

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. X-2016-13
)	
U.S. DEPARTMENT OF ENERGY -)	ORDER RESPONDING TO
HANFORD OPERATIONS,)	PETITION REQUESTING
BENTON COUNTY, WASHINGTON)	OBJECTION TO THE ISSUANCE OF A
)	TITLE V OPERATING PERMIT
PERMIT No. 00-05-006, RENEWAL 2, REVISION B)	
)	
ISSUED BY THE WASHINGTON STATE)	
DEPARTMENT OF ECOLOGY)	

ORDER GRANTING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated September 1, 2016 (the 2016 Petition), from Mr. Bill Green of Richland, Washington (the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petition requests that the EPA Administrator object to the final operating permit No. 00-05-006, Renewal 2, Revision B¹ (the Final Permit) issued by the Washington State Department of Ecology (Ecology) to the United States (U.S.) Department of Energy (DOE) for the Hanford Site in Benton County, Washington (Hanford Site). The operating permit was proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 United States Code (U.S.C.) §§ 7661–7661f, and the Washington Administrative Code (W.A.C.) Chapter (Ch.) 173-401. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the 2016 Petition and other relevant materials, including the Final Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA grants the Petition requesting that the EPA Administrator object to the Final Permit. The EPA recognizes that Ecology is already working to resolve the issues raised in the claim the EPA is granting in this order. To the extent Ecology has made available during the public comment process on the Renewal 3 Hanford Title V Permit all relevant supporting

¹ As explained in more detail below, Renewal 2, Revision B is a complete reissuance of the permit and is currently in effect as the title V operating permit for the Hanford Site. For purposes of this Order, the EPA will refer to the permit as “the Final Permit” or “the Hanford Title V Permit” unless the discussion requires a reference to a specific version of the permit. Ecology is currently in the process of issuing a subsequent renewal title V permit for the Hanford site, referred to as “Renewal 3.”

materials for the permitting decision, which the Petitioner contends were not provided during the public comment period on the Renewal 2, Revision B Title V Permit, we expect that Ecology will have addressed the objection in the Petitioner's 2016 Petition.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The EPA granted interim approval of the title V operating permit program submitted by the state of Washington and its local air agencies effective December 9, 1994. *59 Fed. Reg.* 55813 (November 9, 1994); *see also 60 Fed. Reg.* 62992 (December 8, 1995) (final interim approval after remand on unrelated issue). The EPA promulgated final full approval of Washington's title V operating permit program effective September 21, 2001, *66 Fed. Reg.* 42439 (August 13, 2001), and an update to that final approval effective January 2, 2003, *66 Fed. Reg.* 71479 (December 2, 2002). *See* 40 C.F.R. part 70, appendix A. The regulations comprising the EPA-approved title V program in Washington are codified in W.A.C. Ch. 171-401.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. *57 Fed. Reg.* 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *57 Fed. Reg.* at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period,

petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).² Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.³

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).⁴ When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.⁵ Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision,

² *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

³ *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

⁴ *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

⁵ *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁶ Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).⁷ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).⁸ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).⁹

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

⁶ *See also, e.g., Finger Lakes Zero Waste Coalition v. EPA*, No. 16-3420-ag, 2018 U.S. App. LEXIS 12542, at *9–10 (2d Cir. May 15, 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

⁷ *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

⁸ *See also Portland Generating Station Order* at 7 (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁹ *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

If the EPA grants an objection in response to a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4). However, as explained in the *Nucor II Order*, a new proposed permit in response to an objection will not always need to include new permit terms and conditions. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing additional rationale to support its permitting decision. *Id.* at 14 n.10. In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's opportunity to conduct a 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object. The EPA has explained that treating a state's response to an EPA objection as triggering a new EPA review period and a new petition opportunity is consistent with the statutory and regulatory process for addressing objections by the EPA. *Nucor II Order* at 14–15. The EPA's view that the state's response to an EPA objection is generally treated as a new proposed permit does not alter the procedures for the permitting authority to make the changes to the permit terms or condition or permit record that are intended to resolve the EPA's objection, however. When the permitting authority modifies a permit in order to resolve an EPA objection, it must go through the appropriate procedures for that modification. For example, when the permitting authority's response to an objection is a change to the permit terms or conditions or a revision to the permit record, the permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and an opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that the EPA identified; permitting authorities need not address elements of the permit terms or conditions or the permit record that are unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In The Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

C. Regulation of Radionuclides in Washington

Both Ecology and the Washington State Department of Health (Health) have regulatory authority for “radioactive air emissions”¹⁰ in Washington. The opinion from the Washington Attorney General accompanying Ecology’s initial title V program submittal explains that Ecology’s authority for radioactive air emissions is under Revised Code of Washington (R.C.W.) Ch. 70.94, the Washington Clean Air Act, and Health’s authority is under R.C.W. Ch. 70.98, the Nuclear Energy and Radiation Act (NERA). *Attorney General’s Opinion for the Washington State Department of Ecology*, dated October 27, 1993, at 4 (Attorney General Opinion).¹¹ The Attorney General Opinion further explains that, with respect to the Hanford Site, Health will issue a license addressing radioactive air emissions (referred to hereafter as a NERA license), and the NERA license will be incorporated as an applicable requirement into the title V operating permit issued by Ecology. *Id.* The Attorney General Opinion also states that the title V operating permit for the Hanford Site will be required, issued, and enforced pursuant to the authorities set forth in R.C.W. Ch. 70.94 and its implementing regulations, including specifically, W.A.C. Ch. 173-401, Ecology’s regulation implementing the EPA-approved title V program in Washington.

In December 1993, Ecology and Health revised their existing Memorandum of Understanding (MOU) regarding regulation of radioactive air emissions at the Hanford Site as part of the title V program approval process to clarify the respective roles of Ecology and Health in the issuance and administration of title V operating permits and performing new source review. The MOU, which was updated most recently in 2007, states that R.C.W. Ch. 70.98 and W.A.C. Ch. 246-247, both administered by Health, establish radioactive air emissions requirements, which are “‘applicable requirements’ under Ecology’s W.A.C. 173-400-200” and that all air emissions at the Hanford Site, including radioactive air emissions, will be covered under a title V permit. *Memorandum of Understanding between Department of Ecology and the Department of Health Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions*, dated June 1, 2007, at 2. The MOU further provides that DOE is required to submit two copies of its title V permit application, one to Health for the licensing of radioactive air emissions, and one to Ecology for the permitting of nonradioactive air emissions. Thereafter, the MOU provides that Health will issue a NERA license, which will be incorporated into DOE’s title V permit as an applicable requirement. The MOU states that a title V permit will be issued by Ecology with Health as a signatory reviewer and issuer of the NERA license portion of the permit. MOU at 2, 4. The MOU makes clear that, although Health is primarily responsible for the regulation of radioactive air emissions at the Hanford Site, that responsibility does not alter in any way existing statutory authorities of Health or Ecology. *Id.* at 4.

With respect to the title V permit issuance process, the MOU provides that Health will handle all NERA license procedures and Ecology will handle all title V operating permit procedures and

¹⁰ The Attorney General Opinion uses the term “radioactive air emissions,” which is not used or defined in either R.C.W. Ch. 70.94 or R.C.W. Ch. 70.98. Nevertheless, we understand the term includes radionuclides based on the context in which the Attorney General Opinion applies.

¹¹ Title V operating permits are referred to as “air operating permits” in Washington. The term “title V permit” or “title V operating permit” is used in this Order for consistency.

requirements. *Id.* at 7. It further provides that the agencies will hold joint hearings, will jointly assure proper notice of public hearings, and will jointly prepare responses to public comments, but that Ecology is responsible for submitting notices, comments, and the proposed permit to the EPA. *Id.* at 7. Ecology’s regulations for issuing title V permits include provisions for public notice, a 30-day public comment period, opportunity for public hearing, and the opportunity for judicial review in state court. *See* W.A.C. 173-401-735; W.A.C. 173-400-800; Attorney General Opinion at 14, 20-21. As a matter of state law, a NERA license is not subject to a public comment process or the clear right of judicial review at the state level. *See* Letter from Stuart Clark, Washington Department of Ecology, and Gary Robertson, Washington Department of Health, to Bill Green, dated July 16, 2010, at 4-5 (Ecology/Health July 2010 Letter). Consistent with the requirements of 40 C.F.R. part 70, Ecology’s definition of “applicable requirement” includes specifically identified requirements of the CAA, including any standard or other requirement under section 112 of the CAA. *See* W.A.C. 173-401-200(4)(a). Ecology has adopted by reference all standards in 40 C.F.R. part 61, including Subpart H, *see* W.A.C. 173-400-075(1), which are standards under section 112 of the CAA. Ecology’s definition of “applicable requirement” also includes other requirements of state law, such as NERA and its implementing regulations. *See* W.A.C. 173-401-200(4)(d). As discussed above, the Attorney General Opinion states that the NERA license issued by Health to DOE is an “applicable requirement” under state law. *See* Attorney General Opinion at 4.¹²

Health has also adopted by reference the 40 C.F.R. part 61 standards that regulate radionuclides¹³ [Radionuclide National Emission Standards for Hazardous Air Pollutants (NESHAPs)], including Subpart H. *See* W.A.C. 246-247-035. In 2006, the EPA granted partial approval of Health’s request for delegation of authority to implement and enforce the Radionuclide NESHAPs. 71 *Fed. Reg.* 32276 (June 5, 2006) (final approval).¹⁴

For more information about the regulation of radionuclides in Washington, see *In re U.S. Dep’t of Energy-Hanford Operations*, Order on Petition Nos. X-2014-01, X-2013-01 (May 29, 2015) (2015 Hanford Order).

III. BACKGROUND

A. The Hanford Site

The Hanford Site occupies approximately 560 square miles in south central Washington, just north of the confluence of the Snake and Yakima Rivers with the Columbia River. The Hanford Site was acquired by the federal government in 1943 and for many years was dedicated primarily

¹² The NERA license is not an “applicable requirement” under 40 C.F.R. § 70.2 or for purposes of Washington’s EPA-approved title V program. *See* 2015 Hanford Order at 14 n.14. In contrast, Subpart H is a title V applicable requirement.

¹³ 40 C.F.R. part 61, Subparts B, H, I, K, Q, R, T, and W.

¹⁴ The EPA granted Health partial rather than full delegation. Although Health has the authority required by 40 C.F.R. §§ 70.11(a)(3)(ii) and 63.91(d)(3)(i) to recover criminal penalties for knowing violations, Health did not have express authority to recover criminal fines for knowingly making a false material statement or knowingly rendering inadequate any required monitoring device or method, as required by 40 C.F.R. §§ 70.11(a)(3)(iii) and 63.91(d)(3)(i). *See* 71 *Fed. Reg.* 32276.

to the production of plutonium for national defense and the management of the resulting waste. With the shutdown of the production facilities in the 1970s and 1980s, work at the Hanford Site was redirected to decommissioning and site cleanup, and diversified to include research and development in the areas of energy, waste management, and environmental restoration. The Hanford Site is a source of radionuclides and is a major stationary source subject to the requirements of title V of the CAA (42 U.S.C. §§ 7602 and 7661) and the EPA-approved title V program for Washington, codified at W.A.C. Ch. 173-401. The Final Permit covers more than 250 emission points on the Hanford Site, including tanks, boilers, emergency generators, a vitrification plant, a fuel station, and a pretreatment plant. Final Permit, Attachment 1 at v-vii; *id.* Attachment 2, Enclosure B.

B. Permitting History

The first title V permit for the Hanford Site was issued by Ecology in 2001, and was first renewed in 2006. In 2011, the DOE submitted an application to renew its title V permit for the Hanford Site, referred to as “Renewal 2.” 2015 Hanford Order at 8. After providing for public comment and responding to comments, including comments from the Petitioner, at the state level, Ecology submitted the proposed permit for the EPA to review on February 14, 2013. When the EPA did not object during its 45-day review period, the Petitioner submitted a petition on April 23, 2013 (2013 Petition), requesting that the EPA object to the proposed Renewal 2 permit. *Id.* In May 2013, Ecology reopened the Renewal 2 permit for public comment and, after responding to comments, submitted another proposed permit known as “Renewal 2, Revision A” or “Revision A” for EPA review on February 13, 2014. *Id.* at 9. Again, after the EPA did not object and the Revision A permit was issued, the Petitioner submitted a second petition on April 21, 2014, requesting that the EPA object to Revision A on several grounds (2014 Petition). *Id.*

On May 29, 2015, the EPA issued its order *In re U.S. Dep’t of Energy-Hanford Operations*, Order on Petition Nos. X-2014-01, X-2013-01, granting in part and denying in part the Petitioner’s 2013 Petition and 2014 Petition. Specifically, the EPA denied all of the Petitioner’s claims but one, objecting on the basis that Ecology’s record was inadequate with respect to addressing Subpart H in the Renewal and Revision A permits. *See* 2015 Hanford Order at 20-22. More specifically, in responding to comments relating to Attachment 2 (the NERA license), Ecology stated that the title V permit could not be revised in response to the identified comments because the comments pertained to Attachment 2 and, as an applicable requirement, corrections to Attachment 2 needed to be made using the applicable process for that underlying requirement. The EPA concluded that Ecology’s responses did not adequately address whether Attachment 2, and, therefore, the title V permit, included appropriate terms and conditions pertaining to the federal applicable requirements of Subpart H. The 2015 Hanford Order directed Ecology to supplement its record and its response to address the Petitioner’s concerns, and suggested several ways Ecology could address the CAA requirements regulating radionuclides (specifically Subpart H) consistent with Washington’s statutory and regulatory scheme and consistent with the public participation requirements of the CAA. *Id.* at 22.

When the EPA issued the 2015 Hanford Order, Ecology was already in the process of revising the Revision A permit to incorporate a new NERA license issued by Health for the Hanford Site, address several newly identified emission units, and reformat the part of the permit for toxic

emission units so all information for each unit was in one place. *See* Revision B, Response to Comments (RTC) at 64. Ecology held a public comment period on revisions to the draft permit (which would become the “Revision B” permit that is the subject of the 2016 Petition) from March 22 through May 8, 2015. The Petitioner submitted comments to Ecology on draft Revision B on April 22, 2015.

On June 10, 2016, Ecology submitted to the EPA proposed Revision B for the EPA’s 45-day review period under 40 C.F.R. § 70.8(c). As with the previous title V permits for the Hanford Site, Revision B consisted of a section with standard terms and conditions, and three attachments: “Attachment 1 contains . . . [Ecology’s] permit terms and conditions. Attachment 2 contains . . . [the Health] Radioactive Air Emissions License (FF-01) [NERA license] as permit terms and conditions. Attachment 3 contains the Benton Clean Air Agency permit terms and conditions applicable to the regulations of open burning and asbestos.” Standard Terms and Conditions of Hanford Site Air Operating Permit, Permit Number 00-05-0006, Renewal 2, Revision B at iii. Most of the requirements of Subpart H that are included in the Revision B permit, as well as most other requirements in the permit regulating radionuclides at the Hanford Site, are contained in Attachment 2.¹⁵ In response to the 2015 Hanford Order, Ecology added an Addendum to the Revision B permit to address any omissions or errors in the NERA license that relate to federal requirements for radionuclide emissions that were identified in public comments on the Renewal 2 and Revision A versions of the permit. *Id.* RTC at 3; *see* EPA Order at 22. After the EPA did not object to issuance of the revised permit (Revision B or the Final Permit) during its 45-day review period, Ecology issued Revision B as final on July 28, 2016. 2016 Petition at 4-5.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA’s 45-day review period expired on July 25, 2016. Thus, any petition seeking the EPA’s objection to the Final Permit was due on or before September 23, 2016. The 2016 Petition was dated and received on September 1, 2016, and, therefore, the EPA finds that the Petitioner timely filed the 2016 Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

Claim 1: The Petitioner Claims that “Contrary to 40 C.F.R. 70.7(h)(2), the issuance process for the final Permit failed to provide the public with information used to create terms and conditions implementing requirements of 40 C.F.R. 61 subpart H.”

Petitioner’s Claim: The Petitioner raised a single objection issue in the 2016 Petition. Mr. Green claims that Ecology did not, as required by 40 C.F.R. § 70.7(h)(2), make available during the public comment process all of the information that the permitting authority had “deemed to be relevant by using it in the permitting process.” Specifically, in commenting on the draft Revision B, the Petitioner had requested that Ecology provide the public with all information used in the

¹⁵ Some additional Subpart H requirements are contained in the Standard Terms and Conditions portion of the Revision B permit (for example, the title V reporting requirements related to Subpart H).

permitting process to justify: 1) adding six new emission units; 2) removing nine emission units; and 3) replacing approximately 29 Notice of Construction orders of approval from the previous version of Attachment 2 (NERA license) to the Final Permit, and further requested that Ecology restart the public review process. 2016 Petition at 5. The Petitioner asserts that Ecology responded to his comment by stating that “there is no requirement for Ecology to make available to the public all the information used by the Department of Health in developing the [NERA] license,” and that “It is not necessary to restart the public comment [process] and no change to the AOP [title V permit] is required.” *Id.* at 8.

The Petitioner points to the language in 40 C.F.R. § 70.7(h)(2) that requires the permitting authority to make available to the public, among other things, “all other materials available to the permitting authority that are relevant to the permitting decision.” *Id.* at 6. The Petitioner then cites to *Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006), which upheld the EPA’s interpretation of this language as requiring the permitting authority to make available, among other things, “information that the permitting authority has deemed to be relevant by using it in the permitting process.” 2016 Petition at 6 (quoting *Sierra Club*, 436 F.3d 1284). Because application of Subpart H to individual Hanford emission units is documented in Attachment 2 of Revision B (which is the NERA license), the Petitioner states that the issuance process for Attachment 2 “must be as required by WAC 173-401,” Ecology’s part 70 regulations. 2016 Petition at 7. The Petitioner continues that the additions, removals, and replacements from the previous final version of the Hanford Title V Permit “in some way implicate Subpart H” and could not have occurred absent a request by the permittee and some sort of justification. *Id.* Because these initiating requests and justifications for the additions, replacement, and removals were used in the permitting process, the Petitioner states, “such information would seem to be included” in the information required to be made available to the public under 40 C.F.R. § 70.7(h)(2). *Id.* Absent such documentation, the Petitioner asserts, it is extremely difficult, if not impossible, for the public to conduct a meaningful review. *Id.*

The Petitioner claims that Ecology’s response to his comment—that there is no requirement for Ecology to make available to the public all the information used by Health to develop the NERA license—misrepresents the issue. *Id.* at 8. The Petitioner states that the issue is not whether Health is required to comply with the part 70 permit issuance process when Health issues a NERA license for the Hanford Site, but whether Ecology must abide by part 70 when Ecology issues terms and conditions implementing a federally enforceable requirement (Subpart H) in a title V permit. *Id.* The Petitioner also points to the EPA’s statement in the 2015 Hanford Order that “while the underlying applicable requirements of Subpart H are not subject to public comment under title V, the application of Subpart H to a particular source is.” *Id.* at 8 (quoting from 2015 Hanford Order at 22).¹⁶ The Petitioner contends that Ecology erred in responding to his comment and not providing the required documentation because Ecology ignored the requirement of 40 C.F.R. § 70.7(h)(2) to make available to the public information that the permitting authority has deemed relevant by using it in the permitting process, and failed to acknowledge that Ecology is solely responsible for issuing the title V permit for the Hanford site. *Id.* at 9. The Petitioner continues that Ecology’s response to his comment “effectively removes

¹⁶ In the 2015 Hanford Order, we explained that there must be “a public comment opportunity on how Subpart H is addressed for a particular source in a particular title V permit.” 2015 Hanford Order at 22.

from the part 70 issuance process the new, replaced, and removed federally enforceable terms and conditions implementing Subpart H” in a title V permit. *Id.*

EPA’s Response: For the following reasons, the EPA grants the Petitioner’s request for an objection on this claim.

When a title V petition seeks an objection based on the unavailability of information during the public comment period in violation of title V’s public participation requirements, the petitioner must demonstrate that the unavailability deprived the public of the opportunity to meaningfully participate during the permitting process.¹⁷ See *In re Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Petition No. 11-2000-07, Order on Petition (May 2, 2001) (applying the concepts of meaningful public participation and logical outgrowth to title V); cf., e.g., *In re Murphy Oil USA, Inc., Meraux Refinery*, Petition No. 2500-00001-V5, Order on Petition (September 21, 2011) (discussing a response to significant comments as “an inherent component of any meaningful notice and opportunity for comment” (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977))). To guide this analysis under title V, the EPA generally looks to whether the petitioner has demonstrated “that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit’s content.” See *In re Sirmos Division of Bromante Corp.*, Petition No. II-2002-03, Order on Petition (May 24, 2004). Without such a showing, it may be difficult to conclude that the ability to comment on the information would have been meaningful. In implementing the requirements for public participation under title V, the EPA is mindful that the part 70 regulations were promulgated in light of CAA section 502(b)(6)’s requirement that state permit programs include “[a]dequate, streamlined, and reasonable procedures . . . for public notice, including offering an opportunity for public comment and a hearing.” 42 U.S.C. § 7661a(b)(6). The EPA also notes that where a permitting authority provides an explanation for its decision not to make something available during the public comment period, the petitioner bears the burden of demonstrating that the permitting authority’s explanation is unreasonable.

The EPA has recognized in numerous prior orders that “the unavailability during the public comment period of information needed to determine the applicability of or to impose an applicable requirement also may result in a deficiency in the permit’s content.” *In re Cash Creek Generation, LLC*, Petition No. IV-2010-4, Order on Petition (June 22, 2012), at 9; see also *In re Louisiana Pacific Corporation*, Petition No. V-2006-3, Order on Petition (November 5, 2007); *In re WE Energies Oak Creek Power Plant*, Order on Petition (June 12, 2009); *In re Alliant Energy-WPL Edgewater Generating Station*, Petition No. V-2009-02, Order on Petition (August 17, 2010). Here, Washington has elected, as part of its approved title V program, to implement Subpart H at the Hanford facility through Health’s issuance of a NERA license that implements the requirements of Subpart H and Ecology’s inclusion of the NERA license—and thus the applicable Subpart H requirements—as an attachment to the terms and conditions of the title V permit.¹⁸ Under such circumstances, information that Health materially considered in implementing Subpart H in the NERA license is relevant information for purposes of issuance of

¹⁷ Where a petitioner claims that a permit is not in compliance with an unambiguous, express procedural requirement of 40 C.F.R. part 70 (e.g., failure to publish public notice as required by 40 C.F.R. § 70.7(h)(1)), the EPA will analyze that argument on its own terms.

¹⁸ As discussed in the Hanford 2016 Order, Ecology, as the issuer of the Hanford Title V Permit, bears the ultimate responsibility for ensuring the requirements of Subpart H are appropriately addressed in the permit.

the Hanford title V permit. The Petitioner specifically requested that Ecology provide such information during the public comment process and explained that, without such information, it would be difficult—if not impossible—for the public to determine whether the Hanford Title V Permit was consistent with the requirements of the CAA with respect to Subpart H. The EPA agrees that Ecology’s failure to provide all relevant materials supporting the NERA license has prevented the public from knowing how the title V permit might be said to meet the requirements of Subpart H. This, in turn, means that the public lacked the opportunity to meaningfully participate in the permitting process and that the unavailability of such materials could have resulted in a deficiency in the title V permit. Thus, the EPA concludes that the Petitioner has demonstrated that the unavailability of relevant information during the public comment period on Revision 2, Renewal B of the Hanford Title V permit may have caused the permit not to be in compliance with applicable requirements or requirements of 40 C.F.R. part 70.

For the foregoing reasons, the EPA grants the Petitioner’s request for an objection on this claim.

In responding to this order, Ecology is directed to provide for public notice on a draft title V permit, at which time all relevant supporting materials for the permitting decision, including information used by Health to implement Subpart H, must be made available for public review.

In this regard, the EPA notes that since receipt of this Petition, Ecology has begun the process of issuing a renewal title V permit for the Hanford Site (which is referred to as the “Renewal 3 Title V permit”). On July 19, 2017, Ecology submitted a letter to the EPA explaining its intent to process an anticipated permit-renewal application to be submitted by DOE. In the letter, Ecology acknowledged the 2016 Petition and stated that it would “make available to the public, upon request, copies of the draft permit, the application, and all relevant supporting materials, or provide an email or website address from which interested persons may obtain such materials.” Ecology also committed to “mak[ing] available information used by [Health] to implement the [NERA] license it issued to [DOE], pursuant to 40 C.F.R. part 61, Subpart H, which license is included as part of the Hanford Title V Permit.”

On May 4, 2018, Ecology submitted another letter to the EPA (with a courtesy copy to the Petitioner) containing updated information regarding the public comment process on the permit renewal. This letter explained that DOE submitted a permit-renewal application on September 12, 2017, and that Ecology intended to open a 60-day public comment period on December 17, 2017. However, the start of the comment period was delayed and then extended through April 6, 2018. At the end of the public comment period, Ecology received 324 comments: 136 comments from DOE, 36 from the Confederated Tribes of the Umatilla Indian Reservation, and 152 comments from individuals. Of the 152 comments from individuals, 146 were from the Petitioner. And, of the comments received by the Petitioner, only one relates to the 2016 Petition. The comment from the Petitioner relating to the 2016 Petition and Ecology’s response to that comment are enclosed with the May 4, 2018, letter, along with a closure report for emission unit 141, which Mr. Green contended was not made available to the public during the public comment period on the Renewal 3 Hanford Title V Permit.

On May 11, 2018, the Petitioner submitted a letter to the EPA in response to Ecology’s May 4, 2018, letter. The letter asserts, in part, that the closure report for emission unit 141 “was provided

after the close of the public comment period for Renewal 3,” and, thus, was not provided to the public.

On July 18, 2018, Ecology announced that the public comment period on Renewal 3 would be reopened from July 22, 2018, to August 24, 2018. On August 3, 2018, Ecology announced the public comment period on Renewal 3 would be extended to September 14, 2018. The EPA is not aware of any further extensions and understands that the public comment period on Renewal 3 has closed.

To the extent Ecology has made available during the public comment process on the Renewal 3 Hanford Title V Permit all relevant supporting materials for the permitting decision, which the Petitioner contends were not provided during the public comment period on the Renewal 2, Revision B Title V Permit,¹⁹ Ecology will have addressed the objection in the Petitioner’s 2016 Petition.

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby grant the Petition as described above.

OCT 15 2018

Dated: _____



Andrew Wheeler
Acting Administrator

¹⁹ For example, the emission unit 141 closure report.