UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

APR 28 2015

Alison Dettmer
Deputy Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: CD-001-13, U.S. EPA Consistency Determination for NPDES General Permit No. CAG280000 for Offshore Oil and Gas Facilities

Dear Ms. Dettmer:

I am responding to your letter of May 9, 2014 to Regional Administrator Jared Blumenfeld concerning the Environmental Protection Agency's (EPA) consistency determination (CD-001-13) for General NPDES Permit No. CAG280000 (General Permit), which authorizes discharges from offshore oil and gas facilities operating in Federal waters off southern California. Your letter requests that the EPA submit a supplemental consistency determination for these activities, and/or that the EPA otherwise modify the General Permit to provide for the California Coastal Commission (CCC) review of individual operations and to include additional effluent limits and monitoring requirements for discharges associated with hydraulic fracturing activities that may occur as part of offshore well stimulation operations. After careful consideration of the information you provided, EPA will not supplement the consistency determination nor modify the General Permit, for the reasons discussed below and in the enclosure to this letter. EPA shares the CCC's interest in assuring that discharges from offshore oil and gas facilities operating in Federal waters protect ocean health, and we believe the General Permit which became effective March 1, 2014 contains the necessary conditions.

The Coastal Zone Management Act (CZMA) regulations cited in your May 9, 2014 letter do not authorize the "reopening" or supplementing of a consistency determination for a federal activity, in this case the permit that the EPA had already issued, nor do the regulations nor the information provided by the CCC support modifying the General Permit at this time. The EPA's bases for this determination are explained in more detail in the enclosure.

EPA worked with the CCC staff in fall of 2013 to develop new monitoring and reporting requirements to include in the General Permit to address concerns about the potential for discharges of hydraulic fracturing and well stimulation fluids and to obtain data about the chemical constituents of any such well treatment fluids discharged and their toxicity. These new requirements in the General Permit are virtually identical to the language reviewed and accepted by CCC staff in September 2013 and are designed to enable the EPA to further evaluate impacts

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of any such discharges on the coastal environment. The General Permit includes enhanced monitoring requirements for produced water that require increased frequency of whole effluent toxicity testing (from annual to quarterly), as well as increased frequency of monitoring (from quarterly to monthly) for chemical constituents for any given platform where there has been a demonstration that a discharge has the reasonable potential to cause non-attainment of water quality standards, consistent with requirements that would apply if the platform were located in nearby State waters. See General Permit II.B.2 and Appendix B. EPA also included a provision in the General Permit in response to concerns regarding potential effects of discharges of fluids used for offshore hydraulic fracturing operations, which requires permittees to maintain an inventory of any 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.

As EPA indicated in our February 10, 2014 letter to Dr. Charles Lester, Executive Director of the CCC, the General Permit remains consistent with the California Coastal Management Program. The General Permit establishes a process to gather additional information concerning any discharges associated with hydraulic fracturing and/or of well stimulation fluids during the term of the General Permit. The General Permit may be reopened and modified if the new information indicates a discharge could cause unreasonable degradation of the marine environment. EPA looks forward to working with CCC staff to evaluate this information over the course of the permit term and prior to proposing the General Permit for re-issuance upon expiration.

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

Sincerely,

Jane Diamond, Director
Water Division

Enclosure

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Enclosure

Procedural Background

The EPA provided its original consistency determination to the CCC for the proposed General Permit in a letter dated December 20, 2012. The EPA subsequently amended its consistency determination in a letter dated May 2, 2013, to address comments raised by the CCC. On June 12, 2013, the CCC concurred, by unanimous vote, with the EPA's consistency determination for the proposed General Permit. In a letter dated June 19, 2013, the CCC communicated its concurrence with the EPA's consistency determination, stating that the "Commission found the project to be consistent to the maximum extent practicable with the California Coastal Management Program." The CCC's concurrence did not include any conditions. In July, 2013, the EPA initiated supplemental coordination with the CCC to ensure the CCC would be agreeable to changes that the EPA intended to make to the proposed General Permit. Notice of the issuance of the final General Permit was published in the *Federal Register* on January 9, 2014 and the General Permit became effective on March 1, 2014.

CZMA Regulatory Requirements

The May 9, 2014 letter indicates that after the CCC's June 2013 concurrence on the consistency determination, CCC staff believed that hydraulic fracturing was occurring in Federal and State waters off of southern California and CCC staff became concerned about the potential environmental effects of hydraulic fracturing that may occur as part of offshore well stimulation operations. The letter also mentions that California Senate Bill 4, signed in September, 2013, brought additional attention to hydraulic fracturing. The May 9 letter cites to the regulations implementing the Coastal Zone Management Act (CZMA) at 15 C.F.R. §§ 930.45 and 930.46 as the legal bases for the CCC to revisit its previously-adopted concurrence in EPA's consistency determination.

EPA disagrees that the cited regulations provide bases for the CCC to revisit the concurrence upon which EPA issued the General Permit. In general, "[o]nce a State agency has concurred, even with conditions, the State agency retains no further consistency authority over the project." 65 Fed. Reg. 77127 (December 8, 2000)(preamble to the final CZMA regulations cited by the CCC). In other words, the CZMA "only authorizes one bite of the consistency apple for any particular Federal agency activity." Id. at 77141. In addition, the supplemental review provisions of the CZMA regulations at 15 C.F.R. § 930.46 "apply only to activities that have not yet begun and which are substantially different than that which the State previously reviewed." Id. at 77128. Because the General Permit became effective on March 1, 2014, it did not represent a "proposed activity" at the time of the May 9 letter. Rather, the federally permitted activity had already begun. The federal regulation at 15 C.F.R. § 930.46 does not provide a basis for the CCC to require additional supplemental coordination on the General Permit, as requested in the CCC's May 9 letter.

The CZMA regulatory provisions at 15 C.F.R. § 930.45 address activities that have already

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begun. These provisions indicate that the State agency may request that the Federal agency take appropriate remedial action for an action that was:

> Previously determined to be consistent to the maximum extent practicable with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource that is substantially different than originally described and, as a result, is no longer consistent to the maximum extent practicable with the enforceable policies of the management program; . . .

The May 9 letter, however, does not allege or assert that the activities authorized by the General Permit are having an effect on any coastal use or resource that is substantially different than EPA originally described and/or that the General Permit is no longer consistent to the maximum extent practicable with the California Coastal Management Program. Instead, the CCC cites Senate Bill 4's expression of "concern" regarding the potential for adverse effects from hydraulic fracturing and other well stimulation activities and the legislation's interest in updating regulations and providing for more public disclosure of information. The May 9 letter further states that its "predominant concerns relate to the potentially toxic chemicals commonly found in hydraulic fracturing fluids and the potential for adverse impacts to aquatic organisms associated with exposure to these chemicals," and acknowledges:

> [T]here are not a great deal of data available on the types and concentrations of chemicals used in hydraulic fracturing...[and] *[u]nfortunately the data that are available do not provide enough information to determine whether these chemicals are present in quantities and concentrations that would adversely impact coastal resources.* (Emphasis added).

Even if the CCC had asserted that the activities authorized by the General Permit are currently having a substantially different effect and are no longer consistent to the maximum extent practicable with the California Coastal Management Program, the May 9 letter does not otherwise present new information to support the CCC request that the EPA take some form of remedial action at this time.

While 15 C.F.R. § 930.45 does not define "substantially different" effects, the regulation at 15 C.F.R. § 930.46(a) does so in the context of proposed actions, stating that "[s]ubstantially different coastal effects are reasonably foreseeable if...[t]here are significant new circumstances or information relevant to the proposed activity and the proposed activity's effect on any coastal use or resource." Whether supplemental coordination is required for proposed activities turns on whether new circumstances or information demonstrate a reasonably foreseeable, previously unforeseen or unforeseeable adverse environmental consequences to coastal uses or resources. Thus, EPA's determination of whether remedial action is warranted would need to rely on new information to demonstrate a reasonably foreseeable, previously unforeseen or unforeseeable adverse effect of the activities on coastal resources. Even if the General Permit had not already been issued, the May 9 CCC letter does not offer any new information in an attempt to

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demonstrate that the activities authorized by the General Permit will cause reasonably foreseeable, substantially different adverse effects on coastal resources.

Permit Modification

The CCC also requested that the EPA modify the General Permit. The 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 include material or substantive alterations or additions to the activity that occurred after permit issuance, or new information that would have justified the application of different permit conditions, as 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 a new effluent standard or limitation. The May 9 CCC letter 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 newly-approved effluent standards or limitations that would trigger the reopener clause in the General Permit.

The activities 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 CCC had numerous opportunities to raise concerns regarding discharge of well treatment fluids prior to EPA's issuance of the current General Permit in 2014. The CCC did not raise concerns about well treatment fluids in a timely fashion, and does not now identify activities that have changed since permit issuance in support of the permit modification request.

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