

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF BILL GREEN	}	
RICHLAND, WASHINGTON	}	
	}	
	}	PERMIT NO.: 00-05-006,
THE HANFORD SITE	}	RENEWAL 2,
TITLE V OPERATING PERMIT	}	REVISION A
RENEWAL 2, REVISION A	}	
ISSUED BY THE WASHINGTON STATE	}	
DEPARTMENT OF ECOLOGY	}	

PETITION REQUESTING THE ADMINISTRATOR OBJECT TO THE
U.S. DEPARTMENT OF ENERGY HANFORD SITE,
TITLE V OPERATING PERMIT,
NUMBER 00-05-006, RENEWAL 2, REVISION A

Pursuant to *Clean Air Act* (CAA) § 505 (b)(2) [42 U.S.C. 7661d (b)(2)] and 40 Code of Federal Regulations (C.F.R.) 70.8(d) Bill Green (Petitioner) hereby petitions the Administrator of the United States Environmental Protection Agency (EPA) to object to the Hanford Site Title V Operating Permit, Number 00-05-006, Renewal 2, Revision A (Permit). As detailed below, the regulatory structure under which the Permit was created removes radionuclides (including radon) from regulation under Title V of the CAA and 40 C.F.R. 70 (Part 70). Rather, radionuclides in the Permit are regulated in a license created pursuant to a Washington State statute and regulation that do not implement CAA Title V or Part 70, are not obligated by requirements of CAA Title V or Part 70, and cannot be enforced by any Part 70 permitting authority. This structural flaw also did not provide the Petitioner, and all other members of the public, the opportunity to comment on *federally-enforceable requirements*¹ controlling radionuclide air emissions. In fact, that portion of the Permit containing all terms and conditions implementing requirements of 40 C.F.R. 61 subpart H² was issued as final on February 23, 2012, more than one (1) year before the draft Permit was offered to the public for review.

The Permit also overlooks federal regulation of the certified releases of radon. Radon is the only radionuclide identified by name as a *hazardous air pollutant* in CAA § 112. The Permit further overlooks emissions of radionuclide gases resulting from decay of certain radionuclides released into the Columbia River from contaminated groundwater.

The well-supported objections below plus exhibits and relevant binding authority combine to demonstrate the Permit does not comply with the CAA and Part 70. The Administrator is therefore obligated to object.

¹ See 40. C.F.R. 70.6 (b)

² *National Emission Standards for Emissions of Radionuclides Other Than Radon From Department of Energy Facilities.*

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1. TERMS

Certain terms and definitions used in this Petition are as follows:

- “Administrator” means the Administrator of the U.S. Environmental Protection Agency.
- The terms “CAA Title V permit”, “Title V permit”, “air operating permit”, “AOP”, and “Part 70 permit” are synonymous and mean a permit required by CAA § 502 (a) [42 U.S.C. 7661a (a)].
- CAA or Act is the *Clean Air Act*, 42 U.S.C. 7401, *et seq.*
- “Ecology” means the Washington State Department of Ecology
- “Health”, “DOH”, or “WDOH” means the Washington State Department of Health
- NERA is *The Nuclear Energy and Radiation Act*, codified in Chapter 70.98 RCW
- NESHAPs stands for the *National Emission Standards for Hazardous Air Pollutants*
- “Part 70” means 40 C.F.R. part 70
- “Permit” means the Hanford Site Title V Operating Permit, No. 00-05-006, Renewal 2, Revision A
- “permitting authority” is as defined in CAA § 501 (4) [42 U.S.C. 7661 (4)] and 40 C.F.R. 70.2:
 - “The term ‘permitting authority’ means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.” CAA § 501 (4) [42 U.S.C. 7661 (4)];
 - “*Permitting authority* means either of the following: (1) The Administrator, in the case of EPA-implemented programs; or (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.” 40 C.F.R. 70.2
- “RCW” is the Revised Code of Washington
- “subpart H” means 40 C.F.R. 61 subpart H, the *National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*.
- “WAC” means the Washington Administrative Code

2. BACKGROUND

Under section 505(a) of the *Clean Air Act* (CAA) [42 U.S.C. 7661d (a)] and 40 C.F.R. 70.8(a), 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 C.F.R. 70, EPA must object to the permit. If EPA does not object to the permit on its own initiative, any person may petition the Administrator to object to the permit³ within 60 days after the expiration of EPA’s 45-day review period.

A petition for administrative review does not stay the effectiveness of an issued permit or the terms and conditions therein. Such petition must be based on objections raised with “reasonable specificity” during the public comment period. However, a

³ CAA 505(b)(2) [42 U.S.C. 7661d (b)(2)] and 40 C.F.R. 70.8(d)

petitioner may also raise an objection if it is demonstrated it was “impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.”⁴

The Administrator has a nondiscretionary duty to grant or deny the petition within 60 days and may not delegate action on the petition.⁵ Should the Administrator fail to discharge this nondiscretionary duty, the Petitioner may seek remedy in U.S. District Court⁶, after first serving formal notice of intent to sue⁷.

Under the CAA, the Administrator “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.⁸ If the Administrator denies the petition, the denial is subject to review in the Federal Court of Appeals under CAA § 307 [42 U.S.C. 7607]⁹. The court “may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”¹⁰

If EPA objects to a permit in response to a petition, the permitting authority or EPA will modify, terminate, or revoke and reissue the permit¹¹ using procedures in 40 C.F.R. 70.7(g)(4) or (5)(i) and (ii).

2.1 Overview.

This is the second (2nd) petition filed by the Petitioner objecting to flaws in Renewal 2 of the Hanford Site AOP. The first (1st) petition (Petition 1) was received by the Acting Administrator of EPA on April 26, 2013, well within 60 days of the expiration of EPA’s 45-day review period. Objections raised in Petition 1 primarily regarded use of a regulatory structure that removed terms and conditions implementing subpart H from requirements of Part 70. In Petition 1 the Petitioner also raised an interesting objection regarding whether the 30-day public comment period addressed in 40 C.F.R. 70.7 (h)(4) is 30 consecutive days. Even though far more than 60 days has past since the Administrator received Petition 1, the Administrator has yet to grant or deny this petition. As noted above, this duty is nondiscretionary and may not be delegated. (*See* CAA § 505(b)(2); 42 U.S.C. 7661d (b)(2))

The instant petition (Petition 2) contains some of the same, or very similar, objections regarding use of a Part 70 permit to remove subpart H requirements from regulation under Part 70. Petition 2 also objects to Ecology’s failure to regulate radon,

⁴ 40 C.F.R. 70.8(d)

⁵ CAA § 505(b)(2); 42 U.S.C. 7661d (b)(2)

⁶ Any person may commence a civil action on his own behalf “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator” CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2)

⁷ CAA § 304 (b)(2), 42 U.S.C. 7604 (b)(2), and 40 C.F.R. 54

⁸ 42 U.S.C. 7661d (b)(2); *see also* “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]”. 40 C.F.R. 70.8(c)(1)

⁹ CAA § 505(b)(2); 42 U.S.C. 7661d (b)(2)

¹⁰ CAA § 304(d); 42 U.S.C. § 7604(d)

¹¹ *See* CAA § 505 (b)(3); 42 U.S.C. 7661d (b)(3).

the only radionuclide identified by name in CAA § 112, and the failure to regulate the Columbia River as a source with the potential-to-emit radionuclide air emissions from Hanford. The fact some of Hanford’s radionuclides enter the Columbia River through contaminated seeps and springs has been documented for decades, and the fact decay products from some of these radionuclides include radioactive gasses has been know for far longer.

2.2 General chronology.

April 1, 2013	Date Ecology issued Renewal 2 as final with an effective date of April 1, 2013 (<i>Permit Register</i> vol. 14, no. 6 ¹² , Mar. 25, 2013)
April 19, 2013	Date Petitioner filed for review before the Pollution Control Hearings Board (PCHB)
April 26, 2013	Date EPA Acting Administer received petition objecting to issuance of the Hanford Site Air Title V Operating Permit, Number 00-05-006, Renewal 2 (Permit 1)
May 24, 2013	Date Ecology stipulated to re-opening Renewal 2 of the Permit 1 “for cause, based on possible confusion generated by the public comment notices for the [draft] Permit issued by Ecology in January 2013.” <i>Respondents’ Stipulation in Response to Motion for Summary Judgment</i> , PCHB 13-055, 5/24/2013 (enclosed as <i>Exhibit 3</i>)
June 30 through August 2, 2013	Date Ecology re-opened Renewal 2 of the permit for public review.
July 9, 2013	Date PCHB ruled re-opening Permit 1 for public review: 1.) rendered issues regarding public review as moot, and 2.) rendered issues regarding public review of Permit 1 conditions regulating radionuclides as not ripe for consideration because Permit 1 is subject to change based on new public comments received. <i>Corrected Order on Motions for Summary Judgment and Request for Dismissal</i> , PCHB No. 13-055, 7/9/2013
August 1, 2013	Date Petitioner submitted public comments raising similar objections as those raised in comments submitted earlier. (All Petitioner’s comments are enclosed as <i>Exhibit 1</i> .)
November 17 through December 20, 2013	Date Ecology opened a comment period on the draft Permit to: 1.) incorporate a new radioactive air emissions license issued by Health, 2.) to incorporate new notice of construction (NOC) approval conditions regarding use of diesel engines, and 3.) to increase ammonia limits from some Tank Farms tanks.
December 19,	Date Petitioner submitted comments to Ecology. Petitioner’s

¹² Available at:

http://www.ecy.wa.gov/programs/air/permit_register/Permit_PastYrs/2013_Permits/2013_03_25.html

2013	comments were primarily concerned with the amended Health license and the modified NOC conditions for Tank Farm tanks.
February 13, 2014	Date the “final proposed draft” and Ecology’s response to public comments was emailed to EPA for 45-day review. Ecology’s responses to public comments, as emailed to EPA, are enclosed as <i>Exhibit 2</i> .
March 31, 2014	Date EPA’s 45-day review period expired. EPA did not object.
May 1, 2014	Date Ecology anticipates issuing the Permit as final.

2.3 Permit organization.

The Permit is organized in four (4) parts: *Standard Terms and General Conditions, Attachment 1, Attachment 2, and Attachment 3*. Each of the four (4) parts has an associated Statement of Basis. (See *Exhibit 4*, pages 1-3)

Attachment 1 contains conditions regulating most non-radionuclide air pollutants. *Attachment 2* (License FF-01) contains all radionuclide air emission terms and conditions; those created pursuant to CAA § 112 (*hazardous air pollutants*) as implemented by 40 C.F.R. 61 subpart H¹³ and required by Part 70, and those created in accordance with “Chapter 70.98 RCW and rules adopted thereunder”¹⁴. Terms and conditions created pursuant to 40 C.F.R. 61 subpart M and requirements for outdoor burning are contained in *Attachment 3*.

Attachment 1 is enforced by the Washington State Department of Ecology (Ecology), the issuing permitting authority. *Attachment 2* is enforced solely by the Washington State Department of Health (Health), a state agency that is not a permitting authority under the CAA or Part 70 (*see* Appendix A of 40 C.F.R. 70, enclosed as page 4 of *Exhibit 4*). *Attachment 3* is enforced only by the Benton Clean Air Agency (BCAA). While the BCAA has an approved Part 70 program (i.e. is a permitting authority under the CAA and Part 70), in the context of the Hanford Site Title V Permit the BCAA is not a permitting authority, but rather a “permitting agency”^{15, 16}.

2.4 Radionuclides are a *hazardous air pollutant* subject to regulation under CAA Title V and 40 C.F.R. 70 (Part 70).

The U.S. Congress listed radionuclides (including radon) as a *hazardous air pollutant* under CAA § 112 (b)(1) [42 U.S.C. 7412 (b)(1)]. Congress further required

¹³ *National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities.*

¹⁴ WAC 173-401-200 (4)(b)

¹⁵ “[F]or the Hanford Site AOP, Ecology is the permitting authority as defined in WAC 173-401-200(23). Ecology, Health and BCAA are all permitting agencies with Ecology acting as the lead agency. Health and BCAA authorities are described in the Statements of Basis for Attachments 2 and 3.” *Statement of Basis for Hanford Site Air Operating Permit No. 00-05-006 2013 Renewal*, Nov. 2013, at iv. enclosed as *Exhibit 4*, p. 3. This is the Statement of Basis associated with the *Standard Terms and General Conditions*.

¹⁶ The term “permitting agency” is an invention of the Hanford Site AOP.

EPA to create emission standards for all *hazardous air pollutants*¹⁷. Most emission standards applicable to radionuclide air emissions from Hanford appear in subpart H. While subpart H omits regulation of radon, radon remains a *hazardous air pollutant* under CAA § 112 [42 U.S.C. 7412]. Radon also remains subject to regulation under Part 70. Furthermore, radon is a *hazardous air pollutant* emitted at Hanford. Even though EPA has not yet promulgated regulation addressing Hanford’s emissions of radon, radon remains federally regulated at Hanford in accordance with CAA § 112 (j) [42 U.S.C. 7412 (j)]¹⁸.

Congress also proclaims that:

“it is unlawful for any person to violate any requirement of a permit issued under this subchapter [Title V], or to operate. . . a major source . . . subject to standards or regulations under section [] 7412 [CAA § 112] . . . except in compliance with a permit issued by a permitting authority under this subchapter.” CAA § 502 (a) [42 U.S.C. 7661a (a)].

EPA followed suit by including any standard or other requirement developed pursuant to CAA § 112 [42 U.S.C. 7412] in the Part 70 definition of “applicable requirement”¹⁹.

Thus any standard or other requirement controlling emissions of a *hazardous air pollutant*, including radionuclides, is subject to inclusion in permits issued by a permitting authority pursuant to CAA Title V and Part 70. It is unlawful to violate any such standard or requirement, and a permitting authority shall enforce any such standard or other requirement.

2.5 Radionuclides are a *hazardous air pollutant* regulated without a *de minimis*.

As noted above, radionuclide air emissions from the Hanford Site are regulated as a matter of federal law, primarily through subpart H. While subpart H does set an emission standard, EPA clarifies that any mission source at a DOE facility with a potential to emit radionuclides of less than one percent (1%) of the standard is still subject to periodic confirmatory measurement, reporting, and recordkeeping. Periodic confirmatory measurement requirements of 40 C.F.R. 61.93 (b)(4) applies to even radionuclide air “emissions from diffuse sources such as evaporation ponds, breathing of buildings and contaminated soils”²⁰. Subpart H does not specify a limit below which the potential to emit radionuclides is free from the requirement to conduct periodic confirmatory measurements, and associated recordkeeping, and reporting.

¹⁷ CAA § 112 (c)(2); 42 U.S.C. 7412 (c)(2).

¹⁸ “The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner . . .” CAA § 112 (j)(5)

¹⁹ “*Applicable requirement* means all of the following as they apply to emissions units in a part 70 source . . . (4) Any standard or other requirement under section 112 of the Act . . .” 40 C.F.R. 70.2

²⁰ *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 61 Including Subparts H, I, O & T*, signed 9/29/94 by Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, and on 4/5/95 by Tara J. O’Toole, DOE Assistant Secretary for Environment, Safety and Health, at § 5. Available at: http://www.epa.gov/radiation/docs/neshaps/epa_doe_caa_mou.pdf

EPA also does not recognize a *de minimis* for adverse health effects from exposure to radiation above background. EPA responds to the question: “Is any amount of radiation safe?”, as follows:

‘There is no firm basis for setting a "safe" level of exposure [to radiation] above background. . . Many sources emit radiation that is well below natural background levels. This makes it extremely difficult to isolate its stochastic effects. In setting limits, EPA makes the conservative (cautious) assumption that any increase in radiation exposure is accompanied by an increased risk of stochastic effects.’²¹

Thus, EPA assumes there is a linear relationship between dose and risk, where there is no threshold below which risk does not exist. The assumption of a linear relationship between dose and risk is known as the *Linear No Threshold* model. This model is similar to models used to predict risk from other cancer-causing agents²². Any other model used by Ecology and/or Health that predicts a safe level of exposure to radionuclide air emissions above background is inconsistent with this published determination by EPA.

EPA continues by calling attention to adverse effects owing to specific chemical properties of radionuclides.

“The chemical properties of a radionuclide can determine where health effects occur. To function properly many organs require certain elements. They cannot distinguish between radioactive and non-radioactive forms of the element and accumulate one as quickly as the other. . . . [For example,] [c]alcium, strontium-90 and radium-226 have similar chemical properties. The result is that strontium and radium in the body tend to collect in calcium rich areas, such as bones and teeth. They contribute to bone cancer.”²³

EPA’s view that there is no safe level of exposure to radionuclide air emissions above background likely drives its decision that there is no level below which radionuclide air emissions can escape regulation (i.e., there is no regulatory *de minimis*).

2.6 Permit Attachment 2 (License FF-01) is not an “applicable requirement” under either Part 70 or the Washington State operating permit regulation, WAC 173-401.

The Petitioner and the permittee submitted several public comments addressing the need for changes to certain portions of Permit *Attachment 2* (License FF-01). Ecology denied all requested changes based, in part, on Ecology’s stated belief that License FF-01 is an applicable requirement under the CAA and therefore cannot be modified by public comments submitted in accordance with CAA Title V. Ecology further states that EPA similarly views a license created by Health to be an applicable requirement under the CAA²⁴. However, as discussed below, License FF-01 is not an

²¹ http://www.epa.gov/rpdweb00/understand/health_effects.html#anyamount Last visited April 14, 2014.

²² *Commercial Low-Level Radioactive Waste Disposal Site, Final EIS*, DOH Publication 320-031, May 28, 2004, pg. xxii. Available at: http://www.doh.wa.gov/Portals/1/Documents/Pubs/320-031_voll_w.pdf

²³ http://www.epa.gov/rpdweb00/understand/health_effects.html#chemeffects Last visited April 14, 2014.

²⁴ For example, see response to comment 35 which cites to response to comment 26: “The applicable requirements in the Hanford Air Operating Permit (AOP) (e.g. Ecology Approval Orders, Health FF-01

applicable requirement under either Part 70 or the Washington State operating permit regulation, WAC 173-401.

Permit *Attachment 2* (License FF-01) contains terms and conditions specific to the Hanford Site. These terms and conditions implement requirements of WAC 246-247 and subpart H for the control of Hanford’s radionuclide air emissions. WAC 246-247²⁵ was enacted by Health pursuant to rule making authority provided by the Washington State Legislature in RCW 70.98, *The Nuclear Energy and Radiation Act* (NERA)²⁶. While both NERA and WAC 246-247 were enacted in accordance with the state *Administrative Procedure Act* (RCW 34.05), License FF-01 was never subjected to the rule making process²⁷, including the rule making requirement for public participation.

The federal definition of “applicable requirement” appears in 40 C.F.R. 70.2. This definition consists of thirteen (13) parts, all of which address requirements that have been promulgated or approved by EPA through rulemaking. License FF-01 was never promulgated or approved by EPA through any federal rulemaking action. Nor is License FF-01 a part of Washington’s State Implementation Plan (SIP). Therefore, Permit *Attachment 2* (License FF-01) can never be an “applicable requirement” under federal law. Additionally, Health defines a “license” as an “applicable portion” of an air operating permit and not as an “applicable requirement” in an air operating permit²⁸. Deference is accorded Health’s definition in a regulation it is assigned to execute. Even EPA cannot change a unique definition codified in a state regulation. Furthermore, if License FF-01 were an “applicable requirement” under Part 70, both CAA § 502 (b)(5)(E) and 40 C.F.R. 70.11 (a) demand that License FF-01 be enforceable by all permitting

License, etc...) were all finalized prior to revision of the AOP and cannot be changed using the AOP comment resolution process. . . . EPA agrees with this interpretation of the air operating permit requirements, stating, “The promulgation and revision of applicable requirements are not subject to the public notice, judicial review, and other administrative processes of the Part 70 program. The establishment of or changes to such underlying applicable requirements must be made pursuant to the rules that govern the establishment of such applicable requirements, in this case, the RAD NESHAPs promulgated by the EPA and the *license requirements* promulgated by Ecology.” (emphasis added) Ecology response to comment 26. NOTE: only Health establishes and enforces terms and conditions in a license and these terms and conditions are not burdened by either public participation or by any aspect of the rule making process.

²⁵ “Rules and regulations set forth herein are adopted and enforced by the department [of Health] pursuant to the provisions of chapter 70.98 RCW . . .”

WAC 246-247-002 (1)

²⁶ “The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter.” RCW 70.98.050 (1)

²⁷ “We do not do rule making specific to any license.” Letter from Phyllis Barney, Public Disclosure Coordinator, State of Washington Department of Health, to Bill Green, May 2, 2013. (Enclosed as *Exhibit 5*.) This letter requests clarification of a request for public records regarding required rule making forms specific to License FF-01.

²⁸ “License” means a radioactive air emissions license, either issued by the department or incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology or a local air pollution control authority, . . . (emphasis added) WAC 246-247-030 (14)

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authorities. While Ecology is a permitting authority identified in *Appendix A* of Part 70, Health is not²⁹. However, only Health can enforce *Permit Attachment 2* (License FF-01).

Permit Attachment 2 (License FF-01) can never be an “underlying requirement” pursuant to federal law. Ecology commingles the terms “applicable requirement” and “underlying requirement” in its standard response to comments asserting, correctly, that Ecology lacks authority to act on License FF-01. While “applicable requirement” is defined in both federal statute and federal regulation, the term “underlying requirement” is not defined. However, considering authority flows from statute to regulation and from regulation to enactments under that regulation, it is apparent that if the authorizing statute is not enacted by the U.S. Congress then any implementing regulation is not a federal regulation. *Permit Attachment 2* (License FF-01) was created under the authority of Washington Administrative Code (WAC) 246-247, a Washington State regulation. Washington Administrative Code (WAC) 246-247 was created under rule making authority provided by the Washington State Legislature in Revised Code of Washington (RCW) 70.98, a Washington State statute. Because License FF-01 is not the product of federal rule making it can never be an “applicable requirement” under Part 70. Likewise, because RCW 70.98 is not a federal statute and WAC 246-247 is not a federal regulation, License FF-01 can never be an underlying federal requirement. Ecology will never have the authority to transform a state statute into a federal statute and Ecology will never have the authority to transform *Permit Attachment 2* (License FF-01) into an underlying federal requirement.

Permit Attachment 2 (License FF-01) is also NOT an “applicable requirement” under the Washington State operating permit regulation, WAC 173-401. The definition of “applicable requirement” under WAC 173-401 contains the same thirteen (13) elements as the definition in 40 C.F.R. 70.2, but also includes “Chapter 70.98 RCW [NERA] and rules adopted thereunder.”³⁰ License FF-01 is not the statute “Chapter 70.98 RCW”. License FF-01 is also not a rule. A “rule”, as defined in the Washington State *Administrative Procedure Act* (RCW 34.05), must be of general applicability.³¹ Because License FF-01 is specific to Hanford, License FF-01 cannot be “of general applicability”. License FF-01 is neither “Chapter 70.98 RCW” nor is License FF-01 a “rule adopted thereunder”. Therefore, License FF-01 cannot satisfy the definition of “applicable requirement” under WAC 173-401.

Permit Attachment 2 (License FF-01) does NOT meet the definition of “applicable requirement” under either Part 70 or WAC 173-401. Both Ecology and EPA error when they consider any license issued by Health, including *Permit Attachment 2* (License FF-01), to be an “applicable requirement” under either Part 70 or the Washington State operating permit regulation. Even the definition of license in Health’s

²⁹ See *Appendix A* of Part 70 for Washington State, enclosed as page 4 of *Exhibit 4*. *Appendix A* lists all permitting authorities.

³⁰ WAC 173-401-200 (4)(d)

³¹ “Rule” means any agency order, directive, or regulation of general applicability . . . ’ RCW 34.05.010 (16)

regulation does not consider a license to be an “applicable requirement” in “an air operating permit issued by the department of ecology”³².

2.7 The Nuclear Energy and Radiation Act (RCW 70.98) and rules adopted thereunder do not implement Part 70 and cannot be enforced by Ecology, a permitting authority under Part 70.

Permit *Attachment 2* (License FF-01) contains terms and conditions specific to the control of radionuclide air emissions from Hanford. Certain of these terms and conditions implement requirements of the radionuclide NESHAPs, primarily subpart H. Washington Administrative Code (WAC) 246-247 is a rule adopted in accordance with rule making authority provided only to Health³³ by RCW 70.98, *The Nuclear Energy and Radiation Act* (NERA). The purpose of NERA is the protection of occupational and public health and safety through the regulation of a single pollutant, ionizing radiation; whether that radiation arises from by-product materials, source materials, special nuclear materials, or from any other radiation source³⁴. Consistent with this purpose, NERA does not address any non-radioactive pollutants.

Part 70 was created pursuant to rule making authority provided by the U.S. Congress in Title V of the federal *Clean Air Act* (CAA). Part 70 implements requirements of Title V requiring any major stationary source of air pollution to receive an operating permit that incorporates CAA requirements. Part 70 also establishes a procedure for federal authorization of state-run operating permit programs. A Part 70 permit does not impose additional requirements on sources. Rather, the Part 70 permit is a single document that captures all of a source’s obligations with respect each pollutant the source is required to control. Because of the disparate purposes of Title V and NERA, it should not be surprising that rules adopted pursuant to Title V and rules adopted pursuant to NERA are also disparate. For example, the vast majority of pollutants required to be addressed under Part 70 are non-radioactive air pollutants, while NERA and the rules adopted thereunder focus exclusively on radionuclides. In fact, radionuclides (including radon) are but one (1) of 187 *hazardous air pollutants*³⁵ now listed in CAA § 112. For this reason alone neither NERA nor the rules adopted thereunder can ever be consistent with Part 70.

The Washington State Legislature also did not specify that NERA and the rules adopted thereunder be consistent with the federal CAA and Part 70. For example, WAC 246-247, a rule adopted under rule making authority provided by NERA, does not require review by EPA and any affected states before a license can be issued, as required by 40

³² WAC 246-247-030 (14)

³³ “The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter.” RCW 70.98.050 (1) and “The agency shall for the protection of the occupational and public health and safety: . . . (f) Formulate, adopt, promulgate, and repeal codes, rules, and regulations relating to control of sources of ionizing radiation;” RCW 70.98.050 (4)

³⁴ RCW 70.98.020 - .030

³⁵ See <http://www.epa.gov/ttnatw01/pollsour.html> Last visited April 14, 2014.

C.F.R. 70.8. Nor does WAC 246-247 require any of the issuance, renewal, reopening, and revision requirements specified in 40 C.F.R. 70.7. Part 70 and WAC 246-247 are two (2) different and unique regulations that exist to implement different statutes. Any similarity between the two is unintentional.

Only Health has rule making authority under NERA³⁶. Only Health can create licenses in accordance with NERA and the rules adopted thereunder. Only Health can incorporate a license into an air operating permit issued by Ecology or a local air pollution control authority³⁷. Only Health can enforce these licenses³⁸. However, Health is not a permitting authority³⁹ recognized by EPA⁴⁰, and thus, by definition, Health is not authorized by EPA to carry out a permit program under Part 70. Ecology is a permitting authority under Part 70 and Ecology did issue the Permit. Nevertheless, Ecology cannot enforce *Permit Attachment 2* (License FF-01) because Ecology lacks authority under NERA to do so.

2.8 Ecology has authority under RCW 70.94, The Washington Clean Air Act (WCAA) to regulate radionuclide air emissions.

Ecology does have authority to regulate radionuclide air emissions. Ecology adopted the radionuclide NESHAPs by reference into *The General Regulations for Air Pollution Sources*, codified at WAC 173-400⁴¹. These regulations apply statewide⁴². Because Ecology is a permitting authority, and because Ecology has incorporated the radionuclide NESHAPs into its regulations, Ecology has authority under the CAA to implement and enforce the radionuclide NESHAPs against the Hanford Site. Furthermore, terms and conditions developed by Ecology pursuant to the radionuclide NESHAPs are federally enforceable, even though EPA delegated partial authority to enforce the radionuclide NESHAPs only to Health and only in accordance with Health's regulation⁴³.

³⁶ RCW 70.98.050

³⁷ "License" means a radioactive air emissions license, . . . incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology or a local air pollution control authority, . . . ' WAC 246-247-030 (14)

³⁸ "License" means a radioactive air emissions license, either issued by the department or incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology or a local air pollution control authority, with requirements and limitations listed therein to which the licensed or permitted party must comply. Compliance with the license requirements shall be determined and enforced by the department [of Health].' (emphasis added) WAC 246-247-030 (14)

³⁹ "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 [Part 70]." 40 C.F.R. 70.2

⁴⁰ See *Appendix A* of 40 C.F.R. 70 under Washington State. Health is not listed as a permitting authority.

⁴¹ "National emission standards for hazardous air pollutants (NESHAPs). 40 C.F.R. Part 61 and Appendices in effect on July 1, 2010, are adopted by reference. The term "administrator" in 40 C.F.R. Part 61 includes the permitting authority." WAC 173-400-075 (1)

⁴² "The provisions of this chapter shall apply statewide." WAC 173-400-020 (1)

⁴³ "WDOH [Health] is only delegated the Radionuclide NESHAPs. Other NESHAPs will be enforced by Washington State Department of Ecology and local air agencies, as applicable." 40 C.F.R. 61.04 (c)(10) n.

However, it is Ecology's choice whether to actually include conditions implementing requirements of an applicable NESHAP, such as subpart H, in an order issued pursuant to WAC 173-400. In interpreting WAC 173-400-113 (1), Ecology concluded it is not obligated to include conditions in an order requiring compliance with an applicable NESHAP, Ecology is only obligated to consider whether a proposal will comply with requirements of that NESHAP⁴⁴. Thus, Ecology has authority under WAC 173-400 to enforce subpart H statewide, but it is Ecology's choice whether to issue an order actually requiring compliance with subpart H.

While WAC 173-400 does provide authority for Ecology to regulate radionuclide air emissions, several other portions of the WAC mute that authority. Language in the Washington State operating permit regulation, WAC 173-401, prohibits Ecology from overlooking a Health license in air operating permits where radionuclides are implicated. Ecology defines an "applicable requirement" to include "Chapter 70.98 RCW and rules adopted thereunder."⁴⁵ Ecology cannot enforce either Chapter 70.98 RCW or the rules adopted thereunder⁴⁶, and neither Chapter 70.98 RCW nor the rules adopted thereunder implement Title V of the CAA or Part 70. In WAC 173-401-100 (2), WAC 173-401-605, and WAC 173-401-700 (1)(e) (1), Ecology requires that a permit must contain terms and conditions that assure compliance with all applicable requirements and that the source must comply with all applicable requirements; applicable requirements that include "Chapter 70.98 RCW and the rules adopted thereunder"⁴⁷. Pursuant to WAC 246-247-030 (14)⁴⁸, a license implementing requirements of Chapter 70.98 RCW and the rules adopted thereunder must be included in an AOP issued by Ecology and this license is enforceable only by Health. These requirements are restated in WAC 246-247-060⁴⁹.

15; and "EPA's partial approval and delegation of the Radionuclide NESHAPs to WDOH [Health] does not extend to any additional state standards regulating radionuclide emissions." *Partial Approval of the Clean Air Act, Section 112(l), Delegation of Authority to the Washington State Department of Health*, 71 Fed. Reg. 32276, 32277 (June 5, 2006)

⁴⁴ "WAC 173-400-113(1) states that Ecology may issue an NOC order of approval for a new or modified source in an attainment area only if Ecology determines that the proposal will comply with federal NSPS and NESHAPs. The provision does not say the NOC order of approval must include conditions requiring compliance with the NSPS and NESHAPs. . . ." Ecology responses to Petitioner's comments 26 and 28. Enclosed in *Exhibit 2*.

⁴⁵ WAC 173-401-200 (4)(d)

⁴⁶ "The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter." RCW 70.98.050 (1)

⁴⁷ WAC 173-401-200 (4)(d)

⁴⁸ "License" means a radioactive air emissions license, either issued by the department or incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology or a local air pollution control authority, with requirements and limitations listed therein to which the licensed or permitted party must comply. Compliance with the license requirements shall be determined and enforced by the department.' (emphasis added) WAC 246-247-030 (14)

⁴⁹ "For those facilities subject to the operating permit regulations in chapter 173-401 WAC, the radioactive air emissions license will be incorporated as an applicable portion of the air operating permit issued by the department of ecology or a local air pollution control authority. The department [Health] will be responsible for determining the facility's compliance with and enforcing the requirements of the radioactive air emissions license." (emphasis added) WAC 246-247-060

PETITION TO OBJECT
TO THE HANFORD SITE,
TITLE V OPERATING PERMIT,
NUMBER 00-05-006, RENEWAL 2, REV. A

BILL GREEN
424 SHORELINE CT.
RICHLAND, WA 99354
(509) 375-5443

On the one hand Ecology has authority to regulate radionuclides under WAC 173-400, while on the other hand Ecology's authority to do so is nonexistent. The regulatory scheme used in this Permit honors the other hand, whereby regulation of radionuclides occurs in accordance with WAC 246-247 and the definition of "applicable requirement" codified in WAC 173-401-200 (4)(d) "Chapter 70.98 RCW and rules adopted thereunder". This regulatory scheme removes radionuclides from regulation under Title V of the CAA and Part 70 by regulating radionuclides solely under Chapter 70.98 RCW, WAC 246-247, and License FF-01, a license issued thereunder. As noted in section 2.7 above, Chapter 70.98 RCW and the rules adopted thereunder do not implement Title V of the CAA or Part 70, are not obligated by Title V of the CAA and Part 70, and cannot be enforced by any Part 70 permitting authority.

3. OBJECTIONS

Petitioner respectfully requests the Administrator discharge her duty under CAA § 505(b)(2) [42 U.S.C. 7661d (b)(2)] based on the following objections:

- 3.1 The regulatory structure used in this Permit does not allow Ecology, the sole permitting authority, to enforce all *federally-enforceable requirements* controlling emissions of radionuclides, contrary to CAA § 502 (b)(5)(E) and 40 C.F.R. 70.11 (a).
- 3.2 Ecology oversteps its authority when it removes regulation of radionuclides under subpart H from requirements of Part 70.
- 3.3 The regulatory structure used in this Permit does not allow Ecology, the issuing permitting authority, to issue a Title V permit containing all *federally-enforceable requirements* controlling emissions of radionuclides, contrary to *Clean Air Act* (CAA) section 502 (b)(5)(A), and 40 C.F.R. 70.
- 3.4 The public was not provided with the opportunity to comment on *federally-enforceable requirements* in Permit Attachment 2 (License FF-01), contrary to CAA § 502 (b)(6) and 40.C.F.R. 70.7 (h).
- 3.5 Contrary to 40 C.F.R. 70.7 (a)(5), Ecology failed to address the legal and factual basis for regulating radionuclide air emissions under WAC 246-247 rather than in accordance with WAC 173-400 and Part 70.
- 3.6 The Permit does not regulate radon, the only radionuclide identified by name in CAA § 112.
- 3.7 The Permit overlooks the Columbia River as a source of diffuse and fugitive emissions of radionuclides.

Forty (40) C.F.R. 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 . . . , or unless the grounds for such objection arose after such period.” 40 C.F.R. 70.8(d). The term “reasonable specificity” is not defined.

Except where otherwise noted, all objections in this petition were raised in Petitioner’s comments, comments that were received by the permitting authority during the specified public comment period. To address the requirement of “reasonable specificity” Petitioner has cited and quoted comments giving rise to the particular objection.

3.1 The regulatory structure used in this Permit does not allow Ecology, the sole permitting authority, to enforce all *federally-enforceable requirements* controlling emissions of radionuclides, contrary to CAA § 502 (b)(5)(E) and 40 C.F.R. 70.11 (a).

Objection 1 is based primarily on Petitioner’s comments 1 and 23, which are incorporated by reference and enclosed in *Exhibit 1*. Petitioner’s Comment 1 begins with the following statement:

“Contrary to *Clean Air Act* (CAA) section 502 (b)(5)(E) [42 U.S.C. 7661a (b)(5)(E)] and 40 C.F.R. 70.11 (a), the regulatory structure used in this draft AOP does not allow Ecology, the sole permitting authority, to enforce all standards or other requirements controlling emissions of radionuclides, a *hazardous air pollutant* under CAA § 112.”
(emphasis retained from original, footnote omitted) *Exhibit 1*, Petitioner’s Comment 1

Petitioner’s Comment 23 contains the following text:

“Ecology failed to regulate radionuclide air emissions as required by Title V of the federal Clean Air Act (CAA) and 40 C.F.R. 70 in this draft AOP renewal. Ecology is the issuing permitting authority and is required by the CAA § 502 (b)(5)(E) and 40 C.F.R. 70.11 (a) to have all necessary authority to enforce permits including authority to recover civil penalties and provide appropriate criminal penalties. However, the regulation used in this draft AOP renewal to control all radionuclide air emissions cannot be enforced by Ecology.”
(emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 23

The plain language in the above quotes, including the same citations to specific paragraphs in the CAA and Part 70 as raised in Objection 1, exceeds the minimal regulatory obstacle posed by “reasonable specificity”.

3.1.1 Requirements.

Section 502 (b)(5)(E) of the CAA mandates that any permitting authority shall have all necessary power to enforce the Title V permits they issue, including the authority to exact civil and criminal penalties.

“[T]he minimum elements of a permit program to be administered by any air pollution control agency. . . **shall** include each of the following: . . . (5) A requirement that the permitting authority have adequate authority to: . . . (E) enforce permits, permit fee requirements, and the requirement

to obtain a permit, including authority to recover civil penalties . . . , and provide appropriate criminal penalties;” (emphasis added) CAA § 502 (b); 42 U.S.C. 7661a (b)

EPA addresses this obligation in 40 C.F.R. 70.11 (a), which requires, in part, that:

“[a]ny agency administering a program shall have the following enforcement authority to address violations of program requirements by part 70 sources: (1) To restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment. (2) To seek injunctive relief in court to enjoin any violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit. (3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, . . .” 40 C.F.R. 70.11 (a)

EPA identifies *federally-enforceable requirements* in 40 C.F.R. 70.6 (b) as any terms or conditions included in a permit that are required under the CAA and any terms or conditions required under any CAA applicable requirement, plus those terms and conditions NOT designated as “state-only” enforceable. For example, standard permit requirements identified in 40 C.F.R. 70.6 (a) that are included in a Title V permit are federally enforceable as are the standard compliance requirements codified in 40 C.F.R. 70.6 (c). Only Ecology, the sole permitting authority, can designate terms and conditions in this Permit as “state-only” enforceable.

“(b) *Federally-enforceable requirements*. (1) All terms and conditions in a part 70 permit, including any provisions designed to limit a source’s potential to emit, are enforceable by the Administrator and citizens under the Act. (2) . . . the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.” (emphasis added) 40 C.F.R. 70.6 (b) (*See also* preamble to final Part 70 rule⁵⁰)

Only *federally-enforceable requirements* can be enforced by EPA and citizens in accordance with the CAA. Federal requirements include those propagated pursuant to 40 C.F.R. 61 subpart H⁵¹, a regulation required under CAA § 112. Requirements of subpart H are applicable to the control of radionuclide air emissions at Hanford.

Under WAC 246-247, radionuclide air emissions are controlled through licenses issued by Health. The definition of “license” codified in WAC 246-247 provides that Health incorporates any such license into air operating permits issued by Ecology and further identifies only Health as having the authority to enforce a license.

⁵⁰ “All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act. Consistent with EPA's discretion under the Act, the final rules require the permitting authority to identify those provisions in the permit which are not required under the Act or under any of its applicable requirements (i.e., State origin only) as not being federally enforceable. Like all other permit terms, a term which the permitting authority fails to designate as not federally enforceable will not be subject to challenge after 90 days.” 57 Fed. Reg. 32,255 Final Rule, 40 C.F.R. 70 (Jul. 21, 1992)

⁵¹ *The National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*

"License" means a radioactive air emissions license, . . . incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology . . . , with requirements and limitations listed therein to which the licensed or permitted party must comply. Compliance with the license requirements shall be determined and enforced by the department.' WAC 246-247-030 (14) (enclosed as *Exhibit 4*, page 5)

The point that Health will enforce a license incorporated into an air operating permit issued by Ecology, is reiterated in WAC 246-247-060⁵². This paragraph is enclosed in *Exhibit 4*, as page 6.

Rule making authority for WAC 246-247 is provided only to Health in RCW 70.98, the *Nuclear Energy and Radiation Act* (NERA).

"The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter." RCW 70.98.050 (1) (enclosed as *Exhibit 4*, page 7)

Thus, the CAA requires any permitting authority have all necessary power to issue and enforce Title V permits, including the ability to exact civil and criminal penalties. Such penalties can be enforced for failure to comply with any *federally-enforceable requirement*. *Federally-enforceable requirements* include terms and conditions in a Title V permit implementing a federal requirement and any requirement not designated as "state-only" enforceable. Only a permitting authority may designate a requirement as "state-only" enforceable. Federal requirements include those codified in Part 70 and 40 C.F.R. 61 subpart H. Under Washington State Law, licenses, such as License FF-01, contain requirements controlling radionuclide air emissions. Such licenses are enforced by Health and incorporated by Health into Title V permits issued by Ecology.

3.1.2 Argument.

The CAA and Part 70 require a permitting authority have all necessary power to issue and enforce Title V permits. Ecology is the issuing permitting authority for this Permit. All radionuclide terms and conditions in the Permit reside in *Attachment 2* (License FF-01)⁵³, including those terms and conditions implementing requirements of 40 C.F.R. 61 subpart H, a *federally-enforceable requirement*. However, Ecology is prohibited by Washington State Law, specifically RCW 70.98,050 (1), WAC 246-247-030 (14), and -060, from enforcing Permit *Attachment 2* (License FF-01). Therefore, the regulatory structure under which the Permit is issued does not allow Ecology, the sole

⁵² "For those facilities subject to the operating permit regulations in chapter 173-401 WAC, the radioactive air emissions license will be incorporated as an applicable portion of the air operating permit issued by the department of ecology or a local air pollution control authority. The department [of Health] will be responsible for determining the facility's compliance with and enforcing the requirements of the radioactive air emissions license." WAC 246-247-060

⁵³ See *Exhibit 4*, pages 1 and 3

permitting authority, to comply with the enforcement provisions of CAA § 502 (b)(5)(E) and 40 C.F.R. 70.11 (a).

3.1.3 The Administrator is obligated to object.

The regulatory structure used in this Permit does not allow Ecology, the sole permitting authority, to enforce all *federally-enforceable requirements* controlling emissions of radionuclides. This is contrary to CAA § 502 (b)(5)(E) and 40 C.F.R. 70.11 (a). The Petitioner advanced this objection with reasonable specificity in comments submitted during the public comment period.

In accordance with the CAA, the Administrator “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 Part 70, the regulation implementing Title V.⁵⁴ Under case law the Administrator has discretion defining a reasonable interpretation of the term “demonstrate” in CAA § 505 (b)(2) [42 U.S.C. 7661d (b)(2)]⁵⁵. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit⁵⁶.

Petitioned offers as evidence pages 1 and 3 of *Exhibit 4*, showing all radionuclide terms and conditions in the Permit, including those terms and conditions implementing requirements of 40 C.F.R. 61 subpart H, reside in Permit *Attachment 2* (License FF-01). Petitioner offers binding authority under state law, specifically under RCW 70.98.050 (1), WAC 246-247-030 (14), and -060, as evidence that only Health can enforce License FF-01. This binding authority denies the issuing permitting authority, Ecology, the legal ability to enforce federal requirements controlling Hanford’s radionuclide air emissions. Thus, this binding authority directly conflicts with CAA § 502 (b)(5)(E) [42 U.S.C. 7661a (b)(5)(E)] and 40 C.F.R. 70.11 (a). Under the regulatory structure employed in the Permit, Ecology, the issuing permitting authority, is effectively barred from enforcing all terms and conditions implementing 40 C.F.R. 61 subpart H, because these terms and conditions are regulated solely by Health, an agency that is not a permitting authority, pursuant to WAC 246-247 in Permit *Attachment 2* (License FF-01).

The Administrator must object because the regulatory structure used in the Permit prevents compliance with CAA § 502 (b)(5)(E) [42 U.S.C. 7661a (b)(5)(E)] and 40 C.F.R. 70.11 (a).

⁵⁴ CAA § 502 (b)(2) [42 U.S.C. 7661d (b)(2)]; *see also* “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]”. 40 C.F.R. 70.8(c)(1)

⁵⁵ “The ambiguity of this provision in the statute [42 U.S.C. 7661d (b)(2)] suggests that Congress has left the meaning of “demonstrate” open for EPA to supply a reasonable interpretation under *Chevron [Chevron USA Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)]*.” *MacClarence v. U.S. E.P.A.*, 596 F.3d 1123, 1131 (9th Cir. 2010)

⁵⁶ “Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty.” *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 (2d Cir. 2003)

3.2 Ecology oversteps its authority when it removes regulation of radionuclides under 40 C.F.R. 61 subpart H from requirements of Part 70.

Objection 2 is based primarily on Petitioner’s comments 6, 9, and 35, and on Ecology’s responses to Petitioner’s comments 26 and 28. All five (5) comments are incorporated by reference and enclosed in *Exhibit 1*. Ecology’s responses are contained in *Exhibit 2* and are also incorporated by reference.

The initial sentences in Petitioner’s Comment 6 read as follows:

“In this draft Hanford Site AOP regulation of radionuclides is inappropriately decoupled from 40 C.F.R. 70 (Part 70). Regulation of radionuclides occurs pursuant to a regulation that does not implement Part 70, and cannot be enforced by Ecology, the issuing permitting authority. Because radionuclides are listed in CAA § 112 (b) as a *hazardous air pollutant*, conditions regulating radionuclide air emissions are CAA Title V (AOP) applicable requirements, subject to inclusion in AOPs pursuant to CAA § 502 (a) [42 U.S.C. 7661a (a)], 40 C.F.R. 70.2 *Applicable requirement* (4), RCW 70.94.161 (10)(d), and WAC 173-401-200 (4)(a)(iv).” (emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 6

The following statements appear in Petitioner’s Comment 9:

“The regulatory structure used by Ecology in this draft Hanford Site AOP inappropriately cedes regulation of Hanford’s radionuclide air emissions to the *Nuclear Energy and Radiation Act* (NERA) and enforcement of these requirements to Health. NERA does not implement the CAA, 40 C.F.R. 70, the *Washington Clean Air Act*, or WAC 173-401, and Health has not been approved to enforce CAA Title V and 40 C.F.R. 70. Radionuclides are a *hazardous air pollutant* under CAA § 112. Without Legislative authorization and approval by EPA, Ecology cannot use an AOP to delegate enforcement of radionuclide air emissions to Health. Ecology also cannot choose to remove regulation of radionuclides, a *hazardous air pollutant* under CAA § 112, from requirements of the CAA, 40 C.F.R. 70, the *Washington Clean Air Act* (WCAA), and WAC 173-401. . . . However, in the draft Hanford Site AOP Ecology ceded regulation of Hanford’s radionuclide air emissions to NERA and enforcement of these requirements to Health; actions that are contrary to CAA Title V, 40 C.F.R. 70, and the WCAA.” (emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 9

Petitioner’s Comment 35 begins with the following statement:

Neither Health nor Ecology can ignore federal-enforceability of emission limits imposed pursuant to WAC 246-247-040 (5). Limits on radionuclide air emission are required under 40 C.F.R. 61 subpart H, a Title V applicable requirement, and under 40 C.F.R. 70.6 (a)(1). In accordance with WAC 173-401-625 (2) and 40 C.F.R. 70.6 (b)(2) these emission limits must be federally enforceable. Additionally, 40 C.F.R. 61 subpart H does not recognize a regulatory *de minimis* above background for radionuclide air emissions.” (emphasis retained from original, footnotes omitted) *Exhibit 1*, Petitioner’s Comment 35

Grounds for this objection also arose from Ecology’s responses to Petitioner’s comments 26 and 28. According to 40 C.F.R. 70.8 (d) the requirement that objections be based on public comments does not apply to grounds for objection that arose after the public comment period. Ecology’s responses to Petitioner’s comments were not available before the Petitioner submitted his comments.

Petitioner's comments 26 and 28⁵⁷ point out that two (2) Ecology orders, NOC 94-07 and DE05NWP-001, were issued without any terms and conditions addressing radionuclide air emissions under subpart H.

Ecology responded to Petitioner's comments 26 and 28, in part, by stating:

"WAC 173-400-113(1) states that Ecology may issue an NOC order of approval for a new or modified source in an attainment area only if Ecology determines that the proposal will comply with federal NSPS and NESHAPs. The provision does not say the NOC order of approval must include conditions requiring compliance with the NSPS and NESHAPs. In this case, Ecology determined that the conditions in the Department of Health license (Attachment # 2 of the AOP) would ensure that the project[s] would comply with the applicable NESHAP, 40 CFR part 61, subpart H." (emphasis added) *Exhibit 2*, Ecology responses to Petitioner's comments 26 and 28.

Thus, Ecology used its authority under WAC 173-400 to move conditions from subpart H to Permit *Attachment 2* (License FF-01), a license developed pursuant to WAC 246-247. As discussed in section 2.7 above, neither WAC 246-247 nor the authorizing statute implement Part 70, neither WAC 246-247 nor the authorizing statute are obligated by requirements of Part 70, and neither WAC 246-247 nor the authorizing statute can be enforced by Ecology, the issuing permitting authority.

The plain language in above comments, including citations to specific paragraphs in Part 70, plus Ecology's responses to Petitioner's comments raises the issue in Objection 2 with "reasonable specificity".

3.2.1 Requirements.

Section 502 (b) [42 U.S.C 7661a (b)] grants only to the Administrator of EPA rulemaking authority for implementing Title V of the CAA.

"The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency." CAA § 502 (b); 42 U.S.C 7661a (b)

EPA used this rule making authority to promulgate Part 70.

"Title V of the Clean Air Act (Act) Amendments of 1990, Public Law 101-549, enacted on November 15, 1990, requires EPA to promulgate regulations within 12 months of enactment that require and specify the minimum elements of State operating permit programs. This new part 70 contains these provisions." 57 Fed. Reg. 32,250, (Jul. 21, 1992) (preamble to final rule)

The CAA requires any permit issued in accordance with Title V to contain standards or regulations developed pursuant to CAA §112, and that it is unlawful for any source subject to such standards or regulations to operate except in compliance with a Title V permit.

"After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source. . . , a major source, [or] any other source. . . subject to

⁵⁷ See *Exhibit 1*, Petitioner's comments 26 and 28.

standards or regulations under section [] 7412 [CAA§ 112] of this title, . . . except in compliance with a permit issued by a permitting authority under this subchapter.” CAA § 502 (a); 42 U.S.C 7661a (a)

EPA identifies *federally-enforceable requirements* in 40 C.F.R. 70.6 (b) as any term or condition in a Part 70 permit that implements a requirement of the CAA. Such *federally-enforceable requirements* include the standard permit and standard compliance requirements in 40 C.F.R. 70.6 (a) and (c), any applicable requirement of the CAA, plus those requirements NOT designated as “state-only” enforceable.

“(b) *Federally-enforceable requirements*. . . . (2) . . . the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.” (emphasis added)

40 C.F.R. 70.6 (b)

Only *federally-enforceable requirements* can be enforced by EPA and citizens in accordance with the CAA. Federal requirements include Permit terms and conditions implementing requirements of 40 C.F.R. 61 subpart H. Subpart H requirements are applicable to the control of radionuclide air emissions at Hanford.

Thus, the CAA granted only EPA rule making authority to develop the Title V permitting program codified at Part 70. Any requirement developed under CAA § 112 [42 U.S.C. 7412] is both an applicable requirement and a *federally-enforceable requirement* under Part 70. *Federally-enforceable requirements* include term or condition in a Title V permit implementing a federal requirement and any requirement not designated as “state-only” enforceable. Federal requirements include those codified in Part 70 and 40 C.F.R. 61 subpart H. Terms and conditions implementing subpart H are applicable to Hanford’s radionuclide air emissions.

3.2.2 Argument.

Radionuclides are a *hazardous air pollutant* regulated under CAA § 112 [42 U.S.C. 7412], CAA § 502 (a) [42 U.S.C. 7661a (a)], and under Part 70 as both an applicable requirement and a *federally-enforceable requirement*. Permit *Attachment 2* (License FF-01) contains all terms and conditions regulating Hanford’s radionuclide air emissions, including those implementing requirements of subpart H⁵⁸. Permit *Attachment 2* (License FF-01) was developed under WAC 246-247 and can only be enforced by Health. Health is not a Part 70 permitting authority⁵⁹. Neither WAC 246-247 nor NERA, the authorizing statute, implement Part 70, neither WAC 246-247 nor NERA are obligated by requirements of Part 70⁶⁰, and neither WAC 246-247 nor NERA can be enforced by Ecology, the issuing permitting authority. Thus, the general structure of this Permit inappropriately transfers regulation of radionuclides under subpart H from

⁵⁸ See section 2.3 above and *Exhibit 4*, pp. 1-3.

⁵⁹ See *Appendix A* of 40 C.F.R. 70, enclosed as page 4 of *Exhibit 4*.

⁶⁰ See section 2.7 above.

Part 70 to WAC 246-247 and enforcement of terms and conditions implementing requirements of subpart H from a permitting authority to Health, an agency that is not a permitting authority. Ecology cannot use an AOP to change the scope of Part 70, a federal regulation.

Ecology provides specific examples where it removed requirements subject to Part 70. Petitioner's comments 26 and 28 questioned why *federally-enforceable requirements* regulating radionuclide air emissions were omitted from two (2) Ecology orders; orders where emissions of radionuclides are implicated. These Ecology orders appear in *Permit Attachment 1* and are identified as NOC 94-07 and DE05NWP-001. Ecology responded, in part, as follows:

“ . . . Ecology determined that the conditions in the Department of Health license (Attachment # 2 of the AOP) would ensure that the project[s] would comply with the applicable NESHAP, 40 CFR part 61, subpart H.”

Exhibit 2, Ecology responses to Petitioner's comments 26 and 28.

Ecology's responses recognize radionuclide air emissions are anticipated for the permitted projects. What Ecology's responses failed to recognize is that the standard permit and standard compliance requirements codified at 40 C.F.R. 70.6 (a) and (c) are *federally-enforceable requirements*, in accordance with 40 C.F.R. 70.6 (b). Ecology also failed to recognize that transferring regulation of radionuclides to *Attachment 2* (License FF-01), effectively moved enforcement of subpart H from Part 70 to WAC 246-247. Part 70 is a federal regulation enforceable by permitting authorities and the public, whereas WAC 246-247 is a Washington State regulation that cannot be enforced by any Part 70 permitting authority or the public.

Ecology has zero authority to amend Part 70 to exclude conditions implementing subpart H from regulation under Part 70. Ecology oversteps its authority when it uses its notice of construction approval orders to remove regulation of radionuclides from Part 70.

3.2.3 The Administrator is obligated to object.

Petitioner objects to the use of a Part 70 permit and Ecology orders to remove requirements of 40 C.F.R. 61 subpart H from regulation under Part 70. The Petitioner advanced this objection with reasonable specificity in comments submitted during the public comment period. This objection is also supported by Ecology's responses to Petitioner's comments; responses that were not available until after the public comment period expired.

In accordance with the CAA, the Administrator “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 Part 70, the implementing regulation.⁶¹ Under case law the Administrator has discretion defining a reasonable interpretation of the term “demonstrate” in CAA § 505 (b)(2) [42 U.S.C.

⁶¹ CAA § 502 (b)(2) [42 U.S.C. 7661d (b)(2)]; *see also* “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]”. 40 C.F.R. 70.8(c)(1)

7661d (b)(2)]⁶². However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit⁶³.

Petitioner provides binding authority in CAA § 502 (b) that limits rule making authority to implement CAA Title V to only the Administrator of EPA. Petitioner also offers binding authority in 40 C.F.R. 70.6 (b) that 40 C.F.R. 61 subpart H is an applicable requirement under Title V and therefore a *federally-enforceable requirement* subject to regulation under Part 70. Petitioner also provides, as binding authority, 40 C.F.R. 70.6 (b) requiring that the standard permit requirements codified in 40 C.F.R. 70.6 (a) and the standard compliance requirements codified in 40 C.F.R. 70.6 (c) are requirements under the CAA Title V and are therefore, *federally-enforceable requirements*.

Petitioner offers as evidence the general structure of the Permit. Under the Permit all terms and conditions implementing 40 C.F.R. 61 subpart H reside in Permit *Attachment 2* (License FF-01). License FF-01 does not implement Part 70, is not obligated by Part 70, and cannot be enforced by Ecology, the issuing permitting authority. (*Exhibit 4*, pp. 1-3) Petitioner also offers as evidence Ecology’s responses to two (2) public comments. In these responses Ecology acknowledges it opted to regulate requirements implementing 40 C.F.R. 61 subpart H under a Health license.

“... Ecology determined that the conditions in the Department of Health license (Attachment # 2 of the AOP) would ensure that the project[s] would comply with the applicable NESHAP, 40 CFR part 61, subpart H”

(*Exhibit 2*, Ecology responses to Petitioner’s comments 26 and 28.)

Ecology’s responses overlook that subpart H is a *federally-enforceable requirement* under Part 70, and therefore subject to Part 70. Ecology also overlooks that the standard permit and compliance requirements in 40 C.F.R. 70.6 (a) and (c) are *federally-enforceable requirements*. Ecology further overlooks it has zero authority to modify Part 70 to exclude conditions implementing 40 C.F.R. 61 subpart H from a permit required by Part 70.

The Administrator must object because Ecology lacks rulemaking authority to modify Part 70 to exclude 40 C.F.R. 61 subpart H from regulation under Part 70.

⁶² “The ambiguity of this provision in the statute [42 U.S.C. 7661d (b)(2)] suggests that Congress has left the meaning of “demonstrate” open for EPA to supply a reasonable interpretation under *Chevron* [*Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)].” *MacClarence v. U.S. E.P.A.*, 596 F.3d 1123, 1131 (9th Cir. 2010)

⁶³ “Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty.” *New York Public Interest Research Group v. Whitman*, 321 F. 3d 316, 333 (2d Cir. 2003)

3.3 The regulatory structure used in this Permit does not allow Ecology, the issuing permitting authority, to issue a Title V permit containing all *federally-enforceable requirements* controlling emissions of radionuclides, contrary to *Clean Air Act* (CAA) section 502 (b)(5)(A), and 40 C.F.R. 70.

Objection 3 is raised with reasonable specificity in Petitioner’s Comment 2, which is incorporated by reference and enclosed in *Exhibit 1*. The initial sentence in Petitioner’s Comment 2 begins with the following statement:

Contrary to *Clean Air Act* (CAA) section 502 (b)(5)(A) [42 U.S.C. 7661a (b)(5)(A)], 40 C.F.R. 70, and WAC 173-401, the regulatory structure used in this draft AOP does not allow Ecology, the sole permitting authority, to issue a Title V permit containing all standards or other requirements controlling emissions of radionuclides, a *hazardous air pollutant* under CAA § 112. (emphasis retained from original, footnotes omitted) *Exhibit 1*, Petitioner’s Comment 2

The plain language in the above quote, including citations to the same paragraphs in the CAA and Part 70 raised in Objection 3, vaults the minimal impediment posed by “reasonable specificity”.

3.3.1 Requirements.

Section 502 (b)(5)(A) of the CAA mandates that any permitting authority shall have all necessary power to issue a permit that ensures compliance with all *federally-enforceable requirements*.

“[T]he minimum elements of a permit program to be administered by any air pollution control agency. . . **shall** include each of the following: . . . (5) A requirement that the permitting authority have adequate authority to: . . . (A) issue permits and assure compliance . . . with each applicable standard, regulation or requirement under this chapter;”

(emphasis added) CAA § 502 (b); 42 U.S.C. 7661a (b)

EPA addresses portions of CAA § 502 (b)(5)(A) in 40 C.F.R. 70.1 (b), -70.3 (c), -70.6 (a), and -70.7 (a). In 40 C.F.R. 70.1 (b) EPA requires “[a]ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements.” Forty (40) C.F.R. 70.3 (c) requires “[f]or major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.⁶⁴” Forty (40) C.F.R. 70.6 (a) specifies that every Part 70 permit shall include “. . . those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.⁶⁵” And 40 C.F.R. 70.7 (a) requires that a permit may only be issued if “[t]he conditions of the permit provide for compliance with all applicable requirements and the requirements of this part.⁶⁶”

EPA identifies *federally-enforceable requirements* in 40 C.F.R. 70.6 (b) as any term or condition in a Part 70 permit that implements a requirement of the CAA. Such *federally-enforceable requirements* include the standard permit and compliance

⁶⁴ 40 C.F.R. 70.3 (c)(1)

⁶⁵ 40 C.F.R. 70.6 (a)(1)

⁶⁶ 40 C.F.R. 70.7 (a)(1)(iv)

requirements codified in 40 C.F.R. 70.6 (a) and (c), any applicable requirement of the CAA, plus those requirements NOT designated as “state-only” enforceable.

“(b) *Federally-enforceable requirements*. . . . (2) . . . the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.” (emphasis added)

40 C.F.R. 70.6 (b)

Only *federally-enforceable requirements* can be enforced by EPA and citizens in accordance with the CAA. Federal requirements include those propagated pursuant to 40 C.F.R. 61 subpart H. Subpart H requirements are applicable to the control of radionuclide air emissions at Hanford.

Ecology is both the issuing permitting authority⁶⁷ and a permitting authority recognized in *Appendix A* of Part 70⁶⁸.

Under WAC 246-247, radionuclide air emissions are controlled through licenses issued by Health. The definition of “license” codified in WAC 246-247 provides that Health incorporates any such license into air operating permits issued by Ecology and further identifies only Health as having the authority to enforce a license so incorporated.

“License” means a radioactive air emissions license, . . . incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology . . . , with requirements and limitations listed therein to which the licensed or permitted party must comply. Compliance with the license requirements shall be determined and enforced by the department.’

(emphasis added) WAC 246-247-030 (14) (enclosed as *Exhibit 4*, p. 5)

Health is not a Part 70 permitting authority⁶⁹.

Another portion of WAC 246-247 also requires Health to incorporate a license into a Title V permit issued by Ecology and provides that only Health can enforce this license.

“For those facilities subject to the operating permit regulations in chapter 173-401 WAC, the radioactive air emissions license will be incorporated as an applicable portion of the air operating permit issued by the department of ecology or a local air pollution control authority. The department [of Health] will be responsible for determining the facility's compliance with and enforcing the requirements of the radioactive air emissions license.” (emphasis added)

WAC 246-247-060 (enclosed as *Exhibit 4*, p. 6)

Rule making authority for WAC 246-247 is provided only to Health in RCW 70.98, the *Nuclear Energy and Radiation Act* (NERA).

“The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter.” RCW 70.98.050 (1) (enclosed as *Exhibit 4*, p. 7)

Thus, any permitting authority shall have adequate authority to issue Title V permits that assure compliance with all *federally-enforceable requirements* at the time of

⁶⁷ See *Exhibit 4*, p. 2.

⁶⁸ See *Exhibit 4*, p. 4.

⁶⁹ *Id.*

permit issuance. *Federally-enforceable requirements* include term or condition in a Title V permit implementing a federal requirement and any requirement not designated as “state-only” enforceable. Federal requirements include those requirements codified in Part 70 (e.g. 40 C.F.R. 70.6 (a) & (c)) and in 40 C.F.R. 61 subpart H. Under Washington State Law, licenses, such as License FF-01, contain requirements controlling radionuclide air emissions. Such licenses are enforced by Health and incorporated by Health into Title V permits issued by Ecology.

3.3.2 Argument.

Whether this Permit can comply with CAA § 502 (b)(5)(A) [42 U.S.C. 7661a (b)(5)(A)], is dependent upon whether Ecology, the issuing permitting authority, has the legal ability to:

- 1.) issue a Title V permit containing all *federally-enforceable requirements*; and
- 2.) whether Ecology can assure compliance with all *federally-enforceable requirements* in the Permit.

The answer to both 1 and 2 is “no”.

All *federally-enforceable requirements* in this Permit controlling radionuclide air emissions, including terms and conditions implementing subpart H, reside in *Attachment 2* (License FF-01)⁷⁰. State law, codified in WAC 246-247, provides that only Health will incorporate a license into an air operating permit⁷¹. While Ecology did issue the Permit, under WAC 246-247 it is entirely up to Health whether the Permit issued contains all *federally-enforceable requirements* implementing subpart H in License FF-01. Ecology has no legal ability to act in place of Health and incorporate License FF-01 into the Permit. Thus, Ecology, acting under its own authority, cannot issue a permit containing *federally-enforceable requirements* controlling radionuclide air emissions, including those terms and conditions implementing requirements of subpart H.

Ecology also cannot assure compliance with subpart H, a *federally-enforceable requirement* applicable to Hanford’s radionuclide air emissions. All such requirements reside in Permit *Attachment 2* (License FF-01). State law provides that only Health can enforce licenses⁷², including License FF-01. (*See* section 2.7, above.)

Under the regulatory structure employed in this Permit, Ecology has neither the authority to issue a Title V permit containing all *federally-enforceable requirements*, nor

⁷⁰ *See* section 2.3 above and *Exhibit 4*, pp. 1-3.

⁷¹ “License” means a radioactive air emissions license, . . . incorporated by the department [of Health] as an applicable portion of an air operating permit issued by the department of ecology . . .’ WAC 246-247-030 (14); “For those facilities subject to the operating permit regulations in chapter 173-401 WAC, the radioactive air emissions license will be incorporated as an applicable portion of the air operating permit issued by the department of ecology . . .” WAC 246-247-060

⁷² “License” means a radioactive air emissions license, . . . incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology . . . , with requirements and limitations listed therein to which the licensed or permitted party must comply. Compliance with the license requirements shall be determined and enforced by the department [of Health].’ (emphasis added) WAC 246-247-030 (14); “The department will be responsible for determining the facility’s compliance with and enforcing the requirements of the radioactive air emissions license.” WAC 246-247-060

does Ecology have authority assure compliance with all *federally-enforceable requirements* applicable to Hanford’s radionuclide air emissions. Therefore, under this Permit, Ecology, the issuing permitting authority, does not have adequate authority to issue a Title V permit containing all *federally-enforceable requirements* applicable to emissions of radionuclides, contrary to CAA § 502 (b)(5)(A), and several paragraphs in 40 C.F.R. 70⁷³.

3.3.3 The Administrator is obligated to object.

Under the regulatory structure used in this Permit, Ecology, the sole permitting authority, does not have adequate authority to issue a Title V permit containing all *federally-enforceable requirements* applicable to emissions of radionuclide, including those implementing requirements of 40 C.F.R. 61 subpart H. This is contrary to CAA § 502 (b)(5)(A) and several paragraphs of Part 70. Petitioner advanced this objection with reasonable specificity in comments submitted during the public comment period.

The Administrator has a nondiscretionary duty to object to this Permit if the Petitioner demonstrates it is not in compliance with the CAA. Petitioner offers as evidence binding authority codified in WAC 246-247, specifically in WAC 246-247-030 (14) and WAC 246-247-060, that do not provide Ecology with the authority to issue permits that assure compliance with federally-enforceable terms and conditions implementing requirements of 40 C.F.R. 61 subpart H. Whether the Permit contains any such terms and conditions is solely dependent on Health, an agency that is not a permitting authority under the CAA and Part 70. Ecology has no say in this regard.

The Administrator must object; this Permit is prevented by state law from complying with CAA § 502 (b)(5)(A) [42 U.S.C. 7661a (b)(5)(A)] and 40 C.F.R. 70.1 (b), -70.3 (c), -70.6 (a), and -70.7 (a).

3.4 The public was not provided with the opportunity to comment on *federally-enforceable requirements* in Permit Attachment 2 (License FF-01), contrary to CAA § 502 (b)(6) and 40.C.F.R. 70.7 (h).

Objection 4 is based on Petitioner’s comments 3 and 23, which are incorporated by reference and enclosed in *Exhibit 1*. Petitioner’s Comment 3 begins with the following statements:

“Contrary to Clean Air Act (CAA) section 502 (b)(6) [42 U.S.C. 7661a (b)(6)], 40.C.F.R. 70.7 (h), RCW 70.94.161 (2)(a) & (7), and WAC 173-401-800, the regulatory structure used in this draft AOP does not allow Ecology, the sole permitting authority, to offer for public review AOP terms and conditions controlling Hanford’s radionuclide air emissions. Nor can Ecology provide for a public hearing on AOP terms and conditions controlling Hanford’s radionuclide air emissions.” (emphasis retained from original, footnotes omitted)
Exhibit 1, Petitioner’s Comment 3

Petitioner’s Comment 23 addresses this objection as follows:

⁷³ See 40 C.F.R. 70.1 (b), -70.3 (c), -70.6 (a), and -70.7 (a)

“Ecology failed to regulate radionuclide air emissions as required by Title V of the federal Clean Air Act (CAA) and 40 C.F.R. 70 in this draft AOP renewal. . . . Title V of the CAA and 40 C.F.R. 70 require the public be provided with the opportunity to comment on all draft AOPs. The portion of this draft AOP containing all terms and conditions regulating radionuclide air emissions (*Attachment 2*), including those implementing 40 C.F.R. 61 subpart H, was issued as final without public review, contrary to CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40 C.F.R. 70.7 (h).” (emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 23

The plain language quoted in the above comments including citations to relevant paragraphs in Part 70 and the CAA combine to reasonably specify Petitioner’s objection: The public was not provided with the opportunity to comment on *federally-enforceable requirements* in Permit *Attachment 2* (License FF-01), contrary to CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40.C.F.R. 70.7 (h).

3.4.1 Requirements.

Both *Clean Air Act* (CAA) § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40 C.F.R. 70.7 (h) require the public be provided with the opportunity to comment on draft Part 70 permits.

“[T]he minimum elements of a permit program to be administered by any air pollution control agency. . . shall include each of the following: . . . (6) Adequate, streamlined, and reasonable procedures . . . including **offering an opportunity for public comment** and a hearing. . . .” (emphasis added) CAA § 502 (b) [42 U.S.C. 7661a (b)];

and:

State operating permit programs “. . . shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit.” 40 C.F.R. 70.7 (h). Additionally “[t]he permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing” 40 C.F.R. 70.7 (h)(4);

EPA identifies *federally-enforceable requirements* in 40 C.F.R. 70.6 (b) as any terms or conditions included in a permit that are required under the CAA and any terms or conditions required under any CAA applicable requirement, plus those terms and conditions NOT designated as “state-only” enforceable. For example, standard permit requirements identified in 40 C.F.R. 70.6 (a) that are included in a Title V permit and standard compliance requirements codified in 40 C.F.R. 70.6 (c) are federally enforceable. Only Ecology can designate terms and conditions in this Permit as “state-only” enforceable.

“(b) *Federally-enforceable requirements*. (1) All terms and conditions in a part 70 permit, including any provisions designed to limit a source’s potential to emit, are enforceable by the Administrator and citizens under the Act. (2) . . . the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.” (emphasis added) 40 C.F.R. 70.6 (b)

Only *federally-enforceable requirements* are subject to the opportunity for public comment in accordance with 40 C.F.R. 70.7 and only *federally-enforceable requirements* can be enforced by EPA and citizens in accordance with the CAA. Federal requirements

include those propagated pursuant to 40 C.F.R. 61 subpart H, a regulation required under CAA § 112. Requirements of subpart H are applicable to radionuclide air emissions at Hanford. Terms and conditions implementing subpart H applicable to Hanford reside solely in Permit *Attachment 2* (License FF-01)⁷⁴. License FF-01 was created pursuant to WAC 246-247.

The definition of “license” codified in WAC 246-247 provides that only Health has the authority to enforce a license, and only Health can incorporate a license into a Part 70 permit issued by Ecology.

“License” means a radioactive air emissions license, . . . incorporated by the department as an applicable portion of an air operating permit issued by the department of ecology . . . , with requirements and limitations listed therein to which the licensed or permitted party must comply. Compliance with the license requirements shall be determined and enforced by the department.’

WAC 246-247-030 (14) (emphasis added, enclosed as *Exhibit 4*, page 5)

This point is reiterated in WAC 246-247-060⁷⁵. An accurate copy of paragraph WAC 246-247-060 is enclosed in *Exhibit 4*, as page 6.

Rule making authority for WAC 246-247 is provided only to Health in RCW 70.98, the *Nuclear Energy and Radiation Act* (NERA).

“The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter.” RCW 70.98.050 (1) (enclosed as *Exhibit 4*, page 7)

Neither NERA nor WAC 246-247 inserts public participation into the issuance process for a license.

Thus, every draft permit is subject to at least a 30-day opportunity for public comment. However, the opportunity for public comment applies only to those terms and conditions that are federally-enforceable. *Federally-enforceable requirements* include terms and conditions implementing a federal requirement plus any requirement not designated as “state-only” enforceable. Federal requirements include those codified in Part 70 and in 40 C.F.R. 61 subpart H. Only Ecology can designate terms and conditions in this Permit as not federally enforceable or “state-only” enforceable. Under Washington State Law, licenses containing requirements controlling radionuclide air emissions for which a source must comply are created and enforced by Health. Such licenses are incorporated by Health into Title V permits issued by Ecology. Neither WAC 246-247 nor NERA contain a requirement for public comment.

3.4.2 Argument.

Section 502 (b)(6) of the CAA provides every member of the public with the opportunity to impact the air we breathe through submission of comments on draft Title

⁷⁴ See *Exhibit 4*, pages 1 and 3

⁷⁵ “For those facilities subject to the operating permit regulations in chapter 173-401 WAC, the radioactive air emissions license will be incorporated as an applicable portion of the air operating permit issued by the department of ecology or a local air pollution control authority. The department [of Health] will be responsible for determining the facility’s compliance with and enforcing the requirements of the radioactive air emissions license.” WAC 246-247-060

V permits. Ecology destroyed this right when it regulated *federally-enforceable requirements* applicable to Hanford’s radionuclide air emissions through a Washington State regulation that does not implement the CAA, is not obligated by requirements of the CAA, and cannot be enforced by any permitting authority, including by Ecology.

Ecology provided the public with two (2) opportunities to comment on the slightly different versions of the draft Hanford Site AOP. The first opportunity began on June 30, 2013. The second opportunity began on November 17, 2013⁷⁶. (See section 2.2 above.) Neither opportunity included a complete draft of the AOP. *Attachment 2* had already been issued by Health as final well before the announced public comment periods. The version of *Attachment 2* presented to the public for the first review was issued as final and became effective on February 23, 2012. The version of *Attachment 2* offered to the public for the second review bears the same issuance and effective date (February 23, 2012) but has an “Approved by” date of August 30, 2013⁷⁷. There are differences between the two (2) versions. These differences are listed in the “Table of Changes from FF-01 2-23-12” contained in the Statement of basis for *Attachment 2*, beginning on page 20 of 25.

However, there were some public comments submitted on the final versions of *Attachment 2*. The subject of those comments ranged from missing or mis-identified control equipment⁷⁸ to isotopes incorrectly copied from the application⁷⁹ to correction of typographical errors⁸⁰. Ecology rejected all comments on *Attachment 2* using the following or similar statements:

“Attachment # 2 is included in the AOP as an applicable requirement. As an applicable requirement, corrections to the underlying requirements need to be made using the applicable process for that underlying requirement.” *Exhibit 2*, Ecology response to comment 36.

and

“The underlying requirements to the Hanford Air Operating Permit (AOP) (e.g. Ecology Approval Orders, Health FF-01 License, etc...) have been finalized prior to revision of the AOP and cannot be changed using the AOP comment resolution process. Corrections to the underlying requirements need to be made using the applicable process for that underlying requirement.” *Exhibit 2*, Ecology response to comment 48.

Ecology’s responses confirm the public was unable to use the public participation process required by the CAA and Part 70 to attempt to impact radionuclides in the air we breathe; this because these terms and conditions had already been finalized prior to renewal of the AOP.

What Ecology’s responses overlook is that Ecology cannot enforce Permit *Attachment 2* (License FF-01) nor is *Attachment 2* an applicable requirement under either Part 70 or the Washington State operating permit regulation, WAC 173-401. As explained in section 2.6 above, one of the reasons Permit *Attachment 2* (License FF-01) cannot be an applicable requirement is that Ecology cannot enforce License FF-01.

⁷⁶ Enclosed as *Exhibit 6*, p. 1.

⁷⁷ Enclosed as *Exhibit 6*, p. 2.

⁷⁸ Ecology comment #'s 48 and 50.

⁷⁹ Ecology comment #'s 54 – 58.

⁸⁰ Ecology comment # 36.

Section 502 (b)(5)(E) of the CAA and 40 C.F.R. 70.11 (a) require Ecology, as a permitting authority, have all necessary legal ability to enforce all applicable requirements.

Ecology also overlooks that *federally-enforceable requirements* implementing federal regulation are not “underlying requirements”, they are THE requirements the permittee must abide by. Such terms and conditions in *Attachment 2* (License FF-01) have never been promulgated or otherwise subjected to rule making (“We do not do rule making specific to any license”⁸¹). Ecology’s commingling of the term “applicable requirement” with the undefined term “underlying requirement” simply provides Ecology with the opportunity to attribute its lack of a relevant response to something other than Ecology’s legal inability to address comments regarding Health License FF-01.

Ecology’s responses do not address the associated comment, are inconsistent with regulation, and divert attention from the only credible reason Ecology did not provide cogent responses. That reason is, Ecology cannot make changes to a regulatory product created under rule making authority provided exclusively to another agency.

Permit *Attachment 2* (License FF-01) was created and is enforced pursuant to NERA, and WAC 246-247, a regulation created under rule making authority provided by NERA. NERA does not implement the CAA, (*see* section 2.7 above) but rather “institute[s] and maintain[s] a regulatory and inspection program for sources and uses of ionizing radiation”⁸². Only Health, an agency that is not a permitting authority under the CAA, is authorized by statute to enforce NERA and the regulations adopted thereunder⁸³.

The Washington State Supreme Court addressed the issue of limits on an administrative agency’s authority, stating:

“[There is] a fundamental rule of administrative law—an agency may only do that which it is authorized to do by the Legislature (citations omitted). . . [Additionally an] administrative agency cannot modify or amend a statute through its own regulation.”

Rettkowski v. Department of Ecology, 122 Wn.2d 219, 226-27, 858 P.2d 232 (1993)

Absent statutory authorization, Ecology can neither enforce NERA or the regulations adopted thereunder, nor can Ecology modify NERA or the regulations adopted thereunder to provide for public review or public hearings required by CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40 C.F.R. 70.7 (h).

The public was not provided with the opportunity to comment on *federally-enforceable requirements* in Permit *Attachment 2* (License FF-01), contrary to CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40.C.F.R. 70.7 (h). Permit *Attachment 2* was issued as final well before Ecology opened the draft permit for public review. Additionally, Ecology has no authority to make any changes to Permit *Attachment 2* (License FF-01), no matter how significant the points made in those public comments. In fact, Ecology did NOT make any changes to License FF-01.

⁸¹ Letter from Phyllis Barney, Public Disclosure Coordinator, State of Washington Department of Health, to Bill Green, May 2, 2013. (Enclosed as *Exhibit 5*.) This letter requests clarification of a request for public records regarding required rule making forms specific to License FF-01.

⁸² RCW 70.98.010

⁸³ RCW 70.98.050 (1), enclosed as *Exhibit 4*, p. 7.

3.4.3 Health cannot designate terms and conditions in the Permit as “state-only” enforceable.

Many of the terms and conditions in Permit *Attachment 2* (License FF-01) are designated as “state-only” enforceable. As noted above, terms and conditions designated as “state-only” enforceable are not subject to either the requirement for public participation under 40 C.F.R. 70.7 nor are these terms and conditions subject to enforcement under the CAA by EPA and citizens. However, neither WAC 246-247 nor License FF-01 implements Part 70, so the designation “state-only” enforceable is meaningless in regards to Part 70. Furthermore, under Part 70 it is the permitting authority that specifically designates permit terms and conditions as “state-only” enforceable.⁸⁴ Because Ecology, the permitting authority, has no authority over WAC 246-247 or License FF-01, Ecology is prohibited from designating any term or condition in any Health license as “state-only” enforceable under Part 70.

3.4.4 The Administrator is obligated to object.

The regulatory structure used in this Permit does not allow the opportunity for public comment on all *federally-enforceable requirements* applicable to radionuclide air emissions, including those implementing 40 C.F.R. 61 subpart H. This is contrary to CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40.C.F.R. 70.7 (h). Petitioner advanced this objection with reasonable specificity in comments received by Ecology during the public comment periods.

Under the CAA, the Administrator “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. The Administrator has discretion defining a reasonable interpretation of the term “demonstrate” in CAA § 505 (b)(2) [42 U.S.C. 7661d (b)(2)]⁸⁵. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit⁸⁶.

Petitioner provides binding authority in section 502 (b) of the CAA and 40 C.F.R. 70.7 (h) requiring the opportunity for public comment. Petitioner provides evidence that all *federally-enforceable requirements* implementing 40 C.F.R. 61 subpart H reside in Permit *Attachment 2* (License FF-01). (*Exhibit 4*, pages 1 and 3) Permittee provides binding authority under state law that prevents Ecology from enforcing License FF-01. (WAC 246-247-030 (14) and -060) Petitioner provides evidence *Attachment 2* was

⁸⁴ 40 C.F.R. 70.6 (b)(2)

⁸⁵ “The ambiguity of this provision in the statute [42 U.S.C. 7661d (b)(2)] suggests that Congress has left the meaning of “demonstrate” open for EPA to supply a reasonable interpretation under *Chevron* [*Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)].” *MacClarence v. U.S. E.P.A.*, 596 F.3d 1123, 1131 (9th Cir. 2010)

⁸⁶ “Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty.” *New York Public Interest Research Group v. Whitman*, 321 F. 3d 316, 333 (2d Cir. 2003)

issued as final on February 23, 2012, well before any announced public comment period. (*Exhibit 6*, pp.1-2) Petitioner provides evidence in the form of Ecology’s responses confirming *Attachment 2* was finalized prior to the opportunity for public comment. (*Supra*, Ecology response to comment 48) Petitioner provides case law from the Supreme Court of Washington asserting an agency’s authority is limited by statute and an agency cannot change a statute; statute provides only Health with the ability to issue and enforce *Permit Attachment 2* (Health License FF-01).

The regulatory structure implemented by the Permit does not allow for compliance with CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40 C.F.R. 70.7 (h). The issuing permitting authority does not have the legal ability to enforce all *federally-enforceable requirements* regulating Hanford’s radionuclide air emissions. Binding authority in RCW 70.98.050 (1), WAC 246-247-030 (14), and WAC 246-247-060 confirm Ecology does not have authority to enforce *Attachment 2*. The foregoing authorities and evidence demonstrate this Permit was not issued in compliance with the CAA and Part 70. Therefore, the Administrator must object to this Permit.

3.5 Contrary to 40 C.F.R. 70.7 (a)(5), Ecology failed to address the legal and factual basis for regulating radionuclide air emissions under WAC 246-247 rather than in accordance with WAC 173-400 and Part 70.

Objection 5 is raised with “reasonable specificity” in Petitioner’s comments 15 and 31, which are incorporated here by reference. Comment 15 reads, in part:

“Contrary to 40 C.F.R. 70.7 (a)(5) and WAC 173-401-700 (8), the permitting authority failed to address the legal and factual basis for regulating radionuclide air emissions in the draft Hanford Site AOP pursuant to RCW 70.98, *The Nuclear Energy and Radiation Act* (NERA) rather than in accordance with Title V of the *Clean Air Act* (CAA).”

(emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 15

Petitioner’s Comment 31 reads:

“As required by WAC 173-401-700 (8) and 40 C.F.R. 70.7 (a)(5), provide the legal and factual basis for regulating radionuclide air emissions in accordance with WAC 246-247 rather than pursuant to WAC 173-400, 40 C.F.R. 70, and Title V of the *Clean Air Act*.”

(emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 31

The plain language in comments 15 and 31 above surpasses the minimal regulatory impediment posed by “reasonable specificity”: Contrary to 40 C.F.R. 70.7 (a)(5), Ecology failed to address the legal and factual basis for regulating radionuclide air emissions under WAC 246-247 rather than in accordance with WAC 173-400 and Part 70.

3.5.1 Requirements.

Under Part 70 the permitting authority must transmit to EPA (and others upon request) a statement setting forth the legal and factual basis for the permit conditions included in the draft permit.

“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 permitting authority shall send this statement to EPA and to any other person who requests it.” (emphasis added) 40 C.F.R. 70.7 (a)(5)

Ecology incorporates all *National Emission Standards for Hazardous Air Pollutants* (NESHAPs) by reference into WAC 173-400-075. In WAC 173-400-020 Ecology makes these NESHAPs standards applicable statewide. The incorporated NESHAPs include 40 C.F.R. 61 subpart H. Subpart H is applicable to Hanford’s radionuclide air emissions.

“National emission standards for hazardous air pollutants (NESHAPs). 40 C.F.R. Part 61 and Appendices in effect on July 1, 2010, are adopted by reference. The term "administrator" in 40 C.F.R. Part 61 includes the permitting authority.” WAC 173-400-075 (1)

“The provisions of this chapter shall apply statewide.” WAC 173-400-020 (1)

Permit *Attachment 2* (License FF-01) contains all terms and conditions applicable to Hanford’s radionuclide air emissions, including those implementing requirements of subpart H. License FF-01 is issued and enforced under authority provided only to Health in RCW 70.98, the *Nuclear Energy and Radiation Act* (NERA).

“The department of health is designated as the state radiation control agency, hereinafter referred to as the agency, and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter.”

RCW 70.98.050 (1) (enclosed as *Exhibit 4*, page 7)

NERA does not implement requirements of Part 70. WAC 246-247 is a regulation adopted under rule making authority provided to Health by NERA.

“Rules and regulations set forth herein are adopted and enforced by the department [of Health] pursuant to the provisions of chapter 70.98 RCW . . .”

WAC 246-247-002 (1)

License FF-01 was created by Health under authority provided by WAC 246-247.

Thus, as a permitting authority, Ecology must set forth the legal and factual basis for terms and conditions in the Permit. Ecology has all necessary authority under WAC 173-400 to regulate Hanford’s radionuclide air emissions in accordance with subpart H, a NESHAP Ecology adopted by reference. In this Permit all requirements implementing requirements of subpart H are contained in Permit *Attachment 2* (License FF-01). License FF-01 implements requirements of NERA and WAC 246-247 and can only be issued and enforced by Health. NERA and WAC 246-247 do not implement requirements of Part 70.

3.5.2 Argument.

In this Permit, all radionuclide air emission terms and conditions reside in Permit *Attachment 2* (license FF-01). Permit *Attachment 2* (License FF-01) is a license created in accordance with WAC 246-247, a regulation authorized by NERA (RCW 70.98). Ecology cannot enforce NERA or the regulations adopted thereunder. (Section 2.7 above) Health, the sole agency authorized to enforce NERA and WAC 246-247, is not a

PETITION TO OBJECT
TO THE HANFORD SITE,
TITLE V OPERATING PERMIT,
NUMBER 00-05-006, RENEWAL 2, REV. A

BILL GREEN
424 SHORELINE CT.
RICHLAND, WA 99354
(509) 375-5443

permitting authority under Part 70⁸⁷. Thus Health is not allowed to carry out a permit program under Part 70.

Ecology has full authority to regulate Hanford's radionuclides under WAC 173-400, and Ecology can enforce WAC 173-400. (See section 2.8 above.) Terms and conditions developed pursuant to NESHAPs incorporated by reference into WAC 173-400-075 (1) are *federally-enforceable requirements* pursuant to 40 C.F.R. 70.6 (b). However, Ecology chose to regulate Hanford's radionuclide air emissions exclusively under License FF-01. Ecology, the issuing permitting authority, cannot enforce License FF-01, nor is this license subject to requirements of Part 70. In accordance with 40 C.F.R. 70.7 (a)(5), Ecology should have documented the legal and factual basis for its decision to regulate Hanford's radionuclide air emissions under a Health-only-enforceable license rather than in accordance with WAC 173-400 and Part 70.

3.5.3 Ecology did not respond to a significant point raised in Petitioner's comments 15 and 31.

In *Home Box Office v. FCC* the D.C. Circuit Court of Appeals stated:
“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” (citation omitted) *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

EPA further explains this dictum, stating:

“It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.” *In the Matter of Onyx Environmental Services*, Petition V-2005-1 (February 1, 2006) at 7 citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) [See also *In the Matter of Kerr-McGee, LLC, Fredrick Gathering Station*, Petition-VIII-2007 (February 7, 2008) at 4; *In the Matter of CITGO Refining and Chemicals Company L.P., West Plant, Corpus Christi, Texas*, Petition-VI-2007-1 (May 28, 2009) at 7.]

Case law informs that “significant comments” are those that raise significant problems; those that can be thought to challenge a fundamental premise; and those that are relevant or significant. [*State of N.C. v. F.A.A.*, 957 F.2d 1125 (4th Cir. 1992); *MCI WorldCom, Inc. v. F.C.C.*, 209 F.3d 760 (D.C. Cir. 2000); *Texas Office of Public Utility Counsel v. F.C.C.*, 265 F.3d 313 (5th Cir. 2001), cert. denied, 535 U.S. 986, 122 S. Ct. 1537, 152 L. Ed. 2d 464 (2002) and *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455 (D.C. Cir. 1998)]⁸⁸.

Petitioner's comments raise a significant problem regarding Ecology's failure to address the legal and factual basis for regulating Hanford's radionuclide air emissions as required by Part 70 and WAC 173-400; challenges the fundamental premise that Ecology can use a Title V permit to remove radionuclides from regulation under the CAA Title V and Part 70; and is otherwise relevant or significant.

⁸⁷ See Appendix A of Part 70 for Washington State, enclosed as page 4 of Exhibit 4.

⁸⁸ Dietz, Laura Hunter, J.D., et. al., *Federal Procedure for Adoption of Rules, Response to comment*, 2 Am. Jur. 2d Administrative Law § 160, April 2010

Ecology's responds to Petitioner's comments 15 and 31 by referencing pages 1 through 4 of Ecology's Exhibit A⁸⁹. Ecology's response overlooks that Petitioner's comments 15 and 31 are specific to a deficiency in the statements of basis for this Permit. Ecology Exhibit A addresses Ecology's authority under Washington's Part 70 program⁹⁰. Exhibit A does not address Ecology's failure to provide the legal and factual basis for Ecology's decision to regulate radioactive air emissions in the draft Permit pursuant to WAC 246-247 rather than in accordance with WAC 173-400 and Part 70.

Ecology overlooked responding to the significant point raised in Petitioner's comments 15 and 31. This oversight is contrary to *Home Box Office* and EPA's determination ". . . that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments." *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)⁹¹. Petitioner hereby requests the Administrator require Ecology to provide a relevant response to Petitioner's comments 15 and 31.

3.5.4 The Administrator is obligated to object.

Contrary to 40 C.F.R. 70.7 (a)(5), Ecology failed to address the legal and factual basis for regulating radionuclide air emissions under WAC 246-247 rather than in accordance with WAC 173-400 and Part 70. The Petitioner advanced this objection with reasonable specificity in comments received by Ecology during the public comment period.

Under the CAA, the Administrator "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. However, the Administrator has discretion defining a reasonable interpretation of the term "demonstrate" in CAA § 505 (b)(2) [42 U.S.C. 7661d (b)(2)]⁹². However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit⁹³.

Petitioner cites to binding authority requiring that Ecology "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)" 40 C.F.R. 70.7 (a)(5) Petitioner also provides Ecology's non-response to Petitioner's significant concern. Ecology's non-response also confirms it did not provide the legal and factual basis for regulation of Hanford's

⁸⁹ See *Exhibit 2*, Ecology response to Petitioner's comments 15 & 31.

⁹⁰ See Ecology Exhibit A included in *Exhibit 2* of this petition

⁹¹ "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." (citation omitted) *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

⁹² "The ambiguity of this provision in the statute [42 U.S.C. 7661d (b)(2)] suggests that Congress has left the meaning of "demonstrate" open for EPA to supply a reasonable interpretation under *Chevron [Chevron USA Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)]*." *MacClarence v. U.S. E.P.A.*, 596 F.3d 1123, 1131 (9th Cir. 2010)

⁹³ "Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty." *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 (2d Cir. 2003)

radionuclide air emissions in accordance with a “state-only” enforceable regulation that does not implement Part 70.

The Administrator must object; Ecology did not provide the legal and factual basis for regulating Hanford’s radionuclide air emissions under WAC 246-247 rather than in accordance with WAC 173-400 and Part 70.

3.6 The Permit does not regulate radon, the only radionuclide identified by name in CAA § 112.

This objection is raised with “reasonable specificity” in Petitioner’s Comment 13, which is incorporated here by reference⁹⁴. Comment 13 reads, in part, as follows:

“Overlooked in both Table 5-1 and in this draft AOP is fact that radon, a radionuclide gas, remains a *hazardous air pollutant* under CAA § 112 (b) whether or not EPA has developed regulation for Hanford. While a literal reading of 40 C.F.R. 61 Subpart Q, “National Emission Standards for Radon Emissions from Department of Energy Facilities” overlooks Hanford, CAA § 112 (j) informs that a Title V permit may not disregard any *hazardous air pollutant* unaddressed by regulation. . . . Even though 40 C.F.R. 61 subpart H does not regulate radon, and even though a strict interpretation of 40 C.F.R. subpart Q overlooks Hanford, radon remains a regulated air pollutant under CAA § 112 (j) and 40 C.F.R. 70.2¹. . . .

¹ “*Regulated air pollutant* means the following: . . . [(5)] (i) Any pollutant subject to requirements under section 112(j) of the Act. . . .” 40 C.F.R. 70.2; ““Regulated air pollutant” means the following: . . . (e) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the FCAA, including sections 112 (g), (j), and (r), . . .” WAC 173-401-200 (26)” (emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 13.

The plain language quoted in the above comment including citations to relevant paragraphs in the CAA combine to reasonably specify Petitioner’s objection: The Permit does not regulate radon, the only radionuclide identified by name in CAA § 112.

3.6.1 Requirements.

Section 112 (b)(1) of the CAA [42 U.S.C. 7412 (b)(1)] contains a list of *hazardous air pollutants*. One (1) entry on this list is “Radionuclides (including radon)”. Section 112 (j)(5) of the CAA [42 U.S.C. 7412 (j)(5)] provides that a Title V permit shall contain emission limits for all *hazardous air pollutants* emitted by the source. Where EPA fails to promulgate a standard addressing a *hazardous air pollutant* emitted by a source, EPA or the state shall determine, on a case-by-case basis, an equivalent emission limit.

“The permit shall be issued pursuant to subchapter V of this chapter and shall contain emission limitations for the hazardous air pollutants subject to regulation under this section and emitted by the source that the Administrator (or the State) determines, on a case-by-case basis, to be

⁹⁴ See *Exhibit 1*, Petitioner’s Comment 13.

equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner . . .” CAA §112 (j)(5); 42 U.S.C. 7412 (j)(5)

Federally-enforceable requirements are defined in 40 C.F.R. 70.6 (b) to include terms and conditions in a Title V permit implementing any requirement under the CAA. Section 112 (j)(5) of the CAA is a requirement under the CAA as is CAA Title V. Title V is implemented by Part 70.

Part 70 requires that every permit issued include a set of standard permit requirements and a set of standard compliance requirements. The standard permit requirements are specified in 40 C.F.R. 70.6 (a). The standard compliance requirements are specified in 40 C.F.R. 70.6 (c). These requirements include emission limits and monitoring, reporting, and recordkeeping sufficient to demonstrate continual compliance with the emission limit.

Thus, radon is specifically named as a *hazardous air pollutant* subject to inclusion in a Title V permit where radon is emitted by a source. If a standard limiting emissions of radon has not yet been promulgated, then EPA or the state must establish an equivalent limitation on a case-by-case basis. Terms and conditions implementing emission limits established on a case-by-case basis are federally-enforceable and must be accompanied by monitoring, reporting, and recordkeeping requirements sufficient to demonstrate continual compliance with the emission limit.

3.6.2 Argument.

The CAA requires that a Title V permit contain emission limits for all *hazardous air pollutants* emitted by the source. Radon, a radioactive gas, is specifically named as a *hazardous air pollutant*. EPA considers radon to be the second-leading cause of lung cancer behind only smoking⁹⁵. Neither EPA nor Ecology has promulgated a specific limit for radon of Hanford origin. Therefore, either EPA or Ecology is required by CAA § 112 (j)(5) to determine a equivalent limit that would apply to radon emissions from Hanford if an emission limit had been timely promulgated.

One (1) requirement of subpart H obligates an affected source, such as Hanford, to annually report all its radionuclide air emissions, except those air emissions attributed to radon. Hanford’s annual reporting requirement has been supplemented in accordance with WAC 246-247⁹⁶. Under WAC 246-247 the additional reporting requirement includes radon from all Hanford Site sources during both routine and non-routine operations. These reports are certified by the manager of the U.S. Department of Energy (USDOE), Richland Operations Office, as required by 40 C.F.R. 61.94(b)(9). According to these certified reports, USDOE reported releases of radon from Hanford during five (5)

⁹⁵ Radon is a radioactive gas that EPA has determined is the second-leading cause of lung cancer and is a serious public health problem.
<http://iaq.supportportal.com/link/portal/23002/23007/Article/14270/Are-we-sure-that-radon-is-a-health-risk>
Last visited April 14, 2014.

⁹⁶ WAC 246-247 is a state regulation that is not obligated by Part 70, does not enforce Part 70, and cannot be enforced in accordance with Part 70. See sections 2.6 & 2.7 above.

out of six (6) calendar years from 2007 to and including 2012. The radionuclide air emission report for calendar year 2013 is not yet available to the public. The highest certified emissions of radon over these six (6) years occurred during 2012. Excerpts from these certified reports are included as *Exhibit 7*.

USDOE certified to radon emissions from Hanford yet has escaped all federal requirements for addressing these radon emissions in its Title V permit. Ecology erred when it overlooked requirements of CAA § 112 (j)(5) [42 U.S.C. 7412 (j)(5)] thereby avoiding *federally-enforceable requirements* pertaining to limitations on emissions of radon, the only radionuclide identified by name on the list of *hazardous air pollutants* in CAA § 112 (b)(1) [42 U.S.C. 7412 (b)(1)].

3.6.3 Contrary to 40 C.F.R. 70.7 (a)(5), Ecology failed to provide the legal and factual basis for failing to regulate radon in accordance with CAA §112 (j).

Forty (40) C.F.R. 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 . . . , or unless the grounds for such objection arose after such period” (emphasis added) 40 C.F.R. 70.8(d). Petitioner could not have known during the public comment period that Ecology’s response would overlook applicability of CAA §112 (j)(5) to the regulation of Hanford’s emissions of radon. Therefore, the grounds for this objection arose after close of the public comment period.

According to 40 C.F.R. 70.7 (a)(5), Ecology is required to provide the legal and factual bases for interpreting the *hazardous air pollutant* “Radionuclides (including radon)”⁹⁷ to mean radon is not a *hazardous air pollutant* regulated under Part 70. Hanford emits radon; Hanford has a Title V permit; and Hanford’s Title V permit overlooks *federally-enforceable requirements* addressing radon. What then is the legal and factual basis for allowing radon emissions from Hanford to escape federal regulation?

3.6.4 Ecology did not respond to a significant point raised in Petitioner’s Comment 13.

In *Home Box Office v. FCC* the D.C. Circuit Court of Appeals stated:

“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” (citation omitted) *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

EPA further explains this dictum, stating:

“It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.” *In the Matter of Onyx Environmental Services*, Petition V-2005-1 (February 1, 2006) at 7 citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) [See also *In the Matter of Kerr-McGee, LLC, Fredrick Gathering Station*, Petition-VIII-2007 (February 7, 2008) at 4; *In the Matter of CITGO Refining and Chemicals Company L.P., West Plant, Corpus Christi, Texas*, Petition-VI-2007-1 (May 28, 2009) at 7.]

⁹⁷ See the list of *hazardous air pollutants* codified at CAA § 112 (b)(1); 42 U.S.C. 7412 (b)(1).

Case law informs that “significant comments” are those that raise significant problems; those that can be thought to challenge a fundamental premise; and those that are relevant or significant. [*State of N.C. v. F.A.A.*, 957 F.2d 1125 (4th Cir. 1992); *MCI WorldCom, Inc. v. F.C.C.*, 209 F.3d 760 (D.C. Cir. 2000); *Texas Office of Public Utility Counsel v. F.C.C.*, 265 F.3d 313 (5th Cir. 2001), cert. denied, 535 U.S. 986, 122 S. Ct. 1537, 152 L. Ed. 2d 464 (2002) and *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455 (D.C. Cir. 1998)]⁹⁸.

Under CAA § 112 (j)(5) [42 U.S.C. 7412 (j)(5)] a Title V permit shall contain emission limits for all *hazardous air pollutants* emitted by the source. Where EPA fails to promulgate a standard addressing a *hazardous air pollutant* emitted by a source, EPA or the state shall determine, on a case-by-case basis, an equivalent emission limit.

Petitioner raises this significant point in Comment 13, which reads, in part, as follows:

“Overlooked in both Table 5-1 and in this draft AOP is [the] fact that radon, a radionuclide gas, remains a hazardous air pollutant under CAA § 112 (b) whether or not EPA has developed regulation for Hanford. . . CAA § 112 (j) informs that a Title V permit may not disregard any hazardous air pollutant unaddressed by regulation.”

(emphasis retained from original) *Exhibit 1*, Petitioner’s Comment 13.

Petitioner’s comment raises a significant problem regarding Ecology’s extra-statutory omission of equivalent emission limits required when EPA fails to promulgate a limit addressing a *hazardous air pollutant* emitted by a source; challenges the fundamental premise that because radon emissions from Hanford are not specifically addressed in existing federal regulation, such emissions of radon are not subject to regulation under the CAA; and is otherwise relevant or significant.

Ecology’s response below neglects to even consider CAA § 112 (j), addressing instead the inapplicability of the literal requirements of 40 C.F.R. 61 subpart Q and remedial actions taken under CERCLA.

Subpart Q protects the public and the environment from the emission of radon-222 to the ambient air from Department of Energy (DOE) storage or disposal facilities for radium-containing materials. Radon-222 is produced as a radioactive decay product of radium. The radon-222 emission rate from these facilities to the surrounding (ambient) air must not exceed 20 pico curies per square meter per second.

DOE’s compliance with this standard is included in its Federal Facilities Agreements with EPA. Hanford is not one of these facilities and has never been subject to Subpart Q.

The DOE administers many facilities, including government-owned, contractor-operated facilities across the country. At least six of these facilities have large stockpiles of radium-containing material. Much of this material has high radium content and emits large quantities of radon, making it important to regulate emissions to the atmosphere around the facilities.

DOE is taking remedial action at these facilities under procedures defined by Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Remedial activities are complete at some facilities and the radium-containing residues placed in interim storage. Remedial activities aimed at long-term disposal of the materials are underway at other facilities.

(*Exhibit 2*, Ecology response to Petitioner’s Comment 13.)

⁹⁸ Dietz, Laura Hunter, J.D., et. al., *Federal Procedure for Adoption of Rules, Response to comment*, 2 Am. Jur. 2d Administrative Law § 160, April 2010

Ecology did not respond to Petitioner’s significant point. Failure of Ecology to respond to Petitioner’s significant point is contrary to *Home Box Office* and EPA’s determination “. . . that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.” Petitioner hereby requests the Administrator require Ecology to provide a relevant response to Petitioner’s Comment 13.

3.6.5 The Administrator is obligated to object.

The Permit does not federally regulate radon, the only radionuclide identified by name on the list of *hazardous air pollutants* in CAA § 112 (b)(1). Petitioner advanced this objection with reasonable specificity in comments submitted during the public comment period. Ecology declined Petitioner’s objection, reasoning 40 C.F.R. 61 subpart Q does not apply to Hanford’s radon emissions. Based on Ecology’s response, Petitioner advances an objection that Ecology failed to provide the legal and factual basis, pursuant to 40 C.F.R. 70.7 (a)(5), for not regulating Hanford’s radon emissions as a *federally-enforceable requirement*. Petitioner also advances an objection that Ecology failed to respond to a significant point raised by the Petitioner in comment 13.

In accordance with the CAA, the Administrator “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 Part 70, the regulation implementing Title V.⁹⁹ Under case law the Administrator has discretion defining a reasonable interpretation of the term “demonstrate” in CAA § 505 (b)(2) [42 U.S.C. 7661d (b)(2)]¹⁰⁰. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit¹⁰¹.

Petitioner provides binding authority in CAA § 112 (b)(1) that radon is listed as a *hazardous air pollutant*. Petitioner also provides binding authority in CAA § 112 (j)(5) that:

- 1) every Title V permit shall contain limitations for every *hazardous air pollutant* the source emits; and
- 2) an emission limitation shall be created on a case-by-case basis if an emission standard has not been promulgated.

Petitioner offers as evidence excerpts from USDOE-certified reports attesting to Hanford’s emission of radon. (*Exhibit 7*)

⁹⁹ CAA § 502 (b)(2) [42 U.S.C. 7661d (b)(2)]; *see also* “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]”. 40 C.F.R. 70.8(c)(1)

¹⁰⁰ “The ambiguity of this provision in the statute [42 U.S.C. 7661d (b)(2)] suggests that Congress has left the meaning of “demonstrate” open for EPA to supply a reasonable interpretation under *Chevron* [*Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)].” *MacClarence v. U.S. E.P.A.*, 596 F.3d 1123, 1131 (9th Cir. 2010)

¹⁰¹ “Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty.” *New York Public Interest Research Group v. Whitman*, 321 F. 3d 316, 333 (2d Cir. 2003)

The Administrator is required to object to either the lack of federally-enforceable limitations on Hanford's emissions of radon, or on Ecology's failure to provide the legal and factual basis for not regulating Hanford's radon air emissions as a *hazardous air pollutant* and as a *federally-enforceable requirement* under Part 70.

3.7 The Permit overlooks the Columbia River as a source of diffuse and fugitive emissions of radionuclides.

Petitioner raised this objection with reasonable specificity primarily in comments 14 and 16, but also in comment 21. All three (3) comments are incorporated here by reference.

Petitioner's comment 14 reads as follows:

“Overlooked in this draft Hanford Site AOP is the Columbia River as a source of radionuclide air emissions, including radon. The Columbia River is the only credible conduit for radionuclides of Hanford Site origin found in the sediments behind McNary Dam and possibly beyond. This AOP should address the Columbia River as a radionuclide air emissions source, given:

- 1) the recent discovery of significant radionuclide-contamination in the 300 Area groundwater entering the Columbia River; plus
- 2) radionuclide-contaminated groundwater entering the Columbia River from other Hanford Site sources, some, like the 618-11 burial trench, with huge curie inventories;
- 3) the fact that radionuclide decay results in production of airborne radionuclide isotopes such as radon, the second-leading cause of lung cancer and a serious public health problem¹; and
- 4) neither Health nor EPA recognize either a regulatory *de minimis* or a health-effects *de minimis* for radionuclide air emissions above background².

Airborne radionuclides resulting from Hanford's radionuclide contamination of the Columbia River should be subject to monitoring, reporting, and recordkeeping in accordance with the CAA.

¹ Radon is a radioactive gas that EPA has determined is the second-leading cause of lung cancer and is a serious public health problem.

<http://iaq.supportportal.com/link/portal/23002/23007/Article/14270/Are-we-sure-that-radon-is-a-health-risk>

² “[t]here is no firm basis for setting a “safe” level of exposure [to radiation] above background . . . EPA makes the conservative (cautious) assumption that any increase in radiation exposure is accompanied by an increased risk of stochastic effects.” http://www.epa.gov/rpdweb00/understand/health_effects.html#anyamount (last visited May 3, 2013)”

(emphasis retained from original) *Exhibit 1*, Petitioner's Comment 14

Petitioner's Comment 16 raises the concern that the statements of basis overlook the Columbia River:

“Overlooked in the Statements of Basis is the legal and factual basis for omitting the Columbia River as a source of radionuclide air emissions.”

(emphasis retained from original) *Exhibit 1*, Petitioner's Comment 16

The plain language in above comments raises the issue in Objection 7 with “reasonable specificity”: The Permit overlooks the Columbia River as a source of diffuse and fugitive emissions of radionuclides.

3.7.1 Requirements.

Radionuclides (including radon) are listed as a *hazardous air pollutant* under CAA §112 (b)(1). Section 112 (j)(5) of the CAA specifies that no permit issued under CAA Title V can overlook a *hazardous air pollutant* emitted by a source, even if those emissions are unaddressed in regulation. Subpart H applies to emissions from diffuse sources such as evaporation ponds, breathing of buildings, and contaminated soils¹⁰². Part 70 requires “periodic monitoring sufficient to yield reliable data from the relevant time period. . . .¹⁰³” Part 70 defines an *emission unit* to mean “any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.¹⁰⁴” Part 70 defines *potential to emit* as “the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design.¹⁰⁵” *Federally-enforceable requirements* are defined, in part, as:

“All terms and conditions in a part 70 permit, including any provisions designed to limit a source’s *potential to emit*, are enforceable by the Administrator and citizens under the Act.”
(emphasis added) 40 C.F.R. 70.6 (b)(1)

Part 70 defines *fugitive emissions* as “those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.¹⁰⁶” “Fugitive emissions from a part 70 source shall be included in . . .the part 70 permit in the same manner as stack emissions,¹⁰⁷”

Part 70 further requires that “[a]ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements.¹⁰⁸”

Thus, radon is a *hazardous air pollutant* that must be addressed in any Title V permit where radon is emitted by a source, even if radon is unaddressed by regulation. Every source subject to Part 70 must have a Title V permit that contains all *federally-enforceable requirements* applicable to the source. *Federally-enforceable requirements* include provisions designed to limit a source’s *potential to emit* regulated air pollutants, even those designated as *fugitive emissions*, from any affected *emission unit*. *Fugitive emissions* include those from evaporation ponds, breathing of buildings, and contaminated soils. *Fugitive emissions* must be subject to monitoring, reporting, and recordkeeping requirements in any Title V permit.

¹⁰² “EPA and DOE agree that the dose standard of 40 CFR Part 61, Subpart H applies to emissions from diffuse sources such as evaporation ponds, breathing of buildings and contaminated soils. . . . Data on diffuse sources and the results of analyses will be reported as part of DOE’s Annual Air Emissions Report to EPA.” *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 61 Including Subparts H, I, O & T*, signed 9/29/94 by Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, and on 4/5/95 by Tara J. O’Toole, DOE Assistant Secretary for Environment, Safety and Health, at § 5a. Available at: http://www.epa.gov/radiation/docs/neshaps/epa_doe_caa_mou.pdf

¹⁰³ 40 C.F.R. 70.6 (a)(3)(i)(B)

¹⁰⁴ 40 C.F.R. 70.2

¹⁰⁵ *Id.*

¹⁰⁶ 40 C.F.R. 70.2

¹⁰⁷ 40 C.F.R. 70.4 (d)

¹⁰⁸ 40 C.F.R. 70.1 (b)

3.7.2 Argument.

For many decades the Columbia River has acted as the conduit for the transport of radionuclides originating from Hanford that are deposited downstream in sediments behind McNary Dam¹⁰⁹. Radionuclides of Hanford Site origin include isotopes of uranium. All isotopes of uranium are radioactive, and thus subject to radioactive decay. The decay chain for all uranium isotopes includes radon. Therefore, where there is uranium there is also radon. If that uranium is from Hanford's past operations, then the accompanying radon is above background and both unsafe¹¹⁰ and regulated in accordance with the *Linear No Threshold Model* used by EPA. (See section 2.5 above.)

In a study published in 2007, (cited portions enclosed as *Exhibit 8*) researchers at the Pacific Northwest National Laboratory (PNNL) reported:

“Radionuclide concentrations in sediment collected from riverbank spring discharges along the Hanford Site shoreline were similar to levels in Columbia River sediment, with one exception—the 300 Area, where the average uranium concentrations were usually two to three times the concentrations measured [upstream] at Priest Rapids.¹¹¹”

The 300 Area is just north of the City of Richland and housed research and development laboratories, six (6) small nuclear reactors¹¹², plus uranium fuel fabrication facilities and associated waste sites, now inactive. When active, “hundreds of thousands of tons of raw uranium was sent to the 300 Area to be manufactured into fuel assemblies . . .”¹¹³ The PNNL report continues, stating:

“[S]ite groundwater contaminated from past operations continues to discharge into the river from riverbank springs and groundwater seeps (Poston et al. 2005; Dirkes 1990).¹¹⁴”

and:

“Riverbank spring water samples collected along the Hanford Site 300 Area (adjacent to a contaminated groundwater plume) have concentrations of uranium and gross alpha radioactivity

¹⁰⁹ Beasley M.T., D.C. Jennings, and A.D. McCullough, “Sediment Accumulation Rates in the Lower Columbia River.”, 1986 *J. Environ. Radioactivity* 3:103-123; Robertson, D.E. and J.J. Fix, *Association of Hanford Origin Radionuclides with Columbia River Sediments*, BNWL-2305, 1977

¹¹⁰ “There is no firm basis for setting a “safe” level of exposure [to radiation] above background. . . Many sources emit radiation that is well below natural background levels. This makes it extremely difficult to isolate its stochastic effects. In setting limits, EPA makes the conservative (cautious) assumption that any increase in radiation exposure is accompanied by an increased risk of stochastic effects.”

http://www.epa.gov/rpdweb00/understand/health_effects.html#anyamount Last visited April 14, 2014.

¹¹¹ G. W. Patton and R. L. Dirkes, *Summary of Radiological Monitoring of Columbia and Snake River Sediment, 1988 Through 2004*, Pacific Northwest National Laboratories, PNNL-16990, Oct. 2007, at iv . Enclosed as *Exhibit 8*. Available at:

http://www.pnl.gov/main/publications/external/technical_reports/PNNL-16990.pdf

¹¹² <http://www.hanford.gov/page.cfm/300area> Last visited April 2, 2014

¹¹³ *Id.*

¹¹⁴ G. W. Patton and R. L. Dirkes, *Summary of Radiological Monitoring of Columbia and Snake River Sediment, 1988 Through 2004*, Pacific Northwest National Laboratories, PNNL-16990, Oct. 2007, at 2.4 . Enclosed as *Exhibit 8*.

that can exceed drinking water standards, with both concentrations decreasing rapidly upon release to the river (Poston et al. 2005; Patton et al. 2002).¹¹⁵,”

A report published in 2012 by the U.S. Department of Energy (USDOE) informs that uranium is present in the groundwater underneath the 300 Area¹¹⁶ and that there was elevated uranium levels in near-shore water samples taken from the Columbia River at two (2) 300 Area locations¹¹⁷. (Enclosed as *Exhibit 9*.) Additionally, there certainly is the potential for Hanford’s radionuclides to be deposited into the Columbia River from contaminated dust and from contaminated organic debris, such as tumbleweeds, that may have grown in contaminated groundwater. Severe dust storms in this region of the country are not uncommon.

Thus, groundwater discharges from springs in Hanford’s 300 Area into the Columbia River include uranium of Hanford Site origin, and near-surface water samples confirm measurable uranium of Hanford origin in the Columbia River. Where there is uranium there is radon. Because the uranium is from Hanford’s past operations, the accompanying radon is also attributable to Hanford’s past operations. Such radon is therefore above natural background radiation.

The depth of the Columbia River is also subject to fluctuations. These fluctuations may change the depth of the river by ten (10) feet in a 24 hour period¹¹⁸. Rapid changes in river stage have the potential to strand uranium from groundwater releases on dry river banks, if only temporally. Any uranium in open air results in radon being released directly into the air.

Any potential-to-emit radionuclide air pollutants attributable to radionuclides of Hanford Site origin is subject to inclusion in Hanford’s AOP along with monitoring, reporting, and recordkeeping sufficient to ensure “reliable data from the relevant time period.¹¹⁹” The Columbia River has the potential-to-emit radon owing to the existence of Hanford’s radionuclide pollutants. The large fluctuations in river stage only exacerbate the potential-to-emit radionuclides.

At the end of 2005 the Hanford Site ceased monitoring the Columbia River shoreline in response to budget cuts¹²⁰. In 2006, Health began an independent

¹¹⁵ *Id.* at 4.5

¹¹⁶ U.S. Dept. of Energy, Richland Operations Office, *Hanford Site Environmental Report for Calendar Year 2011*, DOE/RL-2011-119, Rev. 0, Sept. 2012, at 7.15 (Enclosed as *Exhibit 9*.)

Available at: http://msa.hanford.gov/files.cfm/2011_DOE-RL_2011-119_HanfordSiteEnviroReport4CY2011.pdf

¹¹⁷ *Id.* at 7.17.

¹¹⁸ “As a result of daily fluctuations in discharges from Priest Rapids Dam, the depth of the river varies significantly over a short time period. River stage changes of up to 3 m (10 ft) during a 24-hr period may occur along the Hanford Reach (Poston et al. 2000).”

D. A. Neitzel, *Editor*, *Hanford Site National Environmental Policy Act (NEPA) Characterization*, PNNL-6415, Rev. 13, Sep. 2001 at 4.61

Available at: http://www.pnl.gov/main/publications/external/technical_reports/pnnl-6415rev13.pdf

¹¹⁹ 40 C.F.R. 70.6 (a)(3)(i)(B)

¹²⁰ Pacific Northwest National Laboratory, *Hanford Site Environmental Report for Calendar Year 2010*, PNNL-20548, Sept. 2011, at 8.124

Available at: http://msa.hanford.gov/files.cfm/2010_PNNL-20548_Env-Report.pdf

monitoring program with 26 thermoluminescent dosimeters (TLDs) located along the Columbia River¹²¹. However, the radionuclides are Hanford's and so is the responsibility to monitor and report these radionuclide emissions. Until the EPA sets a *de minimis* by rule for radionuclide air emissions, all of Hanford's radionuclide air emissions above background are required by the CAA to be addressed in Hanford's Title V permit. All Hanford's radionuclide air emissions include those that could emanate from the Columbia River.

What is apparent from the above-published information is that normal operations at Hanford include the unabated release of Hanford's radionuclides into the Columbia River from contaminated groundwater. Over time, this practice has undoubtedly resulted in a large number of curies being swept downstream, and becoming inaccessible to discovery and measurement. From an air perspective, measuring radioactive air emissions resulting from decay would be extremely difficult once the parent isotopes are carried downstream. What is also apparent is that current regulation requires assessment of compliance with the dose standard to include measurement of all of a source's radionuclide air emissions; even emissions from "evaporation ponds, breathing of buildings, and contaminated soils¹²²." Evaluation of Hanford's compliance with the dose standard should, therefore, include all regulated air emissions that would be generated had all Hanford's contaminated ground water been discharged into a single impoundment; an impoundment where the contents are subject to the laws of evaporation and decay. USDOE certainly has access to both experts and past sampling data to arrive at an estimate of the cumulative total curie inventory washed downstream. The Columbia River *emission unit* should reflect all expected radionuclide emissions from this ever-increasing cumulative estimate. After all, it is the permittee's informed decision not to prevent its radionuclide-contaminated groundwater from entering the Columbia River that results in the Columbia River being a source of fugitive emissions of radionuclides. The practice of avoiding responsibility for Hanford's regulated emissions because the Columbia River has carried them away from the Hanford Site results in undercounting Hanford's emissions. Ecology errs if it determines Hanford can avoid responsibility for its radon-generating isotopes by releasing these isotopes into the Columbia River.

Ecology offers a four part response to Petitioner's comments 14 and 16. One (1) part addresses actions taken by the permittee and Health, whereby monitoring of radon is not considered a *federally-enforceable requirement*. Parts two (2), three (3), and four (4) advance Ecology's view that radon is not regulated under the CAA absent a specific federal regulation addressing radon emissions from Hanford.

¹²¹ *Id.* at 8.125.

¹²² "EPA and DOE agree that the dose standard of 40 CFR Part 61, Subpart H applies to emissions from diffuse sources such as evaporation ponds, breathing of buildings and contaminated soils. . . . Data on diffuse sources and the results of analyses will be reported as part of DOE's Annual Air Emissions Report to EPA." *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 61 Including Subparts H, I, O & T*, signed 9/29/94 by Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, and on 4/5/95 by Tara J. O'Toole, DOE Assistant Secretary for Environment, Safety and Health, at § 5a. Available at: http://www.epa.gov/radiation/docs/neshaps/epa_doe_caa_mou.pdf

However, Ecology's responses are rendered impotent by four (4) paragraphs in the CAA, CAA §§ 112 (b)(1), 112 (j)(5), 502 (b)(5)(A), and 502 (b)(5)(E). Ecology first (1st) overlooks that "Radionuclides (including radon)"¹²³ are listed as a *hazardous air pollutant* in CAA § 112 (b)(1). Next Ecology overlooks the requirement in CAA § 112 (j)(5) that no permit issued under CAA Title V can overlook a limit for any *hazardous air pollutant* emitted by a source, even if those emissions are unaddressed in regulation. Lastly, Ecology overlooks that Ecology is the issuing permitting authority. As the issuing permitting authority, it is Ecology that must have the legal ability to "issue permits and assure compliance by all sources required to have a permit . . . with each applicable standard, regulation or requirement under this chapter [CAA Title V]¹²⁴", and to enforce those applicable standards, regulations, and requirements. Health is not a permitting authority under the CAA and has no authority to negotiate compliance with the permittee for any CAA requirement in a Title V permit.

3.7.3 Contrary to 40 C.F.R. 70.7 (a)(5), Ecology failed to provide the legal and factual basis for omitting the Columbia River as a source of radionuclide air emissions.

Petitioner raised this objection with reasonable specificity in comment 16. (See Exhibit 1, Petitioner's Comment 16) According to 40 C.F.R. 70.7 (a)(5) Ecology "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)." Ecology failed to do so with regard to the Columbia River as a source for radionuclide air emissions originating from Hanford's groundwater discharges; discharges containing isotopes that constantly generate radon.

3.7.4 The Administrator is obligated to object.

The Permit overlooks the Columbia River as a source of diffuse and fugitive emissions of radionuclides. Petitioner raised this objection with reasonable specificity in comments properly submitted during the advertised public comment period. Petitioner also objects to Ecology's failure under 40 C.F.R. 70.7 (a)(5) to provide the legal and factual basis for omitting the Columbia River as a source of radionuclide air emissions.

The CAA requires that the Administrator "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.¹²⁵ Under case law the Administrator has discretion defining a reasonable interpretation of the word "demonstrate" in CAA § 505 (b)(2) [42 U.S.C. 7661d

¹²³ CAA § 112 (b)(1); 42 U.S.C. 7412 (b)(1) (emphasis added).

¹²⁴ CAA § 502 (b)(5)(A); 42 U.S.C. 7661a (b)(5)(A)

¹²⁵ CAA § 505 (b)(2) [42 U.S.C. 7661d (b)(2)]; *see also* "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]". 40 C.F.R. 70.8(c)(1)

(b)(2)]¹²⁶. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit¹²⁷.

This Petitioner offers binding authority in four (4) paragraphs of the CAA; CAA §§ 112 (b)(1), 112 (j)(5), 502 (b)(5)(A), and 502 (b)(5)(E). In CAA § 112 (b)(1) Congress defined *hazardous air pollutant* to include “Radionuclides (including radon)”¹²⁸. Section 112 (j)(5) of the CAA specifies that no permit issued under CAA Title V can overlook a limit for any *hazardous air pollutant* emitted by a source, even if those emissions are unaddressed in regulation. Sections 502 (b)(5)(A) and 502 (b)(5)(E) of the CAA require every permitting authority have the legal ability to issue and enforce a permit under Title V that assures compliance with all applicable standards, regulations, and requirements of Title V. Petitioner offers evidence in the form of reports prepared for the permittee that state uranium from past operations at Hanford has been, and continues to be, released into the Columbia River and carried downstream. All uranium is radioactive and all uranium decays. One product of uranium decay is radon, a radioactive gas and a *hazardous air pollutant*. Had Hanford maintained physical possession of all its uranium, there can be no doubt that the resulting radon would make a very significant contribution to Hanford’s radionuclide air emissions. However, this Permit continues to allow Hanford to avoid accounting for all its radionuclide air emissions by visiting radon from decay of Hanford’s uranium on members of the public down river from the Hanford Site.

The Administrator is obligated to object to either:

1. Ecology’s failure to recognize there is at least a potential-to-emit diffuse and fugitive emissions of radon, a *hazardous air pollutant*, resulting from past and present releases of Hanford’s uranium into the Columbia River. (Even uranium released by Hanford in the distant past continues to generate radon.)
or
2. Ecology’s failure to provide the legal and factual basis for omitting the Columbia River as a source of radionuclide air emissions.

4. CONCLUSION

In this Permit, Ecology reaches well beyond its authority when it removes radionuclides (including radon) from regulation under Title V of the CAA and Part 70. Rather, Ecology chose to regulate radionuclides under a state statute that does not implement Part 70, is not obligated by requirements of Part 70, and cannot be enforced by any Part 70 permitting authority, including Ecology, the issuing permitting authority.

¹²⁶ “The ambiguity of this provision in the statute [42 U.S.C. 7661d (b)(2)] suggests that Congress has left the meaning of “demonstrate” open for EPA to supply a reasonable interpretation under *Chevron* [*Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)].” *MacClarence v. U.S. E.P.A.*, 596 F.3d 1123, 1131 (9th Cir. 2010)

¹²⁷ “Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty.” *New York Public Interest Research Group v. Whitman*, 321 F. 3d 316, 333 (2d Cir. 2003)

¹²⁸ CAA § 112 (b)(1)

PETITION TO OBJECT
TO THE HANFORD SITE,
TITLE V OPERATING PERMIT,
NUMBER 00-05-006, RENEWAL 2, REV. A

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424 SHORELINE CT.
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Ecology also fails to provide the legal and factual bases for this overreaching. Ecology further fails to recognize radon, the only radionuclide specifically named as a *hazardous air pollutant* in CAA § 112 (b)(1), remains subject to regulation even though the Administrator has not yet promulgated regulation addressing Hanford's emissions of radon. Finally, Ecology overlooks the Columbia River as a source of fugitive emissions of radionuclides. These radionuclides result from decades of documented releases from Hanford's radionuclide-contaminated groundwater. These releases of radionuclides remain unabated and continue to decay, generating radionuclide gases even when they have been washed down river and deposited in sediments behind McNary Dam. However, the most significant impact of Ecology's overreaching results in the inability of the Petitioner to attempt to limit the adverse effects from exposure to Hanford's radionuclide air emissions through the submission of public comments; or from receiving benefit from public comments submitted by others. Because Ecology does not have legislative authority to act on Permit terms and conditions regulating Hanford's radionuclide air emissions, Ecology could not, and did not, change any of these terms and conditions, even those that clearly merited change.

Section 502 (b)(6) of the CAA specifically grants the public the opportunity to impact the air we breathe through submission of public comments. Ecology effectively destroyed this right when it decided to regulate Hanford's radionuclide air emissions through a regulatory scheme Ecology cannot enforce. In fact, all terms and conditions regulating Hanford's radionuclide air emissions were issued as final absent any opportunity for public review, and more than more than one (1) year before Ecology offered the draft Permit for public participation.

The only conclusion supported by the objections, binding authorities, and exhibits is that this Permit is not consistent with the CAA or Part 70, with respect to terms and conditions regulating Hanford's radionuclide air emissions. Therefore, the Administrator has a nondiscretionary duty to object to the issuance of this Permit.

Respectfully submitted April 21, 2014.

Bill Green, Petitioner

5. LIST OF EXHIBITS

List of exhibits:

- Exhibit 1
Pages 1-28 Petitioner's transmittal letters and comments.
- Exhibit 2
Pages 1-23 Ecology's response to public comments. (Exhibits D and E are Petitioner's comments which are included in this Petition as Exhibit 1, above).
Pages 24-29 Ecology Exhibit A
Pages 30-35 Ecology Exhibit B
Pages 36-37 Ecology Exhibit C
- Exhibit 3
Pages 1-4 *Respondents' Stipulation in Response to Motion for Summary Judgment*, PCHB 13-055, 5/24/2013
- Exhibit 4
Page 1 *Hanford Air Operating Permit Number 00-05-006, Renewal 2, Revision A*, 11/17/2013, page iii of viii. This is the *Standard Terms and General Conditions* portion of the Permit.
Pages 2-3 *Hanford Air Operating Permit Number 00-05-006, Renewal 2, Revision A*, 11/17/2013, pages iii and iv of vi. This is the Statement of Basis for the *Standard Terms and General Conditions* portion of the Permit.
Page 4 *Appendix A* of 40 C.F.R. 70 for Washington State.
Page 5 WAC 246-247-030 (14) definition of license.
Page 6 Initial page of WAC 246-247-060 containing -060 (1)(e), and -060 (2)(c).
Page 7 RCW 70.98.050 (1).
- Exhibit 5
Pages 1-2 Letter from Phyllis Barney, Public Disclosure Coordinator, State of Washington Department of Health, to Bill Green, May 2, 2013.
- Exhibit 6
Page 1 Signature page (page 1) of *Attachment 2, Radioactive Air Emission License*, offered for public review on June 30, 2013.
Page 2 Signature page (page 1) of *Attachment 2, Radioactive Air Emission License*, offered for public review on November 17,

2013.

Exhibit 7

Page 1 Page iii from: U.S. Dept. of Energy, Richland Operations Office, *Radionuclide Air Emissions Report for the Hanford Site, Calendar Year 2007*, DOE/RL-2008-03, Rev. 0 (2008)
Page 2 certification page from DOE/RL-2008-03, Rev. 0
Page 3 Page iii from: U.S. Dept. of Energy, Richland Operations Office, *Radionuclide Air Emissions Report for the Hanford Site, Calendar Year 2008*, DOE/RL-2009-14, Rev. 0 (2009)
Page 4 certification page from DOE/RL-2009-14, Rev. 0
Page 5 Page iii from: U.S. Dept. of Energy, Richland Operations Office, *Radionuclide Air Emissions Report for the Hanford Site, Calendar Year 2009*, DOE/RL-2010-17, Rev. 0 (2010)
Page 6 certification page from DOE/RL-2010-17, Rev. 0
Page 7 Page iii from: U.S. Dept. of Energy, Richland Operations Office, *Radionuclide Air Emissions Report for the Hanford Site, Calendar Year 2010*, DOE/RL-2011-12, Rev. 0 (2011)
Page 8 certification page from DOE/RL-2011-12, Rev. 0
Page 9 Page iii from: U.S. Dept. of Energy, Richland Operations Office, *Radionuclide Air Emissions Report for the Hanford Site, Calendar Year 2011*, DOE/RL-2012-19, Rev. 0 (2012)
Page 10 certification page from DOE/RL-2012-19, Rev. 0
Page 11 Page iii from: U.S. Dept. of Energy, Richland Operations Office, *Radionuclide Air Emissions Report for the Hanford Site, Calendar Year 2012*, DOE/RL-2013-12, Rev. 0 (2013)
Page 12 certification page from DOE/RL-2013-12, Rev. 0

Exhibit 8

Page 1 Page iv from: G. W. Patton and R. L. Dirkes, *Summary of Radiological Monitoring of Columbia and Snake River Sediment, 1988 Through 2004*, Pacific Northwest National Laboratories, PNNL-16990, Oct. 2007
Page 2 Page 2.4 of PNNL-16990
Page 3 Page 4.15 of PNNL-16990

Exhibit 9

Page 1 Page 7.15 from: U.S. Dept. of Energy, Richland Operations Office, *Hanford Site Environmental Report for Calendar Year 2011*, DOE/RL-2011-119, Rev. 0, Sept. 2012. Available at: http://msa.hanford.gov/files.cfm/2011_DOE-RL_201119_HanfordSiteEnviroReport4CY2011.pdf
Page 2 Page 7.17 from DOE/RL-2011-119, Rev. 0