BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF BILL GREEN RICHLAND, WASHINGTON TITLE V PERMIT ISSUED BY WASHINGTON STATE DEPARTMENT OF ECOLOGY	))))))))	PERMIT NO. 00-05-006 RENEWAL 1

PETITION REQUESTING THE ADMINISTRATOR OBJECT TO THE HANFORD SITE TITLE V OPERATING PERMIT RENEWAL, NUMBER 00-05-006 RENEWAL 1

Pursuant to 42 USC 7661d(b)(2), 40 CFR 70.8(d) and Washington Administrative Code (WAC) 173-401-620(i) Bill Green (Petitioner) hereby petitions the Administrator of the United States Environmental Protection Agency (EPA) to object to the Hanford Site Air Operating Permit Renewal, Number 00-05-006 Renewal 1 (Permit). As detailed below, the current version of the Permit does not comply with "applicable requirements" of the Clean Air Act (CAA), the requirements of 40 CFR Part 70, and Washington State's approved Part 70 permitting program as codified in WAC 173-401. Because the current version of the Permit does not comply with "applicable requirements", EPA is obligated to object.

I. BACKGROUND

A. Public review and comment chronology

The Petitioner is a private citizen who submitted comments [Exhibit 1] on the draft[1] Permit [Exhibit 2] during the announced July 10 through August 11, 2006 public comment period[2]. Consistent with its role as permitting authority[3] the Washington State Department of Ecology (Ecology) provided responses[4] to the Petitioner's comments. Ecology also provided a responsiveness summary[5] and the Proposed[6] Permit to EPA Region 10 for its 45-day review.

[1] 40 CFR 70.2, "*Draft permit* means the version of a permit for which the permitting authority offers public participation under § 70.7(h)…"
[2] See 40 CFR 70.7h.
[3] 40 CFR 70.2, "*Permitting authority* means either of the following: …(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part [70]."
[4] Hendrickson, Ecology, letter to Green, no subject, October 5, 2006.
[5] See Exhibit 3, Responsiveness_Summary_10-05-06.pdf.

Based on Ecology's responses, the Petitioner wrote the Administrator of EPA identifying several issues believed to be petitionable[7].

To address some of the Petitioner's concerns Ecology revised the Responsiveness Summary [Exhibit 4] and Proposed Permit to reflect changes in responses to 4 of the Petitioner's comments. This action restarted EPA's 45-day review period. Additionally, Ecology provided the Petitioner with the revised comment responses[8].

The Petitioner responded by requesting additional supporting information, identification of significant changes, and additional public review[9].

EPA took no action on the Proposed Permit. Ecology issued the final Permit [Exhibit 5] on December 29, 2006[10] with an effective date of January 1, 2007.

B. Regulatory framework

Under section 505(a) of the CAA, 40 CFR 70.8(a) and WAC 173-401-700(9), the permitting authority is required to submit all proposed Title V operating permits to EPA for review. If EPA determines a permit is not in compliance with applicable requirements of the CAA or the requirements of 40 CFR Part 70, EPA must object to the permit. If EPA does not object to the permit on its own initiative, section 505(b)(2) of the CAA and 40 CFR 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. Under the CAA, EPA "shall issue an objection [to the issuance of a Title V permit]…if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]," or is not in compliance with the Title V implementing regulation.[11]

Part 70 [40 CFR 70.8(d)] requires a petition be "…based only on objections to the permit that were raised with reasonable specificity during the public comment period…unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period."

---

[6] 40 CFR 70.2, "*Proposed permit* means the version of a permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8."
[7] Green letter to S. Johnson, EPA, "Courtesy Notification Of Intent To Petition As Provided For By 40 CFR 70.8(C) And Section 505(B)(2) Of The Federal Clean Air Act", October 16, 2006.
[8] Hendrickson, Ecology, letter to Green, no subject, November 13, 2006.
[9] Green letter to Bogert, EPA Region 10, "Request To Enforce Public And Affected States Review Requirements Of 40 CFR 70 For The Hanford Site Air Operating Permit", November 16, 2006.
[10] Hedges, Ecology, Letter to L. Kral, EPA Region X, S. Harris, CTUIR, K.A. Klein, DOE/RL, A. Ginsburg, ODEQ, R. Jim, YN, R.J. Schepens, DOE/ORP, "Re: Issuance of Hanford Site Air Operating Permit Renewal", December 29, 2006.
[11] 42 USC 7661d(b)(2); see also 40 CFR 70.8(c)(1) ("The Administrator will object to the issuance of any proposed permit determined not to be in compliance with applicable requirements or requirements under this part [70]")

A petition for administrative review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the petition. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue the permit using procedures in 40 CFR 70.7(g)(4) or (5)(i) and (ii), or WAC 173-730 for reopening a permit for cause.

C. Permit organization and state agency enforcement

The Permit is organized into 4 enforceable sections, designated Attachments 1, 2, 3 and Standard Terms and General Conditions. Each of the enforceable sections has a separate statement of basis [40 CFR 70.7(a)(5), WAC 173-401-700(8)].

Attachment 1 contains the Ecology permit terms and conditions. Attachment 2 contains the Washington State Department of Health (Health) Radioactive Air Emissions License (FF-01) as permit terms and conditions. Attachment 3 contains the Benton Clean Air Authority (BCAA) permit terms and conditions applicable to the regulations for outdoor burning and asbestos. Standard Terms and General Conditions portion of the Permit is jointly enforceable by the three agencies, as appropriate.

D. State agency enforcement relationship

Ecology is the permitting authority[12]. The respective roles and responsibilities of Ecology and Health regarding the Permit are defined in a memorandum of understanding (MOU) between these 2 agencies.

A copy of the signed MOU was contained in a statement of basis for the initial Hanford Site Air Operating Permit (number 00-05-006). In 2005 this MOU was modified. The modified MOU[13] presently appears in one of the enforceable section of the final Permit, Attachment 2[14]. Attachment 2 is enforced by Health.

The Ecology/BCAA relationship is described in a letter of delegation from Ecology, dated March 11, 1994. This letter of delegation is contained in the Attachment 3 Statement of Basis[15].

II. BASES FOR OBJECTION

[12] See 40 CFR 70.2, 42 USC 7661(4), section 501(4), and WAC 173-401-200(23). From 70.2 "*Permitting authority* means [t]The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part [70].".
[13] "Memorandum of Understanding between the Department of Ecology and the Department of Health, Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions", signed 2005.
[14] See Exhibit 5, SOB_Attachment_2.pdf, pages13-19.
[15] See Exhibit. 5, SOB_Attachment_3.pdf, pages 5-6

A. Listing of Petition issues

The bases for requesting EPA's objection are as follows:

1. The Permit both misapplies regulation and inappropriately modifies regulation (Regulatory Expansion), thereby creating and imposing new substantive requirements, contrary to 40 CFR 70.1(b) and WAC 173-401-100(2).
2. The Permit is less stringent than an existing requirement for the Bechtel Marshalling Yard, contrary to 40 CFR 70.1(c) and WAC 173-401-600(1).
3. The Permit does not state the origin of and specific legal authority for each requirement and explain the difference in form as compared to the applicable requirement upon which the term or condition is based, as required by 40 CFR 70.6(a)(1)(i), WAC 173-401-600(2) and 70.94.161(10) RCW.
4. The permitting authority inappropriately eliminated or modified terms and conditions prior to public review, affected states review and EPA review, contrary to 40 CFR 70.7(e)(2), (e)(3), and (e)(4), 40 CFR 70.7(h), WAC 173-401-725(2), (3) and (4), and WAC 173-401-800(1).
5. The Permit establishes a fee process not supported by statute and incapable of complying with 40 CFR 70.9, WAC 173-401-900(1), 915, 920, 925, and 940.
6. The Permit does not contain all applicable requirements, contrary to 40 CFR 70.1(b), 70.6(a)(1), and WAC 173-401-100(2), 600(1).
7. The Statement of Basis for Attachment 2 is not in compliance with applicable requirements as specified by 40 CFR 70.7(a)(5) and WAC 173-401-700(8).
8. The Permit does not meet the intent of Title V because it includes unenforceable portions.

B. Petition issues

As required by 40 CFR 70.8(d), petition issues are "…based only on objections to the permit that were raised with reasonable specificity during the public comment period…unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period."

Unless otherwise specified, the terms "comment" and "comments" refer to the comment or comments contained in Exhibit 4, the revised responsiveness summary submitted to Region 10 in a letter dated November 14, 2006[16].

B-1. Regulatory expansion (Comments 36[17] and 40)

The Permit both misapplies regulation and inappropriately modifies regulation, thereby creating and imposing new substantive requirements, contrary to 40 CFR 70.1(b) and WAC 173-401-100(2) [comments 36 and 40]. The Court stated in *New York Public Research Interest Group v. Whitman (321 F.3d 316)* that "[t]Title V permits do not

[16] See Exhibit 4, Revised_Responsiveness_Summary_11-14-06.pdf.
[17] Unless otherwise specified, the term comments refer to those comments contained in Exhibit 4, the revised responsiveness summary submitted to Region 10 in a letter dated November 14.

impose additional requirements on sources but, to facilitate compliance, consolidate all applicable requirements in a single document."

Additionally, the Court ruled "[EPA] does not have discretion whether to object to draft permits once non compliance has been demonstrated…[once] demonstrated to EPA that the draft permits were not in compliance with the CAA, the EPA was required to object to them"[18]. This interpretation was provided by the United States Court of Appeals for the Second Circuit.

B-1.1 Comment 36

Comment 36 addresses inappropriate use of the Permit to create a "State Only" requirement concerning the application of 40 CFR 61, Appendix B, Method 114 ("Test Methods for Measuring Radionuclide Emissions from Stationary Sources") for minor point sources[19] [See Exhibit 5, Attachment 2_Final Permit.pdf, Section 4.0, pages 57 & 58].

The distinction between monitoring and measuring requirements for major point sources[20] and minor point sources is clearly stated in 40 CFR 61.93(b)(4)(i). Major point sources must follow monitoring and measuring requirements contained in 40 CFR 61.93(b)(2). Minor point sources need only perform "…periodic confirmatory measurements... to verify low emissions"[21].

Also, 40 CFR 61 references use of Method 114 for only major point sources[22].

Ecology is using the Permit to inappropriately eliminate the regulatory distinction, for purposes of monitoring and measuring, between major point sources and minor point sources by equating "periodic confirmatory measurements", required of minor point sources, with Method 114 [40 CFR 61.93(b)(2)(iii)], a monitoring and measurement option designated for major point sources.

EPA previously determined lesser monitoring and measurement options are appropriate for minor point sources. Section 1b of the EPA/DOE MOU[23] states "[e]Engineering

---

[18] *New York Public Research Interest Group v. Whitman* (321 F.3d 316) at 333-334

[19] release points which have a potential to discharge radionuclides into the air in quantities which could cause an effective dose equivalent less than 1% of the standard

[20] As used in the Permit, major point sources are release points which have a potential to discharge radionuclides into the air in quantities which could cause an effective dose equivalent greater than 1% of the standard.

[21] See 40 CFR 61.93(b)(4)(i) "…For other release points" [i.e. minor point sources] "which have a potential to release radionuclides into the air, periodic confirmatory measurements shall be made to verify the low emissions."

[22] See 40 CFR 61.93(b)(4)(i) and (b)(2)(iii): "Radionuclide emission measurements in conformance with the requirements of paragraph (b) of this section shall be made at all release points which have a potential to discharge radionuclides into the air in quantities which could cause an effective dose equivalent in excess of 1% of the standard" [i.e. major point sources] and paragraph (b)(2)(iii) "Radionuclides shall be collected and measured using procedures based on the principles of measurement described in appendix B, Method 114…."

calculations and/or representative measurements may be used to comply with periodic confirmatory measurement requirements" required of minor point sources[24]. Requiring Method 114 for minor point sources would eliminate the options agreed-to by EPA of using engineering calculations, etc., to comply with the "periodic confirmatory measurement" requirement.

Given the above, it is clear EPA's interpretation of 40 CFR 61.93(b)(4)(i) allows less stringent and more flexible measurement options in meeting the "periodic confirmatory measurement" requirement for minor point sources.

EPA's interpretation of the applicability of 40 CFR 61, Appendix B, Method 114, if reasonable, must take precedence over any inconsistent interpretation the State of Washington could offer [see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984)]. Additionally, "[t]he power of an administrative agency to administer a congressionally created …program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843, 104 S.Ct. at 2782 (quoting *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974)).

Method 114 [40 CFR 61.93(b)(2)(ii)] may be required for major point sources. It is not required of minor point sources. By requiring use of only Method 114 for minor point sources, Ecology is using the Permit to modify applicability of a federal regulation, thereby creating and imposing a new substantive requirement.

To provide a regulatory justification for misapplying Method 114 to minor point sources, Ecology uses the Permit to create a new type of applicable requirement, a federal requirement [40 CFR 61, Appendix B, Method 114] that is only enforceable by the state ["This clarification deals with the 'State Only' requirement concerning 40 CFR 61, Appendix B, Method 114 for minor point sources."[25]]

As used throughout the Permit, "State Only" means "state only enforceable", pursuant to the requirements in WAC 173-402-625(2) and 40 CFR 70.6(b)(2)[26]. In fact, the Section 4.0 heading reads "…State Only Requirement". Thus Ecology is inappropriately using the Permit to revoke federal enforceability of a federal requirement, in this case 40 CFR 61, Appendix B, Method 114. By so doing, Ecology is both creating and imposing a new substantive requirement, contrary to 40 CFR 70.1(b) and WAC 173-401-100(2).

---

[23] "Memorandum Of Understanding Between The U.S. Environmental Protection Agency And The U.S. Department Of Energy Concerning The Clean Air Act Emission Standards For Radionuclides 40 CFR Part 61 Including Subparts H, I, Q & T", signed by EPA in 1994 and by DOE in 1995. See Exhibit 6, DOE-EPA_MOU.pdf.

[24] For Hanford-specific monitoring requirements pursuant to the EPA/DOE MOU see Exhibit 6: DOE_HEALTH_PCM-per_EPA-DOE_MOU.pdf.

[25] Exhibit. 5, Attachment 2, page 57, Section 4.0, 1st paragraph, 2nd sentence.

[26] 40 CFR 70.6(b)(2) "…the permitting authority shall specifically designate as not being federally enforceable under the Act [CAA] any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements".

Ecology's response to comment 36 "This was an agreed-to condition between WDOH [Health] and the USDOE [permittee]…" expresses flawed regulatory logic. The permittee cannot grant Ecology regulatory authority to contravene regulation [40 CFR 70.1(b)[27]] nor can Ecology contravene regulation based on agreement with the permittee[28].

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). The Permit both creates and imposes a new substantive requirement contrary to 40 CFR 70.1(b) and WAC 173-401-100(2). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-1.2 Comment 40

Comment 40 speaks to the new and inappropriate use of the federally-enforceable[29] requirements in 40 CFR 61, Appendix B, Method 114 or 114(3) for monitoring, testing, quality assurance of certain fugitive, non-point source[30] emission units[31].

There is no explanation in the Attachment 2 Statement of Basis setting forth the legal and factual basis for these permit conditions (including references to the applicable statutory or regulatory provisions) [WAC 173-401-700(8) and 40 CFR 70.7(a)(5)] for requiring use of 40 CFR 61, Appendix B, Method 114 or 114(3) for fugitive emission units.

Application of Method 114 is limited to stack monitoring and stack sampling, and other associated activities for stacks as stated in Section 1 ("Purpose and Background") of Method 114[32]. As fugitive emissions are by definition[33], not capable of passing through a stack, Method 114 is clearly not an applicable regulatory requirement for fugitive emission units.

---

[27] 40 CFR 70.1(b) "…[T] title V does not impose substantive new requirements…".
[28] See *U.S. v. Ford Motor Co.*, 814 F. 2d 1099 at [2] "Clean Air Act contemplates significant participation in air pollution control by state pollution control authorities but final authority is vested in United States Environmental Protection Agency and courts of the United States. Clean Air Act, § 109, 42 U.S.C.A. § 7409."
[29] See 40 CFR 70.6(b) and WAC 173-401-625: quoting from 70.6(b) "All terms and conditions in a part 70 permit…are enforceable by the Administrator and citizens under the Act [unless] …specifically designate as not being federally enforceable under the Act…".
[30] WAC 246-247-030(18) "'Nonpoint source" is a location at which radioactive air emissions originate from an area, such as contaminated ground above a near-surface waste disposal unit, whose extent may or may not be well-defined."
[31] See Emission Unit ID 443, 300 Area Diffuse/Fugitive minor, fugitive non-point source emission unit, approx. pg. 447 and Emission Unit ID 465, Purgewater Moditanks minor, fugitive non-point source emission unit, approx. pg. 476 (Attachment 2 page numbering ceases at page 62).
[32] 40 CFR 61, Appendix B, Method 114(1), "Purpose and Background".
[33] 40 CFR 70.2 and WAC 246-247-030(12) "*Fugitive emissions* are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.".

Additionally, EPA determined in Section 5a of the EPA/DOE MOU[34] that "…[40 CFR 61] Subpart H provides procedures for evaluating only emissions from point sources…", thus not for evaluating emissions from fugitive emission units.

EPA's interpretation of the applicability of 40 CFR 61, Appendix B, Method 114, if reasonable, must take precedence over any inconsistent interpretation the State of Washington could offer[35]. Additionally, "*Chevron deference*" binds courts to follow an administrative agency's interpretation of a statute unless it is arbitrary or capricious[36].

By requiring compliance with an inapplicable federal requirement, Ecology is using the Permit to modify the applicability of a federal regulation, thereby both creating and imposing a new federally enforceable requirement.

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). The Permit inappropriately creates and imposes a new substantive requirement contrary to 40 CFR 70.1(b) and WAC 173-401-100(2). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-2 The Permit is less stringent than an existing requirement for the Bechtel Marshalling Yard, contrary to 40 CFR 70.1(c) and WAC 173-401-600(1). (Comments 13 and 24)

Ecology modified its initial response to public comments for comments 13 and 24 (also comments 11 and 29). These modified responses were transmitted to EPA in a letter dated November 14, 2006, thereby restarting EPA's 45-day review. Thus the grounds for objection arose after the comment period[37]. However, Ecology's revised response with regard to the required dust control plan is less stringent[38] than the dust control plan[39] resulting from an agreement between Bechtel National, Inc. and the Benton Clean Air Authority (BCAA)[40] to settle a citation regarding a dust control violation.

The fugitive dust control condition developed by Ecology appears below[41].

"**Condition Approval: 11/13/2006**
Condition: FUGITIVE DUST CONTROL
Construction Phase Fugitive Dust Control Plan(s), prepared using EPA and Ecology guidelines, shall be developed and implemented. The plan(s) shall

[34] See Exhibit. 6, DOE-EPA_MOU.pdf.
[35] See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).
[36] *Regan v. U.S.*, 421 F. Supp. 2d 319.
[37] See 40 CFR 70.8(d). "…unless the grounds for such objection arose after such period…."
[38] See 40 CFR 70.1(c) "…No permit, however, can be less stringent than necessary to meet all applicable requirements…"
[39] See Exhibit 7, BNI_Dust_Control_Plan.pdf.
[40] See Exhibit 7, BCAA-Bechtel_8-2003_Agreement.pdf
[41] See Exhibit 5, Attachment 1_Final Permit.pdf, page ATT 1-64.

address fugitive dust control at the WTP construction site adjacent to the Hanford 200 Area and the Marshalling Yard established upon property leased from the Port of Benton. A copy of this plan(s) shall be maintained on-site at all times in a place known to facility employees that are responsible for complying with the requirements contained therein and shall be retrievable by those employees at all times when activities regulated by the documents are occurring. These documents shall be made available to Ecology upon request
Periodic Monitoring: Not applicable. The owner or operator shall take reasonable precautions (such as pre-job planning) to prevent fugitive dust from becoming airborne.
Test Method: Construction Phase Fugitive Dust Control Plan
Test Frequency: During construction or routine/*ad hoc* dust suppression
Required Records: Fugitive Dust Control Plan and records of actions taken to minimize fugitive dust
State-Only: No.
Calculation Model: Not applicable."

Items contained in the BCAA dust control plan[42] but missing from Ecology's dust control condition include the following:

1. Identification of individuals responsible for dust control,
2. Source control measures for open areas-vacant lots and unpaved roads consisting of vegetative stabilization, fire prevention, watering, and restricted access,
3. Maintenance of control measures stated above,
4. Contingency control measures consisting of :
    a. Additional watering of roadways to prevent and suppress fugitive dust during scheduled and unscheduled work days.
    b. Spot applications of Hydro Seeding and irrigation as required to cover areas exposed by normal material activities.
    c. Final application of Hydro Seeding and irrigation at the end of construction activities to restore storage areas and prevent future dusting.
    d. Application of Soil Cement, if required, to prevent dusting.
    e. Application of compacted gravel surfaces as required to maintain safe and accessible roadways and/or specific storage areas.
5. Methods of rates of application includes the following:
    a. The method of application for vegetative stabilization will be hydroseeding.
    b. Water application will be conducted on a 24 hour, 7 day per week basis using 3 water trucks per day. Average rate of application is approximately 300,000 gallons per day.

The Permit is not in compliance with 40 CFR 70.1(c) and WAC 173-401-600(1) and is therefore not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

[42] See Exhibit 7, BNI_Dust_Control_Plan.pdf.

B-3 The Permit does not state the origin of and specific legal authority for each requirement and explain the difference in form as compared to the applicable requirement upon which the term or condition is based as required by 40 CFR 70.6(a)(1)(i), WAC 173-401-600(2) and 70.94.161(10) RCW. (Comments 36, 37 & 39)

B-3.1 Comment 36

Comment 36, in part, identifies the need to provide a regulatory citation, pursuant to WAC 173-401-600(2), 40 CFR 70.6(a)(1)(i) [and Chapter 70.94.161(10) RCW,] for the requirement in Section 4.0[43]. This section "…deals with the 'State Only' requirement concerning 40 CFR 61, Appendix B, Method 114 for minor point sources."

The legal authority specified in the Section 4.0 heading is WAC 246-247-040(5) and 060(5). These citations were supplied after close of the public comment period. Thus, grounds for objection arose after the comment period[44].

WAC 246-247-040(5) reads: "In order to implement these standards, the department may set limits on emission rates for specific radionuclides from specific emission units and/or set requirements and limitations on the operation of the emission unit(s) as specified in a license."

WAC 246-247-060(5) states: "The license shall specify the requirements and limitations of operation to assure compliance with this chapter. The facility shall comply with the requirements and limitations of the license."

Neither citation, WAC 246-247-040(5) or 060(5), seems to be appropriate to Section 4.0. A correct citation would be one identifying the legal authority to create and implement a state-only enforceable federal requirement (i.e., a federal requirement enforceable only by the state). Both citations [WAC 246-247-040(5) and 060(5)] fall short.

Much of the text from this section appears to be verbatim from a settlement agreement between Health and USDOE[45]. However, it is the EPA[46] and courts of the U.S. that have final authority necessary to interpret 40 CFR 61, and not the State of Washington[47].

There is no additional text addressing the origin of and specific legal authority for this term or condition pursuant to 70.94.161(10) RCW. Additionally, there is no text identifying any "…difference in form as compared to the applicable requirement upon

[43] See Exhibit 5, Attachment 2_Final Permit.pdf, Section 4, pages 57 & 58.
[44] See 40 CFR 70.8(d).
[45] See Exhibit 9, DOE-WDOH_Settlement_Agreement_9-14-04.pdf.
[46] See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).
[47] *U.S. v. Ford Motor Co.*, 814 F. 2nd 1099 (6th Cir., 1987) at [2] the "Clean Air Act contemplates significant participation in air pollution control by state pollution control authorities but final authority is vested in United States Environmental Protection Agency and courts of the United States…"

which the term or condition is based" pursuant to WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i).

There also is no text in the Attachment 2 Statement of Basis[48] that sets forth the legal and factual basis for this permit condition[49] (including references to the applicable statutory or regulatory provisions) as required by WAC 173-401-700(8) and 40 CFR 70.7(a)(5).

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). The Permit does not state the origin of and specific legal authority for each requirement and explain the difference in form as compared to the applicable requirement upon which the term or condition is based as required by 40 CFR 70.6(a)(1)(i), WAC 173-401-600(2) and 70.94.161(10) RCW. Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-3.2 Comment 37

Comment 37 points out the need to provide a regulatory citation, pursuant to WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i), for each requirement in Section 5.0[50].

The legal authority specified in the Section 5.0 heading is WAC 246-247-040(5) and 060(5). There are 10 subsections and many terms or conditions. WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i) are very clear; "…The permit shall specify and reference the origin of and authority for each term or condition…". Chapter 70.94.161(10) RCW is more specific "Each air operating permit shall state the origin of and specific legal authority for each requirement included therein" (emphasis added). Thus referencing is not sufficient.

The applicable requirements contained in WAC 173-401-600(2), 40 CFR 70.6(a)(1)(i) and 70.94.161(10) RCW have not been met with respect to Attachment 2, Section 5.

Subsection 5.1 "Diffuse and Fugitive Sources at Hanford" requires, in part:

> "Those sources with Emission Unit specific conditions and limitations within the FF-01 License must be monitored, meet the applicable quality assurance and analysis requirements. All required ambient air monitors shall be identified along with their data measurements in the annual Radionuclide Air Emissions Report."

The Permit does not state the origin of and specific legal authority for each of these requirements as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which the terms or conditions are based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i).

---

[48] See Exhibit 2, AOP-Att2-SOB_062006_DRAFT.doc.

[49] The "State Only" requirement to use 40 CFR 61, Appendix B, Method 114 for minor point sources and the creation of a federal requirement enforceable only by the state.

[50] See Exhibit 5, Attachment 2_Final Permit.pdf, Section 5, pages 58 through 61.

Subsection 5.1.2 “Near-Facility Monitoring” reads:

> “Near-facility environmental monitoring is defined as the Department of Energy’s monitoring on the Hanford Site near facilities with radioactive materials that are potentially dispersible. Monitoring locations are associated mostly with major nuclear facilities and waste storage or disposal facilities such as container storage, burial grounds, underground tanks (i.e., Tank Farms in the 200 Areas), ponds, cribs, trenches, and ditches.
>
> In accordance with the definition of “Monitoring” provided in WAC 246-247-030(17), required monitoring activities include the measurement of radionuclides in ambient air. Samples are collected from known or expected transport pathways, which are generally downwind of potential or actual airborne release points and down-gradient of liquid discharges. The accepted primary method of monitoring diffuse and fugitive emissions is ambient air sampling, with other media samples (e.g., surface soil, vegetation for deposition, radiological surveys and thermoluminescent dosimeters) used as qualitative indicators.”

The Permit does not state the origin of and specific legal authority for each of these requirements as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which the terms or conditions are based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i).

Section 5.1.4 “Quality Assurance and Analysis” states:

> “All required ambient air samples collected and analyzed must be compatible with the quality assurance requirements of national standards such as NQA-1, EPA QA/R-5, and Method 114 as applicable. Near-facility ambient air samples from individual stations must be composited at a frequency no greater than 6 months. Analysis of other media samples will be conducted at labs with the appropriate quality assurance programs in-place.”

The Permit does not state the origin of and specific legal authority for each of these requirements as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which the terms or conditions are based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i).

Section 5.1.5.1 “Near Facility Monitoring and Reporting” states:

> “Comparison against 10% of the values listed in Table 2 of 40 CFR 61 Appendix E must be performed. Any analytical result that exceeds these values will be reported to the department. Notification may take the form of an email. These comparisons shall be used to demonstrate that activities being conducted under various approvals are being maintained as ALARACT or BARCT.”

The “Table 2 of 40 CFR 61 Appendix E” referenced in subsection 5.1.5.1 is contained in 40 CFR 61, Subpart I—“National Emission Standards for Radionuclide Emissions From

Federal Facilities Other Than Nuclear Regulatory Commission Licensees and Not Covered by Subpart H"[51]. According to 40 CFR 61.100[52], 40 CFR 61 Subpart I is not applicable to the permittee, as the permittee is covered by 40 CFR 61 Subpart H, the permittee is not a NRC licensee, nor is the permittee a non-DOE federal facility.

Given the above, Ecology is going to be challenged to provide the appropriate legal authority for applying 40 CFR 61 Subpart I to the permittee[53].

Additionally, there is no text in the Attachment 2 Statement of Basis[54] that sets forth the legal and factual basis for this permit condition (including references to the applicable statutory or regulatory provisions) pursuant to WAC 173-401-700(8) and 40 CFR 70.7(a)(5).

.

The Permit does not state the origin of and specific legal authority for this requirement as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which this term or condition is based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i).

Subsection 5.1.7 "Changes to the Diffuse and Fugitive Environmental Monitoring" states:

> "Prior to making a change (i.e., moving, or removing air sample locations, or changing the sampling period) to the accepted periodic confirmatory measurement (for minor diffuse and fugitive sources) or continuous measurement (for major diffuse and fugitive sources), the Department of Energy shall provide a written request describing the change to the Department of Health, Air Emissions and Defense Waste Section for approval. The request for approval may take the form of an email or formal letter."

The Permit does not state the origin of and specific legal authority for this requirement as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which this term or condition is based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i).

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). The Permit does not state the origin of and specific legal authority for each requirement as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…".

---

[51] See Exhibit 4, Comment 52 and Ecology's comment response.
[52] "The provisions of this subpart [40 CFR 61 Subpart I] apply to facilities owned or operated by any Federal agency other than the Department of Energy and not licensed by the Nuclear Regulatory Commission…"
[53] See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).
[54] See Exhibit 2, AOP-Att2-SOB_062006_DRAFT.doc.

B-3.3 Comment 39

Comment 39 requests a regulatory citation, pursuant to WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i), for each term or condition in the Attachment 2 Emission Unit Specific License[55].

Ecology responded, "WAC 246-247-050(5) and WAC 246-247-060(6) will be added at the beginning of each approval with specific conditions." In fact WAC 246-247-050(5) and WAC 246-247-060(5), rather than WAC 246-247-060 (6), were added at the beginning of each approval with specific conditions via the following statement: "Conditions (state only enforceable: WAC 246-247-040(5), 060(5) if not specified)". The "Emission Unit Specific License" in Attachment 2 of the final permit occupies pages 62 through about 738 (Attachment 2 page numbering ceases at page 62)[56].

The "Emission Unit Specific License" contains 135 notice of construction (NOC) approvals, according to the "Emission Unit Specific License List of Contents". Each of these NOC approvals contains many conditions enumerated under the heading "Conditions…". Many of these enumerated conditions lack a regulatory citation, pursuant to WAC 173-401-600(2), 40 CFR 70.6(a)(1)(i) and 70.94.161(10) RCW.

The requirements in WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i) are very clear; "…The permit shall specify and reference the origin of and authority for each term or condition…". Chapter 70.94.161(10) RCW is more specific "Each air operating permit shall state the origin of and specific legal authority for <u>each</u> requirement included therein" (emphasis added). (Thus referencing is not sufficient.) These applicable requirements have not been met.

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). The Permit does not state the origin of and specific legal authority for each requirement as required by 70.94.161(10) RCW, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based, as required by both WAC 173-401-600(2) and 40 CFR 70.6(a)(1)(i). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-4 The permitting authority inappropriately eliminated or modified terms and conditions prior to public review, affected states review and EPA review, contrary to 40 CFR 70.7(e)(2), (e)(3), and (e)(4), 40 CFR 70.7(h), WAC 173-401-725(2), (3) and (4), WAC 173-401-800(1). (Comments 41 & 44)

B-4.1 Comment 41

[55] See Exhibit 2, AOP-Att2_072006_DRAFT.pdf, pages 62 through 711.
[56] See Exhibit 5, Attachment 2_Final Permit.pdf, Enclosure 1 Emission Unit Specific License, approximate pages 62 through ~738.

Comment 41 addresses the absence of Health notice of construction (NOC) approvals for the largest construction project in North America, the Waste Treatment Plant (WTP) in the draft Permit.

AOP Revision H [Exhibit 8] was a significant modification[57] to the Hanford Site Air Operating Permit (number 00-05-006) that was in force from July 2, 2001 through December 31, 2006. This significant modification was issued by Ecology on February 17, 2005[58]. Addition of Revision H occurred only after reviews by the public, affected states, and EPA (Region 10) as required by WAC 173-401-725(4)(b) and 40 CFR 70.7(e)(4)(ii). Notice of construction (NOC) approval conditions for 20 WTP emission units' occupy pages 489 through 661 of Revision H[59]. Included in these 172 pages are about 43 conditions establishing abatement control requirements, about 104 conditions establishing required monitoring or sampling, about 80 conditions establishing reporting requirements, about 53 conditions setting recordkeeping requirements, plus numerous conditions establishing notification, analytical and quality assurance requirements, and more.

About 80 of these conditions are federally enforceable as they cite or otherwise invoke federal regulation[60]. [A tabulation of Revision H monitoring, reporting and recordkeeping condition numbers, including those federally enforceable, for WTP conditions not included in the Permit is presented in Exhibit 8, WTP-Rev_H_Monitoring_Reporting_Recordkeeping_Conditions.pdf.]

With respect to permit renewal, neither the public review draft Permit[61] or the final Permit (00-05-006 Renewal 1)[62] contain any of these conditions for the WTP. Not a single condition.

WAC 173-401-800(1) requires the permitting authority provide "…enough information to inform the public of the extent of the actions proposed" as part of the public involvement process required for Permit renewal. This WAC 173-401-800(1) requirement was not satisfied as Ecology provided no information that WTP NOC approvals contained in AOP Revision H were being removed as part of the Permit renewal process. There is no mention of this fact in the public review fact sheet included

[57] WAC 173-401-725(4) and 40 CFR 70.7(e)(4)
[58] Ecology ltr. to L. Kral, EPA Region 10, A. Ginsburg, Oregon DEQ, G. Burke, CTUIR and R. Jim, YN, "Re: Issuance of Significant Modification to the Hanford Site Title V Air Operating Permit for Revision of Radioactive Emission Units (Revision H)", dated February 17, 2005. Included as Exhibit 8, Rev_H_Issuing_Letter.pdf.
[59] See Exhibit 8, AOP_Rev-H_pgs_404-606.pdf and AOP_Rev-H_pgs_607-827.pdf.
[60] For example: "The facility must meet all reporting and recordkeeping requirements of 40 CFR 61, Subpart H. "
[61] See Exhibit 2, AOP-Att2_072006_DRAFT.pdf.
[62] See Exhibit 5, Attachment 2_Final Permit.pdf.

in the Exhibit 3 Responsiveness summary, in the press announcement[63], or in the Attachment 2 Statement of Basis[64].

WTP's status has not changed, it is still an active project, and still inching towards completion. Neither has there been a significant modification filed for removal of these 172 pages of conditions and 20 emission units[65].

Pursuant to WAC 173-401-725(4)(a) and 40 CFR 70.7(e)(4)(i) a significant modification is required for "every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions." Deleting multiple monitoring, reporting and recordkeeping conditions most certainly qualifies as both a "significant change" and as a "relaxation".

WAC 173-401-725(4)(b) and 40 CFR 70.7(e)(4)(ii) require "…significant permit modifications …meet all requirements …including those for applications, public participation, review by affected States, and review by EPA, as they apply to permit issuance and permit renewal."

Total elimination of about 43 conditions establishing abatement control requirements, about 104 conditions establishing required monitoring or sampling, about 80 conditions establishing reporting requirements, about 53 conditions setting recordkeeping requirements surely triggers the significant modification process defined in WAC 173-401-725(4) and 40 CFR 70.7(e)(4). However, this removal was affected without consideration of public participation, review by affected States, and review by EPA as required by WAC 173-401-725(4)(b), 40 CFR 70.7(e)(4)(ii) and 40 CFR 70.7(h). In fact, the public was never notified Ecology had affected this significant modification.

Ecology did not comply with the WAC 173-401-800(1) requirement to provide the public with information on the extent of the actions proposed. Ecology did not provide the legal and factual basis for eliminating these 172 pages of requirements and 20 emission units as required by WAC 173-401-700(8) and 40 CFR 70.7(a)(5). Nor did Ecology follow the significant modification process, including the requirement for public review pursuant to WAC 173-401-725(4), 40 CFR 70.7(e)(4) and 40 CFR 70.7(h). Thus the Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-4.2 Comment 44

Comment 44 requests the submittal date for the annual compliance certification report required by WAC 173-401-630(5) and 40 CFR 70.6(c)(5) be returned to the July 1 date

[63] See Exhibit 3, Responsiveness_Summary_10-05-06.pdf, pages 164-168.
[64] See Exhibit 2, AOP-Att2-SOB_062006_DRAFT.doc.
[65] See Ecology's permit register at http://www.ecy.wa.gov/programs/air/permit_register/register.html.

indicated in the initial Hanford Site Air Operating Permit (number 00-05-006). The Permit renewal (number 00-05-006 Renewal 1) advanced the submittal date to July 31.

The initial Hanford Site Air Operating Permit (AOP), Number 00-05-006, became effective on July 2, 2001. AOP, Section 4.3.4, "Annual Compliance Certification"[66], required submittal of an annual compliance certification report no later than 12 months following the effective date of the permit, or by July 1 of each year. As part of the Permit renewal process Ecology changed Section 4.3.4 to require annual compliance certification reports be "…submitted by July 31"[67].

WAC 173-401-800(1) requires the permitting authority provide "…enough information to inform the public of the extent of the actions proposed" as part of the public involvement process required for Permit renewal. This WAC 173-401-800(1) requirement was not satisfied as Ecology provided no information the annual compliance certification report submittal date was being changed from July 1 each year to July 31 of each year. There is no mention of this fact in the public review fact sheet (included in the Exhibit 3 Responsiveness summary), in the press announcement[68], or in the Attachment 2 Statement of Basis[69].

Pursuant to WAC 173-401-725(4)(a) and 40 CFR 70.7(e)(4)(i) a significant modification is required for "…every relaxation of reporting or recordkeeping permit terms or conditions." WAC 173-401-725(4)(b) and 40 CFR 70.7(e)(4)(ii) require "…significant permit modifications …meet all requirements …including those for applications, public participation, review by affected States, and review by EPA, as they apply to permit issuance and permit renewal." These requirements include notification of the public[70] followed by a 30-day comment period[71]. Ecology made no such notification[72].

WAC 173-401-725(2) & (3) and 40 CFR 70.7(e)(2) & (3) address air operating permit minor modifications, a lesser modification category for permit modifications that do not meet the criteria for a significant modification. However, even a minor modification requires a public announcement in the permit register followed by "…a public comment period of twenty-one days" [WAC 173-401-725(2)(d)] or "…a public comment period of at least twenty-one days" [WAC 173-401-725(3)(d)]. No announcement was made[73]. No public review occurred.

It is believed that advancing the submittal date of a CAA-required report is a relaxation of a reporting term, and therefore qualifies as a significant modification, subject to "…all requirements …including those for applications, public participation, review by affected

[66] See Exhibit 10, AOP-StandardTerms_10-23-03.pdf, page 21.
[67] See Exhibit 5, Standard_Terms & General Conditions_Final Permit.pdf, page 20.
[68] See Exhibit 3, Responsiveness_Summary_10-05-06.pdf, pages 164-168.
[69] See Exhibit 2, AOP-Att2-SOB_062006_DRAFT.doc.
[70] See WAC 173-401-800(2) and 40 CFR 70.7(h).
[71] See WAC 173-401-800(3) and 40 CFR 70.7(h)(4).
[72] See Ecology's permit register at http://www.ecy.wa.gov/programs/air/permit_register/register.html.
[73] See Ecology's permit register at http://www.ecy.wa.gov/programs/air/permit_register/register.html.

States, and review by EPA, as they apply to permit issuance and permit renewal."[74] However, even if this change were not considered a significant modification the change would be subject to the minor modification requirements. These include a public announcement in the permit register and public review [WAC 173-401-725(2)(d) or WAC 173-401-725(3)(d)].

Ecology advanced the submittal date of a CAA-required report without providing enough information to inform the public of the extent of the actions proposed, as required by WAC 173-401-800(1). Ecology did not make the appropriate public announcements required by WAC 173-401-800(2) and 40 CFR 70.7(h) or, in the case of a minor modification, by WAC 173-401-725(2)(d) or WAC 173-401-725(3)(d). Nor did Ecology provide the legal and factual basis for advancing the submittal date as required by WAC 173-401-700(8) and 40 CFR 70.7(a)(5). Thus the Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-5 The Permit establishes a fee process not supported by statute and incapable of complying with 40 CFR 70.9 and WAC 173-401-900(1), 915, 920, 925, and 940 [Comments 22 & 47].

Comments 22 and 47 address fee process requirements of 40 CFR 70.9 and WAC 173-401-900 as contained in Standard Terms and General Conditions Section 3.6 of the draft Permit[75]. In response to these comments Ecology did make substantial changes to Section 3.6, but the changes were not sufficient to meet regulatory requirements as stated below.

The final paragraph in Section 3.6 "PERMIT FEES"[76] states, in part, the following:

> "Per WAC 246-247-065 [Fees], fees for airborne emissions of radioactive materials shall be submitted in accordance with WAC 246-254-160. The permittee shall pay costs associated with direct staff time of the air emissions program in accordance with WAC 246-254-120(1)(e)…."

A 2005-modified memorandum of understanding between Ecology and Health[77] (Ecology/Health MOU) contains the following on page 17, number 4 of Attachment 2 of the Permit:

> "Health will bill Energy [USDOE, the permittee] and collect fees separately, in accordance with Chapter 246-254 WAC, for all costs incurred by Health in regulating the radionuclides portion of the air operating permit."

[74] See WAC 173-401-725(4)(b) and 40 CFR 70.7(e)(4)(ii).
[75] See Exhibit 5, Standard_Terms & General Conditions_Final Permit.pdf, Section 3.6, page 12 of 31.
[76] See Exhibit 5, Standard_Terms & General Conditions_Final Permit.pdf, Section 3.6, page 12 of 31.
[77] "Memorandum of Understanding between the Department of Ecology and the Department of Health, Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions", signed 2005. See Exhibit 5, Attachment 2_Final Permit.pdf, pages 13-19.

The statutory authority for Washington State's EPA-approved Operating Permit Program is Chapter 70.94 RCW "Washington clean air act". 70.94.162(1) RCW authorizes Ecology and delegated local air authorities "…to determine, assess, and collect… annual fees sufficient to cover the direct and indirect costs of implementing a state operating permit program approved by the United States environmental protection agency under the federal clean air act." This RCW is specific to Ecology, and delegated local air authorities, it does not bestow air operating permit fee authorization to Health, as Health is not a delegated air authority.

The fee process portions of 70.94.162 RCW are codified in Part X of WAC 173-401 [WAC-173-401-900 through 940]. The Attorney General of Washington's opinion[78] dated October 27, 1993, which is required by 40 CFR 70.4(b)(3) for obtaining EPA's approval of Washington State's Operating Permit program, also points to WAC 173-401-900 through 940 as containing the state's authorization to assess and collect fees for facilities subject to Title V of the CAA and 40 CFR 70.

WAC 173-401 is enforced by Ecology and by other permitting authorities. Health is not a permitting authority[79].

WAC 246-247-065 [Fees], does indeed require fees for airborne emissions of radioactive materials be submitted accordance with WAC 246-254-160. WAC 246-247-065 also lists 70.94 RCW as an underlying statutory authority. This is not correct. Neither WAC 246-247-065 nor WAC 246-254-160 complies with the state operating permit fee requirements of 70.94.162 RCW. While Health may use WAC 246-247-065 to collect non-operating permit-associated fees, Health does not have the authority to assess and collect operating permit fees.

There are a vary considerable number of requirements specified in the 70.94 RCW-authorized fee collection process and codified in WAC 173-401-900 through 940 that are not required by the Health-enforced regulations WAC 246-247-065 and WAC 246-254. Some of these differences include:

- establishment of a fee schedule sufficient to cover air operating permit development and administration costs with an opportunity for public participation [WAC 173-401-900(1)],
- the requirement to conduct a workload analysis [*Id* at 900(1)],
- the requirement that all related permit program fees be deposited in a dedicated air operating permit account [*Id* at 915(2)],
- the requirement for public participation in the fee determination process [*Id* at 920(1)],
- the requirement providing an opportunity to review data used to determine development and oversight costs [*Id* at 925(1)], and
- specification of fee-eligible activities [*Id* at 940(1)].

[78] See Exhibit 11, AttorneyGeneralOpinion1993.pdf, Section IV Permit Fees, page 8.

[79] 40 CFR 70.2, *Permitting authority* means…(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part [70].

There are many more differences not stated here.

With respect to the Permit, the permitting agencies assess fees under different regulations; Ecology assesses its fees in accordance with WAC 173-401-900 through 940, Health assesses its Permit fees pursuant to WAC 246-247-065 and WAC 246-254[80].

It appears Benton Clean Air Authority (BCAA) assesses its fees for asbestos regulation (40 CFR 61, Subpart M) directly from DOE/RL through a MOU[81] under the regulatory authority of BCAA Regulation 1. There appears to be no mention of the fee collection mechanism BCAA uses to recoup costs incurred regulating outdoor burning (WAC 173-425).

Additionally, Ecology's response to comment 22 "…The BCAA involvement in the Hanford AOP is minimal; therefore is not included in the Biennial Workload Analysis" required by WAC 173-401-920(1)(c), seems to indicate BCAA is not following at least one requirement of WAC 173-401-900 through 940.

40 CFR 70.9(a) states in part: "The State program shall require that the owners or operators of part 70 sources pay annual fees…that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs" (emphasis added). The Permit is not in compliance with this applicable requirement because some fees are collected pursuant to regulations not compatible with the EPA-approved WAC 173-401.

There is also no explanation in the Statements of Basis setting forth the legal and factual basis for the differing fee payment requirements (including references to the applicable statutory or regulatory provisions) as required by WAC 173-401-700(8) and 40 CFR 70.7(a)(5).

The Permit implements fee requirements, some of which are not compatible with 40 CFR 70.9, 70.94 RCW, and WAC 173-401-900, 920, 925 and 940. Thus the Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-6 The Permit does not contain all applicable requirements, contrary to 40 CFR 70.1(b), 70.6(a)(1), and WAC 173-401-100(2), 600(1) [Comment 41].

The Permit is required to assure compliance with all applicable requirements [40 CFR 70.1(b), 70.6(a)(1), and WAC 173-401-100(2), 600(1)].

[80] "Health will bill Energy (USDOE, the permittee) and collect fees separately, in accordance with Chapter 246-254 WAC, for all costs incurred by Health in regulating the radionuclides portion of the air operating permit." (Attachment 2, page 17, number 4.)
[81] See Exhibit 5, SOB_Attachment_3.pdf, pages 9-16.

B-6.1 Comment 41

(See B-4.1 above.) Comment 41 addresses missing requirements for the largest construction project in North America, the Waste Treatment Plant (WTP). These requirements were contained in notice of construction (NOC) approvals issued by Health under the authority of Chapter WAC 246-247.

Statutory authorities for Chapter WAC 246-247 include 70.94 RCW and 70.98 RCW. Pursuant to WAC 173-401-200(4)(d) an applicable requirement includes "Chapter 70.98 RCW and rules adopted thereunder" as they apply to emission units at a chapter 401 source. The Hanford Site is a chapter 401 source as evidenced by the Permit.

As stated in B-4.1 above, these applicable requirements were added to the initial Permit (#00-05-006) via a significant modification (Revision H)[82]. However, when the permit was renewed, neither the draft[83] nor final Permit (#00-05-006 Renewal 1)[84] contained any of these applicable requirements. The status of the WTP construction project has not changed in the interim.

Because the WTP construction project is still active, removal of these applicable requirements must follow the significant modification process[85]. This removal process was never invoked. Therefore, the requirements are still applicable requirements and they must appear in the permit pursuant to 40 CFR 70.1(b), 70.6(a)(1), and WAC 173-401-100(2), 600(1).

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4) because the Permit cannot assure compliance with all applicable requirements in accordance with 40 CFR 70.1(b), 70.6(a)(1), and WAC 173-401-100(2), 600(1). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-7 The Statement of Basis for Attachment 2 of the draft Permit is not in compliance with applicable requirements as specified by 40 CFR 70.7(a)(5) and WAC 173-401-700(8). (Comments 16, 17 & 18)

40 CFR 70.7(a)(5) and WAC 173-401-700(8) state, in part, the "permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." The Attachment 2 Statement of Basis[86] does not meet these requirements. A statement of basis is issued as a separate supporting reference document. It is not enforceable.

[82] See Exhibit 8.
[83] See Exhibit 2, AOP-Att2_072006_DRAFT.pdf.
[84] See Exhibit 5, Attachment 2_Final Permit.pdf.
[85] WAC 173-401-725(4) and 40 CFR 70.7(e)(4)
[86] See Exhibit 2, AOP-Att2-SOB_062006_DRAFT.doc.

B-7.1 Comment 16

Comment 16 requests inclusion of 2 legally binding settlement agreements between the Department of Energy, Richland Operations Office (RL) and Health [Exhibit. 9] in the Attachment 2 Statement of Basis.

The 09-12-03 settlement agreement[87] legally establishes content of many of the NOC approval conditions. Thus this settlement agreement "…set(s) forth the legal…factual basis for [many] draft permit conditions…" and should be included in the Attachment 2 Statement of Basis.

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Ecology did not adequately discharge the requirement to "…provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)" as required by 40 CFR 70.7(a)(5) and WAC 173-401-700(8). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

B-7.2 Comment 17

Comment 17 requests inclusion in the Attachment 2 Statement of Basis of the "Memorandum of Understanding between the Department of Ecology and the Department of Health, Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions", signed 2005[88]. This MOU establishes each agency's responsibilities with regard to the Permit. It significantly impacts Permit structure, Permit administration and Permit enforcement. Thus this MOU helps to "…set forth the legal and factual basis for the draft permit conditions…" and should be included in the statement of basis.

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Ecology did not adequately discharge the requirement to "…provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)" as required by 40 CFR 70.7(a)(5) and WAC 173-401-700(8). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

[87] See Exhibit 9, DOE-WDOH_Settlement_Agreement_9-12-03.pdf.
[88] This MOU currently resides in Attachment 2, pages 13-19 [Exh. 5, Attachment 2_Final Permit.pdf].

B-7.3 Comment 18

The 6th paragraph on page 1 of 30 in the Standard Terms and General Conditions [Exhibit. 2] portion of the draft Permit contains the following statement; "The regulatory agency relationships are described in the Statement of Basis (Statement)."

Ecology and Health are the agencies responsible for enforcement of all but two Permit conditions (outdoor burning and asbestos). Comment 18 points out the referenced regulatory agency relationship between Ecology and Health is not in any of the statements of basis, contrary to Ecology's statement above ("The regulatory agency relationships are described in the Statement of Basis").

The referenced regulatory agency relationship between Ecology and Health is contained in the "Memorandum of Understanding between the Department of Ecology and the Department of Health, Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions", signed 2005. This MOU establishes each agency's responsibilities with regard to the Permit. It significantly impacts Permit structure, Permit administration and Permit enforcement. Thus this MOU helps to"…set forth the legal and factual basis for the draft permit conditions…" and should be included in a statement of basis.

Additionally, comment 18 requests the EPA-DOE MOU[89] be included in a statement of basis. The EPA-DOE MOU represents a "…mutual effort to clarify provisions of 40 CFR Part 61, Subpart H, I, Q, and T, National Emissions Standards for Hazardous Air Pollutants (NESHAP) promulgated under the Clean Air Act (CAA) for radionuclide emissions from DOE facilities. This effort has been undertaken to assure uniform and consistent interpretation of the NESHAP provisions for radionuclides at DOE facilities and EPA regional offices…" Many of the Permit requirements in Attachment 2 regulating radionuclides are from 40 CFR 61, Subpart H. Thus this MOU aids in setting "…forth the legal and factual basis for the draft permit conditions…" and should be included in a statement of basis.

The Permit is not in compliance with all "applicable requirements" as defined by 40 CFR 70.2 and WAC 173-401-200(4). Ecology did not adequately discharge the requirement to "…provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)" as required by 40 CFR 70.7(a)(5) and WAC 173-401-700(8). Pursuant to 40 CFR 70.8(c)(1) "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part [70]…"

[89] "Memorandum Of Understanding Between The U.S. Environmental Protection Agency And The U.S. Department Of Energy Concerning The Clean Air Act Emission Standards For Radionuclides 40 CFR Part 61 Including Subparts H, I, Q & T", signed by EPA in 1994 and by DOE in 1995. See Exhibit 6, DOE-EPA_MOU.pdf.

B-8 The Permit does not meet the intent of Title V because it includes unenforceable portions. (Comment 31)

Attachment 2 of the Permit contains Health's Radioactive Air Emissions License (FF-01) as permit terms and conditions and is enforceable by Health. Comment 31 requests relocation of the Ecology/Health MOU[90] and an EPA letter granting partial delegation of authority for CAA Section 112(I) to Health to the Attachment 2 Statement of Basis.

In the proposed Permit Ecology replaced the partial delegation letter with the entire federal register notice[91]. Therefore grounds for objection arose after the comment period [40 CFR 70.8(d)].

Attachment 2[92], an enforceable portion of the Permit, now contains a federal register notice (pages 3 through 9) and an inter-agency MOU (pages 13 through 19), neither of which are enforceable against the permittee.

As neither of these items is enforceable against the permittee, they should be moved to the Attachment 2 Statement of Basis, which is not directly enforceable. A statement of basis "…sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)[93]. Both the MOU and federal register notice could meet criteria for inclusion in a statement of basis.

In the background section of *New York Public Research Interest Group v. Whitman ("NYPRIG"), 321 F.3d (2d Cir. 2003)* [Exh. 10] the Court wrote:

> "In 1990, Congress added Title V to the CAA, which requires major stationary sources of air pollutants to receive operating permits incorporating CAA requirements and establishes a procedure for federal authorization of state-run Title V permitting programs. Title V permits…consolidate all applicable requirements in a single document (*emphasis added*).

In *Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996)* a Title V permit is defined as "a source-specific bible for Clean Air Act compliance."

The EPA publication *The Clean Air Act Amendments of 1990* [94] states "The permit program will ensure that all of a source's obligations with respect to its pollutants will be contained in one permit document…"

Senate Report 101-228 (12-20-89), which accompanied bill S. 1630 to amend the CAA states in part,

---

[90] "Memorandum of Understanding between the Department of Ecology and the Department of Health, Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions", signed 2005.
[91] 71 Fed. Reg. 107, June 5, 2006, p. 32276 - 32281
[92] See Exhibit 5, Attachment 2_Final Permit.pdf.
[93] See 40 CFR 70.7(a)(5) and WAC 173-401-700(8).
[94] This publication can be downloaded at http://www.epa.gov/oar/caa/overview.txt

> "The first benefit of the title V permit program is that, like the CWA program, it will clarify and make more readily enforceable a source's pollution control requirements. Currently, in many cases, the source's pollution control obligations-ranging from emissions controls and monitoring requirements to recordkeeping and reporting requirements-are scattered throughout numerous, often hard-to-find provisions of the SIP or other Federal regulations. In addition, SIP regulations are often written to cover broad source categories, and may not make clear how a general regulation applies to a specific source. Moreover, in some cases, the source is not required under the SIP or other Clean Air Act provisions to submit periodic compliance reports to EPA or the States. As a result, there is no ready way to identify the extent of a source's compliance and noncompliance. The air permit program will ensure that all of a source's obligations with respect to each of the air pollutants it is required to control will be contained in one permit document." (emphasis added)

Neither the inter-agency MOU nor the federal register notice are applicable requirements under the CAA or Title V regulations. They are also not applicable requirements or enforceable against the permittee. Therefore, neither the MOU nor the federal register notice is appropriate for inclusion in the Permit. As the Permit is not in compliance with the intent of a Title V permit, EPA should object.

C. EPA's mandatory legal duty to object

Under the CAA, EPA "shall issue an objection [to the issuance of a Title V permit]…if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]," or is not in compliance with the Title V regulations[95]. Federal case law leaves no question that EPA has a mandatory duty to object[96]. In *New York Public Research Interest Group v. Whitman ("NYPRIG"), 321 F.3d (2d Cir. 2003)* EPA denied a petition to enter objections to three proposed Title V permits, even though EPA conceded that the permits probably failed to comply with requirements of 40 CFR, Part 70[97]. EPA contended it was not required to object because the deficiencies in public notice were "harmless" and could have been remedied after the fact if the objecting parties had requested a hearing[98].

The United States Court of Appeals for the Second Circuit held that, where EPA recognized deficiencies in a Title V permit that failed to comply with Title V or its regulations, it is not free to approve the permit. The Court made clear that such a situation does not involve any deference to "agency expertise" – under Title V, EPA simply "does not have discretion whether to object to draft permits once noncompliance has been demonstrated."[99]

---

[95] 42 USC 7661d(b)(2); see also 40 CFR 70.8(c)(1) ("The Administrator will object to the issuance of any proposed permit determined not to be in compliance with applicable requirements or requirements under this part [70]")
[96] *New York Public Research Interest Group v. Whitman ("NYPRIG"), 321 F.3d (2d Cir. 2003).*
[97] NYPRIG, 321 F.3d at 323-324.
[98] *Id.* At 324, 332.
[99] *Id.* At 333-334.

The Court also referred to the legislative history behind the statutory provision in Section 505(b)(2), which states in the relevant part as follows: "This duty to object to such permits is a nondiscretionary duty. Therefore, in the event a petitioner demonstrates that a permit violates the Act, the Administrator must object to that permit."[100]

III. CONCLUSION

For the reasons explained above, EPA is obligated to object to the Permit and modify, terminate, or revoke and reissue the Permit using procedures in 40 CFR 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

Dated: 02-10-2007

By: _____

Bill Green, Petitioner
424 Shoreline Ct.
Richland, WA 99354
(509) 375-5443

cc: Keith A. Klein, Manager, Department of Energy, Richland Operations Office
Roy J. Schepens, Manager, Department of Energy, Office of River Protection
Jane A. Hedges, Manager, Washington State Department of Ecology
L. Michael Bogert, EPA Regional Administrator, Region X
Leslie R. Seffern, Assistant Attorney General for Department of Ecology

[100] 136 Cong. Rec. S16,895, S16,944 (1990)

Contents: Petition Exhibits CD

Exhibit 1 – Petitioner's comments

1. 7-28-06_Comments.pdf
2. 7-31-06_Comments.pdf
3. 8-11-06_Comments.pdf

Exhibit 2 – Draft Permit

1. AOP-Att1_062006_DRAFT.doc
2. AOP-Att1_SOB_062006_DRAFT.doc
3. AOP-Att2_072006_DRAFT.pdf
4. AOP-Att2-SOB_062006_DRAFT.doc
5. AOP-Att3_062006_DRAFT.doc
6. AOP-Att3-SOB_062006_DRAFT.doc
7. AOP-Renewal-SOB_STGC_062006_DRAFT.doc
8. AOP-Renewal-STGC_062006_DRAFT.doc

Exhibit 3 – Responsiveness summary

1. Responsiveness_Summary_10-05-06.pdf
2. Transmittal_Letter.pdf

Exhibit 4 – Revised responsiveness summary

1. Revised_Responsiveness_Summary_11-14-06.pfd
2. Transmittal_Revised_Responsiveness_Sumary_11-13-06.pdf

Exhibit 5 – Final Permit

1. Attachment 1_Final Permit.pdf
2. Attachment 2_Final Permit.pdf
3. Attachment_3_Final Permit.pdf
4. SOB_Attachment_1.pdf
5. SOB_Attachment_2.pdf
6. SOB_Attachment_3.pdf
7. SOB_Standard_Terms_&_General_Conditions.pdf
8. Standard_Terms & General Conditions_Final Permit.pdf
9. Transmittal_Letter_Final Permit.pdf

Exhibit 6 – EPA/DOE MOU

1. DOE_HEALTH_PCM-per_EPA-DOE_MOU.pdf
2. DOE-EPA_MOU.pdf

Exhibit 7 – Bechtel marshalling yard dust control plan

1. BNI_Dust_Control_Plan.pdf
2. BCAA-Bechtel_8-2003_Agreement.pdf

Exhibit 8 – AOP Revision H

1. AOP_Rev-H_pgs_1-203.pdf
2. AOP_Rev-H_pgs_204-403.pdf
3. AOP_Rev-H_pgs_404-606.pdf
4. AOP_Rev-H_pgs_607-827.pdf
5. AOP_Rev-H_pgs_828-1080.pdf
6. AOP_TOC_APRVL.doc
7. AOP_TOC_NOC_ID.doc
8. AOPrevH_NoAtt2.pdf
9. Rev_H_Issuing_Letter.pdf
10. WTP-Rev_H_Monitoring_Reporting_Recordkeeping_Conditions.pdf

Exhibit 9 – Settlement Agreements

1. 09-14-04_DOE-Health_Settlement_Agreement.pdf
2. DOE-WDOH_Settlement_Agreement_9-12-03.pdf

Exhibit 10 – Initial AOP

1. AOP_Attachment_1_10-23-03.pdf
2. AOP-StandardTerms_10-23-03.pdf
3. FinalAOP-EcologySOB.doc

Exhibit 11 – 10-27-1993 AG Letter

1. AttorneyGeneralOpinion1993.pdf