BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Limetree Bay Refining and Limetree Bay Terminals Permit No. EPA-PAL-VI-001/2019	CAA Appeal No. 20-03M

PETITION FOR REVIEW OF LIMETREE BAY REFINING, LLC AND LIMETREE BAY TERMINALS, LLC PLANTWIDE APPLICABILITY LIMIT PERMIT ISSUED BY EPA REGION 2

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC (collectively, "Petitioner" or "Limetree") petition for review of the conditions of Plantwide Applicability Limit ("PAL") Permit No. EPA-PAL-VI-001/2019 (EPA-R02-OAR-2019-0551-0162) (the "PAL permit").[1]

In 2018, Limetree submitted an application to the U.S. Environmental Protection Agency Region 2 (hereinafter, "EPA") to establish plantwide applicability limits ("PALs") under 40 C.F.R. § 52.21(aa) for five pollutants—NO_X, CO, VOC, SO_2 and PM. Its purpose in doing so was to allow Limetree the "flexibility to make certain changes to the facility, *within the established limits*, without being required to determine whether those changes are subject to [Prevention of Significant Deterioration ("PSD")]."[2] By regulation, EPA calculates PALs based on a facility's actual emissions "*allowed under existing PSD permits* and other requirements."[3] Thus, the PAL permit will not result in increased emissions of any of the five pollutants because PALs are based on the baseline actual emissions from Limetree's emissions units as already authorized under existing permits.

As a condition in the PAL permit decision, however, EPA has singled Limetree out and imposed a one-of-a-kind, multi-million dollar, perpetual ambient air monitoring obligation on Limetree—one not deemed necessary to ensure compliance under Limetree's current permits—ostensibly because EPA is concerned that Limetree's emissions might lead to National Ambient Air Quality Standard ("NAAQS") or PSD violations. EPA's imposition of ambient monitoring is

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[1] Limetree does not request oral argument in this petition, but reserves the right to request or participate in oral argument for any other petition for review of the PAL permit.

[2] EPA Response to Comments on the Clean Air Act Plantwide Applicability Limit Permit for the Limetree Bay Terminal and Limetree Bay Refining St. Croix, U.S. Virgin Islands (Nov. 2020) (EPA-R02-OAR-2019-0551-0163) ("Response") 132 (emphasis added).

[3] *Id.* (emphasis added).

unsupported by the law and the facts. Not only does EPA lack the legal authority to make Limetree responsible for conducting ambient air monitoring as a condition of a PAL permit, the facts do not support EPA's speculation that the facility's emissions might cause air quality violations. Rather, it appears that EPA is using Limetree's permit as a vehicle to shift a state ambient monitoring obligation from the United States Virgin Islands to Limetree because it will not otherwise get done.

In addition, EPA has made four other critical errors. EPA has greatly diminished the value of the PAL permit by: (1) requiring Limetree to grossly overstate actual emissions when monitoring data are unavailable, despite the availability of more accurate missing data substitution procedures that EPA has allowed in other PAL permits; (2) refusing to remove synthetic minor limits when the PAL limits are in place for the express purpose of displacing them; (3) refusing to clarify the meaning of "modify" in the final PAL permit to assist Limetree in complying with its terms; and (4) imposing a condition related to performing emissions calculations in a manner that would make compliance with the condition infeasible and refused to clarify the meaning and operation of certain reporting requirements, leaving Limetree unsure of its obligations under the PAL permit.

Because each of these actions is based on clearly erroneous findings of fact and conclusions of law, the Board should direct EPA to eliminate or revise the affected conditions in the PAL permit, as set forth below.

FACTUAL AND STATUTORY BACKGROUND

EPA promulgated the PAL regulations as part of the 2002 New Source Review ("NSR") Reform Rule to provide a benefit to the environment while providing a flexible permitting mechanism to major stationary sources. *See* 67 Fed. Reg. 80186 (Dec. 31, 2002). A PAL permit

establishes plantwide emissions limit for regulated NSR pollutants, measured in tons per year, and requires the source to conduct monitoring, recordkeeping, and reporting of its PAL pollutant emissions on a 12-month, rolling total basis. 40 C.F.R. § 52.21(aa)(2)(v) (defining "Plantwide applicability limitation"); *id.* § 52.21(aa)(4).

The PAL regulations benefit facilities by providing flexibility to make production changes or expansions without triggering applicability determinations and potential NSR permitting. *See* 67 Fed. Reg. 80207–08. "A PAL represents a simplified NSR applicability approach that provides a source with the ability to manage physical and operational changes, and the impacts of those changes on facility-wide emissions, without triggering major NSR or the need to conduct project-by-project major NSR applicability analyses."[4] At the same time, the PAL regulations offer environmental benefits by: (1) incentivizing facilities to reduce emissions with enough buffer under the PAL to make future, market-driven changes; and (2) counting emissions toward the PAL that are below significance levels and would otherwise not be regulated. *See* 67 Fed. Reg. 80207–08.

Limetree submitted a PAL permit application for its refining and terminal operations to EPA on November 26, 2018.[5] EPA issued a draft PAL permit on September 20, 2019, and the 45-day public comment period ran through November 25, 2019.[6] Limetree provided written

[4] Memorandum from Anne L. Austin, Principal Deputy Assistant Administrator, to Regional Air Division Directors, Regions 1-10, *Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations* (Aug. 4, 2020) at 1 ("EPA PAL Guidance"), https://www.epa.gov/sites/production/files/2020-08/documents/pal_guidance_final_-_signed.pdf. *See also Env't Integrity Proj. v. EPA*, 969 F.3d 529, 536 (5th Cir. 2020) ("The whole facility can avoid major new-source review for alterations if, as altered, the whole facility's emissions do not exceed levels specified in the PAL permit.").
[5] Limetree Application for PAL Permit (Nov. 26, 2018) (EPA-R02-OAR-2019-0551-0107).
[6] Draft Plantwide Applicability Limit Permit, EPA-PALs-VI-001/2019 (Sept. 20, 2019) (EPA-R02-OAR-2019-0551-0001) ("Draft PAL permit").

comments on the Draft PAL permit and participated in the public hearing on November 7 and 8, 2019.[7] EPA issued the final PAL permit decision to Limetree on December 2, 2020.[8]

THRESHOLD PROCEDURAL REQUIREMENTS

Limetree satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. *See* 40 C.F.R. § 124.19(a). Limetree submitted comments on the Draft PAL permit, and also participated in the public hearing held by EPA on November 7 and 8, 2019, at the University of the Virgin Islands, St. Croix Campus.[9]

2. The issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review.[10]

3. EPA offered a new rationale in the final PAL permit, in response to comments raised during the public comment period.

STANDARD OF REVIEW

Review of a permit condition is appropriate when a petitioner shows that the condition was based on "a finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. § 124.19(a)(4)(i). When evaluating a challenged permit condition for clear error, the Board examines the administrative record for the permit to determine whether the permit issuer exercised "considered judgment." *In re General Elec. Co.*, 17 E.A.D. 434, 446 (EAB 2018); *In*

[7] Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC, Comments on Draft Plantwide Applicability Limit (PAL) Permit (submitted Nov. 25, 2019) (EPA-R02-OAR-2019-0551-0148) ("Comments"); Email regarding Limetree's Public Sessions Attendees (Nov. 14, 2019) (EPA-R3-PAL-001).
[8] Final Plantwide Applicability Limit Permit for Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC, St. Croix, U.S. Virgin Islands (Dec. 2, 2020) ("PAL permit") (EPA-R02-OAR-2019-0551-0162).
[9] *See* n.6.
[10] *Id*.

re Steel Dynamics, Inc., 9 E.A.D. 165, 191, 224–25 (EAB 2000). "The permit issuer must articulate with reasonable clarity the reasons supporting its conclusions and the significance of the crucial facts it relied on when reaching its conclusions." *General Elec.*, 17 E.A.D. at 560; *see also, e.g.*, *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). The record must demonstrate that the permit issuer "duly consider[ed] the issues raised in the comments" and followed an approach that "is rational in light of all information in the record." *General Elec*., 17 E.A.D. at 561 (internal citations omitted). Where the record demonstrates that the permit issuer failed to exercise "considered judgment" or where there are discrepancies between the permit issuer's conclusions and the administrative record, remand of the permit is appropriate. *Id.*

ARGUMENT

EPA made five key errors in issuing Limetree's PAL permit. First, it imposed ambient air monitoring requirements without legal authority or a sound basis in fact. Second, EPA is requiring Limetree to grossly overstate actual emissions when monitoring data are unavailable, despite the availability of more accurate missing data substitution procedures. Third, the PAL permit unreasonably disclaims that synthetic minor limits are eliminated as a result of PAL permit issuance. Fourth, EPA refused to define "modification" in the permit such that Limetree's obligations remain unclear. And fifth, EPA imposed a condition related to performing emissions calculations in a manner that would make compliance with the condition infeasible and refused to clarify the meaning and operation of certain reporting requirements. EPA's actions with respect to these five issues were based on clear errors of law and fact and should be revised or eliminated.

A. The ambient air monitoring requirements in the PAL permit exceed EPA's authority, are clearly erroneous, and should be eliminated.

As a condition of the PAL permit, EPA has required Limetree to install and operate a multi-million dollar, off-site ambient air monitoring network, comprised of five SO_2 monitors at five locations, two NO_2 monitors (one at a new location and one at the location of an existing SO_2 monitor), one $PM_{2.5}$ monitor at a new location, and a meteorological monitoring station at an eighth location for the life of the permit.[11] The permit condition requires Limetree to implement an ambient air monitoring program with continuous data collection and sufficient data capture to determine compliance with NAAQS and to timely report any exceedance of the NAAQS to EPA, so that EPA can take action to resolve the violation, including by potentially "reopening the PAL pursuant to 40 C.F.R. §52.21(aa)(8)(ii)(*b*)(*3*)."[12]

EPA included this condition, despite the fact that granting the PAL permit does not allow increases in actual emissions. The construct of a PAL permit is to allow facilities like Limetree to make alterations to existing emissions units and add new emissions units, *but only as long as its total emissions do not increase*. *See* 67 Fed. Reg. at 80207. Neither EPA nor the U.S. Virgin Islands Department of Planning and Natural Resources ("DPNR") considered the ambient monitoring EPA devised as a condition of the PAL permit as necessary to ensure Limetree's compliance with the limits set forth in its existing permits. EPA has not and cannot explain why establishing PALs in addition to the unit-specific limits set forth in Limetree's existing permits necessitates such extensive new ambient monitoring measures.

EPA's decision to condition Limetree's PAL permit on its agreement to spend millions of dollars on ambient monitoring is clearly erroneous for three reasons.[13] First, PAL regulations do

[11] PAL permit § VIII.A.6 (Ambient Air Monitoring Requirements).
[12] *Id.* § VIII.B.13.
[13] Limetree raised this issue in Comments 108(b)–(c), 109(a), (c). In addition, Limetree commented that (1) the PAL provisions do not authorize ambient air monitoring, Comment 108(a); (2) the PAL permit will reduce, not increase,

not authorize EPA to impose ambient monitoring in a PAL permit to detect NAAQS violations, as such monitoring will not aid in determining whether Limetree is in compliance with the PALs. The responsibility for monitoring ambient air quality lies with EPA, the states, and the local air protection agencies—in this case, the U.S. Virgin Islands and DPNR.[14] EPA cannot subdelegate that responsibility to Limetree as a condition in a PAL permit, merely because the permit appears to be a convenient vehicle to address unrelated concerns. As EPA's explanation in the Draft PAL permit makes clear, EPA conceived the ambient air monitoring requirements to address environmental justice concerns, rather than concerns regarding compliance with the PALs. That is not permissible because EPA cannot delegate this authority to a private entity. Second, none of the authorities EPA cites empowers it to require Limetree to install and operate ambient monitoring as a PAL permit condition. And third, to the extent that EPA tries to justify the ambient monitoring requirement by claiming that NAAQS or PSD exceedances could occur during Limetree's operations, EPA's explanation does not support its conclusion. EPA has based the ambient monitoring requirements substantially on exceedances that occurred during HOVENSA's operations as the previous owner of the facility. HOVENSA operated and then idled its facility a decade ago. Limetree acquired the facility, completely reconfigured it, and will operate the facility at one third of the operating rate of the prior owner. Therefore, it is impossible for EPA to have concluded that *Limetree's* operations under the PAL permit pose any risk to air quality; EPA's air quality concerns are only relevant to *HOVENSA's* prior operations. Even if there were legitimate concerns, a PAL permit is not the vehicle to address them.

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emissions, and therefore the PAL permit does not warrant monitoring, Comment 109(b)–(c); (3) the responsibility for ambient monitoring and the authority to determine NAAQS compliance belongs to DPNR, not regulated entities, Comment 110(a)-(b); and (4) the monitoring requirements effectively usurp DPNR's authority to determine ambient monitoring requirements under the guise of issuing a PAL permit, Comment 110(d).

[14] Comments 106–115; *see also* Responses 106–115.

Because the air monitoring requirements are both inappropriate in a PAL permit and lacking any basis in law and fact, they are clearly erroneous.

1. EPA lacks the legal authority to impose the ambient air monitoring requirements under the PAL provisions for environmental justice purposes.

Limetree has no operating history at the St. Croix site.[15] It is currently authorized to conduct refining and terminal operations, pursuant to its Title V permit (Permit No. STX-TV-003-10) and MARPOL permit (Permit No. STX-924-AC-18, as amended, Permit No. STX-924-AC-PO-20).[16] DPNR established the conditions of those permits to ensure compliance with NAAQS, and the PAL permit does not alter the NO_X, CO, VOC, SO_2 and PM limits. Since Limetree has not begun operation of the refinery and terminal, it is impossible for EPA to have legitimate concerns about the company's ability to comply with its permit or to cause adverse air quality impacts.

The ambient air quality modeling of Limetree's operations demonstrates that operation under the PAL permit will not result in NAAQS violations. EPA stated in the Draft PAL permit, however, that it was requiring Limetree to install and operate ambient monitoring for the life of the permit in response to environmental justice concerns that arose under HOVENSA's operations.[17] It explained that "consistent with EPA obligations under Executive Order 12898," EPA would require ambient monitoring by Limetree "in light of the burden already experienced by the nearby low income and minority populations."[18]

[15] *See* Comments 110, 114(b).
[16] Response 106. Limetree's permits require it to operate five existing ambient monitors HOVENSA had installed when HOVENSA requested a source specific variance to sulfur limits. *Id.* EPA states "five ambient monitors were installed and operated by [HOVENSA] well before the facility ceased operating in 2012 because EPA modeled violations of the 24-hour SO2 NAAQS." *Id*. But it follows that sentence by acknowledging that HOVENSA installed the ambient monitors prior to that "because it requested a source specific variance." *Id*.
[17] Fact Sheet on Draft PAL permit (Sept. 2019) at 7 (EPA-R02-OAR-2019-0551-0105). The local community expressed concerns that HOVENSA's violations would be repeated. *See, e.g.*, Comment 133.
[18] Draft PAL Fact Sheet at 7.

Executive Order 12898, however, only instructs agencies to consider the environmental justice impacts of their actions; it is not authority for imposing independent obligations on applicants. *See* Exec. Order No. 12898, 59 Fed. Reg. 7629 § 6–609 (Feb. 11, 1994). That authority must be found elsewhere, but it is not found in the PAL regulations. The PAL regulations provide EPA with only narrow authority to impose monitoring in a PAL permit—a "monitoring system that accurately determines plantwide emissions of the PAL pollutant" and "other requirements that the Administrator deems necessary to implement and enforce the PAL." 40 C.F.R. § 52.21(aa)(7)(x), (aa)(12)(i)(a). The ambient monitoring systems EPA has mandated are not permissible because they cannot be used to determine plantwide emissions of a PAL pollutant; their purpose is to detect NAAQS exceedances only. As such, they do not fall within EPA's authority under 40 C.F.R. § 52.21(aa)(7)(x), (aa)(12)(i)(a).

In other contexts, EPA acknowledges that the PAL regulations do not authorize it to impose any condition it likes, even when environmental justice concerns are involved. With respect to oil spills, for example, EPA explained that the "issue of oil spill protocols and damages is beyond the scope of this permit because there are no requirements in 40 CFR § 52.21(aa) for a source seeking a PAL permit to address any issues related to a potential oil spill."[19] EPA thus concluded that it does not "have authority under the PAL provisions to impose a bond or trust fund."[20] The same is true of ambient air monitoring. There are no requirements in 40 C.F.R. § 52.21(aa) for a source seeking a PAL permit to address any issues related to NAAQS compliance, and for that reason, EPA does not have authority under the PAL provisions to impose ambient monitoring requirements.

[19] Response 131.
[20] *Id.*

It is evident that the purpose of ambient monitoring is not consistent with the requirements in 40 C.F.R. § 52.21(aa)(12)(i)(a) based on EPA's explanation that Limetree would not be liable under the permit conditions should an ambient monitor measure impacts consistent with a NAAQS violation.[21] That is because a NAAQS is not an applicable requirement to which Limetree is subject and detection of a NAAQS violation does not establish a violation of a PAL. Thus, EPA explains that if the system were to detect an exceedance, EPA would take further action, "such as reopening and reducing the PAL under 40 CFR § 52.21(aa)(8)(ii)(b)(3) or taking action under the State Implementation Plan."[22] EPA's response not only confirms that the purpose of ambient monitoring is not to monitor PAL compliance, it also contradicts guidance EPA issued in August 2020, in which EPA explained that reopening a PAL permit is not the appropriate mechanism for addressing adverse air quality impacts because *states* address NAAQS and PSD increment violations through State Implementation Plan ("SIP") measures, such as source-specific permit limits.[23]

The CAA plainly assigns to states and territories—not facilities—the responsibilities for performing ambient monitoring and for ensuring that emissions from stationary sources do not cause or contribute to NAAQS violations. Section 110 expressly requires states and territories to adopt a plan which "provides for implementation, maintenance, and enforcement" of ambient air quality standards, "provide[s] for establishment and operation of appropriate devices, methods,

[21] Response 110(b).
[22] *Id*.
[23] EPA PAL Guidance at 3. Indeed, DPNR's SIP-approved Authority to Construct and Permit to Operate (ATC/PTO) rules are the primary mechanism under the CAA for protecting the NAAQS due to exceedances caused by stationary sources. *See* Comment and Response 110(b). Part of the approved SIP for the U.S. Virgin Islands is 12 VIRR § 206-30 (1973; currently codified at § 206-31), which provides that "No approval to construct or modify will be granted unless the applicant shows to the satisfaction of the Commissioner that the source will not prevent or interfere with attainment or maintenance of any national standard." In addition, § 206-27(a)(1)(B) regarding PTOs, both in the SIP and in the current codification, includes similar language, and § 206-27(a)(1)(E) also gives the Commissioner authority to require ambient monitoring.

systems, and procedures necessary to . . . monitor, compile, and analyze data on ambient air quality," and provides for "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved." 42 U.S.C. § 7410(a)(1), (2)(B)–(C). EPA has not required the U.S. Virgin Islands to perform ambient air monitoring based on its population.[24] EPA's requirement that Limetree "procure, install, and maintain an ambient air monitoring network to monitor the NO_2, SO_2, and $PM_{2.5}$ NAAQS . . ."[25] is precisely what Section 110(a) directs a SIP to include. While EPA claims that it is "requir[ing] source specific monitoring at the Limetree facility," it is instead requiring ambient monitoring at locations outside of the Limetree facility.[26] Calling ambient air monitoring source-specific monitoring does not make it so. EPA has directed Limetree to install the system so that it can determine compliance with NAAQS, despite the fact that "NAAQS are not requirements applicable to owners and operators of individual stationary sources such as the Limetree Bay facility."[27] The PAL regulations do not authorize EPA to impose this requirement.

2. The authorities EPA cites do not allow it to delegate to Limetree the responsibility for monitoring ambient air.

EPA cites to four alternative authorities it claims authorize it to impose ambient air monitoring requirements on Limetree: (1) Section 114, 42 U.S.C. § 7414; (2) Section 165, 42 U.S.C. § 7475; (3) 40 C.F.R. § 52.21(aa)(7)(x); and (4) 40 C.F.R. § 52.21(aa)(8)(ii)(*b*)(*3*).[28] None of these provisions empower EPA to impose a multi-million dollar perpetual monitoring obligation in a PAL permit that does not relate to PAL compliance.

[24] Comment 110(c).
[25] PAL permit § VIII.A (Ambient Air Monitoring Requirements).
[26] Response 110(c); PAL permit § VIII.
[27] *See* Comment 110(b).
[28] Response 106.

a. Section 114 of the CAA is a discrete investigation authority that cannot be used to create a perpetual ambient air monitoring obligation as a permit condition.

While Section 114 of the CAA gives EPA the ability to require monitoring, its ability to do so is narrowly prescribed to situations in which EPA is: (1) developing a SIP,[29] a New Source Performance Standard ("NSPS") or Maximum Achievable Control Technology ("MACT") standard, or a regulation pertaining to solid waste combustion; (2) determining whether any person *is in violation* of a SIP, NSPS, MACT, or solid waste regulation; or (3) carrying out provisions of 42 U.S.C. Ch. 85. *See* 42 U.S.C. § 7414(a)(1). Nothing in Section 114 authorizes EPA to require ambient monitoring under a PAL permit.

EPA is not currently reviewing and approving a SIP for the U.S. Virgin Islands, and EPA does not purport to base its authority to require ambient monitoring through the PAL permit on the development of a SIP.[30] Moreover, the plain language of Section 114(a)(ii) allows EPA to require monitoring for purposes of "determining whether any person *is* in violation" of a SIP or standard. 42 U.S.C. § 7414(a) (emphasis added). The phrase "determining whether any person *is* in violation" is framed in the present tense, meaning EPA would have to be presently investigating whether Limetree is in violation of a SIP or standard to trigger EPA's authority to impose monitoring requirements. *See United States v. Xcel Energy, Inc.*, 759 F. Supp. 2d 1106 (D. Minn. 2010) (finding the EPA's authority to request records pursuant to Section 114 commences upon the occurrence of the violation, not prior to the violation). EPA has given the Board no reason to believe that the monitoring requirements it has imposed are for the purpose of determining whether Limetree is in violation of the U.S. Virgin Islands' SIP or an NSPS,

[29] A SIP is a state-developed plan "which provides for implementation, maintenance, and enforcement" of national primary and secondary ambient air quality standards. 42 U.S.C. § 7410(a).
[30] *See* 40 C.F.R. pt. 52, subpt. CCC (detailing EPA approved SIP for the U.S. Virgin Islands).

MACT, or solid waste regulation. Since the facility has not yet fully restarted, it is a practical impossibility for EPA to have determined that the operation of the facility risks violating the SIP or an NSPS, MACT or solid waste standard. If it did, it would not have been permitted. Moreover, EPA's ability to require monitoring does not authorize EPA to create a perpetual monitoring obligation in a PAL permit any more than EPA could add a monitoring requirement to the facility's MARPOL or Title V permit.

Finally, Section 114(a)(iii) permits EPA to require monitoring in order to carry out any provision of Chapter 85. While Chapter 85 requires, among other things, each SIP to "provide for establishment and operation of appropriate devices, methods, systems and procedures necessary to … monitor, compile, and analyze data on ambient air quality," it requires state and local air pollution agencies, not existing owners and operators, to monitor ambient air quality. *See* 42 U.S.C. § 7410(a)(2); 40 C.F.R. § 58.10.

Section 114 of the CAA authorizes EPA to require monitoring for a select few purposes, which do not include ambient air monitoring as a condition of a PAL permit. To the contrary, Section 114 is a discrete investigation authority applicable in other circumstances, such as a history of past violations. None of the cases EPA cites suggests that Section 114 can be used in the context of a PAL permit to require broad air quality monitoring requirements from an entity that has never operated and has no record of noncompliance.[31]

In fact, the cases EPA cites stand for the uncontroversial proposition that Section 114 gives EPA broad authority to investigate violations. Thus, in *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), the Court concluded that EPA's investigatory authority under Section 114 included the right to take aerial photographs of Dow's plant complex, which was otherwise

[31] *See* Response 108(a).

shielded from public view, and that such unannounced aerial photography did not violate Dow's Fourth Amendment rights. In *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007), the court concluded that Section 114 authorized EPA to enter into consent agreements with animal feed operations that limited their liability for CAA violations to civil fines and development of an emissions estimating methodology. Such agreements, the court concluded, did not constitute a rulemaking and were thus not subject to notice and comment requirements. *Id*. at 1037. EPA's reliance on *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274 (3d Cir. 2013) is similarly unpersuasive. In dismissing EPA's claims against owners of a coal-fired power plant for allegedly failing to obtain a preconstruction permit and to install certain pollution-control technology, the court noted in a single sentence that, under Section 114, EPA could "require the advance reporting of some or all proposed changes to facilities, whether or not they rise to a modification." *Id.* at 289.

EPA also relies on *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) and *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015), both of which involved challenges to rulemakings. In *Alabama Power*, environmental groups challenged a rule implementing Section 165 of the CAA, 42 U.S.C. § 7475, not Section 114. Environmental groups objected that the regulations failed to require mandatory post-construction air quality monitoring. 636 F.2d at 373. The case did not involve ambient air quality monitoring requirements in a permit and is not relevant to EPA's imposition of such requirements in the PAL permit. The same is true of *Mexichem*, where the court held that Section 114 authorized EPA to require by regulation that all polyvinyl chloride manufacturers install monitoring equipment on pressure-relief devices in their venting systems to ensure that uncontrolled emissions could be identified and controlled in a timely manner. 787 F.3d at 560–61.

EPA has not cited a single case to support the proposition that Section 114 allows it to shift the responsibility for installing equipment and monitoring ambient air emissions from the U.S. Virgin Islands to Limetree as a condition of a PAL permit.

b. Section 165 of the CAA does not apply to existing facilities and, therefore, does not provide EPA the authority it claims to have.

EPA also cites Section 165(a)(7) of the CAA as giving the agency broad authority to require the "'conduct [of] such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality.'"[32] Section 165(a), however, only applies prior to the construction of a major emitting facility. *See* 42 U.S.C. § 7475(a) ("No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless . . . [enumerated conditions are met]"). Construction includes modifications, *id.* § 7479(2)(C), but a "modification" must, by definition, result in an increase in "the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted," *id.* § 7411(a)(4).

Limetree's facility has already been constructed. EPA admits this: "the state of affairs before EPA in this PAL permitting action is [] resuming operation of *an existing* major stationary source."[33] And the PAL permit is not a modification, as it will not result in an increase in any pollutant. EPA concedes this too: "Limetree did not apply for a PSD permit to establish new BACT limits . . ."; EPA was only considering "Limetree's application to set plantwide applicability limits such that Limetree Bay has flexibility to make certain changes to the facility, *within the established limits*, without being required to determine whether those changes are subject to PSD."[34]

[32] Response 108(a) (quoting CAA Section 165(a)(7)); *see also* Response 108(b) (citing Section 165(a)(3)) and Response 110(b) (citing Section 165(e)(1)).
[33] Response 132 at 107 (emphasis added).
[34] *Id.* (emphasis added).

Nonetheless, EPA claims that Section 165 authorizes it to impose ambient monitoring because Limetree's PAL permit is a "major NSR permit" by process of elimination under 40 C.F.R. § 52.21.[35] According to EPA, because it "is not the minor source permitting authority in the USVI, [and because] the USVI implementation plan is disapproved with respect to PSD, and 40 CFR § 52.21 is incorporated into the applicable implementation plan," Limetree's PAL permit falls under the "Prevention of Significant Deterioration program." Under 40 C.F.R. § 52.21(b)(43), a PSD program is an "'EPA-implemented major source preconstruction permit program.'"[36] Accordingly, EPA concludes that it can apply preconstruction permitting requirements in a permit that does not involve construction or modification.

To sustain this interpretation, the Board would have to read the word "construction" out of the law. Construing Section 165 as EPA suggests is contrary to the general rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks and citation omitted). A PAL is not a PSD permit to which Section 165(a) applies. EPA recognized this in promulgating the PAL regulations in 2002. It explained that under Section 111(a)(4) of the CAA, facilities are "not subject to major NSR unless [they] make a 'modification,' which by definition cannot occur without an emissions increase." 67 Fed. Reg. at 80207. A PAL, EPA explained, does not result in an emissions increase. *Id.* Rather, it "is a source-wide cap on emissions and is one way of making sure that emissions increases from [a] major stationary source do not occur." *Id.* Because complying with a PAL "ensures that there are no emissions increases that trigger major NSR, . . . whatever changes occur at [a] plant will not be subject to major NSR for the PAL pollutant." *Id.* EPA's argument that Limetree's PAL permit

[35] Response 108(b).
[36] *Id.* (quoting 40 C.F.R. § 52.21(b)(43)).

is a "major NSR permit" is not only contrary to the statute, it is inconsistent with the explanation EPA provided in the preamble to the PAL regulations.

Nor can EPA justify treating Limetree's PAL as a "major NSR permit" based on the fact that the U.S. Virgin Islands does not have an EPA-approved PSD implementation plan. Doing so would result in EPA treating similarly situated regulated entities differently, in violation of the Administrative Procedure Act ("APA"). *See Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) ("Government is at its most arbitrary when it treats similarly situated people differently."); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dept. of Health and Human Serv.*, 300 F. Supp. 2d 32, 42 (D.D.C. 2004), *aff'd*, 396 F.3d 1265 (D.C. Cir. 2005) ("'[I]f an agency 'treats similarly situated parties differently, its action is arbitrary and capricious in violation of the APA.'") (citation omitted).

Section 165 therefore does not authorize imposition of the ambient air monitoring requirements in the PAL, and EPA's reliance on Section 165 is clearly erroneous.

c. Sections 40 C.F.R. § 52.21(aa)(7)(x) and 40 C.F.R. § 52.21(aa)(8)(ii)(b)(3) do not authorize EPA to require ambient monitoring.

EPA's reliance on 40 C.F.R. §§ 52.21(aa)(7)(x) and 52.21(aa)(8)(ii)(b)(3) also fail.[37] Although Subsection 52.21(aa)(7)(x) allows the agency to impose "[a]ny other requirements that the Administrator deems necessary to implement and enforce the PAL," it does not provide the authority EPA claims. The PAL referenced in this provision pertains only to enforcement of PAL emission limitations—or, "emission limitation[s] expressed on a mass basis in tons per year"—not to enforcement of other permit provisions. *Id.* § 52.21(aa)(2)(i), (aa)(2)(v). EPA does not and cannot claim that the ambient air quality monitoring and meteorological monitoring requirements

[37] Response 108(c).

are necessary to implement and enforce the annual emission limitations expressed on a mass basis in tons per year. EPA's position appears to be that Subsection 52.21(aa)(7)(x) pertains to any requirement which EPA includes in the PAL permit *and* authorizes EPA to include in the PAL permit any requirement which it deems necessary to enforce any other provision which, in EPA's sole discretion, is included in the PAL permit. This reasoning is circular and must be rejected.

Subsection 40 C.F.R. § 52.21(aa)(8)(ii)(b)(3) allows the agency to "[r]educe the PAL if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation" (the "reopener provision").[38] The reopener provision is inapplicable, however, because it only applies when a PAL permit is effective, not when an applicant is seeking a PAL in the first instance. Moreover, there is no factual basis to conclude that a NAAQS or PSD increment violation is foreseeable, much less that a reduction in the PAL is necessary to avoid such a hypothetical violation, or even less that the ambient air monitoring requirements in the PAL are necessary to such an attenuated end. This is especially true given that the PAL does not authorize new emissions, but will instead reduce emissions, as EPA concedes.[39]

In any event, because both subsections—52.21(aa)(7)(x) and 52.21(aa)(8)(ii)(b)(3)—pertain to the enforcement or reopening of "actuals PALs," 40 C.F.R. § 52.21(aa), EPA's requirements must as well. As discussed *infra*, ambient monitoring will not establish whether

[38] EPA also briefly cites 40 C.F.R. § 52.21(aa)(8)(ii)(b)(1), which allows reopening to reflect newly applicable federal requirements. Response 108(a). EPA argues that this provision confirms that ambient monitoring requirements are not inconsistent with the PAL provisions, but does not rely on 40 C.F.R. § 52.21(aa)(8)(ii)(b)(1) as authority for the monitoring requirements in the PAL. Response 106 ("EPA is exercising its authorities under Sections 114 and 165 of the Clean Air Act and Section 40 CFR § 52.21(aa)(8)(ii)(*b*)(*3*) and 40 CFR § 52.21(aa)(7)(x) of the PAL provisions to require ambient monitoring."). In addition, EPA fails to articulate any factual basis supporting a need for ambient air quality monitoring for purposes of reopening the PAL to reflect newly applicable federal requirements.

[39] Comment 109(b)–(c).

Limetree has violated a PAL. EPA concedes this when it acknowledges that Limetree would not be liable for a NAAQS violation—which is all the ambient monitoring would establish.[40] The PAL regulations state that "[e]ach PAL permit must contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant in terms of mass per unit of time or CO2e per unit of time," *id*. § 52.21(aa)(12)(i)(a), but ambient air monitoring does not satisfy this requirement.

Ultimately, EPA's position regarding ambient monitoring under the PAL provisions has been inconsistent. In promulgating the PAL provisions, EPA rejected a requirement for ambient air quality impacts analysis because "requirements to evaluate ambient impacts would be likely to conflict with the goal of operational flexibility and minimal administrative burden, especially for small changes under the PAL."[41] EPA continued: "Moreover, we believe that we can rely on the reviewing authority's existing programs for addressing air quality issues resulting from changes under your PAL."[42] EPA attempts to distinguish these statements as being made only in the context of post-PAL issuance facility changes, but EPA does not explain why requiring evaluating ambient impacts as a condition of a new PAL does not conflict with operational flexibility or why it cannot rely on the reviewing authority's existing programs from the start.[43] The entire purpose of a PAL is to allow changes in the facility without triggering major source permitting. 40 C.F.R. § 52.21(aa)(1)(ii). The same reasoning applies to the issuance of the PAL in the first place.

[40] Response 110(b).
[41] Comment 109(d) (citing *Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations*, Nov. 2002, at I-7–57).
[42] *Id*.
[43] Response 109(d).

Similarly, the ambient monitoring requirements are inconsistent with EPA's prior implementation of the PAL provisions in the case of the Capitol Power Plant PAL permit (EPA-R3-PAL-001), which maintained EPA's prior position that ambient monitoring is unnecessary and inappropriate in a PAL permit.[44] EPA attempts to distinguish this precedent on the grounds that the agency does not have sufficient information in Limetree's case to reach the same determination,[45] but as explained below, this conclusion lacks factual basis.

In short, none of the sources of legal authority cited by EPA authorize the agency to single out Limetree and force it to spend millions of dollars per year to conduct ambient air monitoring as a condition of securing a PAL permit; the responsibility for ambient air monitoring lies with the U.S. Virgin Islands. EPA's requirement here is not supported by the authorities it cites, its past interpretation, or precedent. Without a reasoned explanation, the monitoring requirements are clearly erroneous as a matter of law.

3. EPA lacks a factual basis to impose the ambient air monitoring requirements.

To the extent that EPA has attempted to articulate a sound factual basis for requiring ambient monitoring in the PAL permit—as opposed to relying on environmental justice, as it did in the Draft PAL permit—it has failed. EPA asserts that "[t]he available ambient data shows that had HOVENSA continued operation as they had been historically, there would have been violations of the new 1-hour SO2 NAAQS"—which is, apparently, a significant concern warranting the ambient air monitoring.[46] EPA's conclusion might have some merit if HOVENSA were seeking a permit to operate as it had historically, but that is not what is

[44] Capitol Power PAL permit (EPA-R3-PAL-001) (EPA-R02-OAR-2019-0551-0148 at Attachment 2); Comments 109(e)–(f), 111.
[45] Response 109(e).
[46] Response 106.

happening here. Limetree is seeking a PAL permit, and its operations—which are already permitted—are significantly different and of a substantially lesser magnitude than HOVENSA's.

EPA expressly bases the ambient air monitoring requirements on the potential need to reopen the PAL under 40 C.F.R. § 52.21(aa)(8)(ii)(b)(3), if a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation.[47] Any such need, however, is entirely hypothetical, speculative, and lacks a factual basis. Although EPA had no authority to require ambient air quality modeling as part of a permit application under 40 C.F.R. § 52.21(aa)(3), Limetree voluntarily performed the modeling, which demonstrated that NAAQS violations will not occur.[48] These results establish that there is no reasonable need for ambient air quality monitoring even if EPA had authority under the PAL regulations to require it. EPA disagrees with the results for essentially two reasons: (1) a limited number of NAAQS exceedances during operations at the facility site by Limetree's predecessor; and (2) uncertainties in the modeling analysis.[49] Neither of these reasons is a rational basis to conclude that NAAQS violations are more than merely speculative, and the basis for the monitoring requirements—EPA's rejection of the modeling analysis—is therefore clearly erroneous.

a. The limited number of historical exceedances at the site are not comparable to operations under the PAL permit.

EPA assumes that because a limited number of NAAQS violations occurred during HOVENSA's operations, there is a significant concern that violations may occur under Limetree's PAL permit.[50] Its concern is not supported by the record. With respect to SO_2

[47] Responses 106, 108(a), (e), 109(d)–(e), 110(b), 111(b).
[48] Final Environmental Justice Analysis ("EJA") (Sept. 19, 2019) at 14 (EPA-R02-OAR-2019-0551-0058) ("the modeling analysis revealed no violation of the 1 hour average NO_2, the 1 hour average SO_2, and the 24 hour and annual average $PM_{2.5}$ NAAQS").
[49] Responses 106–107, 113–114.
[50] Responses 106, 109(b), 114(b). "Historically, five ambient monitors were installed and operated by the former owner, HOVENSA (also HOVIC and Hess Oil prior to that) well before the facility ceased operating in 2012 because EPA had modeled violations of the 24-hour SO2 NAAQS. . . . The available ambient data shows that had

monitoring, EPA acknowledges that Limetree is already subject to ambient air monitoring for SO_2 under a PSD permit issued by EPA, in the event that it burns high sulfur fuel oil.[51] EPA's concerns about SO_2 NAAQS exceedances are based on operations by the prior owner burning high sulfur fuel oil, at a crude oil processing rate three times as high as Limetree's capacity, and prior to implementation of emission reduction measures as required pursuant to a consent decree. Nonetheless, EPA claims that its new SO_2 NAAQS, which is based on a 1-hour average, is stricter than the NAAQS HOVENSA was operating under and violated. Thus, "had HOVENSA continued operation as they had been historically, there would have been violations of the new 1-hour SO2 NAAQS."[52] This explanation is irrelevant to Limetree's SO_2 emissions and whether a PAL can be used as a vehicle for any manner of monitoring or other requirement EPA may like to impose. Limetree has no plans to burn high sulfur fuel oil, but, if it changed those plans at some future date, it has an existing obligation under its PSD permit and Consent Decree to perform ambient air monitoring prior to burning high sulfur fuel oil.[53]

EPA also notes that ambient monitoring for SO_2 is needed because the facility was not operating at the time that modeling was needed to determine whether the area should be designated as an attainment or nonattainament area for the 1-hour SO_2 NAAQS under the Round 3 designation process.[54] But the 2000 tons per year of SO_2 emitted by HOVENSA included emissions associated with burning high sulfur fuel oil. Therefore, EPA is ignoring changes in the

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HOVENSA continued operation as they had been historically, there would have been violations of the new 1-hour SO2 NAAQS. . . . Therefore, the request to operate the ambient monitors is based on information that demonstrated reasons for significant concern." Response 106 at 57 (citation omitted).

[51] Response 106 at 57.

[52] *Id.*

[53] Responses 106, 130.

[54] Response 106 at 58.

operation of the refinery that undermine the basis it asserts for the ambient monitoring requirements.[55]

By ascribing HOVENSA's emissions to Limetree, EPA has relied on the wrong facts to justify its ambient monitoring requirement. EPA asserts that Limetree's PAL level is "similar" to the actual exceedances when the exceedances and violations took place.[56] But in fact, Limetree has substantially reconfigured operations. Its operations: (1) are less extensive than HOVENSA's; (2) will use lower sulfur fuel than HOVENSA's; (3) will reduce emissions of SO_2 and NO_2 by 40% and 33%, respectively, as compared to HOVENSA's; and (4) will reduce overall allowable emissions of SO_2, NO_X, and $PM_{2.5}$ by 77%, when compared to what the facility would be allowed to emit in the absence of the PAL.[57] EPA has not produced any reasonable factual basis for equating the two operations. Therefore, even if a PAL permit were not an inappropriate vehicle for addressing ambient air quality concerns, exceedances and violations by Limetree's predecessor are not a rational basis for the ambient monitoring requirements.

b. There is no factual basis to conclude that the modeling uncertainties are substantial enough to invalidate the air quality modeling.

More importantly, there is no factual basis to support EPA's rejection of the ambient air quality modeling results, which demonstrate that no NAAQS violations will occur. The modeling

[55] Indeed, what EPA is attempting to do is to establish a new requirement in an unrelated permit proceeding that it previously rejected in the Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary NAAQS. Final Rule, 80 Fed. Reg. 51052 (Aug. 21, 2015). That rule "applies to any air agency in whose jurisdiction is located one or more applicable sources of SO2 emissions that have annual actual SO2 emissions of 2,000 tons or more; or in whose jurisdiction is located one or more sources of SO2 emissions that have been identified by the air agency or by the EPA Regional Administrator as requiring further air quality characterization." 40 C.F.R. § 51.1202. Limetree's SO_2 PAL is 1,482 tpy. PAL permit, Condition I, Table I-1. In the final rule, EPA rejected lower thresholds because "the 2,000 tpy source emissions threshold strikes a reasonable balance between the need to characterize air quality near sources that have a higher likelihood of contributing to a NAAQS violation and the analytical burden on air agencies." 80 Fed. Reg. at 51061. EPA has authority under this rule to add the Christiansted area to the list of areas for which the state is required to characterize ambient air quality.

[56] Response 114(b).

[57] Comments 109(c), 114(b), (d)–(e). *See also* Responses 106, 109(b). The PAL permit will reduce allowable emissions of SO_2 by 88%, NO_X emissions by 69%, and $PM_{2.5}$ emissions by 67%, equal to a total reduction of 77% for these three pollutants. Comment 109(c).

analysis employed EPA's preferred refined model, AERMOD, and used multiple years of site-specific meteorological and site-specific background air quality data, which is undeniably the "best practice" for air modeling.[58] EPA nevertheless rejected the modeling results on the basis of various uncertainties in the modeling.[59] Uncertainties are inherent in air quality modeling. Merely identifying sources of uncertainty does not by itself provide any factual basis for concluding that those uncertainties are of a magnitude significant enough to render the modeling results unreliable.[60]

Nor did EPA attempt to determine the range of uncertainty involved. EPA asserts that "the largest flaw in the modeling analysis" is that the short-term emission rates for SO_2, NO_2 and $PM_{2.5}$ are not "technically creditable" because they are based on inaccurate assumptions instead of being based on actual measured short-term emission rates or calculated based on maximum short-term process rates and appropriate emission factors.[61] EPA concedes, however, that the short-term rates were extrapolated from the available data using a protocol developed and approved in consultation with EPA.[62] EPA now asserts that "those methods did not appear to be mathematically correct," without explaining this assertion other than to note the unremarkable fact that extrapolations are a source of uncertainty.[63] Significantly, EPA does not provide any

[58] Comment 113(c); Response 113(c).
[59] Responses 106–107, 113–114.
[60] Response 106. *See generally*, Responses 106–107, 113–114.
[61] Response 106 at 58. EPA notes that the modeled emission rate assumes uniform emissions, but concedes that the variability of emission rates under a PAL would not by itself trigger concerns sufficient to require ambient monitoring. *Id*. The procedures for developing the short term emissions used in the modeling analysis were based on EPA guidance as described in Appendices C and D of EPA's 2014 memorandum "Guidance for 1-Hour SO2 Nonattainment Area SIP Submission," https://www.epa.gov/so2-pollution/guidance-1-hour-sulfur-dioxide-so2-nonattainment-area-state-implementation-plans-sip, and on procedures previously developed by EPA (i.e., using 90% percentile values of heat input or measured mass emission rates). These methods were used to calculate "equivalently stringent" short-term emission rates based on the PAL emissions limits, and were thoroughly discussed in the modeling protocol that was reviewed by EPA. EPA did not raise concerns during their protocol review that the proposed short-term emission calculation methods were not "technically creditable."
[62] Response 113(a).
[63] *Id.*

analysis or factual basis supporting the conclusion that these sources of uncertainty are of a magnitude sufficient to render the modeling results unreliable. In the end, EPA provides no explanation for why, if it was concerned that the modeling results might not be accurate, it nevertheless "indicated to Limetree that they could go ahead with the modeling approach they proposed."[64]

EPA acknowledges that "there is some inherent uncertainty in all modeling due to the accuracy, precision, and representativeness of the data input into the model," but asserts that the extrapolated emission rate data "go beyond the acceptable level of uncertainty."[65] In a similar vein, EPA concedes that "the PAL provisions assume some level of uncertainty due to the variety of possible operating configurations and emissions variations across the emission points," but continues to insist that "the assumptions inherent in Limetree's modeling analysis result in an unacceptable level of uncertainty that has caused EPA to require ambient monitoring in the PAL permit."[66] Nowhere, however, does EPA identify the "acceptable level of uncertainty," compare it to the level of uncertainty in the modeling analysis, or otherwise provide any analysis or factual basis supporting the assertion that the uncertainties in the modeling analysis exceed the "acceptable level of uncertainty." Without more, EPA's conclusion that the modeling results are unreliable remains a bare assertion, devoid of a factual basis, and is therefore based on clearly erroneous findings of fact.

[64] *Id.* Equally contradictory is EPA's explanation that "[i]n this case, general assumptions were made such as the extrapolation of a short-term emission rate from the annual average." However, EPA cannot make general assumptions that the health-based NAAQS are protected. Therefore, EPA cannot rely on Limetree's EJ modeling analysis conclusions." Response 113(d). Here, EPA fails to note that the extrapolation protocol was developed and approved in consultation with EPA, and fails to acknowledge that the conclusion that the health-based NAAQS are protected is not based on some "general assumption," but rather is demonstrated by the results of the air quality modeling.
[65] Response 113(c).
[66] *Id.*

Similarly, EPA cites "issues" with the extensive site-specific monitoring data available for the area and used in the modeling analysis, concluding that these render the modeling results "unreliable."[67] These include missing data for some time periods and monitoring stations in locations other than those that would capture maximum impacts, but EPA does not identify standards of data quality relevant to these concerns or establish that the available data does not meet these standards.[68]

The only data concern that EPA does explain is that the existing $PM_{2.5}$ monitoring data at the Bethlehem Village monitor were not relied upon because they failed the maximum quarterly value data substitution test.[69] EPA does not, however, explain how the rejection of this data renders the entirety of the modeling results unreliable. But it does highlight the work EPA failed to do for each of the other sources of uncertainty it cites. EPA needed to apply the same type of assessment to the modeling as a whole to determine whether the uncertainties it cites together render the modeling results unreliable, but it failed to do so.

In short, EPA fails to establish a factual basis to conclude that the air quality modeling results are unreliable and that NAAQS violations under the PAL are more than merely speculative. Therefore, even if a PAL permit were not an inappropriate vehicle for addressing ambient air quality concerns, EPA's rationale for imposing the ambient air quality monitoring requirements in the PAL permit is based on clearly erroneous findings of fact.

B. EPA's decision to not include missing data substitution procedures is based on clearly erroneous findings of fact and conclusions of law.

EPA erred by requiring Limetree to grossly overstate actual emissions as a condition of the PAL permit. Agency regulations require that permittees "record and report maximum

[67] Response 114(a), (c)–(d).
[68] *Id.*
[69] Response 114(e).

potential emissions without considering enforceable emission limitations or operational restrictions for an emissions unit during any period of time when there are no monitoring data, *unless another method for determining emissions during such periods is specified in the PAL permit*." 40 C.F.R. § 52.21(aa)(12)(vii) (emphasis added). Limetree established that substitution procedures are available to determine emissions during periods when there are no monitoring data available. Those procedures are the same as the procedures EPA has adopted in other cases.

1. EPA did not follow its own guidance and did not act consistently with the only other PAL permit it issued.

EPA's decision to require Limetree to report maximum potential emissions when permit-specified data are missing is clearly erroneous because it is inconsistent with EPA guidance and the only other EPA-issued PAL permit.[70] Agency regulations generally require permittees to "record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for an emission unit during any period of time that there is no monitoring data." 40 C.F.R. § 52.21(aa)(12)(vii). However, if "another method for determining emissions during such periods is specified in the PAL permit," a permittee need not record and report maximum potential emissions. *Id.* The purpose of this exception is to enable permittees to use alternative methods for determining emissions when such methods are available.

And in this case, they are. Limetree proposed using detailed missing data substitution procedures, in lieu of the maximum emission reporting requirement. The methodology Limetree proposed is identical to procedures EPA approved in the Capitol Power PAL permit.[71] In fact, EPA recently issued PAL guidance citing the Capitol Power PAL permit as an example of EPA-

[70] *See* EPA PAL Guidance at 12, 13; Capitol Power PAL permit (EPA-R3-PAL-001).
[71] *Compare* EPA PAL Guidance at 12, 13 *and* Capitol Power PAL permit, Condition 3.e.i & ii (EPA-R3-PAL-001).

approved missing data procedures and recommending that sources applying for a PAL permit and proposing missing data procedures "identify and review examples of missing monitoring data procedures from other permits issued by the relevant reviewing authority."[72]

Although Limetree did precisely as EPA recommended, EPA rejected Limetree's proposed methodology. Limetree followed the recommendations in EPA's guidance to "identify and review" example procedures from other PAL permits issued by the relevant authority—in this case, the only other EPA-issued PAL permit (the Capitol Power PAL permit)—and proposed consistent procedures.[73] There is no material distinction between Capitol Power and Limetree for purposes of allowing data substitution procedures, yet EPA rejected Limetree's proposed methodology. Treating similarly situated entities is arbitrary and capricious.[74] As previously noted, "an agency cannot treat similarly situated entities differently unless it 'support[s] th[e] disparate treatment with a reasoned explanation and substantial evidence in the record.'" *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1313 (D.C. Cir. 2014) (quoting *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)) (alterations in original). EPA was clearly erroneous in rejecting procedures for Limetree that EPA approved for Capitol Power. *See In re Shell Offshore*, 13 E.A.D. at 386.[75]

EPA's "rationale for [] conclusions must be adequately explained and supported in the record," *Shell Offshore*, 13 E.A.D. at 386; but in this case, EPA's explanation for rejecting Limetree's proposed changes is entirely insufficient. In response to Limetree's comment on data

[72] EPA PAL Guidance at 12, 13.
[73] *See* EPA PAL Guidance at 12; Comment 27.
[74] *See Etelson*, 684 F.2d at 926 ("Government is at its most arbitrary when it treats similarly situated people differently."); *El Rio Santa Cruz Neighborhood Health Ctr.*, 300 F. Supp. 2d at 42 ("'[I]f an agency 'treats similarly situated parties differently, its action is arbitrary and capricious in violation of the APA.'") (citation omitted).
[75] *See* EPA PAL Guidance at 12; Comment 27.

substitution, EPA compares the number of PAL-regulated emissions units ("over 200" at Limetree versus "approximately half a dozen at the Capitol Power Plant") and the nature of the facility ("refinery" versus "power plant").[76] After noting these differences, EPA vaguely states that there would be a "level of complexity" and "enforceability concerns" at Limetree that "one would be less likely to expect" at Capitol Power.[77] This statement does not explain the "significance of the crucial facts" supporting EPA's conclusions. *Shell Offshore*, 13 E.A.D. at 386. It does not explain why the alternative data procedures that apply to calculations on each emissions unit individually, regardless of the total number of PAL-covered units, would be too "complex" for Limetree to follow or for EPA to enforce. Nor does EPA explain why alternative data procedures that apply to calculations on each emissions unit depend on the type of facility covered by the permit. In each case, the procedures Capitol Power uses and Limetree proposed enable each to determine emissions, as the regulations require. EPA's failure to adequately explain and support its distinction between Limetree and Capitol Power for purposes of missing data procedures was clearly erroneous.

Moreover, EPA rejected *all* of Limetree's proposed data substitution procedures, without considering whether one or more of the proposed procedures would present fewer "enforceability concerns."[78] EPA's response to Limetree's proposed procedures assumes, without support, that all of the procedures or, indeed, *any* alternative procedure for any missing data period, would "present[] practical enforceability concerns" at Limetree.[79] This leaves Limetree—and this Board—unable to determine whether EPA concluded that the same enforceability concerns applied equally, for example, to Limetree's proposed procedure for replacing missing continuous

[76] Response 27.
[77] *Id.*
[78] *See* Response 27.
[79] *See id.*

emissions monitoring system, or CEMS, data as to the proposed procedure for filling in data during startup of a new or idled emissions unit. EPA's failure to consider each procedure separately does not allow for meaningful review of EPA's conclusion. *See In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004) (the response to a comment must be "clear and thorough enough to adequately encompass the issues raised").

2. EPA failed to consider Limetree's comment that reporting default maximum potential emissions would be grossly inaccurate.

Requiring maximum potential emissions as the default substitution for missing data requires Limetree to report unreasonably inflated emissions data—a requirement that fundamentally undermines the purposes of the PAL permit. The PAL regulations were intended to provide facilities the flexibility to make production changes or expand without triggering applicability determinations and potential NSR permitting. By requiring Limetree to use inflated emissions data without providing reasoned explanation, it has meaningfully reduced Limetree's ability to make the sort of production changes the PAL regulations are intended to allow. Its decision to do so appears to have been based on EPA's desire to reduce its effort, rather than facilitate operational flexibility.

Limetree proposed procedures that rely, among other factors, on hours of operation, average emissions rates, and conservative estimates, and are specific to the type of data needing substitution.[80] Based on those factors, Limetree would be able to calculate emissions that would undoubtedly exceed actual emissions, but would nonetheless be substantially less than what EPA required under Condition II.K of the PAL permit. EPA, however, appears to prefer a "simple, unambiguous" reporting requirement—which is not a consideration under the regulations—to an

[80] *See* Comment 27.

accurate report of emissions.[81] EPA did not dispute the accuracy of Limetree's proposed data substitution procedures and did not respond to Limetree's comment that "[u]sing default maximum potential to emit ('PTE') in most cases as this permit currently provides would grossly overstate emissions and produce an inaccurate emissions calculation."[82] EPA clearly erred by failing to respond to Limetree's concern that the PAL permit will require grossly overstated and inaccurate emissions calculations. *See Wash. Aqueduct*, 11 E.A.D. at 585 (the permitting authority "must address the issues raised in a meaningful fashion"). Limetree's proposed procedures for replacing missing data are consistent with 40 C.F.R. § 52.21(aa)(12)(vii) and the only other EPA-issued PAL permit. The Board should remand the permit to allow the proposed missing data provision.

C. The provision in Condition I regarding synthetic minor limits is based on a clearly erroneous conclusion of law and reflects a failure to consider meaningful comments.

EPA's refusal to eliminate synthetic minor limits is inconsistent with the intent and purpose of a PAL permit—the express purpose of which is to be relieved of these limits and given flexibility to make changes that cannot occur if the synthetic minor limits remain in place. In the Draft PAL permit, EPA stated that the PAL "does not supersede any applicable emission limits contained in any other federal or state permit or applicable regulation."[83] This draft provision was inconsistent with PAL regulations, which provide that issuance of a PAL permit eliminates the limits in EPA-issued PSD permits that ensured substantive PSD requirements for certain pollutants did not apply, so called "(r)(4) limits." *See* 40 C.F.R. § 52.21(aa)(1)(ii)(c). Limetree pointed out the inconsistency between the draft provision and the regulatory

[81] Response 27.
[82] *See* Comment 27; Response 27.
[83] Draft PAL permit, Condition I; Comment 15.

requirements and attached to its comments a list of (r)(4) limits in EPA-issued PSD permits that would be eliminated upon issuance of the PAL permit.[84]

In response to those comments, EPA agreed that the draft condition misstated the PAL regulation and subsequently modified the condition in the final PAL permit to state that the PAL permit does not supersede other permit limits or applicable regulations, "except as provided under paragraph 40 C.F.R. § 52.21(aa)(1)(ii)(c) of the PAL regulations."[85] The minor change to Condition I and the relevant comment response, however, did not correct EPA's decision to disclaim that the synthetic minor limits are eliminated by the PAL permit.

By failing to eliminate the synthetic minor limits, EPA violated PAL regulations and EPA guidance. The PAL regulations require a source to comply with certain permitting requirements upon expiration of the PAL, "except for those emission limitations that had been established pursuant to [Section (r)(4)], *but were eliminated by the PAL* in accordance with the provisions in [40 C.F.R. § 51.21(aa)(1)(ii)(c)]." 40 C.F.R. § 52.21(aa)(9)(v) (emphasis added). EPA has agreed that the PAL regulations state that establishment of a PAL in a PAL permit eliminates (r)(4) limits. In comments supporting promulgation of the PAL regulations, EPA stated:

> We agree with the commenters who supported eliminating synthetic minor limits for sources under a PAL, and we are not changing the final rules in this regard. We agree with commenters that maintaining (r)(4) limits under the PAL would preclude use of the PAL for sources that would otherwise elect to participate in a PAL, resulting in less use of the PAL provisions and ultimately less environmental benefit. We also agree with the commenter who stated that the PAL serves the same purpose as the (r)(4) limits do, which is to avoid circumvention of major NSR permitting.[86]

[84] Comment 15.
[85] PAL permit, Condition I.
[86] Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration (EPA-456/R-03-005), U.S. EPA, Oct. 30, 2003 (EPA-R02-OAR-2019-0551-0148 at Attachment 1); *see also* Comment 15.

Thus, EPA has acknowledged that a PAL and (r)(4) limits are redundant and that issuance of a PAL permit eliminates (r)(4) limits. EPA erred by disclaiming elimination of synthetic minor limits in the PAL permit and in the response to comments.

Rather than agreeing that the (r)(4) limits are eliminated by the issuance of the PAL permit, EPA stated that "Limetree will need to submit a separate application to EPA and the DPNR" requesting elimination of the synthetic minor limits "after the issuance of the Final PAL Permit."[87] A requirement to undergo separate and additional permitting requirements is inconsistent with the purpose of a PAL permit and its benefit to a facility—namely, operational flexibility, reduced permitting burden, and greater regulatory certainty.[88] The separate permitting process suggested by EPA, like the PAL permit, would not be a PSD permitting action subject to the one-year statutory deadline established in CAA Section 165(c). Based on the elapsed time for processing of Limetree's PAL permit application—25 months since the application was deemed complete—Limetree is reasonably concerned that a separate permitting process would be protracted and not a viable means of ensuring it receives the intended benefit of flexibility throughout the term of its PAL permit. In light of EPA's guidance and the language of the PAL regulations, it is clear error to negate the regulatory benefit of the PAL and require Limetree to complete separate, additional, and redundant permitting processes to eliminate synthetic minor limits. The Board should remand the PAL permit for revisions consistent with 40 C.F.R. § 52.21(aa)(1)(ii)(c), including a statement affirming that the PAL supersedes and eliminates synthetic minor limits in EPA-issued permits.

This failure to eliminate (r)(4) limits is especially egregious because EPA declined to consider the list of (r)(4) limits that was provided as an attachment to Limetree's comments on

[87] Response 15.
[88] *See* EPA PAL Guidance at 1.

Condition I. EPA explained that it "did not review the list of conditions in Attachment 1 . . . to determine whether the listed conditions qualify for deletion from other Limetree permits."[89] EPA did not explain why it declined to review the list in the eleven months between receiving Limetree's comments and issuing the PAL permit or why it declined to determine whether the list of synthetic minor limits to be eliminated upon issuance of the PAL permit, as provided by Limetree, is accurate. EPA erred by not addressing substantive comments in a meaningful way that this Board can review. *See Wash. Aqueduct*, 11 E.A.D. at 585. *See also* 40 C.F.R. § 124.17(a) (requiring EPA to "respond to all significant comments on [a] draft permit").

D. EPA's failure to define the term "modified" under Condition VII.A.4 is clearly erroneous, and its explanation for the lack of a definition is deficient.

A PAL permittee must submit semi-annual monitoring reports that include, among other requirements, "[a] list of any emissions units modified or added to the major stationary source or GHG-only source during the preceding 6-month period." 40 C.F.R. § 52.21(aa)(14)(i)(d). The Draft PAL permit provided that the semi-annual monitoring reports must contain "[a] list of each unit at the source that is either new or *modified* during the preceding six-month reporting period."[90]

In its comments on the Draft PAL permit, Limetree requested that the final permit "clarify that . . . 'modify' means a physical change or change in the method of operation of the emissions unit that results in an increase in emissions of a PAL pollutant consistent with the provisions of Section 111(a)(4) of the Clean Air Act."[91] The final PAL permit, however, does not address Limetree's request. Rather, it merely provides that "[a] list of each unit at the source that is either new or *modified per 40 C.F.R. §52.21(b)(2)(iii)* during the preceding six-month

[89] *Id*.
[90] Draft PAL permit, Condition VII.A.4 (emphasis added).
[91] Comment 5.

reporting period."[92] EPA made only one change in the final permit, adding "per 40 CFR §52.21(b)(2)(iii)" after "modified." Section 52.21(b)(2)(iii) explains that routine maintenance, repair or replacement does not qualify as "[a] physical change or change in the method of operation" and, therefore, does not qualify as a "major modification." By adding "§52.21(b)(2)(iii)," EPA affirmed that routine maintenance, repair, and replacement is not enough to trigger the reporting requirements under Condition VII.A.4. Still missing from Condition VII.A.4, however, is an affirmative definition of "modified."

EPA's response to Limetree's request for a definition of "modified" in Condition VII.A.4 was deficient. According to EPA, because the term "modification" is "included with respect to changes at a 'unit' rather than a 'source,'" the term need not be defined.[93] That response incorrectly conflates Limetree's concern regarding the ambiguity of "modification" with a separate and distinct concern—namely, that the term "unit" was not defined in the Draft PAL permit. Further, EPA's explanation is conclusory and deficient because it does not address Limetree's concern, leaving Limetree without guidance on the kinds of modifications that trigger the semi-annual reporting requirements. *See Wash. Aqueduct*, 11 E.A.D. at 585 ("a response to comments must address the issues raised in a meaningful fashion" and "be clear and thorough enough to adequately encompass the issues raised by the commenter"); *see also id*. at 586 ("[T]he permit issuer must articulate with reasonable clarity the reasons for its conclusions and the significance of the crucial facts it relied upon in reaching those conclusions.") (citations omitted).

EPA's failure to define "modified" results in unreasonable ambiguity, contrary to the purpose of a PAL. A PAL is "a simplified NSR applicability approach" meant to provide the

[92] PAL permit, Condition VII.A.4 (emphasis added).
[93] Response 5.

permittee with flexibility while also reducing the permitting burden and providing greater regulatory certainty.[94] By leaving "modified" undefined, EPA deprives Limetree of regulatory certainty in knowing which modifications it must report. *See In re RockGen Energy Center*, 8 E.A.D. 536, 550 (EAB 1999) (finding ambiguity in a permit when the language "can be interpreted as being either more stringent or less stringent than the applicable regulation").

The failure to define "modified" also results in unreasonably broad reporting requirements, again negating the purpose of obtaining a PAL. Read broadly, "modified" could require Limetree to include in its semi-annual reports *any* physical change to any unit, not just emission units that are modified within the meaning of CAA Section 111(a)(4) or are otherwise modified so substantially that the monitoring methods must change. Under that interpretation, Limetree would not benefit from a reduced permitting burden as it should under a PAL. When EPA promulgated the PAL regulations as part of the 2002 NSR Reform Rule, it explained that, under a PAL, a permittee is not subject to major NSR unless the permittee makes a "'modification,' which by definition cannot occur without an *emissions increase*." 67 Fed. Reg. at 80207 (emphasis added). And, as Limetree pointed out in its comments on the Draft PAL permit, "'modify' means a physical change or change in the method of operation of the emissions unit that results in *an increase in emissions of a PAL pollutant* consistent with the provisions of Section 111(a)(4) of the Clean Air Act."[95] At a minimum, the definition of "modified" should be limited to those physical changes that would cause an emissions increase. More simply, the definition of "modified" in Condition VII.A.4 should be tied to the definition used in Condition V, under which a "modified unit" is defined as "any unit at which a change will result in a change to the emission factor used to calculate that unit's emissions to comply

[94] EPA PAL Guidance at 1.
[95] Comment 5 (emphasis added).

with the PAL."[96] This definition would align with the purpose of a PAL, while also resolving an unreasonable ambiguity.

It is clearly erroneous for EPA to leave the term "modified" ambiguous as it relates to Limetree's semi-annual reporting requirements. The PAL permit should be remanded for clarification of the definition of "modified" under Condition VII.A.4. *RockGen Energy*, 8 E.A.D. at 550 (remanding PSD permit to permit-issuing agency for appropriate revision of ambiguous permit language).

E. EPA's reporting requirements in Conditions V and VII should be revised to resolve ambiguity and ensure that Limetree is able to comply with permit conditions.

In Conditions V and VII, EPA has imposed conditions that are either impossible to comply with or unreasonably ambiguous.

Condition V of the PAL permit requires Limetree to conduct performance tests for certain new or existing emissions units that rely on an emission factor to calculate PAL pollutant emissions. The PAL permit states that "[a]ny updated site-specific emission factor based on the performance testing under this condition will supersede the previous emission factor from the month following testing."[97] Limetree and EPA agree that updated performance tests can prompt reopening of the PAL to correct PAL pollutant emissions limits based on site-specific emissions factors.[98] Condition V should be revised, however, to state that any updated site-specific emission factor based on performance testing will supersede the previous emission factor from the month following *receipt of test results* rather than "the month following testing."

First, Condition VII.B requires Limetree to submit a report within 15 days after the end of the month in which a PAL was exceeded. Condition VII.B necessarily requires Limetree to

[96] PAL permit, Condition V.
[97] PAL permit, Condition V.
[98] *See* Comment 95; Response 95.

complete calculations within 14 days of the end of the month. Performance test results are not available immediately. Thus, if a test is performed on the last day of the month, Limetree would have only 15 days to receive performance test results and perform the necessary calculations. Limetree cannot comply with the current requirement as written.

Second, Condition V (Performance Tests) requires Limetree to conduct validation or revalidation testing within six months of constructing new or modified major emissions units. Condition VII.C requires Limetree to submit to EPA the results of any validation or revalidation test within three months after completion of such test. It is not clear whether the requirement in Condition V that "[a]ny updated site-specific emission factor based on the performance testing under this condition will supersede the previous emission factor from the month following the testing" refers to the date that the validation or revalidation test report is submitted to EPA or the month following the actual testing. It is practically impossible for EPA to comply if Condition V is read to mean the month following the actual testing. It is unlikely that Limetree would have the testing results in time to apply the updated emission factors in the month following the actual testing, which is why the PAL permit condition provides for three months to submit the results. The ambiguity in Condition VII.C must be resolved so Limetree is not required to comply with a reporting requirement where compliance is not possible.

Limetree requested that EPA resolve this ambiguity regarding the phrase "following the testing" by letter dated December 18, 2020, but EPA has declined Limetree's request.[99] Limetree also sought clarification regarding which deviations must be reported under the deviation reporting requirement in Condition VII.B. to no avail. Limetree commented on the draft PAL permit that a two-day reporting requirement for a PAL exceedance was not reasonable and cited

[99] Limetree letter to EPA (Dec. 18, 2020) (attached as Exhibit 1) and EPA response letter to Limetree (Jan. 28, 2021) (attached as Exhibit 2).

Capitol Power Plant's PAL, which required reporting of PAL deviances in the Title V semi-annual compliance certifications.[100] In its response, EPA cited VI Rule 206-71(5)(B)(i) to support requiring Limetree to "submit a report in accordance with 40 C.F.R. §52.21(aa)(14)(ii) within two working days, of any deviations or exceedance of the PAL requirements, including periods when no monitoring is available."[101]

As Limetree explained in its clarification request, it appears that EPA is requiring Limetree Bay to report all deviations from the PAL permit (other than exceedances of the PAL emissions limits) within two days, "including periods when no monitoring is available."[102] Limetree noted that EPA appeared to adopt Limetree's comment that deviations other than PAL exceedances are properly reported under Limetree's Title V permit, given EPA's comment that under 40 C.F.R. § 52.21(aa)(14)(ii), Limetree must submit deviation reports "as prescribed by the applicable program implementing 40 C.F.R. § 70.6(a)(3)(iii)(B)."[103] Part 70 governs Title V reporting requirements. In addition, VI Rule 206-71(5)(B)(i), which EPA also cited, applies only to deviations resulting from "emergency or upset conditions," not to *any* deviation from a permit requirement and not to periods when no monitoring is available.[104] Accordingly, EPA should clarify which deviations must be reported within two days under Condition VII.B.

CONCLUSION

For the foregoing reasons, the Board should order EPA to: (1) eliminate the ambient air monitoring requirements; (2) allow Limetree to use available substitution procedures to

[100] Comment 104.
[101] Response 104; Condition VII.B.
[102] Attachment 1 at 1.
[103] Response 104.
[104] VI Rule 206-71(5)(B)(i) provides: "Any deviation *resulting from emergency or upset conditions* as defined in the permit shall be reported within two (2) working days of the date on which the permittee first became aware of the deviation." (emphasis added).

determine emissions during periods when there are no monitoring data available; (3) state that the synthetic minor limits are eliminated by the issuance of the PAL; (4) clearly define the term "modify," as used in Condition VII.A.4; and (5) revise Conditions V and VII such that compliance is possible.

Date: February 3, 2021

/s Odin A. Smith

Odin A. Smith
OSmith@perkinscoie.com
LeAnn M. Johnson Koch
LeAnnJohnson@perkinscoie.com
Jena A. MacLean
JMacLean@perkinscoie.com
Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6344
Facsimile: 202.654.9119

STATEMENT OF COMPLIANCE WITH 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 12.639 words.

Date: February 3, 2021

s/ Odin A. Smith
Odin A. Smith
OSmith@perkinscoie.com
Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6344
Facsimile: 202.654.9119

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 an identical copy of the Petition filed on EAB eFiling System was served on the following by electronic mail:

Elizabeth Leigh Neville, Esq.
Attorney for Petitioners St. Croix Environmental Association, et al.
The Neville Law Firm, L.L.C.
127 West Fairbanks Avenue, #262
Winter Park, Florida 32789
elizabeth@neville.com

Robert DeLay, Office of Regional Counsel
Richard Ruvo, Director, Air and Radiation
Liliana Villatora, Chief, Air Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007
delay.robert@epa.gov
ruvo.richard@epa.gov
villatora.liliana@epa.gov

Gautam Srinivasan, Associate General Counsel
John T. Krallman
Brian Doster
Air & Radiation Law Office, Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
srinivasan.gautam@epa.gov
krallman.john@epa.gov
doster.brian@epa.gov

Date: February 3, 2021

s/ Odin A. Smith
Odin A. Smith
OSmith@perkinscoie.com
Perkins Coie LLP