BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTERS OF	)	PETITION NOS. IX-2015-8
	)	and IX-2015-9
LINN OPERATING, INC., FAIRFIELD LEASE	)	
KERN COUNTY, CALIFORNIA	)	
PROJECT NO. S-1144245	)	ORDER RESPONDING TO THE
PERMIT NOS. S-1246-407-0, 408-0, & 409-0	)	PETITIONER'S REQUESTS FOR
	)	OBJECTION TO THE ISSUANCE OF
LINN OPERATING, INC., ETHYL D LEASE	)	PERMITS
KERN COUNTY, CALIFORNIA	)	
PROJECT NO. S-1144247	)	
PERMIT NO. S-1246-406-0	)	
	)	
ISSUED BY THE SAN JOAQUIN VALLEY	)	
UNIFIED AIR POLLUTION CONTROL DISTRICT	)	
	)	

ORDER DENYING PETITION FOR OBJECTION TO PERMITS

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received two petitions dated June 24, 2015, from the Climate Change Law Foundation (Petitioner). The first petition (Fairfield Petition) requests that the EPA object to the proposed issuance of a set of Authority to Construct / Certificate of Conformity permits (collectively the Fairfield Permit) issued by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or District[1]) to Linn Operating, Inc. (Linn) for the Fairfield Lease in Kern County, California. The second petition (Ethyl D Petition) requests that the EPA object to the proposed issuance of an Authority to Construct / Certificate of Conformity permit (Ethyl D Permit[2]) issued by the SJVUAPCD to Linn Operating, Inc. for the Ethyl D Lease in Kern County, California.

As discussed further below, the substantive claims in the Fairfield Petition and the Ethyl D Petition (Petitions) are essentially identical. Therefore, this Order responds to both of the Petitions. Based on a review of the Petitions and other relevant materials, including the Permits, the permit records, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petitions requesting that the EPA object to the Permits.

[1] Of note, prior to March 20, 1991, when the SJVUAPCD began operation, the Kern County Air Pollution Control District was the permitting authority for area where the Linn leases are located.
[2] The Fairfield and Ethyl D Permits will be hereinafter collectively referred to as the Permits.

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 the SJVUAPCD governing the issuance of operating permits in the District on July 3, 1995, and August 17, 1995. The EPA granted interim approval of the SJVUAPCD's title V operating permit program in 1996 (61 FR 18083) and final approval in 2001 (66 FR 63503). The 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 implementation plan. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 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); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). 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." 57 Fed. Reg. at 32251. 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.

The New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of Title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to the pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and other pollutants regulated under the CAA. CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of Title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to those NAAQS pollutants for which an area is designated as nonattainment. CAA §§ 171–193, 42 U.S.C. §§ 7501–7515. The Linn leases are 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

The SJVUAPCD issues preconstruction NNSR permits—termed Authorities to Construct, or ATCs—under SJVUAPCD Rule 2201, part of the District's EPA-approved State Implementation Plan (SIP). Applicable requirements from a preconstruction permit (such as an ATC) must be

included in a source's title V operating permit.[3] According to the 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 used, proposed permits issued by the SJVUAPCD are 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] The 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

[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."

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

§§ 5.9 and 6.0, which are also part of the 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 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 Petitions

The Petitions request an EPA objection to the ATC permits issued with COCs. The Petitions cite CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) as well as SJVUAPCD Rule 2201 as the bases for the Petitions. 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 Petitions 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

[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."

C.F.R. § 70.8(c)(l).[7] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[8]

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. *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."); *NYPIRG*, 321 F.3d at 333. 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. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (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)).[9] 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.*, *MacClarence*, 596 F.3d at 1130–31.[10] Certain aspects of the petitioner's demonstration burden are discussed below; however, a more detailed 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 comments, or RTC), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.[11] Another factor the EPA has examined is whether a

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[7] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) *(NYPIRG)*.

[8] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *c.f. NYPIRG*, 321 F.3d at 333 n.11.

[9] *See also 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)).

[10] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

[11] *See also, e.g.*, *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (Dec. 14, 2012) (denying a title V petition issue where petitioners did not respond to the 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 a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions, at 9–13 (Jan. 8,

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's 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.").[12] 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* (*Luminant Sandow Order*), Order on Petition Number VI-2011-05 (January 15, 2013), at 9.[13] 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 Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 at 6–7, 10–11, 13–14 (July 23, 2012).[14]

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.

III. BACKGROUND

A. The Fairfield Lease and Ethyl D Lease

Linn operates thermally enhanced oil recovery operations at multiple lease sites on the heavy oil western stationary source (Facility No. S-1246) in Kern County, California. Linn has proposed the addition of three new gas-fired steam generators on its Fairfield Lease (Fairfield Project), as

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2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

[12] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (Sept. 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition, at 7 (June 20, 2007) (*Portland Generating Station Order).*

[13] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (Apr. 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (Mar. 15, 2005).

[14] *See also In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX at 7–10 (June 30, 2011); *Portland Generating Station Order* at 5–6; *Georgia Power Plants Order* at 10.

well as the addition of one new gas-fired steam generator on its Ethyl D lease (Ethyl D Project). Both the Fairfield Project and the Ethyl D Project will result in nitrogen oxide (NOx), carbon monoxide (CO), volatile organic compounds (VOC), PM_{10}, and sulfur oxide (SOx) emissions from the new combustion units. Because the facilities are located in a nonattainment area for ozone and $PM_{2.5}$, Linn was required to obtain ATCs for both the Fairfield Project and the Ethyl D Project pursuant to the SJVUAPCD's NNSR rules. The Fairfield Project and Ethyl D Project will exceed the SJVUAPCD NNSR offset thresholds for multiple pollutants, and, therefore, Linn was required to obtain offsets for the emissions associated with these projects.[15] In relevant part and as discussed further below, Linn proposed to satisfy offset requirements for the Fairfield Project and the Ethyl D project through the use of the same Emission Reduction Credit (ERC) Certificates—Nos. N-1198-2 (for NOx from both projects) and S-4407-1 (for VOC from both projects).

B. Permitting History

On November 12, 2014, Linn submitted an application for a set of ATCs to authorize the proposed Fairfield Project. Linn applied for the ATCs to be processed with a COC, as the modifications would ordinarily require a significant permit modification to Linn's title V permit for the Fairfield Lease. Accordingly, the ATCs were processed according to the enhanced administrative requirements of Rule 2201 § 5.9. The SJVUAPCD published notice[16] of its preliminary decision and the Fairfield Permit for the Fairfield Project on March 31, 2015, triggering a public comment period that ended on May 4, 2015. The SJVUAPCD also emailed the preliminary decision to the EPA on March 31, 2015, triggering the EPA's 45-day review period, which ended on May 15, 2015. The EPA did not object to the issuance of the Fairfield Permit or otherwise submit comments. The SJVUAPCD issued the final ATCs and COC (Final Fairfield Permit) on June 1, 2015, along with its responses to public comments (Fairfield RTC). The SJVUAPCD incorporated the terms of the Fairfield Permit into the facility's title V permit through an administrative amendment on November 5, 2015.

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[15] The SJVUAPCD's EPA-approved NNSR rules include requirements derived from federal law as well as California state law. As such, Rule 2201 requires that a source obtain offsets for pollutants beyond those for which the area is currently designated nonattainment under federal law (i.e., beyond ozone precursor emissions and $PM_{2.5}$ direct and precursor emissions), provided certain thresholds and criteria are met. *See* SJVUAPCD Rule 2201 § 4.5. For the Fairfield and Ethyl D Projects, the SJVUAPCD determined that offsets were required for NOx, SOx, PM_{10}, and VOC emissions. *See* San Joaquin Valley Air Pollution Control District, Authority to Construct Application Review, Project # 1144245 at 10 (December 22, 2014) (Fairfield Application Review); San Joaquin Valley Air Pollution Control District, Authority to Construct Application Review, Project # 1144247 at 10 (December 22, 2014) (Ethyl D Application Review).

[16] 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 ATCs were issued according to the Rule 2201 § 5.9 enhanced administrative procedures, the public notice package also indicated that the projects were "classified as a Title V Significant Modification pursuant to Rule 2520, Section 3.29, and can be processed with a [COC]." Fairfield Application Review at 1; Ethyl D Application Review at 1. The EPA understands this to mean that revising Linn'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 ATCs 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 ATCs, the revision to Linn's title V permit may subsequently be conducted via administrative amendment procedures, rather than the procedures for significant permit modifications.

On November 24, 2014, Linn submitted an application for an ATC to authorize the proposed Ethyl D Project. Linn applied for the ATC to be processed with a COC, as the modifications would have also necessitated a significant permit modification to Linn's title V permit for the Ethyl D Lease. Accordingly, the ATC was processed according to the enhanced administrative requirements of Rule 2201 § 5.9. SJVUAPCD published notice[17] of its preliminary decision and the Ethyl D Permit for the Ethyl D Project on March 25, 2015, triggering a public comment period that ended on April 29, 2015. SJVUAPCD also emailed the preliminary decision to the EPA on March 25, 2015, triggering the EPA's 45-day review period, which ended on May 9, 2015. The EPA did not object to the issuance of the Ethyl D Permit or otherwise submit comments. SJVUAPCD issued the final ATC and COC (Final Ethyl D Permit) on July 2, 2015, along with its responses to public comments (Ethyl D RTC). The SJVUAPCD incorporated the terms of the Ethyl D Permit into the facility's title V permit through an administrative amendment on November 5, 2015.

C. Timeliness of Petitions

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 periods for the Fairfield Permit and the Ethyl D Permit ran until July 14, 2015, and July 8, 2015, respectively. The Petitions were both dated June 24, 2015, and, therefore, the EPA finds that the Petitioner timely filed the Petitions.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

As noted above, the substantive claims in both Petitions are essentially identical and both Permits rely upon the same ERC Certificates (ERC N-1198-2 and ERC S-4407-1) that are at issue in the Petitions. Therefore, this Order responds to the claims in both of the Petitions simultaneously.

Claim I: The Petitioner's Claim that "The Air District May Not Use Banked Offsets for NOx and VOCs [sic] Emissions"

Petitioner's Claim:

The Petitioner states that the Permits rely on two ERC Certificates (N-1198-2 (NOx) and S-4407-1 (VOC)) to offset the Ethyl D and Fairfield Projects' NOx and VOC emissions. Fairfield Petition at 3, Ethyl D Petition at 2. The Petitioner notes that SJVUAPCD Rule 2201 § 4.13.1 states 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." Fairfield Petition at 3, Ethyl D Petition at 3. The Petitioner alleges that at the time of the Petitions, the San Joaquin Valley air basin was designated to be in extreme nonattainment for the 8-hour standard for ozone (for which NOx and

[17] *See supra* note 16.

VOC are precursors), and that SJVUAPCD did not have an approved attainment plan for the 8-hour or 1-hour ozone standards. *Id*. Therefore, the Petitioner concludes that SJVUAPCD may not approve or issue the ATCs in reliance on these NOx and VOC offsets "until a requisite ozone plan for the [San Joaquin] basin is approved," and that the EPA Administrator must object to the Permits. *Id*.

EPA's Response: For the following reasons, the EPA denies the Petitioner's request for an objection on this claim for both Petitions. The Petitioner has failed to demonstrate that the ERCs at issue resulted from "Major Source shutdowns or permanent curtailments in production or operating hours" that were not "included in an EPA approved attainment plan," which would have been necessary to demonstrate that ERC Certificates N-1198-2 (NOx) and S-4407-1 (VOC) could not be used.

Specifically, in regard to ERC S-4407-1 (VOC), the Petitioner fails to present any evidence to demonstrate that the underlying emission reductions associated with the ERC resulted from a shutdown or curtailment, and accordingly the Petitioner failed to demonstrate that this ERC is subject to the restrictions in SJVUAPCD Rule 2201 § 4.13.1. The Petitioner contradicts itself with respect to this ERC, alleging later in Claim II of the Petitions that ERC S-4407-1 "comes from a shutdown or curtailment,"[18] while simultaneously acknowledging that the emissions reductions associated with this ERC resulted from the incineration of coker exhaust at the CO boiler. Fairfield Petition at 3–4, Ethyl D Petition at 3. As SJVUAPCD explains in both the Fairfield RTC and Ethyl D RTC:

> ERC S-4407-1 did not correspond to a shutdown of a major stationary source or permanent curtailments in production or operating hours. Rather, this emission reduction is due to incineration of coker exhaust in a CO boiler. The refinery continued to operate normally after this change. As the emission reduction did not result from a major source shutdown or a permanent curtailment of operation, this ERC is valid to provide offsets for a Federal Major Modification.

Fairfield RTC at 1; Ethyl D RTC at 1. Further, the SJVUAPCD explained that "ERC S-4407-1 represents emission reductions due to control of coker exhaust in a CO boiler and does not represent reductions due to a shutdown." *Id*. at 3. The incineration of coker exhaust at the CO boiler appears to be a pollution control measure, rather than a shutdown or curtailment. Therefore, the Petitioner's assertion that ERC S-4407-1 "comes from a shutdown or curtailment," appears to be factually incorrect. Overall, the Petitioner has provided no information to demonstrate why ERC S-4407-1 is subject to the conditions of SJVUAPCD Rule 2201 § 4.13.1, and, therefore, has failed to demonstrate grounds for an EPA objection.

Further, as noted several times below, the Petitioner failed in either of the Petitions to acknowledge SJVUAPCD's reasoning concerning the validity of the ERCs at issue in both Petitions, which was contained in the RTC for the Fairfield Permit. The Fairfield RTC was

[18] The Petitioner provides no further support for this assertion.

available to the Petitioner prior to the time they submitted both Petitions.[19] The Petitioner was doubtlessly aware of this, as the Fairfield RTC was included as an enclosure to the Final Fairfield Permit and the Petitioner included it as an attachment to the Fairfield Petition. However, the Petitioner has not addressed the merits of SJVUAPCD's response to this specific claim (reproduced above). As discussed in Section II.D of this Order, whether a petitioner has addressed the permitting authority's reasoning—including that found in an RTC—is a criterion for determining whether a Petitioner has demonstrated noncompliance with the Act. Here, the Petitioner's failure to respond to the permitting authority's reasoning further supports the EPA's determination that the Petitioner has not demonstrated grounds for the EPA to object. *See, e.g.*, *MacClarence*, 596 F.3d at 1132–33.

With regard to both ERC S-4407-1 (VOC) and ERC N-1198-2 (NOx), the Petitioner appears to suggest that the ERCs (or the emissions reductions from which they were derived) were not included in an EPA-approved attainment plan, contrary to Rule 2201 § 4.13.1. The Petitioner specifically asserts that, at the time of filing the Petitions, SJVUAPCD did not have an EPA-approved attainment plan for the 8-hour ozone standard or the 1-hour ozone standard. Fairfield Petition at 3; Ethyl D Petition at 3. However, this assertion also appears to be factually incorrect, as the SJVUAPCD 2007 ozone attainment plan (addressing the 1997 8-hour ozone NAAQS) was approved by the EPA on March 1, 2012. *See* 77 Fed. Reg. 12652; *see also* Fairfield RTC at 1; Ethyl D RTC at 1 (explaining that "the emissions upon which this ERC [N-1198-2] were derived were included in the emissions inventory that was incorporated into the 2007 EPA approved 8 hour ozone plan"). The Petitioner provides no information to demonstrate why this approved plan is insufficient to satisfy the conditions of SJVUAPCD Rule 2201 § 4.13.1, and has not responded to the reasoning put forth in the RTC on this point. Therefore, the Petitioner has failed to demonstrate grounds for an EPA objection.

Claim II: The Petitioner's Claim That "Emission Reduction Credit Certificate S-4407-1 is Invalid"

Petitioner's Claim:

The Petitioner claims that ERC S-4407-1 (VOC) is invalid based on three alleged defects: (1) the associated emission reductions occurred before August 7, 1977; (2) the ERC banking application was not timely filed; and (3) the emission reductions are not "real" and have not been verified to be "surplus." Fairfield Petition at 3–4, Ethyl D Petition at 3–4.

[19] The Final Ethyl D Permit and accompanying Ethyl D RTC were issued on July 2, 2015, subsequent to the filing of the Ethyl D Petition on June 24 and close to the expiration of the petition period regarding that permit, which ended on July 8. The EPA acknowledges that, given the date on which the Petitioner filed the Ethyl D Petition (prior to the expiration of the petition period), the Petitioner could not have directly responded to the Ethyl D RTC in the Ethyl D Petition. However, the EPA notes that, as the author of both Petitions, the Petitioner was well aware that the two petitions contained identical claims challenging the exact same ERCs, which were also raised verbatim during the public comment periods. Thus, the Petitioner could reasonably have surmised that the SJVUAPCD would respond to the Ethyl D public comments concerning the exact same ERCs in a similar fashion to its response to the Fairfield public comments, which *were* available in the Fairfield RTC a full 24 days before either petition was submitted. Indeed, the SJVUAPCD issued an identical response to the claims in both of the RTCs.

First, the Petitioner states that ERC S-4407-1 was issued for "incineration of the Fluid Coker exhaust in the CO boiler." Fairfield Petition at 3, Ethyl D Petition at 3. The Petitioner asserts that the ATC for the identified CO boiler was issued on January 12, 1976, and that operation began in May 1977. *Id.* The Petitioner claims that pursuant to 40 C.F.R. § 51.165(a)(3)(ii)(C)(*1*)(*ii*), "in no event may credit be given for shutdowns that occurred before August 7, 1977." *Id*. The Petitioner claims that "the proposed emissions credit comes from a shutdown or curtailment that occurred nearly four decades ago." Fairfield Petition at 4, Ethyl D Petition at 3. The Petitioner also quotes a 1987 letter from the EPA, wherein the EPA advised Kern County APCD (then the permitting authority for this area) that the reductions, having occurred prior to August 7, 1977, were too old to be granted credit and would not be recognized by the EPA. Fairfield Petition at 3, Ethyl D Petition at 3.

Second, the Petitioner claims that both EPA and CARB noted, when commenting on the 1987 ERC banking application, that ERC S-4407-1 was invalid because the application was submitted beyond the required time limits. *Id*. The Petitioner asserts that a completed application for the banking credit was not submitted until October 1985, almost ten years after the reduction occurred. *Id*.

Third, the Petitioner, citing SJVUAPCD Rules 2201 § 3.2.1 and 2301 § 4.1.2, notes that emission reductions associated with ERCs must be "real, enforceable, quantifiable, surplus, and permanent." Fairfield Petition at 4, Ethyl D Petition at 3. The Petitioner claims that, "Given the many changes that have occurred at the refinery since [the reduction occurred in] 1977, this decades-old reduction is no longer 'real' and will not actually offset projected air emissions." Fairfield Petition at 4, Ethyl D Petition at 3–4. As support for this claim, the Petitioner quotes another portion of the EPA's 1987 correspondence with Kern County APCD, in which the EPA stated, among other things, that "[i]n all likelihood, these reductions are <u>not surplus</u> since they occurred so long ago and probably are already reflected in the District's records and plans." Fairfield Petition at 4, Ethyl D Petition at 4. The Petitioner further asserts that the Air District did not provide EPA with verification that these reductions had not been credited elsewhere. *Id*. Finally, the Petitioner states that the EPA previously warned that "any source which attempts to use these emission reductions as an offset may be subject to federal enforcement action." *Id*. Thus, the Petitioner claims that because ERC S-4407-1 is invalid and "subject to federal enforcement action" if used, the Administrator must now object to the Permit. *Id*.

EPA's Response: For the following reasons, the EPA denies the Petitioner's request for an objection on this claim.

As a preliminary matter, the three arguments asserting that ERC S-4407-1 is invalid rely in large part on an EPA Region 9 comment letter that was not determinative and is not sufficient to demonstrate grounds for an objection. *See In the Matter of Chevron USA Inc. – 7Z Steam Plant*, Order on Petition No. IX-2016-8 at 8–9 (April 24, 2017) (*2017 Chevron Order*) ("The restatement of an EPA comment letter—without any analysis of the context in which such comments may have been made; any analysis of a response to the comments, if any were provided; or any analysis why such comments are relevant to the current permitting action in light of current applicable requirements—will rarely be sufficient to demonstrate that the Permit is not in compliance with applicable CAA requirements."); *id*. at 9 n.17 ("As a general matter,

comments provided by the EPA to a permitting authority in the course of a permit proceeding or an ERC issuance proceeding (as opposed to, for example, formal EPA applicability determinations or objection letters) do not typically reflect final determinations by the EPA.") (citing *In the Matter of Appleton Coated, LLC*, Order on Petition Nos. V-2013-12 and V-2013-15 at 12 (October 14, 2016)).

Issue 1: Emission reductions before August 7, 1977

The Petitioner notes that 40 C.F.R. § 51.165(a)(3)(ii)(C)(*1*)(*ii*) states that "in no event may credit be given for shutdowns that occurred before August 7, 1977." The Petitioner claims that "the proposed emissions credit comes from a shutdown or curtailment that occurred nearly four decades ago." Fairfield Petition at 3, Ethyl D Petition at 4. However, as discussed above with regard to the exact same ERC (S-4407-1, for VOC), the Petitioner failed to present any evidence to demonstrate that the underlying emission reductions associated with the ERC resulted from a shutdown. Accordingly, the Petitioner failed to demonstrate that this ERC is subject to the prohibition in 40 C.F.R. § 51.165(a)(3)(ii)(C)(*1*)(*ii*). On the contrary, as the Petitioner briefly acknowledges, and, as the SJVUAPCD explains in its RTC, "ERC S-4407-1 represents emission reductions due to control of coker exhaust in a CO boiler and does not represent emission reductions due to a shutdown." Fairfield RTC at 2; Ethyl D RTC at 2. Given that the reductions do not appear to have resulted from a shutdown, the SJVUAPCD reasonably concluded that "the restriction in 40 CFR 51.165 for emission reductions due to shutdowns that occurred prior to 8/7/77 is not applicable." *Id.*[20] The Petitioner has not provided any evidence to the contrary, and the Petitioner has failed in either of the Petitions to acknowledge or rebut the SJVUAPCD's RTC.[21] Therefore, the Petitioner has failed to demonstrate that 40 C.F.R. § 51.165(a)(3)(ii)(C)(*1*)(*ii*) is applicable to the ERC at issue.

Issue 2: Timely submission of ERC banking application

The Petitioner claims that that both the EPA and CARB have previously stated that ERC S-4407-1 is invalid because the ERC banking application was submitted beyond the required time limit. The Petitioner claims that the completed application was not submitted until October 1985, almost ten years after the reduction occurred. Ethyl D Petition at 3, Fairfield Petition at 3. As stated above, prior comments from the EPA and CARB do not, in and of themselves, establish grounds to object to the permit. In order to compel an EPA objection, the Petitioner must demonstrate why the permit is deficient with respect to an applicable requirement of the CAA or applicable SIP. CAA § 505(b)(2); SJVUAPCD Rule 2201 § 5.9.1.7. In this matter, the Petitioner does not itself allege that the ERC application was submitted beyond required time

[20] Of note, the prohibition cited by the Petitioner present in 40 C.F.R. § 51.165(a)(3)(ii)(C)(*1*)(*ii*) applies to shutdowns only, with no mention of curtailments. Thus, it is appropriate that SJVUAPCD's RTC only addresses whether the ERC corresponded to a shutdown. In addition, as noted above in the response to Claim I, even were this provision applicable to curtailments, SJVUAPCD's RTCs state that "ERC S-4407-1 did not correspond to a shutdown of a major stationary source or permanent curtailments in production or operating hours. Rather, this emission reduction is due to incineration of coker exhaust in a CO boiler." Fairfield RTC at 1; Ethyl D RTC at 1.

[21] *See supra* note 19 and accompanying text. For the same reasons described in the EPA's disposition of Claim I, the Petitioner's failure to respond to the permitting authority's reasoning supports the EPA's determination that the Petitioner has not demonstrated grounds for the EPA to object in response to Claim II.

limits; the sole allegation is simply a characterization of the EPA and CARB comments. To the extent that the Petitioner asserts that ERC S-4407-1 is invalid because the initial banking application was untimely, the Petitioner presents no information in support of this allegation, nor does the Petitioner cite to any SIP rule or other applicable requirement governing the submittal of ERC banking applications.[22] Further, the Petitioner does not provide any date by which they believe the application should have been submitted.

Additionally, the SJVUAPCD explained in its RTC that:

> [W]hen the emission reduction occurred the Kern County APCD did not have an ERC banking rule. Kern County APCD adopted their ERC banking rule, Rule 210.3, in 1983. When adopted, this rule provided for a one-year period to file applications to bank emission reductions that previously occurred. Therefore, the application submitted to the Kern County APCD in 1984 met the application submittal deadline requirements for such emission reductions.

Fairfield RTC at 3; Ethyl D RTC at 3. As with other points addressed in the RTC, the Petitioner failed to acknowledge or respond to SJVUAPCD's reasoning on this issue.[23] Thus, for the reasons discussed above, the Petitioner has failed to demonstrate that the October 1985 ERC banking application date invalidated ERC S-4407-1.

Issue 3: Whether the emission reductions are "real" or "surplus"

The Petitioner alleges that emission reductions used as ERCs must be "real, enforceable, quantifiable, surplus, and permanent." SJVUAPCD Rule 2201 § 3.2.1; *see also* 40 C.F.R. § 51.165(a)(3)(ii)(C)(*1*)(*i*). However, the Petitioner has not demonstrated that the emission reductions associated with ERC S-4407-1 run afoul of any of these criteria.

The Petitioner contends that the emission reductions associated with ERC S-4407-1 are not "real" because they are "decades-old" and because of the "many changes that have occurred at the refinery since 1977." Fairfield Petition at 3, Ethyl D Petition at 3–4. The Petitioner appears to misunderstand the requirement that an emission reduction be "real." To be real, the reduction must have actually occurred,[24] a criterion the Petitioner has not substantively attempted to rebut. Further, SJVUAPCD explained in its RTC that:

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[22] The EPA notes that application submittal requirements such as those contained in in Kern County Rule 210.3 and SJVUAPCD Rule 2301 are not part of an EPA-approved SIP and are therefore not "applicable requirements" warranting EPA review or objection.

[23] *See supra* note 19 and accompanying text. For the same reasons described in the EPA's disposition of Claim I, the Petitioner's failure to respond to the permitting authority's reasoning supports the EPA's determination that the Petitioner has not demonstrated grounds for the EPA to object in response to Claim II.

[24] *See* State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13498, 13553 (April 16, 1992) ("The new statutory requirement provides that emissions increases from the new or modified sources must be offset by real reductions in actual emissions."); Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, 68 Fed. Reg. 7330, 7333 (February 13, 2003) ("Emission reductions must also be real and quantifiable—actual emissions to the air must be reduced. Paper reductions (i.e., changes in a source's permitted emissions that do not require actual emissions to decrease) are not creditable.").

> Subsequent operational changes at the refinery do not invalidate that this actual emission reduction did in fact occur. This emission reduction was made enforceable by permit to operate conditions. If the refinery had proposed to remove the controls that generated the emission reduction (they did not), such an emission increase would have been subject to New Source Review, including the requirement to provide emission offsets.

Fairfield RTC at 3; Ethyl D RTC at 3. Again, the Petitioner failed in either Petition to acknowledge the SJVUAPCD's RTC.[25]

Additionally, the Petitioner's argument regarding whether the emission reductions associated with ERC S-4407-1 were "surplus" is primarily a characterization of prior EPA statements. As noted above, such statements, in and of themselves, are not sufficient to demonstrate grounds for an objection. Further, the EPA statement upon which the Petitioner relies does not provide any evidence that the reductions were not surplus; rather, it simply states that "[t]he District must verify that these reductions are not credited elsewhere." Letter from David Howecamp, EPA, to Leon Hebertson, Kern County APCD (July 17, 1987). The Petitioner states that "the Air District did not provide EPA with verification that these reductions had not been credited elsewhere" and conclude with no further analysis that ERC S-4407-1 is invalid. *Id*. The Petitioner has attempted to shift the demonstration burden onto the Air District in this matter; rather than demonstrating themselves that ERC S-4407-1 is invalid, the Petitioner asserts that the SJVUAPCD has failed to demonstrate that ERC S-4407-1 is valid. As discussed above in Section II.D of this Order, in the context of these Petitions, the burden is on the Petitioner to make the requisite demonstration to the EPA.[26] However, the Petitioner does not even directly allege—much less, provide any evidence to demonstrate—that ERC S-4407-1 was not surplus or that it was credited elsewhere.

Finally, the SJVUAPCD's RTC explained that this ERC was included in the SJVUAPCD's 2007 ozone attainment plan, and states that "[t]he inclusion of this ERC in the 2007 ozone attainment plan verifies that this emission reduction is not being 'credited elsewhere.'" Fairfield RTC at 3; Ethyl D RTC at 3. The Petitioner failed in either Petition to acknowledge or rebut this explanation.[27]

[25] *See supra* note 19 and accompanying text. For the same reasons described in the EPA's disposition of Claim I, the Petitioner's failure to respond to the permitting authority's reasoning supports the EPA's determination that the Petitioner has not demonstrated grounds for the EPA to object in response to Claim II.

[26] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *c.f. NYPIRG*, 321 F.3d at 333 n.11.

[27] *See supra* note 19 and accompanying text. For the same reasons described in the EPA's disposition of Claim I, the Petitioner's failure to respond to the permitting authority's reasoning supports the EPA's determination that the Petitioner has not demonstrated grounds for the EPA to object in response to Claim II.

V. CONCLUSION

For the reasons set forth above, I hereby deny the Petitions as to the claims described above.

Dated: OCT 6 2017

E. Scott Pruitt,
Administrator.