	Page No.
PREFACE	iv
CHAPTER 1: BACKGROUND	
NPDES Permit Program	1
Uses of General Permits	2
General Permits vs. Individual Permits	3
CHAPTER 2: LEGAL FRAMEWORK	
Recognition by the Courts	5
History of the Regulations	5
Coverage under Existing Regulations	8
Administration of General Permits	8
Other Regulatory Provisions Governing General Permits	10
CHAPTER 3: PROCESS	
Identification of Suitable Class or Category	12
Permit Development	17
Relationship to State Water Quality Standards	18
Special Considerations	20
Issuance and Promulgation of General Permits	20
Notice of Intent to be Covered under a General Permit	23
Variances and General Permits	26
State Role in Development and Oversight	27
EPA Regional Office Role in Development and Oversight	28
EPA Headquarters Role in Development and Oversight	29
Continuation of a General Permit	31
CHAPTER 4: EXPERIENCE	
Benefits and Limitations of General Permits	33
Existing General Permits	35
Examples of Existing General Permits	35
Compliance Monitoring and Enforcement	37

TABLE OF CONTENTS (continued)

	Page No.
 CHAPTER 5: STATE PROGRAM APPROVAL PROCEDURES	
General	40
Review of State Statutory Provisions	42
Review of State Regulatory Requirements	43
Modification of State Program	44
Headquarters' Concurrence in Program Approvals and Modifications	46
 APPENDIX A - Federal Register Publication Requirements for Draft and Final NPDES General Permits	
 APPENDIX B - EPA Headquarters' Procedures for the Review of Draft and Final NPDES General Permits	
 General Permitting Strategy for Outer Continental Shelf Oil and Gas Activities Under EPA/MMS MOU	
 APPENDIX C - Continuance of EPA-Issued General Permits Under the Administrative Procedure Act	
 APPENDIX D - Existing General Permits	
 APPENDIX E - Supplemental Attorney General's Statement	
 APPENDIX F - Modified Memorandum of Agreement	
 APPENDIX G - Federal General Permit Citations	
 APPENDIX H - Standard Industrial Category Codes for General Permits	

GENERAL PERMIT PROGRAM GUIDANCE

PREFACE

This guidance document is intended to:

- 1) demonstrate the benefits of general permits as an administrative mechanism to assist permitting authorities to meet the goals of the Clean Water Act and to regulate numerous discharges in similar, but not necessarily identical, circumstances;
- 2) assist permitting authorities that currently have general permit authority in the development and issuance of general permits;
- 3) assist those States currently approved to administer the basic NPDES permit program to obtain general permit authority; and
- 4) identify general permits that have been developed by both EPA Regions and approved States.

Organization

This guidance discusses the background and history of the general permit program (Chapter 1), reviews the evolution of the general permit program in terms of its legal framework (Chapter 2), explains the process for developing and issuing a general permit (Chapter 3), examines EPA's and the States' experience in the development and issuance of general permits (Chapter 4), and

details the process for assumption by a State of general permit authority (Chapter 5).

Appendices

This guidance also provides several appendices that should prove useful as reference materials. Appendix A details federal Register publication requirements for EPA-issued draft and final NPDES general permits. Appendix B furnishes EPA Headquarters' procedures for the review of draft and final general permits. Appendix C discusses the continuation of EPA-issued general permits. Appendix D lists all the existing general permits that EPA Headquarters has on file for use as model general permits. Appendices E and F provide copies of a supplemental Attorney General's Statement and a modified Memorandum of Agreement as examples of how a State NPDES program may be modified to obtain general permit authority. Appendix G contains the federal NPDES general permit cites. Appendix H lists the Standard Industrial Codes used for general permits.

CHAPTER 1

BACKGROUND

NPDES Permit Program

The National Pollutant Discharge Elimination System (NPDES) permit program, established by Congress in 1972, is administered primarily by States, after their authority and ability to manage the NPDES permit program has been reviewed and approved by EPA, pursuant to Section 402 of the Clean Water Act. In addition to the basic NPDES permit program, States are also required to assume responsibility for the regulation of discharges from Federal facilities and the establishment of pretreatment programs. To date, 39 States and Territories (out of a possible 56) have received authorization to administer the basic NPDES permit program. Of those 39, 30 have been approved to regulate Federal facilities and 25 have approved State pretreatment programs.

In 1979, EPA promulgated revisions to the NPDES permit program regulations. These revisions were mainly in response to the 1977 Clean Water Act amendments, but also created a class of permits called general permits. Under the general permit program, one permit may be issued to cover a class or category of similar dischargers in a defined geographic area with similar effluent limitations.

As with pretreatment and Federal facilities (required NPDES permit program elements), a State seeking general permit

authority must either request modification of its approved NPDES permit program or include its request for general permit authority as a part of a concurrent request for NPDES authority. However, unlike pretreatment and Federal facilities authority, there is no requirement that an NPDES State seek general permit authority; it is an optional program element.

General permit authority enables the State to issue one permit covering a similar class or category of dischargers within specified geographic boundaries. A general permit applies the same or similar effluent limitations and control measures to all dischargers covered under the general permit. To date, 13 States (Arkansas, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, New Jersey, Oregon, Rhode Island, Utah, West Virginia, and Wisconsin) have NPDES general permit authority approved by EPA.

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014*

Uses of General Permits

There are many varied reasons why permitting authorities choose to use general permits to cover point source discharges. Permitting authorities approved to issue general permits have used general permits to reduce their permit issuance backlogs. General permits can be written to cover large classes or categories of similar dischargers, thereby substantially reducing permit issuance backlogs. In addition, general permits can be used to cover dischargers that have been previously unpermitted due to resource constraints. By covering numerous dischargers

under one general permit, the permitting authority can avoid much of the time and burden that issuing individual permits to each discharger would involve. For some classes of discharges, such as storm water point sources, issuing individual permits to each source would overburden the existing NPDES permit program.

Permit application costs and paperwork burdens for dischargers covered under the general permit are also reduced. Dischargers covered by a general permit usually are not required to conduct the sampling and analysis associated with individual permit applications.

Early in the history of the general permit program, storm water sewers were identified as ideal candidates for coverage under general permits. The general permit program can serve as a means to handle the vast numbers of storm water point sources needing permits. Since EPA cannot issue general permits covering dischargers in those States with NPDES authority, States that currently do not have general permit authority are strongly encouraged to seek such authority in order to deal with the numbers of storm water permit applications expected in the next few years.

General Permits vs. Individual Permits

A well-fashioned general permit is the equivalent of an individual NPDES permit. A general permit is identical to an individual permit regarding effluent limitations, water quality standards, monitoring and sampling requirements, and enfor-

ceability. The only difference from the permit writer's standpoint is that a general permit covers several point sources. Thus, general permits are fashioned just as individual permits with monitoring and inspection and recordkeeping requirements. The permitting authority must have confidence in the appropriateness of the general permit because of the potential cumulative impact to the environment from the point sources covered by the general permit. Good general permits are no less effective than individual permits; they simply cover more than one discharger.

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

CHAPTER 2

LEGAL FRAMEWORK

Recognition by the Courts

There is no specific provision in the Clean Water Act explicitly defining or authorizing NPDES general permits. The statutory authority for regulating a group of sources with similar discharges under one permit was first recognized in NRDC v. Train (396 F.Supp. 1393 (D.D.C. 1975)); aff'd., NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977)). That decision required EPA to develop and administer a permit program for all point sources in the feedlot, separate storm sewer, agriculture and silviculture categories. EPA had previously exempted these discharges from the requirement of applying for and obtaining an NPDES permit. The court held that once a discharge is identified as a point source it cannot be excluded from coverage under the NPDES program. The court went on to state that EPA could make use of administrative devices, such as "area permits," in appropriate circumstances to make the program more flexible and administratively manageable. 396 F.Supp. at 1402. Following this decision EPA promulgated regulations to implement this device, calling it the general permit program.

History of the Regulations

EPA first proposed general permit regulations (February 4, 1977, 42 FR 5846) that would have limited the scope of the

general permit program to irrigation return flows (later exempted from the requirements of Section 402 of the Clean Water Act by the 1977 amendments) and separate storm sewers. The final regulations, published on June 7, 1979 (44 FR 32854) and codified at 40 CFR 122.48 (1980), expanded the coverage of the general permit program to include other categories of minor point sources, in addition to separate storm sewers, within a designated "general permit program area" or "gppa". A "gppa" had to correspond to existing geographic or political boundaries such as designated planning areas under Sections 208 and 303 of the Clean Water Act, sewer districts, city, county or State boundaries, State highway systems, standard metropolitan statistical areas, or urbanized areas. Categories of point sources falling within a "gppa" that involved similar operations, discharged the same type of wastes, had similar monitoring requirements and the same effluent limitations (whether promulgated effluent limitations guidelines or those developed by best professional judgements) were eligible for general permit coverage, if, in the opinion of the EPA Regional Administrator or State Director, such coverage was appropriate.

When the NPDES regulations were merged with those for the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC), and the Prevention of Significant Deterioration (PSD) permit programs in 1980 into the Consolidated Permit Regulations, the general permit provisions were reorganized and rewritten (at 40 CFR 122.59 (1981)) to clarify

questions relating to the program and to make minor changes. First, the designation of a "general permit program area" was abandoned since it served no purpose that could not be satisfied by simply specifying in the permit the geographic or political boundaries covered. Second, while previously the "gppa" could be redefined if necessary to address differing State water quality standards, the new regulations clarified that the general permit could be modified for any of the causes that applied to individual permits (e.g., receipt of information indicating unacceptable cumulative impacts). Other minor changes to the general permit program included: (1) shortening EPA Headquarters review of EPA-issued draft general permits from 90 days to 30 days; (2) clarifying that a discharger's coverage under a general permit automatically terminates on the effective date of an individual permit for that discharger; and (3) removing the requirement of on-site inspections prior to revoking a general permit and requiring the discharger to acquire an individual permit.

The Consolidated Permit Regulations made one important substantive change. The sources other than separate storm sewers for which a general permit could be written would no longer be limited to "minor" sources so long as the general permit covers sources involving similar types of operations, having the same wastes, effluent limitations and operating conditions and similar

monitoring requirements, and which would be more appropriately regulated under a general permit.¹

Coverage under Existing Regulations

When the Consolidated Permit Regulations were deconsolidated on April 1, 1983, the general permit provisions were recodified at 40 CFR 122.28 without change. Section 122.28(a), which sets forth the appropriate coverage for a general permit, states that a general permit shall correspond to existing geographical or political boundaries, and specifies the types of sources that may be regulated by a general permit. Thus, general permits may be issued to separate storm sewers, or to other sources if such sources satisfy the criteria on similarity and appropriateness. These criteria are discussed in detail in Chapter 3.

Administration of General Permits

Section 122.28(b) addresses the administration of general permits beyond the issuance, modification, revocation, reissuance and termination provisions in Part 124 applicable to all permits. Section 122.28(b) allows the EPA Regional Administrator or State Director to require, on his or her own initiative or in response to a petition by any interested party, any discharger otherwise eligible for coverage under a general permit to obtain an

¹ In the April 1, 1983 de-consolidation of EPA permit programs, the word "minor" was inadvertently reinserted into 40 CFR 122.28 and subsequently published in the July 1, 1984 publication of 40 CFR Parts 100 to 149. This error was corrected in a February 19, 1985 Federal Register notice, at 50 FR 6940.

individual permit. Some of the reasons for which an individual permit may be required are: failure to comply with the conditions of the general permit; a change in the availability of pollution control technology; promulgation of an applicable effluent guideline; approval of an applicable Water Quality Management Plan; failure to meet the criteria in §122.28(a) regarding sources appropriate for coverage under a general permit; or a determination that the source is a significant contributor of pollutants.

The EPA Regional Administrator may require a discharger covered by an EPA-issued general permit to apply for an individual permit as described above only after providing the owner/operator with a written notice that a permit application is required, which contains a brief statement of the reasons for requiring an individual permit, an NPDES application form, a statement setting the deadline for the filing of the application (the Regional Administrator may grant additional time), and a statement that on the effective date of the individual permit the general permit will cease to apply to the permittee (40 CFR 122.28(b)(2)(ii)).

A discharger excluded from coverage under a general permit solely because it is already covered under an individual permit may request that the individual permit be revoked, and that it be covered by the general permit. Upon revocation of the individual permit, the general permit applies to the source. Revocation of

an individual permit must follow public notice and comment procedures (40 CFR 122.28(b)(2)(v)).

Other Regulatory Provisions Governing General Permits

If an NPDES State is proposing to issue a general permit, 40 CFR 123.43 requires the State to send a copy of the draft or proposed general permit, except those for separate storm sewers, to both the EPA Regional Office and the Director, Office of Water Enforcement and Permits, EPA Headquarters. 40 CFR 123.44 allows EPA 90 days from receipt of the proposed general permit to comment on, object to or make recommendations regarding the proposed general permit.

If EPA is issuing the general permit, 40 CFR 124.58 sets forth special procedures for internal EPA review. The EPA Regional Administrator is required to send a copy of the draft general permit and the administrative record to the Director, Office of Water Enforcement and Permits, during the comment period. The Office of Water Enforcement and Permits has 30 days or until the end of the public comment period, whichever is later, to comment upon, object to, or make recommendations with respect to the draft general permit. If the Office of Water Enforcement and Permits objects to a draft general permit within the review period, the Regional Administrator cannot issue the final general permit until the Office of Water Enforcement and Permits concurs in writing with the conditions of the general permit. The Office of Water Enforcement and Permits is not

required to provide written concurrence/approval on all draft general permits; failure to object during the 30-day review period can be taken as an approval. Thus, written concurrence is necessary only for those general permits that have been objected to at the draft stage.

Normally a formal evidentiary hearing is available to any person wishing to challenge any EPA-issued NPDES permit. However, since general permits are rulemakings, 40 CFR 124.71 provides that persons affected by an EPA-issued general permit must either challenge the general permit in the U.S. Court of Appeals under sec. 509(b)(1) of the CWA or apply for an individual NPDES permit. It is particularly important that a complete administrative record of the general permit be compiled since appellate court challenges do not allow the introduction of new testimony through the hearing process. In addition, 40 CFR 124.111(a)(3) provides the option to the Regional Administrator to use nonadversary panel procedures to process draft general permits.

*Filed in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 and filed on September 19, 2014*

CHAPTER 3

PROCESS

Identification of Suitable Class or Category

Normally it is the Region or State that initiates the development of a general permit for a particular class or category of point sources. However, a group of like dischargers may also request that the permitting authority employ a general permit rather than individual permits.

The first step in the development of a general permit is to identify a class or category of dischargers meeting the criteria of §122.28. (As noted in Chapter 2, general permits need no longer be issued to cover only "minor" discharges; although some permitting authorities have made the decision not to use general permits to cover "major" discharges.) The five criteria for general permits contained in §122.28 must be met before a general permit can be developed.

1. Involve the same or substantially similar types of operations

Any category or subcategory of dischargers is eligible for coverage under a general permit provided that all dischargers within the permitted category or subcategory involve similar types of operations. Examples of classes or categories of dischargers that have been covered under general permits are offshore oil and gas exploration, development, and production

facilities; concentrated animal feedlots; non-contact cooling water; hydrostatic testing of petroleum pipelines; and seafood processing. These are just some examples of facilities that can be covered by a general permit; this list is not exhaustive. As mentioned above, coverage of storm water point sources by general permits is also appropriate.

2. Discharge the same types of wastes

Once a class or category of dischargers has been identified as having similar operations, a determination must be made as to the similarity of waste streams. The regulations state that facilities must discharge the "same types of wastes" to be covered under a general permit. EPA has not interpreted this requirement to mean that the waste streams must be identical in composition. Rather, this requirement should be interpreted in conjunction with the next two criteria; the waste streams should be sufficiently similar that the same (or similar) permit conditions are appropriate.

3. Require the same effluent limitations or operating conditions

EPA has not interpreted this requirement to mean that effluent limitations or operating conditions must be identical. Permit writers should be careful when water quality-limited or special use streams are involved. The general permit can be fine-tuned with requirements that ensure that State water quality

standards are not exceeded, or that facilities discharging to water quality-limited or special use streams are excluded from coverage under the general permit. (See page 18 for a further discussion.)

For all types of discharges outside the baseline of the territorial seas, Section 403(c) of the Clean Water Act mandates that Ocean Discharge Criteria Evaluations (ODCEs) be performed. The ODCE provides an additional basis for limitations and monitoring requirements in these general permit. Just as a general permit must incorporate those special limits detailed in an ODCE, so also must Areas of Biological Concern (ABCs) identified by the Regional Administrator in accordance with the criteria set forth in 40 CFR 125.122(a)(1) through (10) be addressed in the general permit for oil and gas facilities in areas in and beyond the territorial seas. In either case, these special limitations need not affect the entire geographical area to be covered by the general permit and do not preclude issuing a general permit to a large class or category of facilities, but the general permit would have to incorporate conditions such that facilities either operating in ABCs or affected by the findings of the ODCE would comply with any special limitations.

4. Require the same or similar monitoring

Again, the benchmark is that similar, not identical, monitoring requirements would be required of all the facilities to be covered under the general permit. For instance, the

general permit could be structured to require different monitoring procedures for different sized facilities within the same class or category of dischargers. In one case facilities with a certain volume of effluent might be required to monitor more frequently than small facilities (e.g., the permit could require weekly monitoring for large facilities and monthly monitoring for smaller facilities). In other cases, the general permit might require different monitoring methods (e.g., continuous monitoring vs. grab samples). As mentioned above, the general permit must also accommodate special conditions required by ODCes or for ABCs. It is possible to tailor the general permit with specific conditions so that a facility that does not have a certain waste stream would not need to monitor and report for that waste stream. For example, a general permit covering petroleum storage and transfer facilities might include requirements for discharges from truck washing and tank loading area runoff. However, if a facility does not have these discharges, it could still be covered by the general permit, but the specific requirements for truck washing and tank loading would not apply. The facility would only comply with those control and monitoring requirements of the general permit that are applicable.

Another example might be a general permit covering both dewatering activities and hydrostatic testing of pipelines, both of which can occur during pipeline construction. If a facility has both operations, all the monitoring requirements of the general permit would apply. If a facility only has one of the

two operations, then only those monitoring requirements specific to that type of operation would apply.

The decision as to which monitoring requirements apply can be made in several ways. The best approach is to fashion the information required in the Notice of Intent (NOI) to allow the permitting authority to make the decision as to which control and monitoring requirements are applicable for that particular discharger. Or the NOI might be fashioned to require that the potential permittee identify those proposed monitoring requirements that apply to the facility, subject to the approval of the permitting authority. Another approach might be to structure the general permit in such a way as to allow the permittee to make the decision, based on the terms of the permit, as to which monitoring requirements are applicable; however, this approach is not recommended.

5. Discharges are more appropriately controlled under a general permit

The permitting authority must determine the suitability of coverage under the general permit by examining the significance of the discharges, pollutant levels, cumulative impacts on the receiving water(s), etc. The EPA Regional Administrator or a NPDES State Director must then state that, in his or her opinion, the discharges are more appropriately controlled under a general permit rather than an individual permit. This statement must appear in the fact sheet accompanying the permit and an oppor-

tunity for public comment on the suitability of covering such dischargers under a general permit must be provided.

Permit Development

Once the five criteria discussed above are met, the actual development of the general permit can proceed just as for any individual permit. The permit writer should first apply any appropriate effluent limitations guideline(s). In the absence of an effluent limitations guideline, the permit writer must use his/her best professional judgement (BPJ) in establishing permit limits and conditions. The NPDES regulations, at 40 CFR 125.3, require that permits developed on a BPJ basis must consider the appropriate technology for the category of point sources, based upon all available information, and any unique factors relating to the class or category of sources. In setting BPJ limitations, the permit writer must consider several specific factors. These factors are also those required to be considered in the development of effluent limitations guidelines, and therefore, are often referred to as the "304(b)" factors (see, 40 CFR 125.3). References (data sources, tools, etc.) for BPJ determinations are numerous and voluminous. Examples of BPJ tools available to the permit writer are abstracts of industrial NPDES permits, treatability manuals, guidance documents, toxicity reduction evaluations for selected industries, industry experts within EPA, and effluent guidelines information (including Section 308

questionnaires, screening and verification data, development documents, etc.), as well as technical journals and books.

Relationship to State Water Quality Standards

The permit writer must also address whether the appropriate effluent limitations guideline or BPJ determination will ensure that State water quality standards are met. EPA has published methods for establishing effluent limitations for all point source discharges based on State water quality standards (e.g., wasteload allocations). Any NPDES permit must ensure that State water quality standards are met at the edge of any applicable mixing zone. This is more difficult for a general permit because of the multiple receiving water bodies involved within the geographic area of the general permit. A general permit can be subdivided, or several general permits can be issued, where there is a need to meet varying State water quality standards. In addition, individual permits can be required of dischargers with existing water quality-based limitations, dischargers that have caused exceedences of State water quality standards in the past, or dischargers into receiving waters known or suspected of failing to meet their designated use(s) due to point source impacts.

State water quality standards are comprised of use classifications and narrative and/or numerical criteria established to protect the use. To be fully protective of aquatic life and environmental quality, States should develop

both numerical and narrative water quality criteria. Where narrative criteria are adopted, the State indicates how it will implement the criteria, e.g., through periodic field sampling of the habitat or bioassays of the effluent (acute and chronic toxicity testing), during the State water quality standards approval process.

In some instances, EPA recommended criteria may be used to help interpret a State narrative standard. For example, a State may specify as a narrative standard that all waters shall not be toxic to aquatic life or human health. In the absence of any State numerical criteria for toxic chemicals, the EPA recommended criteria may be used to define expected levels of toxicity. This approach is recommended in the implementation of the requirements of sec. 304(1) of the CWA, as amended by the Water Quality Act of 1987, for those States that have not yet revised their water quality standards in accordance with sec. 303(c)(2) of the CWA. Such States are still required under sec. 304(1) to list impaired waters and develop individual control strategies.

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 15-37009 archived on September 19, 2014*

There are several ways in which the permit writer can ensure that State water quality standards are met. A narrative statement requiring compliance with State water quality standards can be part of the general permit. In addition, an NOI requesting information about the receiving water body can be used to determine if general permit coverage is appropriate and if State water quality standards will be met by the particular discharger. Another approach would be to use statewide numerical limits as

the applicable limits for a particular water body or group of receiving waters (e.g., all State waters classified with a particular use designation). Other methods, such as best management practices (BMPs), are also available.

Special Considerations

Any special conditions mandated by an ODCE or ABC requirements should be included in the general permit. As discussed above, the permit writer has the latitude to fashion the general permit to cover varying operations, wastes, effluent limitations and operating conditions, and monitoring requirements.

Issuance and Promulgation of General Permits

Once a tentative decision has been made to issue a general permit, the permit writer develops a draft general permit incorporating the necessary terms and conditions. When the draft general permit and accompanying fact sheet have been prepared, public notice must be given in publications of general circulation (e.g., statewide newspapers, or in the case of EPA-issued general permits, in the Federal Register). The draft general permit itself need not be published, only notice of its availability; however, EPA practice has been to publish the fact sheet for draft general permits and to publish the fact sheet, response to comments received on the draft general permit, and general permit upon the issuance of the final general permit.

On November 3, 1983, the Office of Management and Budget waived review of EPA-issued general permits. This has greatly reduced the review time for EPA-issued general permits. Appendix A contains a memorandum of January 16, 1984, providing boilerplate language that should be included in all draft and final EPA-issued general permits. EPA Regional Offices should adhere closely to these requirements in preparing draft and final general permits to avoid delays in publication in the Federal Register.

Since general permits are considered to be rulemakings, EPA's issuance and promulgation activities must be conducted in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 551, et seq.). NPDES States are, of course, bound by the strictures of their statutes governing State rulemaking, licensing, and adjudicatory proceedings. In some States, for instance, this has meant that in addition to providing public notice of a draft general permit in a statewide newspaper, the draft general permit must also be published in a State Administrative Register or Bulletin.

The permitting authority must ensure that there is adequate public notice of the availability of the draft general permit and all supporting materials (e.g., the fact sheet) in the administrative record, including all ODCE and ABC supporting materials. The fact sheet must either be published or made available for review by the public. In addition, the permit

writer must ensure that there is opportunity for effective public comment, including a public hearing, if appropriate.

After the close of the comment period on the draft general permit, all comments received must be evaluated and, where significant, must be responded to, with any necessary changes made to the general permit. Because the fact sheet represents the original intent in developing the general permit, EPA recommends that no changes to the original fact sheet be made. Any necessary changes to the permit in order to respond to comments received can be discussed in an addendum to the fact sheet (commonly called Response to Comments). Any such Response to Comments should include a citation to that part of the final general permit changed in response to the comment. (See, 40 CFR 25.8). Any comments on the draft general permit deemed to be of an insignificant nature can be responded to in a letter to the commenter without reference in the final permit, although this is not required under 40 CFR 124.17. It is also imperative that permit writers maintain complete files on all comments received during the public comment period in order to respond to any challenge to the general permit.

At the time of the final promulgation of the general permit, the effective date and expiration date of the general permit must be explicitly stated. Some permitting authorities have suggested that the draft general permit incorporate a date by which the general permit would automatically become effective if no changes are made to the proposed general permit; this approach is

incorrect since the final general permit may need to be adjusted to respond to comments furnished during the public comment period and such revisions may take longer than the proposed automatic effective date. In addition, Section 553(d) of the APA requires publication of a substantive rule not less than 30 days before its effective date. The purpose of this requirement is to allow permittees sufficient lead time to prepare to comply with new regulatory requirements. Section 553(d)(1) of the APA provides an exemption from the requirement to delay the effective date of a promulgated regulation for 30 days in instances where the regulation will relieve restrictions on the regulated community. In the case of a general permit, such "relief" might be the issuance of an NPDES permit to previously unpermitted point source discharges or that the submission of individual permit applications will be unnecessary. The final permit should be published in the same manner as the original draft permit and must be signed by the EPA Regional Administrator, State Director, or their designees. Although 40 CFR 124.17 provides that only the final general permit and any Response to Comments need be published, a preamble discussion of the circumstances surrounding the issuance of the final general permit is very beneficial.

Notice of Intent to be Covered Under a General Permit

The general permit regulations do not specifically address the issue of how a potential permittee is to apply to be covered under a general permit. EPA and States have generally incor-

porated permit conditions that either require potential permittees to notify the permit authority that they intend to comply with the general permit or that they do not wish to be covered by the general permit and wish an individual permit. Another approach would be to cover all dischargers engaged in an activity regulated by the general permit automatically unless a discharger specifically wishes not to be covered and requests an individual permit. In the latter case, there is no clear accounting for the number of permittees covered by the general permit nor an identification of those permittees, which has a bearing on enforcement and compliance activities. EPA-issued general permits have generally required that those permittees wishing to be covered must notify the permitting authority within a specified time to be eligible for coverage. This notification requirement is commonly called a Notice of Intent (NOI).

EPA recommends the use of NOIs for a variety of reasons. The use of the NOI allows the permitting authority to know the number of permittees covered and their identity and location. If the general permit does not provide for automatic coverage, the permitting authority can use the NOI as a screening mechanism to determine the appropriateness of coverage under the general permit (e.g., if the discharge is located on a water quality-limited stream segment). In addition, the permitting authority can use the NOI to determine appropriate monitoring conditions if the general permit has varying monitoring requirements. The NOI requirement can provide certainty to permittees that they are

covered by the general permit and can also provide general information should they wish an individual permit.

Another advantage of using the NOI is to ensure that the terms and conditions of the general permit continue in effect for those permittees that have submitted an NOI should the general permit expire and a new general permit is not issued in time. An even stronger case for the continuance of general permits can be made if the general permit is structured so as to require a new submission of an NOI just prior to the expiration date of the original general permit. (See discussion on Continuance of General Permits on page 31.)

The general permit should detail the information to be provided by the permittee in the NOI. In most instances, the NOI requires the name, address, and telephone number of the permit applicant, location of the facility (preferably in latitude and longitude), the responsible on-site official, and the name of the receiving water. Other items that might be required in an NOI could include a justification for coverage under the general permit, seasonal or locational (mobile facilities) discharge notifications or topographic maps and/or schematic drawings of the facility. The information required in the NOI should be tailored to the requirements of the permitting authority and the nature of the discharges being covered.² In addition, the

² For mobile facilities, information concerning the general geographic area of operations would be required, along with notification of each instance of termination and initiation of discharges at new sites.

information required in the NOI should be sufficient to enable the permitting authority to determine if the particular facility qualifies for coverage under the general permit.

NOIs are not considered new Information Collection Requests (ICRs) and therefore are not required to be cleared with the Office of Management and Budget. The use of NOIs was incorporated in the generic ICR submission covering the NPDES permit program, which was cleared by the Office of Management and Budget on July 18, 1985 and is effective through July 31, 1988.

Variances and General Permits

Normally, an individual permittee is able to request a variance from otherwise applicable effluent limitations. The types of variances available and the timeframes for requesting such variances are detailed in 40 CFR 122.21(1) and (m). Some States have suggested that it might be appropriate to grant a variance to all dischargers covered under a general permit (i.e., the general permit terms and conditions would contain the variance). It is EPA's position that it is inappropriate to grant variances in general permits.

However, a discharger who would be covered under a general permit still has the right to request a variance. First, an individual discharger could request a variance during the public comment period on the general permit, which would then be processed according to the applicable regulations. If the variance were granted, the discharger would be issued an

individual NPDES permit. Second, the discharger could submit an individual permit application, thereby "opting out" of general permit coverage. This application could include a request for a variance.

State Role in Development and Oversight

NPDES States with general permit authority are responsible for the development, issuance and enforcement of general permits covering dischargers within the State. All State draft or proposed (see, 40 CFR 122.2, Definitions, for the distinction between draft and proposed permits) general permits, except those for separate storm sewers, must be submitted to the appropriate EPA Regional Office and the Office of Water Enforcement and Permits for review and concurrence (see, 40 CFR 123.24(d) and 123.43(b)). The Regional Administrator, according to 40 CFR 123.44(j), may agree in the Memorandum of Agreement between EPA and the State to review draft general permits rather than proposed general permits. If such is the case, there is no need to also submit the proposed general permit to either the Regional Office or the Office of Water Enforcement and Permits unless the proposed general permit (1) differs from the draft permit, (2) the draft permit was objected to by the Regional Office or the Office of Water Enforcement and Permits, or (3) there were significant public comments on the draft permit. The submission of draft general permits should occur well in advance of public

notice of the draft general permit as this tends to expedite the review process.

EPA Regional Office Role in Development and Oversight

The EPA Regional Offices have three roles in the management of the general permit program. First, the Regional Office is responsible for the development of general permits in non-NPDES States.³ In these instances, the EPA Region has control of the general permit issuance process. Second, if an approved NPDES State with general permit authority is developing the general permit, then the EPA Region will have an oversight role, as defined in 40 CFR Part 123 and in the Memorandum of Agreement between the Region and the NPDES State. The EPA Regional Office staff should work closely with the State in developing the draft general permit in order to avoid unnecessary delays.

The third role of the EPA Regional Offices is to work with EPA Headquarters to assist NPDES States without general permit authority in developing the necessary statutory and regulatory framework for assuming the general permit program. In addition, the Regional Offices are responsible for keeping EPA Headquarters informed of new issues concerning general permits, as well as working with EPA Headquarters in addressing such issues.

³ EPA Regional Offices cannot issue general permits covering dischargers in States with NPDES authority, even if the State does not have general permit authority.

EPA Headquarters' Role in Development and Oversight

EPA Headquarters developed procedures for the review of all draft and final NPDES general permits that were detailed in a September 27, 1983 memorandum to the EPA Regional Water Management Division Directors. In essence, these review procedures provided for a 10-day review of draft general permits and a 5-day review of final general permits by Headquarters.

EPA Headquarters has decided to waive its review and concurrence on all non-offshore oil and gas general permits, partly because States and Regions have gained sufficient experience in the use of the general permit mechanism, and also partly because Headquarters views the issuance of non-offshore oil and gas general permits as somewhat routine. Non-offshore oil and gas general permits include, for example, feedlots or onshore oil and gas facilities. Thus, EPA Headquarters will formally review and concur on draft or final general permits only for offshore oil and gas activities and will conform to the review procedures established in the September 27, 1983, memorandum for these general permits. (See Appendix B for a copy of the September 27, 1983 review procedures. Appendix B also contains a guidance document, dated July 3, 1985, that provides information on the NPDES permitting process for oil and gas activities on the outer continental shelf and coordination with the Minerals Management Service.) In general, EPA Headquarters' waiver should speed up the issuance and promulgation of general permits.

Because 40 CFR 123.43, governing transmission of information to EPA from the States, and §124.58, governing special procedures for EPA-issued general permits, require that the Office of Water Enforcement and Permits receive copies of all draft and proposed general permits, whether State or EPA Regional Office general permits, copies should still be sent to EPA Headquarters. In addition, EPA Regional Offices will be required to prepare two semi-annual lists of non-offshore oil and gas general permits that (1) they or the States expect to issue in the upcoming six months and (2) that they or the States have issued in the preceding six months. These two lists should be submitted to the Office of Water Enforcement and Permits by October 1 and April 1 of each year. These lists will keep EPA Headquarters informed of those general permits being developed and issued and will allow Headquarters to distribute applicable general permits to other EPA Regions and NPDES States as models. Such lists will also allow EPA Headquarters to provide a measure of national consistency concerning general permits issued in different Regions and States.

Although EPA Headquarters has waived its review and concurrence of all non-offshore oil and gas general permits, this waiver may be revoked for general permits of national significance or those involving legal or technical issues of first impression. EPA Headquarters will examine the semi-annual lists and identify those non-offshore oil and gas general permits that merit review.

Continuation of a General Permit

Under Section 558(c) of the APA, an expired federally-issued permit continues in force until the effective date of a new permit, provided that the permittee has submitted a timely and sufficient application and EPA, through no fault of the permittee, does not issue a new permit with an effective date on or before the expiration date of the previous permit (see, 40 CFR 122.6). This is to protect the applicant from being jeopardized by EPA's delay or failure to reissue a permit.

Most States with NPDES authority have comparable laws or regulations (see, 40 CFR 122.6(b)). States, of course, are bound by their own statutory requirements regarding continuance.

With regard to general permits, it is EPA's position that an expired general permit continues in force and effect until a new general permit is issued. Only those facilities authorized to discharge under the expiring general permit are covered by the continued permit. Where the notification requirements of a general permit provide permit coverage prior to the actual commencement of operations at a site (e.g., mobile seafood processors), facilities providing such notice prior to the expiration of the general permit are covered by the continued general permit. Although EPA considers such continuance legally permissible,⁴ permit continuance should be only a last resort.

⁴ However, there has been one adverse court decision on this issue. In Nunan Kitlutsisti v. Arco Alaska, Inc., (D.C. Alaska, 1984), 592 F.Supp. 832, the U.S. District Court held that an expired general permit is not continued under the APA as it is not a license "required" by law. (The court reasoned that

(See Appendix B for a January 16, 1984, memorandum containing a further discussion of continuance of EPA-issued NPDES general permits under the APA.)

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014*

issuance or reissuance of a general permit was wholly within Agency discretion.) By the time this case was appealed, EPA had reissued the general permit. The 9th Circuit, finding that there was no longer a controversy between parties, declared the case to be moot and vacated the District Court's decision. Thus, the case is of limited precedential value.

CHAPTER 4

EXPERIENCE

Benefits and Limitations of General Permits

The use of general permits provide certain clear benefits to the permitting authority. General permits give permitting authorities the ability to cover a large number of facilities with one permit action, rather than multiple actions. In addition, the permitting authority has the ability to frame the general permit for a class or category of facilities within one geographical area such that any new facilities entering the area are automatically covered and new permit actions are therefore unnecessary. Permit authorities are also able to significantly reduce permit issuance backlogs in those instances where a large number of similar facilities are contributing to the backlog. This can be especially important in the handling of minor permit backlogs. General permits also provide a practical means to cover discharges from mobile sources within a geographic area; only one permit action is necessary instead of several.

Based upon its experience, the Office of Water Enforcement and Permits considers the benefits of general permits to far outweigh their disadvantages. However, there can also be certain drawbacks to the use of general permits that permitting authorities may need to address. Unlike individual permits, a larger share of the responsibility for the information gathering process leading to the development of a general permit falls on

the permitting authority rather than on the permit applicant(s), although the permitting authority can use existing information from a variety of sources (e.g., an industrial trade association) to develop the general permit. While certain disadvantages may make the issuance of general permits difficult in some cases, they clearly do not preclude the issuance of general permits. For instance, incorporating limitations protecting varying State water quality standards within a large geographical area can be difficult but not insurmountable. As mentioned previously, general permits can address these situations through a tiered approach to the requirements in the general permit. The need to have large numbers of similar facilities to make a general permit administratively worthwhile is often cited as a drawback to general permits. Although general permits are typically viewed as best suited to covering large numbers of similar facilities, general permits have also been issued to cover a modest number of facilities (e.g., a general permit was issued to cover 21 concentrated animal feeding operations in Arizona). In addition, issuance of a general permit to several facilities can be practical if more facilities are expected to enter the geographic area during the term of the permit or the discharges are from mobile sources within the permit area. At times the need to adhere to the APA (or the State equivalent) is viewed as a disadvantage. In fact, adherence to the procedures of the APA need not be burdensome and can lead to the development of effective and administratively supportable general permits, and

is certainly less burdensome than issuance of individual permits to each point source covered by the general permit.

Existing General Permits

A list of general permits already issued by either EPA or NPDES States is furnished as Appendix D. Appendix D also lists the Federal Register citations for each of the EPA-issued permits. EPA Headquarters has copies of these permits on file for distribution upon request. These general permits are available as models for new general permits to be developed by an EPA Region or NPDES States. These models will need to be modified in most cases to ensure that State water quality standards are protected.

Examples of Existing General Permits

Types of facilities covered under general permits include: oil and gas well operations; petroleum storage and transfer plants; seafood processors; construction dewatering activities; hydrostatic testing of pipelines; and non-contact cooling water. A few examples are:

1. Offshore Oil and Gas - (6 permits; 3,800 facilities covered)

The recent round of BPJ BAT/BCT general permits issued by Regions IV, VI, IX, and X is an example of how these general permits are becoming more common. The first BPJ BAT general

permit was issued by Region X for discharges in the Bering/Beaufort Seas. Region X has also issued a general permit for Norton Sound, Alaska that took advantage of the Region's experience with the Bering/Beaufort Seas general permit. Subsequent permits for the Gulf of Mexico, southern California, and Alaska have built upon EPA's experience with these early general permits.

The Gulf of Mexico general permit is a good example of how a general permit can be tailored to incorporate special limits based on an ODCE. The general permit authorizes discharges from any oil and gas facility discharging anywhere within the Gulf of Mexico outside the territorial seas of the coastal States. However, in and near ABCs, the permit will require one of two options. Where the Minerals Management Service (MMS) requires shunting (discharge through a pipe) to near the ocean floor, the NPDES permit will rely on shunting to protect the ABC. If MMS has not required shunting, and MMS has established "no activity zones" around ABCs, then the NPDES permit will require discharge rate limitations depending upon distance from the ABC. In the eastern Gulf of Mexico, where live bottom areas are ill defined, the general permit requires that an operator submit the live bottom survey required by MMS to EPA for decisions regarding ABCs and discharge rate limitations.

2. Concentrated Animal Feedlots - (4 permits; 450 feedlots)

Region VIII developed two general permits for animal feedlots in several western States. Region IX used those general

permits as models in developing a general permit for Arizona and Region X used them as a model to develop a general permit for Idaho. The use of prior general permits as models has significantly reduced the work needed to develop general permits in Regions IX and X, although some issues were raised concerning permit limitations for feedlots confining more than 300, but fewer than 1,000, animal units.

3. Construction Activities & Hydrostatic Testing - (1 permit; 1,000 sites)

Region VIII developed a general permit that authorized discharges from construction dewatering and hydrostatic testing activities. This one general permit was written to cover both types of discharges because both occur during the construction of pipelines. Since the discharge of water from construction pits almost always occurs in any type of construction, Region VIII worked with construction trade associations in developing the terms and requirements of the general permit.

Compliance Monitoring and Enforcement

General permits will be effective only to the extent that permitting authorities (either EPA or NPDES States) are able to systematically and efficiently identify instances of non-compliance with the terms and conditions of the general permit, and then to take timely and appropriate enforcement action to achieve full compliance by the permittee.

The requirements for NPDES permit program compliance monitoring and enforcement are found at 40 CFR Part 123. Specifically, 40 CFR 123.26, 123.27, and 123.45 detail the measures that the EPA Regional Offices and those States approved to administer the NPDES permit program in lieu of EPA are required to implement and conduct with regards to compliance evaluations, enforcement and noncompliance and program reporting. There is no one "correct" administrative system, although 40 CFR Part 123 discusses the minimum basic principles for an effective compliance tracking and enforcement system; differences in organizational structure, staffing, and State laws and regulations will necessitate different systems from State to State. For detailed information on the specifics required of compliance monitoring and enforcement programs, contact J. William Jordan, Director, Enforcement Division, Office of Water Enforcement and Permits (EN-338).

cited in Alaska Community Action on Toxics v. Arctic Slope Regional Corporation, No. 13-35709 archived on September 19, 2014

In general, EPA Headquarters recommends the assignment of a unique permit number to each permittee covered under a general permit.⁵ (See discussion at 23-26, above, concerning the use of

⁵ Each general permit is issued with a specific 9-character alpha-numeric code. the first two characters are letters representing the State or area covered by the general permit (e.g., "NY for New York, "CA for California, "GM" for Gulf of Mexico). The next character must be a "G" for General Permit. The fourth and fifth characters are the two-digit code for the industrial category covered by the general permit (e.g., "28" for offshore oil and gas, "01" for animal feedlots, "99" for unassigned industries). (A complete list of industrial categories is set forth in Appendix H.) The last four categories should be zeros ("0000"), to allow up to 9,999 individual facilities to be covered by the general permit (0001-9999). Then, as each facility submits an NOI, a specific permit number

NOIs to allow the permitting authority to identify permittees covered under the general permit.) This approach allows for the tracking of compliance activities at each individual site covered under the general permit. Information specific to each permittee covered by the general permit should be entered into the Permit Compliance System (PCS, the automated NPDES data base). States that are not regular users of PCS, and do not have an automated system that is compatible, should supply data to the applicable EPA Regional Office in a form that allows the Regional Office to enter the data into PCS.

The PCS system currently considers general permits to be "minor" permits, although some consideration has been given to changing the system to more accurately characterize general permits (e.g., a distinct classification as is currently the case for Federal facilities). Generally, "major" permits require monthly Discharge Monitoring Reports (DMRs), with the information contained therein entered into PCS. "Minor" permits generally contain quarterly monitoring requirements. There should also be a routine schedule for updating the inventory of permittees covered under the general permit to reflect changes in basic information, such as changes in the ownership/address of a source. The more frequently the information is updated and entered into PCS, the greater the confidence and usefulness of PCS.

is assigned for that facility (e.g., AZG010001, AZG010002, etc.). Further information may be obtained by calling the PCS User Support Hotline (202-475-8529).

CHAPTER 5

STATE PROGRAM APPROVAL PROCEDURES

General

Obtaining general permit authority gives a State the full range of regulatory options for controlling point source dischargers.⁶ As of this writing, 13 States have been approved to issue general permits for point sources, and several other States are at various stages of receiving approval for issuance of NPDES permits. As noted earlier, general permit approval allows States to issue permits covering multiple sources and are thus able to reduce substantially their permit backlogs. Obtaining approval to issue general permits is a straightforward, step-by-step process that is described in detail in this Chapter. Usually, obtaining general permit authority is not complex because most State statutes do not preclude the issuance of general permits. The State need only point to general authority to issue permits; specific statutory authority to issue general permits is not necessary. In most instances, the State Attorney General need only certify to EPA that State law is adequate to carry out the general permit program.

An approved NPDES State's plan to implement a general permit program is processed as a revision or modification of its NPDES

⁶ Some NPDES States have issued general permits without first obtaining EPA authorization. While these general permits may be legal State permits, they are not NPDES permits and dischargers are considered to be in violation of the CWA, unless they are also covered by an individual NPDES permit.

program. First, the State statutes, regulations, and NPDES program submission (Attorney General's Statement, Memorandum of Agreement, and Program Description) are reviewed by the State to determine if adequate authority exists to administer NPDES general permits. After any necessary amendments are made, the State submits its program modification to the EPA through the applicable Regional Office.

The authority to approve State NPDES programs and program modifications has been delegated to the EPA Regional Administrators, with certain restrictions. (See, EPA Delegations Manual, Chapter 2, No. 2-34, State NPDES Program, dated July 25, 1984.) Early coordination between the State, the Regional Office, and EPA Headquarters on program approvals and program modifications is important if the review and approval process is to proceed rapidly and delays are to be minimized. (See discussion on page 45.)

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 22, 2014*

In the case of program modifications, the Regional Administrator makes a determination as to whether the program modification is "substantial." (See, 40 CFR 123.62(b)(2).) There are many reasons why a State's request for general permit authority should be treated as a substantial program modification. A general permit program can have the potential for widespread impacts upon point source dischargers within the State. In addition, the State may have to enact important regulatory and/or statutory changes to allow for issuance of general permits. Other legal issues may also be involved, such

as potentially conflicting State statutes. The public participation elements of a State's general permit authority are often crucial because of concerns relating to specific point sources that could potentially be covered under a general permit. Changes made to ensure public participation in the general permit program may make the program modification substantial.

A substantial program modification triggers two requirements. First, substantial program modifications are subject to public notice and comment procedures. Second, Headquarters' concurrence is required.

Review of State Statutory Provisions

The State statutes must be analyzed for general permit authority. The existing permitting authority provided in the statute -- the directives to the permitting authority and/or the Director, the general prohibition against discharging without a permit, and the enforcement authority -- should be reviewed to assure that there is authority to issue and enforce general permits and particularly that any applicable State-specific administrative law requirements are not limited to individual permits. If general permit authority is provided in the statute, it should be reviewed to make certain that it is not limited to particular classes of dischargers, as this may be interpreted to prohibit general permit issuance for categories which are not mentioned. Of course, a State may wish to only provide for the

use of general permits for certain point sources; if so, EPA approval will be limited to those categories.

Review of State Regulatory Requirements

The State should have regulations analogous to 40 CFR 122.28, containing the substantive authority to issue general permits. The State regulations should describe:

- o the geographic area for which general permits may be written;
- o the criteria for selecting categories for coverage, comparable to 40 CFR 122.28(a)(2); and
- o the criteria for requiring or authorizing (upon request) individual permits for specific dischargers.

The State regulations must be at least as stringent as the federal NPDES regulations.

The State regulations requiring that all dischargers into waters of the U.S. obtain permits should be reviewed; they may have to be amended to add a qualifier for general permits. This may be necessary if the language of the regulations or statute seems to envision only the issuance of individual permits. If the current statute is of the type described above, the Attorney General must explain why general permits are also allowed.

The State regulations must also contain procedural requirements for general permit issuance. The regulations must require the State Director, once he or she has made a tentative determination to issue a general permit, to prepare a draft general

permit (40 CFR 124.10(c)). The regulations must require that draft permits contain the requirements set forth in 40 CFR 124.10(d): (1) necessary conditions (the same conditions required to be contained in individual permits); (2) immediate compliance with the terms and conditions of the general permit; (3) monitoring requirements; and (4) applicable effluent limitations, standards, and prohibitions. The regulations also must require that all draft general permits be accompanied by fact sheets (see, 40 CFR 124.8(a)), which set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. Of course, the State regulations also must provide for public participation in the issuance of general permits just as for individual permits (see, 40 CFR 124.10).

Modification of State Program

If general permit authority was not contemplated at the time the State sought approval to administer the NPDES program, some revisions to the State program submission will be necessary.

A program submission must contain an Attorney General's Statement to the effect that the laws of the State are adequate to carry out the program (see, 40 CFR 123.23). This applies equally when general permit program approval is sought. If the State is already approved to administer the NPDES program, its general permit program submission must contain a supplemental Attorney General's Statement certifying that the laws and

regulations of the State provide adequate legal authority to issue and enforce general permits in accordance with 40 CFR 122.28. This statement must include specific citations to statutes and regulations that have been lawfully adopted at the time the statement is signed and that will be fully effective by the time the program is approved. Appendix E provides an example of a supplemental Attorney General's Statement.

The Memorandum of Agreement (MOA) submitted as part of the original program must be examined to determine whether any of its provisions restrict the State's authority to implement a general permit program. If it does, the Regional Administrator must require submission of a modified MOA. In addition, if the MOA provides for procedures different from those specified in the federal regulations, it would have to be changed. For example, 40 CFR 123.44(a)(2) requires that the MOA provide for 90-day review by EPA of general permits. Appendix F contains an example of a modified MOA.

As mentioned previously, the determination of whether the request for general permit authority is a substantial program modification rests with the Regional Administrator. In the case of general permit submissions that are considered substantial, 40 CFR 123.62(b)(2) requires public notice of the revision and 30 days for public comment. The public notice must be mailed to interested persons and be published in the Federal Register, and in the largest newspapers in the State to provide statewide coverage. It must summarize the proposed revision and provide

for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received. This is the responsibility of the EPA Regional Office.

After consideration of the public comments and any hearing held on the program modification, the Regional Administrator, determines whether to approve or deny the modification. The modification does not become effective until approved by EPA. Approvals of substantial program modifications are published in the Federal Register.

If the Regional Administrator determines that the proposed modification is not substantial, the Regional Administrator may approve or deny the modification without public comment by notice of the decision in a letter to the Governor or his designee (usually the State Program Director).

*cited in Alaska Community Action on Toxics v. Amara Energy Services LLC
No. 13-35709 archived to September 19, 2014*

Headquarters' Concurrence in Program Approvals and Modifications

Although the authority to approve State NPDES permit programs and program modifications has been delegated to the Regional Administrators, EPA Headquarters remains involved in the program approval and modification process. The July 25, 1984 State NPDES program delegation provides that EPA Headquarters, both the Director of the Office of Water Enforcement and Permits and the Associate General Counsel, Water Division, must concur in any determination as to the completeness of State program or program modification submittals. In addition, no decision by the

Regional Administrator concerning final approval of a State NPDES program or (substantial) modification to a State program can be made without the concurrence of the two Headquarters offices. Denials of program approval or program modifications may be made by the Regional Administrator without EPA Headquarters formal concurrence, although the Regional Offices should keep Headquarters apprised of all State NPDES activities.

While the delegation document provides that no Headquarters concurrence is necessary for approvals of non-substantial modifications to a State NPDES permit program, Headquarters' concurrence is necessary on the completeness determination that preceeds any decision on a minor modification to a State NPDES permit program. This means that a concurrence package on the completeness determination similar to that used for State program approvals must also be submitted to EPA Headquarters prior to any proposed insubstantial modification. Thus, in effect, Headquarters must concur twice on any program approval or approval of a substantial program modification--once on the completeness decision of the submittal and again on the decision to approve either the program or the substantial modification. It should be noted that any modification, substantial or not, which adds a component (in this case, general permit authority) to any State program will be published in the Federal Register. As mentioned previously, early coordination with EPA Headquarters will ensure that the concurrence process proceeds smoothly and expeditiously.

APPENDIX A

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Federal Register (FR) Publication Requirements for
Draft and Final General NPDES Permits

TO: Water Management Division Directors.
Regions I, II, III, IV, VI, VIII, IX and X

FROM: Martha G. Prothro, Director
Permits Division (EN-336) *MGP*

Until the Office of Management and Budget (OMB) waived review of EPA issued general permits on November 3, 1983, the Permits Division used OMB's review period to correct FR format problems in any pending permits. We can no longer provide that service without delaying permit publication and issuance.

The Office of Standards and Regulations has prepared a checklist for all FR submissions and has advised us that documents will be returned to our office if they are not properly prepared and submitted. Therefore, we are requesting that your staff ensure that each notice is complete and correct before it is submitted to us.

Executive Order 12291

With the waiver of Executive Order review, all general permit fact sheets and/or FR notices should contain the following statement:

The Office of Management and Budget has exempted this action from the review requirements of Executive Order 12291 pursuant to Section 8(b) of that order.

Regulatory Flexibility Act

All notices and/or permit fact sheets should contain the following statement:

After review of the facts presented in the notice printed above, I hereby certify pursuant to the provisions of 5 U.S.C. 605(b) that this (these) general NPDES permit(s) do (will) not have a significant impact on a substantial number of small entities. Moreover, the permit(s) reduce(s) a significant administrative burden on regulated sources.

Paperwork Reduction Act (PRA)

In most cases, all of the monitoring, recordkeeping, and reporting requirements in a general permit are covered under existing generic information collection clearance requests (ICRs).^{*} Where the requirements are already covered by our generic ICRs, the general permit should contain the following statement:

EPA has reviewed the requirements imposed on regulated facilities in this (these) draft (final) general permit(s) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. The information collection requirements of this (these) permit(s) have already been approved by the Office of Management and Budget in submissions made for the NPDES permit program under the provisions of the Clean Water Act.

Should the Region be aware of or should Headquarters identify a permit requirement(s) that is not covered by an existing ICR, an estimate of the burden hours associated with the provision(s) must be prepared by the Region and submitted with each general permit. The Permits Division will prepare the required material for OMB review under the PRA at the time of publication of the draft permit in the FR. OMB is required to comment on paperwork issues during the public comment period. In such cases the required language is:

For draft permits:

EPA has reviewed the requirements imposed in regulated facilities in this (these) draft general NPDES permit(s)

* Generally, information collection requirements provided for specifically in the NPDES regulations have been covered by the Permits Division in its generic ICR submitted to OMB. However, these clearances basically cover only routine information collection. Activities such as underwater diving inspections, monitoring required pursuant to section 403(c) guidelines, etc. would not be covered. (Please feel free to consult with us on any specific requirements for which the status of a clearance request is unclear.)

under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. The information collection requirements of the permit(s), with the exception of Part(s) (insert section number and titles from permit), have been approved by the Office of Management and Budget (OMB) in submissions made for the NPDES permit program under the provisions of the Clean Water Act. Estimates of the burden hours associated with these excepted provisions have been prepared and submitted to OMB for review at the time of publication of this notice.

For final permits:

No comments from OMB or the public were received on the information collection requirements in this (these) permit(s).

OR

Any comments to EPA from OMB or the public on the information collection requirements in the (these) permit(s) appear in the public comment, section of this notice at _____.

Please be advised that clearance of new requirements not covered by the generic requests could delay permit issuance due to OMB review. However, where such requirements are necessary or appropriate, they should be imposed and the anticipated small increase in overall burdens of the program should be defensible. Major delays for this reason are unlikely in my judgment.

General Administrative Requirements

1. The document should be correctly classified as a proposed or final permit in the title.
2. The document should contain each of the preamble elements. AGENCY, ACTION, SUMMARY, DATES, ADDRESSES, FOR FURTHER INFORMATION CONTACT, AND SUPPLEMENTARY INFORMATION
3. The SUMMARY should state in a sentence or two what you're doing, why you're doing it, and the intended effect of the action.
4. The pages should be numbered at the top.
5. The document should be double spaced and printed in 12 pitch.
6. All signatures should be followed by a signature block. (If someone signs for the Regional Administrator or the Water

Management Division Director, include both names in the signature block (e.g., L. Edwin Coate Acting for, Ernesta Barnes, Regional Administrator).

7. The submission should contain an S.F. 2340-15 Federal Register Typesetting Form with the required signatures in place.
8. The cost of publishing the document should be estimated as follows:

2 pages = 1 FR column = \$136.00
photocopied pages = \$350.00 (i.e., maps or reprinted effluent limitations pages)

If you or your staff have further questions on these matters please contact Michelle Hiller of my staff (426-4793). Your efforts to ensure that these documents are properly prepared will eliminate unnecessary delays in Federal Register submissions.

cc: Water Management Division Directors
Regions V and VI
Director, Enforcement Division, OWE

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

APPENDIX B

cited in Alaska Community Action on Toxics v. Arctic Energy Services, LLC
No. 13-35709 archived on September 19, 2014

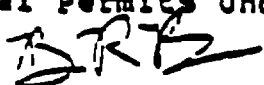
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
WATER

JAN 16 1984

MEMORANDUM

SUBJECT: Continuance of NPDES General Permits Under the APA

FROM: Bruce R. Barrett, Director 
Office of Water Enforcement and Permits (EN-335)

TO: Regional Water Management Division Directors
Regional Counsels

We have received a number of inquiries as to whether continuation of expired general permits is allowed under the Administrative Procedure Act (APA) and the NPDES regulations. A recent Office of General Counsel (OGC) opinion (attached) indicates that such continuance is legally permissible. However, there are important reasons for EPA not to rely on APA continuance except in extreme cases where permit reissuance is delayed for unexpected or unavoidable reasons. This memorandum addresses the general permit reissuance process in light of OGC's recent review of the continuance issue.

SUMMARY

NPDES general permits may be continued under the APA where the Agency has failed to reissue the permit prior to expiration. Although continuance is legally permissible, permits should be continued only as a last resort and continuance should be avoided by timely reissuance of general permits wherever possible.

Because of the geographic scope of general permits and the number of facilities covered, continuance could raise questions as to whether EPA has adequately considered long-term cumulative environmental impacts, exacerbate the permit issuance backlog, and create new issues or workload problems associated with new facility permits since new facilities cannot be covered by a continued permit. Continuance is generally avoidable given adequate planning. Where continuance is unavoidable, it should be for the shortest possible time. Upon determining that a general permit will not be reissued prior to expiration, the

Regional Water Management Division Director should inform the Permits Division Director and provide a specific schedule for completing reissuance.

IMPLEMENTATION

The following requirements govern the continuance of general permits:

- o Only those facilities authorized to discharge under the expiring general permit are covered by the continued permit.
- o Where the notification requirements of a general permit provide permit coverage prior to the actual commencement of operations at a site (e.g., mobile seafood processors and oil and gas drilling vessels) facilities providing such notice prior to expiration are covered by the continued permit.
- o At least six months prior to the expiration date of a general permit, the Regional Water Management Division Director should submit a draft general permit and a schedule for permit issuance or reissuance to the Permits Division Director. If a draft general permit is not ready at that time, an explanation of the reasons for delay and a schedule for permit development and reissuance, should be submitted instead. The Permits Division Director will expedite permit issuance and reissuance processes at headquarters as much as possible and will inform upper management in the Office of Water of any significant delays.

DISCUSSION

As with individual NPDES permits, it may become necessary to administratively continue a general NPDES permit when reissuance of the permit or issuance of a new permit is impossible before permit expiration. The APA allows for continuance of a Federal license or permit when a permittee has made a timely and complete application for a new permit. Until OGC's recent review of the issue, OWEP had advised the Regional Offices that general permits could not be continued under the APA because the NPDES regulations do not require applications for general permits. OWEP requested that OGC review and provide a written opinion on this issue since a number of parties had questioned our legal position. On November 17, 1983, OGC informed OWEP that general permits can legally be continued under the APA.

There are a number of strong policy and program reasons to assure timely reissuance rather than relying on APA continuance. Any general permits cover several dozens or even hundreds of individual facilities. The large number of facilities covered and the broad geographic coverage tend to focus industry and public attention on Agency inaction when the permit is allowed to expire, especially in the early stages of implementation of the general permit program.

Many general permits are controversial at the time of initial permit issuance. Similar controversies can be anticipated during reissuance. EPA cannot allow the public to perceive that we are avoiding these issues through administrative continuance of expired permits. For example, cumulative environmental impact assessments hinge on the number and volume of discharges. Information gathered during the term of the original permit may justify new permit limitations, terms and conditions at the time of reissuance. For marine dischargers, determinations pursuant to §403(c) of the Clean Water Act are usually dependent on the estimates of the number of facilities that will discharge during the term of the permit. Delay in updating these determinations raises questions about potential environmental impacts and the efficacy of permit conditions. Similar issues arise where there have been new standards or effluent limitation guidelines promulgated during the course of the permit or changes in the CWA or applicable requirements under other applicable statutes (e.g., Coastal Zone Management Act, Endangered Species Act).

Finally, a major goal of the general permit program is to reduce the Agency's NPDES permit issuance backlog. Allowing general permits to expire aggravates the backlog problems. In addition, new dischargers would not be covered until EPA re-issued the general permit. Since these facilities would be liable for discharge without a permit, they would likely request an individual permit and be required to submit a full application and do appropriate testing. This creates a permit issuance workload demand that would be avoided by timely reissuance of the general permit, as well as putting burdens on permit applicants that would be removed by reissuance of the general permit.

Given the drawbacks and problems, administrative continuance of general permits should be the exception rather than the rule. Adequate planning and timely permit preparation will allow us to avoid the necessity to use administrative continuance except as a stop gap, short term measure. The Office of Water Enforcement and Permits will work with the Regions to avoid continuance wherever possible.

Colburn T. Cherney, OGC

Attachment

NOV 17 1983

MEMORANDUM

SUBJECT: Continuance of NPDES General Permits Under
the Administrative Procedures Act (APA)

FROM: Margaret B. Silver
Attorney
Water Division (LE-132W)

THRU: Colburn T. Cherney
Acting Associate General Counsel
Water Division (LE-132W)

TO: Bruce Barrett
Director
Office of Water Enforcement
and Permits (EN-335)

This memorandum responds to your request for a legal opinion on several issues related to the expiration, reissuance, and continuance of general permits under the APA.

(1) Issue: Can a general permit be continued under the APA in the absence of a renewal application requirement?

Response: A good legal argument can be made that a general permit may be continued under the APA, even though there is no specific requirement for a renewal application.

Discussion:

Section 9(b) of the APA, 5 U.S.C. 558(c), provides that:

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

This provision allows a licensee (i.e., permittee) to lawfully continue its licensed activity after its license has expired when the issuing agency has failed to act on the licensee's renewal application.

The purpose of this provision is clearly set out in the legislative history of the APA:

[This provision is] necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies. The burden is upon private parties to apply for licenses or renewals. If agencies are dilatory in either kind of application, parties are subject to irreparable injuries unless safeguards are provided. The purpose of this section is to remove the threat of disastrous, arbitrary, and irremediable administrative action.

92 Cong. Rec. 5654 (1946) (remarks of Representative Walter).

The courts have consistently relied on this statement of legislative intent in construing the purpose of this provision. In Committee for Open Media v. FCC, 543 F.2d 861 (D.C. Cir. 1976) the D.C. Circuit described the purpose of this section as the "protection of licensees from the uncertainties stemming from protracted administrative consideration of applications for license renewals." Id. at 867. In County of Sullivan v. CAB, 436 F.2d 1096 (2nd Cir. 1971), Judge Friendly agreed that section 9(b) was intended to protect licensees from an agency's failure to act: "[t]he valuable rights conferred by a license for a limited term shall not be lost simply because the agency has not managed to decide the application before expiration of the existing license." Id. at 1099. The court in Banker's Life & Casualty Co. v. Calloway, 530 F.2d 625 (5th Cir. 1976) quoted Judge Friendly's language and added that "the kind of case that the statute was meant to cover was that in which time exigencies within the agency prevent it from passing on a renewal application, where an activity of a continuing nature is involved." Id. at 634.

Section 9(b) of the APA requires the licensee to make "timely and sufficient application for a renewal ... in accordance with agency rules" to qualify for continuance of its permit. The issue that has been raised is whether the APA continuance provision applies to NPDES general permits since there is no renewal application requirement for such permits. In the case of an individual NPDES permit, the permit holder must submit an application to renew its permit, so the issue does not arise. 1/ Persons who wish to be

1/ The NPDES regulations recognize that the APA continuance provision applies to individual NPDES permits. 40 CFR 122.6(a).

covered under a general permit, however, generally need only submit a "notice of intent to be covered" by the general permit, after the general permit is issued. 2/ Neither the terms of the general permit nor the NPDES permit regulations discuss requirements for coverage after a general permit expires. In other words, in the case of an individual permit, the renewal process is initiated by the permit holder who must submit a renewal application, whereas the Agency must initiate the renewal process for a general permit because the Agency does not provide any opportunity for the permit holder to submit a renewal application.

Based on the overall purpose of Section 9(b), i.e., to limit continuance to situations where the Agency, and not the permittee, has failed to act, we believe it is reasonable to conclude that continuance of general permits is permissible when the Agency has not provided an opportunity to submit a renewal application. 3/ The APA requires the permittee to submit an application "in accordance with agency rules" as a condition for continuance. However, since the current agency rules do not provide a discharger covered under a general permit the opportunity to initiate renewal, the discharger has in essence done all it can to ensure continued permit coverage. Therefore, where "time exigencies" have prevented Agency action, it is a reasonable interpretation of the APA to allow a discharger the protection of the continuance provision where the permit has not been renewed through no fault of the discharger. We believe this position is fair, as well; it does not make sense for continuance to be available to individual permit holders, but not general permit holders, simply because the Agency has not provided for a renewal application for general permits. Also, not allowing continuance would seriously undermine the usefulness of general permits, which were designed to reduce both the regulatory burden on dischargers and the administrative burden on EPA.

Although we believe the position that general permits may be continued under the APA is legally defensible, we strongly recommend that the general permit provisions of the NPDES rules be amended to clarify this issue. The rules should explain how and when a general permit may be continued,

2/ This is a requirement imposed by the terms of the general permit itself, not the NPDES regulations.

3/ Only dischargers covered under the original general permit would be entitled to operate under the continued permit. New dischargers, who would otherwise qualify for coverage under the general permit, could not be covered by the general permit until EPA had reissued it.

and who may discharge under the continued permit. At that time, we may want to consider imposing some sort of application requirement, such as a new notice of intent to be covered when a general permit is about to expire (this provision has appeared in draft amendments to the NPDES rules).

2) Issue: If the Agency conducted an assessment under Section 403(c) of the Clean Water Act before it issued a general permit, can the general permit be continued without a new assessment under the Ocean Discharge Criteria Guidelines? Is continuance affected by the similar requirements of the Endangered Species Act (ESA) and the Coastal Zone Management Act (CZMA)?

Response: A general permit may be continued without additional evaluations under Section 403(c), the Endangered Species Act, or the Coastal Zone Management Act.

Discussion:

As explained above, the APA continuance provision is a stop-gap measure designed to protect the permittee when the Agency has failed to reissue an expired permit. There is no requirement that the Agency have even begun the renewal process for continuance to occur. Since the 403(c), ESA, and CZMA determinations are conducted as part of the permit issuance (or reissuance) process, it is clear that the Agency need not complete any of these determinations before a general permit is continued. In fact, failure to make one or more of these determinations may be precisely the reason for the delay in reissuing the permit.

(3) Issue: What is the effect of issuance of a general permit on previously issued individual permits covering the same type of discharge?

Response: Persons who hold a current individual permit remain covered by that permit until they request coverage under the general permit (generally by submitting a notice of intent to be covered under the general permit) and EPA revokes the individual permit. Persons who hold expired, APA-continued individual permits are covered by the general permit as soon as EPA issues it.

Discussion:

Section 122.18 of the NPDES regulations states that after EPA issues a general permit, a discharger with an individual permit is not covered by the general permit until EPA revokes the individual permit. To date, each general permit has included this provision. It is not clear whether this provision

applies only to current individual permits, or to expired, APA-continued individual permits as well. We think the better reading is to limit this provision to current individual permits. 5/ In the case of an expired, APA-continued individual permit, we believe that issuance of a general permit that covers the discharge should be considered "Agency action" on the permittee's request for renewal of the individual permit (unless the terms of the general permit state otherwise) and that the discharger is covered by the general permit as of the effective date of the general permit. In addition; we believe a new notice of intent would be unnecessary in this case since the discharger has already submitted an application for renewal of its individual permit (both the notice of intent and renewal application serve a similar function, i.e., to inform the Agency who is discharging under the general permit).

Once again, it is important to spell out these provisions in future general permits, or better yet, in the NPDES rules. By distinguishing between current individual permits and expired, APA-continued permits, and the effect of issuing a general permit on each, it will be clear which permit (individual or general) is in effect for each discharge at any given time.

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014*

5/ For the sake of efficiency, we may want to consider revoking all outstanding individual permits as part of the general permit issuance proceeding, rather than revoking them individually.

Prepared by: SILVER:krl:LE-132S:Rm. 539W:382-7706:9/27/83:
9/28/83:10/28/83:11/1/83:11/3/83:11/4/83:11/10/83:
11/16/83:11/17/83

APPENDIX C

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

OFFICE OF
WATER

SEP 27 1983

MEMORANDUM

SUBJECT: Final Procedures for the Review of Draft and Final
General NPDES Permits

FROM: Bruce R. Barrett, Director *Bruce R. Barrett*
Office of Water Enforcement and Permits

TO: Water Management Division Directors

Regional Counsels

Rebecca W. Hanmer, Acting Assistant Administrator
for Water

Colburn Cherney, Acting Associate General Counsel
Water Division

Louise Jacobs, Associate Enforcement Counsel
for Water

C. Ronald Smith, Director
Office of Standards and Regulations

Richard D. Morgenstern, Director
Office of Policy Analysis

Steven Schatzow, Director
Office of Water Regulations and Standards

This memorandum describes the final review procedures for draft and final general NPDES permits. These procedures have been reviewed and accepted by the affected program offices in Headquarters and the Water Management Division Directors. The new procedures outlined below should significantly reduce the problems that have occurred in developing, reviewing, and processing general permits.

- o The attached general permits status report prepared by the Permits Division, OWEP represents a list of all general permits currently in development. Copies of the status report will be sent to the Water Management Division Directors and Headquarters program offices on a monthly basis. Headquarters program offices are requested to identify those permits which they consider important to review each month.
- o Regional offices must submit all draft and final general permits to the Office of Water Enforcement and Permits, to the attention of the Permits Division Director. The Water Management Division Director and the Regional Counsel must review and sign all draft and final general permits submitted for Headquarters review. By so signing, these officials are certifying the programmatic, technical, and legal sufficiency of the general permit. General permits not duly signed will be returned to the Region.
- o Headquarters review of general permits for concurrence will be limited to issues of national significance and consistency with regulations, national guidance, and relevant case law. Any other comments regarding provisions generally within the discretion of the permit writer (such as technical adequacy, identified water quality standards, or general clarity, quality or enforceability) will be suggestions only.
- o Formal communications on general permit issues and Headquarters' concurrence will occur between the Director of the Permits Division and the Water Management Division Director. However, we continue to encourage staff level discussions concerning permit development so that issues can be resolved, to the maximum extent possible, before review for headquarters concurrence.
- o The Permits Division Director is to receive all comments from other Headquarters offices on draft general permits in ten working days. In the review of draft general permits, the Permits Division will identify to the Regional Office any issues which could lead to non-concurrence on the final. Generally, further processing of the draft permit will not be delayed while Headquarters' comments are being addressed by the Region prior to final promulgation. However, there may be occasions involving an issue significant enough to require modification of the fact sheet or draft permit before publication. If Headquarters review identifies a need for a change in the draft permit, the Permits Division Director will notify the Water Management Division Director by phone within the next two working days

after the deadline for submittal of all Headquarters comments to the Permits Division. Written comments will be sent from the Permits Division Director to the Water Management Division Director within five working days after the deadline for submittal of all Headquarters comments to the Permits Division. If the Water Management Division Director does not hear from the Permits Division Director within five days of the end of the Headquarters review period, he may assume that the Permits Division is processing the permit.

- o The procedures for the review of final general permits will be the same as those for draft permits except that Headquarters review time will be shorter. The July 1982 streamlined review process provides that the review period is five working days unless the final permit differs significantly from the draft. (In such cases the review period is specified as ten days.)

On August 8, 1983, the Office of Policy and Resource Management and the Office of Water requested an exemption for general NPDES permits from the review requirements of the Executive Order 12291 from the Office of Management and Budget (OMB). We understand that staff recommendations have been prepared for Robert Bedell, Deputy Administrator, and we expect a written response soon. We will make every effort to keep you informed on the request and OMB's response.

Thank you for your positive comments on these procedures, your efforts to follow them in the interim, and your continued support for the general permit program. Until an exemption is granted, both draft and final general permits must be submitted to OMB for review prior to publication in the Federal Register. Regardless, progress has been made. There was a time when a general permit status report included only permits for offshore oil and gas and animal feedlots.

Attachment



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JL 3 1985

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Transmittal of General Permitting Strategy for
OCS Oil and Gas Activities Under EPA/MMS MOU

FROM: Martha G. Prothro, Director
Permits Division, OWE (EN-336)

Martha G. Prothro

TO: William Dickerson, Director
Federal Agency Liaison Division, OPA (A-104)

Attached is a copy of the guidance document regarding the NPDES permitting process for offshore oil and gas activities. The Permits Division has prepared this as our action under Part IV.A. and Part IV.B. of the Memorandum of Understanding with the Minerals Management Service, signed on May 31, 1984. I hope that this will prove useful to the EPA and MMS staff as they coordinate activities under the MOU.

Please call me if you have any questions regarding this document, or have your staff call Edward Ovsenik (FTS 426-7035).

Attachment

June 18, 1985

**The NPDES Permitting Process
for Oil and Gas Activities on the
Outer Continental Shelf**

**Prepared by the Permits Division
Office of Water Enforcement and Permits
United States Environmental Protection Agency**

*Alaska Community Action on Toxics v. Aurora Energy Services, LLC
cited in No. 13-35703, archived to September 19, 2014*

under the

**Memorandum of Understanding between EPA
and the Minerals Management Service
of the Department of the Interior**

Table of Contents

TOPIC	PAGE
A. Introduction	1
B. Covered Facilities and Permit Areas	1
C. Provisions for Permit Modifications and Revocation	3
D. Provisions for Individual Permits	3
E. Existing Sources, New Dischargers, and New Sources	4
F. Effective Dates	4
G. State Certification	4
H. Fact Sheet	5
I. Technology Based Effluent Limitations	6
J. Ocean Discharge Criteria Guidelines	7
K. Oil Spill Requirements	8
L. Other Legal Requirements	9
1. Endangered Species Act	9
2. Coastal Zone Management Act	9
3. Marine Protection, Research and Sanctuaries Act	11
4. Economic Impact (Executive Order 12291)	12
5. Paperwork Reduction Act	12
6. Regulatory Flexibility Act	12

APPENDICES:

- A. Decision Logic For 403(c) Determinations
- B. States with Approved Coastal Zone Management Programs

A. Introduction

The Environmental Protection Agency (EPA) regulates discharges associated with offshore oil and gas exploration, development, and production on the outer continental shelf (OCS) under the Clean Water Act's (the Act) National Pollutant Discharge Elimination System (NPDES) permit program. EPA Regional Offices issue permits to facilities discharging into ocean waters beyond the three mile limit of the territorial seas and may also issue permits to facilities in the territorial sea if the adjoining State does not have an approved NPDES program. Section 403 of the Act requires that NPDES permits for discharges into the territorial seas, the contiguous zone, and the oceans be issued in compliance with EPA's guidelines for determining the degradation of marine waters. The NPDES Regulations are found in 40 CFR Parts 122, 124 and 125.

B. Covered Facilities and Permit Areas

The traditional NPDES regulatory framework requires that an owner or operator file an application to begin the permit process. The NPDES regulations also authorize the issuance of a general permit for a category of point sources located in the same geographic area if their discharges warrant similar pollution control measures. 40 CFR §122.28. The regulations for general permits provide that sufficient information may be available to the Agency to determine permit conditions without application information. Therefore, general permits are issued without a named party and without application requirements.

The first step in the issuance of a general permit is the Director's determination that a category of point sources meets the requirements of §122.28. The Director is authorized to issue a general permit if there are a number of point sources operating in a geographic area that:

1. Involve the same or substantially similar types of operations;
2. Discharge the same types of wastes;
3. Require the same effluent limitations or operating conditions;
4. Require the same or similar monitoring requirements; and
5. In the opinion of the Director, are more appropriately controlled under the general permit than under individual permits.

Changes to the NPDES regulations on September 1, 1983 (48 FR 9619) also provide that the Regional Administrator (RA) shall issue general permits covering discharges from offshore oil and gas facilities within the Region's jurisdiction. Interested persons, including prospective permittees, may petition the RA to issue a general permit and the RA must promptly establish a project decision schedule for permit issuance. The project decision schedule provides final permit issuance no later than the final notice of sale or 6 months after the petition, whichever is later.

The decision to issue a general permit is dependent upon EPA having sufficient information to determine permit conditions and address the factors in the ocean discharge guidelines. With sufficient information, general permits may be issued for entire tracts or groups of tracts offered in OCS lease sales. Geographic or political boundaries defining the area to be covered are specified in each permit. These boundaries may be OCS lease sale areas defined in lease sale EISs, specific lease parcels, or isobaths surrounding areas of biological concern.

EPA may issue a general permit covering all lease sales occurring within the geographic scope of the permit during its five-year term. EPA also issues general permits only covering specific lease sales which have already occurred, or are about to occur. Currently, EPA Regions III and VI are issuing one permit to cover all lease sale activities within the Gulf of Mexico. EPA Regions IX and X usually issue general permits for only specific lease sales. However, any general permit could be modified to include new lease sale areas during the permit term.

Areas of biological concern (ABCs) are areas which may require special permit conditions and/or effluent limitations which differ from those contained in a general permit for a broader area. In such cases, separate general permits may be necessary. If a lease sale contains several ABCs which require widely different permit terms and conditions, these areas may be more appropriately controlled by individual permits. EPA may also issue one general permit for the entire lease sale area, with one set of effluent limitations established for the broad area, and a second set of limitations for the ABCs.

General permits may be issued for all discharges in the geographic area of the permit (i.e. exploratory, development, and production facilities). However, EPA may also issue a general permit authorizing discharges only from exploratory facilities, with a separate general permit for the development and production facilities. EPA Regions will issue general permits for exploratory facilities first, and wait to determine the interest in the area for development and production, and the possible number of development and production facilities before issuing a development and production general permit.

C. Provisions for Permit Modification and Revocation

The NPDES regulations provide for modification of a general permit for any of the causes in §122.62, including information which indicates unacceptable cumulative impacts (§122.62(a)(2)). The results of any testing required by Section 403(c) may indicate that the general permit should be modified or revoked. If on-site monitoring indicates that an individual permit should be required, §122.28(b)(2)(iv) provides that a general permit terminates on the effective date of an individual permit. All permit modifications or revocations are handled in accordance with §124.5, and requests for modification, revocation, or termination must be in writing and contain facts or reasons supporting the request. The RA may deny the request (§124.5(b)) or prepare a new draft permit incorporating the proposed changes. The procedures for processing the new permit are the same as for all draft permits (§124.6).

D. Provisions for Individual Permits

Any owner or operator authorized to discharge by a general permit may apply for an individual permit; any interested person may petition the Director to require a facility to obtain an individual permit; and the Director may require an owner or operator to apply for and obtain an individual permit on his own initiative. The criteria in §122.28(b)(2) define cases which may require an individual NPDES permit:

1. The discharge(s) is a significant contributor of pollution;
2. The discharger is not in compliance with the terms and conditions of the general permit;
3. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;
4. Effluent guidelines are subsequently promulgated for the point sources covered by the general permits;
5. A Water Quality Management Plan containing requirements applicable to such point sources is approved; or
6. The requirements listed in §122.28(a) are not met (See A. and B. above).

However, changes in pollutant control or abatement technology, effluent guidelines, or water quality standards may more appropriately be addressed through permit modification, or revocation and reissuance if the changes affect a large number of point sources operating under a general permit.

E. Existing Sources, New Dischargers, and New Sources

General permits for offshore oil and gas activities authorize discharges for 'existing sources' and 'new dischargers' (40 CFR §§ 122.2, 122.29(a)). Current general permits do not authorize discharges from 'new sources' as the Agency has not promulgated new source performance standards (NSPS) for the oil and gas extraction point source category, and therefore no new sources are currently operating (122.2, 122.29(b)). When NSPS are promulgated, EPA will have an independent obligation under the National Environmental Policy Act (NEPA) to complete an environmental review for EPA issued oil and gas NPDES permits. Therefore, NEPA compliance will be required for general permits covering Federal waters and the territorial seas of the States that do not have NPDES permit authority. States issuing NPDES permits for their territorial seas have no such NEPA compliance obligations. See 40 CFR 122.29(c)(1).

Mobile drilling units used in exploratory operations -- operations to identify and determine the extent of oil and gas reserves -- are existing sources except in environmentally sensitive areas. Mobile drilling units in areas of biological concern (ABCs) are considered new dischargers after each move within an ABC. The fact sheet of each general permit describes the RA's determination of ABCs affecting new discharger status for mobile drilling units. In determining if an area is an ABC, the RA considers the factors specified in the 403(c) guidelines at 40 CFR 125.122(a)(1) through (4). (See page 7.)

F. Effective Dates

Section 124.15 provides that permits are effective 30 days after final issuance unless 1) a later date is specified in the permit or 2) no comments requesting a change in the draft were received during the comment period. General permits are issued as rulemaking proceedings under the Administrative Procedure Act (APA; 5 U.S.C. §551 et seq.). The APA requires 30-day notice of final rules to allow for administrative appeal and review. Because NPDES general permits are not administratively reviewable, this provision does not apply. Therefore, EPA normally writes general permits to be effective on the date of final publication in the Federal Register. Section 122.46 provides that NPDES permits are effective for a fixed term, not to exceed 5 years.

G. State Certification

Under section 401(a)(1) of the Act, EPA may not issue a permit until certification is granted or waived by the State in which the discharge originates. State certification of general permits covering federal waters is not mandated by statute or regulations. Federal waters are defined as all waters on the Outer Continental Shelf (OCS) beyond any State's Territorial Seas (as defined at Section 502 of the Act). However, the Director

of a permit program may determine that State review of a federal waters permit is appropriate. The Director, pursuant to §124.53, then must send the certifying State agency:

1. A copy of the draft permit;
2. A statement that EPA cannot issue or deny the permit until the certifying State agency has granted or denied certification or waived its right to certify; and,
3. A statement that the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time, not to exceed 60 days.

State certification of a permit requires that the State agency identify more stringent conditions which the State finds necessary to meet applicable conditions of section 208(e), 301, 302, 303, 306, and 307 of the CWA and other requirements of State law. The State must also provide a statement of the extent to which each condition can be made less stringent without violating State law, including the appropriate State water quality standards.

Even though 401 State certification may not be required for federal waters, State participation in the permitting process is ensured under §124.10(c)(1), which requires that public notice, §403(c) determination, draft permits and fact sheets be provided by mail to affected States and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans.

H. Fact Sheet

Section 124.6(c) and (d) requires the Director to prepare a draft of each general permit. The fact sheet for the draft permit also sets forth the significant factual, legal, and policy questions considered in preparing the draft permit. Under §124.8 a fact sheet must include:

1. A brief description of the type of facility or activity;
2. A discussion of the type and quantity of pollutants to be discharged;
3. A brief summary of the basis for the draft permit conditions including:
 - a. applicable statutory and regulatory requirements such as applicable effluent guidelines, and the basis for effluent limitations and permit conditions imposed under 403(c); and,
 - b. supporting references to the administrative record.

4. Reasons why alternatives to required standards do or do not appear justified;
5. A description of the procedures for reaching a final decision on the draft permit including:
 - a. the beginning and ending dates of the comment period and the address where comments will be received;
 - b. procedures for requesting public hearings on a draft general permit and an explanation that the regulations do not provide for evidentiary hearings; and
 - c. procedures by which the public may participate in the final permit decision including notice of public hearings if they have already been scheduled.
6. Name and telephone number of a person to contact for additional information.
7. The provisions of 40 CFR 124.56.

I. Technology Based Effluent Limitations

The Clean Water Act requires all dischargers to meet effluent limitations based on the technological capacity of dischargers to control the discharge of their pollutants. Section 301(b)(1)(A) requires the application of best practicable control technology currently available (BPT) no later than July 1, 1977. On April 13, 1979 EPA promulgated final effluent limitations guidelines establishing BPT for the Offshore Subcategory (40 CFR 435). Sections 301(b)(2)(A) and (B) require the application of the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to control the discharge of toxic and conventional pollutants by July 1, 1984. Effluent limitations establishing BAT and BCT for the subcategory have not been promulgated, therefore permits issued after June 30, 1984 are based on best professional judgement (BPJ) under Section 402(a)(1) of the Act. The factors considered in BPJ determinations are described in 40 CFR Part 122.44(a) and Part 125.3(d) (as amended September 26, 1984, 49 FR 38052). These factors are similar to the factors used in establishing the BAT/BCT effluent limitations guidelines.

Section 306 of the Act requires the application of best available demonstrated technology for new sources or new source performance standards (NSPS) in NPDES permits applicable to new sources. NSPS are based on the best available demonstrated technology for the industrial category. Since new sources have the opportunity to design the best and most efficient wastewater treatment technologies, the Agency considers the best demonstrated process changes and end-of-pipe treatment technologies that reduce pollution to the maximum extent feasible in the development of NSPS.

J. Ocean Discharge Criteria Guidelines

The final 403(c) Ocean Discharge Criteria guidelines 40 CFR Part 125 (45 FR 65952, October 3, 1980) set forth criteria for determinations of unreasonable degradation and irreparable harm which must be addressed prior to the issuance of a NPDES permit. The 403 decision logic is outlined in Appendix A.

The factors considered in a determination of unreasonable degradation are:

1. The quantities, composition and potential for bio-accumulation or persistence of the pollutants to be discharged;
2. The potential transport of such pollutants by biological, physical or chemical processes;
3. The composition and vulnerability of the biological communities which may be exposed to such pollutants including the presence of unique species, communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem such as those important for the food chain;
4. The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways or areas necessary for other functions or critical stages in the life cycle of an organism;
5. The existence of special aquatic sites including, but not limited to, marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;
6. Potential impacts on human health through direct and indirect pathways;
7. Existing or potential recreational and commercial fishing, including fin-fishing and shell-fishing;
8. Any applicable requirements of an approved Coastal Zone Management Plan;
9. Such other factors relating to the effects of the discharge as may be appropriate; and
10. Marine water quality criteria developed pursuant to Section 304(a)(1) of the Act.

The Agency's technical evaluation of drilling fluids discharged by oil and gas operations has identified certain operating conditions which could be incorporated in the NPDES permit in addition to BPT and BAT technologies to address water quality impacts. These conditions may include combinations of the following:

- a. discharge of authorized drilling muds and additives for which the Agency has bioassay test data;
- b. use of a 'buffer zone' around areas of biological concern in which the discharge of drilling fluids may be limited or restricted;
- c. operational requirements such as predilution, discharge rate limitations, adequate dilution and dispersion of drilling fluids, and bulk discharge restrictions;
- d. use of shunting to minimize water column impacts; and
- e. use of a surface or near surface discharge requirement to minimize sediment impacts.

Permits may also include notification requirements for site-specific survey information to aid the Agency in determining the appropriateness of general permit coverage. This measure may be taken, for example, when the nature and extent of an area of biological concern in a frontier area has not been adequately defined. If site-specific information submitted with notification should indicate that the provisions of a general permit would not provide adequate protection of the site, the Director may then require the facility to apply for and obtain an individual permit.

K. Oil Spill Requirements

Section 311 of the Act prohibits the discharge of oil and hazardous materials in harmful quantities. Routine operating discharges are usually specifically controlled by a NPDES permit and are excluded from the provisions of Section 311. A NPDES permit does not preclude the institution of legal action or relieve permittees from any responsibilities, liabilities, or penalties for unauthorized discharges of toxic pollutants, hazardous materials, or oil spills which are covered by Section 311 of the Act. Permittees may have a duty to report such unauthorized discharges to the Minerals Management Service, the United States Coast Guard, and/or the Environmental Protection Agency. EPA regulations codifying Section 311 are found at 40 CFR Parts 110, 112, 113, 114, 116, and 117. Amendments to the Part 110 regulations were proposed on March 11, 1985 (50 FR 9776 et seq.).

L. Other Legal Requirements

1. Endangered Species Act

The Endangered Species Act (ESA) requires that each federal agency shall ensure that none of its actions, including permit issuance, jeopardizes the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their habitat.

For OCS general permits, the Agency follows the consultation procedures described in section 7 of the ESA. Formal consultation begins at the time of public notice of draft permits when EPA submits a written request to the Director or Regional Director of the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS). Once a request for consultation has been received NMFS has 60 days to submit a formal response to EPA. Since the Department of the Interior has 60 days to issue a biological opinion, final permit issuance can be significantly delayed. In addition, a determination by NMFS that insufficient information exists or that the permitting action may jeopardize endangered or threatened species would require EPA to obtain additional information, potentially requiring the Agency to repropose draft permits.

Since the 403(c) guidelines require an evaluation of information on endangered species, informal requests and/or staff meetings are used to identify effected endangered species before permit proposal. A notice of intent to develop a general permit may include requests for identification of endangered species in the permit area, a description of critical life stages or activities affected, and potential impacts on critical habitat. Copies of the information used to complete the 403(c) determination, permit fact sheets, and draft permits may also be provided to the Service with a request for review prior to public notice. With sufficient information FWS and NMFS may be able to provide EPA with recommendations for the draft permit. The final biological opinion is placed in the administrative record for final permit issuance.

2. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) Section 307(c)(3)(A) and its implementing regulations at 15 CFR Part 930 Subpart D require that consistency determinations be made for any federally licensed or permitted activity affecting the coastal zone of a State with an approved Coastal Zone Management Program. For permits covering federal waters, a decision to require CZMA consistency requires a demonstration that the permitted activity will affect the territorial seas or coastal waters of the approved State. Since there is no applicant for a general permit, the Agency, in effect, becomes the applicant and submits a general permit for consistency certification to the appropriate State agency. When EPA is the permit issuing authority within

the territorial seas, consistency determinations are required. For States with approved NPDES programs no CZM consistency is required for permits issued for territorial seas dischargers.

If it is determined that a consistency certification is required for a general permit, a notice of intent to develop a permit may request assistance and solicit recommendations from the State agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the State's management program. EPA provides the State with written certification that the proposed activity complies with, and will be conducted in a manner consistent with, the State's approved management program. The consistency certification is made at the time of public notice of draft permits and includes, in addition to the requirements described in the next paragraph, the 403(c) determinations, the fact sheet, and proposed draft permits.

With the consistency certification, EPA provides the State agency with the following data and information:

- a. A detailed description of the proposed activity and its associated facilities to allow an assessment of their probable coastal zone effects.
- b. A brief assessment relating the probable coastal zone effects of the proposed activity and its associated facilities to the relevant elements of the management program.
- c. A brief set of findings, derived from the assessment, indicating that the proposed activity, its associated facilities and their primary effects are all consistent with the provisions of the management program.
- d. Any additional information required under the State management program.

Formal review of EPA's consistency certification begins at the time the State agency receives a copy of the certification along with the information and data described above. The State agency must provide public notice of the proposed activity in accordance with State Law. At a minimum, this notice must be sent to States significantly affected by the proposed activity. At the discretion of the agency, public notice may include announcement of one or more public hearings.

State agencies must notify EPA "at the earliest practicable time" whether they concur or object to the consistency certification. However, concurrence by the State is not presumed until six months passes without an agency objection. The only other time limit imposed on the State is that, if a decision has not been issued within three months, the State must notify EPA of

the status of the matter and the basis for further delay. Thus, it is clear that the CZMA regulations allow considerable delays in permit issuance, and those delays may be beyond EPA's control.

If the State agency concurs with EPA's consistency certification, EPA may issue the permit. If the State agency objects, it must describe how the proposed activity is inconsistent with specific elements of the management program, and what alternative measures would allow the permit to be issued. In the event of a State agency objection and failure to resolve the issues between the two Agencies, EPA may not issue the permit unless the Secretary of Commerce finds that the permitted activity may be Federally approved because the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. Procedures for appeals are set forth at 15 CFR Part 930, Subpart H.

Appendix B contains a list of States with approved Coastal Zone Management Programs by EPA regions.

3. The Marine Protection, Research and Sanctuaries Act

The Marine Protection, Research and Sanctuaries Act (MPRSA) of 1972, 16 U.S.C. 1431-1434 regulates the dumping of all types of materials into ocean waters and establishes a permit program for ocean dumping including a comprehensive and continuing program of monitoring and research regarding the effect of dumping materials. The MPRSA also establishes the Marine Sanctuaries Program which is implemented by the National Oceanic and Atmospheric Administration (NOAA). MPRSA is applicable to general permits when the permit area includes proposed or designated ocean dump sites and/or marine sanctuaries.

Where proposed and designated ocean dumping sites lie within proposed general permits areas, the discharges authorized by the NPDES permit must be reviewed for consistency or inconsistency with the dump site activities. Generally, permittees entering lease blocks also containing ocean dumping activities are required to notify the EPA Regional offices directing ocean dumping activities of the movement of mobile drilling vessels or the commencement of drilling operations.

Title III of the MPRSA (Section 302(f)) requires that the Secretary of Commerce, after designation of a marine sanctuary, consult with other federal agencies, and issue necessary regulations to control any activities permitted within the boundaries of the marine sanctuary. The Secretary must certify that any permit, license, or other authorization issued pursuant to any other authority is consistent with the purpose of the marine sanctuaries program and can be carried out within its promulgated regulations. The authority of the Secretary to administer the provisions of the Act has been delegated to the Assistant Administrator for Coastal Zone Management, National Oceanic and

Atmospheric Administration (NOAA). The rules governing oil and gas activity within a designated sanctuary are specific to each designation and are published in the Federal Register at the time sanctuaries are designated.

Factor 5 of the 403(c) guidelines specifically requires the identification of marine sanctuaries and an assessment of the impact of the proposed permit on the resources of the sanctuary. NOAA's Office of Coastal Zone Management, Marine Sanctuaries Program, receives notice of the Agency's intent to develop a general permit and is requested to identify both proposed and designated marine sanctuaries within the permit area, as well as corresponding marine resources and NOAA regulations which may be affected by the permit decision.

4. Economic Impact (Executive Order 12291)

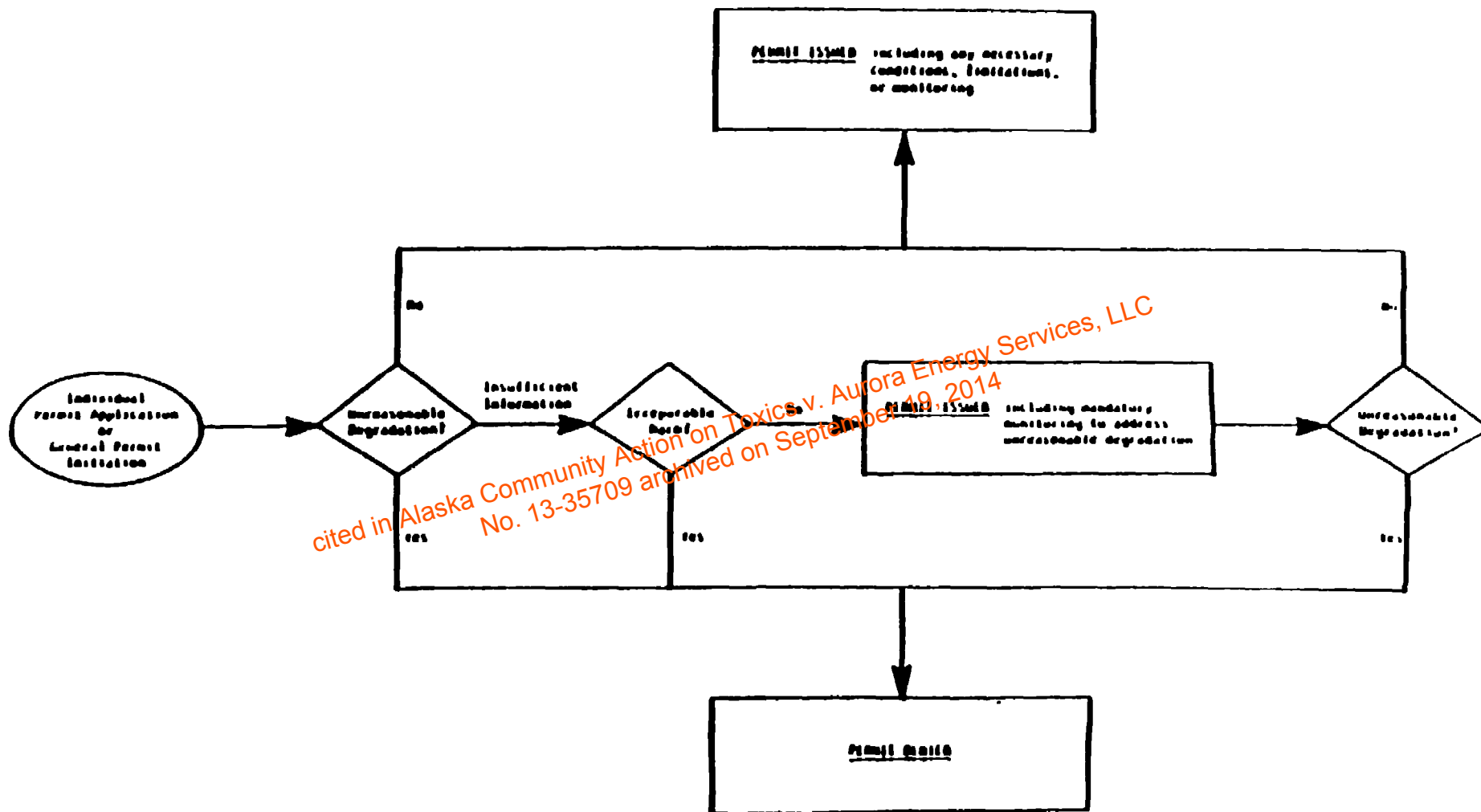
The Office of Management and Budget (OMB) has exempted general NPDES permits from the review requirements of Executive Order 12291 pursuant to Section 8b of that order. Under the exemption the Director of OMB retains discretionary authority to request that a particular general permit be submitted for review. The Director may also, at any time, withdraw the exemption.

5. Paperwork Reduction Act (PRA)

In general, the information collection requirements of general NPDES permits have been approved by the Office of Management and Budget (OMB) in submissions made for the NPDES permit program under the provisions of the Clean Water Act. Should a general permit contain new monitoring and/or reporting requirements not approved by OMB, the permit is submitted to OMB for review under the PRA during the public comment period.

6. Regulatory Flexibility Act (Reg. Flex.)

Because general NPDES permits are considered rulemakings under the APA, they are subject to the Reg. Flex Act. Under this Act, a Federal Agency must scrutinize the impact of any rulemaking on small business. General NPDES permits for Offshore Oil and Gas activities are generally found to have no impact on a significant number of small entities because cost of operations on the OCS prohibits small business from entering the market. EPA has concluded, in recently issued general permits, that no small business would be affected by the general permits.



APPENDIX B

STATES WITH APPROVED COASTAL ZONE MANAGEMENT PLANS
LISTED BY EPA REGION AS OF JANUARY 6, 1984

<u>REGION</u>	<u>STATE</u>	<u>COMMENTS</u>
I	Connecticut Maine Massachusetts New Hampshire Rhode Island	Ocean, Bay Segment 1985
II	New Jersey New York Puerto Rico Virgin Islands	
III	Delaware Maryland Pennsylvania Virginia	1984 [in development]
IV	Alabama Florida Mississippi North Carolina South Carolina	
VI	Louisiana	
IX	California Hawaii	
X	Alaska Oregon Washington	

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

APPENDIX D

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

Non-Oil and Gas General Permits
9/8/87

CATEGORY	PROPOSAL	FINAL	LIMITS	403(c)
<u>Region I</u>				
Non-contact cooling water and uncontaminated storm water	08/16/83 48 FR 37071	06/15/84 49 FR 24785	BPJ/Water Quality	Yes
<u>Region II</u>				
Navy weapons training (Vieques)	06/24/81 46 FR 32669	10/30/84 49 FR 43585	BPJ/Water Quality	Yes
Sanitary & domestic wastes (PR)	04/08/85 50 FR 13871	10/02/85 50 FR 40228	BPJ/Water Quality	Yes
<u>Region VI</u>				
Petroleum storage, transfer & marketing	09/13/83 48 FR 41084	07/12/84 49 FR 28446	BPJ/Settle- ment Agmt	
Correction notice		02/21/85 50 FR 7216		
Hydrostatic testing	09/13/83 48 FR 41084	--		
Private domestic discharges (LA)	07/29/87 52 FR 28337		BPJ/Water Quality	
<u>Region VIII</u>				
Construction activities (UT)	05/20/83 48 FR 22791	12/20/83 48 FR 56268	BPJ/Water Quality	
Construction activities (SD)	05/20/83 48 FR 22791	10/19/84 49 FR 41104	BPJ/Water Quality	

Filed in Alaska Community Action on Toxics No. 1935709 archived on September 19, 2014

Non-Oil and Gas General Permits

Page 2

9/8/87

CATEGORY	PROPOSAL	FINAL	LIMITS	403(c)
<u>Region VIII continued</u>				
Feedlots (UT)	08/04/81 46 FR 39670	04/28/83 48 FR 19201	Pt. 412	
Feedlots (SD)	05/22/81 46 FR 28008	07/29/82 47 FR 28127	Pt. 412	
<u>Region IX</u>				
Feedlots (AZ)	07/18/84 49 FR 29141	10/16/84 49 FR 40441	Pt. 412	
Deep seabed mining	08/29/83 46 FR 39184	10/05/84 49 FR 39442	BPJ/Water Quality	Yes
<u>Region X</u>				
Log transfer facilities	02/23/84 49 FR 6788	--	BPJ/Water Quality	Yes
Seafood processors	12/17/83 48 FR 56107	06/18/84 49 FR	BPT/BCT/Water Quality	Yes
Conc. animal feeding operations (ID)	05/09/86 51 FR 17236	04/14/87 52 FR 12052	Pt. 412/BMP	
Extension comment period	06/13/86 51 FR 21617			
	08/14/86 51 FR 29156			

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

Hudiburgh:D-27:doc-11:gwh:6/30/8
rev:9/8/87

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

9-04-87

OCS Oil and Gas

REGION IV & VI	SALE #	DRAFT PROPOSAL	HEARING/ EXPIRATION DATES	FINAL PERMIT ISSUANCE	EFFECTIVE/ EXPIRATION DATES	LIMITS	403(c)
o Gulf of Mexico (exp, dev & prod)	All new & previous	07/26/85 50 <u>FR</u> 30564	08/27-29/85 09/04-06/85 10/07/85	07/09/86 51 <u>FR</u> 24897	07/02/86 07/01/91	BPJ/BAT BCT	yes DisRateLim
	extension of comment period	10/08/85 50 <u>FR</u> 41020	NONE 11/06/85				
	toxicity suspension notice, errata sheet			09/18/86 51 <u>FR</u> 33130	08/29/86 12/31/86		yes short term
	Thermal Dynamics notice	03/31/87 52 <u>FR</u> 10263	NONE 04/30/87				
	DPMP extension			07/06/87 52 <u>FR</u> 25303	07/02/87 09/30/87		
	ATR explanation			07/13/87 52 <u>FR</u> 26181	NONE		
o Inland Tidal Waters		12/27/83 48 <u>FR</u> 57001				BPT Part 435	
o Reissued OCS		04/04/83 48 <u>FR</u>		09/15/83 48 <u>FR</u> 4194	10/17/83 06/30/85	BPT Part 435	
o OCS	Federal Waters Texas & Louisiana	08/15/80		04/03/81 46 <u>FR</u> 20284	04/28/81 04/30/83		

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

OCS Oil and Gas

9-04-87

REGION IX	SALE #	DRAFT PROPOSAL	HEARING/ EXPIRATION DATES	FINAL PERMIT ISSUANCE	EFFECTIVE/ EXPIRATION DATES	LIMITS	403(c)
o So Cal (exp)	35,48,53,68,73 80,1966,1968	08/22/85 50 <u>FR</u> 34036	09/26/85 10/07/85			BPJ/BAT BCT	yes DisRatLim
o So Cal (dev & prod)	35,48,53,68,73 80,1966,1968	08/22/85 50 <u>FR</u> 34052	09/26/85 10/07/85			BPJ/BAT BCT	yes DisRatLim
extension of comment period		09/19/85 50 <u>FR</u> 38029	10/22/85 11/15/85				
o Reissue So Cal		06/21/83 48 <u>FR</u> 28394		12/03/83 48 <u>FR</u> 55029	12/03/83 06/30/84	BPT Part 435	yes
o Modification So Cal		06/21/83 48 <u>FR</u> 28394		12/03/83 48 <u>FR</u> 55029	12/03/83 06/30/84	BPT Part 435	yes yes
o So Cal OCS		09/14/81 46 <u>FR</u> 45672		02/18/82 47 <u>FR</u> 7313	12/31/83	BPT Part 435	yes yes

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 18-85709 archived on September 19, 2014

OCS Oil and Gas

9-04-87

REGION X	SALE #	DRAFT PROPOSAL	HEARING/ EXPIRATION DATES	FINAL PERMIT ISSUANCE	EFFECTIVE/ EXPIRATION DATES	LIMITS	403(c)
o Beaufort Sea (exp)	71, 87 AK - 36,39, 43, 43A, BF	03/14/84 49 <u>FR</u> 9610	04/16/84 04/18/84	06/07/84 49 <u>FR</u> 23734	05/30/84 05/29/89	BPJ/BAT BCT	yes
o Bering Sea (exp)	70, 83	03/14/84 49 <u>FR</u> 9610	04/16/84 04/16/84	06/07/84 49 <u>FR</u> 23734	05/30/84 05/29/89	BPJ/BAT BCT	yes
response to 5th Circuit remand		08/19/85 51 <u>FR</u> 29600	none 09/19/86	09/ /87 52 <u>FR</u>		No diesel discharge	
o Norton Sound (exp)	57	02/15/85 50 <u>FR</u> 6385	none 08/19/85	06/04/85 50 <u>FR</u> 23578	06/04/85 05/29/90	BPJ/BAT BCT	yes
o Cook Inlet (exp, dev & prod)	55, 60 AK- any	07/17/85 50 <u>FR</u> 28974	none 08/19/85	10/03/86 51 <u>FR</u> 35460	10/10/86 10/10/91	BPJ/BAT BCT/SWQS	yes
extension of comment period		09/03/85 50 <u>FR</u> 35598	none 08/18/85				
extension of comment period		10/07/85 50 <u>FR</u> 40893	none 11/18/85				
o Bering Sea II St. George Basin (exp)	89	07/22/85 50 <u>FR</u> 29928	none 08/19/85	See Withdrawal		BPJ/BAT BCT	yes ABCs
extension of comment period		09/03/85 50 <u>FR</u> 35598	none 09/18/85				
extension of comment period		10/07/85 50 <u>FR</u> 40893	none 11/18/85				
withdrawal		07/08/86 51 <u>FR</u> 24745	none				
o Beaufort Sea (exp)	97	09/ /87 52 <u>FR</u>	/ /87 / /87	53 <u>FR</u>	/ / / /	BPJ/BAT BCT	yes

cited in Alaska Community Action on Energy v. Aurora Energy Services, LLC
No. 1:13-cv-00709 archived on September 19, 2014

ATTACHMENT A

NPDES Attorney General's Statement
for General Permits

I hereby certify, pursuant to Section 402(b) of the Clean Water Act as amended (33 U.S.C. §1251, et. seq.) and 40 CFR §123.25(c) that in my opinion the laws of the State (Commonwealth) of _____ provide adequate legal authority to issue and enforce general permits in accordance with the general permit program outlined in 40 CFR §122.18. The specific authorities provided, which are contained in lawfully enacted or promulgated statutes or regulation in full force and effect on the date of this statement, include the following:

1. Authority to Issue General Permits

State law provides authority to issue general permits for the discharge of pollutants from specified categories of point sources to the same extent as required under the general permit program administered by the U.S. Environmental Protection Agency ("EPA") pursuant to Section 402 of the Clean Water Act, as amended, 33 U.S.C. §1251 et. seq., and 40 CFR §122.28.

- (a) Federal Authority: CWA §402(a), 40 CFR §122.28, §123.23.
- (b) State Statutory Authority:
- (c) State Regulatory Authority:
- (d) Remarks of the Attorney General:
- (e) Judicial Decisions Demonstrating Adequate Authority:

2. Authority to Enforce General Permits

State law grants to the STATE NPDES PERMITTING AUTHORITY the authority to enforce general permits pursuant to the implementation of a general permit program under 40 CFR §122.22.

(a) Federal Authority: CWA §402(a), 40 CFR §122.22, §123.23
§123.27.

(b) State Statutory Authority:

(c) State Regulatory Authority:

(d) Remarks of the Attorney General:

(e) Judicial Decisions Demonstrating Adequate Authority:

*cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014*

APPENDIX F

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

Model MOA
General Permits

AMENDMENT
TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN
(State Agency)
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION ____

The Memorandum of Agreement between the United States Environmental Protection Agency, Region ____ (hereafter EPA) and the (State Agency) (hereafter ____) is hereby amended to include (State Agency) and EPA responsibilities for the development, issuance and enforcement of National Pollutant Discharge Elimination System (hereafter NPDES) general permits as follows:

The (State Agency) has the responsibility for developing and issuing NPDES general permits. After identifying dischargers appropriately regulated by a general permit, the (State Agency) will collect sufficient effluent data to develop effluent limitations and prepare the draft general permit.

Each draft general permit will be transmitted to the following EPA offices:

Water Management Division Director
U.S. EPA, Region ____
(Address) ____

Director, Office Water Enforcement and Permits*
U.S. EPA (EN-335)
401 M Street SW
Washington D.C. 20460.

EPA will have up to ninety (90) days to review draft general permits and provide comments, recommendations and objections to the (State Agency). Each draft general permit will be accompanied by a fact sheet setting forth the principal facts and methodologies considered during permit development. In the event EPA does object to a general permit it will provide, in writing, the reasons for its objection and the actions necessary to eliminate the objection. The State has the right to a public hearing on the objection. Upon receipt

* General permits for discharges from separate storm sewers need not be sent to EPA Headquarters for review.

of EPA's objection, the State may request a public hearing. If EPA's concerns are not satisfied and the State has not sought a hearing within 90 days of the objection, exclusive authority to issue the general permit passes to EPA.

If EPA raises no objections to a general permit it will be publicly noticed in accordance with (insert State requirements), and 40 C.F.R. §124.10, including publication in a daily or weekly newspaper circulated in the area to be covered by the permit. The (State Agency) will issue general permits in accordance with (insert citations to State regulations) and 40 C.F.R. §122.28.

The (State Agency) may require any person authorized by a general permit to apply for, and obtain an individual NPDES permit. In addition, interested persons, including dischargers otherwise authorized by a general permit, may request that a facility be excluded from general permit coverage. Dischargers wishing exclusion must apply for an individual NPDES permit within ninety (90) days of publication of the general permit. The applicability of a general permit will automatically terminate upon the effective date of the individual permit. Finally, a discharger with an effective or continued individual NPDES permit may seek general permit coverage by requesting its permit to be revoked.

The (State Agency) also has the primary responsibility for conducting compliance monitoring activities and enforcing conditions and requirements of general permits.

All specific State commitments regarding the issuance and enforcement of general permits will be determined through the annual 106 workplan/SEA process.

This Amendment to the Memorandum of Agreement will be effective upon approval of the (State Agency's) general permits program application by the Administrator of EPA Region ____.

FOR (State Agency):

Director

(Date)

FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Regional Administrator
U.S. EPA, Region _____

(Date)

APPENDIX G

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

FEDERAL GENERAL PERMIT REGULATIONS -- CITATIONS

<u>Topic</u>	<u>Reg. Cite</u>
Definitions	§122.2
Substantive Regs. Coverage Administration Offshore Oil & Gas	§122.28
Applications	§124.3(a)(1)
Draft Permits	§124.6(c)
Fact Sheets	§124.8(a)
Public Notice	§124.10(c)(1) .10(c)(2)(i) .10(d)(1)(ii-iii) .10(d)(1)(vii)
EPA Review State Permits	§123.24(d)(3) .43(b) .44(a)(2) .44(b)(2) .44(i)
Individual Permits	§124.52(a)
Special Procedures for EPA Permits	§124.58
Evidentiary Hearings	§124.71(a)
Attorney General Statement for State Program Approval	§123.23(c)

Alaska Community Action on Toxics v. Aurora Energy Services, LLC
 cited in No. 13-35709 archived on September 19, 2014

APPENDIX H

cited in Alaska Community Action on Toxics v. Aurora Energy Services, LLC
No. 13-35709 archived on September 19, 2014

**Standard Industrial Category Codes
for General Permits**

<u>Code (GPCT)</u>	<u>Description (GPCD)</u>
01	Agricultural Production Livestock
04	Coal Mining
07	Construction
10	Deep Seabed Mining
13	Fish Hatcheries and Preserves
16	Landfill Runoff
19	Laundry, Cleaning, and Garment Services
22	Meat Products
25	Non-Contact Cooling Waters
28	Offshore Oil and gas
31	Oil and gas Extraction
34	Petroleum and Bulk Stations and Terminals
37	Placer Mining
40	Private Households
43	Processed Fruits and vegetables
46	Salt Extraction
49	Sand and Gravel
50	Sand and Gravel
52	Seafood Processing
55	Sewerage Systems (commercial)
58	Sewerage Systems (municipal)
61	Storm Water Runoff
64	Water Supply
67	Hydrostatic Testing
70	Log Transfer
99	Not Yet Defined

cited in Alaska Community Action on Toxics v. Arctic Energy Services, LLC
 No. 13-35709 archived on September 19, 2014