**Squire Patton Boggs Memorandum to USCG Dated December 18, 2017**
**Response Notes for February 12, 2018 Conference Call for EPA and LOOP**

**Position # 1: Vessel loading at the offshore terminal is subject to EPA permitting requirements because 33 USC 1502(9) provides that a deepwater port "shall be considered a new source for purposes of the CAA."**

*LOOP Response: The referenced provision does not create new source review or permit requirements under the CAA for the following reasons:*

a) *The provision does not extend EPA's permitting jurisdiction to deepwater ports but instead, simply requires EPA review and a conclusion that the port will not violate applicable environmental laws or regulations. This is confirmed by EPA's past practice with respect to LOOP's port.*

- Section 3 of the DPA, 33 U.S.C. § 1502(9)(D), states that a deepwater port "shall be considered a 'new source' for purposes of the Clean Air Act." In reviewing the DWPA in its entirety, we believe DPA is clear in regard to EPA serving as the CAA permit authority for deepwater ports located seaward of State waters. EPA regards a provision of the DPA, 33 U.S.C. § 1501, *et seq,* as the primary source of its authority to apply the CAA and CWA to activities associated with deepwater ports. In relevant part, 33 U.S.C. § 1518(a)(1) extends the Constitution and laws of the United States "to deepwater ports . . . and to activities connected, associated, or potentially interfering with the use or operation of any such port, in the same manner as if such port were an area of exclusive Federal jurisdiction located within a State." In addition, 33 U.S.C. § 1518(b) "federalizes" consistent laws of the adjacent state and directs that they be applied by federal officials. These statutory provisions are similar to Section 4 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(a)(1), and serve the same general purpose, i.e., defining the body of law that applies to activities within the purview of the respective acts. *See generally, e.g., Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Wentz v. Kerr-McGee Corp.*, 784 F.2d 699 (5th Cir. 1986); *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984). 33 U.S.C. § 19 provides that "the Constitution, laws, and treaties of the United States" apply to deepwater ports and to activities connected, associated, or potentially interfering with their use or operation "in the same manner as if such port were in an area of exclusive Federal jurisdiction located within a State." (Boydston Memo)
- LOOP is acknowledging that EPA is responsible for review and conclusion that the DWP will not violate applicable environmental laws or regulations. One of the purposes of EPA's review and regulations is to provide assurances that a project will not adversely impact the NAAQS for an area. By evaluating a project's air emissions, an evaluation of the ambient air quality impacts and evaluation of applicable regulations are reviewed and included in a permit, if applicable, to provide an understanding and assurance that the project will not adversely impact the NAAQS for an area.
- It is unclear what LOOP is referencing in regard to EPA's past practice with respect to LOOP's port. If LOOP has documentation from EPA relating to the facility's air emissions, EPA would appreciate receiving a copy. EPA's regulations and past guidance are clear that is it the owner or operator's responsibility to apply for and obtain any necessary construction permits prior to

commencement of construction and operational permit.

b) *The scope of this provision of the DPA is limited by the CAA itself[1] and EPA's own regulations,[2] which define the term "new source" to include only stationary sources which are constructed or modified after the proposal of applicable new source performance standards. No such standards have been proposed for crude oil loading at deepwater ports. Instead, EPA has concluded that there are no feasible Available Control Technologies for such operations.[3]*

- Footnotes 1 and 2 provide references to the NSPS definition of "New Source" and NPDES Definitions. The NPDES citation to 40 CFR 122.2 does not appear to be relevant to a discussion related to EPA air permitting jurisdictional issues. However, the CAA § 111 defines "New Source" as any stationary source construction or modification of which is commenced after the publication of regulations prescribing a standard of performance under this section which will be applicable to such source. "Stationary Source" is defined as any building, structure, facility, or installation which emits or may emit any air pollutant. In the referenced definitions, it is unclear if LOOP's understanding of the DWP regulations limits the applicable air regulations only to the CAA subset of NSPS regulations and to only apply the NSPS definition? The CAA requires New Source Review permits for: Prevention of Significant Deterioration (PSD) permits (Part C of Title 1), Nonattainment New Source Review permits (Part D of Title 1) and Minor NSR permits (Section 110(a)(2)(C) of Part A of Title 1). The DPA applies federal law and applicable state law to deepwater ports, and based on the location of the existing Marine Offshore Loading Terminal, it appears that the nearest coastal state to the operation is Louisiana. EPA concludes, in accordance with Section 19 of the DPA, the applicable state laws and regulations governing air quality at LOOP are those of Louisiana. In Louisiana's air regulations (33 LAC III.111.A) a "New Source" is defined as "any affected facility, the construction or modification of which is commenced after the adoption of these regulations." The Louisiana definitions also provide that an "Affected Facility" is "(with reference to stationary source), any apparatus to which a standard is applicable."
- The second sentence of LOOP's response *(b)* states that no such standards have been proposed for crude oil loading at deepwater ports. It is unclear if LOOP is implying that because an industry specific regulation for "crude oil loading at deepwater ports" has not been proposed. Air regulations have not been limited by a source's larger source category. Applicable regulatory requirements are typically based on the emission unit, emission levels and ambient air impacts. Possible regulatory exemptions may include Louisiana's regulations that provide exemptions for the following (LAC 33:III.501.A.4):
    - The owner or operator of any source which is not a major source may apply for an exemption from the permitting requirements provided *each* of the following criteria are met:
        - The source emits and has the potential to emit no more than 5 TPY of any criteria pollutant;
        - The source emits and has the potential to emit less than the minimum emission rate listed in LAC 33:III.5112, Table 51.1, for each Louisiana toxic air pollutant;
        - No enforceable permit conditions are necessary to ensure compliance with any

[1] 42 USC Section 7411(a)(2)
[2] 40 CFR 122.2
[3] 60 FR 48388, Sept 19, 1995.

applicable requirement; and,

- No public notice is required for any permitting or other activity at the source.

An additional option may be found in LAC 33:501.A.6, Grandfathered Status. The Louisiana Regulation is as follows: Those facilities which were under actual construction or operation as of June 19, 1969, and granted grandfathered status by DEQ (EPA in this situation) may maintain such grandfathered status, provided a current and accurate Emissions Inventory Questionnaire is maintained on file with the permitting authority and provided the owner or operator of such facility is not required or requested to submit a permit application in accordance with this paragraph. Grandfathered status shall be maintained until final action is taken by the permitting authority on the permit application, provided such application is submitted in a timely manner. A permit application shall be submitted in accordance with LAC 33:III.517.A if any of the following criteria are met or will be met by a planned change at the facility… i.e., major source or as determined by the permitting authority.

Does LOOP meet any of the Louisiana regulatory permitting exemptions?

- The last sentence of LOOP's response *(b)* references a Federal Register Notice for National Emission Standards for HAP's for Marine Tank Vessel Loading Operations for CAA §183(f), Federal Ozone Measures for Ozone Nonattainment Areas. It is unclear how a specific rulemaking from 1995 for a nonattainment area may be applicable to an attainment area and to be considered an EPA source applicability determination.

c) *The definition of "Deepwater Port" in the DPA specifically excludes vessels.[4] Essentially all of the air emissions associated with the changes anticipated at LOOP's port will originate from vessels. They are not covered by the DPA.*

- EPA has provided previous determinations that vessel emissions generated in handling vessel carrier product, such as crude oil, should be included in the applicability determination. This determination is based on the plain reading of the CAA. Specifically, the CAA definition of "stationary source" gives EPA the authority to consider the air emissions from the carrier vessel emission units, such as an engine, turbine or boiler, during the point in time that the emission unit is actively associated with the Port's process. We have also previously determined that "to and fro" emission from marine vessels and the vessels' "hoteling" emissions are not directly associated with the activities of the part as part of the emissions attributable to the port facility. We have made this distinction because un the DPA, other US laws apply "to deepwater ports…and to activities connected, associated, or potentially interfering with the use or operation of any such port." 33 USC §1518(a)(1). The "to and fro" emissions and "hoteling emissions from the vessels are associated with the normal seagoing activities of the vessels and not with the industrial activities associated with the port.
- The Response also states "Essentially all of the air emissions…" All emissions from pollutants that are regulated or subject to regulation should be included in an applicability determination.

d) *To the extent that the DPA provides for the exercise of EPA jurisdiction, the following analysis demonstrates that any such exercise of jurisdiction is limited and proscribed by the later adopted*

[4] 33 USC 1502(9)

*provisions of the OCSLA and Section 308 of the CAA.*

**Position # 2: LOOP's facility is not an Outer Continental Shelf Source**.

*LOOP Response: The contemplated loading operations are OCS production activities. Emissions of pollutants from such facilities are subject to regulation under the OCSLA.*

- 42 U.S.C §7627(a)(4)(C) of the CAA identifies a "OCS source" by referring back to the Outer Continental Shelf Lands Act (OCSLA), see 43 U.S.C. § 1331, *et seq,* An OCSLA source is one that has a lease that provides for the exploration, development and production of minerals including offshore wind farm installations. The LOOP facility is not engaged in the exploration/development/production of oil or natural gas. The facility and its operation descriptions contained in the existing deepwater port license and supporting documentation do not meet the definition of an "OCS source", but instead a deepwater port. LOOP applied for and received a License to operate a deepwater port in 1976 not a lease for the development of mineral resources covered by OCSLA.
- See BOEM email response. BOEM has stated that LOOP is not an OCS source and under OSCLA regulation.
- In an email to EPA on January 26, 2018, BOEM provided an article that states:
  The Mars Pipeline system consists of an 18in line extending from the TLP, about 40 miles to West Delta block 143, where it connects with a 24in line that comes ashore 55 miles away in Fourchon, South Louisiana. From there, the line parallels the Louisiana Offshore Oil Port (Loop) pipeline about 29 miles to Loop's Clovelly storage facilities, where the oil will go into a dedicated three million barrel salt dome cavern, which can feed any of five major interconnecting pipelines serving the national refining market. (see: http://www.offshore-technology.com/projects/mars/) Therefore, it appears that MARS, and perhaps Endymion too, flows directly to LOOP's onshore storage facility, Clovelly Dome, and is not a drilling or production facility. Does LOOP have additional information to support a view that the DWP is a drilling or production facility?

**Position #3: If the loading facilities are not an Outer Continental Shelf Source a Title V Operating Permit is required.**

*LOOP Response: Even if the vessel loading operations at the marine terminal were not covered by OCSLA, no new permits or authorizations would be required by the CAA.*

- See Louisiana regulatory exemptions and grandfather provisions contained in Position 1, Response (*b*). Does LOOP meeting any of the exemptions or provisions?
- An extensive search of EPA's permits issued to offshore facilities has not been completed; however, just because a similar source has not been recently, or historically, issued a permit does not remove any potential permitting obligations under the CAA. A recent Part 71 Operating Permit has been proposed by Region 9 for Mobil Oil – Cabras Terminal, Piti, Guam. This facility is for a bulk petroleum products terminal, gasoline and distillate fuels, that are delivered by transoceanic tanker ships, stored on site at a tank farm, and delivered to trucks and local coastal tankers for local and regional distribution. In the past, Region 6 has also worked with proposed offshore projects related to petroleum distribution, i.e. TOPS.

- The final issuance of a Deepwater Port License and EPA NPDES comments should not be viewed as EPA's determination regarding CAA permitting obligations. The owner and/or operator of the facility is responsible for applying for and obtaining a CAA permit(s), if needed.
- The LDEQ issued permits (1560-00027-V2 and PSD-LA-796(M-1)) are for air emission sources on-shore and do not include the emission units associated with the off-shore Marine Terminal or associated vessel loading operations.

**Position #4: If the loading operation is an Outer Continental Shelf Source, LOOP should be consulting with BOEM.**

*LOOP Response: There is no requirement for advance consultation with BOEM for vessel loading operations.*

- See BOEM email response. BOEM has stated that LOOP is not an OCS source and under OSCLA regulation.