LIMETREE BAY REFINING, LLC

LIMETREE BAY TERMINALS, LLC

May 17, 2021

VIA ELECTRONIC MAIL
Carmen R. Guerrero
Director
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency, Region 2
48 Rd 165, km 1.2. STE 7000
Guaynabo, PR 00968
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Re: Clean Air Act Section 303 Emergency Order ("Order")

Dear Ms. Guerrero:

Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC (collectively, "Limetree") are in receipt of the United States Environmental Protection Agency's ("EPA" or "agency") May 14, 2021 Order directing Limetree to immediately cease "Refinery Operations." As we understand the Order, and as further confirmed in our telephone conversation with Mr. Mugdan, EPA is directing Limetree to cease crude oil refining operations and not the terminal, owned by Limetree Bay Terminals, LLC, or, for example, shared services such as wastewater treatment, turbines, and boilers that provide electricity and potable water to hundreds of Limetree employees that live in Limetree-owned housing. Those operations are unrelated to "refining"—the processing of crude oil into refined petroleum products—and bear no relation to the alleged excess emissions described in the Order. Consistent with Limetree's understanding that the Order is limited to crude oil refining operations, Limetree has already notified EPA that those operations have ceased. As you know, Limetree voluntarily idled the refinery operations early in the morning hours of May 13, 2021.

1. Statement in Response to Paragraph 115(a) of the Order.

Paragraph 115(a) of the Order directs Limetree "[w]ithin one (1) business day of receipt of this Order [to] submit to EPA in writing a statement explaining whether Respondents intends [*sic*] to and is [*sic*] able to comply with this Order." Limetree hereby states:

- With respect to the requirement in ¶ 115(b) to "ensure all Refinery Operations cease," Limetree already did so voluntarily on May 13, 2021.

- Concerning the requirement in ¶ 115(c) to "notify EPA electronically . . . as soon as possible once Refinery operations have ceased," Limetree provided the notification to EPA via email on May 14, 2021.

- As for the remaining requirements in the Order, such as using auditors who have no familiarity or affiliation with the refinery or any entity associated with the refinery to perform compliance and unit/system audits, and including auditing items that are

unrelated to the alleged excess emissions events, Limetree is continuing to evaluate the requirements and is unable to determine within one (1) business day whether it is able and/or intends to comply. As described below, Limetree does not agree that the Order is lawful.

2. The Order Exceeds EPA's Authority.

When it voluntarily shut down its refinery operations on May 13, 2021, Limetree already assured "prompt protection of public health or welfare or the environment." Clean Air Act § 303, 42 U.S.C. § 7603. Consequently, the Order exceeds EPA's authority under § 303 of the Clean Air Act ("CAA"), which states, in relevant part:

> [T]he Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, *may bring suit* on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. *If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action*, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment.

Id. (emphasis added).

As the statute makes clear, the prescribed method for exercising emergency powers under § 303 is for EPA to "bring suit . . . in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants"—*i.e.*, to commence a civil action for an injunction, including by seeking a preliminary injunction and temporary restraining order ("TRO"). *Id.*; U.S. EPA, *Guidance on Use of Section 303 of the Clean Air Act* 8-10 (1983) ("EPA Guidance"). If, and only if, "it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action," EPA may also issue an administrative order to persons it believes are causing or contributing to pollution.[1] CAA § 303. "The administrative order is thus an available enforcement mechanism in those instances where even a TRO might be issued too late to effectively curtail an endangerment to public health." EPA Guidance at 11.

As the U.S. Court of Appeals for the Eleventh Circuit has explained, § 303 enables EPA to issue an emergency administrative order "only in an extremely narrow context." *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1249 (11th Cir. 2003). Even "in the event of an 'imminent and

[1] Only the two Limetree entities can thus be named as allegedly "responsible" or "liable" Respondents under the Order. *See* Paragraphs 1-3.

substantial endangerment,' the EPA does not have unfettered discretion to enter a short-term, injunction-like order. The agency must first resort to a judicial forum; only if that option proves to be impracticable is the EPA justified in issuing such an order." *Id.*; *see also* EPA Guidance at 11 (quoting H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 327-28 (1977) ("the section provides that if it is not practicable to assure prompt protection of health *solely* by commencement of a civil action, the Administrator may issue such orders as may be necessary for this purpose" (emphasis added))). In other words, issuing an emergency administrative order is intended to be a bridge to obtaining a TRO in federal court, not an alternative.

Here, EPA states in conclusory fashion that "[i]ssuance of this Order is necessary to assure prompt protection of public health or welfare or the environment because it is not practicable to wait for the commencement of a civil action in United States District Court to assure prompt protection from additional air emissions events." Order ¶ 112. But the Order does not even attempt to explain how or why that is the case, particularly when Limetree voluntarily shut down refinery operations *before* EPA issued the Order. Nor does the Order indicate EPA seriously considered, much less attempted, seeking a TRO before the agency invoked emergency powers that Congress authorized "only in an extremely narrow setting (public emergency), as a last resort (if suing in federal court is impracticable)." *TVA*, 336 F.3d at 1249.

Furthermore, the Order requires the shutdown of all "Refinery Operations," but EPA's allegations describe four discrete incidents that allegedly "had an immediate and significant health impact on multiple downwind communities." EPA has identified three processes or units in the refinery that it claims are the cause of the imminent and substantial threat—the operation of the Coker Unit, Flare #8, and the amine/sulfur recovery unit. Yet the Order is not limited to the operation of these three units/processes—which according to EPA are the cause of the alleged endangerment—and instead orders the shutdown of the refinery as a whole. This is yet another reason why the Order exceeds EPA's authority.

Also, the Order contains numerous factual errors that form the basis for EPA's conclusion that there is an imminent and substantial risk to human health or the environment. For example, the description of the "First May Incident," in which there were complaints of an odor in the west regions of St. Croix, fails to consider other obvious potential sources of the odor investigated by the government at the time, including the landfill, which was continuously on fire and generating a strong odor during the May 5-7 time period.[2]

In sum, there is no imminent danger to the public health or welfare or the environment while the refinery is shut down. And the scope of the shutdown that EPA seeks is disproportionate to address EPA's allegations, which is impermissible under the statute. Further, the agency cannot

[2] The purpose of this letter is not to document and respond to the many factual errors in the Order, and Limetree reserves all its rights in that regard.

justify its conclusory assertion that it is "not practicable" to commence a civil action under the present circumstances. Therefore, EPA exceeded its authority when it issued the Order[3]

3. The Order's Audit Requirements Are Impermissible and Unnecessary.

In addition to ordering Limetree to cease refinery operations that were already shut down, the Order contains overbroad and unreasonably cumbersome audit requirements that fall outside the scope of EPA's authority to issue an emergency administrative order under CAA § 303. As the agency's guidance acknowledges, "[b]ecause of the potential adverse economic impact of such an order upon the source, the order should require no more than what is clearly necessary to curtailing hazardous emissions." EPA Guidance at 12. Of course, any allegedly hazardous emissions were curtailed when Limetree voluntarily shut down the refinery. Thus, the environmental and process unit audit requirements are not "clearly necessary" to "assure prompt protection of public health or welfare or the environment" until EPA can commence a civil action. CAA § 303; EPA Guidance at 12. If EPA believes each and every component of the audit requirements in the Order is necessary "to stop the emission of air pollutants causing or contributing to" the "imminent and substantial endangerment to public health or welfare, or the environment," then CAA § 303 requires EPA to make its case to a federal judge and satisfy the burden of proof for obtaining injunctive relief.

However, EPA appears to have crafted the audit requirements in the Order to *avoid* judicial review. Section 303 limits the duration of the Order to "a period of not more than 60 days, unless the Administrator brings an action [in federal district court] before the expiration of that period." CAA § 303. Notably, the Order requires Limetree to complete the audits set forth in ¶ 115 "by the earlier of *30 days* after EPA's approval of a list of auditors . . . or *42 days* after issuance of this Order," and to "submit to EPA a detailed plan that addresses" the audit reports with "an expeditious schedule for implementation of all corrective measures" within "*56 days* of the issuance of this Order[.]" Order ¶ 115(e), (l) (emphasis added). The agency's attempt to fashion its own injunctive relief *and require completion* before the Order's expiration compels the agency to commence a civil action violates both the letter and purpose of § 303. It also contravenes EPA's own guidance, which states that "the order may only last [for a temporary time period], *during which time a TRO application and civil suit can feasibly be filed*," and that "the basis of the order *may be challenged by any source subject to it in a proceeding to enforce the order*." EPA Guidance at 12 (emphasis added).

Moreover, the Order's audit requirements appear to require Limetree to try to find evidence to support EPA's Order or to lay the groundwork for a later enforcement action, rather than abating an imminent risk to human health or the environment. That is, by ordering Limetree to conduct a broad environmental audit, as well as audits on the flare system, Coker unit, and amine/Sulfur Recovery Unit, to find purported evidence of "imminent or substantial endangerment," EPA

[3] Because Limetree voluntarily ceased refinery operations, there likewise is no "imminent and substantial endangerment to public health or welfare, or the environment" that would justify the issuance of injunctive relief under CAA § 303. Nothing in this letter is intended or should be construed as a waiver of any rights or defenses Limetree has or may have in the event EPA commences a civil action.

essentially proves the point that the Order was, at best, prematurely issued without evidence that these units were actually causing an imminent or substantial endangerment. A § 303 emergency administrative order is not the place to require a Respondent to find support for EPA's theories on endangerment, proof of material noncompliance with environmental laws, or require a Respondent to establish the need for multi-million-dollar additional controls that would take years to install. It is meant only to assure prompt protection of public health or welfare or the environment until EPA can commence a civil action.

Limetree has already planned to perform audits to ensure that its equipment is safe and can be operated without posing a risk to human health or the environment. In contrast, the Order's requirements for performing the proposed audits are unnecessarily complicated and could impede the progress of the investigations. Just as one example, the Order's requirements for selecting auditors are overly restrictive and will have the undesired effect of eliminating many very well-qualified contractors with institutional knowledge and the best ability to quickly assess compliance and process unit integrity because of that knowledge. Simultaneously with this letter, Limetree will be sending EPA a proposal for a voluntary audit program that will incorporate certain changes to the Order's requirements, which we believe will most quickly and effectively achieve the mutual goals of Limetree, EPA, and VIDPNR. Limetree welcomes the opportunity to discuss its audit proposal with EPA so that together, we can craft a more reasonable and focused audit that will lead expeditiously to the safe restart and operation of the refinery while minimizing the loss of jobs and other negative economic impacts on the U.S. Virgin Islands.

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Limetree welcomes the opportunity to discuss the Order and its contents with the agency and looks forward to working cooperatively with EPA and VIDPNR to safely and expeditiously restart and operate the refinery.

Sincerely,

Jeffrey Rinker

cc: Franklin Quow, Esq. (via electronic mail)
Neil Morgan (via electronic mail)
Craig Miller (via electronic mail)
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