

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

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

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

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 H¹. 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.*

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I. BACKGROUND

I.A. General chronology

September 10, 2011	Ecology announced receipt of a complete Hanford Site AOP application (<i>Permit Register</i> , 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	<i>Attachment 2</i> 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 <i>Exhibit 1</i> .)
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 <i>Exhibit 2</i> .)
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 (<i>Permit Register</i> , 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 authority² 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

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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 Court³, after first serving formal notice of intent to sue⁴.

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 permit⁶ 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 H⁷ 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*.

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)

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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”.

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.

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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

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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.]

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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 explanation [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

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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

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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 CAA¹³ and case law¹⁴ 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 CAA³, 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)

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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)

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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 reference¹⁵ into *The General Regulations for Air Pollution Sources*, codified as WAC 173-400. These regulations apply statewide¹⁶. 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)

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radionuclide NESHAPs only to Health and only in accordance with Health's regulation¹⁷. (*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.

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)

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"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 necessary 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,

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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:

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)

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“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 requirements²¹, but overlooks enforcement²² of those applicable requirements. (EPA guidance²³ cited in Ecology’s Exhibit A suffers from the same oversight²⁴. *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 NESHAPs²⁵. (*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, in this Permit, 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

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 enforce 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

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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 permit²⁸.

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)

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[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 sources²⁹:

“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

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 NERA³⁰. 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-01³¹. 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.

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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 statute³³ and regulation³⁴ 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

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.

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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, 11³⁵, 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*

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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

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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)].

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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)

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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 regulation³⁸. 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)

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regulation applies statewide³⁹. 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 enforce⁴⁰. (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 ponds⁴². 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 MOU⁴³ 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)

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.

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Because there is no regulatory *de minimis* for radionuclide air emissions, any emission limit is federally enforceable. Yet such limits are designated “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.

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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.

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

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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 permit⁴⁶.

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)

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“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:

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“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).

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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

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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."⁴⁸

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 Part 70 permit and not Ecology, the issuing permitting authority charged by the CAA with enforcing the entire permit.

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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

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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 permit⁵¹.

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)

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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.

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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 program⁵². (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.

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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

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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)

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petitioner demonstrates the permit is not in compliance, the Administrator has no option but to object to the permit⁵⁵.

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.

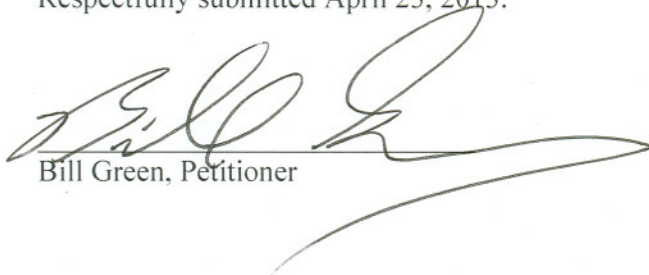
⁵⁵ “Simply put, the Administrator is required to object to permits that violate the Clean Air Act. This duty to object to such permits is a nondiscretionary duty.” *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2nd Cir. 2003), 321 F. 3d 316, 333 (2d Cir. 2003)

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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

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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 number 13-05-001 corrected 1/13

Page 2 *Permit Register* Vol. 14, No. 1⁵⁶

Pages 3-4 *Permit Register* Vol. 13, No. 23⁵⁷

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