

**Agreement for the Delegation of Source Review under the Federal
Prevention of Significant Deterioration (PSD) Regulations
by the United States Environmental Protection Agency, Region 10
to the State of Washington Department of Ecology**

I. Introduction

The Washington State Department of Ecology (Ecology) and U.S. Environmental Protection Agency (EPA) desire to continue to have Ecology conduct source review under the federal PSD regulations. Accordingly, EPA and Ecology are entering into this Delegation Agreement. Through this Agreement, EPA and Ecology establish the legal and procedural bases for Ecology to conduct source review and to implement and enforce the federal PSD regulations.

II. Legal Authority

- A. Pursuant to 40 CFR 52.21(u), the EPA Administrator may delegate to a State full or partial responsibility for conducting source review to meet the requirements of the federal PSD regulations found in 40 CFR 52.21. The EPA Administrator has delegated to the Director of the Region 10 Office of Air, Waste, and Toxics (OAWT), the authority to delegate the federal PSD regulations to a State or local agency. The State or local agency that receives delegation from EPA Region 10 does not have the authority under the federal Clean Air Act to further delegate the federal PSD regulations.
- B. EPA's PSD regulations (hereinafter referred to as the "federal PSD regulations") are found in 40 CFR 52.21 and 40 CFR 124.
- C. Ecology has adopted by reference, with certain changes, relevant portions of the federal PSD regulations found in 40 CFR 52.21, as in effect on July 20, 2011. See WAC 173-400-116, -117, -118, and -700 through -750 (effective September 10, 2011), hereinafter referred to as the "State PSD regulations."
1. Ecology has adopted by reference 40 CFR 52.21(a)(2), (b), (c), (d), (h), (i), (j), (k), (l), (m), (n), (o), (p)(1) through (4), (r), (v), (w), and (aa), with specific exceptions and revisions. See WAC 173-400-720(a) (adoption by reference) and (b) (exceptions).
 2. Ecology has not adopted 40 CFR 52.21(e), (g), (q) but has instead adopted equivalent State provisions that address the requirements of those subsections of 40 CFR 52.21. See WAC 173-400-118, -730, and -740.
 3. Ecology has not adopted 40 CFR 52.21(p)(5) through (8) nor has it adopted equivalent State provisions for Class I variances.
 4. Ecology has adopted the definition of "secondary emissions" currently promulgated in 40 CFR 52.21(b), but that federal definition was vacated by court order. Ecology has advised EPA that they implement the definition of "secondary emissions" consistent with the vacatur such that non-engine emissions from vessels at berth are considered to be part of the source.
 5. Ecology has adopted into its PSD regulations provisions in 40 CFR 52.21 regarding routine maintenance, repair and replacement promulgated by EPA on October 27, 2003 (68 Fed. Reg. 61248) that have been stayed by court order on December 24, 2003 (specifically, 40 CFR 52.21(b)(2)(iii)(a), (b)(55), (b)(56), (b)(57), and (b)(58)) and provisions regarding fugitive emissions promulgated by EPA on December 19,

2008 (73 Fed Reg. 77882), that have been stayed by EPA in a notice published on March 31, 2011 (75 Fed. Reg. 16012) (specifically 40 CFR 52.21(b)(2)(v) and (b)(3)(iii)(c). Ecology has advised EPA that, as a matter of state law, its adoption of 40 CFR 52.21 as of September 10, 2011 includes adoption of the stays in all respects. As such, Ecology's implementation of the State PSD regulations will be consistent with EPA's rules in effect September 10, 2011 with respect to routine maintenance, repair and replacement, and fugitive emissions.

- D. EPA has determined that Chapter 43.05 of the Revised Code of Washington (RCW), often referred to as "House Bill 1010," conflicts with the delegation requirements of 40 CFR 52.21(u). Based on this determination, Ecology has determined that Chapter 43.05 RCW does not apply to permit to construct requirements of Chapter 173-400 WAC, including the State PSD regulations.
- E. The Ecology Division of the Washington Attorney General's Office has issued an opinion¹ stating that the provisions of RCW 70.94.035, "Air Technical Assistance Visits by Ecology," do not prevent enforcement actions, but only require Ecology to wait until the end of the correction period to determine whether enforcement action is appropriate. Based on that opinion letter, EPA has determined that RCW 70.94.035 does not impermissibly interfere with Washington's enforcement authority. See 59 FR 42552 (August 18, 1994) (proposed interim approval of Washington's Title V program).
- F. The PSD permits issued by Ecology pursuant to this Delegation Agreement are federally-enforceable PSD permits under the federal PSD regulations.

III. Scope of Delegation

- A. Pursuant to 40 CFR 52.21(u), the EPA Director of OAWT hereby delegates to the Ecology Air Program Manager responsibility for conducting source review to meet the requirements of the federal PSD regulations, except for the Class I variance provisions of 40 CFR 52.21(p), for sources located in the State of Washington, subject to all of the terms and conditions of this Delegation Agreement.
- B. Pursuant to 40 CFR 52.21(u), the EPA Director of OAWT also hereby delegates to the Directors of the Washington Title V permitting authorities the responsibility for receiving, on behalf of the Administrator, the information and reports required pursuant to 40 CFR 52.21(r)(6) from sources located in the State of Washington.
- C. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations under this Delegation Agreement does not extend to sources or activities located in Indian Country, as defined in 18 U.S.C.1151. Consistent with previous federal program approvals or delegations, EPA will continue to implement the federal PSD regulations in Indian Country in Washington because Ecology has not demonstrated its authority over sources and activities located within the exterior boundaries of Indian reservations and in other areas of Indian Country. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. § 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust land within the 1873 Survey Area. Therefore,

¹Letter from Mary Sue Wilson, Assistant Attorney General, to Chuck Clarke, Regional Administrator, dated June 7, 1994, regarding Supplement to October 27, 1993 and December 30, 1993 Attorney General Opinion Letters for Washington State Department of Ecology.

Ecology will implement and enforce the federal PSD requirements on these non-trust lands of the 1873 Survey Area as provided in this Delegation Agreement.

- D. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations under this Delegation Agreement does not extend to sources or activities under the jurisdiction of the State of Washington Energy Facilities Site Evaluation Council (EFSEC).
- E. For projects exempt from permitting under the federal PSD regulations, nothing in this delegation agreement will preclude Ecology from issuing a state PSD permit under the state PSD regulations.

IV. Requirements

- A. Ecology shall issue federal PSD permits under this Delegation Agreement utilizing the State PSD regulations and 40 CFR Part 124 as it relates to appeals of federal PSD permits, subject to the following qualifications and exceptions:
 - 1. Ecology may not, in implementing the federal PSD regulations, utilize or rely on any provision of State law including, but not limited to the State PSD regulations, to modify, avoid, or contravene any provision of the federal PSD regulations.
 - 2. The authority to implement the Class I variance provisions in 40 CFR 52.21(p)(5)-(8), 52.21(s), and 52.21(t) is retained by EPA;
 - 3. Ecology may not, in issuing a federal PSD permit, implement or enforce any provision of 40 CFR 52.21 that has been vacated or stayed by a federal court or EPA, or any state regulation based on a provision of 40 CFR 52.21 that has been vacated or stayed by a federal court or EPA.
 - 4. A "portable source" as defined in WAC 173-400-020 that is located in an area that is in attainment or unclassifiable and that is a "major stationary source" with a federal PSD permit issued by Ecology to meet the requirements of the federal PSD regulations must comply with the relocation provisions of 40 CFR 52.21(i)(1)(viii) and may not relocate under the provisions of WAC 173-400-036 (relocation of portable sources) in lieu of the State PSD regulations.
 - 5. Where a term defined in WAC 173-400-030 is also defined in the State PSD regulations (specifically, the definitions in 40 CFR 52.21 adopted by reference in the State PSD regulations), the definition adopted in the State PSD regulations must be used instead of the definition in WAC 173-400-030 for purposes of the federal PSD regulations.
 - 6. When the provisions of WAC 173-400-110(3) are being used to approve a relaxation to an enforceable limit, Ecology shall assure that any relaxation meeting the criteria of 40 CFR 52.21(r)(4) meets the requirements of the state PSD regulations.
 - 7. Ecology shall not allow emission reduction credits established under WAC 173-400-131 to be used as a means of avoiding or complying with the federal PSD regulations unless such reductions would also meet the requirements of the federal PSD regulations.

8. Ecology shall not apply WAC 173-400-930 in the case of the installation of an emergency engine that is, or will be, an emission unit to be constructed as part of or at a major source or major modification subject to the federal PSD regulations.
 9. For purposes of this agreement, the term “permit” includes an approval order, order of approval or regulatory order issued by Ecology or a Washington local air agency, as those terms are defined in WAC 173-400-030(8), (61), and (78) and used to implement WAC 173-400-091, -111, -730, -740, and -830.
 10. For purposes of this agreement, the term “federal PSD permit” is a permit issued by Ecology per the terms of this Delegation Agreement that implements the requirements of 40 C.F.R. 52.21.
- B. The responsibility for conducting source review for all regulated sources as provided by this Delegation Agreement, including those under the jurisdiction of the Industrial Section, the Nuclear and Mixed Waste Program, and local air authorities in the State of Washington, rests with Ecology’s Air Quality Program. EPA is relying on the technical and programmatic expertise of program staff located in the Ecology Air Quality Program Headquarters Office (AQP-Headquarters) for the implementation of this Delegation Agreement.
1. The processing and issuance of federal PSD permits and Plant-wide Applicability Limits shall be conducted by program staff located in Ecology’s AQP-Headquarters.
 2. Enforcement of federal PSD permits and Plant-wide Applicability Limits shall be conducted as described in Section VI of this agreement.
 3. All determinations made under this Delegation Agreement by the State of Washington related to the applicability and interpretation of the State PSD regulations and federal PSD regulations as they would apply to individual stationary sources and applications shall be made by AQP-Headquarters. AQP-Headquarters determinations shall be made by an AQP-Headquarters section manager or higher level Ecology manager.
 - a. A copy of each written determination shall be sent to EPA within 5 business days of the date it is issued.
 - b. Any written determination based on a permit application submitted to Ecology or a local authority that a proposed project or activity is not subject to the federal PSD regulations shall include the following language:

"This determination is based on the materials presented in the permit application and has been developed based on the regulations and available EPA guidance. This determination is not binding on EPA."
 - c. Opinions on federal PSD applicability provided to a potential applicant prior to submittal of an actual permit application, shall include the following language:

"This determination is preliminary and based on the information provided and has been developed based on the regulations and available EPA guidance. Actual applicability of the federal PSD program requirements to your project may change based on the information supplied in the application. This determination cannot be relied upon to create any rights enforceable by law or equity by any party."

- C. Ecology shall ensure that there are adequate resources and trained personnel in the AQP-Headquarters to implement an effective PSD permit program. When requested, EPA shall provide timely technical assistance related to the federal PSD requirements, including without limitation, PSD applicability determinations, best available control technology (BACT) determinations, air quality monitoring network design, and modeling procedures. EPA will provide PSD training for Ecology staff to meet program implementation needs identified by EPA or Ecology.
- D. Where the rules or policies of Ecology are more stringent than the federal PSD regulations, Ecology may elect to include such requirements in the federal PSD permit in addition to the EPA requirements.
- E. If both a state or local regulation and a federal regulation apply to the same source, both must be complied with, regardless of whether one is more stringent than the other, subject to the requirements of section 116 of the Clean Air Act.
- F. Ecology shall follow and apply all written PSD policy, guidance, and determinations issued by EPA for implementing the federal PSD regulations. EPA shall promptly provide Ecology with copies of EPA policies, guidance, and determinations as they become available. This includes, but is not limited to, making documents available on EPA databases. When requested by Ecology, EPA shall provide written policy, guidance, or determinations for situations not covered by existing policy, guidance, or determinations.
- G. Ecology shall at no time grant a waiver to the requirements of the federal PSD regulations or to the requirements of an issued federal PSD permit.
- H. Ecology shall consult with the appropriate State and local agency primarily responsible for managing land use as provided in 40 CFR 52.21(u)(2)(i) prior to making any determination under this Delegation Agreement.
- I. To the extent Ecology is unwilling or unable to implement or enforce the federal PSD regulations as provided in this Delegation Agreement with respect to a source or activity subject to the federal PSD regulations, Ecology shall decide on one of the following paths and then promptly inform the EPA Director of OAWT that:
 - 1. EPA and Ecology will issue separate permits for the source or modification; or
 - 2. EPA will co-sign a federal PSD permit where EPA authors the permit terms and conditions that reflect the provisions or requirements of the federal PSD regulations that Ecology is unable to implement or require under the State PSD regulations. In this case, EPA will make efforts to complete its work to meet the permit timeliness requirements of Ecology.

V. Permit Issuance, Modification, and Appeals

- A. Ecology shall not issue a federal PSD permit until EPA has notified Ecology in writing that EPA has satisfied its obligations, if any, under Section 7 of the Endangered Species Act (ESA), 16 USC § 1531 et seq., and 50 CFR Part 402, Subpart B (“Consultation Procedures”), and with Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Act (“Magnuson-Stevens Act”), 16 USC § 1801 et seq., and 50 CFR Part 600, Subpart K (“EFH Coordination, Consultation, and Recommendations”), for federal PSD permits, regarding essential fish habitat. The Attachment to this Delegation

Agreement contains the information to be provided to applicants regarding this requirement.

- B. In addition to meeting the procedural requirements of WAC 173-400-730 and 740 for the issuance of a PSD permit decision, Ecology shall ensure that it is meeting any additional procedural requirements of 40 CFR 124 applicable to the issuance of federal PSD permit decisions when issuing permit decisions under this Delegation Agreement.
- C. Revisions to federal PSD permits previously issued by Ecology to meet the requirements of the federal PSD regulations shall be processed in accordance with the requirements of WAC 173-400-750(1) and (2) and the applicable provisions of WAC 173-400-730 and 740. All revisions to federal PSD permits shall be subject to public involvement except for changes of the owner or operator's business name and/or mailing address, and corrections to typographical errors. Revisions or administrative amendments to any federal PSD permit issued solely by EPA must be processed by EPA.
- D. Failure by Ecology to comply with the terms and conditions of this Delegation Agreement in making a determination or issuing or revising any federal PSD permit renders the subject determination or permit invalid for federal PSD purposes.

VI. Enforcement

- A. Ecology or the local air authority with jurisdiction over the source has the primary responsibility for enforcing the federal PSD regulations for sources subject to this Delegation Agreement, provided, however, that:
 - 1. In the case of any requirement of the federal PSD regulations that is not also a requirement of the State PSD regulations, EPA retains primary enforcement authority.
 - 2. Ecology has the responsibility under this Delegation Agreement to enforce the federal PSD regulations in the event that a local air authority does not.
 - 3. In all cases, EPA retains authority pursuant to sections 113 and 167 of the Clean Air Act with respect to sources that are subject to the federal PSD regulations.
- B. In delegated programs, the role of the State and local agencies is that of primary enforcer or “front line” agency in program implementation. This includes helping to define EPA’s role in the regulated community for a given program. EPA’s principal role is “back up” for the State/local program. However, EPA may initiate an enforcement action, as appropriate, under the following circumstances:
 - 1. At the State or local air agency’s request;
 - 2. EPA determines that a State or local air agency enforcement response is inadequate, or that the State/local agency has failed to carry out action in a timely or appropriate manner (in this situation, the parties will adhere to the “no surprises” principle and will follow the conflict resolution process described in Section IX of the *Washington State Compliance Assurance Agreement for Air Programs (May 30, 2003)*); or
 - 3. As part of EPA’s role established in the collaborative planning process, which includes those situations where national, regional, or sector initiatives warrant an EPA lead.

- C. PSD enforcement actions under this Delegation Agreement will be undertaken by qualified inspectors or trained enforcement staff in Ecology's AQP Regional Offices, Ecology's Industrial Section, Ecology's AQP Headquarters, Ecology's Nuclear and Mixed Waste Program, or local air authorities.
- D. Enforcement of the federal PSD regulations is subject to the *Washington State Compliance Assurance Agreement for Air Programs (May 30, 2003)*, signed by both the State and local agencies. This clearly defines roles and responsibilities, including timely and appropriate enforcement response and the maintenance of the Aerometric Information Retrieval System/Aerometric Facility Subsystem (AIRS/AFS).

VII. EPA and Ecology Communications

- A. Ecology and EPA will strive to establish and maintain a collaborative working relationship during the federal PSD permitting process based on the following principles:
 - 1. Regular communication;
 - 2. Full engagement of both parties to ensure that federal and state permitting timelines can be met; and
 - 3. No surprises – both parties will work to ensure that the other is fully informed during the permitting process.
- B. Ecology shall, within 5 business days of receipt, confirm that EPA has received a copy of each federal PSD permit application. Additionally, Ecology shall provide EPA with notice of every action related to the consideration of the federal PSD permit. Any other information related to federal PSD permits shall be provided to EPA upon request.
- C. Ecology shall provide an opportunity for the EPA permit engineer to discuss federal PSD permitting actions with the Ecology permit writer at not less than four points in the permitting process:
 - 1. Pre-application meetings with prospective applicants.
 - 2. Prior to Ecology making the completeness determination on a permit application or deciding to act on a request for a permit revision.
 - 3. Prior to Ecology making its preliminary determination and proposed permit or permit revision available for public comment.
 - 4. After close of the public comment period but prior to issuance of the final determination and final permit or permit revision.

The purpose of these meetings is to identify and resolve any issues between the agencies prior to Ecology making these determinations. EPA will remain cognizant of Ecology's permit processing timelines and the timelines in 40 CFR Part 124 related to the processing of PSD permit decisions. EPA will work rapidly to resolve any issues to prevent any delays in meeting those permit processing timelines.

- D. Ecology and EPA will communicate sufficiently to guarantee that each is fully informed and current regarding interpretation of federal PSD regulations (including any questions about PSD applicability). Any records or reports relating to federal PSD permitting or

compliance with federal PSD requirements that are provided to or otherwise obtained by Ecology and are not provided to EPA in accordance with VII.B. above shall be made available to EPA promptly upon request.

- E. Ecology will provide EPA with copies of guidance provided to sources or Washington local air agencies related to state regulations as it relates to the PSD program.
- F. Ecology shall enter information on each final BACT determination for a federal PSD permit into EPA's RACT/BACT/LAER Clearinghouse within 30 days after final permit issuance.
- F. Correspondence from EPA to Ecology shall be sent to:

Manager, Science and Engineering Section
Department of Ecology, Air Quality Program
P. O. Box 47600
Olympia, WA 98504-7600

Correspondence from Ecology to EPA shall be sent to:

Manager, Federal and Delegated Air Programs Unit
Office of Air, Waste, and Toxics, AWT-107
Environmental Protection Agency, Region 10, Suite 900
1200 Sixth Avenue
Seattle, WA 98101

VIII. Future Changes to EPA or Ecology Regulations

- A. Ecology's delegation to conduct source review and to implement and enforce the federal PSD regulations does not extend to changes to 40 CFR 52.21 that occur after July 20, 2011.
- B. A new request for delegation is required for any changes to 40 CFR Part 52.21 occurring after July 20, 2011. Implementation and enforcement of new or revised federal PSD regulations will remain the sole responsibility of EPA until a new Delegation Agreement, or amendment to this Agreement, is signed.
- C. In the event that Ecology's rules change, this delegation shall be either amended to ensure the continued implementation of EPA's PSD regulations by Ecology or the delegation shall be revoked. Ecology shall keep EPA apprised of any proposed or finalized modifications to its basic statutory or regulatory authorities or procedures.

IX. Administrative

- A. This delegation supersedes the previously delegated authority contained in the February 23, 2005 Agreement for Delegation and amended by letter on September 25, 2008.
- B. If, after consultation with Ecology, EPA makes any of the following determinations, this delegation may be revoked in whole or in part. As part of the consultation, the parties will adhere to the "no surprises" principle and will follow the conflict resolution process described in Section X prior to making the revocation. Any such revocation shall be effective as of the date of a letter from the Director of the Region 10 Office of Air, Waste, and Toxics (OAWT) to the Ecology Air Program Manager.

1. Ecology's legal authority, rules and regulations, and/or procedures for implementing or enforcing the federal PSD requirements as provided in this Delegation Agreement are inadequate; or
 2. Ecology is not adequately implementing or enforcing the federal PSD regulations; or
 3. Ecology has not implemented the federal PSD regulations with respect to a specific source, federal PSD permit application, or federal PSD permit in accordance with the terms and conditions of this delegation, the requirements of 40 CFR 52.21, 40 CFR 124, or the Clean Air Act, in which case the revocation will be with respect to Ecology's authority to implement the federal PSD regulations for the specific source, federal PSD permit application, or federal PSD permit.
- C. EPA may review the state PSD permitting program as part of the review of the Performance Partnership Agreement (PPA) or any other appropriate agreement. EPA may review State procedures and recommend changes as necessary. All recommendations will be in writing.
- D. The Delegation Agreement expires on the effective date of an EPA action to approve an Ecology PSD permitting program into the state implementation plan.
- E. Upon issuance by EPA Region 10 of a delegation agreement assigning full or partial implementation for the federal PSD regulations to a local air pollution control authority in Washington, this agreement is automatically modified to conform with that delegation to the local authority.
- F. This Delegation Agreement does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this agreement, against the State of Washington, Department of Ecology or EPA, their officers or employees, or any other person. This Delegation Agreement does not direct or apply to any person outside of the State of Washington, Department of Ecology and EPA.

X. Dispute Resolution

EPA and Ecology will use an agreed upon dispute resolution process to handle the conflicts that may arise as the agencies implement the federal PSD permitting program and shall treat the resolution process as an opportunity to improve the agencies' joint efforts and not as an indication of failure.

A. Informal Dispute Resolution Guiding Principles

EPA and Ecology will ensure that all staff and managers:

1. Recognize conflict as a normal part of the State/Federal relationship.
2. Approach disagreement as a mutual problem requiring efforts from both agencies to resolve disputes.
3. Approach the discussion as an opportunity to improve the product through joint efforts.
4. Aim for resolution at the staff level, while keeping management briefed.
5. Seriously consider all issues raised but address them in a prioritized format to assure that sufficient time is allocated to the most significant issues.
6. Promptly disclose and document underlying assumptions, frames of reference and other driving forces.
7. Clearly differentiate positions and check understanding of content and process with all appropriate or affected parties to assure acceptance by all stakeholders.
8. Document discussions to minimize future misunderstandings.
9. Clearly identify the basis for positions (e.g., legal interpretation, Agency policy, and/or implementation guidance).
10. Pay attention to legal time frames and/or deadlines and escalate quickly when necessary.

B. Formal Conflict Resolution

The following conflict resolution procedures will be used if the informal route has failed to resolve all issues:

1. Define dispute - any disagreement over an issue that prevents a matter from going forward.
2. Resolution process - a process whereby the parties move from disagreement to agreement over an issue.
3. Principle - all disputes should be resolved at the front line or staff level.
4. Time frame - generally, disputes should be resolved as quickly as possible but within two weeks of their arising at the staff level. If unresolved at the end of two weeks, the issue should be raised to the next level of each organization.
5. Escalation - when there is no resolution and the two weeks have passed, there should be comparable escalation in each organization, accompanied by a statement of the issue and a one-page issue paper. With mutual agreement, the statement of the issue and one-page issue paper shall be shared with the other party prior to holding a conference call between the parties. The conference call should be held as soon as possible after the end of the two weeks. Disputes that need to be raised to a higher level should again be raised in comparable fashion within each organization.

November 17, 2011

XI. Signatures

On behalf of the Environmental Protection Agency, I grant delegation of the federal PSD regulations to the Washington Department of Ecology pursuant to the terms and conditions of this delegation agreement and the requirements of the Clean Air Act.

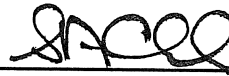
Date: 18 Nov 2011



Director
Office of Air, Waste, and Toxics
Environmental Protection Agency
Region 10

On behalf of the State of Washington and the Department of Ecology, I accept delegation of the federal PSD regulations pursuant to the terms and conditions of this delegation agreement and the requirements of the Clean Air Act.

Date: 11/23/11



Manager
Air Quality Program
State of Washington
Department of Ecology

November 17, 2011

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Attachment 1 Endangered Species Act Requirements

Ecology is to provide the following information to federal PSD permit applicants on what must be provided to EPA and the Services to assure compliance with the federal Endangered Species Act requirements.

What are EPA Obligations under the ESA/EFH?

Under section 7 of the Endangered Species Act (ESA) and the Essential Fish Habitat (EFH) section of the Magnuson-Stevens Act, federal agencies, including EPA, must ensure that actions authorized, funded, or carried out by those agencies are not likely to jeopardize the continued existences of any endangered or threatened species, or destruction or adverse modification of critical habitat for those species. In order for EPA to satisfy those obligations, we must be able to make an effect determination for that action. Until EPA makes an effect determination for the proposed action (i.e., the PSD permit), Ecology cannot approve a final permit. There are three types of conclusions: no effect, not likely to adversely affect, or likely to adversely affect.

No Effect

Based on the information supplied, such as lack of endangered, threatened or proposed species in the project area, etc., it may be concluded that the action will have no effect. EPA will document the basis for concluding “no effect.” *EPA’s obligations will then be satisfied. If there are no other issues, the final permit may be issued.*

Not Likely to Adversely Affect (NLAA)

This determination occurs when it is concluded that the action may have an effect, ranging from a purely beneficial effect, to it will have an effect but it’s discountable, or insignificant, and certain measures have been proposed to minimize the effect (such as, conducting the action outside of breeding time, reducing the area to be affected, etc.) **This determination must be concurred with by either the US Fish and Wildlife Service (USFWS) and/or the NOAA Fisheries Service (NMFS), collectively known as the “Services.”** The minimum time for requesting and obtaining concurrence is 30 days. *EPA cannot conclude its ESA/EFH obligations until it receives concurrence from the Service(s). The final permit may not be issued until EPA has concluded its ESA/EFH obligations.*

Likely to Adversely Affect (LAA)

Under this scenario, EPA must then enter into formal consultation with the Service(s). The statutorily minimum time for this is 135 days. *EPA cannot satisfy its obligations until the Service(s) issue a biological opinion (BO). The permit cannot be issued until the BO is issued.*

What are the Responsibilities of EPA, Ecology, and the Applicant in Making an Effect Determination?

Under the Clean Air Act, a PSD permit authorizes the construction and operation of a new major stationary source or the major modification of an existing major stationary source. Often, the activities involved in the construction or modification of a source (e.g., haul road construction, site clearing for construction activities and material storage, runoff from disturbed areas), have greater potential to impact endangered species than the air emissions from the source itself. In order to ensure timely processing of the PSD application, EPA, Ecology and the applicant need to work together to provide the necessary information to make an effect determination. With the correct information, EPA will be able to make the effect determination so that its ESA/EFH obligations will be satisfied.

EPA

Based on the information provided, EPA will make a determination as described above. The simplest case is where there are no endangered species present in the project area. Another case is if the project will just result in increased emissions without a corresponding increase of footprint (i.e., no habitat destruction) of the project. In these cases, EPA can make a determination of no effect. EPA would then document its rationale for the no effect determination and then notify Ecology and the applicant of the decision. In order for EPA to support that conclusion, it must have adequate information and a thorough description of what the project will consist of. This project description would most likely come from the applicant.

If the project is a greenfield project, then the applicant needs to be notified that they will have to include a biological assessment (BA) of the project. EPA does not have the resources to develop BAs for these projects. If the applicant prepares the BA, the process can be expedited somewhat. A BA generally entails a biologist reviewing the proposed project and preparing a document or letter that answers six questions:

- What species are present?
- What is the timing of the action?
- What is the magnitude of the action (how big is the area covered, contaminants expected, interrelated and interdependent effects)?
- What are the parameters involved (types of toxicants, toxicity to species, habitat and ecosystem, alteration of habitat and more)?
- What is the environmental benefit (any leverage gained by specifically protecting species, etc.)? and
- What is the baseline condition?

Once EPA receives the BA, it will review the document to see if it agrees with the conclusions (i.e., no effect, not likely to adversely affect, likely to adversely affect). If the conclusion is no effect, then EPA will write a memo to file with the BA as the rationale. EPA will notify Ecology and the applicant of its decision and EPA's ESA/EFH obligations will be satisfied.

If the conclusion is NLAA, then EPA will transmit the document to the appropriate Services and ask for their concurrence with our findings. The minimum time this could take is 30 days, based on the Services' workloads at the time. *It is very important to begin this process as early as possible in order to allow time for final concurrence to be obtained by the time the permit is ready to be finalized.*

If the conclusion is LAA, EPA will be responsible for following up with the Services. If this determination is made, the process could take a minimum of six months as required under the ESA.

Ecology

Ecology should provide the applicant with information in this document. In addition, Ecology should inform EPA of upcoming permit actions that will require EPA to fulfill its ESA/EFH obligations in a timely manner. If the PSD permit is for a greenfield project, the applicant should be told to develop a biological assessment (BA) as part of its application. The BA should include information on species presence; timing of the action (e.g., is construction going to occur during critical breeding seasons, etc.); magnitude of the action (how large is the action area, etc.); parameters involved (toxics involved, toxicity to species); environmental benefit from the proposed action; and description of baseline conditions.

In other cases, the permit applicant should be asked for a project description that includes the following information:

- Location of the project
- Any discharges besides air emissions (e.g., if the facility already has an NPDES permit, whether the project will result in changes to the NPDES permit)
- What kind of construction will be taking place
- Will that construction expand the basic footprint of the facility
- Purpose and need for the proposed action

Applicant

At the least, the applicant may only need to provide a project description as described above. More information on the project description is described below in "Items to Consider in Developing a Project description."

Items to Consider in Developing a Project Description

The US Fish and Wildlife Service has offered the following components as crucial to describe a project. Essentially, the project description should answer the following questions: who, what, when, where, why and how of the project.

Who

- Ensure you identify all the players and their roles
- Examples: your permitting agency, other cooperating agencies, applicants, construction contractors

What

- Ensure that you include all parts of the project
- For instance, the goal of the project (increase production, etc) is not the project
- What tasks you are doing to get to the goal or objective is the “what”

Where

- Where is the action area?
 - For example: This would include the physical location of the source and supporting activities, any additional areas disturbed during construction (including construction haul roads), and the significant impact area for air pollutant emissions. Will there be additional clearing such as for a new parking lot to accommodate the project?
- Describe all parts of the project geographically, not just the “footprint” or project site
 - Photographs of the current project site are helpful.
- If work will occur outside of the footprint itself, describe that area

When

- When would the action start and end (especially the timing of construction)?
- If there are phases, when would each begin and end?
- Describe effects of project’s existence after construction

Why

- Explain the purpose behind the need for the proposed action

How

- Build in “flexibility”; if there is a construction window, say March 15 + or – 2 weeks
- Don’t assume anything is “understood” – spell it out

At the most, the applicant will need to provide EPA with a BA. The list below contains the minimum issues that the BA should address.

Items to be Covered in Biological Assessment

The following items need to be considered when developing a BA for a proposed project.

1. Species Presence

- Proximity to action area or area of effect
- Life stage presence
- Life stage sensitivity
- Timing of species' presence

2. Timing of action

- Species' presence or sensitivity as varies with time
- Effects to habitat as varies with time
- Length of action and its effects
- Urgency of action

3. Magnitude of action

- Area covered
- Magnitude of effect
- Types of contaminants or habitat degradation
- Type of habitat improvement
- Interrelated and interdependent (or "related") effects

4. Parameters involved

- Types of contaminants and the toxicity to species, habitat, and corresponding ecosystem
- Types of alteration to environment and its effects on species, habitat, and ecosystem
- Identity of parameters that will be degraded
- Identity of parameters that will be improved
- Parameters' effect in relation to the ecosystem as a whole

5. Environmental Benefit

- Leverage gained by specifically protecting listed species
- Opportunities for this action to help other efforts
- Additional environmental benefit provided by consultation on this action
- Environmental benefit of the action

6. Baseline condition

- Level of habitat impairment
- Magnitude of the action's effect in relation to the baseline condition
- Baseline condition in relation to the overall vulnerability of the species