

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-7851-2]

**Final National Pollutant Discharge Elimination System (NPDES) General Permit for the Offshore Subcategory of the Oil and Gas Extraction Point Source Category for Operations Located in the Eastern Portion of Outer Continental Shelf (OCS) of the Gulf of Mexico (GMG460000) and Record of Decision****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final Issuance of NPDES General Permit.

**SUMMARY:** On December 9, 2004, the Regional Administrator of EPA Region 4 (the "Region") reissued the National Pollutant Discharge Elimination System (NPDES) general permit for operators located in the Outer Continental Shelf (OCS) of the eastern portion of the Gulf of Mexico, General Permit No. GMG460000, (formerly NPDES Permit no. GMG280000) for discharges in the Offshore Subcategory of the Oil and Gas Extraction Point Source Category cited at 40 Code of Federal Regulations (CFR) Part 435, subpart A, which includes guidelines for the discharges of non-aqueous drilling fluids (*i.e.*, synthetic-based drilling fluids) promulgated on January 22, 2001. This permit, which shall become effective on January 1, 2005, and will expire on December 31, 2009, authorizes discharges from exploration, development, and production facilities located in, and discharging to, all Federal waters of the eastern portion of the Gulf of Mexico seaward 200 meter contour depth outer boundary of the territorial seas offshore Florida and Alabama in the Eastern Planning Area and facilities in Mobile and Visca Knoll lease blocks located seaward of the outer boundary of the territorial seas offshore Alabama and Mississippi in the Central Planning Area. Individual NPDES permits will be issued for operating facilities on lease blocks traversed by and shoreward of the 200 meter depth in the Eastern Planning area. The previous Region 4 general permit for Offshore Oil and Gas activities was published at 63 **Federal Register** (FR) 55718 on October 16, 1998, revised on March 14, 2001, at 63 FR 14988, and expired on October 31, 2003.

The proposed NPDES general permit was published at 69 FR 1743 on January 12, 2004. Three public hearings pertaining to the proposed permit, draft Supplemental Environmental Impact Statement (SEIS), and draft Ocean

Discharge Criteria Evaluation (ODCE) document [*i.e.*, Clean Water Act (CWA) Section 403 Determination] were held in the Gulf Coast area during March 16–18, 2004, and the public comment period for these documents ended on April 20, 2004.

This notice constitutes the Agency's Record of Decision in accordance with the Council on Environmental Quality regulations at 40 CFR 1505.2 and EPA regulations at 40 CFR 6.606. Draft and Final SEISs were issued February 13, 2004 and August 27, 2004, respectively, that considered three permitting options available to EPA. Alternative A was the issuance of a general permit to include limits and permit conditions addressing the use of non-aqueous-based drilling fluids [which include synthetic-based drilling fluids (SBFs)] for existing and new sources in areas in general permitting coverage area. Alternative B was the issuance of a general permit that is unchanged from the previous general permit (1998), which did not include permit limits and/or conditions pertaining to the use of SBFs, and Alternative C was no issuance of any general permit. The SEIS process updated information contained in the Final EIS associated with the previous NPDES general permit for Offshore Oil and Gas activities in Region 4.

The final SEIS (EPA 904–9–04–004, dated July 2004) addressed the potential impacts to the environment from the use of SBFs, supplementing the final EIS completed in 1998. Alternative A, EPA's preferred alternative, has been found to be adequately protective of the offshore marine environment. In the process of reaching this finding, the SEIS considered available mitigation for avoiding and minimizing the adverse impacts to federal OCS waters and the coastal waters of the adjoining states. The proposed general permit contains numerous protective specifications which have been evaluated in the SEIS. The effluent discharge limitations, the SBF toxicity and biodegradation rate testing requirements, and the permit conditions requiring seabed surveys and agency coordination, are all deemed necessary mitigation to ensure the protection of the environment.

The general permit is also protective of state coastal waters. To comply with the federal consistency provisions of the Coastal Zone Management Act (CZMA), the permit includes a condition whereby an applicant for permit coverage must provide evidence that the proposed oil and gas extraction project has received the applicable state determination of consistency prior to EPA granting coverage.

EPA also considered in the SEIS the various applicable laws and regulations administered by EPA or other agencies which provide additional direct or indirect environmental mitigation. The Minerals Management Service (MMS) has the broadest regulatory mandate for OCS oil and gas extraction activities. The environmental mitigation provided by the general permit, as issued, will strengthen the mitigation administered by MMS and other federal environmental agencies.

The public review of the SEIS and proposed general permit did not reveal any additional significant adverse impacts not addressed in the SEIS. While the present knowledge of the fate and effects of SBF is considered adequate for regulatory purposes, understanding of the long term impacts of the use of SBF will come from ongoing study. Should new, pertinent technical information become available from these studies, that data would be fully evaluated by EPA relative to the present limitations and conditions of the general permit. To accomplish this, a re-opener condition" is included in the permit.

General permit coverage for all permittees under the previous general permit (NPDES Permit No. GMG280000) will cease 30 days from the effective date of this permit. In order to obtain coverage under the reissued general permit, all permittees with existing general coverages must submit to EPA a new Notice of Intent (NOI) no later than 30 days after the effective date. All facility owners of newly acquired leases, on which a discharge will take place before the expiration date of the reissued general permit (operating facilities) within the area covered by the general permit, must file a written NOI for existing and for new sources prior to discharge. Non-operational facilities, *i.e.*, those on which no production and no discharges have taken place in the two (2) years prior to the effective date of the reissued general permit, are only eligible for coverage once a new MMS-approved Exploration Plan (EP), Development Production Plan (DPP) or Development Operational Coordination Document (DOCD) (or proof that MMS previously approved an EP, DPP or DOCD) is submitted to EPA. Otherwise, coverage under the previous general permit will terminate on the effective date of the reissued general permit. For all applicants, the NOI must contain the information set forth in 40 CFR 122.28(b)(2)(ii) and Part I.A.4 of the reissued NPDES general permit.

In accordance with Oil and Gas Extraction Point Source Category, Offshore Subcategory Effluent

Guidelines and New Source Performance Standards (NSPS) published at 58 FR 12454 on March 4, 1993, and amended at 66 FR 6850 on January 22, 2001, EPA Region 4 made a draft SEIS available concurrently with the draft general permit for review during the public comment period that addressed potential impacts from facilities that may be defined as new sources in the context of a comprehensive offshore permitting strategy. As set forth in Section 4.1 of the final SEIS (EPA 904/9-04-004), the Regional Administrator has determined that the discharges authorized under the reissued general permit would not pose environmental harm within the general permit coverage area.

The final NPDES general permit includes, best conventional pollutant control technology (BCT), and best available technology economically achievable (BAT) limitations for existing sources and NSPS limitations for new sources as promulgated in the effluent guidelines for the offshore subcategory at 58 FR 12454 and amended at 66 FR 6850 (March 4, 1993 and January 22, 2001, respectively). Other permit conditions are included based on the Best Professional Judgement of the permit writer.

**DATES:** The NPDES General Permit shall become effective on January 1, 2005, and shall expire at midnight on December 1, 2009. The final permit, the amendment to the fact sheet (which includes responses to comments on the proposed general permit), an electronic version of the EPA-Region 4 approved, optional Discharge Monitoring Report, and the final ODCE document can be downloaded from the following Internet Web site: <http://www.epa.gov/region4/water/permits/>.

*For Administrative Record and Further Information:* Contact Ms. Karrie-Jo Robinson-Shell, Environmental Engineer by phone at (404) 562-9308, by e-mail at [shell.karrie-jo@epa.gov](mailto:shell.karrie-jo@epa.gov), or at the following mail address: Water Management Division, NPDES and Biosolids Permits Section, U.S. EPA-Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303-8960, Attention: Ms. Karrie-Jo Robinson-Shell.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Procedures for Reaching a Final Permit Decision**

EPA prepared draft and final SEISs that evaluated the potential impacts of the proposed Federal license (issuance of the general permit) within the context of a comprehensive NPDES permitting strategy for the Region 4 jurisdictional

area of the Gulf of Mexico. The process was conducted in accordance with the regulations implementing the National Environmental Policy Act (NEPA). The findings of the final SEIS, the ODCE (*i.e.*, CWA Section 403(c) Evaluation) and public comments were used in reaching the decision to reissue the final NPDES general permit with the limitations and conditions, therein. Important interagency coordination occurred between the EPA, MMS, The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). A significant amount of information and assistance was obtained from MMS. Since EPA will be conducting individual permitting outside the general permit coverage area of new source development/production projects, it intends to coordinate its efforts with MMS on the environmental reviews required of each agency by National Environmental Policy Act (NEPA).

EPA has considered all written comments submitted on the proposed general permit, draft SEIS, draft ODCE document, as well as all comments received during the three public hearings. A summary of the comments on the proposed permit with EPA responses to these comments, the final general permit, the fact sheet, amendment to the fact sheet, and final ODCE document can be downloaded from the following Internet Web site: <http://www.epa.gov/region4/water/permits/>. Copies of these documents, which are made available to the public, state agencies and local governments as part of Region 4's administrative record, can also be obtained by contacting: Ms. Karrie-Jo Robinson-Shell, as directed above.

A formal hearing is available to challenge any NPDES permit issued according to the regulations at 40 CFR 124.15 except for a general permit as cited at 40 CFR 124.71. Persons affected by a general permit may not challenge the conditions of a general permit as a right in further Agency proceedings. They may instead either challenge the general permit in court, or apply for an individual permit as specified at 40 CFR 122.21 as authorized at 40 CFR 122.28, and then request a formal hearing on the issuance or denial of an individual permit. Additional information regarding these procedures is available by contacting Mr. Kevin Smith, Associate Regional Counsel, Office of Environmental Accountability, at (404) 562-9525.

##### **II. Procedures For Obtaining General Permit Coverage**

Notice of Intent requirements for obtaining coverage for operating facilities are stated in Part I Section A.4 of the general permit. Coverage under the reissued general permit is effective as of the postmarked date of all NOIs deemed by EPA to be complete. EPA will notify applicants within 21 days of the postmarked date of the NOI letter to assign an NPDES general permit number or to identify any deficiencies with the NOI.

##### **III. Exclusion of Non-Operational Leases**

This permit does not apply to non-operational leases, *i.e.*, those on which no production and no discharge has taken place in the two (2) years prior to the effective date of the reissued general permit. EPA will not accept NOIs for such facilities, and the general permit will not cover such leases. Non-operational facilities will lose coverage under the previous general permit on the effective date of the reissued general permit. No subsequent exploration, development or production activities may take place on these facilities until and unless the permittee has obtained coverage under the new general permit or an individual permit. EPA will not process an NOI or individual permit application for non-operational until such time that documentation is submitted to EPA that MMS previously approved an EP, DPP or DOCD or a new EP, DPP or DOCD.

##### **IV. State Water Quality Certification**

Because state waters are not included in the area covered by the general permit, its effluent limitations and monitoring requirements are not subject to state water quality certification under CWA Section 401.

##### **V. State Consistency Determination**

Region 4 is required under CZMA to provide all necessary information for the States of Mississippi, Alabama and Florida to review this action for consistency with their approved Coastal Management Programs. A copy of the consistency determination on the proposed activities was sent to each affected State, along with copies of the proposed NPDES general permit, fact sheet, draft ODCE, and draft SEIS. Each state concurred with EPA's finding of consistency.

##### **VI. Administrative Record**

All relevant documents pertaining to this permit issuance are on file and may be inspected any time between 8:15 a.m. and 4:30 p.m., Monday through Friday

at: Water Management Division, NPDES and Biosolids Permits Section, U.S. EPA-Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, GA 30303-8960, Attention: Ms. Karrie-Jo Robinson-Shell. Copies may also be obtained by written request to this same address. Electronic copies of the final NPDES general permit, the fact sheet, amendment to the fact sheet (which includes EPA's response to comments), and final ODCE may be downloaded at <http://www.epa.gov/region4/water/permits>.

## VII. Executive Order 12866

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], the Agency must determine whether the regulatory action is "significant," and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health, or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has exempted review of NPDES general permits under the terms of Executive Order 12866.

## VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rule making requirements under the Administrative Procedures Act (APA) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Issuance of an NPDES general permit is not subject to rule making requirements, including the requirement for a general notice of proposed rule making, under APA Section 533 or any other law, and is thus not subject to the RFA requirements.

The APA defines two broad, mutually exclusive categories of agency action—"rules" and "orders." APA Section 551(4) defines rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice or requirements of an agency \* \* \*." APA Section 551(6) defines orders as "a final disposition \* \* \* of an agency in a matter other than rule making but including licensing." APA Section 551(8) defines "license" to "include \* \* \* an agency permit \* \* \*." The APA thus categorizes a permit as an order, which by the APA's definition is not a rule. Section 553 of the APA establishes "rule making" requirements. APA Section 551(5) defines "rule making" as "the agency process for formulating, amending, or repealing a rule." By its terms, Section 553 applies only to rules and not to orders, exempting by definition permits.

## IX. Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1501, et seq, generally requires Federal agencies to assess the effects of their "regulatory actions" on State, local and tribal governments and the private sector. UMRA uses the term "regulatory actions" to refer to regulations. (See, e.g., UMRA section 201, "Each agency shall \* \* \* assess the effects of Federal regulatory actions \* \* \* (other than to the extent that such regulations incorporate requirements specifically set forth in law)" (emphasis added)). UMRA section 201 defines "regulation" by reference to section 658 of Title 2 of the U.S. Code, which in turn defines "regulation" and "rule" by reference to section 601(2) of the Regulatory Flexibility Act (RFA). That section of the RFA defines "rule" as "any rule for which the agency publishes a notice of proposed rulemaking pursuant to section 553(b) of [the Administrative Procedure Act (APA)], or any other law \* \* \*."

NPDES general permits are not "rules" under APA and thus not subject to the APA requirement to publish a notice of proposed rulemaking. NPDES general permits are also not subject to such a requirement under the CWA. While EPA publishes a notice to solicit public comment on draft general permits, it does so pursuant to the CWA section 402(a) requirement to provide "an opportunity for a hearing." Thus, NPDES general permits are not "rules" for RFA or UMRA purposes.

EPA has determined that the proposed permit reissuance would not

contain a Federal requirement that may result in expenditures of \$100 million or more for State, local and tribal governments, in the aggregate, or the private sector in any one year.

The Agency also believes that the permit would not significantly, nor uniquely, affect "small governments". For UMRA purposes, "small governments" is defined by reference to the definition of "small governmental jurisdiction" under RFA. (See UMRA section 102(1), referencing 2 U.S.C. 658, which references section 601(5) of the RFA.) "Small governmental jurisdiction" means governments of cities, counties, towns, etc., with a population of less than 50,000, unless the Agency establishes an alternative definition.

The permit also would not uniquely affect small governments because compliance with the permit conditions affects small governments in the same manner as any other entities seeking coverage under the permit. Additionally, EPA does not expect small governments to operate facilities authorized to discharge by this permit.

## X. Paperwork Reduction Act

The information collection required by this permit has been approved by OMB under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., in submission made for the NPDES permit program and assigned OMB control numbers 2040-0086 (NPDES permit application) and 2040-0004 [(NPDES Discharge Monitoring Reports (DMRs))].

Since this permit is very similar in reporting and application requirements and in discharges which are required to be monitored as the previous Eastern Gulf of Mexico OCS general permit (NPDES Permit No. GMG280000) the paperwork burdens are expected to be nearly identical. When it issued the previous OCS general permit, EPA estimated it would take an affected facility three hours to prepare the request for coverage and 38 hours per year to prepare DMRs. It is estimated that the time required to prepare the request for coverage and DMRs for the reissued permit will be approximately the same.

## XI. Other Legal Requirements

### *Oil Spill Requirements*

Section 311 of the Clean Water Act prohibits the discharge of oil and hazardous materials in harmful quantities. Routine discharges that are in compliance with NPDES permits are excluded from the provisions of section 311. However, the permits do not

preclude the institution of legal action or relieve permittees from any responsibilities, liabilities, or penalties for other, unauthorized discharges of oil and hazardous materials that are covered by section 311 of the Act.

#### *Endangered Species Act*

The Endangered Species Act (ESA) imposes important requirements upon, federal agencies regarding endangered species of fish, wildlife, or plants that have been designated as critical. Its implementing regulations (50 CFR Part 402) require the Regional Administrator to ensure, in consultation with the Secretaries of Interior and Commerce, that any action authorized, funded or carried out by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat [40 CFR 122.49(c)]. Implementing regulations for the ESA establish a process by which agencies consult with one another to ensure that issues and concerns of both the NMFS and the USFWS collectively are addressed. The NMFS and USFWS have responded to EPA's initiation of the coordination process under the regulations set forth by section 7 of the Endangered Species Act. The species identified by NMFS and USFWS as threatened or endangered species within the permit coverage area have been assessed for potential effects from the activities covered by the proposed permit in a biological assessment incorporated in the draft SEIS. This biological assessment was submitted to the NMFS and USFWS along with the proposed permit for consistency review and concurrence on the Region's finding of no adverse effect. This coordination is appended to the final EIS. Concurrence from the USFWS and the NMFS was received on October 10, 2004, and November 16, 2004, respectively. Both agencies stated that EPA's proposed action to reissue the general permit is not likely to affect resources protected under the ESA.

The NMFS, in association with the Gulf of Mexico Fishery Management Council, administers the Essential Fish Habitat (EFH) requirements established by the Magnuson-Stevens Fishery Conservation and Management Act. Federal agencies are required to consult with NMFS on any activity that may adversely effect fisheries. EFH coordination with NMFS occurred in conjunction with the SEIS which contains the EFH assessment information. EPA requested comments from NMFS on the EFH assessment and finding of minimal effects. The NMFS offered comments which included

recommendations for minimizing potential adverse impacts of the discharges. Comments were fully considered and responded to by EPA in the FSEIS.

#### *Ocean Discharge Criteria Evaluation*

For discharges into waters located seaward of the inner boundary of the territorial seas, the CWA Section 403 requires that NPDES permits consider guidelines for determining the potential degradation of the marine environment. The guidelines, or Ocean Discharge Criteria (40 CFR Part 125, subpart M), are intended to "prevent unreasonable degradation of the marine environment and to authorize imposition of effluent limitations, including a prohibition of discharge, if necessary, to ensure this goal" (45 FR 65942, October 3, 1980).

A final ODCE determination of no unreasonable degradation has been made by Region 4 based comments and information submitted during the public comment period for the proposed general permit. The potential effects of discharges under the proposed permit limitations and conditions are assessed in this document available from Region 4. The ODCE states that, based on the available information, the permit limitations are sufficient to determine that no unreasonable degradation should result from the permitted discharges.

#### *Marine Protection, Research, and Sanctuaries Act*

No marine sanctuaries as designated by the Marine Protection, Research, and Sanctuaries Act exist in the area to which the OCS permit applies.

#### *Regulatory Flexibility Act*

After review of the facts presented above, I hereby certify, pursuant to the provisions of 5 U.S.C. 605(b), that these proposed general permits will not have a significant impact on a substantial number of small entities. This certification is based on the fact that the vast majority of the parties regulated by this permit have greater than 500 employees and are not classified as small businesses under the Small Business Administration regulations established at 49 FR 5024 *et seq.* (February 9, 1984). For those operators having fewer than 500 employees, this permit issuance will not have significant economic impact. These facilities are classified as Major Group

13—Oil and Gas Extraction SIC Crude Petroleum and Natural Gas.

**James D. Giattina,**

*Director, Water Management Division.*

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## **ENVIRONMENTAL PROTECTION AGENCY**

**[FRL-7851-6]**

### **Final Modification of National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities; Notice**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of general permit modification.

**SUMMARY:** Today's action provides notice of modification of permit conditions specific to construction activities covered under EPA's National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities. The general permit is available for use where EPA is the NPDES permitting authority in EPA Regions 1-3 and 5-10. Coverage under the general permit authorizes the discharge of storm water from construction activities consistent with the terms of the permit. The revisions clarify that only sites covered by this permit can be subject to noncompliance with the permit. In addition, this modification includes correction of a typographical error in the permit and a corresponding error in the fact sheet.

**DATES:** This permit modification is effective on January 21, 2005. In accordance with 40 CFR 23.2, this action is considered issued for purposes of judicial review as of 1 p.m. eastern standard time (e.s.t.) on January 5, 2005. Under section 509(b)(1) of the Clean Water Act (CWA), judicial review of the Agency's actions relating to the issuance or denial of an NPDES permit is available in the United States Court of Appeals within 120 days after the decision is final for the purposes of judicial review. Under CWA section 509(b)(2), the modifications issued today may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

**FOR FURTHER INFORMATION CONTACT:** Jack Faulk: telephone 202-564-0768 or e-mail [faulk.jack@epa.gov](mailto:faulk.jack@epa.gov).

**SUPPLEMENTARY INFORMATION:**