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Federal Appellate Court *Deactivates* EPA's *Reactivation Policy*



A federal appellate court struck down a long-held EPA policy requiring shuttered major air pollution sources to essentially *re-enter* the Prevention of Significant Deterioration ("PSD") permitting process prior to restarting operations. In *Port Hamilton Ref'g & Transp., LLLP v. EPA* (decided July 25, 2023), the United States Court of Appeals for the Third Circuit (which includes St.

Croix and the rest of the U.S. Virgin Islands) rejected EPA's final determination requiring a shuttered oil refinery on St. Croix to obtain a PSD permit prior to restarting operations. The Third Circuit held that EPA exceeded its statutory authority when it applied its so-called *Reactivation Policy* in reaching its final determination.

Under EPA's PSD program, a permit is required prior to commencing construction of a new major source or commencing modification of an existing major source. A major source is a source whose potential annual emissions of any one of a number of specified air pollutants exceeds a specified threshold quantity. PSD permit terms and conditions are quite onerous. They require, among other things, that the affected source comply with best available control technology ("BACT"). Because of this and other requirements, the PSD permit application process can considerably lengthen the time necessary to complete a significant capital construction or expansion project. Such a drawn-out process can severely impact project economics. As a result, operators of facilities often go to great lengths to structure a capital construction or expansion

project in a manner so as to avoid the need to obtain a PSD permit.

The Reactivation Policy evolved primarily through a series of PSD applicability determinations by EPA beginning in the 1970s. and culminating with the EPA Administrator's Order *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.* in 1999 (referred to herein as *Monroe Electric*). Under EPA's Reactivation Policy, the reactivation of a permanently shut down facility is considered to be the operation of a new source for the purposes of PSD review. So, for the purposes of such review, even a shuttered facility that had already been through the PSD review and permitting process once before would have to start all the way back at square one and go through PSD review again before it could resume operations.

The Third Circuit rejected this point of view. The Third Circuit resorted to two different sections of the Clean Air Act to conclude that PSD review only applies to major sources that are newly constructed after the PSD "cut-off" date of August 7, 1977. Under the Third Circuit's read of the Clean Air Act, PSD review does not apply to major sources that were shut down and re-started after this date. Thus, it would appear for now that in New Jersey, Pennsylvania, Delaware, and the Virgin Islands, the Reactivation Policy does not apply to the re-start of shuttered major sources.

Major Modifications After *Port Hamilton*

While *Port Hamilton* focuses primarily on the Reactivation Policy, the Third Circuit's statements on *major modifications* may make some waves as well. As noted in the previous article, a PSD permit is required prior to: (i) commencing construction of a new source; and (ii) commencing *modification of a major existing source*. The Reactivation Policy addresses the question of whether the reactivation of a shuttered source amounts to commencing construction of a new source. It does not address the question of whether a modification of an existing source is *major*, thus also triggering the PSD permit requirement.

The limits of the Reactivation Policy's reach notwithstanding, the Third Circuit also opined that the Port Hamilton refinery "has not undergone a 'modification' as the [Clean Air] Act defines that term." It is this part of the Third Circuit's opinion that may create some confusion for the regulated community, as well as some angst for regulators. It is not entirely clear why the Third Circuit waded into this issue in the first place. EPA's final determination is largely devoid of any discussion of whether the refinery's planned actions would amount to a major modification. There does not seem to be any factual detail on whether the planned actions would result in a significant net increase in potential emissions of any regulated pollutant. Such detail is necessary to determine if the planned actions amount to a major modification.

The Third Circuit's statements about major modifications may not have any long-lasting impacts for a number of reasons, not the least of which being the fact that it is hard to discern what it really said on this topic in the first place. Nonetheless, it will be interesting to see if anything develops here. The issue of what constitutes a "major modification" comes up much more frequently than the issue of whether restart of a shuttered operation constitutes construction. For this reason, one can expect that EPA will respond to any perceived threats to its major modification regulations and policies decisively and aggressively.

Understanding *Port Hamilton's* Context

The EPA final decision at issue in *Port Hamilton* appears to be a routine application of administrative policy to an environmental permitting question. EPA considered the PSD permitting status of a shuttered facility, referred back to long-standing Agency policy that required such a facility to obtain a PSD permit prior to re-starting operations, and applied it in its final decision. However, even a routine application of administrative policy is influenced by the underlying factual context.

In this case, the underlying factual context is pretty striking. The refinery had been shuttered for over eight years before a previous owner attempted to restart the facility in late 2020. From the very beginning of this attempted restart, the refinery was plagued by severe operational problems and significant environmental noncompliance. Multiple releases from the refinery resulted in contamination of local vegetable gardens and cisterns used by residents for potable water. As a result, EPA eventually issued an emergency order under Section 303 of the Clean Air Act that called for, among other things, the suspension of operations at the refinery until certain compliance and process safety benchmarks were achieved. In an EPA press release announcing the issuance of the Order, EPA noted that recent repeated incidents at the refinery "[r]aise significant environmental justice concerns, which are a priority for EPA. (*Author's Note: I touched on EPA's authority to issue orders under Section 303 of the Clean Air Act in an article entitled *EPA's EJ Enforcement Guidance: How Will Early Relief Be Sought?* in the June 2, 2021 edition of The Cubical. To access this edition of the newsletter, click [here.](#))*

The factual context in this case is important for two reasons. First and foremost, it serves as a reminder that such decisions are never made in a vacuum. EPA's mission is to protect public health, public welfare, and environmental resources. Ultimately, the public measures EPA's performance on the basis of its results. Thus, even the most seemingly straightforward application of Agency policy can be amplified, or at least influenced, by severe noncompliance or extensive pollution and contamination.

Second, the factual context behind EPA's final decision may influence EPA's next steps in light of the Third Circuit's decision. Given how long the Reactivation Policy has been in place, one might expect that EPA would be eager to seek review in front of the U.S. Supreme Court. However, the current ideological bent of the Court, as well as recent statements and jurisprudence on matters of environmental and administrative law. If EPA believes that it can protect the environment and the public health and welfare of St. Croix and its citizens with tools such as Section 303(a) orders, it may ultimately seek to limit the applicability of the *Port Hamilton* decision to the states and territories of the Third Circuit, and otherwise just let sleeping dogs lie for now.

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