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Dear Mr. Cathey and Ms. Dutton:

This letter responds to communications from El Paso Energy Bridge Gulf of Mexico, L.L.C. (El Paso), regarding preliminary views the Environmental Protection Agency (EPA) Region 6 expressed in a letter dated March 28, 2003, to the United States Coast Guard, and in several subsequent meetings and telephone calls. El Paso's objections to these views are set forth in an "Analysis of Deepwater Port Permitting Requirements" it provided EPA Region 6 at a meeting on May 9, 2003; in Mr. Cathey's June 16, 2003, letter to Commander Mark Prescott; and in Ms. Dutton's letters of July 18, 2003, and August 18, 2003, to EPA attorneys Patrick Rankin and Michael Boydston. EPA's understanding of the facts in this matter is based on representations in that correspondence, in El Paso's Application to the United States Coast Guard for a Deepwater Port (December 2002) (license application), in National Pollutant Discharge Elimination System (NPDES), Prevention of Significant Deterioration (PSD) and Title V permit applications El Paso filed under protest on September 4, 2003, and in El Paso's statements at a meeting with the Regional Administrator for EPA Region 6 on September 12, 2003.

BACKGROUND

Given the Nation's expanding demand for natural gas, a number of entities are in the process of developing plans and permit applications for deepwater ports through which that commodity may be imported from overseas gasification plants. Typically, such deepwater ports would be located on the outer continental shelf of the United States and use existing natural gas pipelines associated with offshore natural gas production to transport the imported gas ashore. Because the vessels transporting the gas carry it in a liquified state and the pipelines carry it in a gaseous state, the primary industrial process that would occur at offshore natural gas ports is conversion of natural gas from liquified to gaseous state for transport ashore. A major capital

expense associated with the ports is generally the construction of offshore fixed facilities on which the re-gasification process will occur. El Paso's proposal, however, is somewhat different.

El Paso proposes to construct and operate a natural gas deepwater port approximately 120 miles off the coast of Louisiana. The proposed port would feature a "submerged turret system" (STS)[1] connected to a short (1.93 miles) pipeline leading to a metering platform. Two other short (3.93 and 1.38 miles) pipelines would convey the natural gas from the metering platform to existing natural gas pipelines operated by other entities for transport ashore. This fixed infrastructure would not include facilities for LNG storage or re-gasification and, under normal circumstances, would not be manned. As explained below, El Paso contends these relatively modest fixed facilities would constitute its entire deepwater port for purposes of federal regulation under the Deepwater Port Act (DPA), Clean Air Act (CAA), and Clean Water Act (CAA).

Only specially designed and equipped liquefied natural gas (LNG) vessels, two of which are now under construction, would be able to deliver natural gas to the fixed infrastructure of the proposed port. Those vessels are identified in El Paso's license application as El Paso Energy Bridge Vessels (EPEBVs). Like most LNG carriers, the EPEBVs would be propelled by steam turbines. The boilers generating the steam would normally be fired with natural gas "boil off" from the cargo on their voyage to the buoy, but by diesel oil while discharging cargo and on the return voyage. Unlike any LNG carrier previously constructed, however, the EPEBVs would be specially outfitted so they could be attached to the STS and re-gasify their LNG cargo before offloading it.

The operator of an EPEBV calling on the port would retrieve the STS, winch it into an opening in the bottom of the vessel's hull, and attach it to the vessel with hydraulically operated locking jacks. It would then ring up "finished with engines" and set a "moored condition" bridge watch. Thereafter, an El Paso representative, a.k.a., "person in charge" (PIC), and "other entities involved in cargo transfer process" would board the vessel. License Application, Appendix M, p. 3. The PIC would inspect the re-gasification system, determine the quantity and quality of the cargo, calibrate metering equipment, assure coordination with the pipeline operators so that maximum operating pressures would not be exceeded, and "issue permission to the vessel operator" to commence the re-gasification and transfer process. *Id,* p. 4.

Onboard re-gasification would be accomplished by warming the LNG until it turned into a gas, a process employing an "open loop" system, "closed loop" system, or a combination of the two. In the open loop mode, warm seawater would be drawn into the EPEBV, then passed through a shell and loop vaporizer, converting the LNG to a gaseous state by heating it, and then

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[1] The proposed STS would be a special purpose buoy equipped with a flexible riser and pipeline manifold and would be affixed to the seabed by chains and anchors. When not in use, it would be submerged, but marked by a smaller lighted buoy on the surface.

would be discharged back to the sea at a reduced temperature. In the closed loop mode, steam from the EPEBV's boilers would be used to heat water circulated through the shell and loop vaporizer in a closed system from which there would be no warming water discharge. El Paso would normally use the open loop system at its proposed Gulf of Mexico facility, but could rely on the closed loop system if necessary. After re-gasification, the natural gas would be conveyed through the buoy, riser, and manifold to the 1.93 mile pipeline leading to the metering platform.

In its letter of March 28, 2003, EPA explained its views on how the CWA would apply to the discharges from the open loop re-gasification system as well as discharges from the metering platform. It also explained its views on how the CAA would apply to emissions associated with both the re-gasification processes and emissions from the metering platform. El Paso objects to regulation of any discharges or emissions originating on the EPEBVs and to the process for authorizing discharges and emissions from the metering platform.

SOURCE OF EPA AUTHORITY TO REGULATE ACTIVITIES ASSOCIATED WITH DEEPWATER PORTS

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). OCSLA § 4 has been long viewed by EPA as the source of its authority to regulate discharges from oil and gas operations on the outer continental shelf. *See* "Outer Continental Shelf Applicability of FWPCA," Opinion of the General Counsel (August 3, 1973), *published at* 2 Gen. Couns. Ops. (Water Pollution) 181, 182 (Environmental Law Publishing Service, 1979).

El Paso contends, however, that the DPA establishes a "one window" licensing process that shifts responsibility for issuing authorizations required by the CWA and CAA from EPA to the Secretary of Transportation. According to El Paso, EPA's role in that unified licensing process is limited to developing conditions implementing those statutes for inclusion in the deepwater port license issued by the Secretary. El Paso further argues that this unified licensing procedure has substantive consequences. According to El Paso, the Secretary's authority to regulate *via* this unified license is circumscribed by the exclusion of "vessels" in the DPA's definition of "deepwater port" and EPA could thus neither recommend nor require the Secretary's imposition of license conditions on vessels, regardless of whether the CWA and CAA authorize EPA to impose such conditions in independent permits. Under that view, only

discharges and emissions from the metering platform would be subject to federal regulation.

EPA is informed, however, that the Secretary of Transportation interprets the DPA as requiring a unified application for all necessary federal permits and close coordination between responsible federal agencies, but not as requiring issuance of a single permit. "Federal Agencies with permit responsibilities such as the EPA and MMS will retain all distinct permit issuance authority." USCG Memorandum, "Environmental Planning Aspects of the Deepwater Port Act" (1 April 2003).[2] Because the Secretary has primary responsibility for administration of the DPA, EPA defers to that interpretation and does not address the merits of El Paso's argument. Nor does EPA address the merits of El Paso's argument on the scope of the DPA's vessel exclusion.[3]

INTERNATIONAL LAW

El Paso argues that EPA must interpret the grant of authority under 33 U.S.C. § 1518 in view of constraints imposed by international law, primarily the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which generally prohibits nations from exercising sovereignty over vessels on the high seas.[4] EPA's interpretation is fully consistent with international law, however, as reflected in UNCLOS.

The United States has not acceded to UNCLOS, but it has been U.S. policy since 1983 to act in a manner consistent with the Convention's provisions regarding traditional uses of the ocean. Nothing in UNCLOS III and no general principle of international law, however, limits a nation's sovereignty over its own ports and internal waters, including the authority to impose conditions for entry. *See, e.g., Nevada v. Hall*, 440 U.S. 410 (1979); *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358 (S.D. Fla. 1998). Assuming that the relevant UNCLOS provisions reflect customary international law and that EPA must interpret §1518 consistently with those provisions, the potential EPA requirements at issue are fully consistent with UNCLOS. Article 60 of UNCLOS explicitly recognizes that coastal States, in their exclusive economic zones (EEZs), "have the exclusive right to construct and to authorize and regulate the construction, operation, and use of . . . installations and structures for the purposes

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[2] Under transition provisions of the Homeland Security Act, the United States Coast Guard remains responsible for processing El Paso's license application, despite its transfer to the recently created Department of Homeland Security. In this context, Coast Guard interpretations of the DPA are attributable to the Secretary of Transportation, who retains ultimate authority for issuance or denial of El Paso's deepwater port license.

[3] The DPA defines "vessel" as "every description of watercraft or other artificial contrivance used as a means of transportation on or through the water." 15 U.S.C. §1506(19).

[4] In addition, El Paso notes the DPA licensing prerequisite that "the deepwater port . . . not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law." 33 U.S.C. § 1503(c)(4).

provided for in article 56 [pertaining to the EEZ] and other economic purposes." Deepwater ports fall within this provision.

Moreover, EPA's regulation of discharges and emissions associated with onboard re-gasification performed by ships that are physically attached to El Paso's submerged turret system in no way interferes with the freedom of navigation. There is thus no need for EPA to interpret its authority under the DPA restrictively in order to maintain consistency with international law.

To the extent you contend the re-gasification operations occur on the "high seas" rather than at ports over which the United States is sovereign, your argument appears directed at the authority of Congress to extend U.S. sovereignty to the area in which you propose to locate a deepwater port. EPA notes that Congress was aware of constraints imposed by international law when it enacted the DPA in 1974. It decided that, under the 1958 United Nations Convention on the High Seas, Article 2, "a nation might properly execute jurisdiction on the High Seas in order to license and regulate such [deepwater port] facilities." Senate Report 93-1217, 1974 U.S. Code Congressional and Administrative News 7529, 7536. Of course, UNCLOS further clarifies the authority of a coastal state to establish a deepwater port in its EEZ.

In support of its international law argument, El Paso also relies on Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL). However, El Paso's arguments related to Annex VI are without merit. First, as El Paso acknowledges, Annex VI is not in force and has not yet been ratified by the United States. Second, El Paso claims that regulating emissions of vessels, as proposed by EPA here, "would undermine the international uniformity sought in MARPOL Annex VI," and alleges that EPA has reaffirmed its "deference to emerging international standards" in a recent rulemaking setting standards for Category 3 marine diesel engines. June 16 Cathey letter at 5 (citing 68 Fed. Reg. 9746, at 9759 (Feb. 28, 2003)). But, although EPA endeavors, where possible, to work within international standards, EPA did not "reaffirm[] its deference to emerging international standards" in that rulemaking. The text in question explains EPA's decision to not exercise its discretion to apply the standards contained in that rulemaking to marine diesel engines installed on foreign flag vessels. One of the reasons for that decision was "to facilitate the development of more stringent consensus international requirements" that have the potential of maximizing emission reductions from all vessels that visit U.S. ports. At the same time, EPA clearly noted that it would reconsider this issue in a future rulemaking. In addition, Annex VI does not address air emissions from re-gasification activities. Nor does MARPOL preclude Parties from imposing more stringent conditions on ships entering their ports. Again, EPA does not intend to impose any requirement on vessels exercising their navigational rights on the high seas, but is instead addressing activities conducted at the port. As earlier stated, this regulatory approach is consistent with Article 60 of UNCLOS, which gives "exclusive jurisdiction over . . . artificial islands, installations and structures" in the EEZ to coastal states.

CWA REGULATION OF VESSEL DISCHARGES

CWA § 502(12)(B), 33 U.S.C. § 1362(12), excludes addition of a pollutant from "a vessel or other floating craft" to the ocean or contiguous zone from its definition of "discharge of a pollutant." Based on that statutory exclusion, El Paso argues the CWA provides EPA no authority to regulate discharges from the EPEBVs. Under the 33 U.S.C. § 1518(a)(1), however, discharges from the EPEBVs must be regulated "as if" they occurred "in an area of exclusive Federal jurisdiction located within a State," i.e., in the territorial seas or inland waters. 33 U.S.C. § 1518(a)(1). The statutory exclusion for vessel discharges to the contiguous zone and ocean would not thus apply.

EPA has, however, promulgated a regulatory exclusion for vessel discharges that applies to the territorial seas and inland waters as well as to the contiguous zone and ocean. 40 C.F.R. §122.3 provides in pertinent part:

> The following discharges do not require NPDES permits:
>
> (a) any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when 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 . . . .

The first sentence of this regulation describes the fundamental ambit of the exclusion and the second sentence serves two purposes. The second sentence first clarifies that refuse discharged overboard is not excluded from NPDES permit requirements as "discharges incidental to the normal operation of a vessel." Second, it serves as a "recapture clause" for incidental discharges that might otherwise be subject to the exclusion of the first sentence "when the vessel is operating in a capacity other than as a means of transportation." This recapture provision is based on long-standing interpretations that Congress intended to exclude only "vessels or other floating craft" engaged in transportation from CWA permit requirements and that discharges from vessels operating other than as a means of transportation should be regulated under CWA § 402.

El Paso contends the re-gasification process that it would perform aboard EPEBVs is part of those vessels' transportation function, arguing that "[t]he Port [sic], while producing some wastewater pursuant to re-gasification operations, is only conducting those operations in furtherance of its sole purpose – the transportation of natural gas." August 18, 2003, Dutton Letter, pp. 8-9. On this basis El Paso distinguishes the EPEBVs from the seafood processing and drill ships the regulation's recapture provision references as examples, because the primary use of such vessels is not transportation, i.e., they only move to reach the locations in which they will

operate in a non-transportation capacity.

There is no need to reach the question of how the recapture provision of the regulation might apply because the warming water discharges from the LNG re-gasification process that EPA would regulate under the port's NPDES permit are not "incidental to the normal operation of a vessel." LNG re-gasification is an industrial process that does not occur as part of the normal operation of a vessel. It is instead an industrial process normally performed at fixed facilities, e.g., onshore terminals, not on vessels delivering the LNG. Moreover, the proposed Port Pelican and Port Cabrillo, subjects of the only other deepwater port applications now pending, would use gravity-based fixed structures on which the LNG would be re-gasified after its delivery. At those facilities, discharges associated with re-gasification would be regulated in the facilities' NPDES permits.

Re-gasification would not even be "incidental to the normal operation" of the EPEBVs themselves. Re-gasification would not occur while the LNG is loaded aboard those vessels nor during their transit of ocean waters. Onboard re-gasification would also not occur should an EPEBV ever offload its cargo at any LNG terminal other than El Paso's. Indeed, the vessel's crew, although it would be fully qualified to transport LNG *via* steam powered vessels to any LNG terminal in the world, would only be allowed to operate the re-gasification system under the direct supervision of El Paso's PIC. Despite its physical location aboard the EPEBVs, the re-gasification process that would occur at this port would be part of El Paso's industrial operation, not part of the vessels' transportation operation. The warming water discharges from this port process should thus be regulated under an NPDES permit in the same fashion as warming water discharges from the same process at competing LNG terminals.

CAA REGULATION OF VESSEL EMISSIONS

El Paso has acknowledged that sources on the port metering platform will produce air emissions of an estimated 9.48 tons per year of NOx, 0.07 tons per year of SO_2, and 0.73 tons per year of PM_{10}. These emissions should be included in the applicability determinations for CAA preconstruction and operating permits. In addition, the much greater vessel emissions associated with the re-gasification process and the transfer of gas to the port should be included. Information submitted by El Paso indicates that these emissions may be as much as 1090 tons per year of NOx.[5] A detailed explanation of our position and a response to your various comments follows.

Fuel Conversion Facility

[5]This figure is derived from El Paso's air permit application, which apparently includes "hotelling" emissions along with re-gasification emissions, and should therefore be viewed as an upper boundary rather than a precise estimate of emissions associated with re-gasification and transfer of gas to the port.

First, in response to your concerns regarding the potential treatment of the port as a "fuel conversion facility," I am attaching a memorandum from EPA's Office of Air Quality Planning and Standards addressing this question. *See* Attachment A, Memorandum from Racqueline Shelton to Guy Donaldson (July 31, 2003). Based on this memorandum and on our current understanding of the nature of the LNG vaporization process at the port, we do not intend to treat the port as a "fuel conversion plant" for new source review (NSR) purposes.

Indirect Source Review

El Paso further asserts that EPA's view that it has permitting jurisdiction over the port "appears to be based on vessels being attracted by the Port, thus making the Port an indirect source of emissions," and that asserting jurisdiction on that basis constitutes a prohibited federally-federally imposed "indirect source review" program under Section 110(a)(5) of the CAA. June 16, 2003, Cathey letter, p. 8. This argument relies on a faulty premise. EPA is not considering the port's potential to attract mobile sources, but is instead examining the activities directly associated with the port and conducted as a part of its operations. This approach is consistent with the CAA:

> it is assuredly not the case that the ban on indirect source review was intended to go so far as to prohibit the attribution to a stationary source of all emissions which happen to emanate from or even merely physically contact a mobile source. Indeed, the statute itself provides that "direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this [ban on indirect source review]."

Natural Resources Defense Council, Inc. v. EPA, 725 F.2d 761, 771 (D.C. Cir. 1984) (*NRDC)* (quoting 42 U.S.C. § 7410(a) (5) (C)). All emissions being considered are direct emissions, and are from stationary sources as defined under Section 302(z) of the Act, as further discussed below.[6]

"Stationary Sources" Under the CAA

El Paso maintains that EPA air permitting programs generally cover only stationary sources, and that the CAA defines all vessel emissions as mobile emissions sources. We agree with the first conclusion, but not the second.

Our determination that vessel emissions generated in handling LNG at the port should be included in the applicability determination stems from our reading of the plain language of the CAA. Specifically, its definition of "stationary source" gives EPA the authority to consider emissions from external combustion engine vessels in preconstruction and operating permits. This

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[6]We also note that the CAA's requirement is that EPA not mandate inclusion of an indirect source review program in a State Implementation Plan (SIP) or include it in a Federal Implementation Plan (FIP). CAA Section 110(a)(5)(A), 42 U.S.C. § 7410. EPA's review of the port for permitting purposes is not equivalent to action on a SIP or FIP.

general definition, which is applicable to both preconstruction permits and operating permits, appears at Section 302(z):

> Stationary Source. The term "stationary source" means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216.

42 U.S.C. § 7602(z). In turn, the Section 216 definitions of "nonroad engine" and "nonroad vehicle" are limited to internal combustion engines. 42 U.S.C. § 7550(10), (11). Thus, a vessel powered by external combustion engines would be a "stationary source" for permitting purposes, because only internal-combustion-driven vehicles are excluded from the Section 302(z) definition of stationary source.[7]

El Paso disagrees with this approach, saying that EPA's "rigid" reading of the plain language of the statute would lead to the "illogical result" of treating internal and external combustion engines differently. "A more sensible reading of the CAA," El Paso contends, "is to exempt from permitting the emissions from all nonroad engines and also engines used for propulsion." July 18 Dutton Letter, p. 1. Such an exemption, however, is not present in the CAA. Whether Congress could have used a different approach when it wrote the CAA is not relevant to EPA's decision here, given the plain words of the statute. It is not EPA that has decided to treat external and internal combustion engines differently for purposes of determining what is a stationary source under the CAA. It is instead the express language enacted by Congress.[8]

However, we believe that these statutory definitions do not require EPA to include "to and fro" emissions from marine vessels powered by external combustion engines, or the vessels' "hotelling" emissions not directly associated with the activities of the port as part of the emissions attributable to the port facility. We draw this distinction because under the DPA other U.S. laws apply "to deepwater ports . . . and to activities connected, associated, or potentially interfering with the use or operation of any such port." 33 U.S.C. § 1518(a)(1). The "to and fro" emissions and "hotelling" emissions from the vessels are associated with the normal seagoing activities of the

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[7]As you have informed us, the vessels used in this operation are powered by external combustion engines, not reciprocating internal combustion engines or gas turbines, which generally combust internally. Also, these engines are distinguished from any auxiliary engines on the vessel that may be internal combustion engines.

[8]Whether the Act as a whole would authorize similar treatment of internal-combustion-propelled vessels is not relevant. In this letter we take no position on the applicability of NSR or Title V to emissions from vessels propelled by internal combustion engines. We simply find that the plain language of the Clean Air Act directs that, when making NSR and Title V applicability determinations, EPA is to consider the re-gasification-related emissions from vessels calling at the port.

vessels and not with the industrial activities associated with the port. We thus intend to consider only the emissions from activities in support of the port's function – i.e., those related to processing and transferring gas at the port, regardless of whether they occur on the metering platform or on marine vessels propelled by external combustion engines, as stationary emissions of the port for CAA Title I and Title V purposes. The nature of controls, if any, EPA will propose to impose on those emissions will be reflected in a draft preconstruction/Title V permit.

EPA PSD Regulations and the *NRDC* Decision

El Paso argues that EPA regulations bar consideration of vessel emissions in CAA permitting applicability determinations. July 18 Dutton Letter, p. 3 (citing 40 C.F.R. §§ 51.166(b)(6); 52.21(b)(6)). The cited EPA regulations indeed exclude "the activities of any vessel" from the scope of a regulated stationary source in PSD permitting. EPA promulgated that exemption in 1982, in a rule withdrawing previous regulations that had provided for consideration of vessel emissions on a "control and proximity" basis. See 47 Fed. Reg. 27554 (July 25, 1982). The 1982 rulemaking amended various regulations, including the two cited by El Paso,[9] by adding the phrase "except the activities of any vessel." In the *NRDC* decision, however, the D.C. Circuit Court of Appeals unambiguously vacated the provisions on which El Paso relies:

> [W]e vacate that portion of EPA's revocation [i.e., its 1982 rule withdrawing the previous rules] which "excepts the activities of any vessel" from the emissions attributable to marine terminals, *see, e.g.,* 40 C.F.R. § 51.24(b)(6) (1983), 47 Fed. Reg. 27,560 (1982).

NRDC, 725 F.2d at 775. El Paso correctly notes that the Court also remanded the matter to EPA for further action consistent with its opinion. Nonetheless, the *vacatur* leaves no legally effective regulation that would exempt "the activities of any vessel" from consideration for port permitting purposes. *See Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 ("To 'vacate' . . . means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'") El Paso therefore cannot rely on the language added to the regulations by the 1982 rulemaking.

El Paso also asserts that even under EPA's 1980 "control and proximity" regulations, which were withdrawn by the 1982 rule partly vacated in *NRDC*, EPA could still not consider any vessel emissions in permitting the port. Without assessing the merits of El Paso's interpretation of those regulations, we note that the *NRDC* court did not re-promulgate them. Accordingly, the statute rather than these regulations governs our decision here. Our conclusion is reinforced by the fact that the definition of stationary source was added in 1990, after both the rules and the D.C. Circuit opinion had been written. Therefore, nothing in the statute supports the conclusion that re-gasification of LNG occurring at a fixed location using power generated by an external

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[9] 40 C.F.R. § 51.24, which is referenced in the 1983 rulemaking partially vacated in *NRDC*, has since been renumbered as 40 C.F.R. § 166. *See* 51 Fed. Reg. 40656 (Nov. 7, 1986).

combustion engine must be regulated as a mobile source, even when the re-gasification process occurs on a vessel used to transport the LNG and re-gasification equipment to that fixed location.

CONCLUSION

As explained above, EPA Region 6 concludes that:

(1) All discharges from the metering platform and discharges of warming water from the re-gasification process performed aboard EPEBVs are subject to regulation under CWA §402.

(2) Emissions related to the re-gasification and transfer of gas at the port will be included in the CAA operating and preconstruction permit applicability determinations without regard to whether those emissions originate on the metering platforms or EPEBVs. The PSD/Title V permit applications El Paso submitted on September 4, 2003, provide a "worst case" estimate of El Paso's potential to emit. Regional technical staff will be contacting El Paso representatives to discuss potential terms of the draft preconstruction and operating permit.

EPA recognizes and appreciates that El Paso has different views on these matters. Nothing in this letter, however, precludes El Paso from acting on its own interpretation of applicable laws and regulations. The views explained in this letter, if and when applied in a permit, would be subject to administrative review by EPA's Environmental Appeals Board. This letter, therefore, does not constitute "final agency action" for purposes of obtaining judicial review. Final agency action occurs upon completion of the permit appeal processes.

Thank you for your patience in this matter. The views of both El Paso and EPA on these difficult issues of first impression have changed substantially since you originally raised them in May, and substantial time was necessary to provide El Paso full opportunity to express its views and to coordinate this response with various affected programs in EPA and other federal agencies. I assure you that EPA Region 6 will give fair and timely consideration to El Paso's permit applications.

Sincerely yours,

Charles J. Sheehan
Regional Counsel

Enclosure

cc: Commander Mark Prescott
United States Coast Guard