

Agreement for Partial Delegation of the
Federal Prevention of Significant Deterioration (PSD) Program
Set Forth In 40 C.F.R. Section 52.21
by the United States Environmental Protection Agency, Region 9
to the Bay Area Air Quality Management District

The undersigned, on behalf of the Bay Area Air Quality Management District (District) and the United States Environmental Protection Agency (EPA), hereby agree to partial delegation of authority to issue Prevention of Significant Deterioration (PSD) initial permits, to modify existing PSD permits, and to extend existing PSD permits, subject to the terms and conditions of this Agreement. This partial delegation is executed pursuant to 40 C.F.R. Section 52.21(u), Delegation of Authority.

I. Background Recitals

1. In accordance with Sections 165 *et seq.* of the Clean Air Act, EPA has adopted regulations that implement the Clean Air Act's Prevention of Significant Deterioration (PSD) program. These regulations are set forth in 40 C.F.R. Section 52.21. These regulations have been incorporated as part of the applicable California State plan for implementation of the New Source Review program under the Clean Air Act pursuant to 40 C.F.R. Section 52.270(a)(3), and they govern the implementation of the Clean Air Act's PSD requirements in the San Francisco Bay Area.
2. EPA's PSD regulations require that certain stationary sources of air pollutant emissions must undergo a PSD source review and obtain a PSD permit before they may be constructed and operated, as set forth in 40 C.F.R. Section 52.21.
3. Under Subsection (u) of EPA's PSD Regulations, 40 C.F.R. § 52.21(u), EPA may delegate its authority to conduct its PSD source review under 40 C.F.R. Section 52.21 to the District for sources within the District's geographical jurisdiction. Pursuant to such delegation, the District "stands in the shoes" of EPA for purposes of conducting the PSD source review and issuing the PSD permit, and in doing so must follow and implement

the same substantive and procedural requirements as EPA would if it were conducting the PSD source review and issuing the PSD permit itself.

4. EPA and the District have entered into several PSD delegation agreements in the past under 40 C.F.R. Section 52.21(u), the most recent of which became effective February 6, 2008. These prior delegation agreements were based on a finding that the PSD portion of District Regulation 2, Rule 2, generally meets the requirements of 40 C.F.R. Section 52.21 for issuing PSD permits, and that District permits issued in accordance with the provisions of District Regulation 2, Rule 2 would therefore be deemed to meet the federal PSD permit requirements in 40 C.F.R. Section 52.21. (These prior delegation agreements did not, however, delegate authority to issue PSD permits using new additional calculation methodologies for determining if a proposed project will result in a major modification and the application of a Plantwide Applicability Limit (PAL), which were promulgated by EPA effective March 3, 2003, (*see* 67 Fed. Reg. 80,186), and were upheld by the United States Court of Appeals for the District of Columbia Circuit on June 24, 2005.)
5. It has now become clear that although the PSD portion of District Regulation 2, Rule 2 may be generally consistent with the Federal PSD requirements in 40 C.F.R. Section 52.21, the District's regulations are not completely consistent with the Federal PSD requirements in every respect. Accordingly, if the District issues PSD permits under its Regulation 2, Rule 2, such permits may not in certain circumstances satisfy all federal PSD requirements in 40 C.F.R. Section 52.21, or all federal procedural requirements for PSD permit issuance in 40 C.F.R. Part 124. EPA and the District are therefore revising their delegation agreement under 40 C.F.R. Section 52.21(u) to clarify that the District must issue PSD permits pursuant to the federal PSD requirements of 40 C.F.R. Section 52.21, and under the provisions of District Regulation 2, Rule 2 only to the extent that that such provisions are consistent with the requirements of 40 C.F.R. Section 52.21.

II. Scope of Partial Delegation

1. This partial delegation of authority to issue, modify and extend PSD permits does not delegate authority to the District to issue new or modified PSD permits based on PALs.
2. For all applications for new, modified, or extended PSD permits other than those described in Paragraph II.1. above, District-issued permits with federal PSD provisions that:
 - a. satisfy all of the substantive requirements of the PSD program in 40 C.F.R. Section 52.21, including (without limitation) the federal BACT requirement pursuant to 40 C.F.R. Section 52.21(j) and 40 C.F.R. Section 52.21(b)(12), and the impact analysis requirements pursuant to 40 C.F.R. Section 52.21(k)-(o); and
 - b. have been issued in compliance with all of the procedural requirements of the PSD program in 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124;

shall be deemed to meet federal PSD permit requirements pursuant to the provisions of this delegation agreement.

III. Applicability

1. EPA and the District have agreed to this partial delegation of PSD authority to allow the District to issue initial and modified PSD permits and extensions of PSD permits, except for modified permits based on an applicability determination using the methods adopted on December 31, 2002 (*see* 67 Fed. Reg. 80,186). EPA shall make the PSD applicability determination and issue any necessary PSD permits if a source seeks a PSD applicability determination using the methods adopted on December 31, 2002; or seeks a new or modified PSD permits with a PAL. (Modifications include Administrative Amendments, Major Modifications, and non-Major Modifications.)
2. Pursuant to this partial delegation agreement, the District shall have primary responsibility for issuing all new and modified PSD permits and extensions of PSD permits.

3. The authority to issue a PSD permit containing a PAL is not delegated to the District as part of this delegation agreement. If any facility subject to this agreement requests a new permit or permit modification to incorporate conditions for a PAL, as provided in 40 C.F.R. Section 52.21(aa), EPA shall process the application and issue the final PAL permit for the modification.
4. EPA is responsible for the issuance of PSD permits on Indian Lands under Sections 110 and 301 of the Clean Air Act. This agreement does not grant or delegate any authority under the Clean Air Act on Indian Lands to the District.
5. This partial delegation of PSD authority becomes effective upon the date of signature by both parties to this agreement.

IV. General Delegation Conditions

1. The District shall issue PSD permits under this partial delegation agreement in accordance with the requirements of 40 C.F.R. Section 52.21 in effect as of the date the District issues the final permit, except as provided in Subsection III; and, to the extent that the PSD requirements of the District's Regulation 2, Rule 2 are consistent with the requirements of 40 C.F.R. Section 52.21, in accordance with those requirements as well.
2. The District may (but shall not be required to) issue Federal PSD permits in an integrated permit proceeding along with permits required under California law and District regulations, and may include both Federal PSD requirements and California and/or District requirements in a single, integrated permit document. All Federal PSD permit conditions shall be clearly identified in any integrated permit document issued. Nothing in this partial delegation agreement shall be construed to direct or to authorize the District to issue PSD permits in an integrated permit proceeding that are inconsistent with Federal PSD requirements, however. Any provisions that are included in an integrated permit document under California law or District regulations that are not consistent with or authorized by the Federal PSD requirements shall not be considered part of the Federal PSD permit.

3. This partial delegation agreement may be amended at any time by the formal written agreement of both the District and the EPA, including amendments to add, change, or remove terms and conditions of this agreement.
4. EPA may review the PSD permit(s) issued by the District to ensure that the District's implementation of this delegation agreement is consistent with federal PSD regulations for major sources, major modifications, and permit extensions as set forth in 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124.
5. If EPA determines that the District is not implementing or enforcing the PSD program in accordance with the terms and conditions of this partial delegation agreement, 40 C.F.R. Section 52.21, 40 C.F.R. Part 124, or the Clean Air Act, EPA may after consultation with the District revoke this partial delegation agreement in whole or in part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the District.
6. Revocation of this partial delegation agreement as specified in Paragraph IV.5. above shall be the sole remedy available for any failure by the District to implement or enforce the PSD program in accordance with the terms and conditions of this partial delegation agreement, 40 C.F.R. Section 52.21, 40 C.F.R. Part 124, or the Clean Air Act. The District's agreement to implement the Federal PSD program on EPA's behalf, and EPA's agreement to delegate its authority for the Federal PSD program to the District under 40 C.F.R. Section 52.21(u), is not intended and shall not be construed to alter or expand the statutory limits on the imposition of sanctions against the District under the Clean Air Act for failure to administer and enforce federal regulatory requirements as described in *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977), and *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).
7. If the District determines that issuing a PSD permit or permits in accordance with the terms and conditions of this partial delegation agreement, 40 C.F.R. Section 52.21, 40 C.F.R. Part 124, and the Clean Air Act conflicts with State or local law, or exceeds the

District's authority or resources to fully and satisfactorily carry out such responsibilities, the District after consultation with EPA may remand administration of such permits, or of Federal PSD delegation in its entirety, to EPA. Any such remand shall be effective as of the date specified in a Notice of Remand to EPA.

8. The permit appeal provisions of 40 C.F.R. Part 124, including subpart C thereof, pertaining to the Environmental Appeals Board (EAB), shall apply to all federal PSD permitting action appeals to the EAB for PSD permits issued by the District under this partial delegation agreement. For purposes of implementing the federal permit appeal provisions under this partial delegation, the District shall notify the applicant and each person who submitted written comments or requested notice of final permit decision of the final permit decision in accordance with 40 C.F.R. Section 124.15. The notice of final permit decision shall include (i) reference to the procedures for appealing the final permit decision under 40 C.F.R. Section 124.19; and (ii) a statement of the effective date of the final permit decision established pursuant to 40 C.F.R. Section 124.15(b) and that the effective date shall be suspended if the final permit decision is appealed pursuant to 40 C.F.R. Section 124.19 until such appeal is resolved by the EAB.

V. Communication Between EPA and the District

The District and EPA will use the following communication procedures:

1. The District will forward to EPA copies of (1) all draft PSD permits prepared by the District pursuant to 40 C.F.R. Section 124.6; (2) all "Statements of Basis" prepared by the District pursuant to 40 C.F.R. Section 124.7 and/or "Fact Sheets" prepared by the District pursuant to 40 C.F.R. Section 124.8; and (3) all public notices the District issues pursuant to the requirements of 40 C.F.R. Section 124.10. Such copies shall be provided to EPA at or prior to the beginning of the public comment period for each PSD preliminary determination.
2. Upon any final PSD permit issuance, the District will forward to EPA copies of the notice of final permit issuance required by 40 C.F.R. Section 124.15(a) and the responses to

public comments required by 124.17(a) (if any); and, if requested by EPA, copies of all substantive comments (if any).

3. The District shall forward to EPA copies of all PSD non-applicability determinations that utilize netting. All such determinations must be accompanied by a written justification.

VI. EPA Policies Applicable to PSD Review

1. All PSD BACT determinations are required to perform a “top-down” BACT analysis. EPA will consider as deficient any BACT determination that does not begin with the most stringent control options available for the source under review.
2. The District shall notify and/or consult with the appropriate Federal, State and local agencies as required by 40 C.F.R. Section 52.21 and 40 C.F.R. Part 124. The District shall (among other requirements as applicable):
 - a. Notify the appropriate Class I area Federal Land Manager(s) within 30 days of receipt of a PSD permit application and at least 60 days prior to any public hearing if the emissions from a proposed facility may affect any Class I area(s), as required by 40 C.F.R. Section 52.21(p);
 - b. Notify the Fish and Wildlife Service (FWS) and EPA when a submitted PSD permit application has been deemed complete, in order to assist EPA in carrying out its non-delegable responsibilities to consult with FWS under Section 7 of the Endangered Species Act;
 - c. Notify the applicant of the potential need for consultation between EPA and FWS if an endangered species may be affected by the project; and
 - d. Refrain from issuing a final PSD permit unless FWS has determined that the proposed project will not adversely affect any endangered species.

VII. Permits

1. The District shall follow EPA guidance on any matter involving the interpretation of sections 160-169 of the Clean Air Act or 40 C.F.R. Section 52.21 relating to applicability determinations, PSD permit issuance and enforcement. EPA shall provide guidance to

the District as appropriate in response to any request by the District for guidance on such federal PSD issues.

2. The District shall at no time grant any waiver of the PSD permit requirements.
3. Federal PSD permits issued by the District must include appropriate provisions to ensure permit enforceability. PSD permit conditions shall, at a minimum, contain reporting requirements on initiation of construction, initial commencement of operation, and source testing (where applicable).
4. When any conditions of a PSD permit are incorporated into a Title V permit, the District shall clearly identify PSD as the basis for those conditions.
5. The primary responsibility for the administration and enforcement of the following EPA-issued permits is delegated to the District:

<u>Facility</u>	<u>EPA File Number</u>	<u>Permit Issuance Date</u>
Calpine Gilroy Cogen	SFB 84-04	August 1, 1985
Cardinal Cogen	SFB 82-04	June 27, 1983
IBM Corporation	SFB 82-01	June 9, 1982
Martinez Cogen Limited Partnership	SFB 83-01	December 13, 1983
Tosco Corporation	SFB 78-07	December 18, 1978
Tosco SF Area Refinery at Rodeo	SFB 85-03	March 3, 1986

District-issued modifications to these permits which meet the requirements of 40 C.F.R. Section 52.21 will be considered valid by EPA. The District shall issue any permit modifications to the above listed facilities pursuant to this agreement.

VIII. Permit Enforcement

1. The primary responsibility for enforcement of the PSD regulations rests with the District. The District will enforce the provisions of the PSD program, consistent with the enforcement provisions of the Clean Air Act and Paragraph VIII.3. of this agreement, except in those cases where District rules, policies, or permit conditions are as stringent

or more stringent than the PSD requirements. In that case, the District may elect to enforce the as stringent or more stringent District requirements.

2. Nothing in this partial delegation agreement shall prohibit EPA from enforcing the PSD provisions of the Clean Air Act, 40 C.F.R. Section 52.21, or any PSD permit issued by the District pursuant to this agreement.
3. In the event that the District is unwilling or unable to enforce a provision of this partial delegation agreement with respect to a source subject to the PSD regulations, the District will immediately notify the Air Division Director. Failure to notify the Air Division Director does not preclude EPA from exercising its enforcement authority.

3-8-11
Date



Jack P. Broadbent
Executive Officer/APCO
Bay Area Air Quality Management District

2-7-2011
Date



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