CERTIFICATE OF SERVICE

I, Heather E. Gange, hereby certify that on April 23, 2023, I electronically filed the foregoing with the Clerk of Court using the ECF system, which effected service on all counsel of record.

/s/ Heather E. Gange
Heather E. Gange

ORAL ARGUMENT SCHEDULED FOR MAY 23, 2023

No. 23-1094

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PORT HAMILTON REFINING AND TRANSPORTATION, LLLP,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for Review of Action of the U.S. Environmental Protection Agency

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BRIEF FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

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GLOSSARY

CAA	Clean Air Act
Complex	Petroleum processing complex that comprises the Terminal, the Shared Facilities and the Refinery
Determination	Letter issued by EPA on November 16, 2022, determining that the Refinery must obtain a PSD permit before restarting petroleum refining operations and related construction
EPA	U.S. Environmental Protection Agency
PSD	Prevention of Significant Deterioration
Refinery	Petroleum refinery on the Island of St. Croix in the U.S. Virgin Islands, co-located with the Terminal.
Shared Facilities	Power plant, wastewater treatment plant, and safety-related services (e.g., fire pumps, emergency lights) operated by the Terminal, and without which the Terminal and the Refinery cannot operate.
Terminal	A petroleum storage and shipping terminal on the Island of St. Croix in the U.S. Virgin Islands, co-located with the Refinery
TPDES	Territorial Pollutant Discharge Elimination System permits issued by the U.S. Virgin Islands

INTRODUCTION

In 2012, a petroleum refinery on the island of St. Croix in the U.S. Virgin Islands ("Refinery") was shut down. Subsequently the Refinery was not well-maintained by its owner, and over the ensuing years the structures and equipment at the facility fell into a state of disrepair. A subsequent owner spent more than $4 billion over three years trying to resurrect the derelict Refinery, and then briefly tried to restart it in 2020 and 2021. Those efforts were catastrophic failures. Contamination rained down on the surrounding community, and releases of toxic gases sent residents to local hospitals in respiratory distress, closed schools and government offices, and caused the government to instruct vulnerable populations to evacuate or remain indoors. [redacted]

Now, new owners of the facility—having purchased the derelict former refinery at a deeply discounted price in bankruptcy—seek to restart refinery operations, but *without* installing the best available pollution control technologies that are required under the Clean Air Act ("CAA") for "new" major sources of pollution. Those new owners, Petitioner Port Hamilton Refining and Transportation, LLLP and West Indies Petroleum Limited (collectively "Port Hamilton"), contest a letter sent by the U.S. Environmental Protection Agency

("EPA") on November 16, 2022 ("Determination") apprising the companies of EPA's determination that a "new source" permit and best available pollution controls will be required under the CAA if the former Refinery is to be restored and restarted.[1] EPA-61-105. EPA's Determination regarding the need for a "new source" permit should be upheld. EPA appropriately construed and applied its longstanding CAA implementing regulations in determining that a derelict facility reopened many years following a permanent shutdown is a source at which "construction is commenced," 42 U.S.C. § 7475(a), and a "new" major pollution source within the meaning of an applicable regulatory provision, 40 C.F.R. § 52.21(a)(2)(iii).

STATEMENT OF JURISDICTION

This Court directed all parties to address its jurisdiction in their briefs. Order dated Feb. 6, 2023, Doc. 13. The CAA gives this Court original jurisdiction to review "final action" of EPA, 42 U.S.C. § 7607(b)(1), and the Determination is such an action. "[T]he phrase 'final action' . . . bears the same meaning in [the CAA] that it does under the Administrative Procedure Act." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Under that standard, the Determination is final because it "consummat[es] . . . the agency's decisonmaking

[1] EPA has provided a *complete* copy of the Determination in Volume I of its Appendix at EPA-61-105. The versions provided by Port Hamilton to date are incomplete.

process" and determines "rights or obligations" of Port Hamilton. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

More specifically, the Determination consummated EPA's decisionmaking regarding whether the Refinery will be a new major stationary source under 40 C.F.R. § 52.21(a)(2)(iii) if it restarts. While the CAA and its implementing regulations—not the Determination—are the source of Port Hamilton's obligation to obtain a permit under the CAA's prevention of significant deterioration ("PSD") program before restarting the Refinery, the Determination nonetheless put Port Hamilton on notice that it risks an EPA enforcement action if it chooses to restart the Refinery without doing so. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 597 (2016); *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985). EPA also has recognized that analogous PSD applicability determinations are final and judicially reviewable, *see, e.g.*, 65 Fed. Reg. 77623 (Dec. 12, 2000), as have other courts of appeals, *see Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1442 (9th Cir. 1984); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 295-96 (1st Cir. 1989).

Port Hamilton's petition for review was timely filed because the Determination was issued on November 16, 2022, and the petition was filed on January 13, 2023. *See* 42 U.S.C. § 7607(b)(1) (60-day statute of limitations).

STATEMENT OF THE ISSUES

1. Whether commencement of operations at a long-dormant facility many years after a permanent shutdown qualifies as "construction" under 42 U.S.C. § 7475(a) and creates a "new" major stationary source of pollution under 40 C.F.R. § 52.21(a)(2)(iii).

2. Whether EPA reasonably applied its interpretation of the CAA and 40 C.F.R. § 52.21(a)(2)(iii) to determine that the St. Croix Refinery—where all operations ended in 2012 and have never successfully recommenced—will qualify as a "new major stationary source" under 40 C.F.R. § 52.21 if its operations restart.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. EPA is not aware of any other case or proceeding that directly concerns PSD permitting for the St. Croix Refinery. EPA is aware of the following tangentially-related cases before other state and federal courts:

(1) *United States of America, and United States Virgin Islands v. HOVENSA L.L.C.,* Civil No. 1:11-cv-00006 (D.C. U.S.V.I) (CAA enforcement action resolved by a twice-amended Consent Decree that, among other things, imposes an unfulfilled obligation on the Refinery's owner and operator to install $700 million in pollution controls);

(2) *United States of America v. Limetree Bay Refining LLC and Limetree Bay Terminals LLC,* 1:21-cv-00264 (D.C. U.S.V.I.) (ongoing CAA Section 303 enforcement action to ensure that any imminent and substantial endangerment to public health or welfare or the environment posed by the Refinery be addressed prior to any restart);

(3) *In re Limetree Bay Serv., LLP, et al*., Bankr. Case No. 21-32351 (S.D. Tex.) (bankruptcy proceedings in which Port Hamilton purchased the Refinery and underlying land for $62 million, and in which Port Hamilton was ordered to join the twice-amended consent decree and a Joint Stipulation with the United States); and

(4) *Limetree Bay Terminals LLC v. Port Hamilton Refining & Transportation LLLP*, No. SX-2022-CV-00227 (V.I. Sup. Ct.) (ongoing collection action by the owner of the co-located petroleum terminal that operates shared utility and emergency service facilities, seeking delinquent payments from Port Hamilton).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Clean Air Act

Congress enacted the CAA in 1963, and substantially amended it in 1967, 1970 and 1977, to establish a comprehensive national program to protect public

health and welfare from the harmful effects of exposure to a series of ubiquitous air pollutants. *See generally* 42 U.S.C. § 7401; Pub. L. No. 95-95, 91 Stat. 685 (1977). Congress substantially amended the CAA again in 1990 to, among other things, promulgate new provisions regarding attainment of air quality standards for specific pollutants. 42 U.S.C. §§ 7511-11f.

a. National Ambient Air Quality Standards

The CAA requires EPA to identify and list air pollutants that "may reasonably be anticipated to endanger public health or welfare" and whose "presence . . . in the ambient air results from numerous or diverse mobile or stationary sources." *Id*. § 7408(a)(1)(A), (B). EPA then must issue "air quality criteria" reflecting the latest scientific knowledge regarding "all identifiable effects on public health or welfare" that may result from a given pollutant's presence in the ambient air. *Id*. § 7408(a)(2).

CAA section 7409 directs EPA to then propose and promulgate primary national ambient air quality standards ("NAAQS"), "the attainment and maintenance of which . . . allowing an adequate margin of safety, are requisite to protect the public health." *Id*. §§ 7409(b)(1)-(2), 7602(h). Once EPA establishes or revises primary NAAQS, the Agency, in cooperation with the States, designates areas of the country as (1) "attainment" (*i.e.,* meeting that NAAQS), (2)

"nonattainment" (*i.e.,* not meeting that NAAQS), or (3) "unclassifiable." *Id.* § 7407(d)(1).

b. Prevention of Significant Deterioration

The CAA's new source review program is a preconstruction review and permitting program for major stationary sources of emissions (*e.g.*, power plants, factories, refineries) that is intended to prevent increased emissions from new and modified sources, which might significantly worsen air quality or interfere with efforts to achieve attainment of the NAAQS. Such sources include petroleum refineries and other listed sources that have the potential to emit 100 tons or more of air pollutants per year, and other sources with the potential to emit 250 tons or more of air pollutants per year. *Id.* §§ 7475(a), 7479(1); 40 C.F.R. § 52.21(b)(1)(i)(a)-(b).

The requirements that must be met to obtain a permit vary depending on whether the area in which the facility is located meets (*i.e.,* is in attainment of) the NAAQS. In areas designated as nonattainment for an applicable NAAQS, the permitting program is generally referred to as the nonattainment new source review program. *See* 42 U.S.C. §§ 7502(c)(5), 7503. In areas that are unclassifiable, in attainment, or a combination of attainment and unclassifiable, the permitting program is generally referred to as the prevention of significant deterioration

("PSD") program. *See id*. §§ 7470-7479; 42 U.S.C. §§ 7407, 7471; 40 C.F.R. §§ 81.300(a), 81.356.

In attainment or unclassifiable areas, the CAA prohibits commencing "construction" on a major stationary source without obtaining a permit that meets PSD program requirements. *Id*. § 7475(a). Specifically, Section 7475 provides that "[n]o major emitting facility on which construction is commenced after August 7, 1977, may be constructed" in applicable areas without a PSD permit. The Act defines "construction" to include the "modification" of any source or facility. *Id*. § 7479(2)(C). "Modification," in turn, means "any physical change in, or change in the method of operation of, a stationary source which increases 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).

Consistent with the statutory text, EPA's implementing regulations require a permit to begin construction of a "new major stationary source" or of a "major modification" of an existing facility. 40 C.F.R. § 52.21(a)(2)(iii). EPA's implementing regulations define "construction" to mean "any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions." *Id*. § 52.21(b)(8). EPA interprets the phrase "new source" within its

implementing regulations at 40 C.F.R. § 52.21(a)(2)(iii) to encompass new operations at long-dormant facilities that were previously permanently shut down.

To obtain a PSD permit, a source must, among other things, show that increased emissions from construction will not cause or contribute to the violation of any applicable air-quality standard, 42 U.S.C. § 7475(a)(3), and the source must meet emissions limitations that reflect application of the best available control technology for all applicable pollutants regulated under the CAA. *Id.* § 7475(a)(4). These emission limits in a facility's PSD permit ordinarily are established for each applicable pollutant that the facility emits in significant amounts. 40 C.F.R. § 52.21(j)(2).

Under EPA's regulations, each modification of an existing facility that increases emissions of applicable pollutants may trigger the requirement to obtain a PSD permit. *Id*. § 52.21(a)(2)(iv), (b)(2). A facility that seeks flexibility to make changes without having to assess whether each change results in a qualifying increase may seek a permit that establishes a plant-wide applicability limit ("PAL") in tons per year based on actual emissions for each applicable pollutant. *See id.* § 52.21(aa). A facility with such a limit may later be modified without triggering PSD permitting, so long as the modification does not cause plant-wide emissions to exceed the limits or violate other requirements established in the PAL permit. *Id*. § 52.21(aa)(1)(ii).

c. EPA's Reactivation Policy

On the infrequent occasions when EPA is faced with making a PSD applicability determination for a dormant facility, the Agency considers certain factors in its fact-based assessment of whether the facility was permanently shut down. These factors include the cause and length of the shutdown, the time and capital needed to restart, evidence of intent to restart, and the degree of maintenance performed during shutdown. EPA-87, 93; [redacted] EPA loosely refers to this collection of factors that it typically considers as its "Reactivation Policy." EPA-65; [redacted]. In a series of final actions over decades, EPA has applied its Reactivation Policy when assessing whether a PSD permit is required under the unique facts presented by each dormant facility that is seeking to restart. EPA-62; EPA-87-88, 91-92.

B. Factual Background

1. Air Quality Regulation in the Virgin Islands

Since 2012, EPA has issued designations of areas for the following new or revised health-based NAAQS: 1-hour SO_2, 8-hour Ozone, and annual $PM_{2.5}$. EPA-064, at 068, 085. St. Croix is designated attainment and/or unclassifiable for these three NAAQS. 40 C.F.R. § 81.356; EPA-68.

2. The St. Croix Refinery

The Refinery is located in St. Croix, U.S. Virgin Islands. It sits within a larger industrial complex ("the Complex") that also includes: (1) a petroleum storage and marine loading terminal ("the Terminal") that is presently owned and operated by Limetree Bay Terminals, LLC, d/b/a/ Ocean Point Terminals ("Ocean Point"); and (2) shared facilities, including a power plant and waste-water treatment facility, without which neither the Terminal nor the Refinery can operate ("Shared Facilities"). *See* EPA-441-42; *see, e.g.,* EPA-415 (map); EPA-771 (map). The Complex was formerly operated by HOVENSA, LLC ("HOVENSA"),"[2] until HOVENSA shut down the Refinery (but not the Terminal or the Shared Facilities) in 2012. EPA-259 (consent decree).

In January 2012, HOVENSA publicly announced that it was closing the Refinery, citing more than $1.3 billion in losses over the prior three years due to market conditions. EPA-65, 73 & n.27, 78-79. In April 2012, HOVENSA notified EPA by letter that the company did not have plans to restart the refining process units. EPA-064**,** at 073. In that same letter, HOVENSA also stated that it was retaining its existing CAA Title V operating permit and Territorial Pollutant

[2] HOVENSA L.L.C. was a joint venture between Amerada Hess Corporation and Petroleos de Venezuela, S.A.

Discharge Elimination System ("TPDES") environmental permits[3] because "a Title V permit will be needed even if only oil storage terminal operations remain at the site." EPA-79. The existing Title V and TPDES permits also allow the operation of the Shared Facilities, without which the Terminal cannot operate. *Id*.

In August 2012, HOVENSA applied to renew its TPDES permit, stating that "no new facility refining operations are planned for the renewed permit." *Id*. The application also described three potential operating scenarios, two of which were different schedules for converting the Complex to Terminal-only operations, and one of which was Terminal-only operation with flexibility to return to refining "if future market conditions warrant." EPA-79-80.

In December 2012, HOVENSA sought a 24-month extension of its obligations under a Consent Decree[4] with the United States and the Virgin Islands

[3] A Title V operating permit compiles all of the CAA requirements applicable to an individual source (*e.g.*, from PSD permits) and provides for monitoring, recordkeeping, and reporting to assure compliance. *See* 42 U.S.C. §§ 7661-7661f. The Clean Water Act prohibits the discharge of pollutants into waters of the United States without a permit issued under the National Pollutant Discharge Elimination System. *See* 33 U.S.C.A. § 1311(a). The Virgin Islands Department of Planning and Natural Resources ("DPNR") administers that permitting program within its jurisdiction, and such permits issued by the DPNR are referred to as "TPDES" permits.

[4] This Consent Decree was entered in June 2011 to resolve CAA violations in *United States of America, and United States Virgin Islands v. HOVENSA L.L.C.,* (D.C. U.S.V.I), Civil No. 1:11-cv-00006, and amended in 2021. *See* EPA-259 (first amendment); EPA-491 (second amendment). Under the Consent Decree, HOVENSA agreed to pay a $5.75 million civil penalty and spend more than $700

Government[5] to facilitate a possible sale of the Refinery, stating that the Virgin Islands "Government's stated position is to have the refinery operations reopened or sold, in view of its economic importance to the Virgin Islands." EPA-75 & n.30. In contemporaneous discussions with the Governor of the Virgin Islands, however, HOVENSA sought to exit the refining business altogether and convert the Refinery into an oil storage terminal. EPA-65, 74, 75-76. Between 2012 and 2015, HOVENSA and the Virgin Islands Government continued to negotiate proposals that included conversion of the Refinery to an oil storage terminal. EPA-77.

After May 2013, HOVENSA ceased maintaining Refinery-related equipment and structures at the Complex. EPA-81. After that time, no more maintenance work hours are documented at the Refinery, and there are no maintenance activity reports for subsequent years. *Id*. Since it shut down, periodic inspections revealed numerous failing structures, including structural steel supports in need of repair, rust at risk of falling on personnel, failing fireproofing, and heavy corrosion on large process tanks. *Id*. There is no evidence that these conditions were ever addressed. *Id*.

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million in new pollution controls. Almost none of that work was completed when the refinery was shut down in 2012.

[5] The Virgin Islands Government and the owners of the components of the Complex also have been parties to operating agreements since the Complex was first constructed.

HOVENSA ultimately petitioned for bankruptcy in September 2015, and the Complex became an asset of the bankruptcy estate. EPA-259; EPA-65, 77. Limetree Bay Terminals, LLC ("Limetree Terminals"), purchased the Complex from the bankruptcy estate in January 2016. EPA-259 (consent decree amendment).

3. Limetree's Failure to Operate

Limetree Terminals purchased the Complex with the option, but not the requirement, to rehabilitate and restart the Refinery. EPA-65, 77, 78. The operating agreement between Limetree Terminals and the Virgin Islands Government required Limetree Terminals to: (1) "refurbish, restart, and operate an oil storage terminal at the Facilities"; and (2) spend 18-36 months "explor[ing] available options for resuming petroleum processing operations at the Facilities." EPA-78 & nn.34-35; *see* EPA-713 (operating agreement). If Limetree Terminals chose not to restart the Refinery, those portions not needed for Terminal operation (*e.g.,* portions other than the Shared Facilities) could be dismantled and sold. EPA-78; EPA-713.

Following the purchase, a new entity named Limetree Bay Refining, LLC was formed, and the Refinery—but not the rest of the Complex—was transferred to that entity, which entered into its own operating agreement with the Virgin

Islands Government.[6] Hereafter Limetree Bay Terminals LLC and Limetree Bay Refining LLC are referred to simply as "Limetree" for clarity and brevity.

a. Failed Attempts to Rehabilitate and Restart the Refinery

Limetree attempted to rehabilitate the Refinery, which by that time had been dormant for nearly six years. That attempt took over three years, at a cost of more than $4 billion, with the aid of more than 4,000 workers. EPA-66, 70, 83-84. At the end of that project, Limetree attempted to restart the Refinery several times. Catastrophe ensued.

Limetree's first attempted restart of a few units in December 2020 led to releases of steam and oil from a vacuum tower that required a temporary facility evacuation and assistance from the facility's fire department. EPA-66. Later that month and again in January 2021, a flare released noxious and hazardous hydrogen sulfide and sulfur dioxide gases at levels similar to those that subsequently led EPA to issue a shutdown order under CAA Section 303, 42 U.S.C. § 7603. EPA-66; *see* EPA-446-90 (complaint).

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[6] More specifically, on April 24, 2018, Limetree Bay Refining, LLC was formed as an affiliate of Limetree Bay Terminals. In July 2018, Limetree Bay Terminals entered into an Amended and Restated Terminal Operating Agreement with the Virgin Islands Government, and Limetree Bay Refining entered into a Refinery Operating Agreement with the Virgin Islands. On November 30, 2018, Limetree Bay Terminals, LLC executed a Bill of Sale transferring the Refinery assets to Limetree Bay Refining, LLC.

After those initial failed attempts to run a limited number of units, Limetree attempted a full startup on February 1, 2021, hoping to begin production and commercial sales. EPA-66; EPA-421-22. Three days later, and again in May 2021, the Refinery flare rained oil on the surrounding community causing widespread contamination of vegetable gardens and drinking water cisterns, EPA-66-67, and presented a substantial risk of combustion, fire and explosion. EPA-428, 432; *see* EPA-446-90 (complaint).

For multiple days in April and May 2021, the Refinery also released clouds of potentially ignitable, uncombusted hydrocarbons and toxic hydrogen sulfide and sulfur dioxide gases that closed schools and government offices, required mobilization of the Island's National Guard and fire services, sent downwind residents to the hospital with headaches and nausea, and caused the DPNR to issue an "evacuate or remain indoors" recommendation to those with allergies, asthma and other respiratory ailments. EPA-66-67; EPA-427-28; *see* EPA-446-90.

During this time, the Refinery exceeded the pollution emission limits under its Title V permit more than 70 times, and exceeded its 3-hour rolling average limit for toxic hydrogen sulfide gas at least 660 times. EPA-428-29. Altogether, the Refinery exceeded its permit limits more than half of the time Limetree attempted to operate it. *Id*. [redacted]

[redacted]

b. Federal Enforcement Action at the Refinery

In May 2021, EPA issued an administrative order under CAA Section 303 ("Section 303 Order"), 42 U.S.C. § 7603, requiring that the Refinery temporarily suspend operations because it posed an imminent and substantial endangerment to public health or welfare, or the environment on St. Croix. EPA-446; EPA-064, at 067. The Section 303 Order also required Limetree to (among other things): (1) have independent auditors perform environmental compliance and process area audits, and (2) submit a plan for implementing the corrective measures identified in those independent audits ("Corrective Measures Plan"). EPA-064, at 067. Limetree and other related entities also entered into a stipulation and agreed order with the federal Occupational Safety and Health Administration ("OSHA"). That order ("OSHA Order") was based in part on an OSHA citation that identified numerous maintenance and safety violations at the Refinery that could have resulted in catastrophic equipment failures and exposed workers to fire, toxic chemicals[7] and explosion hazards. EPA-064, at 082.

[7] These toxic chemicals include hydrogen sulfide, volatile organics and other hydrocarbons.

In June 2021, EPA received the requisite audit reports, but not the requisite Corrective Measures Plan. EPA-064, at 067. [redacted] Later that month, Limetree publicly announced that the Refinery would not restart. EPA-064, at 067.

In July 2021, EPA filed a civil action against Limetree under CAA Section 303, 42 U.S.C. § 7603, based on the continuing imminent and substantial endangerment posed by the Refinery. EPA-064, at 067; EPA-447-90. Limetree and EPA entered into a joint stipulation under which Limetree represented that it began to idle the Refinery on May 12, 2021, and "does not intend to restart the Refinery or any Refinery Process Unit at the current time, except . . . as part of the process of bringing the Refinery to a state of indefinite shutdown" ("Joint Stipulation"). EPA-439.

The Joint Stipulation requires, among other things, submission of the Corrective Measures Plan and formal notice to EPA and to the Virgin Islands District Court at least 90 days before the Refinery or any individual process unit is restarted. EPA-064, at 067; EPA-439, ¶ 4. The Joint Stipulation also requires that,

before the Refinery or any process unit restarts, "all measures necessary to eliminate any imminent and substantial endangerment to public health or welfare, or the environment posed by the Refinery or Refinery Process Unit" must be completed. EPA-440, ¶ 6; *see* [redacted] The 90-day notice and Corrective Measures Plan had not been submitted by the time the Determination issued. EPA-064, at 067; *see* [redacted]. Finally, the Joint Stipulation expressly allows the ongoing operation of the Terminal, including the Shared Facilities. EPA-439, ¶ 13.

c. Limetree Bankruptcy

Limetree Bay Refining, LLC and related entities filed for bankruptcy in July 2021, and the Refinery and underlying land became part of the bankruptcy estate. EPA-064, at 067, 082. In September 2021, EPA placed a letter in the "reading room" for the bankruptcy estate informing potential buyers that they may need a PSD permit to restart the Refinery ("Notice Letter"):

> A prospective purchaser may also be required to obtain a Prevention of Significant Deterioration ('PSD') permit under the Clean Air Act to restart the Refinery. 42 U.S.C. § 7475; 40 C.F.R. § 52.21. . .. EPA has required PSD permits for restarting long-dormant facilities . . . because this action can qualify as . . . the construction of a new source . . ..

EPA-199; *see* EPA-061, at 1; EPA-064, at 068.

In contrast to the $4.1 billion that Limetree had recently invested, Port Hamilton purchased the Refinery and the underlying land from the bankruptcy estate for just $62 million.[8] EPA-064, at 067, 083.

4. Port Hamilton's Ownership of the Refinery

The Bankruptcy Order that authorized the sale of the Refinery to Port Hamilton specified that Port Hamilton "must become a party to (i) the Consent Decree [between HOVENSA, the United States and the Virgin Islands] as modified by the First Modification and the Second Modification . . . , and (b) [sic] the Joint Stipulation . . ." EPA-137; *see* EPA-064, at 075 & n.30; *see, e.g.*, [redacted][9] The Bankruptcy Order also expressly requires Port Hamilton to abide by all federal environmental laws, including those regarding environmental permits. EPA-137.

Before it purchased the Refinery, Port Hamilton contacted the U.S. Department of Justice ("DOJ") to inquire about permits needed to run it. EPA-252; EPA-064, at 064. [redacted]

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[8] In 2021, the underlying land was assessed at $34,631,000 for real property tax purposes. *See* Quitclaim Deed No. 0080407, from Limetree Bay Refining, LLC to Port Hamilton Refining and Transportation, LLLP, received on January 24, 2022, by the Recorder of Deeds, St. Croix.

[9] The list of actions that Port Hamilton characterizes as "the only actions necessary prior to restart" on page 2 of that letter is incomplete, [redacted] Port Hamilton's compliance with the Consent Decree and Joint Stipulation are not at issue in this case, however.

[redacted] In an August 2022 statement to the St. Croix legislature, a senior executive for Port Hamilton also stated an expectation that the Refinery would process at least 180,000 barrels of crude oil per day at startup, and would transition to 650,000 barrels per day. EPA-064, at 085; EPA-243.

Under the Consent Decree (as amended), a flare gas recovery system[10] was due to be installed and operational by March 14, 2023.[11] EPA-274, ¶ 50.B.a.i; EPA-254, at 3; EPA-198, at n.2; [redacted]

5. Port Hamilton's Failure to Maintain and Operate

Port Hamilton did not maintain piles of residual petroleum coke[12] at the Refinery after assuming ownership in January 2022, causing a fire to break out in August 2022 that required over three weeks to extinguish. EPA-064, at 082. In September 2022, in response to that fire, EPA inspected the Refinery under CAA

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[10] Flare gas recovery systems capture hydrocarbon vapor that otherwise might be flared, and return it to a facility's fuel gas system where it is treated to remove sulfur and then burned in heaters and boilers for energy. Overloading the Refinery's existing flare gas system caused excessive sulfur dioxide and hydrogen sulfide gas emissions and liquid hydrocarbon droplets that rained down on the surrounding community during Limetree's tenure.

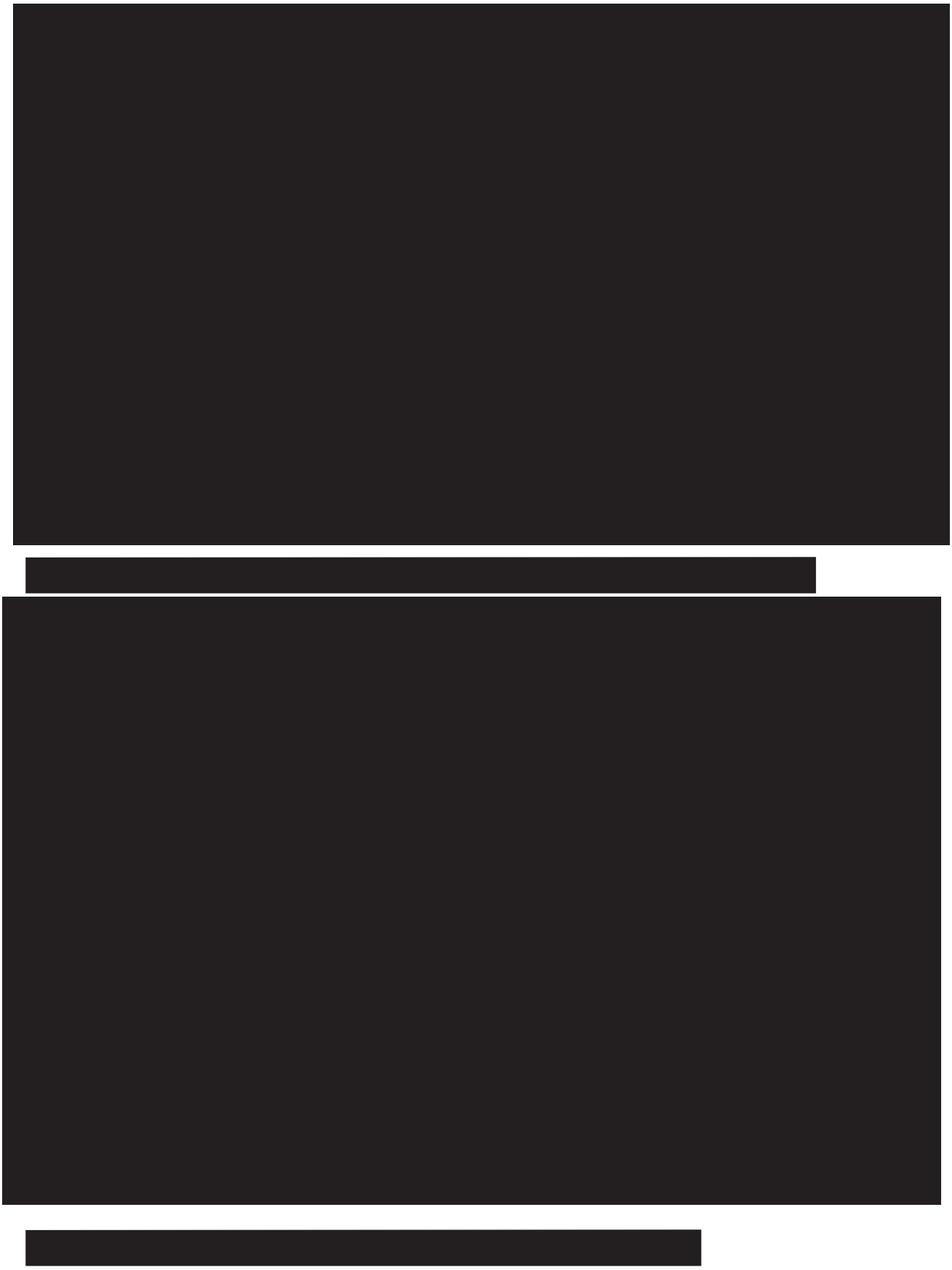
[11] EPA understands that this system still has not been installed; however, Port Hamilton's compliance with the Consent Decree is not at issue in this case.

[12] Petroleum coke is a byproduct of petroleum refining.

Section 112(r)(1), 42 U.S.C. § 7412(r)(1).[13] EPA-064, at 083; EPA-217; EPA-224. The inspection revealed (among other things) that: (1) the Refinery still had no preventive maintenance program; (2) major process units were not being formally inspected; (3) "many process components appear [to] not have been adequately inspected or maintained for significant periods"; and (4) all process units were corroded including "extreme corrosion in many cases to a degree resulting in extreme deterioration (exfoliation)" that "severely compromised integrity and operability." EPA-064, at 083; EPA-217 (inspection report);

[redacted]

[13] CAA Section 112(r) regulates chemical accident prevention at facilities that use extremely hazardous substances. 42 U.S.C. § 7412(r)(1).



To EPA's knowledge, Port Hamilton still has not restarted any petroleum refining. Ocean Point, not Port Hamilton, operates the Shared Facilities primarily for Terminal purposes and bare-bones emergency services (*e.g.*, emergency lights and fire pumps), and Port Hamilton has not been timely paying its share of related expenses.[14] *See, e.g.,* I-01, at 1 (threatened shutoff of power to Refinery from Shared Facilities); *Limetree Bay Terminals LLC v. Port Hamilton Refining &*

[14] The shared services that Ocean Point provides are for a mothballed facility, not refining, and include the treatment and supply of potable and non-potable water, water for firefighting, fire safety and emergency response, and facility security.

Transportation LLLP, No. SX-2022-CV-00227 (V.I. Sup. Ct.) (collection action). Port Hamilton also did not possess a valid TPDES permit for any regulated stormwater outfalls from the Refinery when the Determination issued in November 2022. EPA-064, at 080; EPA-235 ("To have TPDES permit coverage, [Port Hamilton] must apply for its own permit"); EPA-244; EPA-258 ("The [existing TPDES] permit cannot be transferred to . . . Port Hamilton pursuant to 40 C.F.R. Part 122, Subpart D").

C. Permit-Related Proceedings Following the 2012 Shutdown

1. 2018 Preliminary PSD Applicability Letter

In February 2018, Limetree sought a PSD applicability determination for the Refinery, informing EPA that it intended to manufacture a new petroleum product that would meet marine fuel standards referred to as "Marpol." EPA-064, at 065, 071, 085; [redacted] EPA provided a preliminary response in April 2018 that, based on the representations and limited facts provided by Limetree, the Refinery did not appear to have been permanently shut down and accordingly was not a "new source" for PSD purposes ("2018 Letter"). EPA-109; EPA-064, at 065, 070.

While EPA expressed this preliminary view, EPA further made clear that, because it did not have "emissions information and other specifics regarding your planned projects, EPA is not providing any final determination on the applicability

of the PSD regulations to your projects. A final determination on PSD applicability will be made on the basis of the information provided in your application and supporting materials." EPA-115; EPA-064, at 065. Limetree never sought a final determination on PSD applicability from EPA, and the Agency did not make a final determination until the Determination now under review, which was conveyed to Port Hamilton in a letter dated November 16, 2022.

In its 2018 request to EPA, Limetree did not disclose HOVENSA's efforts to convert the Complex to Terminal-only operations. Limetree also made erroneous representations that led EPA to believe that "neither [Limetree] nor HOVENSA made any statements to any party or issued any press release indicating any intent not to restart the plant in the future." EPA-064, at 074. Limetree also erroneously represented that HOVENSA maintained critical Refinery equipment and expended $400 million to "maintain the restart capability" of the Refinery, a representation that is contradicted by the underlying maintenance records. EPA-064, at 080-081. Limetree also did not disclose that the Refinery had deteriorated to the point that more than $4 billion of rehabilitation and new construction would be required over the course of 3 years before Limetree could even attempt to restart it. EPA-064, at 070, 071-072, 073. Limetree also erroneously represented that operation of the Shared Facilities and environmental permit renewals, which were necessary for

Terminal and Shared Facilities operations, constituted ongoing operation of the Refinery. EPA-064, at 079-080; *see* EPA-713.

2. Withdrawn 2020 Plantwide Applicability Limit Permit

To obtain flexibility to make future changes to the Refinery without obtaining PSD permits, Limetree applied for a PAL permit in November 2018. EPA-064, at 065. In December 2020, EPA issued Limetree a PAL permit for the Refinery that never became effective due to an administrative appeal to EPA's Environmental Appeals Board. EPA-064, at 066; *see* 40 C.F.R. § 124.19(m); *Darby v. Cisneros*, 509 U.S. 137, 152 (1993).

EPA responded to public comments in the administrative record for that never-effective PAL permit. One of EPA's responses addressed (among other things) whether the Refinery (1) was an existing source eligible to obtain the requested PAL permit; or (2) had permanently shut down in 2012 and thus constituted a "new major stationary source" that was first required to obtain a PSD permit to resume operating ("Comment Response"). EPA-207-13. EPA stated that its Reactivation Policy should no longer continue to be applied in the same manner that it had been for decades.[15]

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[15] It is unclear why Port Hamilton requests judicial notice of the Comment Response, because it is part of the Response to Comments document in the administrative record for the Determination. *See* EPA-207-13.

Limetree and several environmental organizations filed administrative appeals of the PAL permit with the EPA's Environmental Appeals Board in February 2021. EPA-064, at 065. In March 2021, less than four months after issuing the PAL permit, EPA withdrew it and its entire administrative record, including the Agency's responses to public comments, pursuant to 40 C.F.R. § 124.19(j). EPA-064, at 066; EPA-202. The PAL permit therefore never became effective before EPA withdrew it and its entire administrative record, including the Comment Response. EPA-064, at 066; *see* 40 C.F.R. § 124.15(b)(2).

3. EPA's Final PSD Applicability Determination for the Refinery

In December 2021, before it purchased the Refinery from Limetree's bankruptcy estate, Port Hamilton asked DOJ (among other things) whether any new permits would be required to restart the Refinery. EPA-061. [redacted] EPA responded in March 2022, requesting additional information about Port Hamilton's planned operations so that the Agency could make a final determination. EPA-064, 68; [redacted] EPA-249. EPA also stated that, based on the information already before it—which included new information gleaned from the recent enforcement actions against Limetree and post-shutdown audits and inspections under the Joint Stipulation and OSHA Order—"*there are strong indicators to suggest that the Refinery must obtain a*

PSD permit prior to startup of Refinery operations." EPA-250 (emphasis added); EPA-061, at 062. EPA further stated that, "Because a PSD permit may be required prior to startup of the refinery operations or of any refinery unit(s), EPA strongly recommends that you not proceed with any such actions . . . ." EPA-251; EPA-061, at 062.

Port Hamilton provided additional information to EPA in July 2022. EPA-103, at 104; [redacted] In the midst of its review of that information, EPA sent a letter to Port Hamilton in August 2022 reiterating that the Agency strongly recommended against resuming refinery operations until it had concluded its fact-based review. EPA-233-34; EPA-061, at 062.

On November 16, 2022, EPA issued the Determination that Port Hamilton challenges here. EPA-61-107. EPA found that a PSD Permit is required to restart the Refinery and detailed the factual and legal bases for that determination. More specifically, EPA determined that "restarting the Refinery qualifies as construction of a new major stationary source under the federal PSD permitting regulations," because the Refinery was permanently shut down in 2012 and has not successfully restarted since that time, and Refinery emissions likely will exceed the PSD applicability thresholds for multiple New Source Review-regulated pollutants upon restarting. EPA-061, at 062; EPA-064, at 068-69, 7; [redacted].

EPA explained that the Reactivation Policy, which it has never disavowed in a final action, "is grounded on an interpretation that a major stationary source that has permanently shut down is subject to the PSD regulations at 40 C.F.R. § 52.21 as a new major stationary source upon restart." EPA-087. The Agency reaffirmed the Reactivation Policy as a framework "to determine whether a source that has been in an extended condition of inoperation was permanently shut down." *Id.* (internal citation omitted).

EPA "assess[ed] . . . the applicability of the [CAA's PSD] Program at 42 U.S.C. § 7475 and its implementing regulations at 40 C.F.R. [§] 52.21 to the Refinery," EPA-064, at 064, based on the facts available as of November 2022. Many of those facts had not been put before the Agency in 2018 and 2020, and EPA ultimately found (among other things) that:

(1) HOVENSA intentionally and permanently shut down the Refinery in 2012 (EPA-064, at 065, 073-80, 084);

(2) the Refinery has not been successfully restarted since 2012 (EPA-064, at 065-067, 070-73, 081-82; [redacted]

(3) some environmental permits were allowed to expire, and others that were maintained are required for the Shared Facilities, HOVENSA's planned conversion to terminal-only operations, and ongoing Terminal operations today (EPA-064, at 079-80, 084);

(4) since 2012, the Refinery has not been maintained in a manner that would enable it to successfully restart (EPA-064, at 080-84 & n.44; [redacted]);

(5) "restarting the Refinery would require significant construction and other physical activities that are in addition to the substantial capital and operational investments that Limetree completed before it attempted to restart the refining operations" (EPA-064, at 067, 080-83; [redacted]); and

(6) upon restarting, the Refinery would be by far the largest source of air pollutants in the U.S. Virgin Islands, and it may cause or contribute to violations of a number of NAAQS and PSD increments that were issued or revised after the Refinery was shut down in 2012 (EPA-064, at 068-69, 085; [redacted]).

SUMMARY OF ARGUMENT

1. EPA appropriately interpreted the CAA and its own implementing regulation for the federal PSD permitting program when it determined that the dilapidated former petroleum Refinery in St. Croix would require a PSD permit upon being restored and restarted following its permanent shut down. In particular, EPA reasonably interpreted the term "construction" in 42 U.S.C. § 7475, and the term "new major stationary source" in 40 C.F.R. § 52.21(a)(2)(iii) to

each encompass the reactivation of former sources that are brought back to life long after having been permanently closed and falling into disrepair.

EPA's interpretation of the statute and regulation comports with the statutory language relating to PSD program applicability at 42 U.S.C. § 7475. That CAA provision does not explicitly address or resolve the applicability of the PSD program where construction occurs at a former facility that was previously permanently shut down and then not maintained over a lengthy period. It instead leaves ambiguity which EPA has reasonably resolved through its implementing regulation and interpretation thereof.

Port Hamilton's contrary interpretations of the statutory and regulatory text are not the best readings of those provisions. Those interpretations also undercut Congress' fundamental objective in the Clean Air Act to "promote public health and welfare." 42 U.S.C. § 7401.

2. EPA reasonably applied its regulatory interpretation in the Determination, finding that the dilapidated former petroleum Refinery in St. Croix would require a PSD permit upon being restored and reactivated following its permanent shut down. Based on an extensive factual record—much of which was recently obtained, and which directly contradicts information and representations provided by prior owners—EPA reasonably determined that the Refinery was, in fact, permanently shut down in 2012. EPA further reasonably determined that the

Refinery has substantially deteriorated and has not been successfully restarted since then. EPA thus appropriately concluded that the Refinery, if rehabilitated and started up, will effectively be a new, dominant source of emissions of many regulated pollutants in the U.S. Virgin Islands, and therefore will require a PSD permit as a "new major stationary source" prior to startup.

ARGUMENT

EPA reasonably determined that the St. Croix Refinery would require a PSD permit to resume petroleum refining operations. The PSD program applies to major emitting facilities "on which construction is commenced after August 7, 1977," 42 U.S.C. § 7475, and it is uncontested that the Refinery would qualify as a "major emitting facility." Indeed, it would be the largest pollution source on St. Croix. The interpretive dispute between the Parties is limited to whether engaging in necessary construction and restarting operations at the Refinery following its permanent shutdown in 2012 would result in a "new" major pollution source in St. Croix within the meaning of the CAA and EPA's implementing regulation, 40 C.F.R. § 52.21(a)(2)(iii).

EPA appropriately determined that it would so result after finding that, as a factual matter, the Refinery was permanently shut down in 2012, it has substantially deteriorated since then to the point of requiring significant construction to start up, and will be the dominant source of emissions of a number

of regulated pollutants in the U.S. Virgin Islands when it restarts. Because the Determination was both well-grounded in applicable law and is amply supported by the record evidence, it is neither arbitrary nor capricious and should be upheld.

I. EPA Reasonably Construed the CAA and Its Own Implementing Regulation to Define a Long-Dormant, Major Stationary Source as a "New" Facility That Cannot Restart without a PSD Permit.

A. Standard of Review

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Id.,* at 842. If, after applying the traditional tools of construction, the statute is genuinely ambiguous on a particular issue, the Court must defer to the agency's interpretation if it is reasonable. *Id.*, at 843 & n.11; *see SIH Partners LLLP v. CIR*, 923 F.2d 296, 303-304 (3d Cir. 2019).

An agency's reasonable interpretation of a genuinely ambiguous regulation is entitled to deference under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), if certain criteria are met reflecting that the interpretation reflects an agency's authoritative and expertise-based judgment. *United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (*en banc*). Where *Kisor* deference does not apply, an Agency's interpretation of its regulation is entitled to "respect" "to the extent it has the power

to persuade." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 621 (3d Cir. 2015) (citations omitted).

B. EPA's Restart Interpretation is Fully Consistent with the Statutory Language in Section 7475.

EPA's interpretive position that a dormant facility may require a PSD permit to restart following a lengthy shutdown is well-grounded in both the statutory and the regulatory text. Contrary to Port Hamilton's arguments at 17-18 of its opening brief, EPA's position is consistent with the statutory language at 42 U.S.C. § 7475 addressing the application of the PSD program. Section 7475 provides that the PSD program applies to major emitting facilities "on which construction is commenced after August 7, 1977."[16] This "construction is commenced" language does not explicitly address or resolve the interpretive question presented here: whether that language encompasses a facility that was permanently shut down and then, after many years of dormancy, seeks to restart where that process involves at least some amount of "construction." And it leaves ambiguous when the relevant "construction" activity should be deemed to have been commenced for such a facility.

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[16] Section 7475 itself does not contain the word "new" or specify that the PSD program applies to "new" sources. It is solely EPA's implementing regulations at 40 C.F.R. § 52.21(a)(2) that more explicitly cabin the scope of the program to "new" sources and "major" modifications.

Congress did *partially* define the term "construction" when it specified in 42 U.S.C. § 7479(2)(C) that the term "*includes* the modification (as defined in section 7411(a) . . .) of any source or facility." 42 U.S.C. § 7479(2)(C) (emphasis added). That partial definition makes clear that at least some measures modifying an existing facility qualify as applicable "construction" after 1977. But the express inclusion of certain modifications to existing facilities as "construction" does not answer the precise interpretive question presented here. That is, it does not resolve whether beginning new construction on a deteriorated facility that was previously permanently shut down qualifies as "commenc[ing] construction" within the meaning of Section 7475.

Congress thus left a gap for EPA to fill regarding whether the type of "construction" required to restart a long-dormant facility should trigger application of PSD permitting requirements. EPA has reasonably filled that gap by: (a) promulgating the PSD implementing regulations, including 40 C.F.R. § 52.21(a)(2)(iii) which requires "new major stationary sources" to obtain PSD permits prior to beginning construction; and (b) applying the Agency's reasonable construction of the term "new" in 40 C.F.R. § 52.21(a)(2)(iii).

EPA's gap-filling efforts are particularly sensible when viewed in the relevant statutory context. Congress' fundamental objective in enacting the Clean Air Act was "to protect and enhance the quality of the Nation's air resources so as

to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). And the PSD program specifically was designed to ensure that advanced pollution controls are applied to new stationary sources of air pollution that could threaten attainment of air quality standards. 42 U.S.C. § 7475. Requiring a PSD permit for a facility that has been permanently shut down for a prolonged period best promotes Congress' intent to require best available control technology for what will be, for all intents and purposes, a new facility. *See* EPA-087, at 090-91. Because EPA's resolution of statutory ambiguity is at least reasonable, it should be afforded *Chevron* deference. 467 U.S. at 842-43.

C. EPA Reasonably Construed the Term "New Major Stationary Source" in 40 C.F.R. § 52.21(a)(2)(iii) to Include Facilities That Restart after a Permanent Shutdown.

EPA's interpretive position that a dormant facility may require a PSD permit to restart following a lengthy shutdown is well-grounded in the text of 40 C.F.R. § 52.21(a)(2)(iii). Subsection 52.21(a)(2)(iii) provides that PSD permitting requirements "apply to the construction of any new major stationary source," and "[n]o new major stationary source . . . shall begin actual construction without a permit . . ." 40 C.F.R. § 52.21(a)(2)(iii). Port Hamilton has never disputed that the St. Croix petroleum Refinery is a "major stationary source." *See id.* § 52.21(b)(1)(i)(a). It also is clear that restarting petroleum refining operations at the Refinery will require significant "construction" activity, as that term is defined in

EPA's implementing regulations. *See id.* § 52.21(b)(8) (defining "construction" expansively to include "any physical change or change in the method of operations . . . that would result in a change in emissions"). *See also* EPA-064, at 067 ("the advanced state of corrosion, systemic lack of maintenance, and deficiencies before the 2020 startup of the Refinery, indicate the need for additional construction activity" prior to any resumption of operations); [redacted]

The Parties' dispute here thus boils down to the proper scope of one word in subsection 52.21(a)(2)(iii): the word "new." EPA's regulations do not contain an explicit definition of that word, but the Agency's interpretation of "new" closely adheres to its plain meaning, as reflected in multiple dictionary definitions. As EPA explained in the challenged Determination, one sort of dictionary definition of the word "new" encompasses the concept of "having recently come into existence" or "not existing before." EPA-087, at 088 (citing New Oxford Am. Dictionary, 3d ed., 1180, Oxford Univ. Press (2010) and https://www.merriam-Webster.com/dictionary/new). In the context of air quality management, an industrial facility that has been permanently shut down has effectively ceased to exist because it emits very little or no pollution. From the perspective of the airshed, if an industrial facility is restarted after a long period of dormancy it

comes "into existence" anew upon restart. *Id.* at EPA-089. Thus, a restart following a prolonged shutdown falls within the scope of this definition.

A second type of definition of the term "new" links the word even more expressly to the concept of renewal. For example, dictionaries define "new" as follows: "beginning the resumption or repetition of a previous act or thing;" "made or become fresh;" "already existing, but seen, experienced, or acquired recently or now for the first time;" or "just beginning or beginning anew and regarded as better than what went before." EPA-087, at 088 (citing New Oxford Am. Dictionary, 3d ed., 1180, Oxford Univ. Press (2010) and https://www.merriam-Webster.com/dictionary/ new). That second type of definition explicitly embodying the concept of renewal likewise is fully consistent with EPA's interpretation.

EPA's interpretation of the word "new" as encompassing resurrected plants following a permanent shutdown is also appropriately cabined by limiting principles. EPA does not interpret the term "new major stationary source" to include just *any* sort of resumption by a source of previously-ceased activity. *See* EPA-087, at 089. Thus, when an existing source has only been shut down temporarily, or is capable of resuming its activities without substantial time and effort, EPA does not treat the facility as if it has ceased to exist. Such a facility continues to be treated as an "existing" facility rather than a "new" source when its

activities are resumed.[17] *Id*. And EPA in its Reactivation Policy (*see supra*, at 10), has reasonably articulated a set of appropriate relevant factors that might help inform the Agency's case-by-case assessment as to whether the suspension of operations at a particular facility has been of a sufficient duration and magnitude to amount to a permanent shut-down, thereby triggering the application of PSD requirements upon restart.

D. EPA Was Not Compelled to Apply Port Hamilton's Preferred Interpretation of EPA's Regulations.

There is no statutory or regulatory text, or principle of interpretation, that cabins the scope of "new major stationary source" and limits EPA's discretion in the manner preferred by Port Hamilton. Citing to *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014), and *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), Port Hamilton claims that EPA is required to identify particularly "clear congressional authorization" for the authority to require a PSD permit, as opposed to EPA being able to rely on a more ordinary textual basis for agency authority. Pet. Br. 17. But Port Hamilton overlooks that the "clear congressional authorization" standard applies narrowly to "extraordinary" situations where an agency claims

[17] Because EPA's interpretation is the best construction of the regulation, this Court need not reach the question whether it would be entitled to full deference under *Kisor* or lesser deference under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

"transformative" and "sweeping" power such that the major questions doctrine applies.

This is not a major questions case, as the asserted agency power is neither "transformative" nor "sweeping." *West Virginia*, 142 S. Ct. at 2608. EPA's authority to determine the appropriate scope of the PSD-permitting program lies within the heartland of its statutory authority. And as discussed above, where there is ample "textual basis" supporting the agency's action, no more specific authorization is required. *Id*. at 2609.

Port Hamilton also is incorrect in suggesting that EPA's interpretation is flawed because the Reactivation Policy was not promulgated as a legislative rule through notice-and-comment rulemaking. Port Hamilton appears to misconstrue both the nature of the Reactivation Policy and the manner in which EPA used it in reaching the Determination. EPA did not rely on the Reactivation Policy for authority for its actions—EPA relied on the governing statutory and regulatory provisions and EPA's reasonable constructions thereof. EPA also does not apply its non-binding Reactivation Policy as a legislative rule.

The Reactivation Policy contains a non-binding analytical framework that EPA uses simply for purposes of best assessing the unique facts presented by each source, with the statutory and regulatory provisions themselves continuing to supply the governing law. As EPA explained:

> This policy is grounded on an interpretation that a major stationary source that has permanently shut down is subject to the PSD regulations at 40 C.F.R. 52.21 as a new major stationary source upon restart. *See* Discussion, Section 2, below. EPA developed the factors in the Reactivation Policy to provide a way to determine whether a source that has been in "an extended period of inoperation" was permanently shut down.

EPA-087; *id.*, at EPA-089, EPA-092 ("While labeled a policy, the Agency's approach has been grounded on the legal interpretation . . . that a restart of a permanently shut down facility qualifies as construction of a new source.").

Port Hamilton is further mistaken when it argues that EPA's construction of "new major stationary source" in 40 C.F.R. § 52.21(a)(2)(iii) should be rejected because it reflects a change in position from the 2020 Comment Response in the administrative record for the PAL permit which never became effective. While EPA did articulate a different construction of its regulation in the withdrawn Comment Response, both that Response and the PAL permit were withdrawn in less than four months without ever becoming effective.[18] *See supra*, at 30. Because the Comment Response never became effective, in reaching the Determination, EPA never "changed its position" in a manner that would affect the

[18] The 2018 Letter did not adopt a different regulatory construction. Instead, it merely stated that, "We are applying the current Reactivation Policy to resolve [Limetree's current] issue, but we intend to reconsider the policy in the near future." EPA- 109, n.2.

standard of review or heighten the Agency's burden. *Cf. California v. EPA*, 940 F.3d 1342, 1351 (D.C. Cir. 2019).

In any event, agencies are free to revisit past interpretations and revise them. It is well established that agency constructions of their own regulations and policies are not cast in stone once articulated. Instead, "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (citing *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Serv.,* 545 U.S. 967, 981–982 (2005), and *Chevron U.S.A., Inc. v. NRDC,* 467 at 863–64). Agencies ordinarily need only acknowledge that they are making a change and provide a justification that "need not . . . [be] more detailed than what would suffice for a new policy created on a blank slate." *Encino Motorcars*, 579 U.S. at 221-22 (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

Where a long-standing policy has engendered serious reliance interests, the agency also should provide a reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by the prior policy," although "[no] further justification is demanded by the mere fact of a policy change." *Id.* (quoting *Fox Television,* 556 U.S. at 515-16); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1913-15 (2020). Because the 2020 Comment Response never became effective and was withdrawn with the PAL permit in less

than four months, EPA never had a contrary policy—much less one that was long-standing.

Nonetheless, the PSD Determination now under review satisfied all the criteria for changing such a policy, should that have been necessary. As an initial matter, EPA provided a fulsome and extremely detailed explanation for its construction of the CAA's PSD provisions and 40 C.F.R. § 52.21(a)(2)(iii) and its application thereof. EPA also extensively detailed the record facts that it considered, its analyses thereof, and its reasons for reaching some factual conclusions that differ from those reached in EPA's 2018 preliminary decision and the Comment Response.

Moreover, Port Hamilton accrued no credible "reliance interest" that it would not need a PSD permit. Port Hamilton's purchase of the Refinery from Limetree's bankruptcy estate *post-dated* EPA's withdrawal of the PAL permit and its administrative record. The company also was repeatedly warned—beginning with the Notice Letter to all potential purchasers in the bankruptcy reading room—that the Refinery may require a PSD permit to restart. *See supra,* at 19; EPA-061, at 061-062; EPA-064, at 068; EPA-199 ("A prospective purchaser may also be required to obtain a [PSD] permit . . . to restart the refinery. 42 U.S.C. § 7475; 40 C.F.R. § 52.21. . . . PSD permitting is factually-driven.").

Beginning in March 2022, EPA clearly warned Port Hamilton additional times that it likely *would* need a PSD permit and should not begin construction or restart the Refinery before EPA made a final determination. *See supra*, at 20-21; EPA-233-34; EPA-250 ("strong indicators . . . suggest that the Refinery must obtain a PSD permit prior to startup"); EPA-061, at 061-062; EPA-064, at 068. Therefore, the only credible "reliance interest" that Port Hamilton could have developed is that EPA would perform a factual inquiry to determine whether a PSD permit was required. Consequently, EPA satisfied all the criteria for changing an existing policy or position in the Determination, despite the fact that no contrary position or policy was established by the never-effective and almost-immediately-withdrawn Comment Response.

* * *

For all of these reasons, EPA's clearly-explained construction of the undefined term "new major stationary source" in 40 C.F.R. § 52.21(a)(2)(iii) is not arbitrary or capricious and should be upheld.

II. EPA Properly Determined That the St. Croix Refinery Was Permanently Shut Down and Therefore Will Be a New Major Stationary Source If It Is Restarted.

A. Standard of Review

The standard of review for EPA's fact-based determination that the Refinery was permanently shut down and will be a new major stationary source if restarted

is provided by the Administrative Procedure Act, under which a final agency action may not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); *Pa. Dep't of Human Servs. v. United States*, 897 F.3d 497, 504 (3d Cir. 2018); *Sw. Pa. Growth All. v. Browner,* 121 F.3d 106, 111 (3d Cir.1997); *Alaska Dep't of Env't. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004).

"In applying this standard, [this Court's] 'only task is to determine whether [the EPA] considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) (quoting *Growth Alliance*, 121 F.3d at 111 (alteration in original)); *Pa. Dep't of Human Servs.*, 897 F.3d at 504 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). When doing so, "[a] court simply ensures that the agency has acted within a zone of reasonableness . . .." *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021) (citing *Fox Television,*556 U.S. at 513–514, *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)).

This standard is narrow and highly deferential, and a court is not to substitute its judgment for that of the agency. *Prometheus Radio Project*, 141

S.Ct. at 1158; *Motor Vehicle Mfrs.*, 463 U.S. at 43. This standard also presumes the validity of agency actions, and a decision of "less than ideal clarity" should be upheld if the agency's path may be reasonably discerned. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43-4; *see Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 131 (1985).

B. Introduction

In the Determination and its 23-page, single-spaced Attachment 1, EPA exhaustively detailed the facts it considered and how it applied them to 40 C.F.R. § 52.21(a)(2)(iii) using the Reactivation Policy as a framework. EPA clearly explained how it determined that the Refinery *actually*—not just presumptively—was permanently shut down in 2012 and has not successfully been restarted since that time; why significant additional construction will be required to restart; and why the Refinery will effectively be an entirely new (and the largest) source of emissions in the U.S. Virgin Islands.

While Port Hamilton and EPA disagree about the Agency's conclusions, EPA clearly "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *W.R. Grace*, 261 F.3d at 338 (quoting *Growth All.*, 121 F.3d at 111); *Pa. Dep't of Hum. Servs.*, 897 F.3d at 504. EPA's fact-based determination that the Refinery will be a new major stationary

source under 40 C.F.R. § 52.21(a)(2)(iii), if Port Hamilton chooses to restart it, therefore was not arbitrary or capricious and should be upheld.

C. EPA Reasonably Determined That the Refinery Was Permanently Shut Down.

Determining whether a facility was permanently shut down, such that it is a "new major stationary source" within the meaning of EPA's regulation, is a fact-intensive inquiry. In the Determination, EPA thoroughly analyzed a factual record that was much more extensive and accurate than the information and representations on which the 2018 Letter and Comment Response were based. As the Determination explains at length, the record affirmatively shows that HOVENSA intentionally and permanently shut the Refinery down in 2012 and that the Refinery has not been successfully restarted since then.

1. HOVENSA Permanently Closed the Refinery in 2012.

The detailed examination of the record in the Determination shows that the Refinery portion of the Complex was permanently and intentionally shut down by HOVENSA in 2012. HOVENSA publicly announced that refining operations were shutting down in 2012 due to adverse economic conditions and heavy financial losses, and the company doggedly pursued a conversion of the Refinery into a Terminal-only operation until its bankruptcy in 2015. *Supra*, at 11-13. HOVENSA consistently represented to the Virgin Islands Government that it intended to convert the Refinery to an oil storage Terminal operation, and sought

corresponding revisions to its operating agreement for approximately one year after the shutdown. *Id*. It was the Virgin Islands Government, motivated by a desire to create jobs, that desired a restart of refining operations. *Id.*

Consistent with that clear intention, HOVENSA functionally abandoned the refining portion of the Complex by failing to maintain it after 2013. By the time HOVENSA declared bankruptcy in 2015, the Refinery portion of the Complex was essentially derelict. *Supra,* at 13.

2. Limetree Did Not Successfully Restart the Refinery in 2020-2021.

As Port Hamilton acknowledges in its opening brief , Limetree failed to successfully restart the Refinery in 2020 and 2021. [redacted] The Refinery was besieged by malfunctions that included at least two process blowouts that rained oil on the surrounding community, and releases of toxic gases that sent residents to local hospitals in respiratory distress, closed schools and government offices, and caused the government to instruct vulnerable populations to evacuate or remain indoors. *Supra*, at 15-17.

The impacts were so severe that EPA used its authority under CAA Section 303 to order the Refinery to shut down after determining that the Refinery presented an imminent and substantial endangerment. The United States then

brought an action under CAA Section 303. *Supra,* at 17-19. And despite the more than $4 billion that Limetree had spent over the preceding three years, [redacted] *Supra,* at 16-18; EPA-064, 082.

In the Joint Stipulation between Limetree and the United States, Limetree represented that it had idled the Refinery on May 12, 2021, and "does not intend to restart the Refinery or any Refinery Process Unit at the current time, except . . . as part of the process of bringing the Refinery to a state of *indefinite shutdown*." EPA-439 (emphasis added); *supra,* at 18. [redacted] *Supra*, at 23-27.

3. Port Hamilton Also Has Not Restarted the Refinery.

Port Hamilton distorts the circumstances at the Refinery when it alleges that the Refinery has been "partially operated" and has "remained in a 'hot idle' mode." *See* Pet. Br. 32. That characterization appears to be based on the operation of the Shared Facilities—not any petroleum refining activities. EPA-064; *see also* EPA-441 ¶ 13; *see, e.g.,* EPA-713. Moreover, Ocean Point, not Port Hamilton, is operating the Shared Facilities to support its separate *Terminal* operations because

the Terminal would have to shut down without them. EPA-064, at 079, 080-181; EPA-441, ¶ 13; *see supra,* at 27.

The record also reflects that Port Hamilton did not itself begin maintaining the Refinery upon taking ownership in January 2022, and a fire that burned for three weeks broke out in August 2022 due to its failure to maintain coke piles. *Supra,* at 22-23; EPA-064, at 080-82. EPA's subsequent inspection under CAA Section 112r also revealed that many of the Refinery's process components had not been adequately inspected or maintained for significant periods and were corroded including "extreme corrosion in many cases to a degree resulting in extreme deterioration (exfoliation)" that "severely compromised integrity and operability." *Supra*, at 22-27; EPA-085-86.

Moreover, when the Determination issued in November 2022, the Refinery still was not in an operational state. Aside from the fact that the above issues had not been addressed, there still were outstanding requirements under the Joint Stipulation and under the Consent Decree (as amended) that was entered years ago to address unresolved violations that date back to HOVENSA's tenure. The Bankruptcy Order under which Port Hamilton purchased the Refinery required Port Hamilton to become a party to both of those documents. *Supra,* at 20.

The Joint Stipulation requires that "all measures necessary to eliminate any imminent and substantial endangerment to public health or welfare or the

environment posed by the Refinery or Refinery Process Units" be completed prior to the restart of the Refinery or any Refinery process unit. This would include addressing the maintenance and mechanical issues that caused Limetree's efforts to fail so catastrophically. None of those requirements had been fulfilled by the time the Determination issued.

D. The Refinery Would Require Significant Construction to Restart.

EPA also reasonably determined that the Refinery was not in a condition that would allow it to restart quickly between 2012 and when the Determination issued in November 2022, and that "restarting the Refinery would require significant construction and other physical activities." EPA-064, at 67. This is based on many of the same long-term problems that demonstrated that the Refinery had been permanently shut down, including the systemic lack of maintenance by all Refinery owners since 2013; the advanced state of corrosion and disrepair; and imminent threats of explosion, fire and toxic chemical release identified by OSHA and audits required by the Section 303 Order following Limetree's failed attempts to restart. EPA-064, at 067, 070-71, 080-83; *see* EPA-253-54.

The Joint Stipulation requires a number of actions within specified time frames prior to a startup, and generally requires that "all measures necessary to eliminate any imminent and substantial endangerment to public health or welfare or the environment posed by the Refinery or Refinery Process Unit" be completed

before the Refinery or any process unit restarts. EPA- 440 ¶ 6; *see, e.g., supra,* at 18-19. The Consent Decree also requires, [redacted] the design and installation of a flare gas recovery system [redacted] EPA-439-401, ¶¶ 2, 4, 6-8; [redacted]. None of these actions had been taken by the time the Determination issued.

The Refinery purchase price of $62 million also speaks loudly to its "dire state and poor maintenance . . . at the time of transfer" from Limetree (EPA-064, at 83), especially since the underlying land was contemporaneously assessed for tax purposes at more than $34 million. EPA-064, at 067, 070, 083; *supra*, at 20 & n.8. That dire state was not improved by the time the Determination issued, since Port Hamilton had not even been maintaining the Refinery since its purchase, as described *supra* at 22-27. *See* EPA-064, at 082-83.

E. The Refinery Would Be a New and Dominant Source of Emissions in the Virgin Islands.

EPA also correctly determined that the Refinery will not just be a new source of emissions if it restarts—the Refinery will be by far the largest emitter of air pollutants in the U.S. Virgin Islands. Although it is unclear precisely how much the Refinery actually would emit at each of the three stages of its proposed operation, based on the limited amount of information that Port Hamilton provided to EPA before the Determination issued, the Refinery's emissions of SO_2, NO_x, VOC, PM, $PM_{2.5}$, PM_{10}, H_2SO_4, and CO would exceed the thresholds for PSD

permitting even in the initial phase of operation. EPA-061, at 062; EPA-105, n.5; EPA-064, at 068-069, 085. Moreover, while there is inadequate data from which to project the effect of restarting the Refinery on the Virgin Islands' attainment of the more stringent NAAQS that became applicable after the Refinery shut down in 2012, the Refinery would be by far the largest emitter of a number of PSD pollutants on the Island of St. Croix, potentially jeopardizing the area's attainment status for a number of NAAQS. EPA-064, at 068-69, 085.

* * *

In short, EPA reasonably determined that the Refinery was permanently shut down in 2012 and has not successfully restarted since that time; substantial construction will be required at the Refinery before it actually can restart; and the Refinery will in effect be a new (and the most dominant) emitter of regulated pollutants in the U.S. Virgin Islands.

F. EPA Properly Reached a Final Applicability Determination That Differs from the 2018 Letter.

Port Hamilton is mistaken when it argues that the Determination should be given little or no deference simply because it reflects a change in position from the preliminary PSD applicability determination in the 2018 Letter. The 2018 Letter preliminarily responded to questions posed by Limetree, including addressing whether restarting previously shut down Refinery units would be considered a new stationary source under the Reactivation Policy. While EPA responded to that

question in the negative, the Agency made clear that its statements were not final agency action. EPA stated:

> EPA's responses . . . are based on the information [Limetree] has provided EPA through letters and emails . . .. Since EPA does not have emissions data and other specifics concerning your planned projects, *EPA is not providing any final determination on the applicability of the PSD regulations* to your projects. A final determination on PSD applicability will be made on the basis of the information provided in your application and supporting materials.

2018 Letter, at 5 (emphasis added). Limetree never submitted a PSD permit application or additional supporting materials to EPA, and so the challenged Determination is EPA's only *final* PSD applicability determination since HOVENSA shut the Refinery in 2012.[19]

Moreover, the 2018 Letter was based upon an incomplete set of facts and misleading representations by Limetree, and EPA reasonably chose a different approach after a final and more careful assessment of a much more complete and accurate set of facts. EPA-064, at 065. When Limetree sought the 2018 Letter, it provided press releases, company statements and "various correspondence" to support misrepresentations that HOVENSA and Limetree had always intended to restart the Refinery, and that HOVENSA and Limetree always maintained Refinery equipment in working order and ready for a quick restart. EPA-110.

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[19] Indeed, it is the only final PSD applicability determination since HOVENSA's last PSD permit amendment on August 17, 2011.

EPA also erred in 2018 in accepting the proposition that HOVENSA's and Limetree's operation of the Terminal and Shared Facilities constituted actual operation of the separate Refinery. *Id*.

As EPA later learned, HOVENSA had actually made clear on multiple occasions that it did not intend to restart the Refinery. As EPA also learned after the 2018 Letter, the Refinery had been left to corrode in the salt air because HOVENSA did not even inspect it after 2013, much less perform maintenance. The Refinery was essentially derelict by the time HOVENSA declared bankruptcy in 2015.

In 2021, despite the more than $4 billion that Limetree expended on attempted repairs, it presented an imminent and substantial endangerment and Limetree had to put it in "a state of indefinite shutdown." In addition, the Shared Facilities have been operated primarily to support the *Terminal* and bare-bones emergency services for the Refinery—*e.g*., emergency lights and fire pumps, not petroleum refining—since the Refinery shut down in 2012, because the Terminal cannot operate without their services.

Finally, as discussed above, Port Hamilton was repeatedly warned—even before it purchased the Refinery—that it may require a PSD permit to restart.

The Determination therefore satisfied all of the requirements for adopting new fact-based conclusions as part of a final agency action. Consequently, the

Determination, and the positions and conclusions contained in it, are in no way undermined or rendered arbitrary and capricious by the non-final, preliminary conclusions in the 2018 Letter.

* * *

The Determination and the three attachments thereto clearly detail the information that EPA considered, explain how and why the Agency analyzed it, and articulate a clear connection between the facts that EPA found and the determinations that EPA made. Consequently, the Determination was not arbitrary or capricious and should be upheld.

If the Court were to find otherwise, however, the proper remedy would be to vacate the Determination. 5 U.S.C. § 706(2). Moreover, the scope of the Court's decision should be limited to the questions presented: (1) EPA's construction of "construction is commenced" in 42 U.S.C. § 7475 and "new major stationary source" in 40 C.F.R. § 52.21(a)(2)(iii) with respect to whether facilities which are permanently shut down and then must engage in some amount of "construction" to restart after years of dormancy require a PSD permit as a "new major stationary source"; and (2) EPA's factual determinations regarding the St. Croix Refinery based on the administrative record before it in November 2022. In reaching the challenged PSD applicability Determination, EPA did not consider—and the Determination therefore does not address—the regulation of major modifications

under the PSD program, either in general or with respect to the Refinery. That topic therefore is outside the scope of this case.

CONCLUSION

For the foregoing reasons, the Court should uphold the Determination.

Respectfully submitted,

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