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PBW Project: 2264

To: Ms. Denise Waters O'Brian, Project Manager, Lloyd Engineering, Inc.

From: R Bryan Luper, PE, PhD, Senior Engineer - Pastor, Behling & Wheeler, LLC

Date: April 26, 2018

Subject: **NPDES Individual Permit Applicability to Offshore Crude Export Project**

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PBW understands that the client proposes to install a set of pipelines in the Gulf of Mexico, near Corpus Christi, Texas, and that these pipelines will extend from North Padre Island to approximately 15 miles (12.15 nautical miles) offshore where a single point mooring buoy (SPM) will be anchored to the seabed (in approximately 95' of water depth). This proposed location would lie outside of the limits of the territorial sea of both the State of Texas (9 nautical miles from shore) and the United States (3 or 12 nautical miles from shore), but, it would lie within what is considered the Contiguous Zone of the United States (the stretch of area 12 to 24 nautical miles offshore).

In regard to the operation of the SPM, PBW understands that oil tankers (or petroleum tankers) will attach to the SPM and be loaded with various petroleum crudes from an onshore tank farm. There will not be any discharges from the SPM itself. However, there could be various discharges (e.g., graywater, bilgewater/oily water separator effluent, ballast water, etc.) from the vessels during the approximately 48-hour periods that they are attached to the SPM.

The following provides a summary of the regulatory information PBW has compiled, to-date, which may be relevant to the proposed project:

I. Federal Jurisdiction within the Contiguous Zone under the Clean Water Act

According to the Environmental Protection Agency (EPA) website page – NPDES Permit Basics[3], the Clean Water Act:

1) Prohibits anybody from discharging "pollutants" through a "point source" into a "water of the United States unless they have a National Pollution Discharge Elimination System (NPDES) permit.
2) The term point source is defined very broadly in the Clean Water Act, meaning any discernible, confined and discrete conveyance, such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container. It also includes vessels or other floating craft from which pollutants are or may be discharged.
3) Whether you need a NPDES permit depends on where you send your pollutants. If you will discharge from a point source into the "water of the United States", you will need a permit.
4) The term "water of the United States" is defined very broadly in the Clean Water Act. It means navigable waters, tributaries to navigable waters, interstate waters, the oceans out to 200 miles, etc.

5) If you are in doubt about whether you need a permit or if you need to find out if a discharge is covered by an NPDES permit, you should call the EPA Regional office.
6) An application form must be submitted to the permitting authority at least 180 days before the expected commencement of the discharge.
7) The application forms can be obtained from this EPA website.

According to the actual language of the Code of Federal Regulations (CFR) Title 40 Chapter I Subchapter D Part 122 Subpart A Section 122.2 Definitions[4] - the definition of "Waters of the United States" includes, "(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

If a claim, such as the one described on the EPA website, of jurisdiction over "oceans out to 200 miles" is made, it would have to be based on Part (a) of the CFR's definition.

However, you can note that the same definition also lists "territorial seas" as "waters of the United States". This specific inclusion of "territorial seas" could be interpreted to mean that facilities in the Contiguous Zone might not have been intended to be within the jurisdiction of the Clean Water Act. An example very relevant to the SPM that supports this conclusion can be found in the EPA's Vessel General Permit (VGP). The language provided in the EPA's Interim Revised NPDES Compliance Inspection Manual, January 2017. Chapter 16 – Vessel General Permit (VGP)[1] states:

> *"Waters subject to the VGP are "waters of the United States" as defined in 40 CFR 112.2 (extending to the outer reach of the 3-mile territorial sea as defined in section 502(8) of the CWA)."*

and

> *"The permit does not apply to discharges beyond the 3-mile territorial sea"*

However, based on the current EPA claims in the website described above and anonymous communications with EPA, it is believed that the EPA is likely to argue that any type of discharges occurring in the Contiguous Zone does fall within their jurisdiction under the Clean Water Act, including at the location of the SPM.

II. Federal Jurisdiction over Vessel Discharges through the Vessel General Permit[5]

Until December 2008, by 40 CFR 122.3(a), there existed a long-standing exclusion of discharges incidental to the normal operation of vessels from the NPDES program. In response to court decisions, the EPA now administers the Vessel General Permit (VGP)[5] mentioned above. It is applicable to all discharges incidental to the normal operation of non-recreational, non-military vessels into the waters subject to the permit. The US Coast Guard (USCG) enforces the regulations tied to the VGP on behalf of the EPA under a Memorandum of Understanding (MOU)[6].

EPA first issued the VGP in 2008 and subsequently reissued it in 2013. The VGP provides for NPDES permit coverage for incidental discharges into waters of the United States from commercial vessels (including oil tankers and petroleum tankers) greater than 79 feet in length and for ballast water from commercial vessels of all sizes. EPA estimates that approximately 61,000 domestically flagged commercial vessels and approximately 8,000 foreign flagged vessels require VGP permit coverage for

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such incidental discharges. Part 2.2 of the VGP explicitly identifies 27 different effluent streams eligible for coverage under the permit along with corresponding effluent limits and related requirements for each specific discharge category. Eligible discharges under this permit include bilgewater/oily water separator effluent, ballast water, deck washdown and runoff, above water line hull cleaning, and distillation and reverse osmosis brine.

To obtain authorization to discharge under the VGP, operators/owners of vessels greater than or equal to 300 gross tons must electronically submit a signed and certified, complete and accurate Notice of Intent (NOI) at least seven days before discharging into waters subject to the VGP.

However, as stated in the previous section, this permit does not apply to discharges beyond the 3-mile territorial sea.

III. Federal Jurisdiction over Vessel Discharges while Performing Crude Oil Loading Operations

As described in Section I, the EPA website directs potential permittees to Application Form 1 – General Information – Consolidated Permits Program[2], where one is directed to Section C – Activities Which Do Not Require Permits - to determine whether a proposed activity is excluded from permit requirements. Section C (Page 1-5) states:

> *"You are not required to obtain an NPDES Permit if your discharge is in one of the following categories, as provided by the Clean Water Act (CWA) and by the NPDES regulations (40 CFR Parts 122-125)."*

Among the several categories of exceptions, is Part A – Discharges from Vessels – which states:

> *"Discharges of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, and any other discharges incidental to the normal operation of a vessel do not require NPDES permits."*

BUT, it goes to state that

> *"However, discharges of rubbish, trash, garbage, or other such materials discharged overboard require permits, and so do other discharges when the vessel is operating in a capacity other than as a means of transportation."*

Examples of where a vessel is operating in a capacity other than as a means of transportation, is provided in a continuation of the same sentence –

> *"such as when the vessel is being used as an energy or mining facility, a storage facility, or a seafood processing facility, or is secured to the bed of the ocean, contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development."*

Based on our understanding of the proposed SPM operations, it will be attached to the bed of the ocean, but solely for the purpose of conducting crude oil loading operations, not for oil exploration or development. Furthermore, as the vessels are attached solely for the purpose of crude oil loading operations, they are continuing to operate as means of transportation. **Hence, the vessels' typical discharges will fall within the exceptions provided in Section C of Application Form 1.** Our opinion is based on the language provided in the EPA's Interim Revised NPDES Compliance Inspection Manual, January 2017. Chapter 16 – Vessel General Permit (VGP)[1]. It goes as follows:

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> *"Generally, except as provided for above, a vessel is operating in the capacity as a means of transportation while underway (in transit), temporarily moored to a pier or other mooring device, performing cargo loading/off-loading operations, fueling or defueling, during tug or tow operations, or while performing maintenance outside of a drydock while temporarily moored."*

IV. Communications with EPA Region 6 Office

PBW made a number of anonymous inquiries to the EPA regarding a "conceptual" project, with our initial contacts being EPA Region 6 representatives responsible for administration of outer continental shelf general permits, including the VGP. Our initial discussions with the offshore specialist responsible for VGP applications resulted in a referral to the Region 6 NPDES permit writers since the location of the SPM was beyond the 3-mile territorial sea boundary.

Initially, the permit writer, indicated to PBW that the vessels, when attached to the SPM, would be operating in a capacity other than as a means of transportation, and would be considered to "be part of the SPM (i.e., part of a NPDES jurisdictional facility)". However, during later calls to clarify when a vessel should be considered to "be operating as means of transportation (or not)", the Region 6 office has since been, to date, unwilling to state whether the proposed SPM merits a NPDES Permit.

V. Potential Commercial Restrictions to Comply with Federal Authority

Based on previous project communications regarding contractual restrictions that could be imposed by the client on vessels authorized to access and load crude oil via the SPM, PBW recommends further consideration of the following requirements:

1. Vessels shall have current coverage under VGP;
2. Vessels shall have a current USCG Certificate of Compliance (VGP coverage is required for issuance of a Certificate of Compliance);
3. Vessels shall limit discharges to the maximum extent practicable while attached to SPM. Further evaluation of permitted discharges (i.e. ballast water) is warranted to ensure such restrictions do not cause undue commercial burdens on operation of the SPM.

VI. Regulatory Summary

Based on the EPA references cited here, our opinion would be that neither the SPM nor the vessels will come under the jurisdiction of the EPA's NPDES Permit Program. The SPM because it's operation will not result in any discharges from the SPM. The vessels because they would be operating outside of the jurisdictional limits of the VGP program while at the SPM and not subject to NPDES permitting since the vessels are operating in the capacity as a means of transportation while connected to the SPM.

PBW recommends that the client continue to pursue a definitive answer from EPA Region. If, for some reason, a later determination is made that the vessel discharges will require a permit for the SPM, the application for such permit should be submitted at least 180 days before the start-up of operations. If a

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determination is made that the vessels' discharges fall under the VGP program, a NOI must be submitted by the tanker operator at least 7 days before a discharge into "waters of the US" occurs.

VII. References

1. EPA Publication Number: 305-K-17-001, Interim Revised Version, January 2017; Chapter 16 – Page 433 Waters Subject to the VGP. https://www.epa.gov/sites/production/files/2017-03/documents/npdesinspect-chapter-16.pdf

2. EPA Form 3510-1 Revised August 1990; Application Form 1 – General Information – Consolidated Permits Program; https://www3.epa.gov/npdes/pubs/form_1.pdf

3. https://www.epa.gov/npdes/npdes-permit-basics

4. Code of Federal Regulations (CFR) Title 40 Chapter I Subchapter D Part 122 Subpart A Section 122.2; https://www.gpo.gov/fdsys/granule/CFR-2011-title40-vol22/CFR-2011-title40-vol22-sec122-2

5. Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (VGP), Final 2013. https://www.epa.gov/npdes/vessels-vgp

6. Memorandum of Understanding (MOU) between the US EPA Office of Enforcement and Compliance Assurance and the US Coast Guard Office of Marine Safety, Security and Stewardship, February 2011.

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