

Appendix M

District's Supplemental Responses to Public Comments 3/9/17

(Alon Bakersfield Refining, S-33, 1134224)

This supplemental response to comments is being provided as directed by EPA in their 12/21/16 order.

Responses to EPA's 12/21/16 Order Granting in part a petition for object to permit, Petition No IX-2014-15 (see Appendix M-1)

Below is the EPA direction provided to the District on page12 of the above referenced order:

Direction to SJVUAPCD: In responding to this Order, SJVUAPCD must review its determination and the record with respect to the ERCs at issue in the Petition and provide a record to adequately support its determination. If the District concludes upon further review that its determination in the record with respect to some or all of the ERCs is not supportable, SJVUAPCD must make a new determination and ensure that any such new determination is adequately supported and explained in the permit record. If the District concludes upon further review that its determination in the record is supportable, SJVUAPCD must explain why this is this case.

Specifically, the District must directly respond to the allegations raised in the public comments concerning the validity of the five ERCs relied upon by Alon. Further, the District should explain why the specific emission reductions are eligible for credit as ERCs, consistent with Rule 2201, applicable attainment plans, and associated inventories. The District should also explain its interpretation of its emission offset tracking system and explain how this system addresses the claims raised by the Petitioners. If SJVUAPCD determines, upon additional review, that any of the ERCs are not valid (for example, that ERC certificate S-3462-4 does not reflect a 10 percent reduction), it must take action to address the deficiency.

Allegations raised in Section V of EJ's 11/19/14 public comments concerning the validity of the five ERCs relied upon by Alon and District responses:

EJ Comment V¹:

V. All of the Emission Reduction Credits Proposed Are Invalid

The Air District has proposed to use emission reduction credit (ERC) certificate numbers S-4334-2, S-3465-5, S-3462-4, S-3458-3, and S-3663-1. Application Review at 46. These emission reductions credits come from three separate shutdowns or curtailments at the facility, all of which occurred decades ago: (1) the 1977 incineration of coker exhaust in the CO boiler—almost four decades ago (ERC S-3458-3, and S-3663-1); (2) the 1983 shutdown of the catalytic cracker, fluid coker, and CO boiler—more than three decades ago (ERC S-4334-2 & S-3465-5); and (3) the shutdown of the tailgas incinerator in 1992—more than two decades ago (ERC S-3462-4). *See Ex. JJ.*

Under District Rule 2201 and 2301, emission reductions used as ERCs must be “real, enforceable, quantifiable, surplus, and permanent.” Rule 2201 § 3.2.1; Rule 2301 § 4.1. Given the many changes that have occurred at the refinery since 1977, including the recent shutdown and previous reconfigurations of the refinery, these decades-old reductions are no longer “real” and will not actually offset the refinery’s significant projected air emissions. The notion that these shutdown units could still be operational today and “offset” the existing refinery’s emissions, after the many reconfigurations and shutdowns that the refinery has undergone, is purely fictional.

Moreover, as explained below, all of the ERC credits are either invalid or may not be employed here. The Air District may not approve the Authority to Construct until valid ERCs are included.

District Response V.

Prior of issuance of an Emission Reduction Credit (ERC) the District must determine if the emission reduction meets all of the criteria in Rule 2301, *Emission Reduction Credit Banking*, i.e. that the emission reductions be real, enforceable, quantifiable, surplus, and permanent. In addition, all originating ERC projects are subject to a 30-day EPA/CARB/Public comment period. Any and all comments must be addressed by the District prior to final issuance of an originating ERC certificate.

¹ Please note that this comment is identical to Comment V in Earthjustice’s 12/16/14 Petition to EPA

If an emission reduction does not meet these criteria, an ERC cannot be granted. Conversely, if an emission reduction meets the criteria in Rule 2301, the emission reduction qualifies for banking and an ERC is issued.

Once the ERC is issued, there is no requirement in Rule 2301 or Rule 2201, *New and Modified Stationary Source Review*, to re-evaluate the ERC when used to provide emission offsets required by an Authority to Construct (ATC).

This is critical to providing certainty for applicants, and for the District, that once an ERC has been issued it is valid as a means to provide emission offsets in Rule 2201. As such, it is not required that the District re-establish that ERCs are valid for use at the time that the ERCs are proposed to be used as offsets for an ATC.

Please note while Rule 2201 includes an explicit requirement that emission offsets be provided for every ATC that has an emission increase that exceeds the emission offset thresholds, Rule 2201 includes additional provisions to ensure that the District's offset requirements as a whole are equivalent to the offset requirements prescribed by Federal regulations.

Rule 2201 section 7.0 Annual Offset Equivalency Demonstration and Pre-baseline ERC Cap Tracking System assesses the overall equivalency of Rule 2201 offset requirements with federal offset regulations on an annual basis. The details of this equivalency system have been included in Rule 2201 since December 19, 2002. Each year an offset equivalency demonstration is performed by the District to show the District's offsetting requirements are as stringent, if not more stringent, than the Federal offsetting requirements. This demonstration examines NSR projects processed during the tracking year (August 20th of the previous year to August 19th of the current year). A successful demonstration allows the District to continue administering its offsetting program instead of directly implementing federal offsetting requirements. The District's annual offset equivalency demonstration is detailed in a report to EPA which includes a list of the Federal Major Modifications and new Major Source projects which would have required offsets under the federal offset program. Copies of these reports are located on the District's website, see http://www.valleyair.org/busind/pto/annual_offset_report/annual_offset_report.htm.

This offset equivalency demonstration ensures that the District's offset system provides an equivalent quantity of "federal offsets" for all new Major Source and Federal Major Modifications (as in the case with the subject ATCs issued to Alon) in a given year as would be required under a "Federal only" offset requirement. A successful annual offset equivalency demonstration indicates and confirms that all permitting performed during

the 12-month period of the report complies with federal offsetting requirements, including the need to supply surplus credits for major project emission increases. This demonstration is valid regardless of the specific ERCs that are used to provide offsets for specific new major source and Federal major modification projects.

Therefore, the following responses to Earth Justice's comments do not attempt to demonstrate that the ERCs proposed to be used for the Alon project meet, on an individual ERC basis, federal offsetting requirements. Rather, they demonstrate the legality of the specific ERCs used to satisfy Rule 2201 requirements for the use of such ERCs, while the annual offset equivalency report demonstrates the District NSR rule's programmatic compliance with federal offsetting requirements.

Moreover, the District does not claim, nor does Rule 2201 require, that these ERCs are surplus "at the time of use". As explained above, the surplus nature of emission reductions used to offset increases in emissions from federal major projects is demonstrated on an annual basis through the District's EPA-approved Offset Equivalency Demonstration Report process. Any discussion of the surplus nature of individual credits used to satisfy the offsetting requirements of Rule 2201, the District's NSR rule, is not germane to the applicable regulations.

The Alon ATCs (issued 3/19/15) resulted in a Federal Major modification for NO_x and VOC emissions (but not for PM₁₀, SO_x, or CO emissions). As such, these emissions are included in the 8/20/14 – 8/19/15 Offset Equivalency Report submitted to EPA, see http://www.valleyair.org/busind/pto/annual_offset_report/2014equivalency.pdf.

In this report (see pages 1 and 17), the federal offset quantities for the Alon ATCs are shown to be 18.9 ton NO_x/year and 21.2 ton VOC/year. To offset this federal offset quantity, emission reductions that were surplus at the time the ATCs were issued (not the ERCs identified to satisfy Rule 2201 requirements) were applied to this emission increase. This report identifies each ATC project that constitutes a new Federal major source or a Federal major modification and the quantity of Federal offsets that would be required for that project under a Federal-only permitting program. The report requires two equivalency determinations – offset requirement equivalency and surplus at the time of use equivalency.

The offset requirement equivalency compares the offsets that would be required under a Federal NSR to the annual quantity of offsets required under Rule 2201 and includes any excess or shortfall from previous years. If there is an excess amount of emission reductions provided, the report demonstrates offset requirement equivalency.

The surplus at the time of use equivalency compares the offsets that would be required under a Federal NSR to the surplus value of creditable emission reductions used as offsets during the year and includes any excess or shortfall from previous years. If there is an excess amount of surplus emission reductions, the report demonstrates surplus at the time of use equivalency.

This report concludes that sufficient surplus emission reductions were supplied by the offset equivalency demonstration program for all Federal offsets requirements in the District for this time period, including the Alon ATCs.

EJ Comment V.A.²:

A. The Air District May Not Employ Banked Offsets for NOx and VOC Emissions

The Air District proposes to offset the project's NOx and VOC emissions with ERC S-4334-2, for the 1983 "shutdown of catalytic cracker, fluid coker, & CO boiler," and with ERC S-3663-1, for the 1977 "incineration of coker exhaust in CO boiler." Ex. JJ. Because the District may not approve the use of offsets for NOx and VOC emissions until the 1-hour ozone plan is approved by EPA, the Air District may not issue the Authority to Construct in reliance on these offsets.

Air District Rule 2201 § 4.13.1 requires that "Major Source shutdowns or permanent curtailments in production or operating hours of a Major Source may not be used as offsets for emissions from . . . a Federal Major Modification . . . unless the ERC, or the emissions from which the ERC are derived, has been included in an EPA-approved attainment plan."

The San Joaquin Valley air basin is currently designated as in extreme nonattainment with the 1-hour standard for ozone, for which NOx and VOC emissions are precursors. The District does not yet have an approved attainment plan for the 1-hour ozone standard. Thus, the Air District may not use these banked emission reduction credits to offset the NOx and VOC emissions of this project.

District Response V.A.:

As discussed above, under Rule 2201, *New and Modified Stationary Source Review*, the District is required to demonstrate mitigation of newly permitted major projects with federal surplus reductions on an annual basis, in our Annual Offset Equivalency Demonstration. The individual ERCs surrendered by an applicant to mitigate their

² Please note that this comment is identical to Comment V.A. in Earthjustice's 12/16/14 Petition to EPA

project's emissions are not required by District regulations to satisfy federal offsetting requirements, and any statement by the commenter that they are required by law to be viewed in that context is purely fictional.

While the District does not stipulate that the ERCs being discussed are from the curtailment or shutdown of major sources, a full discussion and explanation of the District's position on this issue for each ERC is unnecessary, as, contrary to the commenter's position, the subject ERCs are "...included in an EPA-approved attainment plan." Each of these ERCs have been incorporated in the District's growth factors as being available to provide offsets for growth in emissions in attainment plans, including the EPA-approved 2007 8-hour ozone plan. Thus, these emissions are included in future year emissions calculations and modeling of future air quality. The attainment plans then provide for real-time mitigation to ensure contemporaneous air quality benefit, regardless of the date the credits were banked or used as offsets under the District's NSR rule. ERC S-3663-1 (listed as previously issued parent ERC S-2333-1) and ERC S-4334-2 (listed as previously issued parent ERC S-2183-2) are included in the EPA approved 2007 ozone attainment plan (approved 3/1/2012, see 77 FR 12652) in Appendix D, see http://www.valleyair.org/Air_Quality_Plans/AQ_Final_Adopted_Ozone2007.htm. The inclusion of these ERCs in the 2007 ozone attainment plan verifies that this emission reduction is not being used as "credit elsewhere".

Please note that Rule 2201 section 4.13.1 requires that such ERCs from major source shutdowns or curtailments that are used as offsets for a major source, Federal Major Modification, or SB288 major modification be included in an EPA-approved attainment plan. As stated above, the ERCs are included in an EPA-approved 2007 8-hour attainment plan. There is not a requirement that the ERCs be included in an EPA-approved 1-hour ozone attainment plan prior to their use (as an aside, EPA has repealed the 1-hour ozone standard, and therefore there is no requirement for attainment plans for that standard, nor will EPA be approving one if it were submitted for approval).

EJ Comment V.B.³:

B. Emission Reduction Credit Certificates S-3458-3 and S-3663-1 Are Invalid

ERC S-3458-3, for CO reduction, and S-3663-1, for VOC reduction, state that they were issued for “incineration of coker exhaust in CO boiler.” Ex. JJ. The authority to construct for the CO boiler was issued on January 12, 1976, and operations began in May of 1977.³⁸ Because these reductions occurred prior to August 7, 1977, the credit given for these reductions is invalid, and may not be used here to offset project emissions. *See* 40 C.F.R. § 51.165(a)(2)(ii)(C)(1)(ii) (“in no event may credit be given for shutdowns that occurred before August 7, 1977.”).

Both the U.S. Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) submitted comments on the proposed emission reduction credits, explaining the many reasons why the credits are invalid.³⁹ Both EPA and CARB pointed out that credits were invalid because the application for banking credit was submitted beyond the required time limits; a completed application was not submitted until October 1985, almost ten years after the reduction occurred. EPA also explained that

The reductions from the installation of the CO boiler are quite old. The burden is on the District to verify in its analysis that these reductions have not been assumed elsewhere (in the emissions inventory, the latest [air quality management plan], the attainment demonstration) and therefore are indeed surplus. In all likelihood, these reductions are not surplus since they occurred so long ago and probably are already reflected in the District’s records and plans. The District must verify that these reductions are not credited elsewhere.

Ex. LL. The District did not provide EPA with verification that these reductions were not credited elsewhere. EPA further explained that:

The reductions occurred prior to August 7, 1977 and are therefore too old to be granted credit. EPA has previously advised the District that banking credit may not be awarded for any reductions which occurred prior to the Clean Air Act Amendments of August 7, 1977.... EPA will not recognize these reductions as valid offsets for any source wishing to purchase these ERCs for offsetting purpose.

Ibid. EPA warned that “any source which attempts to use these emission reductions as an offset may be subject to federal enforcement action.” *Ibid.*

Because ERCs S-3458-3 and S-3663-1 are invalid and “subject to federal enforcement action” if used, the Air District may not employ them here to offset the project’s CO and VOC emissions.

³ Please note that this comment is identical to Comment V.B. in Earthjustice’s 12/16/14 Petition to EPA

District Response V.B.:

The referenced section of the CFR - 40 CFR 51.165(a)(2)(ii)(C)(1)(ii) does not exist. We believe that Earthjustice is referring to 40 CFR 51.165(a)(3)(ii)(C)(1)(ii).

It is worth noting, first, that this section of the CFR is implemented by the District's SIP-approved Rule 2201 as discussed above. If the commenter is objecting to the sufficiency of Rule 2201, the proper forum to do so is in a challenge to EPA's approval of Rule 2201, not in a project analyzed subsequent to EPA's approval of that rule into the SIP. However, the following is offered in an effort to be as fully responsive as possible:

40 CFR 51.165(a)(3)(ii)(C)(1) states:

(C)(1) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs (a)(3)(ii)(C)(1)(i) through (ii) of this section.

(i) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(ii) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. However, in no event may credit be given for shutdowns that occurred before August 7, 1977.

ERC S-3458-3 and S-3663-1 represent emission reductions that were generated from adding controls to an existing emission unit, i.e. incineration of coker exhaust in a CO boiler. The units were not curtailed or shut down. The referenced CFR section only applies to units with emission reductions resulting from being shut down or curtailed. Therefore, the referenced CFR section would not apply, even if District permitting actions were required to directly conform to it.

EJ Comment V.C.⁴:

C. Emission Reduction Credit Certificate S-3462-4 Is Invalid

ERC S-3462-4, for PM10 reductions from the March 1992 shutdown of the tailgas incinerator, does not represent the bankable emission reduction from this shutdown, and is therefore invalid.

In the application review for ERC S-3462-4, the Air District explained that the emission reductions eligible for an emission reduction credit certificate include the baseline emissions of the tailgas incinerator reduced by a 10% deposit into the "Community Bank". See Application review at 5 ("10% of AER shall be deposited to the Community Bank; remaining AER qualifies for the ERC Certificate.") (Exhibit NN). With this reduction, the Air District stated that the Bankable Emission Reductions, available for an ERC Certificate, were:

Quarter 1 Jan-Mar	Quarter 2 Apr-Jun	Quarter 3 Jul-Sep	Quarter 4 Oct-Dec.
1,425.41 lbs	1,689.42 lbs	1611.54 lbs	1,776.42 lbs

Id. at 6. However, the Emission Reduction Certificate issued did not take the 10% reduction into account, and erroneously issued credits as:

Quarter 1 Jan-Mar	Quarter 2 Apr-Jun	Quarter 3 Jul-Sep	Quarter 4 Oct-Dec.
1,584 lbs	1,877 lbs	1,791 lbs	1,974 lbs

See Ex. JJ, ERC S-3462-4. Because this Certificate fails to comply with Air District Rule 2201 § 4.12.1 and 2301 § 4.2.2, it is invalid and may not be used to offset the project's PM10 emissions.

District Response V.C:

Upon reviewing the District record, it was determined that when the original ERC (ERC S-2-4) was issued in 1992, the District erroneously failed to deduct 10% of the emission reduction prior to issuing the ERC, and we appreciate this oversight being brought to the District's attention. This ERC has not been consumed in any way since issuance. It should be noted that this type of oversight is no longer possible with the District's computerized ERC systems that are now in place.

ERC S-2-4 (now ERC S-3462-4) was originally issued in the following quarterly amounts of PM10:

Quarter 1	Quarter 2	Quarter 3	Quarter 4
1,584	1,877	1,791	1,974

⁴ Please note that this comment is identical to Comment V.C. in Earthjustice's 12/16/14 Petition to EPA

To correct the District's oversight, ERC S-3462-4 has now been reduced by 10% in each calendar quarter, specifically by the following quarterly amounts of PM10:

Quarter 1	Quarter 2	Quarter 3	Quarter 4
158	188	179	197

The corrected ERC amount has been reissued as ERC S-4798-4 in the following quarterly amounts of PM10, reflecting the deduction of the required 10% reduction:

Quarter 1	Quarter 2	Quarter 3	Quarter 4
1,426	1,689	1,612	1,777

See new ERC S-4798-4 in Appendix M-2. This adjustment fully resolves the District's 1992 oversight.

EJ Comment V.D.⁵:

D. Emission Reduction Credit Certificate S-4334-2 and S-3465-5 Are Invalid

ERCs S-4334-2 and S-3465 state that they were issued for the “shutdown of catalytic cracker, fluid coker, & CO boiler.” Ex. JJ. Because these certificates were originally applied for in 1987, more than 90 days after the 1983 shutdown occurred, the application was not timely filed and the certificates are invalid. *See* Letter from Leon Hebertson to L.E. Perrier (Aug. 27, 1987) (Exhibit OO).

The Air District acknowledged as much. In a letter on August 27, 1987 to Texaco Refining (the predecessor to the Alon Bakersfield Refinery), the Air District denied Texaco’s original emission reduction credit application as untimely, explaining that:

On July 31, 1987 we received your applications for Emission Reduction Credit Banking Certificates resulting from the November, 1985 [sic] shutdown of the Tosco T.C.C. Unit, Fluid Coker, and CO Boiler. Review of these applications reveals that this request is not timely. Rule 210.3, section C.4.(b) requires applications for banking of emissions reductions to be submitted within 90 days after such reduction occurs. Because your proposal does not comply with this requirement, your applications for Emission Reduction Credits Banking Certificates must be denied within 30 days.

Ex. OO. After Texaco objected to the Air District’s denial, the Air District reversed course and granted the requested emission reduction credits on April 14, 1988. In explaining the change, the Air District capitulated to Texaco’s erroneous interpretation that because Texaco had maintained its operating permit, it had not actually “shutdown,” even though the equipment had last been operated in 1983. Application Review for Application #s 2007130/101, ‘130/201, ‘130/401, ‘130/501, and ‘130/601 (Jan. 14 1988) (Exhibit PP) at 2. This interpretation, however, conflicts with Rule 2301 § 3.14, which defines “shutdown” for the purposes of awarding emission reduction credits as “either the *earlier* of the permanent cessation of emissions from an emitting unit or the surrender of that unit’s operating permit.” (emphasis added).

The Air District had it right the first time: the application was untimely because it was received more than 90 days after the shutdown occurred. ERC certificates S-4334-2 and S-3465 are therefore invalid and may not be used to offset this project’s NO_x and SO_x emissions.

⁵ Please note that this comment is substantially similar to Comment V.D. in Earthjustice’s 12/16/14 Petition to EPA. In the 12/16/14 Petition to EPA EJ also included “Because the Permit fails to include valid emission reduction credit, the Administrator must object to the Permit.”

District Response V.D.:

In evaluating the ERC application, the Kern County APCD determined that the emission reduction occurred for the equipment in question - catalytic cracker, fluid coker, and CO when the PTOs for the equipment were surrendered. The PTOs were surrendered as part of the submittal of the ERC application in 1987.

KCAPCD Rule 210.3 section C. 4. (b) does not specify a criteria to determine “the date such reduction occurs”, however, KCAPCD’s 1985 policy (see Appendix M-3) specifies criteria to determine when a source is shutdown, i.e. when a emission reduction occurs. This policy clarifies that if the operator has a valid PTO and has maintained the equipment in operable condition has the legal right to operate the source shall be considered an operating source, not a shutdown source.

As the subject equipment had valid PTOs and was in an operable condition at the time the ERC application was submitted, the emission reduction had not yet occurred. As such, the ERC application was submitted in a timely manner under Kern County rules in effect at the time.

Summary:

As discussed above, the issuance of the Alon ATCs relied on the use of valid ERCs to provide offsets required by Rule 2201. The ERCs were determined to be valid at the time of issuance. It is not required by Rule 2201 or Rule 2301 to re-evaluate the original issuance of ERCs every time an ERC is used to provide offsets for an ATC. However, to satisfy the request in EPA’s order, we have done so in this case.

Further, the District’s offset equivalency system contained in Rule 2201 includes additional provisions to ensure that the District’s offset requirements as a whole are equivalent to the offset requirements prescribed by Federal regulations, including the requirement to supply surplus reductions for all federal offsetting requirements. The offset equivalency demonstration ensures on an annual basis that the District’s offset system is equivalent to federal offset requirements for all new major sources and federal major modifications. As such, compliance with federal offsetting requirements for the Alon project are satisfied via the offset equivalency tracking system, and not by evaluating the specific ERCs used to provide offsets under Rule 2201 for the Alon ATCs.

Lastly, as discussed above, the ERCs proposed to be used as offsets for the Alon ATCs qualified for banking at the time of original ERC issuance, were subject to an EPA/CARB/Public 30-day comment period and remain valid and available for use as offsets for the Alon ATCs.

We trust that the above justification satisfies the requirement of EPA’s order.

We also note that the District's full discussion of these issues in this forum in no way implies that the District believes that it must supply this level of detail in addressing comments on the surplus nature of individual credits used as offsets for individual increases in emissions on a project-by-project basis. There is no legal requirement that ERCs supplied to offset projects, at the project-approval level, be surplus. As noted several times above, the federal obligation to supply surplus credits is addressed in the District's EPA-approved annual Offset Equivalency Demonstration process. Therefore the District disagrees with EPA in their conclusion that the District should have more thoroughly addressed the commenter's questions about the surplus ("real") nature of the credits used for the Alon project.

Appendix M-1

**EPA's 12/21/16 Order Granting in part a petition for object to permit,
Petition No IX-2014-15**

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. IX-2014-15
ALON USA – BAKERSFIELD REFINERY)	ORDER RESPONDING TO THE
KERN COUNTY, CALIFORNIA)	PETITIONERS’ REQUEST FOR
PROJECT NOS. S-1134224 & S-1134223)	OBJECTION TO THE ISSUANCE OF
ISSUED BY THE SAN JOAQUIN VALLEY)	A PERMIT
UNIFIED AIR POLLUTION CONTROL DISTRICT)	

ORDER GRANTING IN PART A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated December 16, 2014, (Petition) from the Association of Irrigated Residents, Center for Biological Diversity, and the Sierra Club (Petitioners). The Petition requests that the EPA object to the proposed issuance of an Authority to Construct / Certificate of Conformity (Permit) issued by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or District¹) to the Alon USA – Bakersfield Refinery (Alon or facility) in Bakersfield, Kern County, California.

This Order responds to Claim V of the Petition.² Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA grants in part the Petition requesting that the EPA lodge an objection. Specifically, the EPA grants Claim V of the Petition.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits and Preconstruction Permits

Section 502(d)(1) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The California Air Resources Board (CARB) submitted a title V program on behalf of SJVUAPCD governing the

¹ Prior to March 20, 1991, when SJVUAPCD began operation, the Kern County Air Pollution Control District was the permitting authority for the Alon facility. The term “District” used herein is intended to refer to the relevant permitting authority with jurisdiction over the facility at any given point in time.

² Pursuant to the terms of a settlement agreement, noticed on October 21, 2016 (81 FR 72804), this Order responds only to the claims made in Part V of the Petition. The Petitioners’ additional claims will be addressed separately pursuant to the timeline specified in the settlement agreement.

issuance of operating permits in the District on July 3, and August 17, 1995. The EPA granted interim approval of SJVUAPCD's title V operating permit program in 1996 (61 FR 18083) and final approval in 2001 (66 FR 63503). SJVUAPCD's title V program is codified in SJVUAPCD Rule 2520 and portions of Rule 2201.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable state implementation plan (SIP). CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting and other requirements to assure sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

Applicable requirements for a new "major stationary source" or for a "major modification" to a major stationary source include the requirement that the source obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. For major stationary sources, the NSR program is comprised of two core types of preconstruction permit programs. Part C of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to areas of the country that are designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS). CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of the Act establishes the nonattainment NSR (NNSR) program, which applies to areas that are designated as nonattainment with a NAAQS. CAA §§ 171–193, 42 U.S.C. §§ 7501–7515. The Alon facility is located in an area designated federally as nonattainment for ozone and particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers (PM_{2.5}), and, as such, is subject to the NNSR program.

B. SJVUAPCD Title V and Preconstruction Permit Programs

SJVUAPCD issues preconstruction NNSR permits—termed Authorities to Construct, or ATCs—under SIP-approved SJVUAPCD Rule 2201. Applicable requirements from a preconstruction permit (such as an ATC) must be included in a source's title V operating permit.³ According to SJVUAPCD's EPA-approved title V program rules, this can be accomplished in one of two ways, as described below. *See* SJVUAPCD Rule 2520 § 5.3.3. Depending on the procedures

³ Under 40 C.F.R. § 70.1(b), "All sources subject to [the title V regulations] shall have a permit to operate that assures compliance by the source with all applicable requirements." "Applicable requirements" are defined in 40 C.F.R. § 70.2 to include: "(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the [Clean Air] Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 C.F.R.] part 52; [and] (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act."

used, proposed permits issued by SJVUAPCD could be subject to EPA review in two different circumstances.

First, the source's title V permit could be revised to include the ATC terms through significant or minor title V permit modification procedures. *See* SJVUAPCD Rule 2520 §§ 3.20, 3.29, 11.3, 11.4; *see also* 40 C.F.R. § 70.7(e). Title V permit modifications that incorporate the terms of ATC permits through significant or minor title V permit modification procedures would be subject to review according to the requirements of title V of the CAA and the EPA's implementing regulations. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), permitting authorities are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements of the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a proposed permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative, CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit.⁴ SJVUAPCD's EPA-approved title V regulations in Rule 2520 § 11.3 outline this process for initial title V permits, permit renewals, and significant permit modifications.

Alternatively, the ATC terms could be incorporated into the title V permit through administrative permit amendment procedures under certain circumstances. The EPA's regulations at 40 C.F.R. § 70.7(d)(1)(v) provide that requirements from preconstruction permits may be incorporated into a source's title V permit through administrative amendment procedures, provided that the permitting authority's EPA-approved preconstruction permit program "meets procedural requirements substantially equivalent to the requirements of" the EPA's title V regulations in 40 C.F.R. §§ 70.7 and 70.8 that would be applicable if the permit changes were subject to review as a title V permit modification. Under SJVUAPCD Rules 2201 and 2520, if an ATC is issued with a Certificate of Conformity (COC)—certifying that it was "issued in accordance with procedural requirements substantially equivalent to" those that would have been required under title V permit modification procedures—the ATC terms would be eligible to be incorporated into an existing title V permit as an administrative permit amendment. *See* SJVUAPCD Rule 2520 §§ 1.4, 3.2.6, 3.7; Rule 2201 § 6.0; *see also* 40 C.F.R. § 70.7(d)(1)(v). SJVUAPCD Rule 2201 §§ 5.9 and 6.0, which are also part of SJVUAPCD's EPA-approved title V program, detail the "enhanced" procedural requirements that must be followed to issue an ATC with a COC. Among others, these requirements include public notification, EPA 45-day review and objection procedures, and public petition procedures. *See* SJVUAPCD Rule 2201 § 5.9.1. Importantly, where an ATC permit is issued according to these "enhanced" procedural requirements in order

⁴ SJVUAPCD Rule 2520 § 11.3.7 mirrors these provisions for the submittal of petitions to the EPA on title V permit actions.

to qualify for a COC, an opportunity for the public to petition the EPA exists on the ATC issued with a COC, under Rule 2201. *See* SJVUAPCD Rule 2201 § 5.9.1.7.⁵

C. Framework for EPA Review of Issues in the Petition

The Petition requests an EPA objection to the ATC permit issued with a COC. The Petition cites CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) as well as SJVUAPCD Rule 2201 as the bases for its Petition. The framework for the EPA's evaluation of the issues raised in a petition on a proposed ATC issued with a COC according to SJVUAPCD Rule 2201 should be the same as the framework for the EPA's review of a proposed title V permit issued under SJVUAPCD Rule 2520 (under the authority of CAA § 505(b)(2) and 40 C.F.R. § 70.8(d)). The premise of the "enhanced administrative requirements" contained in SJVUAPCD Rule 2201 (and authorized by 40 C.F.R. § 70.7(d)(1)(v)) is to create a process that is "substantially equivalent to" the process delineated in 40 C.F.R. §§ 70.7 and 70.8. As this includes the opportunity to petition the EPA and for EPA objection (SJVUAPCD Rule 2201 § 5.9.1.7), the framework underlying the EPA's review of a SJVUAPCD Rule 2201 petition should be "substantially equivalent to" the standard of review contemplated by title V of the CAA and the EPA's implementing regulations. Moreover, SJVUAPCD Rule 2201 § 5.9.1.9.4 states that EPA objection "shall be limited to compliance with applicable requirements and the requirements of 40 CFR Part 70."⁶ This language mirrors the objection criteria articulated in CAA § 505(b)(1) and (2) and 40 C.F.R. § 70.8(c). Thus, it is appropriate for the EPA to apply the traditional title V standards and framework based on CAA § 505(b)(2) (described in the following subsection) when reviewing the Petition under Rule 2201.

D. Review of Issues in a Petition Pursuant to 505(b)(2)

A petition to the EPA under CAA § 505(b)(2) shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* SJVUAPCD Rule 2201 § 5.9.1.7. In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also* *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316,333 n.11 (2d Cir. 2003) (*NYPIRG*). Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *Sierra Club v. EPA*, 557

⁵ As noted above, these rules are part of the District's EPA-approved title V program. *See* 66 FR 63503 (November 30, 2001); 66 FR 53151 (October 19, 2001) (proposing to approve portions of District Rule 2201 "that contain part 70 requirements allowing a source to obtain a modification under Rule 2201 that also satisfies part 70 requirements").

⁶ Similarly, SJVUAPCD Rule 2201 § 5.9.1.7 indicates, "Petitions shall be based on the compliance of the permit provisions with applicable requirements."

F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *c.f.* *NYPIRG*, 321 F.3d at 333 n.11.

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."). Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object if such a demonstration is made" (emphasis added)); *Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word shall . . . plainly mandates an objection whenever a petitioner demonstrates noncompliance." (emphasis added)). When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130–31. We discuss certain aspects of the petitioner's demonstration burden below; however, a fuller discussion can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA has looked at a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the response to comment (RTC) document), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying title V petition issue where petitioners did not respond to state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying title V petition issue where petitioners did not acknowledge or reply to state's RTC or provide a particularized rationale for why the state erred or the permit was deficient). Another factor the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for petitioner's objection, contrary to Congress' express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive."); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific

applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co. – Sandow 5 Generating Plant*, Order on Petition Number VI-20 11- 05 at 9 (January 15, 2013); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 at 12, 24 (March 15, 2005). Also, if a petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition Number: VIII-2010-XX at 7–10 (June 30, 2011); *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 at 6–7, 10–11, 13–14 (July 23, 2012).

The information that the EPA considers in making a determination whether to grant or deny a petition generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority’s written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency’s review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

If the EPA grants an objection in response to a title V petition, a permitting authority may address the EPA objection by, among other things, providing the EPA with a revised permit. *See, e.g.,* 40 C.F.R. § 70.7(g)(4). However, as explained in the *Nucor II Order*, a new proposed permit in response to an objection will not always need to include new permit terms and conditions. For example, when the EPA has issued an objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing additional rationale to support its permitting decision. *Id.* at 14 n.10. In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, the permitting authority’s response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. §§ 70.8(c) and (d). *See Nucor II Order* at 14. Accordingly, the new proposed permit would be subject to the agency’s opportunity to conduct a 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for a petition if the EPA does not object. The EPA has explained that treating a state’s response to an EPA objection as triggering a new EPA review period and a new petition opportunity is consistent with the statutory and regulatory process for addressing objections by the EPA. *Id.* at 14–15. The EPA’s view that the permitting authority’s response to an EPA objection is generally treated as a new proposed permit does not alter the procedures for making the changes to the permit terms or conditions or permit record that are intended to resolve the EPA’s objection, however. When the permitting authority modifies a permit in order to resolve an EPA objection, it must go through the appropriate

procedures for that modification. For example, when the permitting authority's response to an objection is a change to the permit terms or conditions or a revision to the permit record, the permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 CFR 70.7(e)(2) and (4) or the corresponding regulations in the permitting authority's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 CFR 70.7(h) or the permitting authority's corresponding regulations. The same principles would apply to responses to EPA objections under SJVUAPCD Rule 2201.

It is also important to note that when a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit or permit record with respect to the specific deficiencies that the EPA identified; permitting authorities need not re-propose the entire permit or address elements of the permit or permit record unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or elements of the permit record modified in that permit action—for example, the specific elements revised by the permitting authority in response to the EPA's objection.⁷ See *In The Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10, at 38–40 (September 14, 2016); *In the Matter of WPSC – Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

III. BACKGROUND

A. The Alon Facility

Alon USA owns a petroleum products refinery and gasoline terminal, located in Bakersfield, Kern County, California. Alon has proposed multiple modifications to its facility, including the addition of new equipment and the modification of several process and combustion units (termed the "Crude Flexibility Project"). These modifications will result in nitrogen oxide (NO_x), carbon monoxide (CO), volatile organic compounds (VOC), PM₁₀, PM_{2.5} and sulfur oxide (SO_x) emissions from new or modified combustion units, as well as VOC emissions from tank, loading, and fugitive sources. Because the facility is located in a nonattainment area, Alon was required to obtain ATCs for the Crude Flexibility Project pursuant to SJVUAPCD's NNSR rules. The Crude Flexibility Project will exceed NNSR offset thresholds for NO_x, SO_x, CO, PM₁₀ and VOC emissions, and, therefore, Alon was required to obtain offsets for the emissions associated with the Crude Flexibility Project.

B. Permitting History

On October 25, 2013, Alon submitted an application for multiple ATCs to authorize the proposed Crude Flexibility Project. Alon also applied for the ATCs to be processed with a COC,

⁷ Of course, when a permitting authority chooses to revise permit terms or portions of the permit record not directly addressed by the EPA's objection, any of those revised terms would also be within the scope of the EPA's review and subsequent public petition opportunity.

as these modifications would have also necessitated a significant permit modification to Alon's title V permit. Accordingly, the ATCs were processed according to the enhanced administrative requirements of Rule 2201 § 5.9. SJVUAPCD published notice⁸ of its preliminary decision and proposed ATCs and COC for the Crude Flexibility Project on October 14, 2014, triggering a public comment period that ended on November 19, 2014. SJVUAPCD also emailed the preliminary decision to the EPA on October 14, 2014, triggering the EPA's 45-day review period, which ended on November 27, 2014. The EPA did not object to the issuance of the Permit or otherwise submit comments. SJVUAPCD issued the final ATCs and COC on March 19, 2015. Accompanying the final ATCs were SJVUAPCD's RTC document.

C. Timeliness of Petition

If the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. SJVUAPCD Rule 2201 § 5.9.1.7. The 60-day public petition period ran until January 26, 2015.⁹ The Petition was dated December 16, 2014, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. EPA DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim V: "All of the Emission Reduction Credits Proposed Are Invalid"

Petitioners' Claim: The Petitioners state that the District proposed to use emission reduction credit (ERC) certificate numbers S-4334-2, S-3465-5, S-3462-4, S-3458-3, and S-3663-1 to offset emissions associated with the proposed project. Petition at 13 (citing Application Review at 46). The Petitioners claim generally that all of these ERCs are invalid and conclude that the ERCs therefore may not be used as offsets and that the EPA must object to the Permit. *Id.* at 14–18. To support this claim, the Petitioners put forth a collection of specific arguments, each addressing some or all of the subject ERCs.

First, the Petitioners contend that the emission reductions associated with the ERCs submitted by Alon are not "real" because the reductions took place years ago. *Id.* at 15. The Petitioners claim that because many changes have occurred at the refinery since the reductions took place, the reductions are no longer real and will not offset the refinery's projected air emissions. *Id.*

⁸ As described above, SJVUAPCD rules provide for two distinct procedures to incorporate terms from a preconstruction permit into a title V permit. See SJVUAPCD Rule 2520 § 5.3.3. The EPA notes that although the ATC was issued according to the Rule 2201 § 5.9 enhanced administrative procedures, the public notice package also indicated that the "modification can be classified as a significant Title V modification pursuant to Rule 2520, and can be processed with a [COC]." Authority to Construct Application Review at 2 (October 14, 2014). The EPA understands this to mean that revising Alon's title V permit to incorporate the terms of the ATCs at issue *would have* required title V significant modification procedures, if these changes had been processed through Rule 2520 rather than Rule 2201. The EPA does not interpret the ATC issued with a COC to constitute an actual title V significant permit modification under Rule 2520 §§ 3.29 and 11.3. Rather, the Permit clearly explains that, by virtue of obtaining a COC with the ATC, the revision to Alon's title V permit may subsequently be conducted via administrative amendment procedures (not significant permit modification procedures).

⁹ The EPA notes that the District issued its RTC after the end of the 60-day public petition period. Thus, the Petitioners did not have the opportunity to address the District's RTC in the Petition.

Next, with regard to ERC certificates S-4334-2 and S-3663-1, the Petitioners argue that the District may not approve the use of these ERCs as offsets for NO_x and VOCs until a 1-hour ozone plan is approved by the EPA. *Id.* at 15. The Petitioners rely on SJVUAPCD Rule 2201 § 4.13.1, which provides that “Major Source shutdowns or permanent curtailments in production or operating hours of a Major Source may not be used as offsets for emissions from . . . a Federal Major Modification . . . unless the ERC, or the emissions from which the ERC are derived, has been included in an EPA-approved attainment plan.” *Id.* (citing SJVUAPCD Rule 2201 § 4.13.1). The Petitioners argue that because the District did not yet have an approved attainment plan for the 1-hour ozone standard, the District may not use banked NO_x and VOC emissions for this project. *Id.*

Finally, the Petitioners advance several arguments that specific ERCs are “invalid.” With regard to ERC certificates S-3458-3 and S-3663-1, the Petitioners argue that the subject ERCs are invalid because they were issued for reductions that occurred prior to the August 7, 1977 deadline found in 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii).¹⁰ Petition at 15. The Petitioners cite 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) for the proposition that “in no event may credit be given for shutdowns that occurred before August 7, 1977.” Petition at 15. Citing correspondence between the CARB and the Kern County Air Pollution Control District, the Petitioners assert that the ATC for the CO boiler project associated with the emission reductions at issue in these ERCs was issued on January 12, 1976, and operations began in May of 1977. *Id.* Because these dates predate the August 7, 1977, deadline contained in § 51.165(a)(3)(ii)(C)(1)(ii), the Petitioners claim that the ERCs are invalid. *Id.*

The Petitioners also claim that ERCs S-3458-3 and S-3663-1 “were invalid because the application for banking credit was submitted beyond the required time limits; a completed application was not submitted until October 1985, almost ten years after the reduction occurred.” *Id.* at 16. Furthermore, the Petitioners argue that the District failed to establish that the reductions associated with the subject ERCs were surplus and that they have not been credited elsewhere. *Id.*

With regard to ERC certificate S-3462-4, the Petitioners argue that the ERC is invalid because it does not represent the bankable emission reduction from the associated shutdown. *Id.* at 16–17. Specifically, the Petitioners claim that SJVUAPCD Rules 2201 § 4.12.1 and 2301 § 4.2.2 require the District to deposit 10 percent of the credits into a Community Bank, and decrease the emission reduction eligible for ERC issuance by this quantity. Citing to the application review¹¹ for the subject ERC, the Petitioners argue that even though the application review recognized this obligation and identified the 10 percent reduction, the District failed to make the necessary reduction when it actually issued the ERC certificate. Accordingly, the Petitioners argue that the ERC certificate is invalid.

¹⁰ The Petitioners incorrectly cite the subject regulation as 40 C.F.R. § 51.165(a)(2)(ii)(C)(1)(ii). Petition at 15. The correct citation for the provision is 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii).

¹¹ An “application review” in the context of a specific ERC refers to the documentation associated with the process of initially issuing an ERC certificate for an emission reduction, such that the ERC can be “banked” and potentially later used to satisfy NNSR offset requirements.

With regard to ERC certificates S-4334-2 and S-3465-5, the Petitioners claim that the ERCs are invalid because the application for these ERC certificates was not timely filed. *Id.* at 17–18. According to the Petitioners, Kern County Air Pollution Control District Rule 210.3 required applications for banking of emissions reductions to be submitted within 90 days after the reduction occurs. The Petitioners claim that the equipment at issue—a catalytic cracker, fluid coker, and CO boiler—ceased operation in 1983, and that an application was not received until 1987. Specifically, the Petitioners argue that the (Kern) District was incorrect in finding that the emission units had not actually “shutdown” in 1983 because Texaco had maintained its operating permit. Citing SJVUAPCD Rule 2301 § 3.14, the Petitioners claim that “shutdown” must be defined as the earlier of the permanent cessation of emissions from an emitting unit, or the surrender of that unit’s operating permit. In light of this rule, the Petitioners claim that the unit was shutdown in 1983, rendering the 1987 applications late and the resulting ERCs invalid.

EPA’s Response: For the reasons stated below, the EPA grants the Petitioners’ request for an objection on this claim on the basis that the permit record is inadequate—specifically, that the District’s response to significant comments was insufficient to explain affirmatively why the ERCs relied upon were valid for use as offsets.

The Petitioners request that the Administrator object to the Permit because it does not comply with, *inter alia*, SJVUAPCD Rule 2201. Petition at 3, 14–17. Rule 2201 contains substantive requirements associated with the construction of new or modified emission units—including the NNSR requirement to obtain offsets in § 4.5—as well as “Administrative Requirements” for all applications for new or modified emissions units. *See* SJVUAPCD Rule 2201 § 5.0. As discussed above, Rule 2201 also includes “Enhanced Administrative Requirements” for applications requesting a Certificate of Conformity with the procedural requirements of 40 CFR Part 70. *See* Rule 2201 § 5.9. Section 5.9.1.1 requires that the District must provide public notification and provide 30 days from the date of publication to submit written comments. Section 5.9.1.3 requires the District to provide a written response to persons or agencies that submit timely written comments. These requirements closely track the notice, comment, and response requirements for title V permits found in SJVUAPCD Rule 2520 § 11.3.1.1 and 11.3.1.3.

In its RTC, the District did not specifically acknowledge or address any of the individual alleged deficiencies raised in the public comments regarding the validity of the ERCs at issue in the Petition. Instead, the District’s RTC generally states that ERCs are recognized as real mitigation for emissions increases when appropriate safeguards are employed. The response then outlines the criteria established in SJVUAPCD Rule 2301 that must be met for emission reductions to be eligible for credit as ERCs, and asserts that “[t]he ERCs proposed by Alon were demonstrated to meet these requirements when they were originally granted.” RTC at 6. As such, SJVUAPCD concludes that “the proposed ERCs are valid for any use.” *Id.* Additionally, the RTC notes that all ERCs are “incorporated into the District’s growth factors as emissions in the air attainment plans and associated emissions inventories,” and that the attainment plans “provide for real-time mitigation to ensure contemporaneous air quality benefit, regardless of the date the credits were banked.” *Id.* The RTC also notes that annual accounting and reporting document and verify real-time benefits to air quality. Finally, the RTC states that since 2001, Rule 2201 § 7.0 has required that the District demonstrate on an annual basis that the offset requirements of Rule 2201 are

equivalent to the quantity of offsets that would be required by a federal-only NNSR program. The District asserts that it has demonstrated offset equivalency each year since that time.

As described above, the applicable rules require the District to provide a written response to timely written comments. SJVUAPCD Rule 2201 § 5.9.1.3. Well-established principles of administrative law provide that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *See, e.g., In the Matter of U.S. Department of Energy – Hanford Operations*, Order on Petition Nos. X-2014-01 and X-2013-01, at 20-23 (May 29, 2015) (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”)). A significant comment in this context is one that concerns whether the permit includes terms and conditions addressing federal applicable requirements—for example, NNSR emission offset requirements. *See e.g., Hanford Order* at 21.

In light of the comments received and SJVUAPCD’s response, the record is inadequate to determine whether Alon provided the offsets required by SJVUAPCD’s NNSR program rules. Specifically, the record is inadequate because SJVUAPCD did not adequately respond to the specific comments challenging the validity of the ERCs used as offsets. The comments suggesting that the ERCs are not valid were significant comments, as they related directly to whether Alon had satisfied applicable NNSR emission offset requirements associated with the modifications authorized by the ATC. As such, these significant comments warranted an adequate response, as discussed further below. The District’s general assertions—that the ERCs were determined to be valid when initially issued, that the ERCs are incorporated into the District’s growth factors, and that Rule 2201 § 7.0 requires annual equivalency determinations—are conclusory and an inadequate response to the many specific comments raised by the Petitioners.

As an initial matter, the District did not directly address any of the specific comments regarding alleged deficiencies with individual ERCs. Moreover, the District provided no technical support for its assertion that the ERCs met applicable NNSR requirements pertaining to ERCs when they were originally granted.¹² The record is also lacking in key documentation and information relating to these claims. For example, SJVUAPCD did not provide as part of the record, or otherwise cite or describe, the application review documents associated with the initial issuance of the ERC certificates at issue here. Moreover, the District did not explain why, assuming the ERCs were valid when initially issued, they would necessarily remain valid and available for use as offsets at any later date.¹³ Although the District referenced Rule 2201 § 7.0 in its RTC, the District does not explain whether and how the offset equivalency determination and pre-baseline ERC cap tracking system defined therein relates to any or all of the Petitioners’ specific claims,

¹² As a factual matter, SJVUAPCD Rules 2201 and 2301 did not exist when many of the ERCs at issue were initially granted. For example, ERCs S-3458-3, S-3663-1, S-4334-2, and S-3465-5 appear to have been issued from 1986–89, pursuant to Kern County Rules that existed prior to the promulgation of SJVUAPCD’s NNSR rules. The RTC does not address how the District’s general reliance on the criteria in SJVUAPCD’s NNSR Rules establish the validity of the ERCs for any later use could be impacted by the fact that these rules were not in place when the ERCs were originally granted, nor does the RTC describe any processes or procedures that would ensure the continuing validity of ERCs granted prior to the existence of SJVUAPCD’s NNSR rules.

¹³ The EPA notes that some requirements in SJVUAPCD’s SIP-approved Rule 2201 appear to impose conditions that apply at the time ERCs are used as offsets, such as Rule 2201 § 4.13.1.

or how these systems ensure the continuing validity of ERCs. When the relevant facts go back many years, as they do in this case, it is even more important, both for transparency of the process and credibility of the program, for the permitting agency to respond specifically and in detail to specific comments and questions raised by commenters. Overall, therefore, the District's assertions about the validity of the ERCs and its general discussion of applicable regulations are not sufficient to establish a record adequate to support the use of these ERCs as offsets in light of the specific public comments received.

With regard to the District's record concerning the specific ERCs in the Petitioners' claims, the EPA observes that it is unclear whether a 10 percent reduction, as required by SJVUAPCD Rule 2201 § 4.12.1, was taken from the credits issued for ERC certificate S-3462-4. See Petition at 16-17. Also, with respect to the Petitioners' claim that ERCs S-3458-3 and S-3663-1 are invalid based on the August 7, 1977, deadline contained in 40 C.F.R. § 51.165(a)(3)(ii)(C)(I)(ii), the EPA notes that this limitation applies only to shutdowns. Although the record as it stands appears to suggest that the subject ERCs are not associated with a shutdown, the record does not make this point clear and the District has not clarified this point in its RTC, such as by providing information from the application reviews associated with these ERC certificates.¹⁴

Accordingly, the EPA finds that the District did not provide sufficient responses to significant comments, and therefore the record is inadequate for the EPA to sufficiently evaluate the Petitioners' claim and determine whether Alon obtained the necessary offsets as required by SJVUAPCD's NNSR program rules. For the foregoing reasons, the EPA grants the Petitioners' request for an objection on this claim.

Direction to SJVUAPCD: In responding to this Order, SJVUAPCD must review its determination and the record with respect to the ERCs at issue in the Petition and provide a record to adequately support its determination. If the District concludes upon further review that its determination in the record with respect to some or all of the ERCs is not supportable, SJVUAPCD must make a new determination and ensure that any such new determination is adequately supported and explained in the permit record. If the District concludes upon further review that its determination in the record is supportable, SJVUAPCD must explain why this is this case.

Specifically, the District must directly respond to the allegations raised in the public comments concerning the validity of the five ERCs relied upon by Alon. Further, the District should explain why the specific emission reductions are eligible for credit as ERCs, consistent with Rule 2201, applicable attainment plans, and associated inventories. The District should also explain its interpretation of its emission offset tracking system and explain how this system addresses the claims raised by the Petitioners. If SJVUAPCD determines, upon additional review, that any of the ERCs are not valid (for example, that ERC certificate S-3462-4 does not reflect a 10 percent reduction), it must take action to address the deficiency.

¹⁴ The EPA observes that the Kern County rules governing the timeliness of ERC application submittals are not requirements of SJVUACPD's EPA-approved SIP.

V. CONCLUSION

For the reasons set forth above, I hereby grant the Petition as to the claim described herein.

Dated: DEC 21 2016



Gina McCarthy
Administrator

Appendix M-2

PM10 ERC S-4798-4

Southern Regional Office • 34946 Flyover Court • Bakersfield, CA 93308

Emission Reduction Credit Certificate S-4798-4

ISSUED TO: ALON BAKERSFIELD REFINING
ISSUED DATE: February 7, 2017
LOCATION OF REDUCTION: 6451 ROSEDALE HWY, AREA I, BAKERSFIELD
SECTION: NE27 **TOWNSHIP:** 29S **RANGE:** 27E

For PM10 Reductions In The Amount Of:

Quarter 1	Quarter 2	Quarter 3	Quarter 4
1,426 lbs	1,689 lbs	1,612 lbs	1,777 lbs

Portion of above PM10 Reductions that is PM2.5:

Quarter 1	Quarter 2	Quarter 3	Quarter 4
0.0%	0.0%	0.0%	0.0%
None	None	None	None

Method Of Reduction

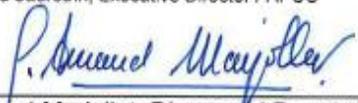
- Shutdown of Entire Stationary Source
- Shutdown of Emissions Units
- Other

SHUTDOWN TAILGAS INCINERATOR 2007027A



Use of these credits outside the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) is not allowed without express written authorization by the SJVUAPCD.

Seyed Sadredin, Executive Director / APCO


 Arnaud Marjollet, Director of Permit Services

Appendix M-3

Kern County APCD 1985 policy

Office Memorandum • KERN COUNTY

TO : Air Quality Control Division

DATE: October 31, 1985

FROM : Leon M Hebertson, M.D.
Air Pollution Control Officer

Telephone No.

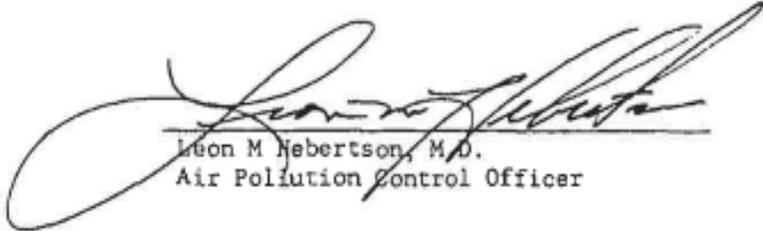
SUBJECT: Shutdown Emissions

Part C - Prevention of Significant Deterioration and Part D - Plan Requirements for Nonattainment Areas of the Clean Air Act as amended August 1977 require preconstruction permits for new sources and modifications to existing sources. Once these permits are issued, the source may construct and operate within the conditions of the permits.

Therefore, a source may modify its operation, shutdown, or curtail production or operating hours, or make other changes within the limits of permit conditions without affecting these permits.

A source that renews its permits and keeps them current, has maintained all equipment in operating condition, has not removed, modified, disassembled any equipment and has a legal right to operate same shall be considered an operating source.

Source shutdown, shutting down, curtailments and permanently curtailing are terms found in Appendix S - Emission Offset Interpretative Ruling, Title 40 CFR. These terms are therefore only applicable to "offsets" and do not affect a source experiencing temporary shutdown or curtailments and then wishing to restart provided permits are kept current.



Leon M Hebertson, M.D.
Air Pollution Control Officer