December 22, 2008

Mr. Mark Prescott
U.S. Coast Guard
Commandant (G-MSO-2)
Vessel and Facilities Operating
2100 Second Street, S.W.
Washington, DC 20593

Subject: EPA Authority Over Construction and Operation
Texas Offshore Port System Deepwater Port Act Project

Dear Mr. Prescott:

EPA Region 6 received a copy of the deepwater port license application package for Texas Offshore Port System (TOPS) crude oil import terminal on December 11, 2008, and provides these comments to assist the United States Coast Guard / Maritime Administration and their contractors as the agencies determine the administrative completeness of the Deepwater Port Act (DPA) license application package and initiate scoping for the Environmental Impact Statement (EIS) under the DPA and the National Environmental Policy Act (NEPA). The proposed port will consist of a fixed facility in the Gulf of Mexico that will receive crude oil from vessels, and convey it through a new crude oil pipeline to a bulk terminal ashore in Texas and then through the crude oil pipeline network to one or more refineries. EPA Region 6 appreciates this opportunity to provide the following information to the Coast Guard and Maritime Administration as part of the coordinated licensing effort for this facility.

We reviewed the TOPS documents and have determined that the applications for EPA permit action are administratively complete in that all of the required EPA forms and certifications were included. In addition to the comments below, we reserve the right to request additional information as we more fully examine the permit applications and begin to develop draft permits for the proposed facility. The NEPA and cross-cutting statutes and regulatory consultation documents need to be sufficient for our use in the regulatory permit actions.

CLEAN WATER ACT. The TOPS deepwater port license application received by EPA Region 6 included a copy of the NPDES permit application forms. In accordance with the applicable Environmental Permit Regulations, (40 CFR 124.3(c), 54 FR 18785, May 2, 1989) this information was reviewed and determined to be administratively complete. During the technical analysis of the application, other deficiencies may be determined and a request for additional or clarifying information will be made to the applicant.

Because the Deepwater Port Act (DPA) designates the proposed type of facility a “new source” for CWA purposes, EPA will consider the information in the Coast Guard’s EIS and

consultation documents in its NPDES permit action in accordance with CWA § 511(c)(1) and DPA § 5(f). Of particular interest will be the conclusion of consultations with the National Marine Fisheries Service and/or U.S. Fish and Wildlife Service for compliance with the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act; including affects on fish, shellfish, and threatened and endangered species, in all life stages, caused by the operation of the water intake structure and discharges.

COASTAL AND WETLANDS. As we currently understand the project, it would involve construction of a new pipeline in the Gulf of Mexico from the terminal facility approximately 35 miles off of Texas. Connecting with existing pipelines would occur via a new pipeline to an onshore tank battery and then subsequent movement through a pipeline to one or more refineries.

Beyond compliance with the NEPA and the CWA, there is also a fundamental need to ensure that the proposed project is consistent with Federal and State efforts to restore coastal resources. The rapid deterioration of coastal areas in the northern Gulf of Mexico is regarded by many as one of the nation's most critical ecological problems. All practicable efforts should be taken to be sure that the proposed project does not inhibit or otherwise conflict with reasonably foreseeable future restoration efforts in this area. Activities which might fall into this category could include support functions such as harboring of supply boats and tugs.

Since significant environmental impacts could result from construction onshore of the components of the terminal and any associated channel excavation required to ship it out of the fabrication yard. These direct impacts should also be evaluated in a single EIS for the entire operation, including the terminal construction and operation as well as the associated pipeline construction.

The impacts of terminal fabrication, including dredging and any projected impacts to wetlands and special aquatic sites (including seagrass beds) are of particular interest to us and should be analyzed in the EIS as direct impacts. We would look for a thorough evaluation in the EIS demonstrating planning efforts to avoid, minimize, and compensate for wetland and special aquatic site losses associated with the dredging (including discussions of alterations to channel width or depth), dredged material disposal, and construction work. All unavoidable direct and indirect impacts would need to be fully compensated. In sum, the planning for this project must ensure that adverse impacts to coastal wetlands and special aquatic sites have been avoided to the maximum extent practicable, taking advantage of every opportunity for beneficial use of dredged material.

CLEAN AIR ACT. EPA does not normally administer the Clean Air Act (CAA) in the western Gulf of Mexico because under CAA Section 328, the Department of Interior's Minerals Management Service is responsible for regulating outer continental shelf (OCS) sources in that area. As presented in the application, however, the proposed source is not an OCS source, so Section 328 does not apply. Instead, EPA is the CAA permitting authority. The DPA applies federal law and applicable State law to deepwater ports, and further designates deepwater ports as "new sources" for CAA purposes. Accordingly, in considering the source's operating and construction permit, EPA will rely on 40 CFR Part 70 and Titles I and V of the Clean Air Act, and also on state law to the extent applicable and not inconsistent with federal law. EPA will consider the information in the Coast Guard's EIS and consultation documents in its CAA permit

action, and in particular will rely on the Coast Guard's consultations with the National Marine Fisheries Service and/or U.S. Fish and Wildlife Service for compliance with the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act.

The applicant asserted that the nearest coastal state to the operation is Texas, based on the location of the terminal. EPA concludes that, in accordance with Section 19 of the Deepwater Port Act, the applicable state laws and regulations governing air quality at TOPS are those of Texas.

Specifically, we did not review the permit application or the modeling files included in Appendix D of the permit application for technical accuracy/approvability. This is only a review for administrative completeness. It appears that the application does contain a discussion and information on each of the PSD components listed below. The application also contains a signature from James Lytal, Vice President - TOPS confirming his knowledge that the information contained in the application are true and correct. Therefore, we believe that the application as submitted is administratively complete.

Any technical issues that are identified during the preparation of the draft permit will require coordination with the company. The Federal PSD requirements clearly require preparation and submittal of (1) a control technology review; (2) a source impact analysis; (3) an air quality model; (4) an air quality analysis for ambient air quality; (5) source information necessary to perform any analysis or make any determination; (6) any additional impact analyses of the impairment to visibility, soils and vegetation; (7) information on sources impacting Federal Class I areas and notice to Federal land managers, if applicable; (8) adequate public participation; and (9) an application which specifies how the facility will be constructed and operated before construction commences.

As an initial matter, during our administrative completeness review, we identified several initial items for which we have technical concerns and comments. Be advised, this is not an exhaustive list of comments due to the restrictive review timeline for administrative completeness.

1. TOPS, in its analysis, should provide a detailed administrative record that documents appropriate BACT determinations for the new emissions of nitrous oxide (NOx), particulate matter (PM) nominally 10 microns and less, sulfur dioxide (SO2), volatile organic compounds (VOC) and carbon monoxide (CO). This analysis should follow the EPA recommended BACT Top Down approach. In particular, there should be a comparison of emission rates/control units with other similar types of operations nationwide. The BACT evaluation process involves reviewing not only the emission rates in EPA's BACT/LAER Clearinghouse, but also in Federal/State/Local NSR permits across the country. Please provide a rationale for the BACT determinations, including an analysis of the technical and economic feasibility of available control technologies.

2. The applicant should provide an on-the-record analysis as to whether compliance with normal BACT limits is feasible or not, during startup, shutdown, and maintenance (SSM). The EPA's long held policy is that BACT emission limitations apply at all times and that BACT limits may not be waived during periods of SSM. If compliance with normal BACT limits is not feasible, then secondary BACT limits for such periods should be established. To the extent that the applicant determines that a technical or economic constraint on the application of a

measurement methodology would make the imposition of an emissions standard infeasible during startup-shutdown periods, the applicant should specify what design, control methodology, work practice (such as a limitation on total startup and shutdown event time) would be appropriate for EPA's consideration for a permit condition to minimize excess emissions during those periods. See 40 CFR 52.21(b)(12). Such secondary limits or work practices must be justified as BACT to ensure that all PSD requirements are met, including compliance with NAAQS and PSD increment provisions.

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT. Under Section 101 of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. § 1401, no person may transport material from the United States or on an American flagged vessel for the purpose of dumping it in ocean waters in the absence of a permit issued by EPA pursuant to MPRSA § 102. A MPRSA §102 permit is also required for any person transporting material from anywhere for the purpose of dumping it in the territorial seas or to the contiguous zone where it might affect the territorial seas. Based on our current understanding, it does not appear that anyone proposes to transport materials for the purpose of dumping it in connection with the construction or operation of the TOPS facility. Moreover, "dumping" does not include "construction of any fixed structure or artificial island nor the intentional placement of any device in ocean waters, or on or in the submerged land beneath such waters, for a purpose other than disposal, when such construction or such placement is otherwise regulated by Federal or state law . . . ." MPRSA § 3(f). The construction of this deepwater port appears to fall within this statutory exclusion.

NATIONAL ENVIRONMENTAL POLICY ACT. Section 309 of the Clean Air Act requires EPA to review EISs prepared by other agencies and refer projects it finds “environmentally unacceptable” to the President’s Council on Environmental Quality (CEQ).

The Coast Guard should file the TOPS EIS with EPA in accordance with 40 CFR § 1506.9 by sending it to:

EPA
Office of Federal Activities
EIS Filing Section
South Ariel Rios Building (Room 7220)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20004

Please provide an additional copy of both draft and final EISs to EPA Region 6 for consideration in its NPDES action.

POINT OF CONTACT. I will be the primary EPA point of contact for communications on the TOPS project. Correspondence should be directed to me as follows:

Robert D. Lawrence
Senior Policy Advisor - Energy Issues
EPA Region 6
1445 Ross Avenue (6PD)
Dallas TX 75202
(214) 665-6580

EPA Region 6 looks forward to working with the Coast Guard and Maritime Administration on this project.

Sincerely yours,

Robert D. Lawrence
Senior Policy Advisor - Energy Issues

cc: Col. Peter J. Rowan
Corps of Engineers, New Orleans LA

Mr. Chris C. Oynes
Minerals Management Service, New Orleans LA

Mr. Keith Lesnick
Maritime Administration, Washington, DC

Mr. James Lytal
Texas Offshore Port System, Houston TX