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

JUL 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, OWEP (EN-336)

Martha G. Prothro

TO: William Dickerson, Director
Federal Agency Liaison Division, OFA (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 (PTS 426-7035).

Attachment

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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**

under the

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

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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 IV 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.

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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)(ii).

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 (10). (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. §§51 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)

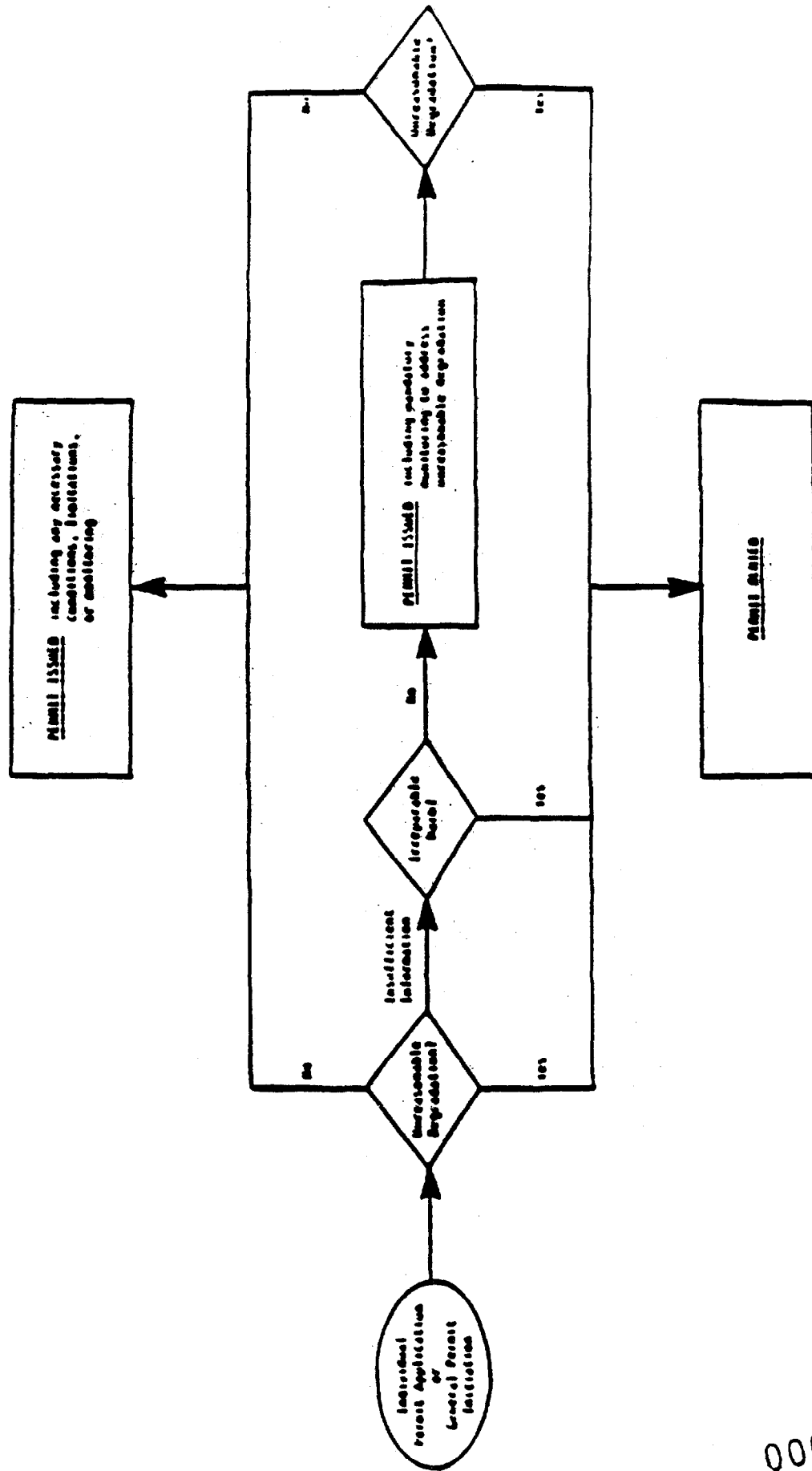
The Office of Management and Budget (OMB) has exempted general NPDES permits from the review requirements of Executive Order 12291 pursuant to Section 8b of that order. Under the exemption the Director of OMB retains discretionary authority to request that a particular general permit be submitted for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



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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	

000115