

MEMORANDUM

SUBJECT: EPA Region VI Endangered Species Act Section 7(d) Determination Relating to Issuance of NPDES General Permit for Offshore Oil and Gas Operations in the Western Gulf of Mexico (NPDES No. GMG290000)

FROM: William Honker, Director
Water Division

TO: File

This Memorandum documents the determination by EPA Region 6, pursuant to Sections 7(a)(2) and 7(d) of the Endangered Species Act (ESA), that EPA Region 6 may proceed to reissue the National Pollutant Discharge Elimination System (NPDES) General Permit for Offshore Oil and Gas Operations in the Western Gulf of Mexico (hereinafter, "General Permit") prior to the completion of consultation under Section 7(a)(2).

BACKGROUND

EPA Region 6 (the Region or the EPA) is proposing to reissue a NPDES General Permit for discharges from offshore oil and gas operations in the Western Gulf of Mexico. The Region published a draft permit in the Federal Register on May 11, 2017, initiating a 60-day public comment period. The EPA has reviewed public comments and developed responses to those comments, and is preparing to issue a final permit, subject to further briefing of, and input from, EPA Headquarters officials.

The EPA is required, pursuant to Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), and in accordance with the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service, and the National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* dated February 22, 2001 (66 Fed. Reg. 11,202), to consult with federal wildlife agencies and ensure that "agency action" (including the issuance of Clean Water Act NPDES permits) does not jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of the critical habitat of such species. EPA Region 6 has done an Endangered Species Act Evaluation (dated October 12, 2016) and determined that this permitting action has no adverse effect on listed species and will not adversely modify critical habitat due to the permit conditions, quality, nature and/or quantity of those discharges.

By letter received by the EPA on June 29, 2017, NMFS notified the EPA that it would address the ESA issues through the ongoing formal consultation with the Bureau of Ocean Energy Management (BOEM), the EPA, and the Bureau of Safety and Environmental Enforcement (BSEE), relating to all federal actions associated with offshore oil and gas activities throughout the Gulf of Mexico. For this ESA 7 consultation, BOEM is the lead action agency and EPA and BSEE are co-federal action agencies. EPA is charged under the Clean Water Act and Clean Air Act to permit the water and air discharges that are associated with oil and gas activities in the Gulf of Mexico, with the exception of air quality for areas west of 87.5° W longitude being screened under BOEM jurisdiction. NMFS indicated in its letter that the issuance of these permits is included as a subset of the Federal actions that make up the Proposed Action under the subject ESA section 7 consultation.

The consolidated review of all pending federal actions associated with offshore oil and gas activities in the Gulf of Mexico by NMFS may result in an overall streamlined action, but results in a substantial extension of the timeframe within which the EPA was anticipating receipt of NMFS concurrence for its proposal to issue the General Permit. The EPA does not know how long it will take NMFS to complete its preparation of a Gulf-wide Biological Opinion and complete the consultation process. Further, the EPA's existing NPDES General Permit for oil and gas operations in the Western Gulf of Mexico will expire on September 30, 2017. While more than 3,000 existing permitted facilities are covered by this General Permit, new facilities are unable to obtain coverage after September 30, 2017 until they either obtain an individual permit or the final General Permit is reissued. This circumstance has led the Region to evaluate whether the permit can be issued notwithstanding the fact that the consultation process with NMFS has not yet been completed.

Section 7(d) of the ESA requires that, after initiation of consultation under Section 7(a)(2), a federal agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." In other words, any action taken prior to completion of consultation must not interfere with the ability of the agency to implement reasonable and prudent measures determined to be necessary to avoid jeopardy to a protected species or adverse effects to its critical habitat. Section 7(d) of the ESA is a preventative measure designed to ensure that the status quo is preserved during the consultations process and clarifies the requirements of Section 7(a). Conner v. Burford, 848 F.2d. 1441 (9th Cir 1988). For the reasons described below, the EPA has determined that issuance of the final General Permit prior to completion of consultation with NMFS is consistent with the requirements of Section 7(d).

ANALYSIS

Issuance of the General Permit Does Not Foreclose the Formulation or Implementation of Reasonable and Prudent Alternative Measures.

As noted above, Section 7(d) of the ESA prohibits any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2). Section 7(a)(2) requires the EPA, in consultation with the Services, to insure that an agency action is not likely to jeopardize the

continued existence of any endangered or threatened species or result in the destruction or adverse modification of their critical habitat.

The EPA's issuance of the General Permit is fully consistent with Section 7(d) because it does not foreclose either the formulation by the Services or the implementation by the EPA of any alternatives that might be determined in the consultation to be needed to comply with Section 7(a)(2). The EPA has authority to modify the General Permit to include any conditions or restrictions on discharge that are identified as necessary by NMFS as a result of the consultation. For example, regulations at 40 C.F.R. § 122.62 list circumstances where the EPA may modify a permit, including where EPA receives new information not available at the time of permit issuance "that would have justified the application of different permit conditions at the time of issuance." For NPDES general permits, this cause includes any information indicating that cumulative effects on the environment are unacceptable. 40 C.F.R. § 122.62(a)(2). Any reasonable and prudent measures identified as necessary by NMFS in order to prevent jeopardy or adverse effects on critical habitat could be added to a modified permit under this provision. Moreover, the EPA will insert a "reopener" provision in the permit specifically stating that the permit will be reopened and modified if necessary to add conditions determined to be necessary to comply with the ESA following the completion of required consultation under Section 7(a)(2) of the ESA.

NPDES regulations give the EPA ample authority to include conditions in a permit that are determined to be necessary to protect endangered or threatened species or the habitats of such species. For example, in the case of offshore discharges (in areas not subject to state water quality standards), any such conditions would be appropriately added to a permit pursuant to the Ocean Discharge Criteria at 40 C.F.R. § 125, Subpart M. Specifically, pursuant to 40 C.F.R. § 125.122, when the EPA is authorizing offshore discharges, the EPA "shall determine whether a discharge will cause unreasonable degradation of the marine environment [and thus be prohibited] based on the composition and vulnerability of the biological communities which may be exposed to such pollutants, including ... the presence of species identified as endangered or threatened pursuant to the Endangered Species Act." Any conditions necessary to ensure that unreasonable degradation of the marine environment does not occur may be added to the permit to comply with the Ocean Discharge Criteria. Moreover, 40 C.F.R. § 125.123(d)(4) requires that permits for offshore discharges include a condition stating, "In addition to any other ground specified herein, this permit shall be modified or revoked at any time if, on the basis of any new data, the director determines that continued discharges may cause unreasonable degradation of the marine environment." Thus, permitting regulations fully empower the EPA to impose new restrictions in the event it is determined to be necessary to prevent unreasonable degradation of the marine environment or to protect threatened or endangered species, or to even revoke the permit altogether. The General Permit itself will fully apprise all permittees of this possibility.

Given the foregoing authorities to modify or revoke a permit if the consultation process identifies reasonable and prudent alternative measures that are necessary for ESA compliance, an opportunity to impose reasonable and prudent alternative measures is not foreclosed by issuance of the General Permit.

Courts cases evaluating the application of Section 7(d) support the use of Section 7(d) to proceed with federal action where, as here, the agency retains authority to implement any reasonable and prudent measures determined to be necessary as a result of the consultation process. For example, in Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs, 2005 U.S. Dist. Lexis 5159 (D.D.C. 2005), the court held that issuance of an NPDES permit did not constitute an “irreversible or irretrievable commitment of resources” in violation of ESA §7(d). In that case, the court held that permitted discharges into the Potomac River were not irretrievable commitments or resources --- that the discharges would not preclude the formulation or implementation of reasonable and prudent alternative measures. The court noted that the “purpose of this restriction is to ensure that the status quo is maintained throughout the consultation process.”

In another case, North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1980), *aff'd in part*, 642 F.2d 589 (D.C. Cir. 1980), the court did hold that the commitment or resources could involve outlays by non-federal actors working in concert with a federal agency. In that case, the court indicated that Congress was intending “to preclude the investments of large sums of money in any endeavor if (1) at the time of the investment there was a reasonable likelihood that the project ... would violate § 7(a)(2) [i.e., cause jeopardy to listed species] and (2) that investment was not salvageable (i.e., it could not be applied to either an alternative approach to the original endeavor or to another project).” North Slope Borough, 486 F. Supp. at 356. In this case, there is not a reasonable likelihood that the General Permit will violate Section 7(a)(2), as explained below.

The Discharges Authorized Under the General Permit Are Unlikely to Cause Jeopardy or Adversely Affect Listed Species.

The discharges authorized under the General Permit are not likely to adversely affect listed species. This determination is reflected in the draft General Permit record, which includes, the Endangered Species Act Evaluation prepared by the EPA in support of the draft General Permit, and the long history of ESA analysis for previous iterations of the General Permit, and information included in the BOEM EIS, which EPA has adopted. This record indicates that discharges are not expected to cause any impacts of concern during the interim period while the ESA consultation is completed.

EPA Region 6 prepared an Endangered Species Act Evaluation (ESA Evaluation) dated October 12, 2016. The ESA Evaluation considered the effects of authorized discharges under the proposed action and the effects of the action on listed species and critical habitat compared to the environmental baseline as determined by assessments prepared for previous iterations of the General Permit. The listed species and designated critical habitats considered are detailed in the ESA Evaluation. The ESA Evaluation prepared by the EPA determined that the proposed General Permit conditions and limitations are sufficient to ensure that the proposed action will not likely adversely affect listed species or their critical habitats.

When EPA Region 6 initiated section 7 consultations with the FWS and NMFS in 2004 and 2007, EPA determined that discharges to be authorized by the reissued permit may affect but are unlikely to adversely affect the sperm whale (*Physeter macrocephalus*), Kemp's ridley turtle (*Lepidochelys kempii*), loggerhead turtle (*Caretta caretta*), leatherback turtle (*Dermochelys coriacea*), hawksbill turtle (*Eretmochelys imbricata*), and the green turtle (*Chelonia mydas*). Previous EPA consultations also document a “No Effect” determination for the northern right whale (*Eubalaena glacialis*), the blue

whale (*Balaenoptera musculus*), the finback whale (*Balaenoptera physalus*), the sei whale (*Balaenoptera borealis*), the humpback whale (*Megaptera novaeangliae*), and the Gulf Sturgeon (*Acipenser oxyrinchus desotoi*). Also EPA has conducted ESA Section 7 consultations for EPA's permitting action for discharges from oil and gas extraction facilities in the territorial seas of Texas and in those consultations, EPA had evaluated effects of same listed species from similar operations. Both FWS and NOAA concurred with EPA's previous determinations. Based on previous consultations and the 2016 ESA Assessment, the EPA anticipates that the current NMFS consultation process will also lead to a concurrence that the proposed General Permit will not jeopardize species or adversely modify critical habitat.

CONCLUSION

The proposed General Permit may be issued consistent with Sections 7(a)(2) and 7(d) of the ESA because the EPA retains authority to implement any reasonable and prudent measures determined to be necessary as a result of the consultation process. Further, there is not a reasonable likelihood that the discharges authorized by the General Permit will cause jeopardy or adversely affect listed species or their habitats. Accordingly, the EPA has determined that the General Permit may be issued consistent with Sections 7(a)(2) and 7(d) of the ESA prior to the completion of consultation with NMFS.