SQUIRE
PATTON BOGGS

MEMORANDUM

Re: Response to Coast Guard Counsel Questions re Clean Air Act

Date: December 18, 2017

This memorandum responds to questions raised and arguments presented in an email dated December 14, 2017, from Coast Guard counsel disputing LOOP counsel's conclusion that the Department of Interior, rather than the Environmental Protection Agency or the Coast Guard, has authority to regulate atmospheric emissions resulting from crude oil loading operations at the Deepwater Port. Each of the positions asserted in the email is separately addressed below.

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

Response: The referenced provision does not create new source review or permit requirements under the Clean Air Act 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.

b) The scope of this provision of the Deepwater Port Act is limited by the Clean Air Act 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]

c) The definition of "Deepwater Port" in the Deepwater Port Act 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 Deepwater Port Act.

---

[1] 42 U.S.C. Section 7411(a)(2).

[2] 40 CFR 122.2.

[3] 60 Fed. Reg 48388, Sept. 19, 1995.

[4] 33 U.S.C. 1502(9).

ED_001774D_00000525-00001

d) To the extent that the Deepwater Port Act 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 provisions of the Outer Continental Shelf Lands Act and Section 308 of the Clean Air Act.

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

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

LOOP, historically, has received, transported and stored over several hundred thousand barrels per day of Outer Continental Shelf (OCS) oil from the Mars and Endymion fields. These major offshore fields could not operate or produce as economically or efficiently without LOOP. Upon completion of the bi-directional MOL project, LOOP will be the most efficient shipping point for the export of OCS oil from Western Gulf fields. LOOP's marine terminal is clearly a facility which is an integral part of OCS production operations.[5] The emissions of pollutants from such operations are subject to regulation by the Department of the Interior under the OCS Lands Act, Section 328 of the Clean Air Act, and the regulations promulgated by the Bureau of Ocean Energy Management at 30 CFR Part 550.

The definitions in the Outer Continental Shelf Lands Act[6] make clear that receipt, transshipment and transportation of OCS oil are production activities within the Act's meaning. This is confirmed by the Act's operative provision,[7] which gives the Secretary exclusive jurisdiction over pollutant discharges from installations and artificial islands for the purpose of transporting OCS oil. It is again confirmed by Section 328 of the Clean Air Act, which makes clear that OCS activities include transportation of OCS oil and that the emissions from vessels associated with an Outer Continental Shelf Source are considered to be emissions from the source.[8]

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

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 Clean Air Act.

As noted above, the loading operations contemplated at LOOP's marine terminal will not be a "new source" since EPA has neither proposed nor promulgated an applicable new source performance standard, but, instead, has determined that there are no available control standards

[5] 43 U.S.C. 1331*et seq.* makes clear that transportation is an essential part of the production function.

[6] 43 U.S.C. 1331 (f) in its definition of Affected State makes clear that receipt and transshipment of OCS oil are OCS activities under the Act. Section 1331 (m) defines production to include activities taking place following successful completion, including transfer to shore.

[7] 43 U.S.C. 333(a)(1).

[8] 42 U.S.C. 7627(a)(4).

ED_001774D_00000525-00002

for such operations.[9] Loading operations such as those contemplated by LOOP, are not comparable to the industrial-type regasification or liquefaction operations[10] contemplated aboard vessels at offshore LNG facilities (e.g., Gulf Gateway or Port Delfin).[11] EPA has never regulated crude oil transfer operations involving vessels at OCS locations. In connection with LOOP's original license application, the DWPA specifically provided that an application under the act would constitute an application for all federal permits required to authorize construction, ownership and operation of the Port. EPA, actively participated in the licensing process, and, in its final comments, noted that LOOP had applied for a National Pollution Discharge Elimination System (NPDES) Section 402 permit. Regarding the Clean Air Act, however, LOOP's final comments did not assert jurisdiction over vessels moored at the port, but, instead, simply suggested that LOOP seek, through its arrangements with transporting companies, to "secure assurances" that ship purging and ballasting operations would be controlled in order to minimize hydrocarbon emissions within the uploading area and concluded that the project would not "violate any provision of the Clean Air Act, as amended." That position has never been changed. The tankers calling at LOOP's marine terminal are marine vessels, and EPA has never sought to impose jurisdiction over normal emissions from marine vessels operating beyond territorial limits even when they are moored.

Thus, the construction, operation and ownership of LOOP's Deepwater Port have been authorized by LOOP's license. No further EPA permits are required for the Port's offshore operations.

If the Clean Air Act requirements were applicable, the remaining question would be whether the changes required to allow OCS loading operations would themselves trigger a need for new permitting procedures. For facilities offshore Louisiana, this question would be answered by reference to the State of Louisiana's Air Quality Regulations and the EPA-approved State Implementation Plan (SIP).[12] Permitting is covered in Section 5 of the approved SIP, which requires all "sources" subject to the State's jurisdiction to operate in conformity with permits obtained from the State or approved by EPA (In this case, LOOP's license functions as such a permit.). LOOP is an existing source and is not required to amend its permit or obtain a new one unless the changes contemplated to enable loading at the marine terminal constitute

---

[9] Footnotes 1 and 2, *supra*. *See also* 60 Fed. Reg 48388, Sept. 19, 1995.

[10] EPA has not adopted New Source Performance Standards for offshore oil transfer operations as it has for gas processing.

[11] Offshore natural gas processing operations are at least arguably subject to a new source performance standard. We note that EPA's effort to assert this jurisdiction has never been upheld by any court and, further, that no court has ever upheld the position that a Title V permit, in addition to the Port license, is required. The Delfin permitting process has now extended over a period exceeding two years. It should not be considered a positive example.

[12] Under the Deepwater Port Act, the port is treated as an area of exclusive federal jurisdiction within the nearest adjacent coastal state -- Louisiana. In Louisiana, EPA's Clean Air Act jurisdiction is exercised by the Louisiana Department of Environmental Quality pursuant to an EPA approved State Implementation Plan.

ED_001774D_00000525-00003

"modifications" under the SIP.[13] The changes contemplated do not constitute "modifications" under the definitions in LAC Section 502 and thus no notice or formal filing with the State's Department of Environmental Quality (DEQ) is required. Notwithstanding that conclusion, LOOP has continuously consulted with DEQ pursuant to the environmental monitoring program, and DEQ participated in the Program Review Committee's deliberations leading to the conclusion that the bi-directional MOL project may be implemented without further review.

Position #4: If the loading operation is an Outer Continental Shelf Source, LOOP should be consulting with the U.S. Bureau of Ocean Energy Management (BOEM).

Response: There is no requirement for advance consultation with BOEM for vessel loading operations. Under the applicable regulations, BOEM review of an existing facility is triggered only at the request of an affected state.[14] Representatives of the State of Louisiana have participated fully in the review of the bi-directional MOL proposal and have actively monitored the port's operation since inception. They have not determined it to be necessary or appropriate to make any such request and have made no such request.

*****

We trust that the foregoing adequately resolves concerns that have been expressed and that consideration of this issue will not further delay action on LOOP's request for approval of Operations Manual changes.

[13] LAC Section 502.
[14] 30 C.F.R. § 550.304.

ED_001774D_00000525-00004