Richard Smith – WSBA # 21788
Meredith Crafton – WSBA # 46558
Smith & Lowney, PLLC
2317 East John Street
Seattle, Washington 98112
(206) 860-2124

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BILL GREEN Plaintiff, v. GINA MCCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency, Defendant.	Civil Case No._____ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER 42 U.S.C. § 7604. (Environmental)

Plaintiff, Bill Green, through the undersigned counsel, complains of Defendant, Gina McCarthy, as follows:

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief, and costs and fees, under the Clean Air Act ("the Act" or "CAA"), 42 U.S.C. §§ 7401, *et seq.*

2. Plaintiff, Mr. Bill Green, seeks an order declaring that Defendant, the

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SEATTLE, WA 98112
(206) 860-2883

Administrator of the Environmental Protection Agency ("Administrator"), is required, under CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2), to grant or deny petitions filed by Green to object to the proposed CAA Title V operating permits for the United States Department of Energy Hanford Site, Permit No. 00-05-006, Renewal 2 ("Permit 1") and Permit No. 00-05-006, Renewal 2, Revision A ("Permit 2").

3. Green seeks an order requiring defendant Administrator to perform her non-discretionary duty to grant or deny the two petitions submitted to the Administrator by Green under CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2).

JURISDICTION AND VENUE

4. This action arises under the citizen suit provision of the CAA. 42 U.S.C. § 7604(a)(2). This Court has subject matter jurisdiction over the claims set forth in this complaint under 42 U.S.C. § 7604(a)(2), 28 U.S.C. § 1331, and 28 U.S.C. § 2201. The relief requested by Green is authorized by 42 U.S.C. § 7604, 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) and 42 U.S.C. § 7604(c) because the U.S. Department of Energy's Hanford Site is located within the Eastern District of Washington, the permits at issue are site specific, local permits and Green resides within the Eastern District of Washington.

6. A copy of this Complaint will be served upon the Attorney General of

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the United States and the Administrator as required by 42 U.S.C. § 7604(c)(3).

NOTICE

7. Green gave notice pursuant to and in compliance with the requirements in CAA § 304 (b)(2), 42 U.S.C. § 7604 (b)(2), and 40 C.F.R. Part 54. On July 11, 2014, Green notified the Administrator, via certified mail as well as other required recipients, via first class mail, of Plaintiff's intent to file this action through a Notice of Intent to Sue Pursuant to § 304 (b)(2) of the Clean Air Act. See Exhibit A. The certified mail receipt shows the notice letter was post marked on July 11 and received by the Administrator's office on July 17, 2014. See Exhibit B.

8. More than 60 days have passed since Green provided his Notice of Intent to File Suit to the Administrator and others which was postmarked on July 11, 2014.

9. Defendant has neither granted nor denied Green's two petitions. Thus, upon information and belief, Defendant's failure to perform her nondiscretionary duty to grant or deny Green's petitions is ongoing and will continue until enjoined and restrained by this Court. Therefore an actual controversy exists between the parties.

PARTIES

10. Bill Green, 424 Shoreline Court, Richland, WA 99354-1938, is a natural born citizen of the United States of America and has resided in Richland,

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(206) 860-2883

Washington, for more than twenty years.

11. Green owns real property and lives within five miles of the Hanford Site, 300 Area. For many years the 300 Area has been the source for slightly more than ninety-eight percent (98%) of the total dose from all of Hanford's point source radionuclide air emissions received by the public according to Department of Energy-certified reports required by 40 C.F.R. 61 subpart H. Green's health and use of the air is harmed by the radionuclide pollutants released into the air by the Hanford Site.

12. The release of pollutants into the air from the Hanford Site impairs Green's use and enjoyment of his property as well as his ability to conduct his daily life activity free from concerns related to exposure to harmful pollutants.

13. Green is also adversely affect by the Administrator's delay in responding to his petitions. The Administrator's failure to respond deprives Green of his procedural rights to protect his interests and rights codified by Congress in the Clean Air Act.

14. Defendant GINA MCCARTHY is the Administrator of the United States Environmental Protection Agency ("U.S. EPA"). The Administrator is responsible for directing the activities of the U.S. EPA and implementing the requirements of the CAA. Specifically, the Administrator is statutorily required to respond to petitions under CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2).

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(206) 860-2883

LEGAL BACKGROUND

15. The primary purpose of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1). To help meet this goal, the 1990 amendments to the Clean Air Act added Title V, creating an operating permit program that applies to the Hanford Site. See 42 U.S.C. §§ 7661-7661f.

16. In enacting the CAA, Congress decided that "air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Section 502(d)(1) of the CAA calls upon each state to develop and submit to EPA an operating permit program to improve compliance with, and enforcement of, federal air quality requirements. 42 U.S.C. § 7661a(d). Correctly implemented, the Title V program "will enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. 32,251 (July 21, 1992).

17. Permits issued under the Title V program ("Title V permits") are required to "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance." 42 U.S.C. § 7661c(c).

18. Before a state can issue a Title V permit, the state must forward the proposed Title V permit to EPA for review. 42 U.S.C. § 7661d(a)(1)(B). EPA then

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(206) 860-2883

has 45 days to review the proposed permit. 42 U.S.C. § 7661d(b)(1). EPA must object to the permit issuance if EPA finds that the permit does not comply with all applicable provisions of the CAA. Id. If EPA does not object to the permit issuance, then "any person may petition the Administrator within 60 days" of the end of EPA's review period to request that EPA object. 42 U.S.C. § 7661d(b)(2).

19. Once EPA has received a petition requesting that it object to the issuance of a permit, it has a non-discretionary duty to grant or deny the petition within 60 days. Id. If a state issues a final Title V permit and EPA subsequently objects to the permit, then EPA "shall modify, terminate, or revoke such permit." 42 U.S.C. § 7661d(b)(3).

20. The Clean Air Act authorizes citizen suits "against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2).

FACTUAL BACKGROUND

21. The 586-square-mile Hanford site is a legacy of World War II and the Cold War. In 1943, the federal government selected Hanford as a Manhattan Project site, to enrich plutonium for nuclear weapons. Major site activities included the fabrication of nuclear reactor fuel assemblies in the 300 Area, irradiation of the fuel assemblies in reactors in the 100 Areas, dissolution of fuel assemblies and

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2317 EAST JOHN STREET
SEATTLE, WA 98112
(206) 860-2883

chemical separations in the 200 Areas, and the storage of waste primarily in the 200 Areas. During Hanford's operation, the federal government deposited hundreds of millions of gallons of radioactive waste directly into the ground in injection wells, trenches, and buried drums, as well as placing waste in 177 large underground tanks. Since 1989, Hanford has become one of the world's largest environmental remediation projects as the Department of Energy develops new waste treatment and disposal technologies as well as demolishes buildings and contains waste from historical operations.

22. The Hanford Site a major stationary source of air pollution in eastern Washington State. As a major source as defined by CAA § 112(a)(1), 42 U.S.C. § 7712(a)(1), Hanford is required to obtain a Clean Air Act Permit Program Title V Permit ("Title V Permit").

COUNT 1

23. On August 2, 2012, on January 3, 2013, and on January 24, 2013, Green submitted public comments regarding the Hanford Site Title V Permit, Permit No. 00-05-006, Renewal 2 ("Permit 1") to the Washington State Department of Ecology ("Ecology"). Green's comments were received by Ecology within the time provided for such comments under Washington State and federal law.

24. Ecology submitted the proposed version of Permit 1 for the Hanford Site to the U.S. EPA on or about February 14, 2013. This submission commenced

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WA 98112
(206) 860-2883

a 45-day period for the U.S. EPA to review the permit under CAA § 505 (b)(1), 42 U.S.C. § 7661d (b)(1).

25. The Administrator did not object to the proposed operating permit (Permit 1) for the Hanford Site within the 45-day period provided by CAA § 505 (b)(1), 42 U.S.C. § 7661d (b)(1).

26. On April 23, 2013, within the 60-day petition period provided by CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2), Green petitioned the Administrator to object to Permit 1 ("Petition 1"). See Exhibit C.

27. Green provided a copy of Petition 1 to the applicant, the U.S. Department of Energy, and to Ecology, the issuing permitting authority, as required by CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2).

28. Under CAA § 505 (b), the Administrator had 60 days to grant or deny Green's Petition 1. This 60-day period expired on or about June 24, 2013.

29. The Administrator's duty to grant or deny Green's Petition 1 within 60 days, by June 24, 2013, is not discretionary.

30. As of the date of this Complaint, the Administrator has not granted or denied Green's Petition 1, notwithstanding the fact that the deadline to do so was more than one year ago.

31. The CAA provides Green with a cause of action to compel the Administrator's nondiscretionary duty to grant or deny Mr. Green's timely petition

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WA 98112
(206) 860-2883

in CAA § 304 (a), 42 U.S.C. § 7604 (a).

COUNT 2

32. On June 30, 2013, Ecology re-opened the Hanford Site Title V Permit, Permit No. 00-05-006, Renewal 2 (Permit 2) for public comment.

33. On August 1, 2013, Green submitted public comments on the re-opened Permit 2. Green's comments were received by Ecology, the issuing permitting authority, within the time provided for such comments under Washington State and federal law.

34. On November 17, 2013, Ecology opened public comment on Permit 2.

35. On December 19, 2013, Green submitted public comments to Ecology regarding Permit 2. Green's comments were received by Ecology within the time provided for such comments under Washington State and federal law.

36. Ecology submitted the proposed Permit 2 to the U.S. EPA on or about February 13, 2014. This submission commenced a 45-day period for the U.S. EPA to review the permit under CAA § 505 (b)(1), 42 U.S.C. § 7661d (b)(1).

37. The Administrator did not object to the proposed Permit 2 within the 45-day period provided by CAA § 505 (b)(1), 42 U.S.C. § 7661d (b)(1).

38. On April 21, 2014, within the 60-day petition period provided by CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2), Green petitioned the Administrator to object to Permit 2. See Exhibit D.

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WA 98112
(206) 860-2883

39. Green provided a copy of his petition ("Petition 2") to the applicant, the U.S. Department of Energy, and to Ecology, the issuing permitting authority, under CAA § 505 (b)(2), 42 U.S.C. § 7661d (b)(2).

40. Under CAA § 505 (b), the Administrator had 60 days to grant or deny Green's Petition 2. This 60-day period expired on or about June 22, 2014.

41. The Administrator's duty to grant or deny Green's Petition 2 within 60 days, by June 22, 2014, is not discretionary.

42. As of the date of this Complaint, the Administrator has not granted or denied Green's Petition 2, notwithstanding the fact that the deadline to do so was several months ago.

43. The CAA provides Green with a cause of action to compel the Administrator's nondiscretionary duty to grant or deny Green's timely petition in CAA § 304 (a), 42 U.S.C. § 7604 (a).

PRAYER FOR RELIEF

WHEREFORE, Green respectfully prays for this Court to:

A. Declare that the Administrator has a non-discretionary duty to grant or deny Plaintiff's Petition 1 within 60 days of receiving this petition;

B. Declare that the Administrator's failure to grant or deny Mr. Green's Petition 1 within 60 days is a violation of CAA § 505 (b), 42 U.S.C. § 7661d (b);

C. Order the Administrator to grant or deny Petition 1 immediately, or at

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WA 98112
(206) 860-2883

a time set by the Court;

D. Declare that the Administrator has a non-discretionary duty to grant or deny Plaintiff's Petition 2 within 60 days of receiving this petition;

E. Declare that the Administrator's failure to grant or deny Green's Petition 2 within 60 days is a violation of CAA § 505 (b), 42 U.S.C. § 7661d (b);

F. Order the Administrator to grant or deny Petition 2 immediately, or at a time set by the Court;

G. Award Green his costs of this action, with reasonable attorney fees, pursuant to CAA § 304 (d), 42 U.S.C. § 7604 (d); and

H. Grant such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 10th day of September, 2014.

Smith & Lowney, PLLC

By: s/Richard Smith
Richard A. Smith, WSBA # 21788
2317 E. John Street, Seattle, WA 98112
Tel: (206) 860-2883; Fax: (206) 860-4187
Email: rasmithwa@igc.org

s/Meredith Crafton
Meredith A Crafton, WSBA # 46558
2317 E. John Street, Seattle, WA 98112
Tel: (206) 860-2883; Fax: (206) 860-4187
Email: meredithc@igc.org

Attorneys for plaintiff Bill Green.

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WA 98112
(206) 860-2883

EXHIBIT A

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

July 11, 2014

Via Certified Mail - Return Receipt Requested
Administrator Gina McCarthy
United States Environmental Protection Agency
Ariel Rios Building, Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Notice of intent to sue for failure to perform non-discretionary duty under the Clean Air Act to respond to petitions requesting that the Administrator object to the Title V operating permit for the U.S. Department of Energy Hanford Site, Permit No. 00-05-006, Renewal 2 and Renewal 2, Revision A**

Dear Administrator McCarthy:

This letter is served upon you under Section 304(b) of the Clean Air Act, 42 U.S.C. § 7604(b), and 40 C.F.R. § 54, and provides you with sixty days notice of intent to sue by Bill Green ("Petitioner"), 424 Shoreline Ct., Richland, WA 99354, (509) 375-5443, for your failure to respond within sixty days to the above-referenced timely submitted petitions. Any response to this notice of intent to sue should be directed to Petitioner's counsel, the undersigned.

You have violated your non-discretionary duty by failing to grant or deny the Petitioner's request that you object to Title V Air Operating Permit No. 00-05-006, Renewal 2, for the U.S. Department of Energy Hanford Site, which was received by EPA from the Washington Department of Ecology on or about February 14, 2013. EPA did not object to the proposed permit within 45 days of receipt and, on April 23, 2013, Petitioner submitted a petition requesting that EPA object within the next 60 days. Section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), instructs the Administrator of EPA to respond to such a petition within sixty days of receipt. It is now more than a year past the sixty-day deadline, and you and the EPA have failed to act on Petitioner's request and are thus in violation of your non-discretionary duty to respond. 42 U.S.C. § 7661d(b)(2).

Similarly, you have violated your non-discretionary duty by failing to grant or deny the Petitioner's request that you object to Title V Air Operating Permit No. 00-05-006, Renewal 2, Revision A, for the U.S. Department of Energy Hanford Site, which was received by EPA from the Washington Department of Ecology on or about February 13, 2014. EPA did not object to the proposed permit within 45 days of receipt and, on April 21, 2014, Petitioner submitted a petition requesting that EPA object within the next 60 days. Section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), instructs the Administrator of EPA

to respond to such a petition within sixty days of receipt. It is now several weeks past the sixty-day deadline, and you and the EPA have failed to act on Petitioner's request and are thus in violation of your non-discretionary duty to respond. 42 U.S.C. § 7661d(b)(2).

Section 505(b)(2) of the Clean Air Act provides that if the "Administrator does not object to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action." 42 U.S.C. § 7661d(b)(2). Following receipt of such a petition, "the Administrator shall grant or deny such petition within 60 days after the petition is filed." *Id.*

Where there is a failure by the Administrator to perform a non-discretionary act or duty under the Clean Air Act, a civil action is available to enjoin such action. 42 U.S.C. § 7604(a)(2). Accordingly, at the close of sixty days from the postmark date of this notice of intent to sue, the Petitioner intends to file suit against you and EPA in federal district court under Section 304 of the Clean Air Act, 42 U.S.C. § 7604(a)(2), seeking declaratory relief, an injunction requiring prompt action on the Petitioner's petitions that is overdue, and an award of litigation expenses.

If you have questions or would like to discuss this matter, please contact me.

Very truly yours,

SMITH & LOWNEY, PLLC

By: _*s/Richard Smith*
Richard Smith
(206) 860-2124
rasmithwa@igc.org

cc: Dennis McLerran, Region 10 Administrator, U.S. EPA
Maia Bellon, Director, Washington Department of Ecology

EXHIBIT B

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Street, Apt. No.; or PO Box No. 1200 Pennsylvania Ave NW
City, State, ZIP+4 Washington DC 20460

PS Form 3800, August 2006 See Reverse for Instructions

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1. Article Addressed to:

Administrator Gina McCarthy
U.S. Environmental Protection Agency
William Jefferson Clinton Bldg.
Mail Code 1101A
1200 Pennsylvania Ave NW
Washington DC 20460

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* C. Date of Delivery 7/17

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

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Sent To: D. McLerran
Street, Apt. No.; or PO Box No.: 1200 Sixth Ave Ste. 900
City, State, ZIP+4: Seattle, WA 98101

PS Form 3800, August 2006 — See Reverse for Instructions

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1. Article Addressed to:

Dennis J. McLerran
Regional Administrator
U.S. Environmental Protection Agency, Region 10
1200 Sixth Ave, Ste. 900
Seattle, WA 98101

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Addressee

B. Received by *(Printed Name)*: Mike W
C. Date of Delivery: 7/14/14

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
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☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

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SEATTLE WA 981

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Street, Apt. No.; or PO Box No.: PO Box 47600
City, State, ZIP+4: Olympia WA 98504-7600

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Maia D. Bellon, Director
Washington Department
of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Department of Enterprise Services
Consolidated Mail Services
Olympia, WA 98504-1050

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X ☐ Agent ☐ Addressee

B. Received by (Printed Name) JUL 14 C. Date of Delivery 2014

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

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4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Transfer from service label)* 7013 2630 0000 5746 8664

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EXHIBIT C

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

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

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 Air Title V Operating Permit, Number 00-05-006, Renewal 2 (Permit). As detailed below, the regulatory structure under which the Permit was created does not provide the Washington State Department of Ecology (Ecology), the issuing permitting authority, with the legal ability to enforce all CAA Title V applicable requirements and the terms and conditions created thereunder. One impact of this structural flaw is to remove from regulation under the *Clean Air Act* (CAA) and 40 C.F.R. 70 all terms and conditions created pursuant to the radionuclide National Emission Standards for Hazardous Air Pollutants (NESHAPs), specifically the NESHAP codified at 40 C.F.R. 61 subpart H[1]. Nor does this structural flaw allow Ecology to provide the Petitioner, and all other members of the public, the opportunity to comment on federally enforceable terms and conditions implementing requirements of 40 C.F.R. 61 subpart H. In fact, that portion of the Permit containing all terms and conditions implementing requirements of 40 C.F.R. 61 subpart H was issued as final more than three (3) months before the draft Permit was offered to the public for review.

The Administrator is obligated to object: 1.) because the issuing permitting authority does not have the authority specified in CAA Title V; 2.) because the regulation of radionuclides is decoupled from 40 C.F.R. 70 (Part 70); 3.) because the Permit was issued absent the opportunity for public involvement for those federally enforceable terms and conditions implementing requirements of the radionuclide NESHAPs; and 4.) because there is no opportunity for judicial review in state court as required by Part 70 for those federally enforceable terms and conditions implementing requirements of the radionuclide NESHAPs.

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

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

Table of Contents

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

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

I. BACKGROUND

I.A. General chronology

September 10, 2011		Ecology announced receipt of a complete Hanford Site AOP application (*Permit Register*, vol. 12, no. 17, Sep. 10, 2011)
December 31, 2011		Expiration date of the Hanford Site AOP No. 00-05-006, Renewal 1
February 23, 2012		*Attachment 2* of the Hanford Site AOP was issued as final
June 4 – Aug. 3, 2012		Ecology opened the draft Hanford Site AOP for public comment
August 2, 2012		Ecology received Petitioner's comments. (All Petitioner's comments are enclosed as *Exhibit 1*.)
December 10, 2012, - January 4, 2013:		Ecology opened the draft Hanford Site AOP for a second (2nd) public comment period
January 3, 2013		Ecology received Petitioner's second (2nd) set of comments
January 14 – January 25, 2013:		Ecology opened the draft Hanford Site AOP for a third (3rd) public comment period
January 24, 2013		Ecology received Petitioner's third (3rd) set of comments
February 14, 2013		EPA's 45-day review begins. EPA received the Proposed permit along with Ecology's response to public comments. (Ecology's responses to public comments are enclosed as *Exhibit 2*.)
March 31, 2013		EPA's 45-day review expired without an objection.
April 1, 2013		Ecology issued the permit as final with an effective date of April 1, 2013 (*Permit Register*, vol. 14, no. 6, Mar. 25, 2013)

I.B. Overview

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[2] 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 within 60 days of the expiration of EPA's 45-day review period to object to the permit. CAA 505(b)(2), 42 U.S.C. 7661d (b)(2), 40 C.F.R. 70.8(d)

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

[2] As used herein the term "permitting authority" is as defined in 40 C.F.R. 70.2: "*Permitting authority* means. . . (2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part." 40 C.F.R. 70.2

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

raised with "reasonable specificity" during the public comment period. However, a 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." 40 C.F.R. 70.8(d)

The Administrator has a nondiscretionary duty to issue or deny the petition within 60 days and may not delegate action on the petition. CAA § 505(b)(2); 42 U.S.C. 7661d (b)(2) Should the Administrator fail to discharge this nondiscretionary duty, the Petitioner may seek remedy in U.S. District Court[3], after first serving formal notice of intent to sue[4].

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.[5] 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. CAA § 505(b)(2), 42 U.S.C. 7661d (b)(2) 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." CAA § 304(d), 42 U.S.C. § 7604(d)

If EPA objects to a permit in response to a petition, the permitting authority or EPA will modify, terminate, or revoke and reissue the permit[6] using procedures in 40 C.F.R. 70.7(g)(4) or (5)(i) and (ii).

I.C. 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.

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 H[7] and required by Part 70, and those created in accordance with "Chapter 70.98 RCW and rules adopted thereunder"[8]. Terms and conditions created pursuant to 40 C.F.R. 61 subpart M and requirements for outdoor burning are contained in *Attachment 3*.

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[3] 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)

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

[5] 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)

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

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

[8] WAC 173-401-200 (4)(b)

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

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 40 C.F.R. 70 (*see* Appendix A of 40 C.F.R. 70). *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 40 C.F.R. 70), in the context of the Hanford Site Title V Permit the BCAA is not a permitting authority, but rather a "permitting agency"[9, 10].

As used herein, the terms "CAA Title V permit", "Title V permit", "air operating permit", "AOP", and "Part 70 permit" are synonymous.

II. OBJECTIONS

II.B-1. Objection 1: Ecology did not comply with requirements for public participation as specified in WAC 173-401-800 and 40 C.F.R. 70.7 (h)

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…unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period." 40 C.F.R. 70.8(d). The term "reasonable specificity" is not defined.

Objection 1 is based on Petitioner's comments 59 and 63 which are incorporated by reference and enclosed in *Exhibit 1*, as comments 59 and 63. Petitioner's Comment 59 begins with the statement: "**Provide the public with the full comment period required by WAC 173-401-800 (3).**" (emphasis retained from original) and continues by pointing-out that under WAC 173-401-800 (3) "the public comment period should have begun no sooner than December 10, 2012, rather than on December 3, 2012, and should have extended for a minimum of thirty (30) days thereafter." *Exhibit 1*, Comment 59.

The initial sentence of Comment 63 is: "**Provide the public with an accurate notice of the opportunity to submit comments on the draft Hanford Site AOP renewal along with a minimum of thirty (30) days to provide such comments, as required by 40 C.F.R. 70.7 (h) and WAC 173-401-800.**" (emphasis retained from original) *Exhibit 1*, Comment 63.

The plain language of comments 59 and 63, including citation to specific regulatory text addressing the above objection, exceeds the minimal regulatory obstacle posed by "reasonable specificity".

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[9] "[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*, June, 2012, at 2. enclosed as *Exhibit 4*, p. 2. This is the Statement of Basis associated with the *Standard Terms and General Conditions.*

[10] The term "permitting agency" is an invention of the Hanford Site AOP.

II.B-1.1. Requirements

Forty (40) C.F.R. 70.7 (h) "makes clear that all permit proceedings, except those for minor permit modifications, must provide adequate procedures for public participation. For this purpose, public participation includes: notice, an opportunity for public comment, and a hearing where appropriate." 57 Fed. Reg. 32250, 32290 (Jul. 21, 1992)

Forty (40) C.F.R. 70.7 (h)(1) "addresses the manner of giving notice, and those to whom it must be given. It provides that notice must be given: By publication in a general circulation newspaper; to all those who request to be included on a mailing list developed by the permitting authority by other means if necessary to assure adequate notice to the affected public." *Id*.

Forty (40) C.F.R. 70.7 (h)(2) "describes the information that the notice must include . . . and [40 C.F.R. 70.7 (h)] (4) and (5) contain requirements for the timing of public comment and notice of any public hearing. For initial permit issuance, permit renewals, and significant modifications, the permitting authority must provide at least 30 days for public comment and at least 30 days advance notice of any public hearing." *Id*.

Forty (40) C.F.R. 70.8 (c)(3) states that "[f]ailure of the permitting authority to do any of the following also shall constitute grounds for an objection: . . . (iii) Process the permit under the procedures approved to meet § 70.7(h) of this part except for minor permit modifications." (emphasis added) 40 C.F.R. 70.8 (c)(3). In Washington State "procedures approved to meet § 70.7(h)" are codified in WAC 173-401-800. EPA granted full approval of Washington's operating permit program effective September 12, 2001. (66 Fed. Reg. 42,439 (Sep. 12, 2001))

II.B-1.2 Argument: Ecology did not comply with requirements for public participation as specified in WAC 173-401-800 and 40 C.F.R. 70.7 (h)

There are minimally three (3) requirements for public participation under WAC 173-401-800 and 40 C.F.R. 70.7 (h) that Ecology failed to provide:

1. adequate notice to the affected public foretelling a comment period;
2. followed by a minimum of 30-days for public comment; and
3. availability, during the comment period, of all nonproprietary information contained in the permit application, draft permit, and relevant supporting material used by Ecology in the permitting process.

The Permit was the subject of three (3) public comment periods; the first (1st) was June 4 through August 3, 2012; the second (2nd) was December 10, 2012, through January 4, 2013; and the third (3rd)[11] was January 14 through January 25, 2013. Each of these public comment periods was defective.

Ecology acknowledges the first (1st) comment period (June 4 through August 3, 2012) was defective because it was not supported by any required review materials.

> "The initial comment period was June 4 to August 3, 2012. We reopened the comment period in December because the permit application materials were not available during the summer comment period." Ecology publication number 13-05-001 corrected 1/13. (*Exhibit 3*, p. 1)

[11] Ecology refers to the third (3rd) comment period as an extension of the second comment period.

Ecology also acknowledges the second (2nd) comment period (December 10, 2012, through January 4, 2013) was defective with regard to duration.

> "The online permit register was published after the start of the reopened comment period, so the comment period was shorter than the required 30 days. The end date for submitting comments is now **January 25, 2013.**" (emphasis retained from original) *Id.*

Ecology refers to the third (3rd) public review opportunity (January 14 through January 25, 2013) as a fourteen (14) day extension of the second (2nd) comment period.

> "This permit register entry is to extend the comment period listed in the 12/10/2012 permit register of 12/10/2012 to 1/4/2013. This extension will run 14 to 25 January, 2013. Combining the 25 days from the 12/10/2012 register with the 14 days on this announcement will provide the public with more than the minimum required 30 days comment period on the draft AOP." *Permit Register* Vol. 14, No. 1. Available at: http://www.ecy.wa.gov/programs/air/permit_register/Permit_PastYrs/2013_Permits/2013_01_10.html (enclosed as *Exhibit 3*, p. 2)

Ecology thus combined two (2) comment periods that are separated in time by nine (9) days into a single comment period. Each of the two (2) comment periods was less than thirty (30) days in length. However, when the two (2) comment periods were combined the total length exceeds thirty (30) days.

Ecology erred when it determined two (2) non-compliant comment periods, when combined, equals one (1) compliant comment period. The sum of one (1) comment period that cannot comply with regulatory requirements plus another comment period that cannot comply with regulatory requirements is two (2) comment periods that cannot comply with regulatory requirements. Each distinct comment period is individually subject to the requirements of WAC 173-401-800 and 40 C.F.R. 70.7 (h).

Ecology overlooked its requirement that the ". . . comment period **begins** on the date of publication of notice in the *Permit Register* or publication in the newspaper of largest general circulation . . . , whichever is later" (emphasis is mine) [WAC 173-401-800 (3)] and extends for a minimum of thirty (30) days thereafter. *Id.* Therefore, the second (2nd) comment period began on December 10, 2012, and ran for 25 days (Ecology's number), while the third (3rd) comment period began on January 14, 2013, and ran for 14 days (Ecology's number). Thus, neither the second (2nd) nor the third (3rd) comment periods satisfied the thirty (30) day comment period duration requirement of 40 C.F.R. 70.7 (h).

Even if Ecology is able to cure the less than 30-day duration defect in the second (2nd) comment period by adding fourteen (14) days from a comment period separated in time by nine (9) days, Ecology can do nothing to cure the resulting defect in the public notice. (*Exhibit 1*, Comment 63)

Both the December 10 and January 14 public notices are defective because neither accurately foretells a comment period of thirty (30) days or longer. The December public notice announced a twenty five (25) day comment period and made no mention of a January 14 through January 25 "extension". The January public notice did not announce the beginning of a thirty (30) day comment period, but rather announced a joining-in-time of twenty five (25) days from the past with fourteen (14) days in the future. In effect, the

January notice announced an event that had largely expired. Because both public notices failed to foretell a minimum thirty (30) day public comment period, both notices are defective.

Under 40 C.F.R. 70.8 (c)(3) the "[f]ailure of the permitting authority to do any of the following also shall constitute grounds for an objection: . . . (iii) Process the permit under the procedures approved to meet § 70.7(h) of this part . . .." (emphasis added) 40 C.F.R. 70.8 (c)(3). Ecology failed to comply with the following minimum elements of public participation addressed in "procedures approved to meet § 70.7(h)":

1. adequate notice to the affected public foretelling a comment period;
2. followed by a minimum of 30-days for public comment that "**begins** on the date of publication of notice in the *Permit Register* or publication in the newspaper of largest general circulation . . . , whichever is later" (emphasis is mine) (WAC 173-401-800 (3)); and
3. availability, during the comment period, of all nonproprietary information contained in the permit application, draft permit, and relevant supporting material used by Ecology in the permitting process.

Each of the three (3) comment periods provided by Ecology was deficient. The first (1st) comment period lacked required public review information. Ecology acknowledges this. The second (2nd) comment period consisted of 25 days (Ecology's number), which is less than the required minimum of thirty (30) days. Ecology also acknowledges this. The third (3rd) comment period consisted of fourteen (14) days (Ecology's number). Fourteen (14) days is also less than the required thirty (30) days. The second (2nd) and third (3rd) comment periods were also not preceded by a notice that accurately foretold a public comment period consisting of thirty (30) days or more.

Thus, each of the comment periods failed to comply with the minimum elements specified in WAC 173-401-800. In accordance with 40 C.F.R. 70.8 (c)(3)(iii) the failure of Ecology to comply with WAC 173-401-800 " shall constitute grounds for an objection." (emphasis added) 40 C.F.R. 70.8 (c)(3).

II.B-1.3. Ecology failed to respond a significant point raised in Petitioner's Comment 63.

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 explained this dictum as follows in responses to petitions to object to certain Part 70 permits:

> "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.]

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

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)][12].

Petitioner raises a significant point in Comment 63. *Exhibit 1*, Comment 63. The significant point is the need for an accurate public notice of the opportunity to provide public comments.

> "**Provide the public with an accurate notice of the opportunity to submit comments on the draft Hanford Site AOP renewal** . . ." (emphasis retained from original) *Exhibit 1*, Comment 63:

Petitioner's point raises a significant problem regarding oversights in the notification process Ecology employed; challenges the fundamental premise regarding the need for an accurate notice that foretells a comment period of at least thirty (30) days; and is both relevant and significant.

Ecology's response focuses completely on the thirty (30) day comment period duration requirement.

> "Ecology provides the following explanatioFn [sic]. WAC 173-401-800 (3) states that a minimum of thirty days for public comment will be provided with the later of the dates between newspaper publication or publication in the permit register. Ecology provide [sic] a total of 39 days for public comment from the December 10, 2012, Permit Register publication. No compelling reason exists to further extend the public comment period." *Exhibit 2*, response to Petitioner's Comment 63

Overlooked in Ecology's response is the need for an accurate notice that foretells a thirty (30) day comment period. 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." Accordingly, the Administrator should require Ecology provide a relevant response to Petitioner's Comment 63.

II.B-1.4. Ecology failed to provide the opportunity for public review of a complete draft Permit.

Permit *Attachment 2* (License FF-01) was issued as final on February 23, 2012, several months before Ecology provided the first (1st) opportunity for public comment (June 4 through August 3, 2012), and without any opportunity for public participation. See *Exhibit 4*, p.4. Permit *Attachment 2* (License FF-01) contains all terms and conditions regulating radionuclide air emissions. These terms and conditions include

[12] 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

those needed to implement requirements of 40 C.F.R. 61 subpart H (*National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*).

Petitioner's Comment 65 (*Exhibit 1*, Comment 65) presents this concern:

> "**Provide the public with the opportunity to review all portions of a complete draft Hanford Site AOP renewal. *Attachment 2* was issued as final absent any public review.**" (emphasis retained from original) *Exhibit 1*, Comment 65

Ecology responds, in part, by referencing its response to Comment 49. Ecology's response to Comment 49 contains the following quote: ' "… Part 70 cannot be used to revise or change applicable requirements."' (*Exhibit 2*, Ecology response to Petitioner's Comment 65) Ecology's response is correct, but overlooks *Attachment 2* (License FF-01) is not an applicable requirement under either 40 C.F.R. 70 or WAC 173-401. *See* 40 C.F.R. 70.2, WAC 173-401-200 (4), and Section **II.B-4.3.,** *infra*.

Forty (40) C.F.R. 70.7 (h) requires that, with a few exceptions, none of which apply here:

> "all permit proceedings, including initial permit issuance, significant modifications, and renewals, 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).

Forty (40) C.F.R. 70.7 (h) does not exempt from public participation federally enforceable terms and conditions implementing requirements of 40 C.F.R. 61 subpart H and contained in a Part 70 permit.

EPA has determined radionuclide air emissions are so hazardous that there is no safe level of exposure above background. ['There 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 April 3, 2013) By failing to provide these terms and conditions to the public for review, Ecology effectively denied the Petitioner the opportunity to attempt to mitigate harm from Hanford's radionuclide air emissions through the submission of public comments and the ability to benefit from the comments of others. The right of the public to comment is protected by the CAA [CAA § 502 (b)(6); 42 U.S.C. 7661a (b)(6)]. Ecology cannot change the CAA by choosing to ignore public participation requirements in 40 C.F.R. 70.7 (h).

Contrary to WAC 173-401-800 and 40 C.F.R. 70.7 (h), Ecology failed to provide the opportunity for public review of a complete draft Permit.

II.B-1.5. The Administrator is obligated to object

Failure of Ecology to process the Permit under EPA-approved procedures in WAC 173-401-800 "shall constitute grounds for an objection". 40 C.F.R. 70.8 (c)(3)(iii) When Ecology did provide required review material, Ecology did not provide a public notice that foretold a comment period of at least thirty (30) days, nor did Ecology provide

thirty (30) calendar days for public comment. Thus, Ecology failed to process the Permit under EPA-approved procedures in WAC 173-401-800.

Ecology also failed to provide the public with an opportunity to review a complete draft Permit, contrary to 40 C.F.R. 70.7 (h). Missing were all terms and conditions implementing requirements of 40 C.F.R. 61 subpart H. These terms and conditions were issued as final on February 23, 2012, more than three (3) months before the first (1st) public comment period and without any opportunity for public participation.

Based on the foregoing, Petitioner respectfully requests the Administrator follow the CAA[13] and case law[14] by objecting to the Permit. Ecology failed to discharge its duty to provide for public participation required by 40 C.F.R. 70.7 (h) and "procedures approved to meet § 70.7(h)". 40 C.F.R. 70.8 (c)(3)(iii)

II.B-2. Objection 2: The regulatory structure of the Permit does not provide, Ecology, the issuing permitting authority, with the required legal ability to enforce all standards or other requirements controlling emissions of radionuclides, a *hazardous air pollutant*.

Objection 2 is raised with "reasonable specificity" in Petitioner's comments 1 and 2. These comments are incorporated here by reference and are enclosed in *Exhibit 1*. Comment 1 contains the following statement with a footnote quoting CAA § 502 (b)(5)(E), the CAA requirement specifying the legal abilities a permitting authority shall have:

> " Ecology, the only permitting authority, is required by the CAA[3], and 40 C.F.R. 70 to have all necessary authority to enforce permits including authority to recover civil penalties and provide appropriate criminal penalties (*see* CAA § 502 (b)(5)(E) [42 U.S.C. 7661a (b)(5)(E)] and 40 C.F.R. 70.11 (a)). In this draft AOP Ecology only has the necessary authority to enforce *Attachment 1*." *Exhibit 1*, Comment 1

[3] "[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; . . .[and] (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)

Comment 2 states, in part:

> "Contrary to CAA Title V and 40 C.F.R. 70, regulation of radionuclide air emissions in this draft Hanford Site AOP occurs pursuant to a regulation that does not implement requirements of 40 C.F.R. 70, and is not enforceable by Ecology, the issuing permitting authority." *Exhibit 1*, Comment 2

[13] "*See* 42 U.S.C. § 7661d(b)(2) (providing that the EPA Administrator "*shall* issue an objection" if a permit is defective)." *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir.2006)

[14] "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 (2nd Cir. 2003)*, 321 F. 3d 316, 333 (2d Cir. 2003)

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

The plain language of the cited comments including quotes of specific statutory text addressing the referenced objection seems to surpass the minimal regulatory impediment posed by "reasonable specificity".

II.B-2.1. Requirements

Section 502 (b) of the CAA specifies the minimum authority a permitting authority SHALL have, as follows:

> "[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 echoes 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).

The law, as contained in the CAA and implementing regulation, requires a permitting authority have legal ability to enforce permits issued pursuant to CAA Title V.

Revised Code of Washington (RCW) 70.98.050 (1) grants authority to enforce the *Nuclear Energy and Radiation Act* (NERA) only to Health, an agency that is not a permitting authority under the CAA. (*See* Appendix A of 40 C.F.R. 70 for Washington State.)

> "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) *Exhibit 4*, p. 5

Washington Administrative Code (WAC) 246-247, a regulation adopted under rulemaking authority provided by NERA, defines a license as an applicable portion of an air operating permit (Part 70 permit).

> '"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.' WAC 246-247-030 (14) *Exhibit 4*, p. 6

Thus, binding authority in Washington State designates Health as the agency with sole authority to regulate and enforce radionuclide air emission licenses. Radionuclide air emission licenses are an applicable portion of an air operating permit (Part 70 permit)

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

issued by Ecology, though Health retains sole authority to enforce the license. Permit *Attachment 2* (License FF-01) is a license as defined by regulation.

II.B-2.2. Radionuclides are *hazardous air pollutants* subject to regulation under CAA Title V and 40 C.F.R. 70

The U.S. Congress listed radionuclides as a *hazardous air pollutant* under CAA § 112 (b) [42 U.S.C. 7412 (b)]. Congress further required EPA to create emission standards for all *hazardous air pollutants*. CAA § 112 (c)(2); 42 U.S.C. 7412 (c)(2). Emission standards applicable to this Permit for radionuclide air emissions appear in 40 C.F.R. 61, subpart H (*National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*).

Congress further 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".

> "*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

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 40 C.F.R. 70. It is unlawful to violate any such standard or requirement, and a permitting authority shall enforce any such standard or other requirement.

II.B-2.3. Argument: The regulatory structure of the Permit does not provide, Ecology, the issuing permitting authority, with the required legal ability to enforce all standards or other requirements controlling emissions of radionuclides, a *hazardous air pollutant*

On a programmatic level, Ecology does have authority to regulate radionuclide air emissions. Ecology adopted the radionuclide NESHAPs by reference[15] into *The General Regulations for Air Pollution Sources*, codified as WAC 173-400. These regulations apply statewide[16]. 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 enforcement of the

[15] "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)

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

radionuclide NESHAPs only to Health and only in accordance with Health's regulation[17]. (*Exhibit 1*, Comment 57)

However, under the regulatory structure of this Permit, all radionuclide terms and conditions reside in Permit *Attachment 2*. Permit *Attachment 2* (License FF-01) is enforceable only by Health in accordance with RCW 70.98, the *Nuclear Energy and Radiation Act* (NERA) and WAC 246-247, a rule adopted under authority of NERA.

> "Attachment 1 contains the State of Washington Department of Ecology (Ecology) permit terms and conditions.
> Attachment 2 contains the State of Washington Department of Health (Health) Radioactive Air Emissions License (FF-01) as permit terms and conditions." (emphasis added) *Exhibit 4*, p. 1

The statute under which Permit *Attachment 2* (License FF-01) is issued does not provide Ecology with authority to enforce *Attachment 2* or the radionuclide terms and conditions contained therein. NERA grants only Health the authority to issue and enforce radionuclide licenses, like Permit *Attachment 2* (License FF-01).

> "The department of health is designated as the state radiation control agency,. . . and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter." (emphasis added) RCW 70.98.050 (1). *Exhibit 4*, p. 5

Health regulation, WAC 246-247, implementing provisions of NERA denotes Ecology's lack of authority to enforce radionuclide terms and conditions in a Part 70 permit, as follows:

> "Rules and regulations set forth herein are adopted and enforced by the department [Health] pursuant to the provisions of chapter 70.98 RCW [NERA]which:
> (a) Designate the department as the state's radiation control agency having sole responsibility for the administration of the regulatory, licensing, and radiation control provisions of chapter 70.98 RCW. . ." (emphasis added) WAC 246-247-002 (1).

and;

> 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. WAC 246-247-060.

(It is not clear whether Health is authorized by statute to enforce against Ecology or local pollution control authorities for failure to incorporate a license into an air operating permit.)

By definition, a radionuclide air emissions license, like License FF-01 (Permit *Attachment 2*), is an applicable portion of a Part 70 permit that is only included in a Part 70 permit at the behest of Health and is only enforceable by Health.

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[17] "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. 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)

> '"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.' WAC 246-247-030 (14)
> *Exhibit 4*, p. 6

(Health does not have authority to incorporate a license into a Part 70 permit, or to otherwise act on a Part 70 permit.)

Permit *Attachment 2* (License FF-01) contains all terms and conditions regulating radionuclide air emissions, including those terms and conditions implementing requirements of 40 C.F.R. 61, subpart H (*National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*). Forty (40) C.F.R. 61 subpart H is an applicable requirement under the CAA and 40 C.F.R. 70. (*See* Section **II.B-2.2**, *supra*)

In addressing the issue of limits on the authority of an administrative agency, the Washington State Supreme Court wrote:

> "[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)

The Washington State Legislature granted only Health enforcement authority over NERA and the rules adopted thereunder. RCW 70.98.050 (1), *supra*. WAC 246-247 is a regulation adopted pursuant to NERA. WAC 246-247-002 (1), *supra*. Lacking legislative authorization, Ecology cannot enforce Health's regulation, WAC 246-247, the underlying statute NERA, or the terms and conditions developed pursuant to WAC 246-247 contained in *Attachment 2* (License FF-01) of this Permit. Furthermore, Ecology cannot grant itself authority to enforce NERA, the regulations adopted thereunder, or Permit *Attachment 2* (License FF-01).

Under the codified structure used in this Permit, Ecology, the sole permitting authority, cannot enforce terms and conditions implementing federally enforceable requirements in 40 C.F.R. 61, subpart H. Only Health, a "permitting agency", can enforce these permit terms and conditions. Thus, Ecology lacks the minimum authority specified in CAA § 502 (b) [42 U.S.C. 7661a (b)] and 40 C.F.R. 70.11 (a).

Ecology, the issuing permitting authority, is required by law to have all authority necessity to enforce permits, including the authority to recover civil penalties and provide for criminal penalties. In plain language, the CAA requires:

> ". . .the 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;" [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)

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the U.S. Supreme Court stated “If the intent of Congress is clear, that is the end of the matter; for the court, ***843** as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)[18]. In the instant situation, Congress stated its intent, “…that the permitting authority have adequate authority to. . .enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties . . . , and provide appropriate criminal penalties;. . .”. 42 U.S.C. 7661a (b)(5)(E). However, under this Permit, the sole permitting authority cannot enforce terms and conditions implementing requirements of 40 C.F.R. 61 subpart H “including authority to recover civil penalties . . . , and provide appropriate criminal penalties” for violation of WAC 246-247.

The *Chevron* Court further stated “[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.” *Id.* at 844. Consistent with Congressional intent, EPA, the administrative agency charged with implementing the CAA, requires “[a]ny agency administering a program shall have the [ ] enforcement authority to address violations of program requirements by part 70 sources. . .”. 40 C.F.R. 70.11 (a). Contrary to *Chevron*, under this Permit, the sole permitting authority does not have the authority to enforce terms and conditions in Permit *Attachment 2* implementing requirements of 40 C.F.R. 61 subpart H.

Thus, under binding authority in state statute and regulation, Ecology, the issuing permitting authority, does not have the authority required by the CAA and Part 70, and confirmed as law by the *Chevron* Court.

Ecology responds to Petitioner’s Comment 1 by citing to two (2) letters[19, 20] previously sent to Petitioner. Both letters affirm Ecology does have authority to enforce the radionuclide NESHAPs. (*Exhibit 2*, response to Petitioner’s Comment 1)

The first (1st) letter (enclosed as Exhibit A to Ecology response to public comments, included in *Exhibit 2* to this petition, pp. 64-69 of 76) is from EPA Region 10 in response to a petition to repeal filed under the *Administrative Procedures Act* [5 U.S.C. § 553(e)]. The conclusions are partially summarizes, as follows:

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[18] ‘Although an agency's interpretation of the statute under which it operates is entitled to some deference, “this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.” *Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct. 790, 800 n. 20, 58 L.Ed.2d 808 (1979).’ *Southeastern Community College v. Davis, U.S.N.C*, 99 S.Ct. 2361, 2369, 442 U.S. 397, 60 L.Ed.2d 980 (1979)

[19] Letter from Dennis J. McLerran, Regional Administrator, EPA Region 10, to Bill Green (Oct. 11, 2012) (enclosed as Exhibit A to Ecology response to public comments, included in *Exhibit 2* to this petition)

[20] Letter from Stuart A. Clark, Air Quality Program Manager, Washington Department of Ecology, and Gary Robertson, Director, Office of radiation Protection, Washington Department of Health to Bill Green (Jul. 16, 2010) (enclosed as Exhibit B to Ecology response to public comments, included in *Exhibit 2* to this petition)

> "In summary . . . Ecology . . . meet[s] the requirements of Title V and Part 70 when [it] issue[s] Part 70 permits that contain applicable requirements consisting of a license issued by WDOH [Health] regulating radionuclide emissions and containing the requirements of the Rad NESHAPs." Exhibit A at 6 (*Exhibit 2*, p. 69 of 76)

This summary statement is incorrect, in part. A license issued by Health is not an "applicable requirement" under either Part 70 or WAC 173-401. (*See* Section **II.B-4.3** *infra*) However, the summary statement does correctly address the CAA requirement that an issued Title V permit contain all applicable requirements[21], but overlooks enforcement[22] of those applicable requirements. (EPA guidance[23] cited in Ecology's Exhibit A suffers from the same oversight[24]. *Exhibit 2*, p. 66 of 76)

Region 10 is correct in that Ecology has authority under WAC 173-400, a regulation adopted in accordance with the *Washington Clean Air Act*, to also enforce the radionuclide NESHAPs[25]. (*Supra*, **II.B-2.3.**)

> Ecology has incorporated the Rad NESHAPs by reference into its state regulations and Ecology. . . [therefore has] authority to implement and enforce the Rad NESHAPs and include such provisions in Part 70 permits where applicable. In legislation adopted after the language in NERA cited by your Petition, the Washington Legislature specifically required that each air operating permit contain requirements based on "RCW 70.98 [NERA] and rules adopted thereunder" when applicable. RCW 70.94.161(10)(d). RCW 70.94.422(1) makes clear that WDOH's authority "does not preclude the department of ecology from exercising its authority under this chapter [RCW Ch. 70.94]," which includes Washington's Part 70 program. *Id.* at 5

(However, nothing in RCW 70.94 grants Ecology authority to enforce RCW 70.98 [NERA] and the rules adopted thereunder.)

Thus, on a programmatic level, Ecology does have authority to regulate radioactive air emissions in accordance with the radionuclide NESHAPs. However, <u>in this Permit</u>, all radionuclide air emissions are regulated SOLELY under the authority of NERA (RCW 70.98), a statute only Health can enforce.

Contrary to CAA § 502 (b)(5)(E) [42 U.S.C. 7661a (b)(5)(E)] and 40 C.F.R. 70.11 (a), Ecology, the issuing permitting authority, does not have the legal ability to enforce all standards or other requirements controlling emissions of the *hazardous air pollutant*, radionuclides. To underscore Ecology's lack of authority, Health issued Permit

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[21] 42 U.S.C 7661a (b)(5)(A); CAA § 502 (b)(5)(A)

[22] 42 U.S.C 7661a (b)(5)(E); CAA § 502 (b)(5)(E)

[23] John S. Seitz and Margo T. Oge, *The Radionuclide National Emission Standard for Hazardous Air Pollutants (Neshap) and the Title V Operating Permits Program*, U.S.EPA, Sept. 20, 1994.

[24] "Left unaddressed is the requirement that the permitting authority also must possess statutory authorization to <u>enforce</u> these radioactive air emission requirements. This oversight results in Title V permits where enforcement of applicable requirements is divided between two (2) agencies, with each agency enforcing pursuant to a different regulation. . . . While an IGA [intergovernmental agreement] can assure an issued Title V permit contains all applicable requirements, an IGA cannot grant statutory enforcement authority to an administrative agency." Letter from B. Green to G. McCarthy, Assistant Administrator, Office of Air and Radiation, EPA, (Certified letter no.: 7007 2560 0002 8364 3126), Nov. 13, 2009

[25] Region 10 is incorrect when it asserts a license issued by Health is an "applicable requirement" under 40 C.F.R. 70.2. *See* definition of "license" in WAC 246-247-030 (14). *Exhibit 4*, p. 6

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

Attachment 2 (License FF-01) as final more than one (1) year before Ecology issued the remainder of the Permit as final, and without any of the CAA-required pre-issuance reviews, including public review. *Exhibit 4*, p. 4.

II.B-2.4. The Administrator is obligated to object

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 the Title V implementing regulation.[26] Under case law the Administrator has discretion defining a reasonable interpretation of the term "demonstrate" in CAA § 502 (b)(2) [42 U.S.C. 7661d (b)(2)][27]. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit[28].

Petitioner offers as evidence excerpts from the Permit (*Exhibit 4*) plus binding authority under state law that directly contradicts CAA § 505 (b)(5)(E) [42 U.S.C. 7661a (b)(5)(E)] and 40 C.F.R. 70.11 (a). Under this Permit, Ecology, the issuing permitting authority, lacks legal ability to enforce 40 C.F.R. 61 subpart H (*National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*), a CAA applicable requirement, and terms and conditions developed thereunder.

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).

II.B-3. Objection 3: Under this Permit, Ecology does not have all the required authority to issue a permit that assures compliance with all applicable standards, regulations, or requirements

Objection 3 is raised with "reasonable specificity" primarily in Petitioner's Comment 1, but also in comments 7 and 9. All three (3) comments are incorporated here by reference. In Comment 1 Petitioner wrote:

> "Absent the authority to enforce all applicable requirements, Ecology also cannot comply with state and federal requirements that Ecology have authority to issue a permit containing all applicable requirements [*see* WAC 173-401-100 (2), -600, -605, -700 (1); CAA § 502 (b)(5)(A)[3]

[26] 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)

[27] "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)

[28] "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 (2nd Cir. 2003),* 321 F. 3d 316, 333 (2d Cir. 2003)

> [footnote quotes CAA § 502 (b)(5)(A); 42 U.S.C. 7661a (b)(5)(A)]; 42 U.S.C. 7661a (b)(5)(A); 40 C.F.R. 70.1 (b), -70.3 (c), -70.6 (a), and -70.7 (a)]." *Exhibit 1*, Comment 1

Comment 7 states, in part:

> "In plain language, the U.S. Congress requires that permitting authorities SHALL have all necessary authority to issue and enforce permits containing all CAA applicable requirements. [CAA § 502 (b)(5)(A) and (E); 42 U.S.C. 7661a (b)(5)(A) and (E)]" *Exhibit 1*, Comment 7

Comment 9 addresses the inability of Ecology to assure compliance with all applicable requirements as follows:

> "Absent the authority to enforce all applicable requirements Ecology cannot comply with CAA § 502 (b)(5)(A) and (E) [42 U.S.C. 7661a (b)(5)(A) and (E)], and 40 C.F.R. 70.9 and 70.11 (a)." (footnote omitted) *Exhibit 1*, Comment 9

The plain language of comments quoted above, plus relevant Part 70 and CAA citations combine to reasonably specify Petitioner's objection; under this Permit, Ecology does not have all the required authority to issue a permit that assures compliance with all applicable standards, regulations, and requirements.

II.B-3.1. Requirements

Section 502 (b) of the CAA specifies the minimum authority a permitting authority SHALL have.

> [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 captures this requirement in several paragraphs of 40 C.F.R. 70. In 40 C.F.R. 70.1 (b) EPA requires:

> "All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements." 40 C.F.R. 70.1 (b)

Forty (40) C.F.R. 70.3 (c) calls for the following with regard to major sources[29]:

> "For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source." 40 C.F.R. 70.3 (c)(1)

In 40 C.F.R. 70.6 (a) EPA requires:

> "Each permit issued under this part shall include the following elements: . . .(1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. 70.6 (a)(1)

EPA also requires that:

> "A permit, permit modification, or renewal may be issued only if all of the following condition have been met: . . . (iv) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part;" 40 C.F.R. 70.7 (a)(1)(iv)

Thus, CAA Title V and the implementing regulation, requires a permitting authority have legal ability to issue permits that assure compliance with each applicable standard, regulation, or requirement.

[29] The term "major source" is defined in 40 C.F.R. 70.2

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

Revised Code of Washington (RCW) 70.98.050 (1) grants authority to enforce the *Nuclear Energy and Radiation Act* (NERA) only to Health, an agency that is not a permitting authority under the CAA.

> "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) *Exhibit 4*, p. 5

Washington Administrative Code (WAC) 246-247 defines a license as an applicable portion of an air operating permit (Part 70 permit).

> '"License" means a radioactive air emissions license, either issued by the department [Health] 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.' WAC 246-247-030 (14) *Exhibit 4*, p. 6

Thus, Washington State statute and regulation designate Health as the agency with sole authority to regulate and enforce radionuclide air emission licenses. Radionuclide air emission licenses are an applicable portion of an air operating permit (Part 70 permit) issued by Ecology, though Health retains sole enforcement authority to enforce the license. Permit *Attachment 2* (License FF-01) is a license as defined by Health's regulation.

II.B-3.2. Argument: Under this Permit, Ecology does not have the legal ability to issue permits that assure compliance with all applicable standards, regulations, or requirements

The regulatory structure of this Permit denies Ecology, the sole permitting authority, the legal ability to enforce terms and conditions in Permit *Attachment 2*. (Objection **II.B-2.**, *supra*.) These terms and conditions include those implementing requirements of 40 C.F.R. 61 subpart H. In Permit *Attachment 2* (License FF-01) was created in accordance with RCW 70.98, the *Nuclear Energy Radiation Act* (NERA) rather than in accordance with the CAA and 40 C.F.R. 70. Health, the sole agency with authority to enforce NERA and Permit *Attachment 2*, is not a permitting authority, according to *Appendix A* of 40 C.F.R. 70, and therefore does not have a program authorized to enforce 40 C.F.R. 70.

Ecology does not have Legislative authorization to enforce NERA[30]. Absent Legislative authorization, Ecology lacks jurisdiction over Permit *Attachment 2* (License FF-01). Such jurisdictional limitations do not allow Ecology to take any action regarding Permit *Attachment 2* (License FF-01) including the act of issuing License FF-01[31]. In

[30] "The department of health is designated as the state radiation control agency,. . . and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter." (emphasis added) RCW 70.98.050 (1). *Exhibit 4*, p. 5.

[31] Ecology cannot subject Permit *Attachment 2* to any requirement of 40 C.F.R. 70, absent legal ability to act on requirements developed pursuant to RCW 70.98 (NERA) and the regulations adopted thereunder.

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

fact, Permit *Attachment 2* was issued as final on February 23, 2012, more than one (1) year before Ecology issued the remainder of the Permit as final, and without being subjected to any CAA-required pre-issuance reviews. *Exhibit 4*, p. 4. Without the legal ability to issue and enforce a permit containing terms and conditions implementing requirements of 40 C.F.R. 61 subpart H, Ecology cannot issue permits that "assure compliance . . . with each applicable standard, regulation or requirement under this chapter"[32]

II.B-3.3. The Administrator is obligated to object

In this Permit, Ecology, the sole permitting authority, does not have the legal ability to enforce terms and conditions implementing requirements of 40 C.F.R. 61 subpart H; Washington State statute[33] and regulation[34] renders this point indisputable. Also beyond dispute are the CAA and Part 70 requirements that a permitting authority have the authority to issue permits that assure compliance with all applicable requirements, all applicable standards, and all applicable regulations. Because, the codified structure of this Permit denies Ecology the ability to enforce 40 C.F.R. 61 subpart H, and terms and conditions created thereunder, Ecology does not have authority to assure compliance with all applicable requirements, standards and regulations. Thus, this Permit cannot comply with CAA § 502 (b)(5)(A) [42 U.S.C. 7661a (b)(5)(A)] 40 C.F.R. 70.1 (b), -70.3 (c), -70.6 (a), and -70.7 (a); all of which require issuance of permits that assure compliance with all applicable requirements, standards and regulations.

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 that includes Washington State statute (RCW 70.98.050 (1)), Washington State regulation (WAC 246-147-030 (14) and WAC 246-247-060), and the structure of this Permit (I.C. Permit organization, *supra*), all of which deny Ecology the ability to issue permits that assure compliance with terms and conditions developed pursuant to 40 C.F.R. 61 subpart H. Whether the Permit contains any terms and conditions implementing requirements of 40 C.F.R. 61 subpart H 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 cannot comply 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). Permit *Attachment 2* was issued by Health more than one (1) year before Ecology, the sole permitting authority, issued the remainder of the Permit. Portions of

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

[33] "The department of health is designated as the state radiation control agency,. . . and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter." (emphasis added) RCW 70.98.050 (1). *Exhibit 4*, p. 5.

[34] "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." WAC 246-247-060.

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

the Permit Ecology had authority to issue did not assure compliance with each applicable standard, regulation, or requirement under CAA Title V and 40 C.F.R. 70.

II.B-4. Objection 4: Contrary to CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40.C.F.R. 70.7 (h), the regulatory structure under which *Attachment 2* (License FF-01) of the Permit is issued does not provide the public with the opportunity to comment on all federally enforceable terms and conditions

Objection 4 is raised with "reasonable specificity" principally in Petitioner's Comment 3. In Comment 3, Petitioner states:

> **"The state regulatory structure under which *Attachment 2* (License FF-01) is issued prohibits public comment. Prohibiting public comment is contrary to the CAA. The U.S. Congress codified both a public right to comment and a public right to request a hearing on all draft Title V permits (AOPs). (*See* in CAA § 502 (b)(6); 42 U.S.C. 7661a (b)(6)). These rights are implemented by 40.C.F.R. 70.7 (h), by the *Washington Clean Air Act* (RCW 70.94.161 (2)(a) & (7)), and by WAC 173-401-800."** (emphasis retained from original) *Exhibit 1*, Comment 3

(*See also* Petitioner's comments 8, 11[35], 24, 36, and 65. Petitioner's comments 3, 8, 11, 24, 36, and 65 are incorporated here by reference.)

The plain language in comments noted above reasonably specify Petitioner's objection and the related objection stated below.

II.B-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 and the opportunity for a public hearing.

> "[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);

Forty (40) C.F.R. 70.2 defines "applicable requirement" to include: requirements in an approved state implementation plan (SIP); requirements under approved PSD and NSR programs; requirements and standards in the NESHAPs, including the radionuclide NESHAPs; and several other air quality requirements that have been promulgated or approved by EPA through rulemaking.

[35] "NERA and the regulations adopted thereunder do not accommodate public participation [RCW 70.98.080 (2)]" *Exhibit 1*, Comment 11

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

WAC 173-401-200 (4) defines "applicable requirement" to contain the same requirements as the federal definition, but also includes "Chapter 70.98 RCW [NERA] and rules adopted thereunder." WAC 173-401-200 (4)(d) Washington Administrative Code (WAC) 246-247 is a rule adopted under authority of NERA and is the regulation under which *Attachment 2* (License FF-01) of the Permit was created and is enforced.

Forty (40) C.F.R. 70.6 (b)(2) exempts terms and conditions that are "state-only enforceable" (i.e., not enforceable by the Administrator and citizens under the CAA) from public review, EPA review, and affected state(s) review.

> "Terms and conditions so designated ["state-only" enforceable] 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." 40 C.F.R. 70.6 (b)(2)

EPA has interpreted CAA § 116 to require a Part 70 permit include both the federal requirement and the state requirement, when both apply, regardless of whether one is more stringent than the other.

> "However, if both a State or local regulation and a Federal regulation apply to the same source, both must be complied with, regardless of whether the one is more stringent than the other, pursuant to the requirements of section 116 of the Clean Air Act." *Partial Approval of the Clean Air Act, Section 112(l), Delegation of Authority to the Washington State Department of Health*, 71 Fed. Reg. 32276, 32278 (June 5, 2006)

Washington State has a similar requirement in WAC 173-401-600 (4).

> "Where an applicable requirement based on the FCAA and rules implementing that act . . . is less stringent than an applicable requirement promulgated under state or local legal authority, both provisions shall be incorporated into the permit in accordance with WAC 173-401-625." WAC 173-401-600 (4) "No permit, however, can be less stringent than necessary to meet all applicable requirements." 40 C.F.R. 70.1 (c)

II.B-4.2. Argument: The regulatory structure under which *Attachment 2* (License FF-01) of the Permit is issued does not provide the public with the opportunity to comment on all federally enforceable terms and conditions.

Radionuclides are a *hazardous air pollutant* subject to regulation under CAA Title V and 40 C.F.R. 70. (Section **II.B-2.2.** *supra*) Permit *Attachment 2* (License FF-01) contains all terms and conditions regulating radionuclide air emissions including all those implementing requirements of 40 C.F.R. 61 subpart H.

Permit *Attachment 2* was issued as final and became effective on February 23, 2012, more than one (1) year before the remainder of the Permit was issued as final and absent any opportunity for public participation, as required by CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40 C.F.R. 70.7 (h). *Exhibit 4*, p.4.

Permit *Attachment 2* (License FF-01) was created and is enforced pursuant to RCW 70.98 the *Nuclear Energy and Radiation Act* (NERA), and WAC 246-247, a regulation created under rulemaking authority provided by NERA. NERA does not implement the CAA, but rather "institute[s] and maintain[s] a regulatory and inspection program for

sources and uses of ionizing radiation". RCW 70.98.010. Only Health, an agency that is not a permitting authority under the CAA, is authorized by statute to enforce NERA and the regulations adopted thereunder. RCW 70.98.050 (1), enclosed as *Exhibit 4*, p. 5.

NERA does provide for a twenty (20) day pre-issuance review of a license by a single public official in the area of the licensee, however, NERA specifically exempts licenses pertaining to Hanford from this pre-issuance review. RCW 70.98.080 (2)[36], enclosed as *Exhibit 5*. Whereas Part 70 requires the general public be provided with the opportunity for a review of thirty (30) or more days. 40 C.F.R. 70.7 (h)

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).

Ecology responds to Petitioner's concern that the regulatory structure under which Permit *Attachment 2* (License FF-01) is issued does not provide the public with the opportunity to comment on all federally enforceable terms and conditions, as follows:

> "Although not required to by law, Ecology can, and does, relay public comments concerning Health licenses to the Department of Health. Health is then able to take actions as appropriate on those comments. Health routinely considers public comments it receives, including any complaints regarding whether a licensee is complying with its license conditions." *Exhibit 2*, Ecology response to Petitioner's Comment 3

Ecology's response correctly acknowledges Ecology has no legal ability to directly respond to public comments submitted on Permit *Attachment 2* (License FF-01). Ecology's response also informs that Health is not obligated by the CAA requirement for public participation, nor is Health obligated to respond to public comments resulting from CAA-required public participation.

EPA has determined radionuclide air emissions are so hazardous that there is no safe level of exposure above background. ['There 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 April 3, 2013)[37] Yet under this Permit, the public was never provided with the opportunity to comment on any *Attachment 2* (License FF-01) terms and condition

[36] "This subsection [concerning the 20-day license review afforded to a single government executive] shall not apply to activities conducted within the boundaries of the Hanford reservation." RCW 70.98.080 (2)
[37] There is also no regulatory *de minimis* for radionuclides, because one has not been established pursuant to CAA § 112 (j)(5) [42 U.S.C. 7412 (j)(5)].

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

regulating radionuclide air emissions, including those implementing requirements of 40 C.F.R. 61 subpart H. Permit *Attachment 2* was issued as final without public participation, more than three (3) months before Ecology provided the draft Permit for public review.

Thus, under the regulatory structure of this Permit, the public is denied the right to comment, a procedural right protected by the CAA. In particular, the Petitioner was denied the opportunity to even attempt to mitigate the cumulative adverse impacts from exposure to radionuclides through submission of public comments or from receiving benefit from public comments submitted by others.

II.B-4.3. Ecology seeks to limit public involvement by incorrectly claiming Permit *Attachment 2* (License FF-01) is an applicable requirement under the *Washington Clean Air Act* and the federal *Clean Air Act* (CAA).

Regulation requires a petition be "…based only on objections to the permit that were raised with reasonable specificity during the public comment period…unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period." (emphasis added) 40 C.F.R. 70.8(d). The basis for this objection rests on Ecology's response to Petitioner's Comment 11 and USDOE Comment 49. Because Ecology's responses to public comments were not known at the time the draft Permit was offered for public review, the grounds for this objection arose after the comment periods ended.

Ecology offers the following in response to Petitioner's Comment 11:

> "The comment [*Exhibit 1*, Comment 11] mistakenly ties the Hanford Air Operating Permit (AOP) revision or renewal process with the process to implement changes to the underlying requirements in the Hanford AOP. . . . [see] response to Comment 49, above, related to the fact that underlying requirements such as the FF-01 license cannot be amended as part of the AOP revision."
>
> *Exhibit 2*, Ecology response to Petitioner's Comment 11.

Ecology's response to Comment 49, in part, quotes from an EPA letter:

> 'Corrections to underlying requirements need to be made using the applicable process for that underlying requirement. This issue was addressed by the United States Environmental Protection Agency in Exhibit A, page 6, second full sentence which stated "… Part 70 cannot be used to revise or change applicable requirements."' *Exhibit 2*, Ecology response to USDOE comment 49; USDOE comment 49 sought to correct the words "Prohibitive Activities" to read "Prohibited Activities".

Ecology's response erroneously associates changes to Permit *Attachment 2* (License FF-01) with the rulemaking process. Permit *Attachment 2* is not a regulation, but a license issued in accordance with WAC 246-247, which is a regulation. Because License FF-01 is not a product of rulemaking, changes to License FF-01 are not subject to the rulemaking process. Even if License FF-01 was a regulation, and it definitely is not, it would have been subject to public review during the promulgation process. Permit *Attachment 2* (License FF-01) has never been subject to public review.

Ecology also overlooks that a Health license is not an "applicable requirement" under either 40 C.F.R. 70.2 or WAC 173-401-200 (4). (*See* Section **II.B-4.1.** above)

While WAC 173-401-200 (4)(d) does make NERA and the regulations adopted thereunder an "applicable requirement", the definition does not also include a license issued by Health pursuant to a regulation adopted under authority of NERA. License FF-01 is an administrative construct of Health that is not a product of rulemaking and is not included in the definition of "applicable requirement". Furthermore, Health defines a license as an **applicable portion** of a Part 70 permit not as an applicable requirement under Part 70.

> '"License" means a radioactive air emissions license, either issued by the department [Health] 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.' WAC 246-247-030 (14) (emphasis added) *Exhibit 4*, p. 6

Health's definition is due deference. ("Where a statute is within the agency's special expertise, the agency's interpretation is accorded great weight. . ." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000)

One thing all Part 70 applicable requirements have in common is that they were issued only after the public had been provided with an opportunity to comment. Permit *Attachment 2* (License FF-01) has never been subject to public participation. Indeed, Permit *Attachment 2* (License FF-01) was issued as final on February 23, 2012, (see *Exhibit 4*, p. 4.) absent public participation and more than three (3) months before Ecology offered the remainder of the draft Permit for review.

Permit *Attachment 2* (License FF-01) includes federally enforceable terms and conditions implementing requirements of 40 C.F.R. 61 subpart H. Forty (40) C.F.R. 61 subpart H is a requirement promulgated under authority of CAA § 112 and is thus an applicable requirement under the CAA. Administrative law informs that no permit can change a regulation; therefore, no permit can change, for example, the dose standard codified in 40 C.F.R. 61.92, or the reporting requirements codified in 40 C.F.R. 61.93 (a). While a license issued by Health, an agency that is not a permitting authority, may contain certain "applicable requirements" that cannot be changed based on public comment, the license itself is not an applicable requirement under 40 C.F.R. 70.2. Terms and conditions in a Part 70 permit implementing federal requirements from promulgated standards, regulations and requirements are subject to public comment and a hearing as specified in 40 C.F.R. 70.7 (h).

A credible reason Ecology cannot consider public comments regarding terms and conditions regulating radionuclide air emissions is that Ecology chose to regulate radionuclides in the Permit pursuant to NERA rather than in accordance with WAC 173-400 and Part 70. Ecology cannot enforce Permit *Attachment 2* (License FF-01), but can enforce WAC 173-400 and Part 70. Ecology adopted all NESHAPs codified in 40 C.F.R. 61, including the radionuclide NESHAPs, by reference into its regulation[38]. This

[38] "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)

regulation applies statewide[39]. Because Ecology is an EPA-authorized permitting authority under the CAA, Ecology has authority 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 has not delegated enforcement of these NESHAPs to Ecology or extended delegation to any regulation Ecology can enforce[40]. (This concern is expressed in *Exhibit 1*, Comment 57)

However, in this Permit, Ecology chose to regulate radionuclides pursuant to NERA and a regulation adopted thereunder, neither of which implement CAA Title V or Part 70.

II.B-4.4. The Permit seeks to limit federally enforceable requirements by creating conditions pursuant to a state regulation, overlooking the federal analogs.

Forth (40) C.F.R. 70.6 (b)(2) exempts terms and conditions that are "state-only enforceable" (i.e., not enforceable by the Administrator and citizens under the CAA) from public review, EPA review, and affected state(s) review.

> "Terms and conditions so designated ["state-only" enforceable] 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." 40 C.F.R. 70.6 (b)(2)

However, the CAA and Washington State regulation require both the federal requirement and the state requirement be included in a permit when both apply. EPA has interpreted CAA § 116 to require a Part 70 permit include both the federal requirement and the state requirement, when both apply, regardless of whether one is more stringent than the other.

> "However, if both a State or local regulation and a Federal regulation apply to the same source, both must be complied with, regardless of whether the one is more stringent than the other, pursuant to the requirements of section 116 of the Clean Air Act." *Partial Approval of the Clean Air Act, Section 112(l), Delegation of Authority to the Washington State Department of Health*, 71 Fed. Reg. 32,276, 32,278 (June 5, 2006) [41]

WAC 173-401-600 (4) implements a similar requirement.

> "Where an applicable requirement based on the FCAA and rules implementing that act . . . is less stringent than an applicable requirement promulgated under state or local legal authority, both provisions shall be incorporated into the permit in accordance with WAC 173-401-625." WAC

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

[40] "This partial approval and delegation delegates to WDOH [Health] authority to implement and enforce 40 CFR part 61, subparts A, B, H, I, K, Q, R, T, and W, as in effect on July 1, 2004. The partial approval and delegation does not extend to any additional state standards, including other state standards regulating radionuclide air emissions." (emphasis added) 71 Fed. Reg. 32,276, 32,278 (June 5, 2006.)

[41] EPA did not cite the authority under which it can change either state statute or regulation. EPA used the delegation process to require Health follow requirements in CAA § 116, even though NERA and the rules adopted thereunder do not implement the CAA.

173-401-600 (4) "No permit, however, can be less stringent than necessary to meet all applicable requirements." 40 C.F.R. 70.1 (c)

Thus, under federal and state law, when both federal and state requirements apply, both must appear in the Part 70 permit.

As stated in Petitioner's Comment 24 (*Exhibit 1*, Comment 24, incorporated here by reference):

> "The radionuclide NESHAPs are federal regulations that exist independent of and in addition to WAC 246-247. Health simply cannot remove radionuclides from the CAA by incorporating the radionuclide NESHAPs into WAC 246-247.
>
> Minimally, all License FF-01 conditions that are required by the CAA or any CAA applicable requirement, any conditions that impact emissions, or set emission limits, or address monitoring, reporting, or recordkeeping, and any requirements enforceable pursuant to 40 CFR 70.11(a)(3)(iii) are federally enforceable under 40 C.F.R. 70.6.
>
> . . .
>
> Radionuclides remain federally enforceable pursuant to the CAA regardless of how Health regulates radionuclides under WAC 246-247. A federal CAA requirement implemented by a state regulation is still a federal requirement." *Exhibit 1*, Comment 24

The Administrator of EPA has not established a *de minimis* by rule for radionuclides. CAA § 112 (j)(5), 42 U.S.C. 7412 (j)(5). Therefore, there is no regulatory *de minimis* for emissions of radionuclides including from diffuse emission sources like contaminated soil and ponds[42]. Minimally, any NERA License conditions that, in any way, limit potential to emit, or that address monitoring, reporting, or recordkeeping (i.e. emission verification conditions) are federally enforceable.

For example, Permit *Attachment 2* shows WAC 246-247-010 (4) and 040 (5) as "state only enforceable" (i.e. not enforceable by the Administrator and citizens under the CAA). WAC 246-247-010 (4) requires:

> "The control technology standards and requirements of this chapter apply to the abatement technology and indication devices of facilities and emission units subject to this chapter. Control technology requirements apply from entry of radionuclides into the ventilated vapor space to the point of release to the environment." WAC 246-247-010 (4)

However, 40 C.F.R. 61 subpart H and the EPA-DOE MOU[43] also address abatement control technologies. Those requirements have been overlooked. Furthermore, any abatement technology is federally enforceable, because there is no regulatory *de minimis* for emissions of radionuclides.

WAC 246-247-040 (5) reads:

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

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[42] *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. Available at: http://www.epa.gov/radiation/docs/neshaps/epa_doe_caa_mou.pdf

[43] *See* footnote 42 above.

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

Because there is no regulatory *de minimis* for radionuclide air emissions, any emission limit is federally enforceable. Yet such limits are designates "state only enforceable". There are hundreds of these "state only enforceable" terms and conditions in Permit *Attachment 2* created pursuant to WAC 246-247-010 (4) and 040 (5), without any analogous federally enforceable terms and conditions. These hundreds of overlooked federally enforceable terms and conditions would be subject to public participation under 40 C.F.R. 70.7 (h).

Ecology responds to Petitioner's Comment 24 by citing its response to USDOE Comment 49. Ecology's response to Comment 49, in part, quotes a statement in an EPA letter. The specified quote reads:

> ' "… Part 70 cannot be used to revise or change applicable requirements."' *Exhibit 2*, Ecology response to USDOE Comment 49

As discussed in Section **II.B-4.3.** above, Ecology's response overlooks that Permit *Attachment 2* (License FF-01) is not an "applicable requirement" as defined in 40 C.F.R. 70, WAC 173-401, or WAC 246-247. Nor is Permit *Attachment 2* (License FF-01) the product of rulemaking.

A credible reason Ecology did not include all federally enforceable terms and conditions is that Ecology chose to regulate radionuclides in the Permit pursuant to NERA rather than in accordance with WAC 173-400. NERA does not implement the CAA, nor can the CAA obligate NERA. Ecology cannot enforce Permit *Attachment 2* (License FF-01), a license created pursuant to NERA, but can enforce WAC 173-400. WAC 173-400 is consistent with the CAA.

II.B-4.5. Ecology did not respond to a significant point raised in Petitioner's Comment 24

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)][44].

Petitioner raises a significant point in Comment 24. *Exhibit 1*, Comment 24. That point is:

> *Attachment 2* (License FF-01) of the Permit seeks to limit federally enforceable requirements by creating conditions pursuant to a state regulation, overlooking the federal analogs.

Under Part 70, permit requirements that are not federally enforceable are not subject to public review, EPA review, and affected state(s) review required by 40 C.F.R. 70.7 & 70.8. 40 C.F.R. 70.6 (b).

The opening sentence in Petitioner's Comment 24 reads: "**Address federally enforceable requirements as specified in WAC 173-401-625 and 40 C.F.R. 70.6 (b).**" (emphasis retained from original) (*Exhibit 1*, Comment 24) Petitioner continues by clarifying this significant point and offers examples where certain requirements created under state regulation have analogous federal requirements that were omitted.

Petitioner's point raises a significant problem regarding Ecology's omission of analogous federal requirements; challenges the fundamental premise regarding the regulatory scheme under which Ecology chose to implement requirements of 40 C.F.R. 61 subpart H in this Permit; and is both relevant and significant.

Ecology's response does not address this concern. Ecology's response states:

> "Ecology offers the following explanation. Please see response to Comment 49 in response to changing the FF-01 License. Additional supplemental information is also available in Exhibit A, pages 2 and 3." *Exhibit 2*, response to Petitioner's Comment 24

"Exhibit A" is Region 10's response to a petition filed under the *Administrative Procedures Act* seeking to overturn approval of specific operating permit programs in Washington State. The context of Petitioner's Comment 24 is *Attachment 2* (License FF-01) of the Permit, not a state-level permit program. As noted in Section **II.B-2..3.** *supra*, Ecology does have authority under WAC 173-400 to regulate radionuclide air emissions, but, in this Permit, chose to regulate these emissions in accordance with NERA, a statute Ecology cannot enforce. For Ecology's response to have any meaning to the concern raised, Ecology must respond in the same context presented by Petitioner's comment.

Ecology's response is irrelevant, at best. An irrelevant agency response 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." Accordingly, EPA should require Ecology provide a relevant response to Petitioner's Comment 24.

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[44] 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

II.B-4.6. The Administrator is obligated to object

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)][45]. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit[46].

Petitioner offers as evidence excerpts from the Permit showing the portion of the Permit containing all terms and conditions regulating emissions of radionuclides was issued February 23, 2012, (*Exhibit 4*, p. 4) several months before the first (1st) public comment period (June 4 to August 3, 2012) and absent any opportunity for public participation. Radionuclides are a *hazardous air pollutant* under CAA § 112 and therefore subject to inclusion in Part 70 permits. *Clean Air Act* (CAA) § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] and 40 C.F.R. 70.7 (h) both require that the permitting authority **shall** provide for public comment and a public hearing.

Petitioner further references Ecology's responses to public comments in which Ecology acknowledges it cannot directly address public comments regarding radionuclide terms and conditions, even to correct a typographical error (i.e., changing "Prohibitive Activities" to read "Prohibited Activities").

The Administrator must object; 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) because terms and conditions implementing requirements of 40 C.F.R. 61 subpart H in the Permit are barred by statute (RCW 70.98.080 (2)) from ever being subjected to public participation. Indeed, Permit terms and conditions implementing requirements of 40 C.F.R. 61 subpart H were never made available for public participation.

II.B-5. Objection 5: The regulatory structure under which *Attachment 2* (License FF-01) of this Permit is issued does not recognize the right of a public commenter to judicial review in State court, as required by the CAA and 40 C.F.R. 70.

Objection 5 is raised with "reasonable specificity" in Petitioner's comments 4, 17, and 36. These comments are incorporated here by reference and included in *Exhibit 1*. Comment 4 opens with the following statements:

[45] "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)

[46] "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 (2nd Cir. 2003),* 321 F. 3d 316, 333 (2d Cir. 2003)

> "**The state regulatory structure under which *Attachment 2* (License FF-01) is issued does not recognize the right of a public commenter to judicial review in State court, as required in the CAA. The U.S. Congress codified a right afforded to any person who participated in the public comment process to seek judicial review in State court of the final permit action. (*See* in CAA § 502 (b)(6); 42 U.S.C. 7661a (b)(6)[1]). This right is implemented by 40 C.F.R. 70.4(b)(3)(x) and (xii)[2], and by WAC 173-401-735 (2)[3] .**" (emphasis retained from original) *Exhibit 1*, Petitioner's Comment 4

[1] "[T]he minimum elements of a permit program to be administered by any air pollution control agency. . . **shall** include . . . (6) . . .an opportunity for judicial review in State court of the final permit action by [ ] any person who participated in the public comment process . . ." (emphasis added) CAA § 502 (b) [42 U.S.C. 7661a (b)]

[2] 40 C.F.R. 70.4(b)(3)(xii) provides "that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits . . ."

[3] "Parties that may file the appeal . . . include any person who participated in the public participation process" WAC 173-401-735 (2)

Comment 17 requests Ecology specify the appeal process under state law that applies to Permit *Attachment 2*.

> "The appeal process specified in *Section 4.12* does not apply to *Attachment 2* because the Pollution Control Hearings Board (PCHB) does not have jurisdiction over actions by Health. Health is not a permitting authority nor does Health have the legal ability to issue an AOP in accordance with RCW 70.94, the CAA, and 40 C.F.R. 70." *Exhibit 1*, Petitioner's Comment 17

Comment 36 states, in relevant part:

> "The CAA calls for an opportunity for judicial review in State court of the final permit action by any person who participated in the public participation process. NERA does not provide an opportunity for such judicial review by a qualified public commenter." *Exhibit 1*, Petitioner's Comment 36

The plain language of comments 4, 17, and 36, including citations to specific statutory text addressing the referenced objection, exceeds the minimal regulatory obstacle posed by "reasonable specificity".

II.B-5.1. Requirements

Section 502 (b) of the CAA specifies the minimum elements of a permitting program administered by a permitting authority, as follows:

> "[T]he minimum elements of a permit program to be administered by any air pollution control agency. . . **shall** include . . . (6) . . .an opportunity for judicial review in State court of the final permit action by [ ] any person who participated in the public comment process . . ." (emphasis added) CAA § 502 (b) [42 U.S.C. 7661a (b)]

EPA captures this obligation by requiring a state program approved under Part 70:

> "[p]rovide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to § 70.7(h) of this part, and any other person who could obtain judicial review of such actions under State laws." 40 C.F.R. 70.4(b)(3)(x)

and further:

> "that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits . . ." 40 C.F.R. 70.4(b)(3)(xii)

Forty (40) C.F.R. 70.4 requires a legal opinion, with legal precedence that provides EPA with assurance the state program properly implements requirements of the CAA. For Washington State this opinion was provided by the Washington State Attorney General's Office (AGO). This AGO opinion reads as follows with regard to the state court judicial review requirement:

> "The Washington State Supreme Court has ruled that appeals to the PCHB provide the exclusive means for challenging issuance of, and conditions in, NPDES permits. Dioxin/Organochlorine Center v. Ecology, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992). This conclusion was based upon exclusivity language found in RCW 43.21B.310(1). This provision also applies to air operating permit appeals and makes appeals via the PCHB followed by judicial review of such an appeal the exclusive means for challenging final permit action by Ecology. . . [other than challenges based on] . . . new grounds and [Ecology's] failure to take final action. . ." [citing RCW 34.05.542(3) and RCW 34.05.570(4) (b)]. M. S. Wilson, *Attorney General's Opinion for the Washington State Department of Ecology*, 10-27-1993, at 23-24. *Exhibit 6*, pp. 1-2

The statute creating Washington's operating permit program (Part 70 program) requires, in part, that:

> "[t]he procedures contained in chapter 43.21B RCW shall apply to permit appeals." RCW 70.94.161 (8)

Revised Code of Washington (RCW) 43.21B created the Pollution Control Hearings Board (PCHB).

Thus, the exclusive means of challenging final action on a Part 70 permit in state court is via the PCHB in accordance with RCW 43.21B.310 (1).

Revised Code of Washington (RCW) 43.21B.310 (1) states, in relevant part:

> ". . . any permit, certificate, or license issued by the department [Ecology] may be appealed to the pollution control hearings board if the appeal is filed with the board and served on the department or authority within thirty days after the date of receipt of the order. . . . this is the exclusive means of appeal of such an order." (emphasis added; restrictive citations omitted) RCW 43.21B.310(1).

However, PCHB jurisdiction is limited, primarily, to deciding appeals regarding RCW 70.94, the *Washington Clean Air Act*.

> "The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department [Ecology], the director, local conservation districts, and the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, or local health departments [regarding issuance and enforcement of solid waste permits and permits to use or dispose of biosolids]. . ." RCW 43.21B.110 (1).

Thus, the PCHB cannot decide appeals of licenses issued and enforced by Health in accordance with RCW 70.98, the *Nuclear Energy and Radiation Act* (NERA).

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

II.B-5.2. Argument: The regulatory structure under which *Attachment 2* (License FF-01) of this Permit is issued does not recognize the right of a public commenter to judicial review in State court, as required by the CAA and 40 C.F.R. 70.

Permit *Attachment 2* contains all terms and conditions regulating radionuclide air emissions from the Hanford Site, including those implementing requirements of 40 C.F.R. 61 subpart H, (*National Emission Standards for Emissions of Radionuclides Other Than Radon from Department of Energy Facilities*). (*See* I.C. *Permit organization*, above.) Permit *Attachment 2* was issued as final on February 23, 2012, more than one (1) year before Ecology issued the remainder of the Permit as final, and absent any opportunity for public participation. (*See* Objection **II.B-4** and *Exhibit 4*, p. 4.) Petitioner provided comments (*supra*) specifying Permit *Attachment 2* could not comply with requirements for state court judicial review in CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)], 40 C.F.R. 70.4(b)(3)(x) & (b)(3)(xii).

Judicial review in state court of the final permit action by any person who participated in the public comment process is required by CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)], and 40 C.F.R. 70.4(b)(3)(x) & (b)(3)(xii). Regarding Permit *Attachment 2*, there are at least two (2) reasons a qualified public commenter cannot obtain such judicial review. The first (1st) reason is that Permit *Attachment 2* was never offered for public comment. Even if it were offered for public participation, NERA, the statute under which Permit *Attachment 2* was created, does not accommodate public comment. (See Objection **II.B-4** above.) Therefore, there can be no public comments on Permit *Attachment 2* that would be subject judicial review in state court.

The second (2nd) reason is that public comments on terms and conditions in Permit *Attachment 2* are beyond the jurisdiction of the PCHB, the quasi-judicial body charged by statute with being the "exclusive means of appeal" of a Part 70 permits issued as final by Ecology. RCW 70.94.171 (8), RCW 43.21B.310 (1), and RCW 43.21B.110 (1).

Forty (40) C.F.R. 70.4 (b)(3) requires a state "[p]rovide an opportunity for judicial review in State court of the final permit action by … any person who participated in the public participation process… " [40 C.F.R. 70.4(b)(3)(x)] and further provide "… that the opportunity for judicial review … shall be the exclusive means for obtaining judicial review of the terms and conditions of permits...". 40 C.F.R. 70.4(b)(3)(xii). Under Washington State statute, the exclusive means of obtaining judicial review in state court is through the PCHB. However, the PCHB does not have jurisdiction over actions by Health, including actions regarding terms and conditions in a license issued pursuant to NERA. Thus, any actions regarding *Attachment 2* of this Permit are beyond the reach of the PCHB. This Permit cannot comply with CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)] or 40 C.F.R. 70.4 (b)(3)(x) and (xii), absent the opportunity for state court judicial review by qualified public commenters on terms and conditions in Permit *Attachment 2*.

Ecology responded to Petitioner's Comment 4, citing three (3) letters, two (2) of which are from EPA Region 10. (See *Exhibit 2*, Ecology Exhibits A, B, and C.) Ecology

responded to Petitioner's Comment 17 by citing its response to Petitioner's Comment 4, while the response to Petitioner's Comment 36 cites generally to Ecology's Exhibit A.

The thrust of Ecology's response is captured by the following quote from Ecology's Exhibit A, a letter from Region 10 in response to a petition filed pursuant to the federal *Administrative Procedures Act*[47]:

> "With a few exceptions not applicable here, Part 70 cannot be used to revise or change applicable requirements. Similarly, any changes to such underlying applicable requirements are governed by the laws that apply to establishment of such license requirements. The requirements of Title V and Part 70, including the judicial review requirement of 40 CFR § 70.4(b)(3)(k) [sic] and the issuance, renewal, reopening, and revision provisions for Part 70 permits in 40 C.F.R § 70.7(h), do not apply as a matter of federal law to WDOH [Health] when issuing a license pursuant to WAC 246-247.[4]"
>
> [4] We also note that many of the provisions in radionuclide licenses issued by WDOH and included in Part 70 permits for subject sources are established as a matter of state law and specifically identified in the license as "state-only". Terms and conditions so designated are not subject to the requirements of Part 70 in any event. See 40 CFR § 70.6(b)(2). To the extent the conditions in the WDOH radionuclide licenses are federally enforceable, Part 70 can still not be used to revise or change the underlying federally enforceable applicable requirements.

The linchpin for conclusions in the first (1st) two (2) sentences in the above quote and in the other two (2) letters cited by Ecology is that licenses issued by Health are applicable requirements under Part 70, and thus any changes are subject to the rulemaking process. This conclusion is incorrect. Licenses issued pursuant to WAC 246-247, a state regulation that does not implement Part 70, are NOT included in the Part 70 definition of "applicable requirement", nor are Health-issued licenses the product of rulemaking. *See* 40 C.F.R. 70.2 and Section **II.B-4.3.** *supra*. While the definition of "applicable requirement" in state regulation does include "Chapter 70.98 RCW [NERA] and rules adopted thereunder" [WAC 173-401-200 (4)(d)] this definition does not extend to licenses issued under WAC 246-247, a regulation created pursuant to rulemaking authority provided to Health in NERA. Furthermore, Health's regulation defines a license incorporated into a Part 70 permit not as an "applicable requirement" but as an "applicable portion" of that permit. ['"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. . ."[48] (emphasis added) WAC 246-247-030(14) *Exhibit 4*, p. 6]

Without a linchpin the wheels come off Ecology's response. A license issued by Health in accordance with WAC 246-247 is not an applicable requirement under Part 70, nor is such a license the product of rulemaking. Terms and conditions contained in Permit *Attachment 2* (License FF-01) implementing requirements of 40 C.F.R. 61 subpart H are subject to the full requirements of the CAA including the requirement for judicial review in state court.

[47] Letter from Dennis J. McLerran, Regional Administrator, EPA Region 10, to Bill Green (Oct. 11, 2012), p. 6 (enclosed as Exhibit A to Ecology response to public comments, included in *Exhibit 2* to this petition, pp. 64-69 of 76.)

[48] Note, under WAC 246-247 it is Health that incorporates the license into a Pert 70 permit and not Ecology, the issuing permitting authority charged by the CAA with enforcing the entire permit.

The third (3rd) sentence quoted above reads as follows:

"The requirements of Title V and Part 70, including the judicial review requirement of 40 CFR § 70.4(b)(3)(k) [sic] and the issuance, renewal, reopening, and revision provisions for Part 70 permits in 40 C.F.R § 70.7(h), do not apply as a matter of federal law to WDOH [Health] when issuing a license pursuant to WAC 246-247". (footnote omitted) Letter from Dennis J. McLerran, Regional Administrator, EPA Region 10, to Bill Green (Oct. 11, 2012) p. 6 (enclosed as Ecology's Exhibit A, included in *Exhibit 2* to this petition, pp. 64-69 of 76)

Thus, Ecology contends the process of issuing a license under WAC 246-247 is not impacted by requirements of CAA Title V and Part 70.

Overlooked by this statement is that terms and conditions implementing a federally applicable requirement (40 C.F.R. 61 subpart H) cannot be divorced from either Title V or Part 70, when a Part 70 permit is implicated. In this Permit, terms and conditions implementing requirements of 40 C.F.R. 61 subpart H reside only in *Attachment 2* (License FF-01). Permit *Attachment 2* is a license issued by Health pursuant to WAC 246-247. Ecology is thus attempting to avoid requirements of the CAA and Part 70 by addressing federally enforceable terms and conditions in a Part 70 permit pursuant to a state regulation, WAC 246-247, that does not implement the CAA. This position by Ecology overlooks the deference due an act of Congress.

The U.S. Supreme Court decided that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, ***843** as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Congress unambiguously defines radionuclides as a *hazardous air pollutant* under the CAA (CAA § 112 (b)). Congress unambiguously declares radionuclides to be subject to inclusion in permits issued in accordance with CAA Title V (CAA § 502 (a); 42 U.S.C. 7661a (a)), and Congress unambiguously requires "an opportunity for judicial review in State court of the final permit action by [ ] any person who participated in the public comment process" (CAA § 502 (b)(6); 42 U.S.C. 7661a (b)(6)). Neither Ecology nor Washington State can change "the unambiguously expressed intent of Congress" in the CAA, so declares the U.S. Supreme Court. The CAA applies irrespective of any state statute or regulation to the contrary.

The *Chevron* Court further states "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. 837, 844. Consistent with Congressional intent, EPA, the administrative agency charged with implementing the CAA, requires that a state "[p]rovide an opportunity for judicial review in State court of the final permit action by … any person who participated in the public participation process… " [40 C.F.R. 70.4(b)(3)(x)] and further provide "… that the opportunity for judicial review … shall be the exclusive means for obtaining judicial review of the terms and conditions of permits...". 40 C.F.R. 70.4(b)(3)(xii). Ecology thus cannot escape the CAA as implemented by EPA regulation, 40 C.F.R. 70.4 (b)(3)(x) and (xii).

Judicial review in state court of the final permit action by any person who participated in the public comment process is a right protected under the CAA. Ecology simply does not have the authority to vacate a federally protected right by choosing to enforce 40 C.F.R. 61 subpart H through a state regulation that does not implement the

CAA. As a matter of federal law, federally enforceable terms and conditions in Permit *Attachment 2* (License FF-01) remain subject to CAA Title V and 40 C.F.R. 70 irrespective of the state regulatory scheme Ecology chooses to use.

II.B-5.3. The Administrator is obligated to object

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.[49] 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 (b)(2)][50]. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit[51].

This Petitioner offers binding authority that excludes state court judicial review for qualified public commenters on terms and conditions in Permit *Attachment 2*. Terms and conditions in Permit *Attachment 2* include those implementing federal requirements in 40 C.F.R. 61 subpart H.

The Administrator must object because the regulatory structure implemented by Ecology does not allow this Permit to comply with CAA § 502 (b)(6) [42 U.S.C. 7661a (b)(6)], or 40 C.F.R. 70.4 (b)(3)(x) and (xii).

II.B-6. Objection 6: Ecology failed to provide the legal and factual basis for Ecology's decision to regulate radioactive air emissions in the draft Permit pursuant to RCW 70.98, *the Nuclear Energy and Radiation Act* (NERA) rather than in accordance with WAC 173-400 and Part 70

Objection 6 is raised with "reasonable specificity" primarily in Petitioner's Comment 57, which is incorporated here by reference. Comment 57 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 radioactive air emissions in the draft Hanford Site AOP renewal pursuant to RCW 70.98, *the Nuclear Energy and Radiation Act* (NERA) rather than in accordance with WAC 173-400 and the federal *Clean Air Act* (CAA).**" (emphasis retained from original) *Exhibit 1*, Comment 57

[49] 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)

[50] "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)

[51] "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 (2nd Cir. 2003)*, 321 F. 3d 316, 333 (2d Cir. 2003)

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

Petitioner also addresses this issue in comments 36 and 42, both of which are incorporated here by reference. Comment 42 reads:

> "**In accordance with 40 C.F.R. 70.7 (a)(5) and WAC 173-401-700 (8), provide the legal and factual basis for omitting public participation for *Attachment 2*, even though *Attachment 2* contains federally enforceable requirements. Public participation is required by 40 C.F.R. 70.7 (h) and WAC 173-401-800.**
>
> Health issued *Attachment 2* as final effective February 23, 2012. Public participation for the remainder of the draft Hanford Site AOP did not begin until June 4, 2012, several months after Health's final action on *Attachment 2*." (emphasis retained from original) *Exhibit 1*, Comment 42

The plain language in the comments above surpasses the minimal regulatory impediment posed by "reasonable specificity".

II.B-6.1. 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)

This requirement is captured by Washington State in WAC 173-401-700 (8), as follows:

> "At the time the draft permit is issued, 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, the applicant, and to any other person who requests it." WAC 173-401-700 (8)

Both federal and state regulations require a permitting authority shall provide a legal and factual basis for permit conditions included in the draft permit.

II.B-6.2. Argument: Ecology failed to provide the legal and factual basis for Ecology's decision to regulate radioactive air emissions in the draft Permit pursuant to NERA rather than in accordance with WAC 173-400 and Part 70.

On June 4, 2012, when the draft Permit was first (1st) made available for public review, Permit *Attachment 2* had already been issued as final. (See *Exhibit 4*, p. 4) Permit *Attachment 2* contains all radionuclide air emission terms and conditions, including those implementing requirements of 40 C.F.R. 61 subpart H. (See *Exhibit 4*, p. 1 and Section **II.B-3.,** *supra*) The June 4th public review was supported by four (4) statements of basis, one (1) for each portion of the Permit; *Standard Terms and General Conditions*, and attachments 1, 2, and 3. (Section **I.C.**, *supra*) None of these statements of basis address the legal and factual basis for the regulatory structure under which Ecology chose to regulate radionuclide air emissions in this Permit.

Ecology incorporates all the NESHAPs codified in 40 C.F.R. 61, including 40 C.F.R. 61 subpart H (*National Emission Standards for Emissions of Radionuclides Other Than Radon From Department of Energy Facilities*), by reference into the *General Regulations for Air Pollution Sources*, WAC 173-400.

> "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 NESHAPs are enforceable statewide. WAC 173-400-020

Under WAC 173-400 Ecology does have all necessary authority to regulate radionuclide air emissions addressed by 40 C.F.R. 61 subpart H, as well as all pollutants addressed by the other NESHAPs.

However, in this Permit, all radionuclide air emission terms and conditions reside in Permit *Attachment 2*. Permit *Attachment 2* 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 **II.B-3.** *supra*) Health, the sole agency authorized to enforce NERA and WAC 246-247, is not a permitting authority under Part 70. Thus Health is not allowed to carry out a permit program under Part 70.

It was Ecology's choice whether to regulate radionuclide air emissions in this Permit under NERA and WAC 246-247 or in accordance with WAC 173-400 and Part 70. Ecology should have documented the legal and factual basis for its decision in accordance with 40 C.F.R, 70.7 (a)(5) and WAC 173-401-700 (8).

Ecology responds to Petitioner's Comment 57 by referencing Ecology's response to Petitioner's Comment 1. Ecology's response to Petitioner's Comment 1 reads:

> "The commenter is concerned the permitting authority; i.e., Ecology, does not have adequate authority to enforce the radionuclide requirements in a license issued by Health that are part of an air operating permit. This issue was previously raised in inquiries to the United States Environmental Protection Agency and the Washington State Department of Health. Those agencies responded to the inquiry in letters dated October 11, 2012 and July 16, 2010 which are attached as Exhibit A and B respectively. Please see Exhibit A at p. 1-4; Exhibit B at p. 3, Issue 1." (*Exhibit 2*, response to Petitioner's comment 1)

Ecology's response overlooks that the comment was specific to an alleged deficiency in the statement of basis for this Permit. The exhibits cited by Ecology address Ecology's authority under Washington's Part 70 program[52]. (See Ecology Exhibits A and B included in *Exhibit 2* of this petition) The letters do 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.

Petitioner's Comment 42 requests Ecology provide the legal and factual basis for omitting public review of Permit *Attachment 2*.

> "**In accordance with 40 C.F.R. 70.7 (a)(5) and WAC 173-401-700 (8), provide the legal and factual basis for omitting public participation for *Attachment 2*, even though *Attachment 2***

[52] Both letters incorrectly claim a Health license issued pursuant to WAC 246-247 is an "applicable requirement" under Part 70. A license issued by Health has no connection with Part 70 because neither NERA nor WAC 246-247 implement Part 70.

contains federally enforceable requirements. Public participation is required by 40 C.F.R. 70.7 (h) and WAC 173-401-800." (emphasis retained from original) *Exhibit 1*, Comment 42

Ecology responds by citing its response to Petitioner's Comment 3.

"Please refer to Exhibit A, last paragraph of p. 5 -p. 6; Exhibit B, Issue No.2, pp.3-4; and Exhibit C,. p.2. The Exhibits specifically address the applicability of public notice requirements to underlying requirements.

Although not required to by law, Ecology can, and does, relay public comments concerning Health licenses to the Department of Health. Health is then able to take actions as appropriate on those comments. Health routinely considers public comments it receives, including any complaints regarding whether a licensee is complying with its license conditions." (*Exhibit 2*, response to Petitioner's comment 3)

Ecology's response references a different concern, "the applicability of public notice requirements to underlying requirements" rather than the one raised by Petitioner's Comment 42. *Id*. Again Ecology overlooks responding Petitioner's concern, the legal and factual basis for omitting public comment on Permit *Attachment 2*.

II.B-6.3. Ecology did not respond to significant points raised in Petitioner's comments 57 and 42

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 explained this dictum as follows in responses to petitions to object to certain Part 70 permits:

"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)][53].

[53] 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

Petitioner raises a significant point in Comment 57. *Exhibit 1*, Comment 57. That point is:

> Ecology failed to provide the legal and factual basis for Ecology's decision to regulate radioactive air emissions in the draft Permit pursuant to NERA and WAC 246-247 rather than in accordance with WAC 173-400 and Part 70.

Petitioner's comment raises a significant problem regarding oversights in the Permit statements of basis; challenges the fundamental premise regarding the regulatory scheme under which Ecology chose to implement requirements of 40 C.F.R. 61 subpart H in this Permit; and is both relevant and significant.

Ecology's response (Section **II.B-6.2.**, supra) does not address this concern, but rather cites to letters on a different topic. At best, Ecology's response is irrelevant.

Petitioner raises another significant point in Comment 42; that Ecology failed to provide the legal and factual basis for omitting public participation for Permit *Attachment 2*.

> "**In accordance with 40 C.F.R. 70.7 (a)(5) and WAC 173-401-700 (8), provide the legal and factual basis for omitting public participation for *Attachment 2*,. . ."** (emphasis retained from original) *Exhibit 1*, Comment 42

Petitioner's Comment 42 also raises a significant problem with the Permit statements of basis; challenges the fundamental premise that Ecology can implement requirements of 40 C.F.R. 61 subpart H in this Permit, outside of Part 70 and without public participation; and Petitioner's Comment 42 is also relevant and significant.

Ecology responds by referencing statements regarding "the applicability of public notice requirements to underlying requirements" in letters concerning the Washington State Part 70 program. (Section **II.B-6.2.**, *supra*) For Ecology's response to have any meaning to the concern raised, Ecology must respond in the same context as Petitioner's comment.

Ecology's offers no relevant response to Petitioner's comments 57 and 42. An irrelevant agency response 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." Accordingly, the Administrator should require Ecology provide relevant responses to Petitioner's comments 57 and 42.

II.B-6.4. The Administrator is obligated to object

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)][54]. However, once the

[54] "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)

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

petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit[55].

Petitioner cites to binding authority requiring 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.R.F. 70.7 (a)(5) Petitioner also offers evidence all radionuclide terms and conditions in the Permit were issued as final on February 23, 2012, (*Exhibit 4*, p. 4) more than three (3) months before Ecology provided the draft Permit for public participation. Furthermore, Ecology provided no cogent response to significant points raised in Petitioner's public comments regarding the statement required by 40 C.F.R. 70.7 (a)(5).

The Administrator must object; Ecology did not provide the legal and factual basis for Ecology's decision to regulate radionuclide air emissions in this Permit in accordance with a regulation that Ecology cannot enforce and that does not implement Part 70; Ecology did not provide the legal and factual basis for omitting public review for terms and conditions implementing requirements of 40 C.F.R. 61 subpart H; nor did Ecology respond to significant points raised by Petitioner in his comments.

III. CONCLUSION

The core issue raised by the above objections is: Whether this Permit, or the underlying state regulatory structure, can be used to nullify rights protected by the CAA with respect to terms and conditions implementing the radionuclide NESHAP, 40 C.F.R. subpart H? These specific rights include the right of the Permittee, and general public, to comment on all draft Permit terms and conditions that are federally enforceable, and the right of the Permittee, and any other person who participated in the public comment process, to seek judicial review in state court of terms and conditions in the final Permit.

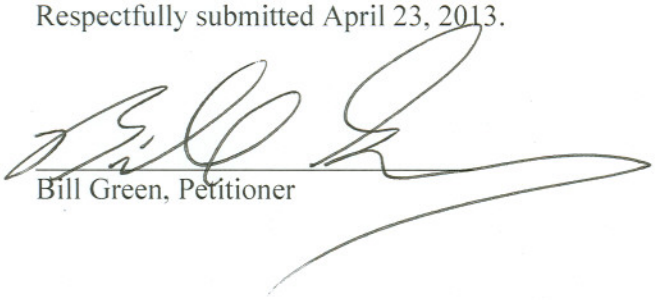
Of particular concern is that the Petitioner was denied the opportunity to mitigate the cumulative adverse impacts from exposure to radionuclides through submission of public comments, or from receiving benefit from public comments submitted by others; this because terms and conditions implementing requirements of 40 C.F.R. 61 subpart H were issued as final absent any opportunity for public participation and more than three (3) months before Ecology offered the draft Permit for public participation.

[55] "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 (2nd Cir. 2003),* 321 F. 3d 316, 333 (2d Cir. 2003)

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

The only conclusion supported by the cited authorities and exhibits is that this Permit is not consistent with the CAA or Part 70, with respect to terms and conditions implementing the radionuclide NESHAP, 40 C.F.R. subpart H. Therefore, the Administrator has a nondiscretionary duty to object to the issuance of this Permit.

Respectfully submitted April 23, 2013.



Bill Green, Petitioner

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

IV. LIST OF EXHIBITS

List of exhibits

Exhibit 1:		
	Pages 1-47	Petitioner's transmittal letters and comments
Exhibit 2:		
	Pages 1-63	Ecology's response to public comments (as submitted to EPA and obtained through the *Public Records Act*, RCW 42.56)
	Pages 64-69	Ecology's Exhibit A
	Pages 70-74	Ecology's Exhibit B
	Pages 74-76	Ecology's Exhibit C
Exhibit 3:		
	Page 1	Ecology publication number13-05-001 corrected 1/13
	Page 2	*Permit Register* Vol. 14, No. 1[56]
	Pages 3-4	*Permit Register* Vol. 13, No. 23[57]
Exhibit 4:		
	Page 1	Hanford Site Air Operating Permit, 2013 RENEWAL, *Standard Terms and General Conditions*, page 1/57
	Page 2	*Statement of Basis for Hanford Site Air Operating Permit No. 00-05-006 2013 Renewal*, June, 2012, page 2 of 50. This is the Statement of Basis associated with the *Standard Terms and General Conditions*.
	Page 3	Hanford Site Air Operating Permit, 2013 RENEWAL, *Attachment 1*, page ATT 1-6
	Page 4	Attachment 2, Radioactive Air Emission License, signature page, page 1
	Page 5	RCW 70.98.050
	Page 6	WAC 246-247-030 (14)
Exhibit 5:		
	Page 1	RCW 70.98.080
Exhibit 6:		
	Pages 1-2	M. S. Wilson, *Attorney General's Opinion for the Washington State Department of Ecology*, 10-27-1993, at 23-24.

[56] Available at: http://www.ecy.wa.gov/programs/air/permit_register/Permit_PastYrs/2013_Permits/2013_01_10.html

[57] Available at: http://www.ecy.wa.gov/programs/air/permit_register/Permit_PastYrs/2012_Permits/2012_12_10.html

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

EXHIBIT D

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

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 H[2] 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.*

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

Table of Contents

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

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

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 permit[3] 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)

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

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 Court[6], after first serving formal notice of intent to sue[7].

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 permit[11] 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,

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[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).

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

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 (*Permit Register* 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." *Respondents' Stipulation in Response to Motion for Summary Judgment*, PCHB 13-055, 5/24/2013 (enclosed as *Exhibit 3*)
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. *Corrected Order on Motions for Summary Judgment and Request for Dismissal*, 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 *Exhibit 1*.)
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 *Exhibit 2*.
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 H[13] 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.

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[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 agents[22]. 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 CAA[24]. However, as discussed below, License FF-01 is not an

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[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_vol1_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 246-247[25] 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 process[27], 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 permit[28]. 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

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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)

authorities. While Ecology is a permitting authority identified in *Appendix A* of Part 70, Health is not[29]. 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

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[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 Health[33] 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 source[34]. 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

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[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 NERA[36]. 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 authority[37]. Only Health can enforce these licenses[38]. However, Health is not a permitting authority[39] recognized by EPA[40], 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 173-400[41]. These regulations apply statewide[42]. 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 regulation[43].

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[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 NESHAP[44]. 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 thereunder[46], 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 adopter thereunder must be included in an AOP issued by Ecology and this license is enforceable only by Health. These requirements are restated in WAC 246-247-060[49].

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

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.

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

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 rule[50])

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[51], 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.

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[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 246-247-060[52]. 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 permit[56].

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).

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[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 28[57] 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 H[58]. 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 authority[59]. Neither WAC 246-247 nor NERA, the authorizing statute, implement Part 70, neither WAC 246-247 nor NERA are obligated by requirements of Part 70[60], 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 permit[63].

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.

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[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)

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

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 authority[67] and a permitting authority recognized in *Appendix A* of Part 70[68].

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 authority[69].

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.*

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

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 permit[71]. 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 licenses[72], 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. 70[73].

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 <u>not required under the Act or under any of its applicable requirements</u>. 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 246-247-060[75]. 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, 2013[76]. (*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, 2013[77]. 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 equipment[78] to isotopes incorrectly copied from the application[79] to correction of typographical errors[80]. 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.

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[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 thereunder[83].

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.

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[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 permit[86].

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

permitting authority under Part 70[87]. 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 <u>significant problem</u> 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; <u>challenges the fundamental premise</u> that Ecology can use a Title V permit to remove radionuclides from regulation under the CAA Title V and Part 70; and is otherwise <u>relevant or significant</u>.

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[87] <u>See</u> *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

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

Ecology's responds to Petitioner's comments 15 and 31 by referencing pages 1 through 4 of Ecology's Exhibit A[89]. 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 program[90]. 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 permit[93].

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

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[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)

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

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 reference[94]. 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. 70.2[1].. . .
>
> [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 Tile 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 smoking[95]. 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 246-247[96]. 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 permit[101].

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*)

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[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 problem[1]; and
> 4) neither Health nor EPA recognize either a regulatory *de minimis* or a health-effects *de minimis* for radionuclide air emissions above background[2].
>
> 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 soils[102]. 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 sources *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.

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[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 Dam[109]. Radionuclides of Hanford Site origin include isotopes of uranium. All isotopes or 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 unsafe[110] 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 reactors[112], 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

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[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 Area[116] and that there was elevated uranium levels in near-shore water samples taken from the Columbia River at two (2) 300 Area locations[117]. (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 period[118]. 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 cuts[120]. In 2006, Health began an independent

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[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 River[121]. 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 soils[122]." 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.

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[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)

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

(b)(2)][126]. However, once the petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit[127].

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.

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[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)

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

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-201 0-17, 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

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

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

BILL GREEN
424 Shoreline Court
Richland WA 99354

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Richard Smith, Esq., Smith and Lowney, PLLC, 2317 E. John St, Seattle WA, 98112, Phone: (206) 860-2124

DEFENDANTS

GINA MCCARTHY, Administrator
United States Environmental Protection Agency
Ariel Rios Building, Mail Code 1101A

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Eric Holder, Attorney General, U.S. Department of Justice, 950 Pennsylvania Ave, NW, Washington, DC 20530-0001

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☒ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Clean Air Act 42 U.S.C. § 7604(a)(2)

Brief description of cause:
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. § 7604 et. seq.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

BILL GREEN
424 Shoreline Court
Richland WA 99354

Plaintiff(s)

v.

GINA MCCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* GINA MCCARTHY, Administrator
United States Environmental Protection Agency
Ariel Rios Building, Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Richard Smith, Esq.
Smith and Lowney, PLLC
2317 E. John St
Seattle WA 98112
(206) 860-2124
rasmithwa@igc.org

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date

SEAN F. McAVOY, Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

_____ _____

Date *Server's signature*

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

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