UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

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OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Timely Processing of Prevention of Significant Deterioration (PSD) Permits when EPA or a PSD-Delegated Air Agency Issues the Permit

FROM: Stephen D. Page, Director
Office of Air Quality Planning and Standards

TO: Regional Air Division Directors, Regions 1-10

The purpose of this memo is to clarify expectations and responsibilities regarding the processing of Prevention of Significant Deterioration (PSD) permit applications when an EPA Regional Office (Regional Office) or a PSD-delegated air agency issues the PSD permit.

This memo summarizes the permit processing requirements of the Clean Air Act (CAA) and the EPA's implementing regulations, and identifies best practices and other recommended tools to foster timely and consistent permit processing across the Regional Offices under the applicable procedures in 40 CFR Part 124. Some other air agencies issue PSD permits under delegation of federal authority from the EPA [40 CFR 52.21(u)] and the EPA expects delegated air agencies to also follow this guidance. The timely processing goals and procedures in this memo should be applied to new PSD applications and to those applications already under review to the extent practicable. Air agencies that administer EPA-approved PSD permitting programs under their implementation plans should process their PSD applications in accordance with the procedures applicable under their EPA-approved implementation plan, but the EPA recommends these air agencies consider following the approaches outlined in this document to the extent that the applicable procedural requirements are comparable to those outlined in Part 124 of the EPA's regulations.

Timely processing of PSD permit applications is good public policy assuring permit applicants of timely action on their application and also ensuring that the Regional Office has adequate review time to make an informed permit decision. An efficient, yet well-informed, permit decision also ensures that the EPA's Environmental Appeals Board (EAB) has the time it needs

to meaningfully review a permit decision on appeal. An EAB standing order calls for expedited handling of PSD permit appeals, in recognition of the time-sensitive nature of these permits.[1]

This document explains the requirements of the EPA regulations, describes the EPA policies, and recommends procedures for permitting authorities to use to ensure that permitting decisions are consistent with applicable regulations. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as "guidance", "recommend", "may", "should", and "can" is intended to describe the EPA's policies and recommendations. Mandatory terminology such as "must" and "required" are intended to describe controlling legal requirements under the terms of the CAA and the EPA regulations. Neither such language nor anything else in this document is intended to or does establish legally binding requirements in and of itself.

I. The Processing Goal - Permit Decision by the Regional Office within 10 Months

Under the CAA, the EPA is required to make a permit decision on a PSD permit application within 1 year after the application is complete as determined by the EPA. 42 U.S.C. 7475(c). The EPA's processing goal is that the Regional Office make a final permit decision (to issue or deny) on a PSD permit application within 10 months after the date that the Regional Office has determined that the application is complete. The EPA regulations define a complete application as one that "contains all of the information necessary for processing the application." 40 CFR 52.21(b)(22). The Regional Office makes the decision as to when the application is complete.

For some projects, the PSD permitting process is straightforward and noncontroversial, and the Regional Office can readily make a completeness determination and process the application expeditiously. This might occur, where, for example, the applicant submits a comprehensive and thorough application that the Regional Office determines early on to be complete, the Regional Office has no dispute regarding the applicant's analysis of Best Available Control Technology

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[1] This requirement for timely processing of PSD permits was raised in the case of a PSD permit issued by the EPA for the Avenal Energy Project (Avenal). Avenal is a proposed combined-cycle gas-fired power plant near Avenal, California. The PSD permit application for this facility had been under review at the EPA for more than 3 years after the Agency had deemed the permit application complete. This led the applicant to seek and obtain a federal district court order based on CAA Section 165(c) imposing a deadline for final Agency action (to issue or deny a permit) within 90 days. *Avenal Power Center, LLC v. U.S. EPA*, 787 F. Supp.2d 1 (D.C. Dist. 2011). Although EPA disagreed with the decision, the Agency did not appeal and initially issued the permit the day after the judge's ruling. The permit was then appealed to the EAB, and EPA issued the final EPA permit within the 90 days as ordered. However, because of the short period for EAB review, the EAB lacked sufficient time to consider the most contentious issue (i.e., case-specific grandfathering from the 1-hour NO_2 NAAQS, SO2 NAAQS, and new GHG requirements that otherwise would have applied to the permit). EPA's action to issue the final permit has been challenged in federal court. This guidance is intended to reduce the likelihood of future lawsuits seeking a permit decision, and to put EPA in a position to respond quickly to any such lawsuits.

(BACT) or ambient impacts, and there is no reason for a public hearing. For such projects, comments are minimal and do not raise complex substantive issues and an appeal of the permit action is not anticipated, so it is unlikely that the EAB will be petitioned to review the permit before it becomes effective. For such projects Regions should be able to issue final permits within 10 months from the date that the Regional Office determines the application complete, although we recognize that there may be specific factors that lead the Regional Office to issue the final permit decision later than 10 months after the completeness determination.

Some other PSD projects are very complex, controversial, and contested. These projects typically require additional extensive and time-consuming technical review, multiple interactions with the applicant, scheduling and holding public hearings, and in some cases the development of further information in response to public comments. In such cases, it is very difficult to complete the permit application review process, including public involvement and response to comments, and make a permit decision within the 10-month goal. Regardless, for all PSD projects the Regional Offices should still make every effort to assure that their actions on permit applications are completed as expeditiously as possible, consistent with the need to ensure that the record supporting each permit action is sufficient to demonstrate that the application meets all applicable permitting requirements, and therefore is defensible if challenged.

If no comments were received that requested a change in the draft permit during the public comment period and all of the notice requirements of 40 CFR Section 124 are met, the final permit becomes effective immediately. If any such comments had requested a change to the draft permit but there is no appeal to the EAB, the permit decision becomes effective 30 days after issuance (or at a later time if the Regional Office has established a later effective date). 40 CFR 124.15(b). If such an appeal is requested, a PSD permit does not become effective until further proceedings are completed. 40 CFR 124.15(b)(2); 40 CFR 124.19. If the Regional Office can issue its decision on a PSD permit application within 10 months of the completeness determination and the permit action is appealed, then the administrative appeal process through EAB will likely be underway before an applicant (or an opponent of the permit) could file an action seeking an order directing EPA to take final action on the permit, which may reduce the incentive for such legal action. Appeals to the EAB historically have taken an average of 5 months from the time a petition is filed to the date of a final decision. The time for review and a final decision varies considerably depending on the volume and quality of the record, as well as the complexity of the issues.

II. Processing, Procedures, Practices, and Issues

The following discussion provides recommendations to facilitate timely processing of PSD permit applications. In addition, to promote consistency across all Regions, boilerplate language is suggested for Regional Offices to use when corresponding with a PSD permit applicant and other agencies, including acknowledgement of the application, notification to the Federal Land Manager(s) (FLM), request for additional information, complete and incomplete application notifications, denial, notice of constructive application withdrawal, and response to an applicant's request for the Regional Office to delay making a final permit decision. Of course,

language should be tailored by the Regional Office to address the specific facts and context of the applicant and the permit application being reviewed. These and other issues are addressed in more detail below.

Acknowledgement, Application Tracking Database, Notification to FLM, Notification to Canada, Environmental Justice, and Tribal Consultation

Acknowledgement - Within 2 weeks of receipt, the Regional Office should acknowledge receipt of the PSD permit application by letter or email and include in this correspondence the contact information for the assigned Regional Office review staff. The acknowledgement should not attempt to address completeness, which the Region should address after further review.

Suggested Language

The EPA acknowledges receipt of your application for a permit under the Prevention of Significant Deterioration (PSD) requirements of 40 CFR 52.21. We expect to initiate review of your application as soon as possible and advise you within 30 days regarding our progress and if more information or more time is needed to enable the EPA to deem your application complete. Your review contact in the EPA Region [number] for this application is [name] at [phone] or [email].

Application Tracking Database –The Office of Air Quality Planning and Standards (OAQPS) has established a new PSD Permit Application Tracking database to track permit review from receipt of the permit application to the final agency action for PSD permit projects for which a Regional Office is the permitting authority. Regional Offices should also use the database to track PSD permit applications where the EPA's PSD permitting authority has been delegated to another air agency. The appropriate Regional Office should add (within 2 weeks of receipt) the proposed new or modified PSD project information into the tracking system as a new project and then update the information as the review progresses. All data entry fields that apply to the project should be completed. Using this database, the Regional Offices and OAQPS should periodically assess the progress of the review of these applications and resolve processing delays as needed.

Notification to FLM - Note that if the proposed project may affect a Class I area, within 2 weeks (and no later than 30 days) of receipt of the permit application the Regional Office should send a copy of the application and related materials to the FLM(s) and other federal official(s) directly responsible for any lands within such area(s). 40 CFR 52.21(p)(1). The Regional Office should determine the distance from the proposed source to the nearest Class I area(s). The EPA's policy is that the FLM(s) should be notified by the Regional Office about any project that is within 100 kilometers of a Class I area. For sources having the capability to affect air quality at greater distances, notification should also be considered for Class I areas beyond 100 kilometers. Applicants should be asked to submit an additional copy of the application for the Regional Office to submit to the FLM(s). The application should address the proposed source's anticipated impacts on the Class I area(s).

Suggested Language

In accordance with 40 CFR 52.21(p)(1), this letter is to notify you of the receipt of [company name]'s application dated [insert date] and received by this office on [insert date of receipt], for a Prevention of Significant Deterioration (PSD) permit for [project name]. The emissions from this project may affect a Class I area(s) for which you are the responsible federal official.

The application and supporting information are under review by this office for completeness. Due to proximity of the project to the [insert FLM area], we are asking for your input on the completeness of this application. Enclosed with this letter is a printed copy of the application [or compact disk, etc.] that contains all information submitted by [company name]. The application includes [or does not include] an analysis of the proposed source's anticipated impacts on visibility in the Class I area(s). Please provide any comments to us by [insert date].

If you have any questions concerning the review of the application, please contact [name] at [phone] or [email].

Notification to Canada - Under the 1991 Canada-U.S. Air Quality Agreement, Article V, each country agreed to notify the other regarding any planned new or modified industrial source of emissions that is located within 100 kilometers of the border. Regional Offices should provide information on the proposed PSD major new source or PSD modification to OAQPS. OAQPS will then notify Canada and post the information on the EPA's Technology Transfer Network at http://www.epa.gov/ttn/gei/uscadata.html.

Environmental Justice (EJ) - Executive Order (EO) 12898 provides for federal agencies to identify and address disproportionately high and adverse effects of their actions on minority, low-income, and tribal populations. The EPA defines EJ to include the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income in environmental decisions that affect them. Consistent with the Agency's commitment to environmental justice, as part of the permit review process and before issuing a PSD permit, the Regional Office should examine any superficially plausible claim that the facility seeking the PSD permit will disproportionately affect a minority, low-income, or tribal community. The EPA's policy, guidance, and information resources regarding EJ are at http://www.epa.gov/environmentaljustice/index.html. EJ guidance as reflected in EAB decisions may be found at the EAB website (www.epa.gov/eab).

Tribal Consultation – Under EO 13175 if the proposed project may affect tribal interests, the Regional Office should initiate consultation with the affected tribe(s) sufficiently early in the process to allow for meaningful input by the tribe(s). In accordance with the Regional Office's consultation plans and practices, the Regional Office should engage in such consultation prior to taking actions or implementing decisions that may affect the tribes. See the Tribal Consultation Policy dated May 4, 2011 at http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf

A. Completeness Determination

A determination of application completeness by the EPA is a very important step because this starts the statutory 1-year decision clock for the EPA to either issue or deny the requested permit. The date of completeness is the date that the Regional Office notifies the applicant that the application is complete. 40 CFR 124.3(f). Once an application is determined to be complete, requests for additional information do not make the application incomplete. 40 CFR 124.3(c). Regional Offices should thus take the time needed to thoroughly review the application and not make a premature decision that an application is complete. The EPA rules define a "complete" application as one that "contains all the information necessary for processing the application." 40 CFR 52.21(b)(22). To avoid any misunderstanding regarding whether the 1-year decision clock has started, the term "administratively complete" should not be used, and the focus should be on whether the application contains all the information needed for the EPA to propose a permit decision. As a tool to assist in making this completeness determination, a listing and discussion of information needed in a PSD application are included in Appendix A.

The Goal - The goal is for the Regional Office to be proactive by notifying the applicant as soon as possible of application deficiencies (*e.g.,* lack of an adequate BACT analysis) to help decrease overall review and processing time. Experience shows that in some cases the receipt of requested information from the applicant and the subsequent review by the Regional Office may take several months or more. In some cases, there are long delays by the applicants in responding to information requested by the Regional Office. It is important that the applicant be notified in writing once the Regional Office has determined the application is complete (*i.e.,* the applicant has submitted all the information needed for the Regional Office to propose a decision regarding whether to issue or deny the permit). In some cases, it may not be possible to determine that the application is complete until shortly before or at the same time that the Regional Office proposes the permit action.

First 30 Days after Receipt - In keeping with the terms of 40 CFR 124.3(c) and the EPA's goals, the Regional Office should strive to review the application and determine whether the application is complete within 30 days of receipt. Below is suggested language for a situation where the application is complete as submitted. In cases where it is determined that the application is not complete, language similar to that in Section C below should be used.

Suggested Language

The EPA has reviewed your Prevention of Significant Deterioration (PSD) permit application for [name and location of project] that was received by the EPA on [insert date], including supporting documentation, and determined that as of [insert date of this letter] your application is complete. Even though your application is deemed complete, in the course of this review we may identify further information that will be essential to enable the EPA to continue processing your application and make a permit decision, including information that may be needed to respond to public comments.

If you have any questions please contact [name] at [phone] or [email].

B. Requests for Additional Information

When an application is not yet deemed complete - Regional Office requests for additional or clarifying information should be in writing and specify the information needed and an expectation of a response time (*e.g.*, 30, 60 days, etc.) for receiving the specific information from the applicant depending on the scope and complexity of the request. Any requests for information should affirm that the application is not yet complete.

Suggested Language

The EPA has reviewed your Prevention of Significant Deterioration (PSD) permit application for [name and location of project] that was received by the EPA on [insert date], including supporting documentation, and determined that your application is incomplete at this time. The following information is needed from you so that the EPA can continue its completeness review.

[List additional info needed, being as specific as possible. Propose a date for the applicant to provide the information.]

Please notify [name] if a complete response is not possible by this date. Your application is considered incomplete until this information is received and evaluated and the EPA has determined that the application contains all the information needed for the EPA to propose a permit decision. Note that as the EPA continues review of your application we may identify further information that will be essential to enable the EPA to continue processing your application and make a permit decision, including information that may be needed in response to public comments. If you have any questions please contact [name] at [phone] or [email].

When an application is already deemed complete - Experience shows that even after a careful completeness determination has been made by the Regional Office, the EPA may need to request more information from the applicant in order to complete review of the application and proceed to public notice of a proposed decision. Also, additional information may be needed from the applicant to respond to issues raised during public comment. For applications already deemed complete, if additional information is essential and needed from the applicant, the application remains complete and the 1-year permit decision clock is not stopped by the request. 40 CFR 124.3(c). However, the Regional Office's request for additional information will inform the applicant that the EPA will not be in a position to take permit action until the information is received and reviewed, even if that means delaying the decision beyond the 1-year decision time frame.

Suggested Language

The EPA has reviewed your Prevention of Significant Deterioration (PSD) permit application for [name and location of project] that was received by the EPA on [insert date], including supporting documentation, and determined complete by the EPA on [insert date]. Upon further review, the EPA has now determined that the following clarifying information from you is essential to enable the EPA to process your application and make a permit decision.

[List additional info needed, being as specific as possible. Propose a date for the applicant to provide the information.]

Please notify [name] if a complete response is not possible by this date.

This request does not affect the completeness of your application and the EPA will continue to review your application to the extent possible until the above information is received.

If you have any questions please contact [name] at [phone] or [email].

C. Project Changes by the Applicant

Sometimes, even after the Regional Office has deemed a permit application complete, the applicant may need to propose changes to the project or may discover and wish to correct substantial errors in its application. In some cases the submittal of changes will not impact the Regional Office's prior completeness decision and the running of the EPA's 1-year permit decision clock. However, if the applicant submits substantial changes to the project (*e.g.,* the addition of new emissions units or processes) or has identified substantial errors in the permit application (*e.g.,* the modeling is resubmitted to correct emissions rate calculations and erroneous stack exhaust parameters), the Regional Office may consider the revised or corrected PSD application to supersede (rather than supplement) the earlier application, such that it may be treated as newly submitted and not yet deemed complete. This means that the 1-year permit decision clock has not yet started on the new or revised project and will not start until the new information submitted by the applicant to support the proposed changes is deemed complete by the Regional Office. Even with a new 1-year decision clock, Regions should still strive to complete review as soon as possible, consistent with ensuring an appropriate, defensible permit decision.

Suggested Language

The EPA has reviewed your request to amend and supplement the Prevention of Significant Deterioration (PSD) permit application for [name and location of project] that was received by the EPA on [insert date], including supporting documentation, and previously determined complete on [insert date]. Because the changes to the project [or corrections to the application] are substantial, including [address specific changes or corrections here such as addition of new emissions units, changes in scope and purpose of project], the EPA has concluded that the

revised application for the project supersedes the earlier application. Thus, the EPA will treat the amended application as new and not complete. Even though we consider this submission to be equivalent to a new application for the project, we will strive to complete review as soon as possible.

If you have any questions please contact [name] at [phone] or [email].

D. Requests by Applicants to Delay the EPA Permitting Decision

Permit applicants have sometimes requested that a permitting authority suspend its review of a permit application without withdrawing it. The Regional Office may put on hold the review of the permit application and consider it inactive, but should not do so unless the Regional Office obtains a written request from the permit applicant. If the application was previously determined complete by the EPA, the EPA considers the 1-year review clock stopped for such inactive applications. If the applicant wants the EPA to reactivate review, the applicant should contact the Regional Office to discuss reactivation and any additional or new information that may be needed from the applicant. Note that if and when the project is reactivated, it will need to meet the requirements applicable at the time the permit is issued.

Suggested Language

The EPA has reviewed your request dated [insert date] that the EPA cease processing the Prevention of Significant Deterioration (PSD) permit application for [name and location of project] that was received by the EPA on [insert date] and that we determined to be complete on [insert date], and put the permit decision on hold. Based on your request, effective [insert date], the EPA is placing your permit application on hold and considers it inactive. Please advise us if you would like to discuss reactivating your application and any additional information that may be needed. Note that if and when the project is reactivated, it will need to meet the requirements applicable at the time the permit is issued.

If you have any questions please contact [name] at [phone] or [email].

E. Preventing Inaction on Permit Processing

Absent a written request by a permit applicant to suspend review of an application, the Regional Office should proceed toward a decision on a permit application without delay. If the Regional Office is unable to propose or complete final approval of an application because an applicant stops responding, or is repeatedly nonresponsive to requests from the Regional Office for additional information, or the information provided does not demonstrate that the project meets the PSD requirements, the Regional Office has several options. Because of the statutory deadline, it is not advisable in these situations for a Regional Office to take no action on an application while the clock continues to run. If after a reasonable effort has been made by the Regional Office to obtain information that would support granting a permit the applicant has not adequately demonstrated compliance with all the PSD requirements, the EPA's options to avoid

inaction include the following: 1) encourage the applicant to withdraw the application; 2) treat the application as constructively withdrawn; 3) repeat the information request with a clarifying explanation of the remaining deficiencies in the application; or 4) begin steps to deny the permit application.

Constructive withdrawal - If the applicant is known or suspected to have lost interest or has stopped responding to inquiries from the EPA, the Regional Office may consider the application to be withdrawn. For example, the applicant has not responded to several EPA requests for additional information and has not contacted the EPA to discuss reasons for the delay. Under the constructive withdrawal option, the Regional Office would notify the applicant that the permit application will be deemed withdrawn unless the applicant contacts the Regional Office within 30 days to discuss the status of the application and a plan to provide the requested information. If no response is received, the Regional Office will send a notice to the applicant that the permit application is considered withdrawn. If a response with the requested information is received and the information does not demonstrate compliance with the PSD requirements, the Regional Office may renew the information request with a clarifying explanation of the remaining deficiencies in the application or may use the denial option.

Suggested Language

This letter is in reference to your application for a Prevention of Significant Deterioration (PSD) permit for [name and location of project] that was received by the EPA on [insert date] and to our request(s) for additional information dated [insert date(s)]. It has been over [insert number of days, months or years as appropriate] since our last request and we still have not received a response that addresses our request. Accordingly, the EPA will consider your application as withdrawn unless you contact us within 30 days to discuss the status of your application and a plan to provide the information requested.

If you have any questions please contact [name] at [phone] or [email].

Permit denial – The denial of a PSD permit is not an approach that the EPA has traditionally taken. However, proceeding to denial may be an appropriate option where, for example, the applicant has not adequately modeled compliance with a NAAQS or where its proposed BACT analysis is unacceptable, and time is running out to be able to meet the 10-month goal for a final permit decision by the Regional Office. Denial may also be appropriate where the applicant refuses to provide information that the Regional Office believes is needed to make a defensible permit decision. In accordance with the administrative process at 40 CFR 124.6, 124.10, and 124.15 the Regional Office will propose and take public comment on a denial, giving the applicant the opportunity to respond before the Regional Office makes a final decision. A Regional Office denial of a permit is reviewable by the EAB.

Suggested Language

This letter is in reference to your application for a Prevention of Significant Deterioration (PSD) permit for [name and location of project] that was received by the EPA on [insert date] and to our request(s) for additional information dated [insert date(s)]. It has been over [insert number of days, months or years as appropriate] since our last request and {[we still have not received the requested information] or [the information you submitted in response to that request does not provide an adequate basis for issuing the requested permit]}. Based on this lack of needed information, the EPA believes it cannot lawfully grant the permit and is initiating the steps to deny your application. [Describe the next step(s).] The administrative process for denial of a PSD permit application is at 40 CFR 124.6, 124.10, and 124.15.

If you have any questions please contact [name] at [phone] or [email].

F. Requirements of Other Acts

In addition to the CAA requirements there are requirements in four other statutes that sometimes must be met before a source can begin construction and operation under a PSD permit. This justifies treating as requirements for completeness certain of the information needed from the applicant in order for the EPA to start, or complete, the appropriate review processes under these four statutes. As discussed further below, the other statutory requirements that may apply to the project are the Endangered Species Act (ESA), the Coastal Zone Management Act (CZMA), the National Historic Preservation Act (NHPA), and the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA).

The permit applicant should first initiate contact with the Regional Office and then with other implementing federal departments or agencies, state agencies, and tribal officials for these statutes to determine appropriate contacts and specific requirements that may apply to the proposed project. The applicant's contacts with the EPA and other federal, state, or tribal officials should be documented in the application along with the applicant's assessment of the applicability of these statutory requirements. In addition, the specific information needed from the applicant that is identified below for the four statutes, and any additional information that may be requested by the EPA, should be provided in the application. If the applicant does not address the applicability of these four statutes in the initial application, or does not provide the information identified below, this should be communicated to the applicant as a completeness gap in the application.

- **Endangered Species Act**

Under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the EPA must ensure that any action authorized, funded, or carried out by the EPA is not likely to jeopardize the continued existence of any federally listed endangered species or threatened species or result in the destruction or adverse modification of such species' designated critical habitat. If the EPA's action (*i.e.,* permit issuance) may affect a federally listed species or designated critical habitat, Section 7(a)(2) of the

ESA and relevant implementing regulations at 50 CFR Part 402 require consultation between the EPA and the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), depending on the species at issue.

Under the ESA, applicants have certain opportunities to be involved in the Section 7(a)(2) compliance process. Under the ESA regulations, the EPA may also designate a non-federal representative to participate in, and conduct, certain aspects of a required consultation. 50 CFR 402.08. The Regional Office should work with the applicant to designate it as the non-federal representative. After first contacting the Regional Office to discuss the process, applicants should contact the FWS (and/or NMFS, if applicable) to ask whether there are any species or critical habitats listed or designated, or proposed for listing or designation, in the action area. The applicant should use this information to prepare a biological evaluation analyzing the impacts, if any, of the project on relevant species and critical habitat and provide a copy with the PSD application to assist the EPA in carrying out its responsibilities under ESA. The preparation of relevant analyses and fulfillment of ESA requirements is often a reason the issuance of a PSD permit is delayed; therefore, Regional Offices should strongly encourage applicants to work with the Regional Office, FWS, and the NMFS prior to submitting a PSD permit application.

- **Coastal Zone Management Act**

The CZMA encourages states to preserve, protect, develop, and where possible, restore or enhance valuable natural coastal resources such as wetlands, floodplains, estuaries, beaches, dunes, barrier islands, and coral reefs, as well as the fish and wildlife using those habitats. It includes areas bordering the Atlantic, Pacific, and Arctic Oceans, the Gulf of Mexico, Long Island Sound, and the Great Lakes. In any application for a PSD permit for a facility located in a state's coastal zone (or outside the state's coastal zone but affecting any land or water use or natural resource of the coastal zone), the applicant should provide the Regional Office with the applicant's own certification that the proposed activity complies with the enforceable policies of the state's NOAA-approved coastal program and that such activities will be conducted in a manner consistent with that program. The applicant also furnishes the state coastal zone management agency a copy of the certification, with necessary data and information. The state agency may concur or object to the consistency determination. The Regional Office cannot issue the license or permit until the state agency concurs in the certification or, through the state's failure to act, its concurrence can be conclusively presumed.

Accordingly, information as to whether the proposed facility is within the state's coastal zone or affects any land or water use or natural resource of the coastal zone is an application completeness item. Also, an application is not complete until it includes a copy of the applicant's certification of compliance and evidence that this certification has been furnished to the state coastal zone management agency. It is the Regional Office's responsibility to confirm the applicant has received concurrence (or presumed concurrence) from the state coastal zone management agency prior to the Regional Office taking final action to issue the permit.

- **National Historic Preservation Act**

Section 106 of the NHPA requires the EPA – prior to the approval of the expenditure of any funds on, or prior to the issuance of any license for, an undertaking – to take into account the effects of its undertakings on historic properties and afford the Advisory Council on Historic Preservation (the Council) a reasonable opportunity to comment with regard to such undertakings. 16 U.S.C. § 470f. Under the Council's implementing regulations at 36 CFR Part 800, section 106, consultation is required for all undertakings that have the potential to affect historic properties. Section 106 consultations assess whether historic properties exist within an undertaking's area of potential effect and, if so, whether the undertaking will adversely affect such properties. Consultation is generally with relevant state and tribal historic preservation authorities in the first instance, with opportunities for direct Council involvement in certain circumstances. Other interested entities may also be involved in the process, which must also provide for appropriate public involvement. Permit applicants are entitled to participate as a consulting party in the process and may be authorized by the EPA to initiate the consultation. The Regional Office should discuss this possible authorization upfront with the permit applicant prior to initiating consultation. As part of the permit application, the applicant should furnish its assessment of whether historic properties exist within the source's area of potential effect. If so and there are adverse effects to such properties caused by the project, the application should also discuss ways to avoid, minimize, or mitigate such effects. The term "historic properties" means prehistoric or historic districts, sites, buildings, structures, or objects included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Department of the Interior. Historic properties include properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization.

- **Magnuson-Stevens Fishery Conservation and Management Act**

The MSFCMA was enacted to promote the U.S. fishing industry's optimal exploitation of coastal fisheries by consolidating control over territorial waters to manage fish stocks. Implementation of the MSFCMA is by the U.S. Department of Commerce, National Marine Fisheries Service (NMFS), and its appointed regional fishery management councils. As part of the permit review process, the Regional Office should discuss the project with the applicant and the NMFS and the applicant may include as part of the permit application an assessment that, if determined adequate to meet the EPA's obligations under the MSFCMA and implementing regulations, the EPA would transmit to the NMFS for its review as appropriate.

G. New Regulatory Requirements

New EPA regulations (*e.g.*, new or revised NAAQS, requirements to control new pollutants) may become effective and incorporated into the applicable PSD permitting requirements after the date that the EPA determined the application complete. These requirements apply to any final permit issued after the effective dates of the requirements unless the EPA has provided for grandfathering of the specific requirements for applications pending on the effective date of the new requirement. If new requirements apply to an application under review, the Regional Office

should as promptly as possible inform the applicant in writing, request the needed information with respect to the new requirements, state that the information is necessary for processing the application, communicate that the application is incomplete, and explain that the EPA will not be able to complete its review until the requested information is received. The EPA does not interpret the last sentence of section 124.3(c) (see Appendix B) to be applicable when new requirements apply to a pending permit application. Any prior determination that an application was complete would have been based on requirements applicable at that time. When permitting requirements change, an application that does not adequately address the new requirements will become incomplete by operation of law and the request for additional information will be necessary to ensure that the new requirement is addressed in the application. Even though the application has become incomplete because of a new requirement, the Region is encouraged to continue review of the application based on the information submitted to date.

H. Using Electronic Docketing for Comments

One approach that can help Regional Offices decrease permit processing time is to direct commenters on a proposed permit action to provide their comments directly to the federal government's electronic docketing system at http://www.regulations.gov/, or to a contact person at the Regional Office who then submits them to the electronic docket. If the docketing system is used directly, then comments do not need to be submitted in paper form. Use of *Regulations.gov* is required for all the EPA rulemaking actions, but is available and is used by some Regional Offices for permitting actions as well. For Regional Offices, using the electronic docket system can lighten the task of dealing with high volumes of form letters and other comments. It also provides more transparency, by allowing commenters near real-time access to each others' comments. Properly managed, it also avoids delays in being able to provide parties who are appealing permit decisions to the EAB with a copy of the administrative record of the action. Questions and answers regarding the Federal Docket Management System are at https://fdms.erulemaking.net/fdms-web-agency/component/loginInfo?page=faq

III. Final Action and Review by EAB

A. Final Steps to Completing Permit Decisions

After the comment period on a permit closes, the next step is for the Regional Office to make any needed changes to the draft permit in light of public comments, prepare responses to public comments, compile the appropriate record, and issue a final permit decision. 40 CFR 124.15; 40 CFR 124.17; 40 CFR 124.18. Issuance of the final permit decision includes providing notice of that decision to the applicant and each person who commented or requested notice. 40 CFR 124.15(a). A final permit decision cannot be issued before the full record is completed (including the response to comments document).[2] If many comments are received and the comments raise

[2] *In Re Prairie State Generation Station*, 12 E.A.D. 176 (EAB 2005) (remanding final permit decision issued before completing response to comments document).

complex issues, this step can be time consuming and some comments may require new information for an adequate response. Permit review time can be reduced by focusing effort on these tasks as soon as the comment period closes or even as soon as the expected major comments have been received, but Regional Offices should ensure the record supporting the final permit decision is complete. The Agency's highest priority is to make appropriate permit decisions, based on records that fully support those decisions. A Regional Office should not compromise the quality of the record supporting the final permit decision in pursuit of quicker action. Doing so may result in a decision that is more vulnerable to a remand upon review by the EAB for the reasons discussed in the next section or to being overturned in any subsequent judicial appeal.

If the Regional Office received no comments that requested a change in the draft permit during the public comment period and if the notice requirements of 40 CFR Section 124 are met, the final permit becomes effective immediately. 40 CFR 124.15(b)(3). If the Regional Office received comments that requested a change to the draft permit but there is no appeal to the EAB, the permit decision becomes effective 30 days after issuance (or at a later time if the Regional Office has established a later effective date). 40 CFR 124.15. To ensure timely action, it is recommended that the Regional Office avoid extending the effective date of a PSD permit beyond the minimum 30-day period that applies in most cases. Within this 30-day period, interested parties may file a petition requesting review of the PSD permit decision by the EAB. If such an appeal is requested, a PSD permit does not become effective until further proceedings are completed. 40 CFR 124.15(b)(2); 40 CFR 124.19.

B. EAB Review

EAB review historically has taken an average of 5 months from the time a petition is filed to the time the EAB issues its decision in the matter. The EAB has issued a standing order to assist the EAB in expediting further its PSD appeal process *(available at www.epa.gov/eab).*

Although the EAB is cognizant that permitting decisions should be made at the Regional Office level and will typically defer to the Regional Office on technical issues that are well supported in the administrative record, the EAB will take a close look at the record to determine whether the Regional Office has duly considered the issues raised in comments. If the EAB finds that a permit condition is based on a clearly erroneous or insufficiently explained finding of fact or conclusion of law by the Regional Office, the EAB may grant review and remand the permit to the Regional Office to correct the error. Correcting such errors can take several months, especially where additional public comment is solicited on the portions of the permit or supporting rationale that need to be corrected. Many of the EAB's past remands were due to an inadequate record. Thus, being careful to ensure the final permit decision is well supported can avoid delays in completing action on a PSD permit.

Record deficiencies usually cannot be cured on appeal to the EAB, necessitating a remand. When an appeal to the EAB reveals record deficiencies, permit issuers are encouraged to withdraw a permit under the process described in section 124.19 or seek a voluntary remand depending on

the status of the appeal. Curing the record promptly prior to an EAB decision can shorten the time it takes to issue a final defensible Agency action.

Regional Offices can take several steps that have the potential to reduce the time it takes the EAB to resolve a petition for review of a permit and reduce the chance of a remand. One such step is to ensure that the permitting record is complete and is indexed and certified promptly. Each Regional Office should also make sure its reasoning is clearly articulated and well supported in the Statement of Basis, Response to Comments, and any supplemental documents as needed. The timing and efficiency of EAB review may also be improved by precisely pinpointing where in the record the Regional Office's rationale and support for that rationale can be found.

C. Final Agency Action Letter

If review by the EAB is requested, the permit does not become final and effective until after agency review procedures under 40 CFR Part 124 are exhausted and the Regional Administrator subsequently issues a final permit decision. Under 40 CFR 124.19, agency review procedures are exhausted either when the EAB issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or upon the completion of remand proceedings if the proceedings are remanded, unless the EAB's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

EPA Offices have not always consistently interpreted this provision. The Office of Air and Radiation recently observed that one final action had occurred on the date the EAB issued a decision denying review. *See,* Letter from Assistant Administrator for Air and Radiation to Jim Rexroad, Avenal Power Center, LLC (August 26, 2011); 76 FR 55799 (Sept. 9, 2011). However, based on recent litigation under the National Pollutant Discharge Elimination System program and Underground Injection Control program, the EPA believes the better reading of section 124.19 is that final agency action for purposes of judicial review does not occur on matters appealed to the EAB until the Regional Administrator takes the additional step, after review procedures are exhausted, of issuing a final permit decision under section 124.19. The EPA's interests and those of the public are best served by conforming the Agency's interpretation of section 124.19 across all program areas to which this provision is applicable.

Therefore, to complete final agency action on a permit decision expeditiously, Regional Offices should issue a letter formatted as follows[3] as soon as agency review procedures are exhausted as provided in section 124.19.

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[3] Regional Offices should not follow the format of the letter issued by OAR on August 26, 2011 for the Avenal permit. This is recommended to facilitate a consistent reading of section 124.19 on a prospective basis across all programs that apply this regulation, and is not intended to suggest any error in prior actions. Any prior PSD permitting decisions that were determined by EPA to be final and effective on the date of an EAB order meeting the

Suggested Language

[address of permit applicant]

Re: [permit applicant name and number]

Dear [applicant]:

The United States Environmental Protection Agency, Region [number] is hereby issuing and providing you with notice of its final permit decision on [permit number], which the EPA Region [number] initially issued to [applicant] for the [description of project] on [date] under 40 CFR 124.15.

On [date], the EPA's Environmental Appeals Board denied review of all petitions for review of the permits. [cite order denying review.] Thus, in accordance with 40 CFR 124.19, this letter serves as the final permit decision by EPA Region [number] for the permit. All conditions of [permit number], as issued by Region [number] on [date], are final and effective as of the date of this letter.

Public notice of this final agency action will be published in the Federal Register pursuant to 40 CFR 124.19.

Sincerely,

[name]

Regional Administrator

As discussed in the template above, with respect to PSD permits, section 124.19 of the EPA's regulations states that "[n]otice of any final agency action regarding a PSD permit shall promptly be published in the Federal Register." Regional Offices should publish such a notice promptly to initiate the 60 day period for requesting judicial review and to comply with section 124.19, but such notice is not the action that renders the permit decision final and effective.

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criteria in section 124.19 continue to be final and effective as of the date identified by EPA. The August 26, 2011, letter from the Assistant Administrator for Air and Radiation to Avenal Power Center, LLC was sufficient to serve as a final permit decision under the interpretation of section 124.19 recommended for PSD permitting actions from this point forward. Therefore, under either the interpretation applied in that action or the interpretation recommended in this memorandum, EPA issued a final decision granting the Avenal permit application by the deadline established by court order. Avenal Power Center, LLC v. U.S. EPA, F. Supp.2d 1.

For any questions on this guidance or appendices, please contact Raj Rao at (919) 541-5344 or rao.raj@epa.gov.

cc: Mike Koerber
Anna Wood
Richard Wayland
Phil Lorang
Raj Rao
Brian Doster

APPENDICES

APPENDIX A - Comprehensive PSD Permit Applications– What Information Is Needed?

Introduction and Overview

The submittal of comprehensive Prevention of Significant Deterioration (PSD) permit applications that address all the PSD requirements is a first step towards timely processing of permit applications by the Regional Offices. The EPA should strongly encourage applicants to engage the Regional Office early-on in the application development process and to contact Regional Office review staff for pre-application discussions and meetings as needed, especially regarding modeling air impacts, meeting pre-construction monitoring requirements, using the "top-down" methodology for evaluating Best Available Control Technology (BACT), and contacting other federal agencies, and state, local, or tribal governments or agencies that may be involved. Applicants should be strongly encouraged to submit a written modeling protocol to the Regional Office for review prior to conducting modeling and to discuss the possible and appropriate use of existing ambient air monitoring data. The information below is intended to assist both applicants in preparing applications and the EPA in determining if information and analyses addressing all required components of the application have been submitted. As part of the review process, the EPA will request from the applicant any missing components and any needed clarifying or additional information. Only when the applicant has submitted all information needed for the EPA to propose a permit decision should the Regional Office deem the application to be complete. *A determination of completeness by the EPA is very important because this initiates the 1-year statutory period for the EPA to make a decision to issue or deny the requested permit.*

Applications

Each proposed new or modified PSD project has unique source characteristics, such as site location, process configuration, topography, and ambient impacts. However, there are some common PSD requirements and related issues that each application should address. For example, applications should include a detailed description of the project, location, processes, emissions units, and associated air pollutant emissions. Applications should address PSD applicability for each regulated New Source Review (NSR) air pollutant, emissions controls, and ambient impacts. Applications should demonstrate that all PSD program requirements are met for each regulated NSR pollutant that will be emitted in major amounts or cause a major modification. As discussed below in more detail, PSD permit applications submitted to the Regional Office for review and permit action should address all PSD requirements and include:

1. A Project Overview and Description,
2. A PSD Applicability Section,
3. A "Top-down" BACT analysis for each regulated NSR pollutant subject to major PSD review,

4. An Air Quality Analysis for the National Ambient Air Quality Standards (NAAQS) and PSD increments, as applicable for each regulated NSR pollutant subject to major PSD review,
5. An Analysis of Class I Areas Impacts,
6. An Analysis of the New Source or Project's Impacts on Visibility, Soils, Vegetation, and the Impact on Associated Growth for the Project or New Source,
7. Compliance with other EPA Air Regulations [such as New Source Performance Standards (NSPS)],
8. Compliance with Non-Clean Air Act (CAA) Requirements such as the Endangered Species Act (ESA), and
9. Clear Identification of Confidential Business Information Claims, if needed.

1. Project Overview and Description

A. ***Applicant Information*** - The application should list the name, mailing address (street, city, state, zip code), email address, and telephone number of the applicant, the owner/operator (if different from the applicant), any consultants, and the designated contact for the project. The application must be signed by a responsible official. 40 CFR 124.3(a).

B. ***Project Location*** - Describe the project location by address (street, city, state) and map location (UTM or Lat/Long coordinates), and the current use of the project site. Provide local and regional maps showing the location of the project. Discuss location of the source in relation to Class I areas.

Note that if the proposed project may affect a Class I area, within 30 days of receipt of the permit application the Regional Office should send a copy of the application to Federal Land Manager(s) (FLM) and other Federal official(s) directly responsible for any lands within such area.

C. ***Project Description*** - Provide the purpose of the project and include the Standard Industrial Classification (SIC) code(s). Provide a detailed description of all processes, process equipment, storage units, raw materials used, fuels to be burned, emission control systems, all emission sampling ports and continuous monitoring systems, and any other information necessary to completely describe the proposed project and its air pollutant emission points. Include a schematic drawing and plot plan of the project showing the design and plant layout that identifies each air pollution emission point, property and fence line, buildings, etc.

For each proposed or modified emission unit, provide its design capacity, date of emission unit construction or modification, anticipated operating capacity (*i.e.,* projected average and maximum) and operational schedule including daily or seasonal variations. For each emission control system, provide the make and model of the device, the control efficiency of the system, and required operating parameters. Describe any work practices used to prevent or reduce air emissions.

D. ***Construction Schedule*** – Provide a detailed construction schedule for the proposed source or modification.

2. PSD Applicability Section

The application should address the applicability of PSD to the project (a proposed new major stationary source or a proposed modification) for all regulated NSR pollutants based on the proposed emissions of each pollutant in tons per year. The applicant should address whether the source is major for PSD purposes at 100 tons per year (tpy) or 250 tpy, based on its SIC codes. The applicant should list the attainment status of the area for each criteria pollutant. The applicant should also identify and address the applicability of and plans to comply with any other EPA air requirements such as applicable NSPS and National Emissions Standards for Hazardous Air Pollutants (NESHAP).

The application should contain the following information:

- All emissions of regulated NSR pollutants, including emissions calculations. A permit application shall describe all emissions of regulated NSR pollutants emitted from each emissions unit, except units that are exempt.
- Identification and description of all points of emissions release.
- Emissions rate in tpy, short term rates (*e.g.*, pounds/hour) for use in air quality impact assessments, and in any other such terms as are necessary to establish compliance consistent with the applicable standard reference test method. Include methods used to derive the emission rates, including information sources used such as manufacturer's warranties, stack test results, etc.
- Operational restrictions (existing or proposed) that limit equipment's "potential to emit". (Sometimes an existing permit limits the potential emissions of a particular emission unit or units; these should be identified and included in the permit application.)

3. A "top-down" Best Available Control Technology (BACT) analysis for each regulated NSR pollutant subject to major PSD review

The EPA's policy is that the "top-down" BACT process, developed by the EPA, is the best way to make the demonstration that an applicant satisfies the BACT requirements. Thus, to demonstrate that the BACT requirement is satisfied, on a per pollutant basis, the application should include a "top-down" BACT analysis for each emission unit that emits regulated NSR pollutants for which the source is subject to major PSD review. The analysis should be consistent with the EPA's "top-down" BACT guidance. This guidance is included in the draft 1990 NSR Workshop Manual as well as more recent discussions of the elements needed to successfully apply the "top-down" BACT process reflected in EAB decisions, orders on title V permits, and other relevant EPA guidance documents. http://www.epa.gov/NSR/publications.html. EAB decisions in PSD permit appeals may be found at the EAB website (www.epa.gov/eab), under Board Decisions, Published, PSD Permit Appeals. EPA has also recently provided guidance on the top-down BACT process in section III of its PSD and Title V Permitting Guidance for Greenhouse Gases (March 2011) (http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf).

4. Air Quality Analysis for the National Ambient Air Quality Standards (NAAQS) and PSD Increments, as applicable for each regulated NSR pollutant subject to major PSD review

The EPA's regulations require the permit applicant to submit for review an air quality analysis for each regulated NSR pollutant that will be emitted in significant amounts "in the area that the major stationary source or major modification would affect." 40 CFR 52.21(m). This pollutant-specific analysis typically entails a modeling component and an ambient air quality monitoring component. The information provided in meeting this requirement must demonstrate that the emissions from the new source or modification will not cause or contribute to a violation of any NAAQS or PSD increment. 40 CFR 52.21(k)(1).

Modeling Analysis – Estimates of ambient concentrations required to meet the PSD requirements must be based on applicable models, data bases, and other requirements specified in the Guideline on Air Quality Models (Guideline). 40 CFR 52.21(l); 40 CFR Part 51, Appendix W. To ensure that any air quality analysis meets the applicable regulatory requirements and is consistent with the Guideline, the EPA strongly recommends that the applicant submit a modeling protocol to the Regional Office prior to performing the air quality analyses. It is both advantageous and advisable that the applicant prepare a modeling protocol to ensure that planned modeling analyses meet the needs of other federal agencies (*e.g.,* FLM). The EPA recommends that applicants consult with the Regional Office to determine the nature of ambient air quality monitoring data that is needed (40 CFR 52.21(m)(3)(iii)-(viii)) and/or the need (if any) for site-specific meteorological monitoring.

Air Quality Data – The required air quality analysis should also consider the existing ambient air quality at the proposed site for those regulated NSR pollutants emitted from the project in significant amounts. The air quality data used for the analysis may be obtained from monitoring carried out by the applicant; however, in many cases the analysis may be based on data from existing monitoring sites that provide data representative of the area affected by the proposed project's emissions. The record for the required analysis should include such items as the source of the data and the number and location of monitoring stations. The applicant should also include a brief description of the local meteorological conditions that would affect transport and dispersion of pollutants, describe the source of meteorological data to be used, the range of dates of the data, and the representativeness of the data for application at the proposed plant site. It is also recommended that the proposed air quality data and meteorological data be included in the modeling protocol submitted to the Regional Office. Recommendations concerning ambient air quality and meteorological data collection in support of PSD applications are presented in the EPA publications EPA-450/4-80-012, Ambient Monitoring Guidelines for Prevention of Significant Deterioration, and EPA-454/R-99-005, Meteorological Monitoring Guidance for Regulatory Modeling Applications.

A description of any monitoring program that the applicant intends to initiate should be submitted to the EPA for approval prior to commencing the program.

5. Analysis of Class I area impacts

The applicant is required to provide an air quality analysis for any Class I area that may be affected by the emissions from the proposed new source or modification. There are two components for this analysis — the NAAQS and Class I increments analysis, and the air quality related values (AQRV) analysis. Such analysis is preceded by a notification process in which the appropriate FLM for the Class I area(s) potentially affected by the proposed new source or modification is advised by the Regional Office of the PSD application and given an opportunity to determine the extent of the analysis needed for any air quality related values that have been identified for the Class I area. It is important to recognize that the compliance determination for the NAAQS and Class I increments is the responsibility of the Regional Office, while the FLM has an affirmative responsibility for protecting the AQRVs in the Class I area and may demonstrate that a proposed source or modification would have an adverse impact on AQRVs.

The Regional Office should determine the distance from the proposed source to the nearest Class I area(s). The EPA's policy is that the FLM should be notified by the Regional Office about any project that is within 100 kilometers of a Class I area. For sources having the capability to affect air quality at greater distances, notification should also be considered for Class I areas beyond 100 kilometers. In such cases, the appropriate FLM should be contacted by the Regional Office to determine if an analysis of the impacts on the AQRV in the Class I area is needed. The applicant should contact the Regional Office to determine the need for and appropriate assessment procedures to address the NAAQS and Class I increments. If an AQRV impact analysis is needed, a copy of the PSD application should be provided to the FLM by the Regional Office. The project's modeling protocol should include PSD Class I assessments and be provided to the appropriate FLMs and to the Regional Office for review, discussion, and approval.

6. Analysis of impacts on visibility, soils, vegetation, and associated growth for the proposed project or new source

Additional Impact Analysis - As required by 40 CFR 52.21(o) of the PSD regulations, the applicant must provide an analysis of the proposed facility's impact on soils, vegetation and visibility and the expected general commercial, residential, and industrial growth associated with the new or modified source.

If no impacts are anticipated, then the analysis can generally be qualitative in nature and designed to provide the basis for this determination and inform the general public of the relative impact of the project/source on the above cited values. The proposed analyses to address these items should be included in the modeling protocol provided to the EPA.

7. Compliance with other emissions standards or standards of performance (such as NSPS)

List and describe all other emissions standards and standards of performance applicable to the proposed project (*e.g.,* NSPS, NESHAPS, State Implementation Plan and Federal Implementation Plan requirements, local district rules). Summarize the status of all other air pollution permits required, applied for and/or received for the proposed project or new source.

8. Non-Clean Air Act requirements such as the ESA

See Section II.G of this memo.

9. Confidential Business Information claims (see instructions below)

An applicant may assert a business confidentiality claim covering part or all of the information requested by the EPA by placing on (or attaching to) the information, at the time it is submitted to the EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "trade secret," "proprietary," or "company confidential." Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business, and should be submitted separately to facilitate identification and handling by the EPA. If the applicant desires confidential treatment until a certain date or until the occurrence of a certain event, the notice should clarify this request. Information covered by such a claim will be disclosed by the EPA only to the extent and by means of the procedures set forth in 40 CFR Part 2, Subpart B. If no such claim accompanies the information when received by the EPA, it may be made available to the public by the EPA without further notice to the applicant. If a claim covering the information is received after the information itself is received, the EPA will make such efforts as are administratively practicable to associate the late claim with copies of previously submitted information files. However, the EPA cannot assure that such efforts will be effective, in light of the possibility of prior disclosure or widespread prior dissemination of the information.

INSTRUCTIONS FOR CLAIMING CONFIDENTIALITY

A. Pursuant to 40 CFR 2.204(e), your claim must address these points:

i. The portions of the information alleged to be entitled to confidential treatment;

ii. The period of time for which confidential treatment is desired by the business (e.g., until the occurrence of a specific event, or permanently);

iii. The purpose for which the information was furnished to the EPA and the appropriate date of submission, if known;

iv. Whether a business confidentiality claim accompanied the information when it was received by the EPA;

v. Measures taken by you to guard against the undesired disclosure of the information to others;

vi. The extent to which the information has been disclosed to others and the precautions taken in connection therewith;

vii. Pertinent confidentiality determinations, if any, by the EPA or other Federal agencies, and a copy of any such determination or reference to it, if available;

viii. Whether you assert that disclosure of this information would be likely to result in substantial harmful effects on your business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial; and an explanation of the casual relationship between disclosure and such harmful effect; and

ix. Whether you assert that the information is voluntarily submitted information and if so, whether any disclosure of the information would tend to lessen the availability to the EPA of similar information in the future. "Voluntarily submitted information" is defined in 40 CFR Section 2.201(i) as business information in the EPA's possession.

a) The submission of which the EPA has no statutory or contractual authority to require; and

b) The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registration, or certification programs, but excluding programs concerned solely or primarily with the award or administration by the EPA of contracts or grants.

B. We will disclose information covered by your claim only to the extent provided for in 40 CFR Part 2, Subpart B Confidentiality of Business Information.

APPENDIX B – Regulations for PSD Permit Processing

40 CFR 124.3(c)

(c) The Regional Administrator shall review for completeness every application for an EPA-issued permit. Each application for an EPA-issued permit submitted by … a major PSD stationary source or major PSD modification … should be reviewed for completeness by the Regional Administrator within 30 days of its receipt. … Upon completing the review, the Regional Administrator shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Regional Administrator shall list the information necessary to make the application complete. … The Regional Administrator shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

40 CFR 124.3(f)

(f) The effective date of an application is the date on which the Regional Administrator notifies the applicant that the application is complete as provided in paragraph (c) of this section.

40 CFR 124.4(e)

(e) Except with the written consent of the permit applicant, the Regional Administrator shall not consolidate processing a PSD permit with any other permit under paragraph (a) or (b) of this section when to do so would delay issuance of the PSD permit more than one year from the effective date of the application under 40 CFR 124.3(f).

40 CFR 52.21(b)(22)

Complete means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

APPENDIX C – Example of ESA Consultation Letter

Sent to U.S. Fish & Wildlife Service and/or NOAA's National Marine Fisheries Service

By this letter, the United States Environmental Protection Agency, [*insert Region*] requests informal consultation and concurrence under Section 7 of the federal Endangered Species Act (ESA) for the proposed [*insert project name)*]. The Prevention of Significant Deterioration (PSD) Application consists of [*insert project description*]. The proposed project will result in a [*insert summary of emission changes*]. The Project is located [*insert project location*].

In processing the PSD permit application, the EPA must assure that listed species or their critical habitat will not be jeopardized by the changes at the [*insert facility name*] facility. The information provided in the application is not detailed enough for us to determine our obligations, if any, under Section 7 of the ESA.

The EPA would like to begin an informal consultation with the [*insert appropriate service: U.S. Fish and Wildlife or National Marine Fisheries*] Service regarding the proposed project. [*insert applicant/company name*] has been designated by the EPA as the non-federal representative, and will be responsible for preparing and submitting a complete biological evaluation to the EPA and to the Service.

In summary, pursuant to Section 7 of the ESA, we request informal consultation and an evaluation in writing as to what impact, if any, the Project may have on relevant endangered species. We look forward to working with you on this matter. If you have any questions, please contact [*name*] at [*phone] or [email]*.