

ATTACHMENT 1

Application of EPA’s Reactivation Policy Permanent Shutdown Factors to the Port Hamilton Refining and Transportation LLLP Refinery¹

I. Introduction

The U.S. Environmental Protection Agency (“EPA”) provides its assessment in this Attachment of the applicability of the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) Program at 42 U.S.C. § 7475 and its implementing regulations at 40 C.F.R. 52.21 to the Refinery at 1 Estate Hope in Christiansted, St. Croix, U.S. Virgin Islands (the “Refinery”). EPA concludes that the proposed restart of the Refinery qualifies as construction of a new major stationary source under applicable PSD permitting regulations, as interpreted by EPA and applied through the Agency’s Reactivation Policy, described below. Based on this conclusion, and EPA’s analysis of the Refinery’s increase in emissions (*See* Section IV, below) using information from PHRT and the previous owners, PHRT must apply for and obtain a final effective PSD permit prior to restarting the Refinery or beginning actual construction of the Refinery, as defined in 40 C.F.R. 52.21(b)(11). The PSD permit application should include, among other information, analyses of air quality impacts, environmental justice, and Best Available Control Technology.

In 1999, the EPA Administrator issued a Clean Air Act Title V Order articulating how the PSD requirements may apply to reactivation of shutdown sources. *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2 (June 11, 1999) (“*Monroe*”). In the *Monroe* Order, the Administrator indicated that “EPA has a well-established policy that reactivation of a permanently shut down facility will be treated as operation of a new source for purposes of PSD review” (“Reactivation Policy”), citing to five prior Agency determinations on reactivation dating back to 1978.²

As discussed in Section III, below, determinations under EPA’s Reactivation Policy require a detailed examination of the facts and circumstances related to a shutdown source and application of six factors set out in the Reactivation Policy. Because Reactivation Policy analyses are fact-sensitive, this discussion begins with detailed background information in Section II followed by an assessment under the Reactivation Policy in Section III and an analysis of emissions increases at the Refinery in Section IV.

¹ References to PHRT throughout this Attachment should be understood to include both PHRT and West Indies Petroleum Limited (“WIPL”) as purchasers of the Refinery in the bankruptcy proceeding.

² On December 2, 2020, EPA criticized the Reactivation Policy and stated that the Agency would not follow it in the context of an action to issue a final Plantwide Applicability Limit (PAL) permit to Limetree Bay Refinery, LLC and Limetree Bay Terminals, LLC (Limetree). That action did not become final and effective. Even if the December 2020 action had taken effect and rescinded the Reactivation Policy, for the reasons described in Attachment 2, the Policy reflects the EPA’s current views and the Agency intends to continue following it.

II. Background

A. History of Refinery Shutdown and Attempts at Startup

The facility's unusual history over approximately the last decade provides factual support for EPA's determination that the Refinery is a new source. As discussed in detail below in Section III, the evidence indicates that HOVENSA's initial intention in 2012, when it ceased operations, was to permanently shut down the Refinery and convert it to an oil storage terminal.³ However, at the urging of the U.S. Virgin Islands Government, HOVENSA instead sought to find a buyer. It took nearly four years after the February 2012 shutdown, and a bankruptcy proceeding, before HOVENSA did so. Limetree Bay Terminals, LLC and/or its corporate parent or associated business entities acquired the Refinery in January 2016 with the option – but without the obligation - to rehabilitate and restart the Refinery.⁴ Limetree Bay Terminals, LLC later transferred certain of the Refinery assets to Limetree Bay Refining, LLC.⁵

On February 1, 2018, approximately two years after Limetree's⁶ purchase, Limetree informed EPA of its intention to produce refined petroleum products that would meet new marine fuel standards (“MARPOL project”) by January 1, 2020 and sought EPA's view⁷ on whether restarting the shutdown Refinery would require a PSD permit under EPA's Reactivation Policy.⁸ EPA responded on April 5, 2018 in a letter from then Assistant Administrator William Wehrum (“EPA's 2018 letter”) which stated that, based on the information provided by Limetree, the Refinery “was not permanently shut down and should not be considered a ‘new source’ for purposes of PSD applicability.” The information regarding the scope of the restart of the Refinery has changed substantially since that statement and EPA no longer supports this view. Further, EPA's 2018 letter sent a clear message that since EPA did not have all the specifics regarding Limetree's plans, a final determination would be left for a later time.

EPA also expressed the view that the Refinery had not permanently shut down in EPA's 2020 response to public comments on Limetree's application for a Plantwide Applicability Limit Permit.⁹ However, this view was also not reflected in a final EPA determination. On February 3, 2021, both Limetree and environmental organizations filed petitions for review of EPA's final Plantwide Applicability (“PAL”) permit with the EPA Environmental Appeals Board (“EAB”).

³ See, e.g., *Fourth Amended Agreement Between the USVI, HOVENSA, Hess Oil VI Corp, and PDVSA* (April 3, 2013), transmitted as enclosure to Letter from Governor John P. de Jongh, U.S. Virgin Islands, to Honorable Shawn-Michael Malone, President, U.S. Virgin Islands Legislature (July 12, 2013), available at https://stthomassource.com/legacy_files/userfiles/file/2013%20July/07132013-HOVENSA%20AGREEMENT%20DOCUMENTS.pdf.

⁴ See Section III.B.3, below, for a discussion of the absence of an obligation to rehabilitate the Refinery.

⁵ Complaint, *Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC, Civ. A. No. 1:21-cv-264* (D.Ct. USVI July 12, 2021), at <https://www.justice.gov/opa/press-release/file/1411231/download>.

⁶ Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC are collectively referred to in this Attachment as “Limetree.”

⁷ Limetree approached EPA with this question because the federal PSD regulations at 40 C.F.R. 52.21 apply to the Refinery since the U.S. Virgin Islands does not have an approved territorial PSD program. Instead, EPA Region 2 implements the federal PSD requirements in the territory. 40 C.F.R. 52.2779.

⁸ Letter from LeAnn Johnson Koch, Perkins Coie, to John Filippelli, EPA Region 2 (Feb. 1, 2018).

⁹ EPA Plantwide Applicability Limit Permit for Limetree Bay Terminals, LLC and Limetree Bay Refining, LLC, PAL permit No. EPA-PAL-VI001/2019, Response to Comments (Dec. 2, 2020).

The EPA’s regulations at 40 C.F.R. Part 124 provide that a permit doesn’t become effective if a party files a timely request for EAB review. On March 25, 2021, EPA withdrew “the [Limetree] PAL permit and its administrative record in its entirety, including the Agency’s response to comments.”¹⁰ As a result, the EAB remanded the PAL permit for further action within EPA. Thus, EPA has not issued a final determination on PSD applicability for the Refinery until today.

Limetree informed EPA that it began planning for construction activities at the site in late 2017¹¹ and then initiated construction in mid-2018. After approximately three years of planning and intensive physical rehabilitation of the Refinery, and spending approximately \$4.1 billion¹² using over 4,000 workers,¹³ Limetree’s attempted restart in late 2020 was accompanied by significant noncompliance.

An examination of Limetree’s failed restart and accompanying noncompliance is instructive in EPA’s Reactivation Policy factors analysis because the facts underscore that the Refinery needed more time before restarting (*See* Section III.A, below, on the *Monroe* factor related to the length of time the facility was shut down). In particular, Limetree made several unsuccessful attempts to start up the Refinery beginning in the last quarter of 2020, but repeated problems at the Refinery resulted in several startups and shutdowns and, finally, complete cessation of operations.

During the months immediately following the 2020 startup, the Refinery experienced significant violations of its Clean Air Act Title V permit and the Clean Air Act’s New Source Performance Standards (“NSPS”) Subpart Ja requirements, including the following: (1) the Refinery caused a large cloud of steam and light hydrocarbons from Vacuum Tower #3 on December 8, 2020 that resulted in the temporary evacuation of some employees and the mobilization of the Refinery’s fire department; and (2) Hydrogen Sulfide (“H₂S”) concentrations at Flare #8 exceeded the NSPS limit of 162 ppmv including levels higher than 5,000 ppmv for a number of hours in December 2020 and 20,000 ppmv for at least 5 hours on January 25, 2021.¹⁴ Ambient H₂S and sulfur dioxide (“SO₂”) levels modeled based on H₂S measured in gas combusted in the flare during some periods in January 2021 were at least as high as the levels that later led EPA to issue an emergency order under the Clean Air Act, discussed below.

Limetree then indicated it would again operate the facility in February 2021 to begin production and commercial sales. In February and May 2021, the Refinery experienced a flare rainout on two occasions, which resulted in oil droplets raining on local residential areas, causing

¹⁰ Administrator Michael S. Regan, *Withdrawal of Plantwide Applicability Limit Permit No. EPA-PAL-VIOO1/2019* (March 25, 2021), at https://www.epa.gov/sites/default/files/2021-04/documents/withdrawal_decision_applicability_limit_permit_signed.pdf.

¹¹ In late 2017, Limetree informed EPA of its plans to take advantage of favorable market conditions that it expected would result from the new MARPOL fuel requirements, which became effective on January 1, 2020.

¹² *In re: Limetree Services, LLC*, Case No. 21-32351, U.S. Bankruptcy Court, Southern District of Texas, Declaration of Mark Shapiro, Senior Managing Director for GlassRatner Advisory & Capital Group LLC, Chief Restructuring Officer for Limetree (July 13, 2021).

¹³ Statement of Bob Weldzius, Senior Vice President of Refining at Limetree Refinery, EPA Public Hearing Transcript, Plantwide Applicability Limit Public Hearing, Nov. 8, 2019.

¹⁴ Complaint, *Limetree Bay Refining, LLC and Limetree Bay Terminals, LLC, Civ. A. No. 1:21-cv-264* (D.Ct. USVI July 12, 2021), at <https://www.justice.gov/opa/press-release/file/1411231/download>.

widespread contamination including contamination of vegetable gardens and cisterns used by residents for drinking water and other household water needs. In addition, on two occasions, each lasting multiple days in April and May 2021, the Refinery emitted H₂S, SO₂, and/or uncombusted hydrocarbons at levels that had immediate and significant adverse impacts on downwind residents and required multiple public health advisories, the closure of schools and government offices, and the mobilization of the Virgin Islands National Guard and Fire Service.¹⁵ The incidents caused nausea and headaches among residents and a recommendation by the U.S. Virgin Islands Department of Planning and Natural Resources (“DPNR”) to residents with allergies, asthma and other respiratory ailments to evacuate or remain indoors.

The health and environmental impacts during the Refinery’s brief periods of operation between late December 2020 and approximately May 14, 2021 were of such grave concern, and so far outside the bounds of compliance, that EPA took the unusual step of exercising emergency powers under the Clean Air Act by issuing an order on May 14, 2021 under Section 303 of the Clean Air Act, 42 U.S.C. § 7603 (“Section 303 Order”) based on the imminent and substantial endangerment to public health or welfare, or the environment, on St. Croix. The Section 303 Order to Limetree required, *inter alia*, the suspension of operations of the refinery. EPA had previously issued such an order requiring a facility to shut down only approximately four times in the history of the Clean Air Act.

After ceasing operations in May 2021, Limetree announced in June 2021 that it would not restart. The Refinery ended up in a second bankruptcy proceeding, which resulted in PHRT’s ownership of the Refinery. PHRT’s \$62 million bid for a Refinery that had recently invested \$4.1 billion raises questions about the physical, financial and regulatory viability of the facility. The Refinery has now been shut down for an additional eighteen months. EPA’s understanding is that 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. As discussed in Section III.E, below, 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.

The May 14, 2021 Section 303 Order required Limetree to hire independent auditors to conduct both an environmental compliance audit and process area audits and submit a plan including a schedule for implementing corrective measures identified in audit reports produced by the auditors. The audit reports were submitted to EPA on June 24 and 25, 2021. In addition to EPA’s administrative Section 303 Order, on July 12, 2021, the U.S. Department of Justice filed a civil action against Limetree under Section 303 of the Clean Air Act, as well as a Joint Stipulation between the United States and Limetree, which the bankruptcy court later ordered PHRT to become a party to as a condition of the purchase of the Refinery. The Joint Stipulation requires, *inter alia*, submittal of the required plan and a schedule for implementation of all corrective measures set forth in the audit reports, as specified in EPA’s Section 303 Order. The plan must be submitted by no later than ninety days prior to any restart of the Refinery or any refinery process unit. It has not yet been submitted to EPA.

¹⁵ *Id.*

The audit reports submitted to EPA on June 24 and 25, 2021, contain additional facts that are germane to the Reactivation Policy analysis but are claimed to be Confidential Business Information (“CBI”). As such, Attachment 3, Additional Facts Claimed to be Confidential Business Information, provides further information.

Due to the unusual history at the Refinery, EPA made clear both during the Limetree bankruptcy proceeding and after PHRT assumed ownership that PSD permit requirements might apply to the restart of the Refinery. A September 24, 2021 letter from EPA to all potential bidders in the bankruptcy proceeding, which was placed in the bankruptcy case reading room, made clear that a PSD permit may be required and explained that “EPA has required PSD permits for restarting long-dormant facilities that qualify as major stationary sources.”¹⁶ On March 2, 2022, the U.S. Department of Justice alerted PHRT to the September 24, 2021 letter again.¹⁷ Also on March 22, 2022, EPA informed PHRT via letter that, based on currently available information, “there are strong indicators to suggest that the Refinery must obtain a PSD permit prior to startup of Refinery operations.”¹⁸ The letter also sought additional information from PHRT on past and future changes at the Refinery to evaluate the issue further before making a final determination as to PSD applicability. PHRT provided an initial response to EPA on July 15, 2022 and a corrected response on July 27, 2022 (“PHRT’s July letter”).¹⁹ The response is claimed to be CBI. As such, additional information from the response can be found in Attachment 3, Additional Facts Claimed to be Confidential Business Information.

B. Continuing Air Quality Impacts

In addition to the acute impacts on the St. Croix community between late 2020 and May 14, 2021, there are potential longer-term air quality impacts. The long shutdown period since 2012 has resulted in uncertainty about the Refinery’s impact on the National Ambient Air Quality Standards (“NAAQS”) upon restart because there have been changes in air quality planning requirements since February 2012. After HOVENSA’s last pre-shutdown air quality analysis was conducted, EPA promulgated several new or revised health-based NAAQS: 1-hour SO₂, 1-hour NO₂, and 8-hour ozone NAAQS, and 24-hour and annual PM_{2.5} NAAQS and PSD increments. Further, there are no existing air quality demonstrations to assess attainment of any of the new or revised NAAQS that include projected emissions from the Refinery (which, upon startup, would be by far the largest emitter on the island) because the Refinery was shut down and not considered during the EPA designations process. Therefore, EPA does not have any information on the air quality impacts from the Refinery related to the new or revised health-based NAAQS or PM_{2.5} PSD increments, other than some ambient data that measured violations of the 1-hour SO₂ NAAQS prior to the facility’s 2012 shutdown. Due to the high level of emissions from any Refinery, and the physical configuration of this particular facility as well as

¹⁶ Letter from Dore La Posta, EPA, to All Potential Buyers of Limetree Bay Refinery, September 24, 2021.

¹⁷ Letter from Myles E. Flint, II, U.S. Department of Justice, to Julie R. Domike and Thomas Eagan, March 2, 2022.

¹⁸ Letter from Liliana Villatora, US EPA, to Julie R. Domike and Thomas Eagan, March 22, 2022.

¹⁹ Letter from Julie R. Domike and Thomas Eagan, Counsel for PHRT, to Suilin Chan and Joseph Siegel, EPA, July 27, 2022.

the prevailing trade winds, there are uncertainties about whether the Refinery would cause or contribute to violations of new or revised NAAQS and PSD increments.²⁰

C. The St. Croix Community and Environmental Justice

In addition to the acute impacts from the rainout of oily mist, the H₂S and SO₂ exceedance incidents, the longer-term air quality impacts from the Refinery and lack of air quality demonstrations related to the new NAAQS, the vulnerable community neighboring the Refinery has already experienced manifold health and environmental impacts over decades from multiple sources including HOVENSA and Limetree. In addition, impacts from climate change-related storm events will increase the vulnerability of the community.

Even before the Refinery rained oil on homes and cisterns in the nearby community and exposed the residents to an oily mist and high levels of H₂S, SO₂, and uncombusted hydrocarbons, EPA determined that the community near the Refinery is particularly vulnerable as a predominantly low-income and minority population that experiences environmental and other burdens. In September 2019, EPA issued an environmental justice analysis along with the draft PAL permit. The analysis stated that the area of south-central St. Croix, where the Refinery is located, is an industrialized area with a large residential population. There are several schools, a hospital, and other locations that include sensitive populations. Even without the Refinery's emissions, the community is burdened by several nearby complex environmental challenges including the St. Croix Renaissance Industrial park that was reported to cause health issues due to irritants from Red Mud, odor from sources in the area that resulted in the closing of nearby schools, fires from the Anguilla landfill, proximity to a wastewater treatment plant, noise and traffic issues associated with the Henry E. Rohlsen Airport, and emissions from large ships docked at the coast.

The industrialized nature of southern central St. Croix, in the vicinity of the Refinery, stands in contrast to the rest of the island of St. Croix and even more broadly, the rest of the U.S. Virgin Islands, which is not as industrialized. The island of St. Croix was severely damaged during Hurricanes Maria and Irma in 2017, leaving many areas surrounding the Refinery's location, as well as the rest of St. Croix, in much need of environmental recovery.

III. Analysis of Reactivation Policy Factors - Refinery Restart

Sections I and II, above, provide important factual context for EPA's Reactivation Policy analysis presented in this Section which concludes that the Refinery was permanently shut down and that restart of the units needs to be evaluated as if the source were new. In prior EPA analyses, whether a shutdown is considered permanent depends in part on the intent of the owner or operator at the time of shutdown, based on all the facts and circumstances. *Monroe* at 8. After two years, however, there is a presumption that the shutdown is permanent, unless the facts and

²⁰ EPA advised PHRT that it must comply with ongoing Regional Haze obligations under Clean Air Act §§ 169A and 169B and 40 C.F.R. 51.308 and "notify EPA 60 days in advance of startup and resumption of operation of refinery process units and provide required information." Letter from Paul Simon, Acting Regional Counsel, EPA Region 2, to Julie R. Domike and Tom V. Eagan, Attorneys for PHRT, *Re: Questions Regarding Refinery Restart* (March 2, 2022).

circumstances rebut this presumption by indicating a continuing intent to reopen by the owner. The six factors that EPA has examined in prior situations where a source has been shut down or dormant for more than 2 years to evidence the continuing validity of the original intent not to permanently shut down are:

- A. Length of time the facility has been shut down
- B. Time and capital needed to restart
- C. Evidence of intent and concrete plans to restart
- D. Cause of the shutdown
- E. Status of permits
- F. Maintenance and inspections during shutdown

When EPA analyzes these factors, “no single factor is likely to be conclusive in the Agency’s assessment” and the final determination will often involve a judgment regarding whether the owner’s actions at the facility during shutdown support or refute any express statements regarding the owner’s or operator’s intentions. *Monroe* at 9.

EPA’s consideration of the six factors in the context of the facts and circumstances of the Refinery lead EPA to the conclusion that the 2012 shutdown was permanent. The facts and circumstances include, among others, the shutdown by HOVENSA in 2012, the project to refurbish the Refinery by Limetree beginning in 2018, the failed attempts to restart the Refinery in late 2020 and 2021, non-operation since that time, and the need for PHRT to continue to refurbish the refinery before it can be operated again. While some factors point more strongly in the direction of permanent shutdown than others, when taken together, the factors in this case lead EPA to the conclusion that the Refinery was permanently shut down and thus would constitute a new source upon restart by PHRT.

The analysis that follows includes some information that either did not exist in 2012 or did not become known to EPA until after issuance of EPA’s 2018 letter and the Response to Comments (“RTC”) supporting EPA’s December 2, 2020 final PAL permit which was later withdrawn by Administrator Regan on March 25, 2021. With this new information, including a cost of \$4.1 billion using 4,000 workers over several years, 8.5 years of shutdown prior to an attempted startup that substantially endangered human health and the environment, a total of over 11 years before the new owners plan to restart, and long-term systemic maintenance failures at the Refinery, among others, the balance of factors support a conclusion that the Refinery was permanently shut down in 2012.

A. Length of time the facility has been shut down and time and capital to restart

The first two factors, length of time the facility has been shut down and the time and capital to restart, are so interconnected in this matter that they are discussed together in this subsection. As noted above, the Refinery was shut down from February 2012 until the last quarter of 2020, followed by several months of failed attempts to restart and significant noncompliance in 2020-21, resulting in the May 2021 shutdown and EPA’s Section 303 Order in addition to a subsequent judicial enforcement action and Joint Stipulation. The Refinery has not resumed operations to date. Therefore, the Refinery was shut down initially for over 6 years

before actual construction began, unable to restart for over 8.5 years after HOVENSA's shutdown and, as of today, unable to restart in its present physical condition, which is over 10.5 years since HOVENSA's shutdown in 2012. At a July 14, 2022 U.S. Virgin Islands Legislature hearing, PHRT testified that the company hopes to restart the Refinery in the second quarter of 2023,²¹ which would be 11.25 years after the 2012 shutdown. However, even apart from the PSD permitting question, EPA questions the feasibility of starting the refinery on this timetable because of, among other things, the need for PHRT to address other significant environmental compliance requirements prior to restart.²² These facts strongly favor a finding that there was a permanent shutdown.

An important guiding principle articulated in *Monroe* is that shutdowns of more than two years are presumed to be permanent. In particular, after two years of not operating, "it is up to the facility owner or operator to rebut the presumption" to avoid treatment as a new source by demonstrating a continuous intent to restart. EPA has consistently applied the two-year presumption. *See, e.g., Noranda Lakeshore Mines*, Memo from John Seitz, Director, Stationary Source Compliance Division, OAQPS, to David Howekamp, Director, Air Mgt. Div. Reg. IX (May 27, 1987); *Watertown Power Plant, South Dakota*, Memo from John B. Rasnic, Director Stationary Source Compliance Division, OAQPS, to Douglas M. Skie, Chief, Air Programs Branch (Nov. 19, 1991); *PSD and NSPS Applicability to a Reactivated Source*, Memo from Director, Division of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Reg. 2 (Sept. 6, 1978).²³

Limetree provided factual information in a letter dated February 1, 2018, which the EPA considered before sending its 2018 letter indicating that the Refinery was not permanently shut down. Much of the information provided to EPA was either incorrect at the time or became outdated over time. For example, with respect to the length of the shutdown, the Limetree letter stated that the Refinery would begin producing refined petroleum products, specifically MARPOL compliant fuel, by January 1, 2020.²⁴ EPA was also informed by Limetree in meetings that restart would take place in late 2019 so that Limetree could be ready to sell the compliant fuel on January 1, 2020 when the new standards became effective. The EPA's 2018 view that the Refinery was not permanently shut down did not contemplate that Limetree wouldn't attempt to start up until late 2020, one year later than expected, and would still not be able to start up in compliance as of today, nor did it contemplate \$4.1 billion in costs for physical

²¹ Statement of Charles Chambers, Representative of Port Hamilton Refining and Transportation, Before the 34th Legislature of the U.S. Virgin Islands Committee on Economic Development and Agriculture (July 14, 2022).

²² *See also*, Section III.E, below, which presents information on deficiencies that existed at the Refinery before the 2020 startup as well as the advanced state of corrosion and systemic lack of maintenance at the Refinery.

²³ In addition, as discussed in Attachment 2, Region 2 applied the 2-year presumption when it objected to the Title V operating permit issued by NYSDEC to the Greenidge Station in Dresden, New York, *Letter from Judith A. Enck, Regional Administrator, to Honorable Basil Seggos, EPA Review of Proposed Title V Operating Permit for Greenidge Station Permit ID: 8-5736-00004/00017* (Dec.7, 2015), determining that the facility owner must rebut the presumption after placing the facility in protective lay-up for five years. Region 2 also instructed NYSDEC that two years after a shutdown of the Caithness plant, it was the permit applicant's obligation to fill information gaps related to whether the shutdown was permanent. *Letter from Suilin Chan, Chief, Permitting Section, to Alfred Carlacci, Air Pollution Control Engineer* (Sept. 19, 2017).

²⁴ Letter from LeAnn Johnson Koch, Perkins Coie, to John Filippelli, EPA Region 2 (Feb. 1, 2018). The MARPOL standards became effective on January 1, 2020 and Limetree had also informed EPA that it wanted to be an early entrant into the market for compliant fuel.

and operational changes necessary to restart the Refinery. These additional facts present a more compelling basis for finding a permanent shutdown than the facts that were known to EPA in 2018.

The failed attempts to run the facility from late 2020 through May 2021 indicate that the Refinery was not in adequate condition to start up in late 2020 and thus the length of time of the shutdown should be viewed as longer than 8.5 years. In a rush to begin refining operations, Limetree restarted without adequate staffing and with significant operational problems that affected multiple units such as the coker, flare #8, knockout drum, pressure safety valve, flame scanners and amine regeneration unit.²⁵

Both the length of time that the Refinery has been shut down and the capital needed to make physical and operational changes to restart it are extraordinary and do not support a claim that the refinery was merely temporarily idled and adequately maintained to enable a quick return to refining petroleum products. As noted above, it took Limetree roughly three years of planning and intensive physical rehabilitation of the Refinery at a cost of approximately \$4.1 billion using over 4,000 workers to start up and briefly operate in a manner that was fraught with operational problems and non-compliant.

By contrast, in another matter, EPA considered the “limited time and capital” necessary to restart a power plant in South Dakota “with only a few weeks of work” after nine years on cold standby an important factor in determining that the plant had not been permanently shut down. Memorandum from John B. Rasnic to Douglas M. Skie, *Applicability of PSD to Watertown Power Plant, South Dakota* (Nov. 19, 1991).

EPA also determined that a roaster leach acid plant in Arizona was permanently shut down based on a number of factors including the significant amount of time that elapsed since the shutdown, failure to maintain an operating permit, removal of the plant from the emissions inventory, and “the time and capital that must be invested in the rehabilitation of the plant in order to make it operable.” While a number of the Reactivation Policy factors other than costs and time to restart were significant in the roaster leach acid plant example, it is notable that EPA considered only “several hundred thousand dollars worth of work” and the facility’s inability to “come on line for approximately four months” as weighing in favor of a permanent shutdown. Memorandum from John S. Seitz, Director, Stationary Source Compliance Division, EPA, to David P. Howekamp, Director, EPA Reg. 9, *Reactivation of Noranda Lakeshore Mines, RLA Plant and PSD Review* (May 27, 1987). The time and cost necessary to restart the roaster leach acid plant pales in comparison to the time and costs at the Refinery.

While refineries might take more time and capital to restart after a period of dormancy than other kinds of facilities, the U.S. District Court in California determined that a cost between \$28 and \$180 million to reactivate a refinery over a period of six to eighteen months “slightly favors finding a permanent shutdown.” *Communities for a Better Environment (CBE) v. CENCO Refining*, 179 F. Supp. 2d 1128, 1146 (C.D. Cal. 2001).

²⁵ Section 303 Order.

The cost and time required for the Refinery startup, which continues to accrue because it still hasn't successfully restarted, is significantly out of step with prior Reactivation Policy decisions. To offer some further perspective on costs, one of HOVENSA's stated reasons for the shutdown in 2012 was a loss of \$1.3 billion over three years.²⁶ This figure suggests that, even for a refinery, \$4.1 billion in startup costs is a significant sum of money. It far exceeds the costs that supported a determination of permanent shutdown in prior matters.

Limetree's expenditure of \$4.1 billion using 4,000 workers over three years of planning and construction activities plus at least 8.5 years of shutdown would have, by itself, been sufficient for EPA to determine that the two factors -- length of shutdown and costs of startup -- strongly refute any expressed intent of the owners to not permanently shut down. But the Refinery's inability to restart in late 2020 without causing an imminent and substantial endangerment to public health or welfare, or the environment, indicates that the actual length of the shutdown was, in effect, longer than 8.5 years because the Refinery was not ready to start up in compliance. When these facts are considered in light of the additional planned restart in 2023, more than 11 years will have passed since HOVENSA's shutdown. These facts and circumstances lead EPA to conclude that the cost and time factors are so significant that they weigh heavily in the six-factor analysis.

B. Evidence of Intent and Lack of Concrete Plans to Restart

Consistent with the Reactivation Policy, another factor in assessing whether a shutdown is permanent is the intent of the owner/operator, who must "continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future." *Monroe* at 9. Thus, any break in that intent is sufficient to find that this factor points to a permanent shutdown. However, the threshold inquiry relates to the intent of the owner or operator "at the time of the shutdown." *Monroe* at 9. Once the Agency finds that the owner or operator "has no real plan to restart a particular facility," this finding, by itself, is sufficient to conclude that the shutdown was permanent and the owner's or operator's initial intention cannot be overcome by pointing to more recent efforts. *Id.* We look to subsequent actions only to assess "the continuing validity of the original intent not to permanently shut down." *Id.*

HOVENSA announced on January 18, 2012 its intention to shut down the Refinery citing significant losses after having "explored all available options to keep the Refinery operating."²⁷ After shutting the Refinery down in February 2012, HOVENSA stated in an April 26, 2012 letter to EPA that "currently, HOVENSA has no plans to restart the process units at its facility."²⁸ This statement, by itself, is an indication that HOVENSA lacked concrete plans in April 2012 to restart the Refinery.

There is further evidence, beyond the initial statements, as discussed in more detail below, that reveals HOVENSA's lack of the requisite intent to restart the facility sometime in the

²⁶ Press Release, *HOVENSA Announces Closure of St. Croix Refinery* (Jan. 18, 2012).

²⁷ Hess Press Release, *Hess Announces Charge Related to Closure of HOVENSA Joint Venture Refinery* (Jan. 18, 2012).

²⁸ Letter from Kathleen C. Antoine, Environmental Director, to Steve Riva, Chief, Air Programs Permitting Section, Cessation of Operation of SO₂ Monitoring Stations (April 26, 2012).

reasonably foreseeable future. This evidence falls into two categories. First, in negotiations with the U.S. Virgin Islands Government during approximately a period of one year after the 2012 shutdown, HOVENSA demonstrated its initial intention to permanently shut down the Refinery by converting it to an oil storage terminal. Second, later filings in 2015 proceedings offer evidence of HOVENSA's intention back in 2012. In addition, as discussed below, the transfer of assets from HOVENSA to Limetree did not include concrete plans to restart the Refinery. Many of these facts were not provided to EPA in the February 1, 2018 letter from Limetree requesting EPA's concurrence that the MARPOL project should not require a PSD permit under the Reactivation Policy. Instead, Limetree's representations to EPA led to the statement in the EPA's 2018 response letter 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."

1. Negotiations Between HOVENSA and the Government of the U.S. Virgin Islands after 2012 Shutdown

Negotiations between the U.S. Virgin Islands Government and HOVENSA during approximately the first year post-shutdown demonstrate HOVENSA's intention to convert the Refinery to an oil storage terminal. On July 12, 2013, Governor John P. de Jongh, Jr. sent a letter to the President of the U.S. Virgin Islands Legislature that advocated for ratification of the "Fourth Amendment Agreement" with HOVENSA. The letter provides the history of HOVENSA's actions and intentions related to the Refinery. In particular, the letter states as follows:

Not only did [HOVENSA] shutter the St. Croix Refinery last year, but one of its parent companies, Hess Corporation, has publicly announced its intention to exit the Refinery business altogether, and the other, Venezuela's national oil company has indicated no interest in making new investments in the Refinery. Although HOVENSA has not publicly admitted it, it seems all but certain that, under its current ownership, the St. Croix Refinery will never reopen.²⁹

The Governor's letter also discusses the "concession agreement" between HOVENSA and the U.S. Virgin Islands Government which dates back to the 1960s and was on its third iteration at the time of the shutdown. The Governor explains that HOVENSA wanted to be relieved of certain responsibilities related to the Refinery under its existing concession agreement with the U.S. Virgin Islands Government and so HOVENSA proposed "drastic modifications" to the agreement that would "essentially mothball the Refinery while allowing the company to operate an oil terminal business." *Id.* at 2.

The Governor's letter confirms that HOVENSA did not have concrete plans to either operate or sell the Refinery. In particular, the Governor states that "on August 6, 2012, I informed HOVENSA and the public of the Government's position: The company must either restart the Refinery or sell it to someone who will." *Id.* at 3.

²⁹ Letter from John P. de Jongh, Jr., Governor, USVI, to Honorable Shawn-Michael Malone, President, 30th Legislature, USVI, *Transmittal of Legislation Ratifying the Fourth Amendment to the HOVENSA Concession Agreement* (July 12, 2013).

At some point between August 2012 and December 2012, under pressure from the Governor, HOVENSA agreed to put the Refinery up for sale³⁰ but only on conditions unacceptable to the Governor because if the Refinery did not sell, HOVENSA would “shed most of its obligations under the existing Concession Agreement and still operate its oil storage terminal business.” *Id.* Concerned that HOVENSA would not have sufficient incentive to sell the Refinery under such terms, the Governor rejected that offer and the parties “remained at impasse from mid-December 2012 to late January 2013,” when they agreed to terms that would have significant consequences for HOVENSA if it didn’t sell the Refinery including “resumed Concession Agreement obligations, a substantial repayment of deferred taxes, a limited revenue-producing oil terminal, and a lawsuit.” *Id.* at 5. As the Governor states in his letter to the Legislature, “this is not the original course that HOVENSA and its owners wanted, but it is the best course for the long term interest of our community.” *Id.* at 7. In short, the Governor’s letter reflects that his goal of having either HOVENSA or another party operate the Refinery was not shared by HOVENSA at the time of the Refinery shutdown and for much of 2012.

Consistent with the Governor’s characterization of HOVENSA’s intent, HOVENSA made clear its intention to permanently shut down the Refinery when it signed an agreement with the Governor regarding the future of the Refinery. The April 3, 2013 Fourth Amended Agreement, signed by HOVENSA, Hess, Petroleos de Venezuela, S.A (“PDVSA”), and the Governor includes “whereas” clauses that reveal HOVENSA’s intentions prior to entering into the Agreement:

“WHEREAS, HOVENSA desires to convert the Oil Refinery and Related Facilities to an oil storage terminal operation; and

WHEREAS, the Government believes that the economic well-being of the U.S. Virgin Islands depends on continued refining operations at the Oil Refinery and Related Facilities and prefers that said facilities be sold to a new owner who will resume refining operations; and

WHEREAS, in the interest of reaching a mutually acceptable resolution of the situation....

NOW, THEREFORE, the Government, HOVENSA, HOVIC and PDVSA VI hereby agree to enter into this Fourth Amendment Agreement, which temporarily suspends certain of the parties’ contractual obligations under the Concession Agreement to facilitate a sale of the Oil Refinery and Related Facilities....”

Fourth Amendment Agreement Between the USVI, HOVENSA, Hess Oil VI Corp, and PDVSA (April 3, 2013).

³⁰ HOVENSA sent a letter to EPA’s enforcement program on December 3, 2012 related to potential modifications to an existing consent decree with EPA. In the letter, HOVENSA refers to its negotiations with the U.S. Virgin Islands Government and indicated that “the Government’s stated position is to have the refinery operations reopened or sold, in view of its economic importance to the Virgin Islands. To accommodate the possibility of a sale process, HOVENSA is requesting that certain provisions to the Consent Decree be placed in a standstill mode for a period of 24 months.” Letter from Brian K. Lever, HOVENSA, to John Fogarty, EPA (Dec. 3, 2012).

This Agreement reveals the contrast between HOVENSA’s desire to cease refining petroleum products and convert the facility to an oil storage terminal and the Government’s desire for HOVENSA to sell the Refinery to ensure resumption of refining operations. Not only did HOVENSA lack concrete plans to restart the Refinery but, prior to pressure from the Governor, it lacked concrete plans to sell the Refinery and intended to convert it to an oil storage terminal.

Members of the legislature confirmed their understanding of HOVENSA’s intention to convert the Refinery to an oil storage terminal. Nine Senators of the U.S. Virgin Islands legislature proposed a resolution on August 7, 2013³¹ “to encourage HOVENSA to find a new owner for its Refinery property on St. Croix” because “HOVENSA, rather than engaging in aggressive efforts to obtain a buyer for the Refinery, proposes to substitute an oil storage business in place of the oil refining business, maintaining that it is not a breach of contract.” *Thirtieth Legislature of the U.S. Virgin Islands, Bill No. 30-0186, A Resolution to Encourage HOVENSA to find a new owner for its Refinery Property on St. Croix (Aug. 7, 2013).*

The Government of the U.S. Virgin Islands hired Duff & Phelps, LLC, a consulting firm, to evaluate HOVENSA’s 2012 proposed revisions to the concession agreement along with options for the facility. Duff & Phelps produced a report for the U.S. Virgin Islands that discusses a 2011 agreement between HOVENSA, HESS, HOVIC, and PDVSA to “transition the facility into an oil storage terminal, a process estimated to take approximately 18 months, putting completion of the conversion process in the second half of 2013.”³² Duff & Phelps’ report references three options in response to HOVENSA’s concession agreement modification request: (1) full acceptance [of HOVENSA’s request], in which the U.S. Virgin Islands “accepts the proposed modifications to the Concession Agreement and HOVENSA proceeds with full conversion of the site to an import/export oil terminal” (emphasis added); (2) interim acceptance with HOVENSA’s commitment to restart or sell the Refinery; or (3) outright rejection.³³ The Duff & Phelps report is further evidence that HOVENSA was requesting a permanent conversion to an oil terminal.

Limetree provided some information in its February 1, 2018 letter to EPA and accompanying timeline indicating that HOVENSA left the door open for a potential return to service of the Refinery. EPA has considered this information in its examination of the 2012 period and concludes that the overwhelming evidence is that HOVENSA’s stated intention and objective was to convert the Refinery to an oil storage facility. HOVENSA lacked sufficient concrete plans for a return to service to overcome the evidence of its intention in 2012 to convert the Refinery to an oil storage terminal. Additional evidence of this intention is contained in documents from proceedings after the 2012 timeframe, discussed below.

³¹ The U.S. Virgin Islands Legislature later ratified the Agreement. *Fourth Amendment Agreement, dated April 3, 2013, as ratified by the Legislature of the U.S. Virgin Islands on November 4, 2013 and approved by the Governor of the U.S. Virgin Islands on November 4, 2013, as Act No. 7566.*

³² Duff & Phelps, LLC, *Highest and Best Use of the HOVENSA Refinery*, at 4 (Aug. 3, 2012), at https://stthomassource.com/legacy_files/userfiles/file/Duff%20&%20Phelps%20-%20HOVENSA%20Highest%20and%20Best%20Use%20Report.pdf.

³³ *Id.* at 8.

2. Later Proceedings that Reflect HOVENSA’s Intent Regarding the Planned Conversion

Further confirmation that, at the time of the shutdown, HOVENSA did not intend to either restart or sell the facility as a Refinery can be found in a petition filed by HOVENSA in 2015 under Chapter 11 of the U.S. Bankruptcy Code. A sworn certification of the “HOVENSA proposed Chief Restructuring Officer” states as follows:

[I]mmediately after the idling of the Refinery in February 2012, HOVENSA...approached the [government of the U.S. Virgin Islands] and proposed certain amendments to the Concession Agreement intended to facilitate operations as a storage terminal.... Former Governor of the USVI, John de Jongh, Jr., rejected this request and insisted that HOVENSA either restart and operate the Refinery or conduct a sale process to sell the business to a purchaser that would engage in Refinery operations.

In re: HOVENSA LLC, Debtor, Certification of Thomas E. Hill In Support of Chapter 11 Petition and First Day Motions, Case No. 1:15-bk-10003-MFW, District Court of the U.S. Virgin Islands Bankruptcy Division, St. Croix Division, at 25 (Sept. 15, 2015).

In a separate action in 2015, Claude E. Walker, Acting Attorney General of the U.S. Virgin Islands, filed a Complaint against Hess Corp., one of the two joint owners of HOVENSA, for damages related to the shutdown. The Complaint alleges that “as part of the closure announcement, Hess Corp. representatives affirmed their intent to convert the Refinery into an oil-storage terminal business in direct violation of the law and the Agreement [with the U.S. Virgin Islands].” *Government of the United States Virgin Islands v. Hess Corporation*, Complaint, Superior Court of the U.S. Virgin Islands, Division of St. Croix (Sept. 14, 2015). The Complaint further states that, “to achieve Hess Corp’s goal of converting the Refinery into an oil storage facility, Hess Corp proposed a series of drastic alterations to the Third Extension Agreement it claimed to be necessary to make the terminal operation viable.” *Id.*

While the record of HOVENSA’s initial intent to close the refinery makes it unnecessary to look beyond the first year post-shutdown, there were discussions about the conversion to an oil storage facility as late as 2015. A sworn declaration of Joel H. Holt, co-counsel for the Government of the U.S. Virgin Islands indicates that for the three years following the January 2012 closure announcement, the U.S. Virgin Islands Government negotiated various proposals with Hess regarding the future use of the Refinery. One such proposal was offered in a June 5, 2015 meeting in which Hess and PDVSA met with the Government of the U.S. Virgin Islands “to outline a potential sale of the Refinery as an oil storage facility.” *In re: HOVENSA, LLC, Debtor, Declaration of Joel H. Holt*, District Court, U.S. Virgin Islands Bankruptcy Division, St. Croix, U.S. Virgin Islands, Case No. 15-100003 (Nov. 29, 2015).

3. Limetree Lacked Concrete Plans to Restart Upon Purchase of the Assets in Bankruptcy

On December 1, 2015, Kenneth E. Mapp, the Governor of the U.S. Virgin Islands, sent a letter to the President of the Legislature of the U.S. Virgin Islands which transmitted for ratification the Operating Agreement between the Government of the U.S. Virgin Islands and Limetree upon HOVENSA's transfer of the Refinery and terminal assets to Limetree.³⁴ The transmittal letter makes clear that the Agreement was for Limetree to "refurbish, restart, and operate an oil storage terminal at the Facilities, [and] explore available options for resuming petroleum processing operations at the Facilities" (emphasis added).³⁵

The Agreement provides that Limetree had between 18 and 36 months to evaluate the prospects of a Refinery restart and if, by the end of the evaluation no restart is planned, Limetree could deconstruct those portions of the Refinery that are not necessary for operation of the terminal. The plan for "dismantling" the Refinery was to be implemented by Limetree at their expense, and the proceeds from sale of the structures, fixtures, equipment and machinery, up to \$5 million plus 50% of proceeds above \$5 million, would go to Limetree.³⁶ The language of this Agreement is inconsistent with concrete plans to restart the Refinery in the reasonably foreseeable future.

C. Cause of the Shutdown

As stated above, at the time of the shutdown, Hess was exiting the refining business and PDVSA did not want to make further investments in the Refinery.³⁷ In addition to the \$1.3 billion in losses suffered by HOVENSA over three years, the press release at the time of closure stated that:

[Losses] were projected to continue. These losses have been caused primarily by weakness in demand for refined petroleum products due to the global economic slowdown and the addition of new refining capacity in emerging markets. In the past three years, these factors have caused the closure of approximately 18 refineries in the United States and Europe.... In addition, the low price of natural gas in the United States has put HOVENSA, an oil-fueled Refinery, at a competitive disadvantage.³⁸

With losses projected to continue, the low price of natural gas in the United States, weakened demand, Hess Corporation's announcement of its intention to exit the Refinery business altogether, and PDVSA's indication of no interest in making new investments in the Refinery, the causes of the shutdown do not appear to be consistent with formulating concrete

³⁴ Operating Agreement By and Among The Government of the U.S. Virgin Islands and Limetree Bay Terminals, LLC (Dec. 1, 2015), available at https://stthomassource.com/legacy_files/userfiles/file/0%202015/12%20December%202015/LIMETREEBAY_AGREEMENT-SPEC_SESSION-12_17-2.pdf.

³⁵ *Id.*

³⁶ *Id.* at 31-32.

³⁷ Letter from John P. de Jongh, Jr., Governor, USVI, to Honorable Shawn-Michael Malone, President, 30th Legislature, USVI, *Transmittal of Legislation Ratifying the Fourth Amendment to the HOVENSA Concession Agreement* (July 12, 2013).

³⁸ Hess Press Release, *Hess Announces Charge Related to Closure of HOVENSA Joint Venture Refinery* (Jan. 18, 2012).

plans to restart. They are, however, consistent with HOVENSA's intent to convert the facility to an oil storage terminal and abandonment of the refining business.

D. Status of permits

EPA is aware that HOVENSA, and later Limetree and PHRT, maintained at least some of their environmental permits, including their Clean Air Act Title V permit. HOVENSA indicated in a February 7, 2012 letter to DPNR that it retained the permits so that the process units could be operated in the future, "without obtaining new source permits that would likely impose unsustainable burdens on any resumption of operations at the refinery."³⁹ The status of permits is the *Monroe* factor which, at first glance, appears potentially most consistent with a determination that the Refinery was not permanently shut down in 2012. This factor was emphasized when EPA responded to public comments on the PAL permit in 2020 and sent its 2018 letter based on the facts provided at the time by Limetree. But in light of changed circumstances and new information related to the other factors, EPA is revisiting this factor as well. A more detailed review of the structure of the permits, and subsequent developments, suggests that this factor does not as compellingly support a determination that the Refinery was not permanently shut down as EPA had previously indicated.

First, the Title V permit, existing PSD permit⁴⁰ and Clean Water Act permit include conditions for the utilities shared by the Refinery and the terminal. The additional information, regarding the planned conversion of the Refinery to an oil storage terminal, which was not provided to EPA by Limetree before EPA's 2018 letter was issued, and which EPA did not previously consider, sheds new light on the permits. HOVENSA depended upon each of these permits for its planned conversion of the facility to an oil storage terminal.⁴¹ For example, in the February 7, 2012 letter to DPNR, referenced above, HOVENSA stated that it "believes that a Title V permit will be needed even if only oil storage terminal operations remain at the site." Therefore, HOVENSA, and later Limetree, needed to retain those permits for continuation of the terminal business. Moreover, HOVENSA's stated desire to avoid future New Source Review (NSR) permitting does not demonstrate concrete plans to restart or overcome their other actions that speak to a permanent shutdown.

While HOVENSA left the door open to future refinery operations by maintaining some of its permits, its August 31, 2012 Territorial Pollution Discharge Elimination System (TPDES) permit renewal application to DPNR reflects its primary objective, to convert the Refinery to an oil storage terminal. The application requests that the renewed permit include three different operating scenarios. Although the permit application states that "no new facility refining operations are planned for the renewed permit," the first operating scenario in the application

³⁹ Letter from Brian K. Lever, HOVENSA, to Alicia K. Barnes, Commissioner, U.S. Virgin Islands Department of Planning and Natural Resources (Feb. 7, 2012).

⁴⁰ There is nothing required of a facility owner or operator to maintain a PSD permit because the permit continues to be in effect indefinitely. Rather, the owner or operator would have to make an affirmative request to EPA to rescind the permit.

⁴¹ EPA also notes that the RCRA permit for the facility is unrelated to whether or not the refinery operates in the future.

reflects HOVENSA's request to retain the flexibility to refine "if future market conditions warrant." The other two operational scenarios requested by HOVENSA reflect its real intention for the Refinery in 2012 and beyond. The second operational scenario "covers the transition period" of 18-24 months, starting from January 2012 during which remaining refining operations were being idled at the facility and reflects HOVENSA's intention to undergo "the conversion to Operation Scenario III (Terminal Only Operations)." The third operational scenario description in the permit renewal application states that "after completion of all steps required to idle refining operations, the facility will operate as a terminal-only facility." While HOVENSA left open the door in its permit application to the possibility of refining if future market conditions change, the permit application demonstrates concrete plans to convert the refinery to an oil storage terminal.

Second, the Clean Water Act permit has not been maintained. In a May 25, 2022 letter to Limetree and PHRT, EPA expressed concern that neither Limetree Bay Terminals nor PHRT have appropriate Territorial Pollutant Discharge Elimination Systems (TPDES) permit coverage for discharges from their respective industrial activities.⁴² After PHRT failed to address EPA's concern, EPA sent PHRT another letter dated August 22, 2022 stating that, "to date, the DPNR has not received a TPDES application from PHRT, and has not issued a TPDES permit to PHRT. As a result, PHRT does not have coverage under any TPDES permit for either the process wastewater treatment plant, or for any regulated storm water outfalls associated with its industrial activities, as required by 40 C.F.R. 122.26(b)."⁴³ The letter further states that the disposal of the amine purge waste planned by PHRT "is not authorized by any applicable TPDES permit, and therefore, if it were to occur, would be a violation of Section 301 of the CWA."

E. Maintenance and Inspections During Shutdown

Limetree did provide maintenance records to EPA in 2018, which are referenced in EPA's 2018 letter. They were also relied upon in the 2020 PAL RTC document, which expressed the view that the Refinery had not been permanently shut down. EPA noted in the 2018 letter as important the "over \$400 million to maintain the restart capability of the Refinery, which included removing residual material from equipment, retaining control room operability, and conducting other process equipment mothballing activities" and maintenance of "critical Refinery equipment, such as compressors, pumps, utilities, wastewater treatment units" and a "timeline of significant maintenance activities."⁴⁴

⁴² Letter from Virginia Wong, Chief, EPA Region 2 Clean Water Regulatory Branch, to Mark Chavez, Limetree Bay Terminals, LLC and Julie R. Domike and Tom V. Eagan, PHRT (May 25, 2022).

⁴³ Letter from Virginia Wong, Chief, EPA Region 2 Clean Water Regulatory Branch, to Thomas V. Eagan, PHRT (Aug. 22, 2022).

⁴⁴ EPA's 2018 Letter at 3. Limetree's February 1, 2018 letter states that part of the \$400 million was for removal of "residual hydrocarbon materials from units and tanks ('sludge disposal')." EPA's understanding is that, given the high costs associated with sludge removal and disposal, a significant portion of the \$400 million shutdown costs must have involved recovery and disposal of hazardous waste catalyst material and was therefore not strictly for purposes of ongoing maintenance but also to avoid contamination from existing units and tanks.

However, a closer review of the underlying maintenance records now leads EPA to a different conclusion. EPA's 2018 letter relied on Limetree's representations that HOVENSA maintained critical refinery equipment. The 2018 letter indicated that Limetree's representations are demonstrated in a general "list of critical equipment and the timeline of significant maintenance activities performed at the refinery" that were provided to EPA. But prior to the EPA 2018 letter, the Agency did not consider the underlying logs and records that Limetree transmitted to EPA on January 26, 2018.⁴⁵

EPA's review of the logs and records reveals poor maintenance of the Refinery by HOVENSA between 2012 and 2016 and minimal maintenance by Limetree in 2016 and 2017. Among the documents provided by Limetree are records referred to as "refining rounds" which include identification of numerous failing structures including heavy corrosion on tanks at Beavon Units 1 and 2, heavy corrosion on top of oxidation tanks, failing fireproofing, structural steel supports in need of repair, and rust at risk of falling on personnel. Other than a plan to barricade areas where rust was at risk of falling, it isn't clear from the records that the failing structures identified in the "refining rounds" records were remediated. In fact, there is little evidence of follow-up after an inspection discovered a problem. And according to the 2013 Maintenance Activity Progress Report, by May 6, 2013, no additional work hours were spent at the Refinery by HOVENSA, and there are no Maintenance Activity Progress Reports for subsequent years. After May 2013, there were walk-throughs but little evidence of maintenance, and as the years progressed, there were fewer and fewer logs. This represents inadequate maintenance for a large Refinery subject to corrosion from its location near saltwater.

Even if more robust maintenance occurred than is evident from EPA's more recent review of the underlying records, it is clear that this Refinery was not in a condition that allowed it to resume refining quickly, either at the initial shutdown or when Limetree purchased the assets. Under the Reactivation Policy, a facility should be maintained in a state of readiness to resume operations. EPA previously determined that a facility that is well maintained with periodic testing of the equipment "to ensure quick reactivation" so that a plant could be brought back online "with only a few weeks of work" could arguably overcome deficits in the other factors. See *Watertown Power Plant, South Dakota*, Memo from John B. Rasnic, Director Stationary Source Compliance Division, OAQPS, to Douglas M. Skie, Chief, Air Programs Branch (Nov. 19, 1991). But the significant time and money required to bring the Refinery back into service (*see* Section III.A, above) leads EPA to conclude that the Refinery was not well-maintained to enable a quick restart and supports the determination that the Refinery was permanently shut down.

Inadequate maintenance is also evident from Limetree's failed startup of the Refinery. As stated in Section III.A, above, EPA's Section 303 Order reflects that Limetree started up the Refinery without adequate staffing and with significant operational problems that affected multiple units. The audit reports stemming from the Section 303 Order also contain additional

⁴⁵ Limetree referred to these logs and records in its Feb. 1, 2018 letter. Letter from LeAnn Johnson Koch, Perkins Coie, to John Filippelli, EPA Region 2 (Feb. 1, 2018), citing to Jan. 26, 2018 submission (*see* Tab 8, 2013 Maintenance Records, Refinery Rounds, East SRU of Jan. 26, 2018 submission).

facts that are germane but are claimed as Confidential Business Information. As such, Attachment 3, Additional Facts Claimed as Either Confidential Business Information or Subject to the Federal Rules of Evidence, Rule 408, provides further information.

Inadequate maintenance, in part, also led to the dangers posed by a May 2021 incident, which was addressed by OSHA in a Stipulation and Agreed Order with Limetree with attached Citation and Notification of Penalty.⁴⁶ The Citation and Notification of Penalty includes numerous counts related to maintenance including, among others, the following:⁴⁷

1. Limetree failed to correct deficiencies outside of acceptable limits found on the Coke drums (D-8501/2/3/4), including bulging Coke drums and stainless-steel clad liners on the internal surfaces of Coke drums without corrosion protection.
2. Limetree failed to repair significant pitting on the Flare Knockout Drum (D-7941) before further use or in a safe and timely manner, “which can result in catastrophic failure of vessel and exposure to fire, toxic[s] and hazards.”
3. Limetree did not have adequate safety, operating, maintenance and emergency procedures in place prior to the introduction of hazardous chemicals. In particular, Limetree “failed to develop and implement written operating procedures to manage and address abnormal coke drum conditions.” Such failures prior to startup “can result in operator errors, catastrophic incidents and expose employees to fire, toxic and explosion hazards.”
4. Limetree also “failed to establish and implement written procedures to maintain the on-going integrity of process equipment.”
5. Limetree failed to complete the following items prior to startup:
 - a. Restore missing cladding on internal surfaces of Coke drums
 - b. Correct corrosion under insulation on Coke drums
 - c. Correct pitting on Blowdown Drum Overhead Separator (D-8513)
 - d. Restore pressure vessel fireproofing
6. Limetree failed to correct corrosion on flanges and bolts, inspect insulated piping for SUI and label all process piping.

Insufficient maintenance continued after Limetree filed for Bankruptcy. A smoldering fire broke out at the Refinery’s coke piles on August 4, 2022, which was not suppressed until August 26, 2022. The likely cause of the fire was poor maintenance. According to PHRT, the contractor that had maintained the coke piles “left the site abruptly” when Limetree filed for Bankruptcy⁴⁸ in July 2021, and there is no indication that steps were taken by PHRT to properly maintain the coke pile when it assumed ownership in January 2022. Proper maintenance of the coke piles should have included, among other things, water spraying combined with turning of the coke and air circulation via fans, and inspections. Such steps could have prevented the fire.

⁴⁶ Citation and Notification of Penalty, Limetree Bay Refining, LLC., Inspection No. 1521774, U.S Dep’t of Labor, Occupational Safety & Health Admin. (Nov. 8, 2021).

⁴⁷ *Id.* at 24 and 27-30.

⁴⁸ Information Response Letter from Thomas V. Eagan, Counsel to PHRT, to Dwayne Harrington, US EPA, *Request for Information Pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) received on August 18, 2022*, Sept. 1, 2022.

PHRT provided EPA with a plan on August 27, 2022 to begin maintenance activities.⁴⁹ It therefore appears that for approximately one year, no maintenance was performed at the coke piles.

In response to the coke fire, EPA performed an inspection of the Refinery pursuant to Section 112(r)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7412(r)(1), between September 20 and September 26, 2022 (“112(r) inspection”). The 112(r) inspection revealed that the facility does not have a preventative maintenance program nor does it undergo formal process unit inspections. The inspectors observed conditions demonstrating a “systemic lack of maintenance” upon touring the following process units: #5 Crude Unit; #6 Crude Unit; #3 Vacuum Unit; Anhydrous Ammonia Drum; Amine Units; LPG Unit #3; Delayed Coker Unit; Coker Supply Tank 8501. The inspectors noted corrosion at all process units including “extreme corrosion in many cases to a degree resulting in extreme deterioration (exfoliation)” that “severely compromised integrity and operability.”⁵⁰ Also significant to the maintenance factor is the inspection report’s finding that “many process components appear [to] not have been adequately inspected or maintained for significant periods (emphasis added).”

The lack of inspection and maintenance for significant periods of time, the advanced state of corrosion found during the 112(r) inspection, and the OSHA findings, reflect that the Refinery was not properly maintained even prior to PHRT’s ownership. In addition, the change in ownership from Limetree to PHRT should have been done in a manner that provided a smooth transition to avoid problems like the coke fire. While a change in ownership of a facility doesn’t, by itself, render a stationary source subject to PSD permitting, it “represents further attenuation” in time and, perhaps more importantly, the circumstances surrounding the change in ownership may be probative of whether the shutdown was permanent. Letter to Robert T. Connery, Esq., Holland & Hart, from EPA, Region 9, *Supplemental PSD Applicability Determination Cyprus Cas Grande Corporation Copper Mining and Processing Facilities* (Nov. 6, 1987). The circumstances surrounding the change from Limetree to PHRT that shows the dire state and poor maintenance of the facility at the time of transfer is reflected in the \$62 million purchase price for a Refinery that had recently seen \$4.1 billion invested. All of the circumstances surrounding both the transfer from HOVENSA to Limetree and Limetree to PHRT, including lack of maintenance evidenced in part by the time and cost already expended to restore the Refinery and the inability to resume operation without significant noncompliance indicate that the Refinery was permanently shut down.

F. Conclusion of Reactivation Policy Factor Analysis

While “no single factor is likely to be conclusive in the Agency’s assessment,” *Monroe* at 9, the length of time the Refinery has been shut down and the time and capital needed to put the Refinery in a condition to restart are so out of step with past decisions that they weigh heavily in EPA’s analysis. A cost of \$4.1 billion using 4,000 workers over several years, and then an

⁴⁹ Fermin Rodriguez, VP & Refinery Manager, PHRT, *Coke Dome Smoldering Event Status*, Aug. 27, 2022.

⁵⁰ Many of the inspectors’ observations were documented with photographs referenced in the inspection report. These photos have been claimed as CBI.

attempted startup that caused an imminent and substantial endangerment to public health or welfare or the environment is far from the “limited time and capital” and “a few weeks of work” that one would expect from a plant that had not been permanently shut down. Memorandum from John B. Rasnic to Douglas M. Skie, *Applicability of PSD to Watertown Power Plant, South Dakota* (Nov. 19, 1991).

In addition, HOVENSA, which shut the Refinery down, did not continuously demonstrate concrete plans to restart the Refinery. It had no concrete plans to restart the Refinery at the time of shutdown in February 2012 and lacked the requisite intent for the better part of a year following the shutdown. Not only did HOVENSA lack concrete plans to refine product in the future, it intended to convert the Refinery into an oil storage terminal. Once an owner or operator has no real plan to restart a particular facility, “such owner or operator cannot overcome this suggestion that the shutdown was intended to be permanent” by later pointing to more recent efforts at restart. *Monroe* at 9. Therefore, HOVENSA’s lack of intent to restart at the time of shutdown and soon thereafter is, by itself, sufficient to determine that there was an intent to permanently shut down the Refinery in 2012. In addition, the period of transition from HOVENSA to Limetree during the bankruptcy proceeding is another period when concrete plans to restart the refinery were lacking as restarting the Refinery was optional.

The evidence regarding the cause of the shutdown provides no indication that the Refinery would one day operate again. To the contrary, in addition to statements soon after the shutdown that HOVENSA had no plans to restart the Refinery, HOVENSA’s two parent companies were either exiting the refining business or unwilling to invest additional funds into the Refinery after losing \$1.3 billion. Moreover, HOVENSA’s decision to shut down was also due to its competitive disadvantage as an oil-fueled refinery compared to gas-fueled refineries in other parts of the United States that could rely on cheaper natural gas for their energy needs.

The maintenance and inspections during shutdown were viewed by EPA upon issuance of EPA’s 2018 letter and the 2020 RTC to favor a finding that the 2012 shutdown was not permanent, but a close examination of the facts to-date suggests otherwise. Despite some efforts by HOVENSA to maintain some of the refining equipment, there have been significant lapses in maintenance that led to severe incidents of air pollution, the Section 303 Order, the OSHA Citation and, most recently, a smoldering fire at the coke domes and discovery of systemic lack of maintenance for significant periods of time. While the retention of Refinery permits by HOVENSA, and HOVENSA’s statements about them, might be seen as being suggestive of an intention to restart the facility, this factor does not as compellingly support an intention to restart considering that such permits were necessary for continued operation of the oil storage terminal.

On balance, the six factors point convincingly in favor of a finding that the Refinery was permanently shut down in 2012. Even viewing the status of permits as representing an intention to restart, the Refinery’s history with respect to the other factors is so compelling that EPA concludes there was a permanent shutdown.

IV. The Refinery is a New Major Stationary Source and Exceeds the PSD Major Stationary Source and/or Significant Thresholds for Multiple PSD Pollutants

As discussed in the analysis above, HOVENSA permanently shut down the Refinery in February 2012. In the event of a Refinery restart or actions at the Refinery that “begin actual construction,” as defined in 40 C.F.R. 52.21(b)(11), EPA would treat the Refinery as a new source. The determination of PSD applicability is therefore based on how the PSD regulations apply to new sources.

A “major stationary source” is any source belonging to a list of 28 source categories which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant, or any other source which emits, or has the potential to emit, such pollutants in amounts equal to or greater than 250 tons per year. 40 C.F.R. 52.21(b)(1)(i). A stationary source generally includes all pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under common control. 40 C.F.R. 52.21(b)(5) and (b)(6). Since petroleum refineries are on the list of 28 source categories, if the potential to emit of any regulated NSR pollutant exceeds 100 tons/year, the source is considered a major stationary source and a PSD permit is required. Once a source is a major stationary source, a PSD permit is required not only for pollutants exceeding the 100 tons/year threshold but for any pollutant that has a potential to emit over the “significant” level in 40 C.F.R. 52.21(b)(23).

After purchasing the HOVENSA assets in 2016, Limetree applied for an Authority to Construct permit for the MARPOL Project from the U.S. Virgin Islands Department of Planning and Natural Resources (DPNR) in April 2018. In its application, Limetree provided the source’s projected actual emissions which exceeded the 100 tons/year major source threshold for multiple regulated NSR pollutants and/or the “significant” levels in 40 C.F.R. 52.21(b)(23)(i).⁵¹ In a July 14, 2022 statement to the U.S. Virgin Islands Legislature, Charles Chambers, the lead principal of PHRT and Chief Executive Officer of West Indies Petroleum Limited, stated a commitment to “restarting of the refinery at 180-thousand barrels per day of production.”⁵² At the levels of production in both the DPNR permit and Charles Chambers’ statement, the Refinery is a major stationary source and, therefore, PHRT is required to apply for and obtain a final and effective PSD permit prior to restarting the Refinery or beginning actual construction, as defined in 40 C.F.R. 52.21(b)(11). Based upon the emissions associated with the MARPOL permit application and factoring in the production rate in Charles Chambers’ statement,⁵³ PHRT must submit a PSD permit application to EPA for multiple PSD pollutants, including but not limited to SO₂, NO_x, VOC, PM_{2.5}, PM₁₀, PM, H₂SO₄ and CO.

⁵¹ It is likely that the potential to emit for these pollutants would be higher than the projected actual emissions.

⁵² Statement from Charles Chambers, Representative of Port Hamilton Refining and Transportation, Before the 34th Legislature of the U.S. Virgin Islands, Committee on Economic Development and Agriculture (July 14, 2022), at <https://www.legvi.org/committeemeetings/Committee%20on%20Economic%20Development%20and%20Agriculture/July%2014,%202022/Charles%20Chambers%20PHRT%20Testimony.pdf>.

⁵³ This conclusion assumes a refinery design and operation substantially consistent with what Limetree proposed in the MARPOL permit application. PHRT will have to examine the applicability of all PSD pollutants when it prepares its application. While Limetree did not provide estimates for greenhouse gases in its MARPOL permit application, it is highly likely that the Refinery will also require PSD review for greenhouse gases.

PHRT's July 2022 response to EPA's March 22, 2022 letter contains additional facts that are germane to the PSD applicability analysis but are claimed to be CBI. As such, Attachment 3 provides further information.