APR 28 2015

Miyoko Sakashita
Oceans Program Director
Center for Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

Re: Petition for Rulemaking on Ocean Discharge Criteria and to Modify Offshore Oil and Gas General Permit CAG280000

Dear Ms. Sakashita:

This letter responds to the Petition for Rulemaking on Ocean Discharge Criteria and to Modify Offshore Oil and Gas General Permit CAG280000 (CBD Petition), dated February 26, 2014, that you submitted to the Environmental Protection Agency (EPA) on behalf of the Center for Biological Diversity (CBD). The EPA has determined that the applicable regulations and available information do not support the EPA taking further action at this time and thus the EPA denies the CBD Petition. The EPA's bases for this determination are explained in more detail below.

1. There Is No Basis to Modify or Revoke and Reissue the General Permit

The EPA proposed the Offshore Oil and Gas General Permit CAG280000 (General Permit) on December 20, 2012. 77 Fed. Reg. 75429. CBD had an opportunity to comment on the proposed General Permit, and did not do so. EPA published notice of the issuance of the final General Permit in the *Federal Register* and the General Permit became effective on March 1, 2014. See 79 Fed. Reg. 1643 (Jan. 9, 2014).

The CBD Petition requests that the EPA modify or revoke the General Permit and implies that new information indicates that the use of unconventional oil and gas extraction techniques endangers water quality and the marine environment. The EPA's National Pollutant Discharge Elimination System (NPDES) permitting regulations and the reopener clause in the General Permit address the circumstances under which a permit may be modified. The NPDES permitting regulations provide, in relevant part, that "material and substantial alterations or additions to the permitted facility or activity… which occurred after permit issuance," or new information that was not available at the time of permit issuance, that would have justified the application of different permit conditions, are causes for modification. 40 C.F.R. § 122.62(a). In addition, section II.G.5 of the General Permit contains a reopener clause that specifically provides for modifying or revoking and reissuing the General Permit to comply with any applicable effluent standard or limitation issued or approved under Sections 301(b)(2)(C) and (D), 304(b)(2), and

307(a)(2) of the CWA that contains different conditions or is more stringent than the conditions in the permit or controls any pollutant or disposal method not addressed in the permit.

The CBD Petition does not proffer a justification for modifying the General Permit that would meet the criteria in 40 C.F.R. § 122.62 and there are no applicable effluent standards or limitations that would trigger the reopener clause in the General Permit.

The CBD Petition requests that the EPA make a determination that pollution from unconventional well stimulation activities endangers human health and the environment. CBD asserts that fracking is increasing and its impacts are dangerous to human health and wildlife. The CBD Petition does not, however, support the assertions with information specifically for offshore operations. Instead, the studies cited by CBD are related to fracking on land. Moreover, even if the cited studies had provided support for CBD's position, the cited studies pre-date issuance of the final General Permit and thus would not represent "new" information.

The discharges authorized by the General Permit are not new and have not changed since permit issuance. In fact, EPA issued a previous general permit for the offshore oil and gas facilities off Southern California in 2004 (modified in 2009) that authorized the discharge of well treatment fluids, either as a separate waste stream or when blended with produced water. The CBD had numerous opportunities to raise concerns regarding discharge of well treatment fluids prior to the EPA's issuance of the current General Permit in 2014, and will have those opportunities again when EPA proposes the next general permit in anticipation of the 2014 permit's expiration. The CBD did not raise concerns in a timely manner and does not now identify discharges that have changed since permit issuance in support of the permit modification request.

The CBD Petition does not offer specific data or information concerning hydraulic fracturing projects, the amounts and concentrations of well treatment chemicals that are used in such projects, nor the influence of such activities on the quality of discharged well treatment fluids or produced waters. EPA does not have, nor has the petition provided, information demonstrating that well treatment or produced water discharges cause adverse effects on the receiving waters. The lack of any such information supports EPA's decision not to modify the General Permit to impose different and/or more stringent permit conditions.

The EPA included new monitoring and reporting requirements in the 2014 General Permit to address possible concerns about discharges of hydraulic fracturing and well stimulation fluids and to obtain data about the chemical constituents of well treatment fluids and their toxicity. The data generated pursuant to these new requirements should enable the EPA to further evaluate impacts of these discharges on the environment. The General Permit includes enhanced monitoring requirements for produced water that require increased whole effluent toxicity testing (increased from annual to quarterly), as well as increased monitoring frequency (from quarterly to monthly) for chemical constituents where reasonable potential had been demonstrated for a given platform. See General Permit II.B.2 and Appendix B. The EPA also added a provision to the General Permit in response to stakeholder concerns regarding potential effects of discharges of fluids used for offshore hydraulic fracturing operations, that requires permittees to maintain an

inventory of chemicals used to formulate well treatment, completion and workover fluids, and if there is a discharge of the fluids, to report the chemical formulation with the quarterly discharge monitoring report. See General Permit II.C.3.

The General Permit establishes a process to gather additional information concerning discharges of hydraulic fracturing and well stimulation fluids during the term of the General Permit. The General Permit may be reopened and modified if the new information justifies the application of different permit conditions.

2. Individual Permits Are Not Necessary or Appropriate to Regulate Discharges from Offshore Oil and Gas Facilities

After considering the information provided by CBD in its petition, the EPA has determined that there are not sufficient bases for the EPA to exercise its discretion in 40 C.F.R. § 122.28(b)(3) and Section II.B of the General Permit to require any of the discharging facilities regulated by the General Permit to apply for and to obtain an individual permit. As explained in the above response regarding CBD's request to revoke or modify the General Permit, there is no new relevant information that has surfaced since the issuance of the General Permit that suggests a change in circumstances or that the discharges warrant the application of new or different conditions in individual permits in lieu of regulating the activities via the existing General Permit.

The current General Permit and the expired 2004 general permit authorize discharges from the same activities and from the same 23 platforms. While there are areas of biological concern in certain areas of the Santa Barbara Channel, the General Permit authorizes discharges only within the 49 lease blocks considered active by the Bureau of Ocean Management and there is no information that demonstrates that any of these individual lease blocks include areas of biological concern.

The CBD Petition includes a variety of references to endangered species, suggests that water pollution from offshore fracking poses a risk to the conservation and recovery of such species, and that the associated habitat areas for certain species will be adversely affected by water pollution associated with fracking. Again, the CBD Petition offers no new data or information to support its suppositions. Indeed, prior to issuing the 2004 general permit, the EPA prepared biological assessments to assess the potential impacts of the permit issuance on species listed under the Endangered Species Act and designated critical habitat. As documented in the assessments, EPA concluded that there would be no effect on listed species and designated critical habitat. Since the issuance of the 2004 general permit, both the federal agencies charged with administration of the Endangered Species Act have delisted species, listed a few new species, and designated new critical habitat. The EPA re-considered the potential effects of the permitted discharges on listed species, the additional listings, and designation of new habitats in developing the General Permit.[1]

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1 The additional species evaluated include the short-tailed albatross, marbled murrelet, California red-legged frog, beach layia, costal dune milk-vetch, Gambel's watercress, marsh sandwort, Hoffman's slender-flowered gilia, island

3. Available Information Does Not Support Amending ELGs

The CBD Petition asks that EPA amend the effluent limitations guidelines (ELGs) applicable to offshore oil and gas extraction (40 C.F.R. Part 435, Subpart A) to prohibit discharges of fracking fluids. The CBD Petition does not offer an explanation or basis for why such a revision would be appropriate under the requirements of the Clean Water Act (CWA). Specifically, the CWA specifies that for toxic and nonconventional pollutants, EPA is to set the standard for the "best available technology economically achievable" (BAT). CWA Section 301(b)(2)(A). BAT calls for a level of effluent control technology that is both technically available and economically achievable. The CBD petition does not identify any available technology that could reduce ocean discharges of fracking fluids to zero, nor provide information to suggest that any such technology would be economically achievable by the industry. Absent such information, EPA would not propose to revise the existing BAT-based determination in order to require zero discharge of fracking fluids.

EPA disagrees with the CBD Petition's assertion that EPA must undertake a Clean Water Act rulemaking in order to reduce air emissions. While EPA is to consider the non-water quality environmental impacts of its rules to reduce or eliminate pollutant discharges and could promulgate a Clean Water Act ELG that also reduced air emissions, the provisions in the CWA authorizing promulgation of ELGs have as their objective controlling pollutant discharges to waterbodies. CWA sections 301, 304 and 306.

The CBD Petition suggests that it is inconsistent to have a zero discharge requirement for the discharge of fracking wastewaters from on-shore oil and gas facilities, but allow for a discharge of this same wastewater from off-shore facilities. The records for the two rulemakings and the record before EPA now indicate that these two subcategories have very different characteristics in terms of the statutory factors detailed in CWA Sections 301, 304 and 306 which is why the limits for all wastewaters from on-shore oil and gas production are zero discharge, whereas controlled discharge is allowed for many wastewaters in the off-shore subcategory. Zero discharge limits in one subcategory cannot simply be transferred to another subcategory without a finding of technological feasibility and economic achievability and a consideration of the other relevant statutory factors.

The CBD Petition correctly notes that the CWA specifies a process for review of existing ELGs to identify candidates for revision. CWA Section 304(m)(1)(A); 304(b). EPA will continue to consider the ELG for offshore oil and gas extraction in the context of this ongoing planning process. However, as discussed above, EPA does not possess – nor has the CBD Petition provided – information to support amending the ELG. Given this lack of information, and in light of competing Agency priorities to address environmental concerns in the face of continuing budgetary limitations, EPA finds that it is not appropriate to undertake a rulemaking to revise this ELG at this time.

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phacelia, soft-leaved paintbrush, Ventura marsh milk-vetch, and white abalone.

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As the CBD Petition points out, EPA is currently undertaking a rulemaking to revise the ELG for onshore oil and gas extraction to include pretreatment standards for unconventional oil and gas extraction. In that rulemaking, EPA has reasonably decided to concentrate its resources on such onshore activities – for which pretreatment standards are currently lacking entirely – rather than a broader rulemaking to include revising the existing effluent guideline for offshore discharges.

4. Insufficient Basis to Revise Ocean Discharge Criteria and/or to Adopt Federal Water Quality Standards

Finally, the CBD Petition requests that EPA exercise authority under CWA section 403 ("ocean discharge criteria") to establish designated uses and water quality criteria, specifically a "healthy ocean waters" designation applicable to ocean waters of the United States, as well as water quality criteria to maintain temperature, pH, nutrients, oil, and toxic pollutants within safe and historical ranges, and numeric water quality criteria and recommended criteria for pH, biological oxygen demand, sewage, oil, and nutrients. The CBD Petition notes that EPA prepared a proposed rule in 2000, which was withdrawn prior to publication. Beyond the prior proposed rule draft, the CBD requests that any such future proposed rule also establish a limitation of zero chemicals from unconventional well stimulation.

As with the other requests, EPA denies this portion of the CBD Petition on the basis that it does not offer information, data, or evidence why revision of the ocean discharge criteria and/or adoption of federal ocean water quality standards should be a priority for use of limited EPA resources at this time. The current and operative requirements of the General Permit require the collection and sampling of any discharges associated with offshore fracking. As explained above, the General Permit provides the opportunity for EPA to gather and evaluate such data and information before making decisions regarding the exercise of further regulatory control to ensure protection of the marine environment from risks or threats associated with offshore fracking.

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Should you have any questions regarding this matter, please contact David Smith, Manager of the NPDES Permits Section, EPA Region 9 at (415) 972-3464.

Sincerely,

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