BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re: Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC Docket No. EPA-PAL-VI-001/2019	APPEAL NO. CAA 20-02M PETITION FOR REVIEW OF THE LIMETREE BAY TERMINALS AND LIMETREE BAY REFINING PLANTWIDE APPLICABILITY LIMIT PERMIT

PETITION FOR REVIEW
SUBMITTED BY ST. CROIX ENVIRONMENTAL ASSOCIATION, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and ELIZABETH NEVILLE

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I. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

This Petition requests review of Plantwide Applicability Limit ("**PAL**") Permit No. VI-001/2019 ("**Permit**")[1] that the U.S. Environmental Protection Agency ("**EPA**") issued[2] to Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC under the parent company of Limetree Bay Ventures, LLC (collectively, "**Limetree**") for its oil refinery and storage facility located in St. Croix, U.S. Virgin Islands ("**Refinery**"). The St. Croix Environmental Association, Center for Biological Diversity, Sierra Club, and Elizabeth Neville (collectively, "**Petitioners**") petition the Environmental Appeals Board ("**EAB**" or "**Board**") pursuant to 40 C.F.R. § 124.19(a) to review:

(1) whether the Refinery is ineligible to receive a PAL permit given its many years of shutdown and should have been considered a new source under applicable PAL and Prevention of Significant Deterioration ("**PSD**") regulations;

(2) whether the Permit contains impermissibly high emissions caps;

(3) whether the Permit insufficiently addresses environmental justice ("**EJ**") issues despite EPA finding that there would be disproportionate impacts on the EJ community;

(4) whether EPA complied with applicable language access and translation requirements for individuals with limited English proficiency ("**LEP**"); and

(5) whether EPA failed to satisfy the Endangered Species Act ("**ESA**") requirement to consult on the Permit's impacts on threatened and endangered species. The former EPA Administrator's decision to issue this Permit as a PAL Permit, with excessively high emissions

[1] *See* EPA-R02-OAR-2019-0551-0162, December 2, 2020, Final Plantwide Applicability Limit Permit for Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC, St. Croix, U.S. Virgin Islands. Subsequent references to documents in the administrative record will be cited as *AR-XXXX*. The administrative record is available at www.regulations.gov under Docket Id. EPA-R02-OAR-2019-0551.

[2] EPA Region 2 (the "Region") ordinarily handles this type of permitting in the U.S. Virgin Islands, but in an unusual intervention, former EPA Administrator, Andrew Wheeler, signed and issued the Permit on December 1, 2020.

caps, without appropriate consideration of environmental justice issues, and without sufficient consultation on threatened and endangered species, is based on clearly erroneous findings of fact and conclusions of law. Accordingly, Petitioners respectfully request that the Board vacate and remand the Permit to EPA.

II. THRESHOLD PROCEDURAL REQUIREMENTS

Petitioners satisfy the threshold requirements for filing a petition for review under 40 C.F.R. part 124 because:

1. Petitioners filed timely comments with the Region on November 24, 2019. See 40 C.F.R. § 124.19(a)(2); AR-0137 ("**PC**"); and

2. The issues Petitioners raise in this Petition for Review were raised during the comment period, preserving them for review, or were not reasonably ascertainable during the public comment period because EPA raised them for the first time in the final Permit or its response to public comments. *See* 40. C.F.R § 124.19(a)(4)(ii).

III. FACTUAL BACKGROUND

A. History of the Refinery

The Permit would allow Limetree to undertake large-scale refining operations at a facility that was been shut down for over eight years and to emit harmful air pollutants into the surrounding environment that is home to vulnerable communities and over two dozen threatened and endangered species.

The Refinery was previously owned by Hovensa, LLC ("**Hovensa**"), a joint venture between Hess Corporation ("**Hess**") and Petroleos de Venezuela, and was originally constructed by Hess Oil Virgin Islands Company in 1966. Ex. 1 (Matthew P. Johnson, *Black Gold of Paradise: Negotiating Oil Pollution in the US Virgin Islands, 1966–2012*, Environmental History 24 (2019):

766-792), at 768, 781.[3] Between 1987 and 2008, the Refinery released approximately as much petroleum into the groundwater as four times that of the 1989 Exxon Valdez spill, with "approximately 95 percent of recoverable petroleum products [being] recovered" amounting to 42 million gallons of petroleum product. Ex. 2 (*Hovensa Cleanup Comes to 42 Million Gallons So Far*, St. Croix Source, March 9, 2008).[4]

In 2011, Hovensa settled allegations by EPA and the U.S. Department of Justice that it violated the Clean Air Act ("**CAA**") by making emissions-increasing modifications to the Refinery without first obtaining preconstruction permits or installing required pollution control devices. Ex. 3 (*Nation's Second Largest Refinery to Pay More Than $5.3 Million Penalty for Clean Air Act Violations / Smog- and asthma-causing emissions to be cut by 8,500 tons per year*, EPA News Release, Jan. 26, 2011) at 1.[5] Hovensa agreed to pay a $5.3 million civil penalty and entered a consent decree requiring the installation of $700 million of new pollution control and monitoring technology. EPA then acknowledged that "[h]igh concentrations of SO2 and NOx, two key pollutants emitted from refineries, can have adverse impacts on human health, and are significant contributors to acid rain, smog, and haze." *Id.* The consent decree also required Hovensa to "set aside nearly $4.9 million for projects to benefit the environment of the U.S. Virgin Islands." *Id.*

Rather than implement the required pollution controls and pay for mitigating the damage it has caused to Virgin Islands environment, in early 2012, Hovensa shut down the Refinery because it was no longer profitable. *See* PC at 3-5. In its 2011 Annual Report, Hess, part owner of the Hovensa joint venture, acknowledged that "as a result of Hovensa's decision to shut down

[3] Also available at https://academic.oup.com/envhis/article-abstract/24/4/766/5520015.
[4] Also available at https://stcroixsource.com/2008/03/11/hovensa-cleanup-comes-42-million-gallons-so-far/#:~:text=The%20Exxon%20Valdez%20spilled%20about,fisheries%20after%20nearly%2019%20years.
[5] Also available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/2e321f78933fa2e685257824005812cd.html.

its refinery, which was announced in January 2012, Hovensa believes that it will not be required to make material capital expenditures pursuant to this consent decree." Ex. 4 (Hess Corporation 2011 Annual Report) at 39.[6] Subsequently, as discussed below, Hovensa repeatedly and publicly expressed intentions to shut down the refining operations and operate the facility as a long-term oil storage terminal. PC at 4-6.

In September 2015, the U.S. Virgin Islands filed a lawsuit against Hess for more than $1 billion alleging "a pattern of misconduct by executives at Hess," who "conspired to strip the facility's assets in order to leave the government with claims against a broke, polluted and inoperable refinery." Ex. 5 (*US Virgin Islands sues oil company over shuttered refinery*, Associated Press, Sept. 15, 2015) at 2.[7] Within hours of the filing, Hovensa announced that it would file for Chapter 11 bankruptcy, "allowing it to pursue the sale of the refinery for use as a simple storage facility." *Id.*

In December 2015, Hovensa sold the Refinery to Limetree. PC at 5. Initially, Limetree communicated its intention to operate the facility as an oil storage terminal and to potentially dismantle part of the refinery and sell off the scrap metal. *Id.* at 5-6. In 2016, Limetree reopened part of the facility for oil storage and announced a 10-year storage lease agreement with China Petroleum & Chemical Corp. (Sinopec), and hired a marketing director "to head Limetree Bay's storage marketing effort." *See* Ex. 6 (*Fast Track: Limetree Bay Will Be Ready To Re-Open Oil Terminal In April!*, Virgin Islands Free Press, Jan. 22, 2016).

[6] Also available at https://www.annualreports.com/HostedData/AnnualReportArchive/h/NYSE_HES_2011.pdf.
[7] Also available at https://www.businessinsider.com/ap-us-virgin-islands-sues-oil-company-over-shuttered-refinery-2015-9 .

B. Application for PAL Permit

In fall 2018, Limetree began having biweekly meetings with EPA to discuss plans for "expansion/modification" of the facility, targeting a January 2020 "restart date." Ex. 7 (Tomiak Sept. 28, 2018 Email) at ED_002591_00000120-00011-12.[8] Former Administrator Wheeler communicated to the EPA team to "fully cooperate" in the effort. *Id*. at ED_ 002591_00000120-00015. On November 26, 2018, nearly seven years after the Refinery ceased refining operations, Limetree applied for a PAL permit. *See* AR-0236 ("**Permit Application**"). Limetree based its Permit Application on an April 5, 2018 letter from former EPA Assistant Administrator William Wehrum that concluded the Refinery should be treated as the reactivation of an "idled" facility, rather than a "new source," against longstanding EPA Reactivation Policy and PSD preconstruction permitting regulations. Ex. 8 ("**Wehrum Letter**").[9] On September 20, 2019, EPA Region 2 issued a draft PAL permit to Limetree, proposing plant-wide emissions limits for Sulfur Dioxide, Nitrogen Oxides, Volatile Organic Compounds, Carbon Monoxide, Particulate Matter, Particulate Matter 10, and Particulate Matter 2.5. *See* AR-0001 ("**Draft Permit**").

C. Environmental Justice Analysis

As detailed in Petitioners' comments and the citations therein, St. Croix is home to vulnerable communities of color that suffer worse health outcomes than the national average and have limited access to quality healthcare resources. PC at 13-15. These communities are disproportionately vulnerable to certain health conditions, including conditions caused or aggravated by oil refining activities, such as heart disease, respiratory disease, and cancer. *Id*.

[8] Also available at https://foiaonline.gov/foiaonline/api/request/downloadFile/ED_002591_00000120_00_dc8e3928-0e4b-a7e5-cddb-6f06d4990549.pdf/d6daa5ef-457e-4124-bdf0-02825e2ee156.
[9] Also available at https://www.epa.gov/sites/production/files/2018-04/documents/limetree_2018.pdf.

In June 2019, Limetree submitted an Environmental Justice Analysis Air Modeling Report to EPA. AR-0060 ("**Modeling Report**"). While the Modeling Report acknowledged that the areas surrounding the Refinery are "communities of concern," it concluded there were "no EJ impacts" because its modeling showed that air quality impacts from the Refinery would not violate national ambient air quality standards ("**NAAQS**"). *Id*. at 4 (relying on conclusion in Hovensa's 2004 EJ analysis).

EPA disagreed, finding instead that there would be disproportionate impacts on the EJ community. On September 19, 2019, EPA issued its Final Environmental Justice Analysis, which found that "it is difficult to conclude that the operation of the facility under the flexibility allowed by the PAL, and the uncertainties in the modeling and background concentrations, will not contribute to a disproportionately high and adverse human health or environmental effect on the community." AR-0058 ("**EJA**") at 14. EPA concluded that "in light of the burden already experienced by the nearby low income and minority populations, Region 2 is requiring Limetree to resume an ambient air monitoring network that will measure NO_2, SO_2, and $PM_{2.5}$." *Id*.

D. Public Participation Process

EPA held a public availability session on November 7, 2019, followed by a public hearing on November 8, 2019. AR-0165 ("**Public Notice**"). All public notices and press releases regarding the Draft Permit were only published in English and did not mention that translation could be made available. *See* Public Notice; AR-0045 ("**Press Release**"). Neither the transcript of the public hearing nor the public availability presentation slides mention that translation of documents or oral interpretation could be made available for LEP individuals. *See* AR-0173, ("**Public Hearing Transcript**"); AR-0187 ("**Public Availability Session Presentation**"). The record is entirely devoid of documents translated into languages other than English.

E. Endangered Species Consultation

St. Croix is also home to 25 endangered and threatened species that are likely to be adversely impacted by the restart of refining activity. *See* PC at 17-25. St. Croix is particularly vulnerable to hurricanes and tropical storms, which can increase the probability of oil spills; for example, in 1989, Hurricane Hugo caused a spill of 10,000 barrels of oil at the Refinery. *Id.* at 22.

On February 19, 2020, EPA requested concurrence from the Fish and Wildlife Service ("**FWS**") with its determination that the air pollution impacts of the Permit were not likely to adversely affect four federally-protected species, improperly omitting the roseate tern, loggerhead sea turtle, and North and South Atlantic Distinct Population Segments ("**DPS**") of the green sea turtles from consideration. *See* AR-0180. On August 11, 2020, EPA requested similar concurrence from the National Marine Fisheries Service ("**NMFS**") on nineteen protected species. *See* AR-0181. EPA received concurrence from FWS and NMFS that the permitted activity was not likely to adversely affect the species on February 28, 2020 (AR-0184) and September 3, 2020 (AR-0186), respectively.

F. Issuance of Final Permit and Petitioners' Comments

On November 24, 2019, Petitioners submitted comments objecting to the Draft Permit on a least five grounds: (1) EPA failed to treat the refinery as a "new" or modified source subject to PSD preconstruction permitting requirements, PC at 3-8; (2) the Permit's emissions caps were improperly high, PC at 8-10; (3) EPA failed to adequately address EJ issues due to failure to translate documents and insufficient modeling to assess public health measures, PC at 10-17; and (4) inadequate consultation under the ESA for federally-listed species, PC at 17-25.

On December 1, 2020, EPA issued the Permit. EPA released its Response to Comments on the same day, acknowledging that under this Permit, Limetree could "relax previously

enforceable [emissions] limitations." AR-0163 ("**RTC**") at 63. While EPA addressed some of Petitioners' comments, it clearly erred regarding the issues presented to the Board herein.

IV. STATUTORY AND REGULATORY FRAMEWORK

A. The Clean Air Act

Congress amended the CAA in 1977 to expand and strengthen provisions governing pre-construction review of impacts on air quality. This process, known as New Source Review ("**NSR**"), requires new major stationary sources of air pollution, as well as existing major sources undertaking major modifications, to obtain preconstruction permits that impose strict requirements and limitations on facilities' operation. 42 U.S.C. §§ 7475, 7503; 40 C.F.R §§ 51.165, 51.166, 52.21, 52.24.

The CAA establishes separate requirements for major sources located in "clean air" attainment areas and those located in areas that have failed to attain national air quality standards. In "clean air" areas—where the objective is the prevention of significant deterioration of air quality—Part C of Title I of the Act, 42 U.S.C. §§ 7470–7492, specifies that no "major emitting facility" may begin construction or undertake major modifications without first demonstrating that emissions from construction or operation of the facility will not exceed applicable limitations. 42 U.S.C. § 7475(a)(3). Additionally, the PSD program requires installation of the best available control technology ("**BACT**") prior to construction or modification. *Id*. § 7475(a)(4). PSD permittees must also conduct a detailed "analysis of ambient air quality in the area." 40 C.F.R. § 52.21(m)(3).

The PSD program applies to "major emitting facilities" 42 U.S.C. § 7479(1). If a facility falls within any one of 28 listed industrial categories, which includes petroleum refineries, then it is a major source if it emits at least 100 tons per year of any regulated pollutant *See* 42 U.S.C. § 7473; 42 U.S.C. § 7479(l); 40 C.F.R. § 52.21(b)(1)(i)(a).

Certain existing major stationary sources may apply for a PAL permit, which has a 10-year duration. 67 Fed. Reg. 80,186 (Dec. 31, 2002) ("**PAL Regulations**"). A PAL permit sets plantwide emissions limits (PALs), in tons per year, for regulated air pollutants. Among other conditions, PAL permits are only available "for any ***existing*** major stationary source," and for non-major modifications. 40 C.F.R. § 51.166(w)(1)(i)-(ii) (emphasis added). Furthermore, "emissions associated with units that were . . . shutdown" must be "subtracted" from the plantwide emissions limit. PAL Regulations at 80,285/3; 40 C.F.R. § 52.21(aa)(6)(iii).

B. Environmental Justice Rules

EPA is required to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations." Exec. Order No. 12,898, *Fed. Actions to Address Env'l Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 11, 1994) ("**EJ Order**").[10] The Board requires that EPA comply with the EJ Order pursuant to its CAA authority and consider environmental justice in the permitting process when there is any "superficially plausible" claim that a minority or low-income population may be disproportionately affected by a particular facility. *In re Shell Gulf of Mex., Inc. & Shell Offshore, Inc.* ("***Shell 2010***"), 15 E.A.D. 103, 148 n.71 (EAB 2010) (citations omitted); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 69 n.17 (EAB 1997);

[10] Petitioners note that 85 Fed. Reg. 51650 (August 21, 2020), entitled *Streamlining Procedures for Permit Appeals*, purports to restrict the Board's ability to review EPA's compliance with executive orders. However, this procedural rule is included on The White House List of Agency Actions for Review pursuant to Executive Order 13990, entitled *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, "that are, or may be inconsistent with, or present obstacles to," environmental justice, and it is reasonably foreseeable that this procedural rule may be revoked in the near future. Exec. Order. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021); Ex. 9 [also available at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/]. Due to this review, combined with the Board's long history of reviewing EPA's compliance with environmental justice rules, *In re EcoEléctrica*, L.P., 7 E.A.D. 56 (EAB 1997); *In re Shell Gulf of Mex., Inc. & Shell Offshore, Inc.*, 15 E.A.D. 103 (EAB 2010); *In re Chem. Waste Mgmt*., 6 E.A.D. 66 (EAB 1995); *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294 (EAB 2014), and the gravity of this unique situation whereby EPA found a disproportionately high and adverse impact to an environmental justice community due to the proposed Permit activity under Executive Order 12898, see EJA at 14, Petitioners posit that the issues described herein warrant Board review.

In re Shell Offshore, Inc. ("***Shell 2012***"), 15 E.A.D. 536 (EAB 2012); *accord* RTC at 77. If EPA determines that there is a disproportionately high or adverse impact, "then appropriate action should be pursued to minimize or mitigate such concerns." AR-0064, U.S. EPA Region 2, *Interim Environmental Justice Policy*, 22-23, 27 (Dec. 2000) ("**Region 2's EJ Policy**"); *accord In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 327 (EAB 2014).

C. Language Access Requirements

EPA is required to ensure that LEP individuals are able to meaningfully participate in the permitting process. *See* EJ Order at 7632; *see* also Exec. Order No. 13,166; 65 Fed. Reg. 50,121 (Aug. 11, 2000) ("**LEP Executive Order**"). For example, federal agencies are required to "translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations." EJ Order at 7632. The U.S. Department of Justice and EPA established compliance standards for the LEP Executive Order. 67 Fed. Reg. 41,455 (June 18, 2002), ("**LEP Guidance**"); U.S. EPA Order No. 1000.32, *Compliance with Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency*, (issued July 28, 2011, updated Feb. 10, 2017) ("**LEP Order**").

D. The Endangered Species Act

In 1973, Congress enacted the ESA to conserve the nation's endangered and threatened fish, wildlife, and plants and their natural habitats. 16 U.S.C. § 1531. The Supreme Court held that Congress's "plain intent" in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184-85 (1978). Toward this goal, Section 7(a)(2) of the ESA mandates that:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .

16 U.S.C. § 1536(a)(2). Section 7(a)(2) also mandates that "each agency shall use the best scientific and commercial data available" in making its determinations. *Id*. Federal agencies have a substantive duty to ensure none of their actions, including issuing a permit, is likely to jeopardize listed species or destroy or adversely modify their critical habitat. *In re Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 509 (EAB 2009). "Action[s]" include "all activities or programs of any kind, authorized, funded, or carried out, in whole or in part, by Federal agencies . . . ." 50 C.F.R. § 402.02; *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994) ("Congress intended to enact a broad definition of agency action in the ESA").

To fulfill this duty, EPA must consult with the relevant wildlife agencies prior to approving any discretionary action, including permitting, that "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1504-05 (9th Cir. 1995). The term "may affect" is construed broadly to include any possible effect, whether beneficial, benign, adverse, or of an undetermined character. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 196 (EAB 2006); *Desert Rock Energy*, 14 E.A.D. at 516 n. 33.

An agency may fulfill its consultation duties through "informal" consultation if the action is "not likely to adversely affect" the listed species or critical habitat. If the wildlife service concurs in writing with the "not likely to adversely affect" finding, the consultation process is concluded and no further action is necessary. 50 C.F.R. § 402.13(c). If the agency determines that its proposed action may affect a listed species or its critical habitat, then formal consultation is required. 50 C.F.R. § 402.14(a). However, it is the action agency that "has the ultimate duty to ensure that its actions are not likely to jeopardize listed species." *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005); *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118,

1127 (9th Cir. 1998) (finding agency failed to meet its "independent responsibilities under the ESA" when it failed to "request a formal consultation").

V. STANDARD OF REVIEW

The Board may review a permit decision when it is "based on a finding of fact or conclusion of law that is clearly erroneous" or when it involves an "exercise of discretion or an important policy consideration that the [Board] should, in its discretion, review." 40 C.F.R 124.19(a)(4)(i); *see also In re Deseret Power Elec. Coop.*, 14 E.A.D. 212, 226, 239 (EAB 2008). When evaluating a permit for clear error, the EAB considers the administrative record as a whole "to determine whether the permit issuer exercised considered judgment in rendering its decision . . . [and] provided a cogent explanation for its permitting decision." *In re Veolia ES Tech. Sols., L.L.C.*, 18 E.A.D. 194, 207-09 (EAB 2020) (citations omitted); *see also In re Town of Concord Dep't of Pub. Works*, 16 E.A.D. 514, 523-24 (EAB 2014) (remanding permit where Region failed to exercise "considered judgment"). The permit issuer is not "free to disregard, without explanation, inconsistencies raised by petitioners in the facts or determinations in the permitting record." *Id.*; *see also In re Weber # 4-8*, 11 E.A.D. 241, 246 (EAB 2003) (vacating permit where Region failed to adequately consider comments before issuing permit). For technical issues, the Board determines whether the Region "duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of the information in the record." *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 251-52 (EAB 2005) (citation omitted) (remanding permit for failure to ensure compliance with water quality standards).

VI. ARGUMENT

A. EPA Clearly Erred by Failing to Treat the Refinery as a New Source Subject to PSD Permitting Requirements and Disregarding the Reactivation Policy

Pursuant to the CAA's permitting schemes, and EPA's regulations and policies implementing them, EPA should have classified the reactivating Refinery as a new source or a major modification, subject to the more stringent permitting requirements under the PSD program.

See generally 42 U.S.C. §§ 7470–7492; PC at 3-8. Instead, despite the Refinery's eight years of shutdown, EPA erroneously decided to withdraw its Reactivation Policy and issue Limetree a PAL permit.

The CAA requires PSD preconstruction permits prior to construction and/or operation of a "new major stationary source" and for "major modifications" to an existing stationary source, in attainment and unclassifiable areas. *See* 42 U.S.C. §§ 7475(a) & 7479(2)(C); 40 C.F.R. 52.21(2)(ii). Certain "existing" major sources, however, may obtain PAL permits with fewer regulatory requirements. *See* 40 C.F.R. 51.166(w)(1)(i).

Under EPA's longstanding Reactivation Policy interpreting the CAA and implementing regulations, it is established that:

> Where facilities are reactivated after having been permanently shutdown, operation of the facility will be treated as operation of a new source. Alternatively, shutdown and subsequent reactivation of a long-dormant facility may trigger PSD review by qualifying as a major modification.

Ex. 10 (*In re Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Petition No. 6-99-2, (Administrator, EPA, June 11, 1999) ("***Monroe***") at 8 & n. 9 (collecting sources for Reactivation Policy from 1978 onwards))[11]; *see also Cmtys. for a Better Env't v. Cenco Ref. Co*., 179 F. Supp. 2d 1128, 1143-46 (C.D. Cal. 2001) (applying the Reactivation Policy and finding that a six-year shutdown was likely to trigger PSD review in granting an injunction).

In issuing the Permit, EPA withdrew this policy, violating its own rules on withdrawing and implementing new guidance. EPA clearly erred by improperly departing from, and purporting

[11] Also available at https://www.epa.gov/sites/production/files/2015-08/documents/entergy_decision1999.pdf.

to eliminate, its longstanding Reactivation Policy, and by failing to treat the Refinery restart as a new source for PSD permitting.[12]

1. EPA Clearly Erred by Failing to Treat the Refinery as a "New Source"

EPA erroneously disregarded and disavowed its "***well-established policy*** that reactivation of a permanently shutdown facility will be treated as operation of a ***new source*** for purposes of PSD review." *Monroe* at 8 (emphasis added). As explained by a former EPA Administrator:

> The key determination to be made under this policy is whether the facility to be reactivated was "permanently shutdown." In general, EPA has explained that whether or not a shutdown should be treated as permanent depends on the ***intention of the owner*** or operator ***at the time of shutdown*** based on all facts and circumstances. Shutdowns of ***more than two years***. . . ***are presumed to be permanent***. In such cases it is up to the facility owner or operator to rebut the presumption.

Id. (emphasis added). In applying the *Monroe* factors, EPA looks to the duration of the shutdown and the intent of the owner at the time of the shutdown. PSD preconstruction permits are required upon reactivation where contemporaneous statements by owners evince intent to permanently close a facility. *See, e.g.*, Ex. 11 (Memorandum from E. Reich, Director, Stationary Source Enforcement Division, to S. S. Gardebring, Director, Enforcement Division, Region V (Oct. 3, 1980) (cement kiln required PSD permitting where it was shut down for over three years, removed from State's emissions inventory, and described by owner as permanently closed)). This presumption of permanent shutdown may be overcome only if "the owner or operator has demonstrated a ***continuous intent to reopen***," which means "continuously demonstrate concrete

[12] The restart of the Refinery's long-shutdown emissions units should alternatively be considered a "major modification" subject to PSD permitting, as it constitutes a "physical change in, or change in the method of operation of, a stationary source." 42 U.S.C. § 7411(a)(4); 40 C.F.R. § 52.21(b)(2)(i); *Monroe*, at 10 (citing *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 908 (7th Cir. 1990) (noting that "courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that") (citations omitted); *see also* PC at 3. The reactivation of these units does not qualify for any of the regulatory exemptions from this definition. *See*, *e.g.*, *Monroe*, at 10-11 (discussing the most common exemptions).

plans to restart the facility sometime in the ***reasonably foreseeable future***." *Monroe* at 9-10 (emphasis added).

The record here establishes that the Refinery shut down in January 2012, based upon multiple consistent statements by Refinery owners at the time of shutdown and in subsequent years. Documents reflecting these statements are collected in a list titled "Limetree Reactivation Fact Documents Post-Wehrum Letter." AR-0238. For example, a January 18, 2012 press release states: "Hess Corporation announced today that it will take a $525 million after-tax charge against its fourth quarter 2011 earnings as a result of the shutdown of the Hovensa L.L.C. refinery . . . Following the shutdown, the complex will operate as an oil storage terminal." Ex. 12 (*Hess Announces Charge Related to Closure of Hovensa Joint Venture Refinery*, Press Release, Jan. 18, 2012).[13] Hess's 2012 Annual Report repeatedly discusses the shutdown of refining operations and its plans to operate the facility as an oil storage terminal, along with the attendant shutdown costs and enforcement actions in connection with Hovensa's environmental violations. Ex. 13 (*Hess Corporation 2012 Annual Report*) at 2, 10-11, 15-16, 54-55, 101.[14] Nearly two years after the shutdown, an October 2013 presentation for Hovensa's executive committee, entitled "Shut Down Cash Cost Summary ($MM)," detailed "Shutdown and Mothball" costs, "Personnel Exit Cash Costs," and other "Shutdown Cash Costs." AR-0237 at 9, Tab A. Importantly, the presentation estimated shutdown costs in December 2011, actual costs in 2012, and forecast and planned shutdown costs from 2013 to "2016++", showing that the Refinery owners intended to keep it shutdown well into the future. *Id.* During the period from 2013 to 2017, Hovensa continued to

[13] Also available at: https://investors.hess.com/news-releases/news-release-details/hess-announces-charge-related-closure-hovensa-joint-venture.
[14] Also available at: https://investors.hess.com/static-files/ad76ecba-abf1-4024-aa40-2b9c84fb4cd2.

notify the Virgin Islands Division of Environmental Protection each year that "it [was] not subject to payment of fees" under the Division's operating permit program regulations. AR-0234.

The record thus establishes that "at the time of the shutdown" in 2012 and for "more than two years" afterwards, the Refinery shutdown was "presumed to be permanent" under the Reactivation Policy. *Monroe* at 8-10. EPA has not contradicted this established shutdown and "acknowledges that some of this evidence indicates Hovensa pursued the option of permanently converting the facility to an oil storage and transfer facility." RTC at 112. Indeed, EPA agreed in the RTC that the eight year "period of time invokes the presumption that the facility was permanently shut down under the Reactivation Policy." *Id.* at 111. However, EPA erroneously concluded that Limetree rebutted this presumption.

Far from expressing a "continuous intent to reopen," *Monroe* at 9-10, the Refinery's owners consistently expressed their intent, from 2012 until 2018, to shut down the refinery and operate it as an oil storage terminal. EPA did not cite any statement by the owner of continuous intent to reopen the Refinery in its RTC. at 112. Rather, EPA stated that "actions sometimes speak louder than words." *Id.* But here, the clear message was that the Refinery was shut down and there was an 8-year period of ***inaction***, at least with respect to oil refining, the relevant activity for purposes of the CAA. EPA mischaracterized the Hess statements as "simply … about the facts on the ground after the refinery operations were idled while other operations were not." *Id.* However, even when Limetree purchased the Refinery in 2015, its parent company expressed plans to operate the facility as an oil terminal and dismantle part of the Refinery to sell off the scrap metal. *See* PC at 6; *see also* Ex. 14 (*ArcLight, Freepoint to buy Hovensa St. Croix refinery, plan storage hub*, Reuters, Dec. 1, 2015).[15] EPA also did not adequately address other owner and stakeholder

[15] Also available at https://www.reuters.com/article/us-hovensa-refinery-storage-idUSKBN0TK4TM20151201.

statements Petitioners raised in comments, PC at 4-6, merely declaring that many of the press reports "are based on the perceptions of other parties." RTC at 112. EPA's decision to summarily dismiss this evidence, and instead rely on post-hoc statements from Limetree's attorneys about a previous owner's intent years prior (discussed below), is clearly erroneous because it is fails to consider all the relevant information.

EPA claims that the fact that Limetree "continuously operated the oil storage and terminal operations, wastewater treatment plant, and power generation equipment" and that Hovensa and Limetree maintained some permits for the facility weighs against a finding that the facility was shut down. RTC at 111-112. However, as noted by Petitioners in their comments, most of the permits were required for the oil storage and wastewater treatment facilities, as well as for the containment of hazardous waste at the site, and the law is clear that a facility can be deemed "shut down" with respect to the relevant operations (here, refining) even if other equipment on site is maintained. PC at 7, *citing Cmtys. for a Better Env't,* 179 F. Supp. 2d at 1128.

It was not until 2018, over six years after the shutdown, that Limetree attorneys expressed intent to restart refining activity, writing to EPA to request concurrence that the Reactivation Policy should not apply and to request that a "new source" PSD permit not be required. AR-0237. In responding to their request, Assistant Administrator William Wehrum relied on the Limetree attorneys' statements that the Refinery operations had been merely "idling" although he also incongruously stated that "final idling of all refinery units" was completed on February 21, 2012. Wehrum Letter (Ex. 8) at 3. Mr. Wehrum noted that Limetree "represents that neither it nor Hovensa made any statements to any party or issued any press release indicating any intent not to restart the plant in the future," *id*. at 2, which is contradicted by the evidence in the record discussed

above. Based on this self-serving description of the evidence provided by Limetree, Mr. Wehrum found "continuous intent to restart the refinery operations." *Id.*

Significantly, evidence of more "recent efforts to reopen the facility" does not suffice to rebut the presumption of shutdown under the Reactivation Policy. *Monroe* at 9-10 ("Once it is found that an owner or operator has no real plan to restart a particular facility, such owner or operator cannot overcome this suggestion that the shutdown was intended to be permanent by later pointing to the most recent efforts to reopen the facility") & n. 11 ("This approach for assessing the intent of the owner or operator is consistent with the general notion that a company cannot sit indefinitely on a governmental permission to emit air pollution without showing some definite intention to use it.") (collecting citations). Change in ownership indeed "represents further attenuation... between shutdown and prospective reactivation" and, though not determinative, is probative of permanent shutdown. *See* Ex. 15 (Letter from D. Howekamp, Director, Air Management Division, EPA Region IX, Nov. 7, 1987).

Neither the Limetree attorneys' letter to EPA, the Wehrum Letter, nor the RTC addressed or acknowledged the repeated contemporaneous statements by Hess and Hovensa from 2012 onwards that the Refinery had been "shut down" in 2012 and remained shut down for several years thereafter. Indeed, the Wehrum Letter failed to cite any actual record evidence. Mr. Wehrum ignored all contradictory evidence and misapplied the Reactivation Policy, including by failing to analyze whether the owners had an "original intent not to permanently shut down" the Refinery; whether they had "continuous intent" to reopen it in the "reasonably foreseeable future"; and whether "for at least some period of the shutdown, the shutdown was intended to be permanent." *Monroe* at 9-10; Wehrum Letter at 2-3; PC at 5-6. After the Wehrum Letter, EPA prepared a document for the record entitled, "Limetree Reactivation Fact Documents Post-Wehrum Letter."

AR-0238.[16] This document lists 13 documents, ranging from 2012 to 2015, that confirm that the Refinery was shut down in 2012 with no continuous intent to restart. *See* e.g. Exs. 11, 12.

The record establishes that the refining operations were shut down in early 2012 and remained shut down for over six years afterwards. This shutdown period exceeded the two-year period that EPA "presume[s] to be permanent," *Monroe* at 8-10, and it is clear that the intention of the owner at the time of the shutdown was to transition the facility to oil storage. Contemporaneous statements by Refinery owners and stakeholders confirm this. Limetree attorneys and EPA failed to overcome the presumption that the shutdown was permanent. EPA therefore clearly erred by failing to treat the Refinery as a "new source" under the PSD permitting regulations.

2. EPA Clearly Erred by Improperly Departing From, and Purporting to Eliminate, the Reactivation Policy

Faced with overwhelming evidence that the Refinery had permanently shut down and its reactivation should have undergone PSD new source permitting under the Reactivation Policy, the Administrator announced that:

> Since EPA has concluded that the Reactivation Policy is no longer an appropriate policy in the context of the existing NSR regulations, the Agency is not applying it in this permitting action.

RTC at 108. This was the first notice that Petitioners (and the public) received that EPA would jettison its forty-two-year-old Reactivation Policy. Petitioners and the public thus were denied the opportunity to comment on the abandonment of the Reactivation Policy before EPA issued the Permit.

[16] This one-page document lists no author, but metadata for the Adobe Acrobat file reveals that the author was Joseph Siegel, a senior attorney in EPA Region II. This document was posted to the permitting docket on December 2, 2020.

a) EPA violated its own Guidance Rule

By abruptly abandoning the Reactivation Policy without any notice or adequate explanation, and without following the procedures in EPA's own recently-issued guidance rule, EPA acted with clear error.

On November 18, 2020, a final EPA rule on guidance signed by then-Administrator Wheeler became effective. 85 Fed. Reg. 66,230 (Oct. 19, 2020) ("**Guidance Rule**").[17] Thirteen days later, Mr. Wheeler violated that rule. The Guidance Rule requires EPA to first seek "public comment on the Agency's intent to withdraw a significant active guidance document," and publish a notice in the Federal Register announcing that intent. *Id*. at 66,239 (40 C.F.R. § 2.506(b)(1) & (2)). *Monroe* and the five EPA Reactivation Policy guidance documents cited therein, *Monroe* at 8, n.9, meet the definitions of "active guidance document" and "significant guidance document." *See* Guidance Rule at 66,238 (40 C.F.R. § 2.503). Yet there is no evidence that EPA sought public comment or published notice of its intent to withdraw the Reactivation Policy. EPA further violated the Guidance Rule by adopting new guidance – that a long-shutdown facility is not a "new source" subject to PSD requirements – without first fulfilling its public notice and comment requirements. *Id*. at 66,239 (40 C.F.R. § 2.506(a)(1) & (2)).

b) EPA misinterpreted the PAL Regulations' reliance upon the Reactivation Policy

Not only did EPA's withdrawal of the Reactivation Policy violate its own Guidance Rule, it highlights how EPA clearly erred in issuing this Permit. A permit issuer acts with clear error when it does not exercise "considered judgment" in its permitting decisions, *see, e.g.*, *Town of Concord*, 16 E.A.D. at 523-24, or when it disregards, without explanation, "inconsistencies raised

[17] Petitioners note that this regulation, entitled *EPA Guidance; Administrative Procedures for Issuance and Public Petitions*, is included on the White House "List of Agency Actions for Review." Ex. 9. As this regulation remains in place as of February 2, 2021, Petitioners hereby bring this issue to the Board for review.

by petitioners in the facts or determinations in the permitting record." *Veolia ES Tech. Sols.*, 18 E.A.D. at 207-209 (citations omitted). The Administrator's evasion of PSD permitting and the RTC's terse announcement that, for the first time, EPA was abandoning the Reactivation Policy lacks "considered judgment" and does not adequately explain EPA's inconsistent positions on the Reactivation Policy, and is thus clearly erroneous.

EPA's explanations for abandoning the Reactivation Policy in the permitting record are internally contradictory. The explanations consist of arguments that the Reactivation Policy is inconsistent with what EPA refers to as "2002 NSR Reform Rule," 67 Fed. Reg. 80,186 (referred to here as "**PAL Regulations**"). *See* RTC at 109-111 ("Under this current framework in the NSR regulations, the Reactivation Policy no longer serves the purpose that it did under the pre-Reform NSR regulations, when sources could seek to establish baseline emissions by demonstrating that emissions experienced before the last 24 months were more representative of normal operations.") But the RTC conveniently ignores that the 2002 NSR rule that sets forth PAL Regulations ***cited and relied upon*** the Reactivation Policy, as described in *Monroe*, and that it was a central element necessary to implement the rule. Importantly, the rule ***depends*** on application of the Reactivation Policy to determine whether emissions units are "permanently shutdown" for PAL emissions calculations. PAL Regulations at 80,208-80,209 & n. 30 (stating that "for any emissions unit that is permanently shut down or dismantled since the 24-month period, its emissions must be subtracted from the PAL level" and citing *Monroe* for propositions that whether shutdown should be treated as permanent depends on the intention of the owner or operator at the time of shutdown, and that shutdowns of more than 2 years are presumed to be permanent). The 2002 rule references *Monroe* as the agency's definitive interpretation for when stationary sources and emissions units are "permanently shutdown" for purposes of emissions calculations. *Id.* There is no hint that the

Reactivation Policy is inconsistent with the rule in any respect. The RTC attempts to explain away a long-standing agency policy by claiming inconsistencies with the 2002 rule which itself cites the policy—and these supposed inconsistencies have never been noted by the EPA in the 18 years since the 2002 rule issued until EPA's response on this Permit. EPA is attempting to misrepresent the 2002 rule to disavow the Reactivation Policy and issue the Permit to Limetree. This is clearly erroneous agency action. *See In re Town of Concord Dep't of Pub. Works*, 16 E.A.D. 514, 523-24 (EAB 2014); *see also, for example Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (rejecting agency action based on "an explanation for its decision that runs counter to the evidence before the agency.").

B. EPA Clearly Erred by Issuing a PAL Permit That Grossly Inflates the Emissions Caps

EPA clearly erred by issuing the Permit with emissions caps based on a period with some of the Refinery's highest emissions, from January 2009 – December 2010, which immediately preceded the Refinery's CAA violations, and by failing to subtract emissions from units that were permanently shut down since the 24-month baseline period. *See* PC at 8-10. In the RTC, EPA admits that certain units were shut down starting in 2011 but fails to account for that fact in its calculations. RTC at 102 ("EPA's understanding is that Limetree chose this 24-month period for its baseline emissions because Hovensa began shutting down portions of the refinery in 2011 and, as a result, 2009/2010 represents the most recent period of full operation of the facility.").

EPA regulations authorizing the Plantwide Applicability Limit (PAL) describe it as a "source-wide cap on emissions [that] is one way of making sure that emissions increases from your major stationary source do not occur." PAL Regulations at 80,207/1. The Permit here does the opposite: it creates caps on emissions significantly higher than source-wide emissions since 2011. The Permit's grossly inflated emissions caps eliminate the incentive to install "voluntary

emissions controls" or to "improve process efficiency" as envisioned by PAL Regulations because there is already so much headroom under the inflated emissions caps. *See* PAL Regulations at 80,207/3.

EPA facilitated this harmful outcome by violating its own PAL Regulations. Those regulations require that "[e]missions associated with units that were permanently shutdown after [the PAL's 24-month baseline period] ***must be subtracted*** from the PAL level." PAL Regulations at 80,285/3. A "10-year actuals PAL" is created by adding "baseline actual emissions" for each regulated pollutant, from all emissions units, to an additional significant emissions increase level for each emissions unit. *Id.* "Baseline actual emissions," relevant to the Limetree PAL, are defined as:

> the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 10-year period immediately preceding . . . the date a complete permit application is received by the Administrator for a permit required under this section.

Id. at 80,278/3 (40 C.F.R. § 52.21). The Limetree PAL is based on baseline emissions from the Refinery reflecting the average emissions rate (in tons per year, "tpy") over the years 2009-2010, when the full Refinery was operating – its most polluting years that lead to the charges resulting in the consent decree, *see* RTC at 84 – plus significant emissions increases for each PAL pollutant. Accordingly, the Permit's cap for volatile organic compounds is an astonishing 6,094 tpy; for nitrogen oxides, 5,594 tpy; and for sulfur dioxide, 1,482 tpy. Permit, Enclosure 1, at 3. In sharp contrast, these were the facility-wide emissions for these same pollutants during the following years, in tons per year:

Year	**VOCs**	**NO_x**	**SO_2**
2012[18]	944	1,101	131

[18] AR-0230 (Limetree 2012 Title V/Part 70 Permit Emissions Inventory & 2011 Revision (July 12, 2013)).

2014[19]	659	493	47
2016[20]	292	556	10
PAL	*6,094*	*5,594*	*1,482*

Critically, the PAL Regulations require that "[e]missions associated with units that were permanently shutdown after this 24-month period [2009-2010 here] ***must be subtracted*** from the PAL level." PAL Regulations at 80,285/3 (40 C.F.R. § 52.21(aa)(6)(iii)) (emphasis added). This, EPA did not do (or claim to do): the PAL levels in the Permit are based upon the average rate, in tons per year, of all emissions units that were operating at the Refinery during 2009-2010, including all units that shut down in 2011-2012 and remained shutdown thereafter. As discussed above, PAL Regulations use the standard set out in *Monroe* to determine whether emissions units were "permanently shut down." *See* PAL Regulations at 80,208-80,209 & n.30.

EPA's error caused the Limetree emissions caps to be unlawfully inflated—to more than 10 times the 2012 emissions rate for sulfur dioxide and 5 times the emissions rates for volatile organic compounds and nitrogen oxide—because it did not follow its own PAL Regulations intended to reflect that "in calculating the net emissions increase for reactivation of long dormant sources potentially subject to PSD, the source is considered to have ***zero emissions as its baseline***." *Monroe* at 14. It is undisputed that EPA did not assign the shutdown units zero emissions for their baseline emissions when establishing the PALs.

The EPA cannot have it both ways. EPA may not create PAL Regulations that incorporate and refer to the Reactivation Policy to maintain the integrity of permissible PAL caps and then

[19] AR-0232 (Limetree 2014 Title V/Part 70 Permit Emissions Inventory (July 14, 2015)).
[20] AR-0234 (Limetree 2016 Title V/Part 70 Permit Emissions Inventory (July 11, 2017)).

turn around and arbitrarily jettison the Reactivation Policy and the applicable calculation rules in granting the Permit. This is clear error that necessitates vacating the Permit.

C. EPA Clearly Erred by Not Requiring PAL Permit Conditions That Ensure Compliance with the NAAQS or Avoid Further Burdening the Environmental Justice Community of South Central St. Croix

In response to Limetree's Modeling Report, EPA made the rare finding that "EPA cannot conclude that the operation of the refinery under the PAL will assure compliance with the NAAQS in the EJ community" and "there is in fact a disproportionate burden in South-Central St. Croix." RTC at 71, 76. EPA reached the troubling conclusion that "it is difficult to conclude that the operation of the facility under the flexibility allowed by the PAL, and the uncertainties in the modeling and background concentrations, will not contribute to a disproportionately high and adverse human health or environmental effect on the community." EJA at 14.

The only permit condition that EPA required to address this finding of disproportionate impact is an ambient air quality monitoring network that includes resuming five SO_2 monitors in place when Hovensa operated, adding one new NO_2 monitor, and one new $PM_{2.5}$ monitor. *Id*. at 59; *see* Permit at 37-40. In its EJ Analysis, EPA stated that this modeling network "will ensure that any exceedance or violation of the health-based NAAQS will not go unnoticed," and that EPA maintains "discretion to reopen the PAL permit if a reduction is necessary to avoid causing or contributing to a NAAQS violation and avoid further burdening the environmental justice community in South Central St. Croix." *Id.* at 15.

EPA clearly erred under the EJ Order because EPA made a finding that the Refinery would have a disproportionate impact on an EJ community but did not condition the permit to ensure that such impacts do not occur. *See In re Chem. Waste Mgmt. of Ind., Inc. Permitee*, 6 E.A.D. 66, 74 (EAB 1995) (holding that "if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, [EPA] would be required to include permit terms

or conditions that would ensure that such impacts do not occur"). The Board and Region 2's EJ Policy identify two broad areas in which EPA should exercise its discretion under EJ Order: "(1) public participation, and (2) the omnibus authority - *i.e.*, EPA's authority under various statutory and regulatory provisions to set conditions as it determines necessary in order to protect human health and the environment." Region 2's EJ Policy; *see also In re Envotech L.P.*, 6 E.A.D. 260, 278 (EAB 1996) (citing *Chem. Waste Mgmt.*, 6 E.A.D. at 73).

Petitioners supported the presence of an ambient air monitoring network but did not believe that ambient monitoring alone would be enough to assure compliance with NAAQS or protect the community. PC at 12. Petitioners commented that EPA's approach was fundamentally reactive and foreseeably ineffective to address immediate health impacts from a NAAQS violation, especially since the Refinery is not required to report a violation for 15 days. *Id.* at 13. Petitioners also shared concern that EPA was repeating history by requiring essentially the same monitoring and self-reporting approach EPA used with Hovensa, which resulted in residents becoming "violently ill" from excessive air pollution and ultimately resulting in multi-million dollar fines for CAA violations. *Id.*

EPA responded that the ambient air quality monitoring is sufficient to address Petitioners' EJ concerns because the monitoring will "alert EPA to any possible exceedance or violation," which EPA can then address by exercising its authority to either reopen the Permit or address the violations through the State Implementation Plan ("SIP") process. RTC at 62, 68. To support its approach, EPA asserts that it has considerable discretion to determine how best to implement its mandate within the existing confines of law. RTC at 68-69.

First, the precedent that EPA relies on to support its exercise of discretion is distinguishable because in each case EPA was able to make a finding that the underlying permit would *not* have a

disproportionate impact because of compliance with the NAAQS. *See Energy Answers Arecibo*, 16 E.A.D. at 326 (modeled emissions show compliance with the NAAQS and EPA conducted human health risk assessment that showed facility likely would not pose concern to human health); *In re Pio Pico Energy Ctr.*, 16 E.A.D. 56, 91 n.30 (EAB 2013) (modeled results indicate that proposed emissions of the pollutants would not cause or contribute to a violation of the NAAQS); *cf. In re Jordan Dev. Co., L.L.C.*, UIC Appeal Nos. 18-06, et al., 2019 WL 3816212 (E.P.A.), at *13-14 (EAB Aug. 8, 2019) (EPA reasonably exercised its discretion not to require additional permit conditions requested by EJ petitioner when EPA determined that the proposed conditions of the permit "will be sufficient" to prevent contamination of surface waters and "more was not needed."); *Envotech*, 6 E.A.D. at 281 (EPA reasonably exercised its discretion when it determined the permit would "ensur[e] the protection of the [Underground Sources of Drinking Water] upon which the minority or low-income community may rely.") (citation omitted). Here, because EPA "could not conclude that the NAAQS are protected," its decision not to require additional permit conditions that would minimize or mitigate the impacts is clearly erroneous. RTC at 71, 88.

Second, EPA's response is clearly erroneous because it does not provide a reasoned explanation for how the ambient air quality monitoring will protect the community from suffering the disproportionate impacts from the Refinery. According to EPA's explanation, the monitoring merely alerts the EPA of a problem after the fact. *See* RTC at 90-91. EPA's response raises more concern for Petitioners because EPA explains that it might wait until it collects three years of averaged NAAQS exceedance data before it finds a violation of the NAAQS standard warranting reopening the Permit. *Id.* at 92-93. While EPA could, in the event of regular exceedances of the NAAQS at the ambient monitors, take immediate enforcement action, reopen the Permit, or make revisions through the SIP process, the Permit does not include any assurances that this will actually

happen. Permit at 37-40. As Petitioners pointed out in their comment, this approach is fundamentally reactive and exposes the community surrounding the Refinery to high concentration levels of air pollution in exceedance of the NAAQS for the 15 days it takes the Refinery to report the incident and even longer if it has to wait for EPA to reopen the Permit, all without any idea as to whether they are in harm's way. PC at 13. Further, as written, the ambient monitoring conditions of the Permit allow the Refinery to operate without the ambient monitors for the first six months of operation, exacerbating the threat to the community's public health. Permit at 37-40.

Third, EPA's decision to require only ambient air quality monitoring at the operational stage in response to EJ concerns was clearly erroneous because the evidence in the record shows that the Refinery has historically—and will likely continue—to violate the NAAQS. EPA itself acknowledged in the RTC that there may be adverse impacts on nearby communities because the historic ambient monitors in operation prior to the shutdown of the Refinery showed exceedances and violations of the 1-hour SO_2 NAAQS from 2008 to 2011. RTC at 60. Further, EPA admits that "the PAL does authorize increases in the short-term emission rate at different units as long as the annual PAL is not exceeded" which "has implications for the 1-hour NO2, 1-hour SO2, and 24-hour PM2.5 NAAQS." *Id.* Given the evidence of historic pollution, the uncertainties in the Refinery's modeling, and EPA's finding that the community suffers disproportionate adverse impacts, EPA should have taken affirmative action to minimize and mitigate the risk, rather than choosing this "wait and see" approach. EPA clearly erred by not exercising its omnibus authority under the CAA to condition the Permit to ensure the Refinery's air emissions do not violate the NAAQS or harm the community. RTC at 62 (EPA has the authority to reduce the PAL if "a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation").

In its RTC, EPA suggested that "the clear purpose" of the PAL provisions is "to ensure that a PAL does not cause a NAAQS or increment violation." *Id.* Thus, EPA should have denied or conditioned the Permit to reduce the emissions as necessary to comply with the NAAQS and protect the community.

D. EPA Clearly Erred by Failing to Provide Individuals with Limited English Proficiency Meaningful Access to the Public Participation Process for the Limetree Permit

EPA acknowledged in its RTC that it is required to provide meaningful access to any LEP individuals under the LEP Executive Order. *See* RTC at 88-89 (explaining that the LEP Order sets out EPA's expectations and requirements to comply with the LEP Executive Order). Despite these requirements and obligations, EPA did not assess St. Croix's LEP population, did not use the most recently available U.S. Census data and other information regarding St. Croix's LEP population, and did not translate vital documents for St. Croix's LEP population. These failures constitute clear error and warrant review by the Board.

1. EPA Clearly Erred by Failing to Assess St. Croix's Limited English Proficiency Population

Federal agencies including the EPA apply a four-factor balancing test to determine the appropriate means to provide meaningful access to LEP individuals. *See* LEP Guidance at 41,459. One factor is determining "the number or proportion of LEP individuals in the eligible service population." *Id.*

Evidence in the record indicates that there is an LEP population in the area surrounding the Refinery. For instance, Petitioners presented U.S. Census data that showed that a significant percentage of the population in the U.S. Virgin Islands, particularly in St. Croix are LEP individuals. PC at 16-17. Specifically, about one-third of the U.S. Virgin Islands population over age five (28,041 people out of 98,905 total population) speak a language other than English, and

of this group, over 4,000 individuals speak English "not well" or "not at all." *Id.* (citing USVI 2010 Census, Detailed Crosstabulations, Fig. 1-8). Consistent with LEP Guidance to consult other data, LEP Guidance at 41,460, Petitioners also submitted other evidence that there are LEP individuals in the area, including information from FEMA, the Virgin Islands Housing Authority, the Virgin Islands Police Department, and historic evidence of "bonded aliens" from non-U.S. islands who worked at the Refinery. *Id.* at 16-17. In fact, EPA's EJA includes a FEMA table showing that 28.7% of the population in South Central St. Croix, the area where the Refinery is located, is Hispanic or Latino. *See* EJA at 4. Yet, there is no indication in the administrative record that EPA ever assessed whether it should provide language access to LEP individuals before issuing the Permit.

In its RTC, EPA did not deny its failure to conduct an LEP assessment before issuing the Permit. Instead, EPA reasoned that the assessment was unnecessary because EPA was not first contacted by an LEP individual. RTC at 89. Specifically, EPA stated:

> EPA was not made aware before or during either the public availability session or public hearing that there were LEP individuals in need of translation, so the Agency did not have an opportunity to make the assessment with respect to oral translation. No comments either verbally or orally at the hearing or any communication requests were received in any language besides English or from people with LEP.

Id. First, EPA's reasoning is clearly erroneous on its face, because LEP individuals cannot contact EPA if they are unaware of the existence of a public comment period, public availability session, or public hearing. The public notice and press release announcing the public comment period for the Draft Permit, the public availability session, and the public hearing were only published in English, so LEP individuals had no way to know that they could or should engage in this public participation process and should contact EPA for language assistance services. *See* Public Notice; Press Release. EPA's LEP Order anticipates this dilemma and makes clear that "lack of awareness of the existence of a particular program may effectively deny LEP individuals meaningful access,"

so "it is important for federal agencies to regularly assess the needs of eligible service populations in order to determine whether certain critical outreach materials should be translated into other languages." LEP Order at 10-1. Second, EPA ignores the fact that Petitioners put EPA on notice that there were LEP individuals when they submitted their public comment letter on November 24, 2019 requesting translation of vital documents in Spanish and French Creole. *See* PC at 15-17. This public comment was submitted only 17 days after the public hearing, and EPA could reasonably have republished the Public Notice and other outreach materials at that time to ensure that any LEP individuals were given meaningful access to the permitting process. Also, as noted above, EPA's September 2019 EJA noted that 28.7% of the population in the Refinery's area were Hispanic or Latino. EJ Analysis, at 4.

Third, EPA's response misconstrues the LEP Order. EPA claims that it did not need to conduct an LEP assessment based on the LEP Order, which states "at the first point of contact with an LEP individual, EPA staff will make an initial assessment of the need for language assistance services." RTC at 89 (quoting LEP Order at 7). However, EPA misconstrues this sentence to mean that it does not need to provide language assistance services *unless* first contacted by an LEP individual. The LEP Order explains what EPA should do if contacted by an LEP individual, but not to the exclusion of taking other affirmative steps to provide meaningful access. *See* LEP Order at 7-8. Under the LEP Order, EPA should have applied the four-factor test to "assess the need to provide oral and written services in languages other than English" by first determining "the number or proportion of LEP individuals in the eligible service population . . . ." *Id.* at 3.

Finally, EPA's response is inconsistent with the LEP Executive Order, which states that "it is the responsibility of EPA"—not the LEP individual—"to take reasonable steps to ensure that communications between the EPA and the LEP individual are not impaired as a result of the

individual's limited English proficiency." LEP Executive Order at 50,121. EPA clearly failed to meet this responsibility.

2. EPA Clearly Erred by Relying on Outdated U.S. Census Data to Determine That There Was Not a Significant Limited English Proficiency Population in St. Croix

Petitioners demonstrated that a significant percentage of the U.S. Virgin Islands population that is likely to be directly affected by the Permit is LEP. PC at 15-17. In addition to other evidence, Petitioners cited the latest U.S. Census data from 2010 which showed that close to one-third of the U.S. Virgin Islands population over age 5 (28,041 people out of 98,905 total population) speak a language other an English, and of this group, over 4,000 individuals speak English "not well" or "not at all." *Id.* (citing USVI 2010 Census, Detailed Crosstabulations, Fig. 1-8).

EPA responded by citing and summarizing outdated U.S. Census data from 2000. RTC at 89. Relying on this outdated data from nearly 20 years ago, EPA determined that it did not need to provide translation of vital documents because there is a "very low proportion of LEP population in the USVI." *Id.*

EPA's conclusion is clearly erroneous because it is not based on the most recent and best available data. At a minimum, EPA should have relied on the most recent U.S. Census data which showed that a higher percentage of the population in the area has LEP. EPA was aware that U.S. Census data from 2010 was available because EPA referenced the 2010 data in its EJ Analysis and Petitioners cited the 2010 data in their comment. *See* EJA at 3 (stating, "[a]ccording to the 2010 Census, there are 106,405 residents in the US. Virgin Islands," and "[i]n a 2018 report by FEMA the area is characterized as 75% minority based on the 2010 U.S. Census."); PC at 16.

EPA's conclusion is also clearly erroneous because EPA did not consult other data sources, instead only citing the 2000 U.S. Census data. The LEP Guidance directs EPA to consult other

data when assessing the LEP population. For example, LEP Guidance at 41,460 states "[o]ther data should be consulted . . . including the latest census data for the area served, data from school systems and from community organizations, and data from state and local governments." EPA never responded to the other evidence and data presented in Petitioners' comments which showed a significant LEP population. RTC at 88-89; PC at 16-17 (citing evidence from FEMA, the Virgin Islands Housing Authority, the Virgin Islands Police Department).

3. EPA Clearly Erred When It Failed to Translate Vital Documents, Including the Public Notice and Permit Fact Sheet, for St. Croix's Limited English Proficiency Population

EPA is required to "translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations." *See* 59 Fed. Reg. at 7629, 7632. The Board has found that publishing the notice of a preliminary permit decision, the opportunity for comment, and public hearing in languages other than English "are among the kinds of actions specifically encouraged by the environmental justice Executive Order." *EcoEléctrica*, 7 E.A.D. at 68 n.16.

Classification of a document as "vital" depends upon "the importance of the program, information, encounter, or service involved, and the consequence to the LEP individual if the information in question is not provided accurately or in a timely manner." LEP Order at 10. It follows that "[t]he more important the activity, information, service, or program, or the greater the possible consequences of the contact to the LEP individuals, the more likely language services are needed." *Id.* The LEP Order's list of "vital" documents includes "notices of permit, brochures, fact sheets, and press releases" because these "documents are intended for public outreach or a broad audience." LEP Order at 10-11.

There are no documents in the record, including vital documents, translated into languages other than English. *See, e.g.,* Public Notice, Press Release, AR-0105 ("**Permit Fact Sheet**").

There is also no indication that EPA ever assessed whether there was an LEP population in the area before issuing the Permit and engaging in a public participation process, nor assessed "the importance of the program, information, encounter, or service involved, and the consequence to the LEP individual if the information in question is not provided accurately or in a timely manner." LEP Order at 10.

Petitioners requested that EPA translate vital documents for the Draft Permit, such as the Public Notice and the Permit Fact Sheet. PC at 15-17. EPA failed to provide a direct response to this comment. In response, EPA inexplicably stated that "it is unclear which specific documents the commenter believes EPA should have translated" even though Petitioners' comment clearly stated that EPA must prepare translation of public outreach documents such as the Public Notice and Permit Fact Sheet. RTC at 89; *cf.* PC at 15-16.

EPA also claimed that it was not required to translate the Draft Permit and Permit Application because they were "detailed and lengthy technical documents." RTC at 89 (citing U.S. EPA Region 2, Order No. R-1500.1, *Region 2 Policy on Translations and Interpretations* (Dec. 10, 1997)). However, Region 2's translation policy states that translation is appropriate "when a document is intended primarily for communication with members of the public" such as "fact sheets about, or summaries of, important EPA actions, such as . . . final permits . . . notices or announcements of public hearings or meetings . . . ." AR-0190 (EPA Region 2's Translation Policy) at 2.

EPA's RTC provides no other explanation for its decision not to translate vital documents, stating simply "EPA has not provided translation given the specific facts of this permit action." RTC at 90. This conclusory statement does not meet the Board's standard that agencies cogently explain their decisions supported by the record. *See Jordan Dev.*, 2019 WL 3816212, at *4, *15

n.4 (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997) ("[A]cts of discretion must be adequately explained and justified.")); *see also Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 48-49 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . .") (citations omitted).

EPA's responses do not meaningfully respond to Petitioners' request for translation of vital documents; instead, EPA either ignores the relevant evidence presented, misconstrues the applicable standards, or provides conclusory statements without explanation. EPA's decision to deny meaningful access to the public participation process for LEP individuals is clearly erroneous and warrants review by the Board.

E. EPA Clearly Erred by Issuing the Permit Without Adequate ESA Consultation

EPA violated the ESA by failing to appropriately consult with FWS and NMFS to ensure its issuance of the Permit will not jeopardize the continued existence of threatened or endangered species in the project area. *See* 16 U.S.C. § 1536(a)(2).[21]

The Refinery's air, water and other environmental impacts may affect 25 federally listed species: 9 managed by FWS (hawksbill, leatherback, loggerhead, and North and South Atlantic Distinct Population Segments (DPSs) of the green sea turtles when in terrestrial habitat; West Indian manatees; St. Croix ground lizards; and least and roseate terns); and 21 managed by NMFS (the five types of sea turtles while in the marine habitat; blue, fin, sei, and sperm whales; giant manta ray; Nassau grouper; oceanic whitetip shark; Central and Southwest Atlantic DPS of the scalloped hammerhead shark; and boulder star, elkhorn, lobed star, mountainous star, pillar, rough

[21] EPA does not dispute that issuance of the Permit was a "final permit decision," subject to ESA consultation requirements. *See* 40 C.F.R. § 124.15(a); 50 C.F.R. § 402.02; *see also Indeck-Elwood*, 13 E.A.D. at 212 (failure to consult is reviewable by the Board); *Desert Rock Energy*, 14 E.A.D. at 509 (remanding to agency in part to address ESA compliance).

cactus, and staghorn corals).[22] Petitioners' comments described the negative impacts the Refinery's water discharges, noise pollution, light pollution, climate pollution, and air pollution would have on these species, and expressed concern that, at the time of Petitioners' comments, the record demonstrated no evidence that EPA had consulted with FWS or NMFS. PC at 17-25. Many other comment letters expressed similar concerns. AR-0152, AR-0160, AR-0118, AR-0130, AR-0142, AR-0143, AR-0148, AR-0150, AR-0152, AR-0158. Despite the scale of the Refinery's potential impacts on a significant number of imperiled species, EPA failed to adequately ensure that its action would not jeopardize these listed species. Specifically, EPA failed to conduct any consultation on loggerhead and green sea turtles and the Caribbean roseate tern, and violated consultation requirements for the other listed species. This constitutes clear error warranting that the Board vacate and remand the Permit.

1. EPA Failed to Consult with FWS on Loggerhead and Green Sea Turtles and the Caribbean Roseate Tern

EPA failed altogether to consult with FWS on the impacts of permitting the Refinery on the loggerhead sea turtle, the North and South Atlantic Distinct Population Segments (DPSs) of the green sea turtles, and the Western Hemisphere DPS of the Caribbean roseate tern. *See* AR-0180; AR-0184.

EPA is required to consult where its actions "will likely affect" a listed species. 16 U.S.C. § 1536(a)(3). The threshold for a "may affect" determination triggering EPA's consultation duty

[22] Final listing rules for the roseate tern, 52 Fed. Reg. 41,943, 42,064 (Nov. 2, 1987); hawksbill and leatherback sea turtles, 35 Fed. Reg. 8,491 (June 2, 1970), Northwest Atlantic Ocean DPS of loggerhead sea turtle, 76 Fed. Reg. 58,867 (Oct. 24, 2011), and North and South Atlantic Distinct Population Segments (DPSs) of the green sea turtles, 81 Fed. Reg. 20,058 (Apr. 6, 2016); West Indian manatees, 82 Fed. Reg. 16,668 (Apr. 5, 2017); St. Croix ground lizards, 42 Fed. Reg. 28,543 (June 3, 1977); blue, fin, sei, or sperm whales, 35 Fed. Reg. 18,313, 18,319 (Dec. 2, 1970); giant manta ray, 83 Fed. Reg. 2,916 (Jan. 22, 2018); Nassau grouper, 81 Fed. Reg. 42,268 (June 29, 2016); oceanic whitetip shark, 83 Fed. Reg. 4,153 (Jan. 30, 2018); Central and Southwest Atlantic DPS of the scalloped hammerhead shark, 79 Fed. Reg. 38,213 (July 3, 2014); and boulder star, elkhorn, lobed star, mountainous star, pillar, rough cactus, and staghorn corals, 79 Fed. Reg. 53,851 (Sept. 10, 2014).

is low. *See* 50 C.F.R. § 402.14(a); Interagency Cooperation–Endangered Species Act of 1973, as Am.; Final Rule, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) ("Any possible effect . . . triggers the formal consultation requirement."); *Indeck-Elwood*, 13 E.A.D. at 196 (same). ESA provides that in fulfilling the consultation requirements, "each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

EPA's issuance of the Permit may affect the loggerhead and green sea turtles, as well as the Caribbean roseate tern. The best available science demonstrates that loggerhead and green sea turtles are found in the project area. AR-0186 at 8, 10 (noting that green turtles particularly are "present year-round in the action area where they nest and use nearshore areas such as seagrass beds and coral habitats for refuge and foraging."). In fact, green sea turtle nesting "is reported as increasing on Sandy Point." AR-0186 at 8. Limetree itself reported that "[g]reen turtles, hawksbills and a loggerhead turtle were seen during the site surveys." Ex. 16 (2019 Environmental Assessment Report) at 130. NOx pollution contributes to the threatened status of the present sea turtles and turtle species are at risk from mercury—a developmental and reproductive toxin. AR-0205 at 12-100, 14-24, 14-27. Toxins from air pollution and exposure to hydrocarbons from oil spills may also injure sea turtles. AR-0170 at 40; 81 Fed. Reg. at 20071 (petroleum contamination "adversely affects turtles by external fouling, ingestion, and interference with olfactory perception and food supply").

EPA failure to consult with FWS on the green and loggerhead sea turtles cannot be remedied by NMFS' post-hoc statement that the FWS "did not include green sea turtles in their concurrence letter even though nesting by this species is reported as increasing on Sandy Point, but the effects determination for green sea turtles ***would likely be the same*** as that for the other two sea turtle species [hawksbill and leatherback]." AR-0186 at 8 (emphasis added). First, this

ignores EPA's own failure to consider impacts to the green and loggerhead sea turtles. Second, as courts have made clear, "[t]he failure to respect the process mandated by [the ESA] cannot be corrected with post-hoc assessments of a done deal." *Nat. Res. Def. Council*, 146 F.3d at 1129; *see also Desert Rock Energy*, 14 E.A.D. at 515-516 (quoting same). Post-hoc rationalization by another agency cannot substitute for EPA's compliance with its ESA duties—particularly where FWS is the expert consulting agency for nesting sea turtles, not NMFS. *See, e.g.*, *Nat. Res. Def. Council*, 146 F.3d at 1127 (finding agency failed to meet its "independent responsibilities under the ESA" when it failed to "request a formal consultation"); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) ("An agency cannot 'abrogate its responsibility to ensure that its actions will not jeopardize a listed species[.]'") (citation omitted). In its RTC, EPA offered no explanation for why it failed to consult on the loggerhead and green sea turtles, simply stating its "evaluation and determination and the Services' concurrence is included in the record for this permitting action and is incorporated by reference as part of this response." RTC at 96.

The roseate tern, whose range encompasses all of the U.S. Virgin Islands, Ex. 17 (2010 FWS Sandy Point, Green Cay and Buck Island National Wildlife Refuges Comprehensive Conservation Plan) at 43-44; Ex. 18 (1993 FWS Roseate Tern Recovery Plan) at 3, 7, 10-11, 15 (noting vast migration path and largest breeding colonies in the Virgin Islands, its "stronghold"), has also been observed at Krause Lagoon, adjacent to the Refinery. Ex. 19 (Birds of St. Croix). The Permit may affect these terns by exposing them to pollutants that can cause irreversible lung damage. *See e.g.,* AR-0137 at 20; AR-0205 at 8-34, 12-80, 15-2, 15-27 (EPA assessment concluding "birds report physiological responses to air pollutants, including PM [particulate matter]"). Despite these threats, EPA neither mentioned the roseate tern during its abbreviated consultation process with FWS, nor acknowledged that EPA previously considered the tern to

"occur in the vicinity of the facility" in assessing remedies for site contamination by Hovensa. Ex. 20 (EPA Statement of Basis/Proposed Final Remedy Decision, VID 980536080) at 3.

In the RTC, EPA acknowledged its omission of the roseate tern but explained that while the tern is a threatened species in the U.S. Virgin Islands, "the IPaC tool used for identifying FWS species, does not list this species in the vicinity of the project and impact area." RTC at 96. This response is not sufficient to support EPA's failure to consult on the roseate tern and to use best scientific and commercial data available, particularly when other data generated and publicized by the EPA, FWS, and other sources indicates the roseate tern occurs in the project area. *See* Exs. 16-19; *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 346 (4th Cir. 2019) (noting "[t]he best-available-data standard also means [an agency] is not free to disregard other 'available biological information'" and the agency "must seek out and consider all existing scientific data relevant to the decision . . . ") (citations omitted). EPA's failure to consult on the loggerhead and green sea turtles and roseate tern constitutes a clear error and a violation of the ESA.

2. EPA Violated Procedural Obligations for Informal Consultation on Over Twenty Other Federally Listed Species

EPA failed to satisfy the ESA's procedural obligations for informal consultation with FWS and NMFS regarding twenty-three other endangered and threatened species that the Refinery may affect.

To properly engage in informal consultation, an agency "shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs." 50 C.F.R. § 402.13(c)(1). Section 402.14(c)(1)(i) requires "[a] description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action." It directs agencies to "provide sufficient detail to assess the effects of the action on listed species and critical habitat, including: (A) The purpose of the action; (B) The

duration and timing of the action; (C) The location of the action; (D) The specific components of the action and how they will be carried out; (E) Maps, drawings, blueprints, or similar schematics of the action; and (F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat." 50 C.F.R. § 402.14(c)(1)(i).

The ESA clarifies that the "action area" encompasses "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The "effects of the action" include "all consequences to listed species or critical habitat that are caused by the proposed action[.]" *Id.* Effects are measured against the "environmental baseline" for the species, which should reflect the status quo of no refinery operations. The baseline also includes the "past and present impacts of all Federal, State or private actions and other human activities in the action area . . . ." *Id.*

EPA's February 19, 2020 consultation request to FWS did not comply with these obligations. EPA's request to FWS was a cursory one-page letter that only covered four species in the project area (West Indian manatee, hawksbill sea turtle, leatherback sea turtle, and the St. Croix ground lizard), leaving out other species over which FWS has authority, as discussed above. *See* AR-0180. EPA's request for consultation, and FWS's concurrence, also omitted key information, including that leatherback sea turtles nest at Sandy Point National Wildlife Refuge, a critical habitat, AR-0170 at 34, and that leatherback, hawksbill, and green sea turtles nest at Canegarden Bay and Manchenil Beach, which are directly in the facility's modeled air pollution plume. Ex. 21 (Geographic Response Plan Map: VI-2); AR-0180; *compare* AR-0181 at 26-27 (failing to acknowledge nesting beaches in concluding "[s]pecies expected to transit past impacted areas, so any exposures would be short-term"). Limetree itself has reported "as many as 14 turtle

nests in this area at one time including nests which were laid by leatherbacks" at the project site. Ex. 16 at 130 (2019 Environmental Assessment Report). Yet EPA's concurrence request says little more about the Refinery except its location and that it "would like to restart operations at the former HOVENSA refinery" without any specific components of the action. AR-0180. It attaches just three air modeling figures to illustrate the project and concludes there will be no effect on the four species.

Further, EPA inaccurately described the action by stating that the Permit "does not introduce new emissions compared to those emitted by the HOVENSA refinery." AR-0180 at 1. EPA made no mention of the baseline conditions on the project site—a total shutdown of refinery operations for the past nine years—nor described the full scope of the facility or its functions. EPA further narrowed its consultation request by only referencing the project's potential for air impacts, saying nothing of its other operational impacts to the project area, including water pollution, vessel strikes, noise and disturbance, trash and debris, light pollution, and risk of oil and chemical spills, particularly in light of increasing frequency and intensity of storms. *See, e.g.*, RTC at 97 (EPA stated that it need not address impacts from "Limetree's vessels on the south shorelines of St. Croix including Cane Garden Beach" and other impacts from the Refinery such as polystyrene accidents, oil spills, and ship strikes because "[t]hese issues related to operations at the facility unrelated to the PAL permit"). Based in part on this improperly narrow view of "action area," "effects of the action," and "environmental baseline" in clear violation of §402.02, EPA concluded that the Permit will have no effect on these four species. AR-0180 at 2. In response, FWS sent EPA a cursory 1.5-page concurrence with EPA's determination of "not likely to adversely affect" that largely imported language from EPA's request (including its omission of green and loggerhead sea turtles). AR-0184 at 2.

Similar to its consultation with FWS, when it requested concurrence from NMFS on twenty-one species, EPA focused exclusively on air emissions in determining that the Permit "may affect" but was not likely to adversely affect "all listed species in general, including the leatherback turtle, the Nassau Grouper, and the endangered corals." AR 0181; *see id* at 23-24 (chart listing species present). EPA again erred by ignoring the many non-air impacts from restarting the shuttered refinery. AR-0181, *see also* RTC at 97. In its September 4, 2020 concurrence letter, NMFS acknowledged that the action area "means all areas affected directly or indirectly by the Federal action, and not just the immediate area involved." AR-0186 at 5. NMFS also acknowledged that effects of the action mean "all consequences to listed species or critical habitat that are caused by the proposed action." *Id.* at 8. As noted above, effects are measured against the "environmental baseline," which reflects current conditions and threats to listed species in the area and includes the past and present impacts of all Federal, State or private actions in the action area. 50 C.F.R. § 402.02. None of these factors were mentioned, let alone assessed in the request and concurrence letters, rendering the consultation inadequate. *See, e.g.*, *Am. Rivers v. FERC*, 895 F.3d 32, 47 (D.C. Cir. 2018) (analysis arbitrary when failing to account for effects of all relevant conditions on threatened species).

EPA's "no adverse effect" conclusion further improperly relied on vague assertions including that "Limetree will create an Endangered Species Management Plan to address the numerous ESA-listed species that occur in the Action Area, including listed corals, fish, marine mammals, sea turtles and birds. The plan will be provided to NMFS for review prior to the start of operations." AR-0181 at 16. The substance of this proposed Endangered Species Management Plan is not clear (nor is it ever mentioned again), though it suggests EPA admits that the Permit action will indeed impact listed species. EPA may not rely on uncertain, non-binding mitigation

plan to arrive at its conclusion of no adverse effect. *See, e.g.*, *Ctr. for Biological Diversity v. Bernhardt*, No. 18-73400, 2020 U.S. App. LEXIS 38033, at *36, *54 (9th Cir. Dec. 7, 2020) (agency violated the ESA by "relying upon uncertain, nonbinding mitigation measures in reaching its no-adverse-effect conclusion . . . "); *Desert Rock Energy*, 14 E.A.D. at 515-16 (agency could not cure consultation deficiencies with a permit condition).

The RTC further underscores that EPA clearly erred in issuing the Permit without having adequately considered the aggregate effects of the action in light of the imperiled status of the species at issue and the environmental baseline. *See* 16 U.S.C. § 1536(a)(2); *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255 (D.D.C. 2003) ("The ESA requires that all impacts of agency action . . . be addressed in the consultation's jeopardy analysis.") (citations omitted). EPA's RTC on this issue was brief and dismissive, incorporating by reference the faulty concurrence requests and concurrences. RTC at 96. EPA's cursory responses to comments do not remedy the above-described errors. The Board should vacate the Permit for failing to comply with the ESA. In the alternative, the Board should direct EPA to reinitiate consultation with FWS and NMFS pursuant to 50 C.F.R.§ 402.16(a)(2) to correct the errors that originated in EPA's incomplete consultation requests and failure to consider relevant scientific information.

VII. CONCLUSION

For the foregoing reasons, the Region clearly erred in issuing the Permit over Petitioners' objections and Petitioners respectfully request that the Board vacate and remand PAL Permit No. VI-001/2019.

(signature page follows)

Respectfully submitted,

Date: February 3, 2021

By: _____

Elizabeth Leigh Neville, Esq.
In her individual capacity,
and on behalf of:
The St. Croix Environmental Association,
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REQUEST FOR ORAL ARGUMENT

Petitioners respectfully request oral argument before the Board on its Petition for Review of PAL Permit No. VI-001/2019 because it believes oral argument will assist the Board.

STATEMENT OF COMPLIANCE WITH THE WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) & (d)(3), I hereby certify that this Petition for Review does not exceed 14,000 words. Not including the transmittal letter, caption, tables of contents, authorities and attachments, figures, signature block, certification of service, and statement of compliance with the word limitation, this Petition contains **13,049** words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2021 a copy of the foregoing Petition for Review in Appeal No. CAA 20-02M/Docket No. VI-001/2019 was filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System, and was served on the following by electronic mail. I hereby certify that the emailed copy is identical to that filed using the EAB eFiling System:

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