

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____	)	PETITION No. IX-2016-8
IN THE MATTER OF	)	
	)	
CHEVRON USA INC. – 7Z STEAM PLANT	)	ORDER RESPONDING TO THE
KERN COUNTY, CALIFORNIA	)	PETITIONERS’ REQUEST FOR
	)	OBJECTION TO THE ISSUANCE OF
PROJECT No. S-1144548	)	A PERMIT
	)	
ISSUED BY THE SAN JOAQUIN VALLEY	)	
UNIFIED AIR POLLUTION CONTROL DISTRICT	)	
_____	)	

**ORDER DENYING A PETITION FOR OBJECTION TO PERMIT**

**I. INTRODUCTION**

The U.S. Environmental Protection Agency (EPA) received a petition dated July 7, 2016, (Petition) from the Climate Change Law Foundation, Association of Irrigated Residents, Center for Biological Diversity, and 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<sup>1</sup>) to the Chevron USA Inc. – 7Z Steam Plant (Chevron or facility) near Bakersfield, in Kern County, California.

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 denies the Petition requesting that the EPA object to the Permit.

**II. STATUTORY AND REGULATORY FRAMEWORK**

**A. Title V Permits and Preconstruction Permits**

Section 502(d)(1) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The California Air Resources Board (CARB) submitted a title V program on behalf of SJVUAPCD governing the 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 Fed. Reg. 18083) and final approval in 2001 (66 Fed. Reg. 63503). SJVUAPCD’s title V program is codified in SJVUAPCD Rule 2520 and portions of Rule 2201.

<sup>1</sup> Prior to March 20, 1991, when SJVUAPCD began operation, the Kern County Air Pollution Control District was the permitting authority for the Chevron facility.

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.

Applicable requirements for construction of a new “major stationary source” or for a “major modification” to an existing major stationary source include the requirement that the source obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. For these sources, the NSR program is comprised of two core types of preconstruction permit requirements. 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 Chevron 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<sub>2.5</sub>), 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 EPA-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.<sup>2</sup> 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 used, proposed permits issued by SJVUAPCD could be subject to EPA review in two different circumstances.

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<sup>2</sup> 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.”

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.<sup>3</sup> 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 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.<sup>4</sup>

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<sup>3</sup> SJVUAPCD Rule 2520 § 11.3.7 mirrors these provisions for the submittal of petitions to the EPA on title V permit actions.

<sup>4</sup> As noted above, these rules are part of the District's EPA-approved title V program. *See* 66 Fed. Reg. 63503 (November 30, 2001); 66 Fed. Reg. 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").

### 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 is 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.”<sup>5</sup> This language mirrors the objection criteria articulated in CAA § 505(b)(1) and (2) and 40 C.F.R. § 70.8(c). Thus, it is appropriate for the EPA to apply the traditional title V standards and framework based on CAA § 505(b)(2) (described in the following subsection) when reviewing the Petition under Rule 2201.

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

A petition to the EPA under CAA § 505(b)(2) shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* SJVUAPCD Rule 2201 § 5.9.1.7. In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).<sup>6</sup> Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.<sup>7</sup>

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)]

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<sup>5</sup> Similarly, SJVUAPCD Rule 2201 § 5.9.1.7 indicates, “Petitions shall be based on the compliance of the permit provisions with applicable requirements.”

<sup>6</sup> *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

<sup>7</sup> *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.

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.”); *NYPURG*, 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)).<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.”).<sup>11</sup> 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-2011-

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<sup>8</sup> *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)).

<sup>9</sup> *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

<sup>10</sup> *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 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 (January 8, 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).

<sup>11</sup> *See also 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); *In the Matter of Portland Generating Station*, Order on Petition, at 7 (June 20, 2007) (*Portland Generating Station Order*).

05 at 9 (January 15, 2013).<sup>12</sup> 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).<sup>13</sup>

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 Chevron Facility**

Chevron USA Inc. has proposed to install eight new natural gas-fired steam generators to the 7Z Steam Plant at the McKittrick Oil Field, located in Bakersfield, Kern County, California. The new gas-fired steam generators will be used for thermal enhanced oil recovery. Because the facility is located in a nonattainment area, Chevron was required to evaluate the project pursuant to SJVUAPCD’s NNSR rules. Among other air pollutants, the steam generators will result in increased emissions of volatile organic compounds (VOC) above NNSR offset threshold levels. Therefore, among other things, Chevron was required to obtain offsets for the VOC emissions associated with the eight new steam generators.

#### **B. Permitting History**

On December 23, 2014, Chevron submitted an application for multiple ATCs to authorize construction of the proposed natural gas-fired steam generators. Chevron applied for the ATCs to be processed with a COC, as these modifications would have also necessitated a significant permit modification to Chevron’s title V permit. Accordingly, the ATCs were processed according to the enhanced administrative requirements of Rule 2201 § 5.9. SJVUAPCD

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<sup>12</sup> *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 (April 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 (March 15, 2005).

<sup>13</sup> *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.

published notice<sup>14</sup> of its preliminary decision and proposed ATCs with a COC for this project on May 6, 2016, triggering a public comment period that ended on June 10, 2016. SJVUAPCD also emailed the preliminary decision to the EPA on May 6, 2016, triggering the EPA's 45-day review period, which ended on June 20, 2016. The EPA did not object to the issuance of the Permit or otherwise submit comments. SJVUAPCD issued the final ATCs with a COC, along with a RTC document, on October 6, 2016.

### 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 August 19, 2016.<sup>15</sup> The Petition was transmitted to the EPA on July 7, 2016, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

## IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

### **Claim I: The Petitioners' Claim that "Emission Reduction Credit Certificate S-3869-1 is Invalid."**

**Petitioners' Claim:** The Petitioners claim that the Permit relies on an invalid VOC emission reduction credit (ERC) (Certificate S-3869-1) and that the EPA must therefore object to the Permit. Petition at 3–4. For support, the Petitioners rely on an August 11, 1993 comment letter from the EPA to SJVUAPCD. *See* Letter from Ken Bigos, Chief, Stationary Source Branch Air and Toxics Division, EPA Region IX, to Sayed Sadredin, Director of Permit Services, Air District ("1993 EPA Letter"). The Petitioners' claim, in its entirety, states as follows:

Petitioners request that the Administrator object to the Permit because it relies on invalid emissions reduction credits for emissions increases in violation of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i), which requires that for an emissions reduction for shutting down an existing unit or curtailing production to be creditable, it must be "surplus, permanent, quantifiable, and federally enforceable." In particular, the Permit relies on invalid emissions reduction credits ("ERCs") for volatile organic compounds ("VOCs"), which result in the formation of ozone.

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<sup>14</sup> 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 Title V significant modification pursuant to Rule 2520, and can be processed with a [COC]." Authority to Construct Application Review at 1 (September 19, 2016). The EPA understands this to mean that revising Chevron'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 Chevron's title V permit may subsequently be conducted via administrative amendment procedures (not significant permit modification procedures).

<sup>15</sup> The EPA notes that the District issued its RTC on October 6, 2016, after the conclusion of the 60-day public petition period, which was August 19, 2016. Thus, the Petitioners did not have the opportunity to address the District's RTC in the Petition.

## **I. Emission Reduction Credit Certificate S-3869-1 is Invalid**

ERC S-3869-1, for VOC reduction, states that it was issued for “steam drive well casing collection systems installed prior to April 25, 1983 (ERC project 920255).” This credit certificate originated from the 1980 control of steam drive well casing gases at a series of production wells operated by Chevron U.S.A. At the time these credits, which include application Nos. S-0037-1 through ’0038-1 and S-0056-1 through ’0068-1, were issued, EPA commented that the credits were “clearly not surplus” of federal requirements, that they were “not legal” and that EPA would “not be able to allow their use.” Chevron claimed credit for reducing steam drive well casing gases by 99 percent. However, as EPA stated, by the time the credits were awarded, this level of reduction was required as reasonably available control technology (“RACT”), and Air District “Rule 4401.5.3 [already required] a 99% control efficiency of VOC emissions.” Therefore, EPA concluded, none of the proposed credits were surplus. EPA also stated that there was no proof that the emissions had been accounted for in the 1987 emissions inventory.

Despite these clear deficiencies, the Air District proceeded to issue the credits. However, the Air District explicitly warned the ERC applicant that “EPA may challenge any project which uses these credits to gain approval.” Because ERC S-3869-1 is invalid or “not legal” the Administrator must object to the Permit.

Petition at 3–4 (footnotes omitted).<sup>16</sup>

***EPA’s Response:*** For the following reasons, the EPA denies the Petitioners’ request for an objection based on the claim that the Permit relies on an invalid ERC (Certificate S-3869-1).

### *Issue 1: Whether Emission Reductions Are Surplus of Federal Requirements*

The Petitioners have failed to demonstrate that the Permit relies on an invalid ERC (Certificate S-3869-1) on the ground that the associated emission reductions were not surplus of federal requirements. As discussed in Sections II.C and D of this Order, the Petitioners have the burden to demonstrate that the Permit is deficient with respect to an applicable CAA requirement. The Petitioners support their assertion that ERC S-3869-1 is not surplus by quoting the 1993 EPA Letter, which stated that “[b]ecause the reductions are required by RACT rules, they are clearly not surplus.” The Petitioners’ claim is a restatement of portions of the 1993 EPA Letter without any further analysis. 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

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<sup>16</sup> Among other references, the Petitioners cite to the 1993 EPA Letter in support of each of the Petitioners’ quotations or characterizations of EPA statements. The Petitioners also cite to an additional August 18, 1993 letter from EPA Region IX to SJVUAPCD in support of their attribution concerning the 1987 emissions inventory.



demonstrate that the Permit is not in compliance with applicable CAA requirements.<sup>17</sup> This is particularly true in this case, where, as discussed below, the EPA's prior comments have been superseded by subsequent changes to applicable SJVUAPCD regulations.

The Petitioners have not analyzed the claim under the SJVUAPCD rules that are currently applicable, including EPA-approved SJVUAPCD Rule 2201. *See* 79 Fed. Reg. 55637 (September 17, 2014). In particular, the Petitioners have failed to acknowledge or address SJVUAPCD's annual offset equivalency demonstration, established in SJVUAPCD Rule 2201 Section 7.0 and approved by the EPA in 2004, well after the 1993 EPA Letter. As discussed below, SJVUAPCD Rule 2201 Section 7.0 specifically addresses the surplus requirement for offsets used in the District, and is directly relevant to the issues raised in the Petitioners' claim. Thus, the EPA finds that the tracking system and annual offset equivalency determination established by SJVUAPCD Rule 2201 Section 7.0 renders the EPA's 1993 comments regarding the surplus nature of the ERC at issue moot.

The EPA provides the following information to further explain why the concerns in the 1993 EPA Letter regarding the surplus nature of the ERC at issue were not raised under the currently relevant SJVUAPCD rules and do not satisfy the Petitioners' demonstration burden. Section 173(c)(2) of the CAA states that emissions reductions "otherwise required by [the Act] shall not be creditable as emissions reductions for purposes of any such offset requirement." This statutory provision is implemented, in part, by 40 CFR 51.165(a)(3)(ii)(C)(I)(i), which lists the requirement that a State Implementation Plan (SIP) contain conditions requiring that such reductions be "surplus, permanent, quantifiable, and federally enforceable." This regulatory provision and SIP requirement is, in turn, implemented in part by Section 7 of SJVUAPCD's Rule 2201, as approved by the EPA, which establishes an "Annual Offset Equivalency Demonstration and Pre-baseline ERC Cap Tracking System." Pursuant to Section 7.1, SJVUAPCD shall implement a system tracking (1) "[t]he quantity of offsets that would have been required for new major sources and federal major modifications in the District had the federal new source review requirements, codified in 40 CFR 51.165, and Title I part D of the [CAA], been applied to these sources"; (2) "[t]he quantity of offsets actually required for all new and modified sources in the District pursuant to the requirements of this rule, and, for the purposes of the Pre-baseline ERC Cap Tracking System outlined in any District-adopted and EPA-approved attainment plan"; and (3) "[t]he surplus value of creditable emission reductions used as offsets by stationary sources." Section 7.1.5 states that "[f]or purposes of the requirements of Section 7.0, creditable shall be defined as emission reductions [that] are real, surplus, quantifiable, enforceable and permanent." Section 7.2 establishes an annual demonstration report. Among other things, pursuant to Section 7.2.2.1, the report "shall include a comparison of the annual quantity of federal offsets that would have been required (as tracked pursuant to Section 7.1.1) to the surplus value of creditable emission reductions used as offsets during the year (as tracked pursuant to Section 7.1.3)."

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<sup>17</sup> 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. *See In the Matter of Appleton Coated, LLC*, Order on Petition Nos. V-2013-12 and V-2013-15, at 12 (October 14, 2016).

Notably, the EPA approved the use of the tracking system established in SJVUAPCD Rule 2201 in 2004. *See* 69 Fed. Reg. 27837 (May 17, 2004). In its proposed approval of SJVUAPCD Rule 2201, the EPA stated:

Major sources (and major modifications) should therefore ensure that the emission reductions used to satisfy offset requirements meet federal creditability criteria. The one potential exception is with regard to the federal requirement to determine the surplus value of an emission reduction at time of use. Rule 2201 allows the surplus value to be determined at the time the ATC for an emission reduction or the application for an emission reduction credit (ERC) is deemed complete. Rule 2201, section 3.2.2. With our final approval of the District tracking system, EPA will allow the District to forgo the federal surplus adjusting requirement and sources will be able to rely on emission reductions EPA might otherwise not consider surplus.

68 Fed. Reg. 7330, 7333 (February 13, 2003) (emphasis added) (footnote omitted). At final approval of the rule, the EPA stated that “nothing in section 7.1.5 requires the District to withdraw a permit issued in reliance on an [ERC] that is of lesser surplus value at the time of use under federal criteria. Rule 2201 allows such credits to be used as long as equivalency is demonstrated annually.” 69 Fed. Reg. at 27839 (footnotes omitted). SJVUAPCD Rule 2201 Section 7 addresses the issue at hand and the Petitioners have not addressed the rule or provided any relevant analysis in that regard.

In addition, the Petitioners have not provided the relevant citations and analysis to support their claim. The Petitioners have failed to meet their demonstration burden, as described above, because, among other reasons, they have not identified an applicable requirement for which there is a flaw in the Permit. *See* 40 C.F.R. § 70.2. Petitioners only cite to the requirements in 40 C.F.R. § 51.165(a)(3)(ii)(C)(l)(i). However, 40 C.F.R. § 51.165(a) states provisions that must be contained in an approvable SIP for a nonattainment permitting program to satisfy sections 172(c)(5) and 173 of the CAA. *See* § 51.165(a)(3)(ii) (“The plan shall further provide that: [listing requirements for plan approval]”). These are requirements necessary for a SIP to be approvable; however, the Petitioners have not provided any reasoning as to how these requirements would apply to an individual permit. Consequentially, the Petitioners have not provided sufficient citation or reasoning to demonstrate that the Permit lacks a specifically identified applicable requirement.

The Petitioners’ claim relies on EPA commentary and District rules that are no longer relevant to their claim. The EPA’s concerns from 1993, upon which the Petitioners rely, do not address the current framework of the SJVUAPCD rules. Overall, because the Petitioners have failed to cite to current applicable requirements or provide any relevant analyses to support their claims, and because the Petitioners have failed to address a key element of the particular issue at hand, the Petitioners have not demonstrated that the Permit is not in compliance with applicable requirements of the Act. *See MacClarence*, 596 F.3d at 1131; *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).

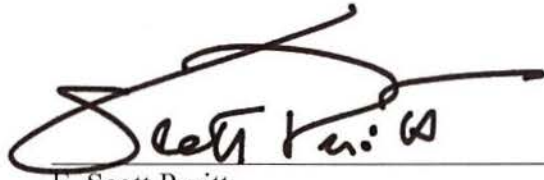
*Issue 2: Inclusion of Emissions in Emissions Inventory*

The Petitioners also briefly assert that in the 1993 EPA Letter, the EPA “stated that there was no proof that the emissions had been accounted for in the 1987 emissions inventory.” Petition at 3.<sup>18</sup> The Petitioners provide no additional analysis or support for this statement; they do not identify an applicable requirement that would require these emissions to be accounted for in this particular inventory prior to ERC use, nor do they otherwise connect the 1993 EPA Letter to their burden of showing that the 2016 Permit is not in compliance with requirements of the Act.<sup>19</sup> Accordingly, the Petitioners have not met their burden with respect to this argument. Therefore, the EPA has no grounds for objecting to the Permit on this issue.

**V. CONCLUSION**

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

Dated: APR 24 2017

  
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E. Scott Pruitt  
Administrator

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<sup>18</sup> To the extent that the 1993 EPA Letter requested a demonstration from SJVUAPCD, such a request does not relieve the Petitioners of their burden in the context of a petition requesting that the EPA object to a permit. As explained in Sections II. C and D of this Order, in the context of a petition, the petitioner must demonstrate that the permit is not in compliance with applicable CAA requirements. And, as discussed above, petitioners must make this demonstration in light of the current facts and rules applicable to the facility.

<sup>19</sup> Moreover, the Petitioners have not established why the 1987 inventory, as opposed to more recently approved planning documents, is relevant to the present Permit. *See, e.g.*, Clean Air Plans; 1-Hour and 1997 8-Hour Ozone Nonattainment Area Requirements; San Joaquin Valley, California, 81 Fed. Reg. 19492 (April 5, 2016); Technical Support Document and Response to Comments, Final Rule on the San Joaquin Valley 2007 Ozone Plan and the San Joaquin Valley Portions of the 2007 State Strategy, Docket ID No. EPA-R09-OAR-2011-0589-0023, at 164 (pdf page 174) (December 15, 2011) (“[T]he use of these pre-baseline ERCs is anticipated in the Plan’s attainment and RFP demonstrations and we have concluded that these demonstrations meet applicable CAA requirements including the requirement to show expeditious attainment.”).