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
	)	OBJECTION TO THE ISSUANCE OF
PROJECT NOS. S-1134224 & S-1134223	)	A PERMIT
	)	
ISSUED BY THE SAN JOAQUIN VALLEY	)	
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 Irritated 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 District[1]) 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)(l) of the Clean Air Act (CAA or Act), 42 U.S.C. § 766la(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)(l); *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 (NOx), carbon monoxide (CO), volatile organic compounds (VOC), PM_{10}, $PM_{2.5}$ and sulfur oxide (SOx) 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 NOx, SOx, CO, PM_{10} 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 notice[8] 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 NOx 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 NOx 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 review[11] 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 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)(*1*)(*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 2 1 2016

Gina McCarthy
Administrator