

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY

IN THE MATTER OF)	
)	
U.S. DEPARTMENT OF ENERGY-HANFORD)	
OPERATIONS, BENTON COUNTY,)	
WASHINGTON)	PETITION NUMBERS X-2014-
)	01 AND X-2013-01
PERMIT NUMBERS 00-05-006, RENEWAL 2,)	
AND 00-05-006, RENEWAL 2,)	
REVISION A)	
)	ORDER RESPONDING TO THE
)	PETITIONER'S REQUESTS THAT THE
)	ADMINISTRATOR OBJECT TO THE
)	ISSUANCE OF STATE OPERATING
)	PERMITS
)	
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ISSUED BY THE WASHINGTON)	
DEPARTMENT OF ECOLOGY)	
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**ORDER GRANTING IN PART AND DENYING IN PART TWO PETITIONS FOR
OBJECTION TO PERMITS**

This Order responds to two related petitions submitted to the U.S. Environmental Protection Agency (EPA) by Bill Green of Richland, Washington (Petitioner) pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The petitions submitted by the Petitioner on April 23, 2013 (2013 Petition), and April 21, 2014 (2014 Petition), request that the EPA object to the title V operating permit (Permit No. 00-05-006, Renewal 2 and Permit No. 00-05-006, Renewal 2, Revision A)¹ issued by the Washington State Department of Ecology (Ecology)

¹As explained in more detail below, Renewal 2, Revision A is a complete reissuance of the Renewal 2 version 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 permits as “the Hanford Title V Permit” unless the discussion requires a reference to a specific version of the permit. Additionally, while the 2013 Petition and the 2014 Petition relate to different versions of the Hanford Title V Permit, due to the significant overlap in the issues raised in the two petitions and the similarity of the relevant permit conditions in the two versions of the Hanford Title V Permit, the EPA is responding to both petitions in this Order.

to the U.S. Department of Energy (DOE) for the Hanford Site in Richland, Washington (Hanford Title V Permit). The Hanford Title V Permit was issued pursuant to title V of the CAA, CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f (title V), and Washington Administrative Code (W.A.C.) Chapter (Ch.) 173-401. *See also* 40 C.F.R. part 70 (part 70). This operating permit is also referred to as a title V permit or a part 70 permit.

I. INTRODUCTION

This Order responds to all claims raised in the 2013 Petition and the 2014 Petition (collectively, the Hanford Title V Petitions). The claims are described in detail in Section IV of this Order. In summary, the issues raised are that: (1) the structure of the Hanford Title V Permit does not provide Ecology the authority to issue a permit that assures compliance with all applicable requirements, in particular, 40 C.F.R. Part 61, Subpart H (Subpart H) relating to radionuclide air emissions (radionuclides); (2) the structure of the Hanford Title V Permit does not provide Ecology with authority to enforce the portions of the Hanford Title V Permit relating to Subpart H; (3) Ecology did not comply with the requirements for public participation in issuing the Hanford Title V Permit; (4) the permit issuance procedures for the Hanford Title V Permit prevent access to judicial review; (5) the statement of basis for the Hanford Title V Permit related to radionuclides is inadequate; and (6) the Hanford Title V Permit does not include all applicable CAA § 112 requirements for radionuclides. Although the Petitioner raised some claims only in the 2013 Petition or in the 2014 Petition, due to significant overlap in the issues raised in the two petitions and the similarity of the relevant permit conditions in the two versions of the Hanford Title V Permit, the EPA is responding to both petitions in this Order.

Based on a review of the Hanford Title V Petitions and other relevant materials, including the Hanford Title V Permit, the permit records and relevant statutory and regulatory authorities, and as explained more fully below, I grant the Petitioner's request in part and deny in part for the reasons set forth in this Order.

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. 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 (Nov. 9, 1994); *see also* *60 Fed. Reg.* 62992 (Dec. 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 12, 2001, *66 Fed. Reg.* 42439 (August 13, 2001), and an update to that final approval effective January 2, 2003, *67 Fed. Reg.* 71479 (December 2, 2002). *See* 40 C.F.R. part 70, Appendix A. The regulations comprising the EPA-approved program in Washington are found 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. CAA §§ 502(a) and 504(a),

42 U.S.C. §§ 7661a(a) and 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 sources' compliance with applicable requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). 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.” *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

B. Regulation of Radionuclides in Washington

Both Ecology and the Washington State Department of Health (Health) have regulatory authority for “radioactive air emissions”² in Washington. The Washington Attorney General opinion 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).³ The Attorney General Opinion further explains that, with respect to the Hanford Site, Health will issue a license addressing radioactive air emissions, and the 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 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 Memorandum of Understanding, which was updated most recently in 2007 in only minor respects not relevant here, 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 (MOU). 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

² 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.

³ 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.

nonradioactive air emissions. Thereafter, the MOU provides that Health will issue a radioactive air emissions 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 radioactive air emissions license portion of the permit. MOU, at 2, 4. The MOU makes clear, 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 radioactive air emissions license procedures and Ecology will handle all title V operating permit procedures and 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 procedures 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).

With respect to enforcement authority, the MOU states that both Ecology and Health have identical enforcement authorities under R.C.W. 70.94.422. MOU, at 6. This is confirmed by the Attorney General Opinion. Attorney General Opinion, at 16-17. R.C.W. 70.94.422(1) was enacted in 1993, at the same time state of Washington amended the Washington Clean Air Act to provide Ecology with authority to implement the federal title V operating permit program, and gives Health all of Ecology's enforcement powers provided in R.C.W. 70.94.332, 70.94.425, 70.94.430, 70.94.431(1) through (7) and 70.94.435 with respect to radioactive air emissions.⁴ Attorney General Opinion, at 16-17. Under the MOU, Health is assigned the primary responsibility for inspections and enforcement actions that involve only radioactive air emissions, and Ecology has responsibility for inspections and enforcement actions that involve only non-radioactive air emissions. MOU, at 6. Although the MOU identifies the process by which such enforcement authorities will be exercised in a coordinated manner, R.C.W. 70.94.422(1), the MOU and the Attorney General Opinion make clear that both Ecology and Health retain their respective enforcement authorities. *See* R.C.W. 70.94.422(1) ("This section does not preclude the department of ecology from exercising its authority under this chapter."); MOU, at 6; Attorney General Opinion, at 16-17.

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-

⁴ These identified provisions authorize Ecology to assess civil and criminal penalties of up to \$10,000 per violation per day, seek restraining orders and injunctions, and seek other enforcement remedies, including those required by title V and part 70.

400-075(1), which are standards adopted 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.

Health has also adopted by reference the 40 C.F.R. Part 61 standards that regulate radionuclides⁵ (Radionuclide 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).⁶

The possibility that a state air permitting authority might rely on the expertise and resources of other state agencies to meet requirements necessary for EPA approval of the state title V operating permit program with respect to sources of radionuclides was specifically acknowledged by the EPA in the early years of the title V program. In guidance issued soon after the promulgation of part 70, the EPA specifically addressed whether the EPA expected all state radionuclide program activities to be carried out by the state air program. *See Memorandum from John S. Seitz, EPA Office of Air Quality Planning and Standards, and Margo Oge, Director, EPA Office of Radiation and Indoor Air, to EPA Regional Division Directors, re: "The Radionuclide National Emissions Standard for Hazardous Air Pollutants (NESHAP) and the Title V Operating Permits Program,"* dated September 20, 1994, at 2 (Radionuclide NESHAP/Title V Guidance). In that memo, the EPA stated, "States would be free to use whatever combination of their personnel they feel is appropriate for [implementing Part 70 permits at sources subject to the Radionuclide NESHAPs]. Such joint efforts would have to be sufficiently described so that EPA and the public can understand how the job will be done." *Id.* The Radionuclide NESHAP/Title V Guidance includes as an attachment an example of an interagency agreement that could be entered into among state agencies to outline their respective obligations for carrying out their respective responsibilities under the CAA.

C. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to the 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 permit if the EPA determines that the permit is not in compliance with applicable requirements of the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative,

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

⁶ 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.

§505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit.

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 agency (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 to the Administrator 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); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130-33 (9th Cir. 2010); *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); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081-82 (10th Cir. 2013); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments (RTC).

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," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265-66 ("[I]t is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment whether a petition demonstrates a permit does not comply with clean air requirements."). 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 petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating § 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); *NYPIRG*, 321 F.3d at 334 ("§ 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, *depending on* whether non-compliance has been demonstrated.") (emphasis added); *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). When courts review 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., Sierra Club v. Johnson*, 541 F.3d at 1265-66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130-31. A more detailed discussion of the petitioner demonstration burden 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 (June 19, 2013) (*Nucor II Order*), at 4-7.

The EPA has looked at a number of criteria in determining whether the 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, and the permitting authority's final reasoning (including the RTC), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132-33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012), at 20-21 (denying title V petition issue where petitioners did not respond to 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 (June 22, 2012) (*2012 Kentucky Syngas Order*) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient). Another factor the EPA has examined 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' 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.”); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 (Sept. 21, 2011), at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, 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 No. VI-2011-05 (Jan. 15, 2013), at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition No. VII-2004-02 (Apr. 20, 2007), at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (Mar. 15, 2005), at 12, 24. Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX (June 30, 2011), at 7–10; and *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 (July 23, 2012), at 6-7, 10–11, 13–14.

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 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, missions were 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.

B. Hanford Site Title V Permitting History

The first title V permit for the Hanford Site was issued by Ecology in 2001, and was first renewed in 2006. Relevant for purposes of these petitions, DOE submitted an application for the second renewal of the title V permit for the Hanford Site to Ecology and Health, which Ecology announced as complete on September 10, 2011. *Washington Department of Ecology Permit Register*, Vol. 12, No. 18 (September 10, 2011). Health issued Radioactive Air Emissions License FF-01 to DOE for the Hanford Site on February 23, 2012 (NERA License).

Ecology held an initial public comment period on draft Permit No. 00-05-006, Renewal 2 from June 4, 2012, to August 3, 2012. 2013 Petition, Ex. 3, at 1. Ecology reopened the public comment period from December 3, 2012, to January 14, 2013, after acknowledging that the permit application materials were not available during the initial public comment period, but public notice of the reopened public comment period was not published until December 10, 2012. *Id.* at 3-4. Because the reopened public comment period was less than 30 days, Ecology announced that it was extending the reopened public comment period on the draft permit from January 14, 2013, to January 25, 2013. *Id.* at 2. The Petitioner submitted comments on draft Permit No. 00-05-006, Renewal 2, which includes the NERA License, during each of these public comment periods. DOE also submitted comments on draft Permit No. 00-05-006, Renewal 2.

On February 14, 2013, Ecology submitted the proposed Permit No. 00-05-006, Renewal 2 to the EPA for the EPA's 45-day review period, which ended on March 31, 2013. Ecology issued the final permit on April 1, 2013 (Renewal 2 Permit), which would expire on March 31, 2018. As with the previous title V permits for the Hanford Site, the Hanford Title V Permit consisted of a section with standard terms and conditions, and three attachments: "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. Attachment 3 contains the Benton Clean Air Agency (BCAA) permit terms and conditions applicable to the regulations of open burning and asbestos." Most of the requirements of Subpart H that are included in the Renewal 2 Permit as well as most other requirements in the permit regulating radionuclides at the Hanford Site are contained in Attachment 2. Some additional Subpart H requirements are contained in the Standard Terms and Conditions portion of the Renewal 2 Permit (for example, Conditions 5.6, 5.10, 5.11 and 5.12, concerning title V reporting requirements related to Subpart H). On April 23, 2013, the Petitioner submitted a petition to the EPA (the 2013 Petition) requesting that the EPA object to the Renewal 2 Permit.

In May 2013, Ecology announced that it was reopening the public comment period on the entire Renewal 2 Permit from June 30, 2013, through August 2, 2013. In the public notices related to that reopening, Ecology stated that "We are holding another public comment period because we became aware of some confusion in notifications sent to our mailing list. To remove any confusion, and to encourage public comments, we are providing another review of the entire permit and supporting materials." 2014 RTC, Hanford Air Operating Permit, June 30 – August 2, 2013, November 17 – December 20, 2013, Appendix A. Health revised the NERA License on

August 30, 2013.⁷ Ecology then held a public comment period on proposed changes to the Renewal 2 Permit from November 17 through December 20, 2013. *Id.* Ecology explained that the proposed changes were “to incorporate new information into the permit,” in particular, updating the permit to address several notices of construction that had been issued by Ecology for the Hanford Site and replacing the previous NERA License (issued on February 23, 2012) with the revised NERA License (issued on August 30, 2013) as Attachment 2 to the Hanford Title V Permit. *Id.* The Petitioner commented during both of these public comment periods, and DOE also submitted comments. Ecology submitted to the EPA the proposed permit for what became Permit No. 00-05-006, Renewal 2, Revision A for the EPA’s 45-day review period on February 13, 2014, which ended on March 30, 2014. Ecology issued the final permit on May 1, 2014 (Renewal 2, Revision A Permit), which would still expire on March 31, 2018.

Again, as with the previous title V permits for the Hanford Site, the Hanford Title V Permit currently in effect consists of a section with standard terms and conditions, and three attachments. Attachment 2 is the NERA License that was applicable to the Hanford Site when the Hanford Title V permit was issued and most of the Subpart H requirements included in the permit, as well as most other requirements in the permit regulating radionuclides at the Hanford Site, are contained in Attachment 2. Some additional Subpart H requirements are contained in the main body of the permit (for example, Conditions 5.6, 5.10, 5.11 and 5.12, concerning title V reporting requirements related to Subpart H). On April 21, 2014, the Petitioner submitted a petition (the 2014 Petition), requesting that the EPA to object to the Renewal 2, Revision A Permit.

C. Timeliness of the Petitions

Pursuant to the CAA, if the EPA does not object 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. CAA § 505(b)(2); 42 U.S.C. § 7661d(b)(2). Thus, any petition seeking the EPA’s objection to the Renewal 2 Permit was due on or before May 31, 2013, and any petition seeking the EPA’s objection to the Renewal 2, Revision A Permit was due on or before May 30, 2014. The 2013 Petition was dated April 23, 2013, and the 2014 Petition was dated April 21, 2014. The EPA therefore finds the Petitioner timely filed both petitions.

D. Previous EPA Correspondence with the Petitioner

The EPA has previously responded in writing to the Petitioner on several issues that overlap with the issues raised in the Hanford Title V Petitions.

First, in a letter dated July 20, 2009, the Petitioner questioned whether Washington’s title V program met the title V and 40 C.F.R. part 70 requirements for judicial review of final permit actions and for public comment, affected state review and the EPA review with respect to title V permits issued by Ecology and local air authorities in Washington for sources of radionuclides. The Petitioner noted that for each of the four sources of radionuclides subject to title V permits in

⁷ This version of the NERA License has the same issuance and effective date (February 23, 2012) as the previous version, but states that it is “DATED at Richland, Washington the 30th day of August 2013,” followed by “Approved by:” and a signature.

Washington, the requirements for radionuclides were contained in a NERA license issued by Health that was then incorporated into the title V permit by Ecology or the local title V permitting authority as an applicable requirement. The Petitioner stated that NERA licenses are enforceable only by Health, that Ecology and local title V permitting authorities in Washington lack authority over such licenses, and identified two specific concerns with this approach. First, the Petitioner alleged that, because a NERA license is not subject to the same requirements for judicial review as title V permits in Washington, Washington's title V program did not comply with the requirements of 40 C.F.R. § 70.4(b)(3)(x) and (xii) for judicial review. Second, the Petitioner stated that title V permitting authorities in Washington do not have jurisdiction for title V operating permit conditions contained in the NERA license portion of the title V permit and that Washington title V permitting authorities therefore lacked authority to address public comments. Finally, the Petitioner asserted that neither NERA nor its implementing regulations require an opportunity for public comment, the EPA review, or affected state review for NERA licenses, which is required for title V operating permits pursuant to 40 C.F.R. §§ 70.7(h) and 70.8(b).

The EPA responded in a letter dated September 29, 2009. *See* Letter from Michelle L. Pirzadeh, Acting Regional Administrator, Region 10, to Bill Green, dated September 29, 2009 (EPA's September 2009 Letter). In that letter, the EPA stated that, to the extent these license requirements are "applicable requirements" as defined in 40 C.F.R. § 70.2, Ecology is required to include the requirements in the title V permit for a subject source, but that the underlying applicable requirements themselves are not subject to the judicial review, public participation and the EPA and affected state review requirements of title V and 40 C.F.R. part 70. *Id.*, at 1-2. The EPA also stated that the requirements of title V do not apply to the establishment of or challenge to applicable requirements established under separate statutory or regulatory authority. *Id.*, at 2.

Similar issues were raised by the Petitioner in a letter to the EPA titled "Administrative Procedure Act Petition: Concerning Repeal of Portions of Appendix A of 40 C.F.R. Part 70," dated July 1, 2011. In that letter, the Petitioner requested the EPA to exercise its rulemaking authority to repeal the authorization of Ecology and the Puget Sound Clean Air Authority (PSCAA), a local title V permitting authority in Washington, to carry out the title V operating permits program with respect to permits containing the Radionuclide NESHAPs as applicable requirements.⁸ The Petitioner asserted that the Washington Clean Air Act, R.C.W. Ch. 70.94, grants only Health the authority to create and enforce title V applicable requirements regulating radioactive air emissions and that Health is not a title V permitting authority and thus cannot enforce the CAA. The Petitioner also asserted that no title V permitting authority in Washington can enforce any title V requirements created by Health. Thus, the Petitioner asserts that applicable requirements created by Health escape any CAA and 40 C.F.R. part 70 permit issuance procedures, including requirements for public participation and the ability to obtain judicial review in state court.

In a response dated October 11, 2012, the EPA concluded that the issues raised in the Petitioner's letter were not grounds for repealing the EPA's approval of Washington's title V program. *See*

⁸ The letter also requested the EPA to repeal Health's delegation of the Radionuclide NESHAPs (40 C.F.R. Part 61, Subparts B, H, I, K, Q, R, T and W). The EPA denied this request.

Letter from Dennis McLerran, Regional Administrator, Region 10, to Bill Green, dated October 11, 2012 (EPA's October 2012 Letter). The letter explains that Ecology has incorporated the Radionuclide NESHAPs by reference into its regulations and pointed to Washington statutes and regulations, as well as the Attorney General Opinion and MOU, that make clear that Ecology and PSCAA have authority to implement and enforce the Radionuclide NESHAPs and include such requirements in title V permits, if applicable. The letter further explained that the requirements of title V and part 70, including requirements for public participation and judicial review, do not apply as a matter of federal law when Health issues a license under NERA and its implementing regulations.

IV. EPA DETERMINATIONS ON THE ISSUES RAISED BY THE PETITIONER

Claim 1. Petitioner Claims that the Structure of the Hanford Title V Permit Does Not Provide Ecology the Authority to Issue a Permit that Assures Compliance with All Applicable Requirements, in Particular, Subpart H

This section responds to the claims in Section II.B-3 on pages 16-20 of the 2013 Petition and Section 3.2 and 3.3 on pages 17-25 of the 2014 Petition. We view these claims as related and are responding to them together.

Petitioner's Claim. The Petitioner claims that Ecology, the title V permitting authority for DOE's Hanford Site, does not have the required authority to issue a title V permit that meets all title V requirements controlling emissions of radionuclides at the Hanford Site as required by CAA § 502(b)(5)(A) and 40 C.F.R. §§ 70.1(b), 70.3(c), 70.6(a) and 70.7(a). 2013 Petition, at 17; 2014 Petition, at 22. The Petitioner acknowledges that Ecology does have authority under state law to regulate radionuclides,⁹ has adopted Subpart H by reference in its regulations (W.A.C. 173-400-075), and has authority to enforce Subpart H at the Hanford Site. The Petitioner claims, however, that by choosing not to adopt Subpart H in the Hanford Title V Permit and to instead include the Subpart H requirements in the NERA license as Attachment 2 to the Hanford Title V Permit, Ecology cannot subject Attachment 2 to any requirement of 40 C.F.R. part 70 because Ecology lacks the legal ability to act on requirements developed pursuant to NERA. 2013 Petition, at 11, 13-15; 2014 Petition, at 10-12, 15-16, 20. The Petitioner characterizes this permit structure as "inappropriately transfer[ing] regulation of radionuclides under Subpart H from Part 70 to W.A.C. 246-247 and enforcement of terms and conditions implementing requirements of Subpart H from a permitting authority to Health, an agency that is not a permitting authority." 2014 Petition, at 19-20. The Petitioner also asserts that: (1) Health is the agency that identified terms and conditions in Attachment 2 as "state-only," but only Ecology has authority under title V to make this designation (2013 Petition, at 25; 2014 Petition, at 14-15, 26-27, 30); (2) that Attachment 2 is not a rule promulgated by the EPA or part of the Washington State Implementation Plan and therefore not included in the federal definition of applicable requirement in 40 C.F.R. § 70.2 (2014 Petition, at 7-8) and is also not an applicable requirement under Washington's title V program; and (3) that "any standard or other requirement controlling emissions of hazardous air pollutants, including radionuclides, is subject to inclusion in permits

⁹ The Hanford Title V Petitions refer to both "radionuclides" and "radioactive air emissions." Subpart H Radionuclide NESHAPs apply to radionuclide emissions. *See* 40 C.F.R. § 61.91. This Order uses the term radionuclides in discussing the Petitioner's claims as they pertain to Subpart H and other Radionuclide NESHAPs.

issued by a permitting authority” pursuant to title V and part 70 (2013 Petition, at 11; 2014 Petition, at 5).

EPA’s Response. For the reasons stated below, I deny the Petitioner’s request for an objection to the Hanford Title V Permit on these claims.

The Petitioner has not demonstrated that the structure of the Hanford Title V Permit deprives Ecology of the authority to issue a title V permit to DOE for the Hanford Site containing all federal applicable requirements, including Subpart H, and all federally-enforceable requirements controlling emissions of radionuclides as required by CAA § 502(b)(5) (A) and 40 C.F.R. §§ 70.1(b), 70.3(c), 70. (6)(a) and 70.7(a). These provisions require permitting authorities to have authority to issue permits that include emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements; that permitting authorities have authority to issue permits that provide for compliance with all applicable requirements; that permits for a major source include all applicable requirements for all relevant emission units in the major source; and that each subject source have a permit that assures compliance with all applicable requirements.

The Petitioner is correct that only Health has authority to carry out the requirements of NERA under R.C.W. Ch. 70.98 and W.A.C. Ch. 246-247 and that the NERA License was issued by Health to DOE under that authority. As discussed in the EPA’s October 2012 Letter, however, a review of Washington’s statutes, regulations and the Washington Attorney General Opinion make clear that Ecology also has certain authorities with respect to radionuclides. Specifically, Ecology has adopted the Radionuclide NESHAPs by reference into its regulations at W.A.C. 173-400-075(1). Furthermore, Ecology has authority, and in fact is required, under R.C.W. 70.94.161(10)(a), W.A.C. 173-401-200(4)(a)(iv) and W.A.C. 173-400-600(1)(a), to include in the Hanford Title V Permit all requirements of Subpart H that apply to the Hanford Site. *See also* Washington Attorney General Opinion, at 4 (“Ecology and local air authorities are also charged with regulatory authority over these same sources pursuant to Ch. 70.94 R.C.W.”).

As the Petitioner notes, Ecology has chosen to meet most of its title V obligations with respect to radionuclides at the Hanford Site by incorporating the NERA License issued by Health into the Hanford Title V Permit. The Petitioner acknowledges that Subpart H requirements applicable to the Hanford Site are included in Attachment 2.¹⁰ The Hanford Title V Permit states that “Attachment 2 contains the State of Washington Department of Health (Health) Radioactive Air Emissions License (FF-01) as permit terms and conditions.” Permit No. 00-05-006, Renewal 2, Standard Terms and Conditions, at 1; Permit No. 00-05-006, Renewal 2, Revision A, Standard Terms and Conditions, at iii (emphasis added). This language clearly indicates that Ecology is, in issuing the Hanford Title V Permit, adopting the terms and conditions of the Health License—including the Subpart H requirements in Attachment 2—as terms and conditions of the Hanford Title V Permit. Similarly, although Health has, in the first instance in issuing the NERA License, identified certain conditions in the NERA License as “state only,” Ecology has, by including the

¹⁰ The Petitioner states on several occasions that all of the Subpart H requirements are in Attachment 2 of the Hanford Title V Permit. *See, e.g.*, 2013 Petition, at 12. In fact, several conditions relating to Subpart H are included in the main body of the permit. *See* Standard Terms and Conditions, Conditions 5.6, 5.10, 5.11 and 5.12.

NERA License in the Hanford Title V Permit “as permit terms and conditions,” adopted Health’s designation as its (Ecology’s) designation of which title V permit conditions it considers to be “state only.”¹¹

The Petitioner’s reliance on language in R.C.W. 70.98 and W.A.C. Ch. 246-247 stating that implementation and enforcement of NERA and its implementing regulations rests with Health ignores the fact that, once incorporated into the Hanford Title V Permit, the permit terms and conditions of the NERA License are terms and conditions of the Hanford Title V Permit. As a result, Ecology’s authority with respect to such permit terms and conditions derives from R.C.W. 70.94 and its implementing regulations, including W.A.C. Ch. 173-401. Indeed, the Washington Attorney General Opinion, describing the specific situation in this case (a license issued by Health, but included in a title V permit issued by Ecology), states expressly that:

The operating permit [issued by Ecology for the Hanford Site] will include components addressing both radioactive (from Health’s license) and non-radioactive air emissions. The operating permit will be required, issued, and enforced pursuant to the authorities set forth in 70.94 Ch. R.C.W. [] and its implementing regulations, including specifically Ch. 173-401 W.A.C....

Attorney General Opinion, at 4.

Additionally, the EPA recognizes that at the time the Petitioner filed the Hanford Title V Petitions, W.A.C. 246-247-030(14) stated that “‘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 agency, with requirements and limitations listed therein to which the licensed or permitted party must comply.” However, Health subsequently revised this regulation “to accurately reflect the Department of Health actions and to clarify related actions by the Department of Ecology and the local air pollution control authorities.” Health further stated that “While the radioactive air emissions license is always issued by the Department of Health, incorporation of the license into the air operating permit is done by the Department of Ecology or the local air pollution control authorities under their authority.” *See Proposed Rulemaking for Radiation Protection – Air Emissions, W.A.C. 246-247-030 Definitions. W.A.C. 246-247-*

¹¹ As discussed in response to Claim 3 below, to the extent Ecology receives public comments on title V permits using this permit structure regarding whether certain requirements in Attachment 2 are appropriately characterized as “state-only” for purposes of the federal title V program, Ecology has an obligation, prior to issuing the title V permit, to respond to significant comments by explaining the basis for its determination that the requirement is not “required under the Act or under any of its applicable requirements.” *See* 40 C.F.R. § 70.6(b); W.A.C. 173-401-625(2). If, after considering the comments, Ecology concludes that Attachment 2 incorrectly characterizes a certain requirement as “state-only,” Ecology must ensure that the final title V permit appropriately characterizes that requirement as federally enforceable prior to issuing the final title V permit. To the extent this first requires a revision to the NERA License, Ecology must delay issuance of the final title V permit until the NERA License is revised consistent with title V deadlines for permit issuance. *See, e.g.,* 40 C.F.R. § 70.7(a)(2) (providing that a permitting authority must “take final action on each permit application (including a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application”).

030(14) currently states that “The license will be incorporated as an applicable requirement in the air operating permit issued by the department of ecology or a local air pollution control authority when the department of ecology or a local air pollution control authority issues an air operating permit.” Accordingly, while the prior language may have been ambiguous, Health’s clarifications are consistent with other statutory and regulatory language and the Washington Attorney General Opinion clearly indicating that the title V permit for the Hanford Site is issued by Ecology and that the NERA License is incorporated into the title V permit by Ecology. In short, the Petitioner has not demonstrated that the structure of the Hanford Title V Permit deprives Ecology of the authority to issue a title V permit to DOE for the Hanford Site containing all federal applicable requirements, including Subpart H, and all federally-enforceable requirements controlling emissions of radionuclides.

With respect to the Petitioner’s claim that the NERA License issued by Health for the Hanford Site is not an “applicable requirement,”¹² the EPA acknowledges that the EPA’s October 2012 Letter to the Petitioner included language on this issue that could have been misconstrued. The EPA did explain in the letter that many provisions in NERA licenses issued by Health and included in title V permits for radionuclides sources are established as a matter of state law and not subject to the requirements of part 70. *See* EPA’s October 2012 Letter, at 6, n. 4. Several statements in the letter, however, used the term “applicable requirement” in connection with discussing licenses issued by Health under NERA without indicating whether the EPA was using that term to describe federal “applicable requirements” or state-only “applicable requirements.”¹³ The EPA is clarifying here that we do not consider a license issued by Health—or requirements of R.C.W. Ch. 70.98 or the regulations issued thereunder that do not meet the definition of “applicable requirement” in 40 C.F.R. § 70.2—to be “applicable requirements” for purposes of Washington’s EPA-approved title V program. In contrast, the Radionuclide NESHAPs, including Subpart H, which are adopted in both Ecology’s regulations at W.A.C. 173-400-075 and Health’s regulations at W.A.C. 246-247-035, are “applicable requirements” under the EPA-approved title V program for Washington because they are standards or other requirements under CAA § 112. *See* 40 C.F.R. § 70.2 (EPA’s definition of applicable requirement).¹⁴ Thus, the fact

¹² Although the Petitioner now contends that the NERA License is not an applicable requirement under state or federal law, the Petitioner’s July 29, 2009, letter to the EPA stated that “As required by W.A.C. 246-247-010(5), -060, -060(1), and -060(2)(c), these licenses are incorporated into the [title V permit] as [title V permit]-*applicable requirements*.” July 29, 2009, letter at 2 (emphasis added).

¹³ The EPA October 2012 letter stated that “Radionuclide regulatory requirements are established by [Health] in a license that is then incorporated by Ecology or PSCAA (as applicable) into part 70 permits as applicable requirements as provided in the MOUs” (at 4); “Licenses issued by [Health] for radionuclide emissions, which incorporate the Radionuclide NESHAPs, are incorporated into the part 70 permits, where applicable, as applicable requirements in air operating permits” (at 5); “The establishment of or changes to such underlying applicable requirements must be made pursuant to the rules that govern the establishment of such applicable requirements, in this case, the RAD NESHAPs promulgated by EPA and the license requirements promulgated by Ecology” (at 6); “In summary, nothing in your Petition calls into question our previous conclusion that Ecology and PSCAA meet the requirements of Title V and part 70 when they issue part 70 permits that contain applicable requirements consisting of a license issued by [Health] regulating radionuclide emissions and containing the requirements of the Radionuclide NESHAPs” (at 6).

¹⁴ The Petitioner contends that a license issued by Health under NERA is also not an “applicable requirement” within the meaning of R.C.W. 70.94.161(10)(d) and W.A.C. 173-401-200(4)(d) because those provisions identify as applicable requirements only the NERA statute itself, R.C.W. Ch. 70.98, “and rules adopted thereunder.” The Petitioner also points to the definition of “license” in W.A.C. 246-247-030(14), which, at the time the Petitioner

that a NERA license is not a federal applicable requirement does not demonstrate that the structure of the Hanford Title V Permit deprives Ecology of the authority to issue a title V permit to DOE for the Hanford Site containing all federal applicable requirements, including Subpart H.

With respect to the Petitioner's contention that any federal standard or other requirement controlling emissions of hazardous air pollutants, including radionuclides, is subject to inclusion in permits issued by a permitting authority pursuant to title V and part 70 (2013 Petition, at 11; 2014 Petition, at 5), the Petitioner has not met his demonstration burden on this issue. The only explanation the Petitioner provides for this assertion is in his 2013 Petition, when he points to CAA § 116. That section provides that, except as provided in statutes preempting certain state regulation of mobile sources regulated under title II of the CAA:

nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

The Petitioner contends that the CAA and Washington state regulations require both the federal requirement and the state requirement to be included in a title V permit when both apply, stating that "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" (2013 Petition, at 25). In support of this assertion, the Petitioner points to a statement in the EPA's partial delegation of authority to Health to implement and enforce the Radionuclide NESHAPs, which stated, "However, if both a State or local regulation and a Federal regulation apply to the same sources, both must be complied with, regardless of whether one is more stringent than the other, pursuant to the requirements of section 116 of the CAA." *See 71 Fed. Reg. 32276, 32278* (June 5, 2006). Nothing in CAA § 116 or in the EPA's partial

submitted the Hanford Title V Petitions, defined a NERA license as an "applicable portion" of an air operating permit, not as an applicable requirement. We need not address this issue because of our conclusion that a NERA license is not an "applicable requirement" within the meaning of the EPA-approved title V permitting program for Washington. We note, however, that W.A.C. 246-247-030(14) has since been amended to clearly state that a NERA license is an "applicable requirement" under state law to be included in Washington title V permits, as applicable. In addition, both the Attorney General Letter (at 4) and the MOU (at 13) have long interpreted a NERA license to be an "applicable requirement" as a matter of state law under R.C.W. 70.94.161(10)(d) and W.A.C. 173-401-200(4)(d), presumably because a NERA license is issued under R.C.W. Ch. 70.98 and rules adopted thereunder. In any event, whether or not a NERA license is an "applicable requirement" under state law does not change the conclusion we reached in the EPA September 2009 and October 2012 letters, namely, that the public participation, judicial review and other requirements of title V and part 70 do not apply as a matter of federal law to Health when issuing a license pursuant to R.C.W. Ch. 70.98 and W.A.C. Ch. 246-247. Title V and part 70 requirements do apply, of course, to issues relating to whether Ecology has included all requirements of Subpart H, and any other "applicable requirements," as defined in 40 C.F.R. § 70.2, in the Hanford Title V Permits.

delegation of the Radionuclide NESHAPs to Health in any way suggests that the CAA requires that “state-only” requirements be included in a title V permit. Similarly, the EPA’s statement in the partial delegation was in no way intended to suggest that both a federal and a “state-only” state regulation must, as a matter of federal law, be complied with. Rather, the EPA was only pointing out that, as provided in and subject to CAA § 116, nothing in the CAA precludes states or local agencies from adopting and enforcing their own standards and requirements regulating air pollution.

For the foregoing reasons, the EPA denies the Hanford Title V Petitions as to Claim 1.

Claim 2. Petitioner Claims that the Structure of the Hanford Title V Permit Does Not Provide Ecology with Authority to Enforce the Portions of the Hanford Title V Permit Relating to Subpart H

This section responds to the claims in Section II.B-2 on pages 11-16 of the 2013 Petition and Section 3.1 on pages 13-16 of the 2014 Petition. We view these claims as related and are responding to them together.

Petitioner’s Claim. The Petitioner claims that Ecology does not have authority to enforce all federally-enforceable requirements in the Hanford Title V Permit controlling emissions of radionuclides as required by CAA § 502(b)(5)(E) and 40 C.F.R. § 70.11(a). The Petitioner claims that by choosing not to adopt Subpart H by reference in the Hanford Title V Permit and instead choosing to address Subpart H requirements by including the NERA License as Attachment 2 to the permit, Ecology has effectively moved enforcement of Subpart H to a state regulation that cannot be enforced by Ecology, as the title V permitting authority, or the public. 2013 Petition, at 11, 13-15; 2014 Petition, at 10-12, 15-16, 20. This is because, the Petitioner asserts, only Health has authority under state law to enforce requirements under NERA, citing to R.C.W. 70.98.050(1), W.A.C. 246-247-002(1)(a), W.A.C. 246-247-030(14) and W.A.C. 246-247-060. 2013 Petition, at 12-13; 2014 Petition, at 4, 10, 15-16. The Petitioner also contends that, although an intergovernmental agreement can assure that an issued title V permit contains all applicable requirements, it cannot grant statutory enforcement authority to an administrative agency, as suggested by Region 10 in its October 11, 2012, letter or by the EPA in guidance (citing to Radionuclide NESHAP/Title V Guidance). 2013 Petition, at 15, n. 24.

EPA’s Response. For the reasons stated below, I deny the Petitioner’s request for an objection to the Hanford Title V Permit on these claims.

The Petitioner has not demonstrated that Ecology lacks authority to enforce all federally-enforceable requirements in the Hanford Title V Permit controlling emissions of radionuclides as required by CAA § 502(b)(5)(E) and 40 C.F.R. § 70.11(a). Those provisions require that title V permitting authorities have authority to enforce permits, permit fee requirements and the requirement to get a permit, including civil and criminal penalties and injunctive relief.

As discussed above in response to Claim 1, both Ecology and Health have regulatory authority for radioactive air emissions in Washington. The Petitioner is correct that the Health License was issued in the first instance by Health under NERA and that only Health has authority to carry out the requirements of NERA under R.C.W. Ch. 70.98 and W.A.C. Ch. 246-247. By including the

NERA License as an attachment to the Hanford Title V Permits, however, Ecology has issued the terms and conditions of the NERA License as terms and conditions of the Hanford Title V Permit.

As discussed in both the EPA's September 2010 Letter and the EPA's October 2012 Letter, Washington's statutes and regulations provide Ecology with authority to enforce all requirements of the title V permits it issues. Both versions of the Hanford Title V Permit state that they are issued under the authority of R.C.W. Ch. 70.94. Ecology has authority to seek criminal and civil penalties against any person who violates any provision of R.C.W. Ch. 70.94. *See* R.C.W. 70.94.430 (criminal penalty authority); R.C.W. 70.94.431 (civil penalty authority). In addition, in granting to Health all of Ecology's enforcement authorities in R.C.W. 70.94.422, the Washington Legislature made clear that granting such enforcement authority to Health "does not preclude the department of ecology from exercising its authority under this chapter [R.C.W. Ch. 70.94]." *See* R.C.W. 70.94.422(1). These statutory provisions were submitted by Ecology to the EPA as part of its title V program.

The Attorney General Opinion specifically confirms Ecology's authority to enforce provisions of a NERA license issued by Health when included in a title V permit, as Ecology has done in issuing the Hanford Title V Permit that is the subject of these petitions. In discussing Ecology's enforcement authority specifically with respect to the Hanford Site, the letter states:

In 1993, the State Legislature granted the Washington State Department of Health the enforcement powers listed above with respect to emissions of radioactive air emissions. *See* R.C.W. 70.94.422(1). As explained in Section I above, Ecology and Health have developed an MOU whereby each agency will have primary responsibility for development of a component of the operating permit. Health's component is identified as a "license" per Ch. 70.98 R.C.W. This license will be incorporated as an applicable requirement into the operating permit issued by Ecology. Each agency will retain enforcement authorities, although the MOU identifies the process through which such authorities will be exercised in a coordinated manner.

Attorney General Opinion, at 17-18.

The MOU also makes clear that both Ecology and Health have enforcement authority with respect to radioactive air emissions from the Hanford Site, stating "Both Ecology and Health have identical enforcement authority under Chapter 70.94 R.C.W...." MOU, at 6. The MOU then states that Health will assume primary responsibility for inspection and enforcement actions that involve only radioactive air emissions, but makes clear that Ecology retains its enforcement authority and may exercise this authority consistent with the MOU under extenuating circumstances. MOU, at 6-7. Ecology and Health more recently confirmed this joint authority to enforce, in particular, the radionuclide provisions of the title V permit issued by Ecology to DOE for the Hanford Site in a letter to the Petitioner dated July 16, 2010. *See* Ecology/Health July 2010 Letter, at 3. In responding to comments raising concerns regarding Ecology's authority to enforce the Hanford Title V Permit, Ecology referred to the Ecology/Health July 2010 Letter, as well as the EPA's October 2012 Letter. 2013 RTC, #s 75 and 77; 2014 RTC, #s 3-4 and 11.

The Petitioner acknowledges that Ecology may have authority to regulate radionuclides, but contends that several other provisions of state law “mute” that authority. The statutory and regulatory provisions the Petitioner relies on to support this contention, however, are NERA and its implementing regulations. Both NERA and its implementing regulations do provide that Health has “sole” responsibility for carrying out NERA and “responsibility” for enforcement of NERA licenses. *See, e.g.*, R.C.W. 70.98.50(1); W.A.C. 246-247-002(1)(a); W.A.C. 246-247-060. As discussed above, however, when Ecology includes the NERA License as an attachment to the Hanford Title V Permits, it is also a requirement of a title V permit issued by Ecology under R.C.W. Ch. 70.94. Therefore, Ecology also has enforcement authority under R.C.W. Ch. 70.94.

Moreover, Ecology’s authority does not stem from the MOU or the EPA’s Radionuclide NESHAP/Title V Guidance, as the Petitioner contends. Rather, such authority stems from the fact that the NERA License becomes part of a title V permit when included as an attachment to that title V permit, and, as such, is issued under R.C.W. 70.94, and thus subject to Ecology’s enforcement authority.

For the foregoing reasons, the EPA denies the Hanford Title V Petitions as to Claim 2.

Claim 3. Public Participation Claims

Claim 3A responds to the claims in Section II.B-1 on pages 3-9 of the 2013 Petition. Claim 3B responds to the claims in Section II.B-4 on pages 20-29 of the 2013 Petition and Section 3.4 on pages 25-31 of the 2014 Petition. We view these claims as closely related, and we are responding to them as Claims 3A and 3B.

Claim 3A. Petitioner Claims that Public Participation for the Hanford Title V Permit was Inadequate

Petitioner’s Claim. The Petitioner claims that public participation for the Hanford Title V Permit was inadequate because Ecology did not comply with W.A.C. 173-401-800 and 40 C.F.R. § 70.7(h) during the Renewal 2 Permit public participation process. Specifically, the Petitioner asserts that Ecology did not provide: 1) adequate notice to the affected public; 2) a minimum of 30-days for public comment; and 3) all required materials “contained in the permit application, draft permit, and relevant supporting material.” 2013 Petition, at 4.

EPA’s Response. For the reasons stated below, I deny the Petitioner’s request for an objection to the Hanford Title V Permit on these claims.

As noted by the Petitioner, Ecology opened the draft Renewal 2 Permit, for public comment on three separate occasions. 2013 Petition, at 4. The first comment period occurred between June 4 and August 3, 2012, but was deemed deficient by Ecology because certain permit application materials were not available during this period. Ecology opened a second period from December 10, 2012, to January 4, 2013, and extended this period from January 14 to January 25, 2013. Within each period, the Petitioner submitted written comments to Ecology for a total of 43 pages of comments.

Due to concerns relating to public participation associated with the Renewal 2 Permit, Ecology “invited public comment on the . . . Renewal 2, Revision A” Permit from June 30 to August 2,

2013. 2014 RTC, 2. During this period, Ecology made “[t]he permit, supporting documents, the previous draft permit, and the Response to Comments for the draft permit” available for review. 2014 RTC, Appendix A. In fact, Ecology explained that “[t]o remove any confusion and to encourage public comments, we are providing another review of the *entire permit* and supporting materials.” 2014 RTC, Appendix A (italics added). Ecology held another public comment period for the Renewal 2, Revision A Permit, between November 17 and December 20, 2013. *Id.* During both periods, the Petitioner again submitted extensive written comments.

Ecology’s decision to re-open the Renewal 2 Permit in all respects and reissue it as the Renewal 2, Revision A Permit, is relevant to the Petitioner’s claims concerning public participation. However, the Petitioner does not consider or take any position on the effect of Ecology’s decision to re-open and reissue the permit; nor does the Petitioner raise these claims in his 2014 Petition. As a result, the Petitioner did not demonstrate that Ecology did not comply with the procedural requirements for public participation when it issued the Hanford Title V Permit. Nevertheless, we believe this issue is now moot due to the subsequent public comment periods provided for the Renewal 2, Revision A Permit. Because Ecology did not limit the scope of comments that could be submitted on the Renewal 2, Revision A Permit, the Petitioner had two additional opportunities to submit comments on any issues for which he believed he had an insufficient opportunity to do so on the Renewal 2 Permit. *See LGE Trimble II*, Order on Petition No. IV-2008-3 (Aug. 12, 2009), at 12. In fact, we note that the Petitioner took advantage of every opportunity for public participation and submitted numerous comments. Thus, to the extent a new or extended comment period may have been warranted, it has already been provided.¹⁵

The Petitioner also did not demonstrate that the unavailability of information during the public comment period deprived the public of the opportunity to meaningfully participate during the permitting process.¹⁶ 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.” *In re Sirmos Division of Bromante Corp.*, Order on Petition No. II-2002-03 (May 24, 2004), at 6. “Without such a showing, it may be difficult to conclude that the ability to comment on the information would have been meaningful.” *2012 Kentucky Syngas Order*, at 8. Here, the Petitioner fails to identify what information was missing and also fails to show how that unavailability has resulted in, or may have resulted in, a deficiency in the

¹⁵ We also observe that the Petitioner cites to an order of the Pollution Control Hearings Board in which he characterizes the order as “re-opening [the Renewal 2 Permit] for public review” and “render[ing] issues regarding public review [with respect to the Renewal 2 Permit] as moot.” 2014 Petition, at 3, citing *Corrected Order on Motions for Summary Judgment and Request for Dismissal*, PCHB No. 13-055 (July 9, 2013).

¹⁶ To the extent that the Petitioner claims that there was no public comment opportunity on the Subpart H requirements in the Hanford Title V Permit because the NERA License was issued without an opportunity for public comment prior to the public comment period on the Hanford Title V Permit, the Petitioner and DOE in fact submitted extensive comments on Attachment 2 (the NERA License) during the public comment periods for both the Renewal 2 Permit and the Renewal 2, Revision A Permit. As discussed above in response to Claim 1 and below in response to Claim 3B, however, title V and part 70 do not provide an opportunity for public comment on the underlying federal applicable requirements themselves (here, Subpart H) or “state-only” portions of Attachment 2. On the other hand, title V and part 70 do provide an opportunity for public comment during the title V issuance process on whether federal applicable requirements included in Attachment 2 meet the requirements of title V and part 70. Accordingly, whether a requirement is appropriately characterized as federally enforceable or “state only” is an issue for which the title V permitting authority must provide an opportunity for public comment.

permit. Accordingly, the Petitioner's claim with respect to the unavailability of information is also denied for his failure to demonstrate this claim.

For the foregoing reasons, the EPA denies the Hanford Title V Petitions as to Claim 3A.

Claim 3B. Petitioner Claims that Ecology Did Not Adequately Respond to Public Comments Regarding Subpart H

Petitioner's Claim. The Petitioner claims that Ecology did not provide an opportunity for public comment because Ecology does not and cannot revise Attachment 2 in response to public comments. Specifically, the Petitioner points to several comments submitted to Ecology during the Renewal 2, Revision A Permit public comment process that relate to Subpart H, ranging from "missing or mis-identified control equipment to isotopes incorrectly copied from the [permit] application to correction of typographical errors." 2014 Petition, at 28 (internal citations omitted). Similarly, during the Renewal 2 Permit public comment process, Ecology received public comments stating, for example, that Ecology had incorrectly identified certain provisions regulating radionuclides as "state-only." 2013 Petition, at 23. Nevertheless, the Petitioner argues, Ecology rejected all comments on Attachment 2 by generally explaining that Attachment 2 cannot be changed using the title V public comment process. *See* 2014 Petition, at 28; 2013 Petition, at 23.

EPA's Response. For the reasons provided below, I grant the Petitioner's request to object to the Hanford Title V Permit on the basis that Ecology's record is inadequate with respect to addressing Subpart H in the Hanford Title V Permit.

Ecology's record on whether the Hanford Title V Permit properly addressed all federal applicable requirements is inadequate. In particular, the administrative record for the permit, which includes Ecology's response to comment documents, does not adequately explain the rationale for including certain isotopes listed in the "Radionuclides Requiring Measurement" table of Attachment 2 for emission units 735, 736, 855 and 856. *See* 2014 RTC, #54-57. Similarly, Ecology did not address whether "all additional radioactive air emissions licensing activities . . . are identified and captured in an updated [NERA License] for issuance with the final AOP [air operating permit]." 2013 RTC, #50; *see also id.*, #54 and #63 (identifying closed emission units).

Ensuring compliance with all federal applicable requirements is an essential component of the title V operating permit program. It is not disputed that Subpart H is a federal applicable requirement. However, in responding to multiple comments that the Petitioner identifies, Ecology's RTC document does not provide any analysis to demonstrate whether the Hanford Title V Permit sufficiently addresses Subpart H. Instead, Ecology stated that the title V permit cannot be revised in response to these particular public comments. Specifically, in its RTC document, Ecology states:

"Attachment # 2 is included in the [title V permit] as an applicable requirement. As an applicable requirement, corrections to the underlying applicable requirements need to be made using the applicable process for that underlying requirement." and

“The underlying requirements to the Hanford [title V permit] . . . have been finalized prior to revision of the [title V permit] and cannot be changed using the [title V permit] comment resolution process. Corrections to the underlying requirements need to be made using the applicable process for that underlying requirement.”

2014 Petition, at 28; 2014 RTC, #s 36 and 48-58. These responses do not address whether Attachment 2 includes the appropriate permit terms and conditions pertaining to the federal applicable requirements of Subpart H. Accordingly, it is not clear from the administrative record that Ecology (in partnership with Health) adequately addressed all federal applicable requirements in the Hanford Title V Permit. For these reasons, I grant the Petitioner’s claims and direct Ecology to supplement its record and response to address these concerns, and, if necessary, make any appropriate changes to the Hanford Title V Permit. *See In re Mettiki Coal*, Order on Petition No. III-2013-1 (September 26, 2014), at 5-9; *In re EME Homer City*, Order on Petition No. III-2012-06, III-2012-07; III-2013-02 (July 30, 2014), at 41-42.

We note that in reviewing the record, including Ecology’s RTC document, we observed that there may be additional issues that were raised in public comments that may concern whether the permit includes terms and conditions addressing federal applicable requirements. As we have recognized, it is a general principle of administrative law that an inherent component of any meaningful opportunity for public comment is a response by the permitting authority to significant comments. *See, e.g., In re Onyx Environmental Services*, Order on Petition V-2005-1 (February 1, 2006), at 7, citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”). A significant comment in this context is one that concerns whether the title V permit includes terms and conditions addressing federal applicable requirements, including monitoring and related recordkeeping and reporting requirements. In reviewing a petition to object to a title V permit because of an alleged inadequate response to a significant comment, the EPA considers whether the petitioner has demonstrated that the permitting authority’s response resulted in, or may have resulted in, a deficiency in the content of the permit. *See, e.g., In re Cash Creek II*, Order on Petition IV-2010-4, at 9, 21-22 (June 22, 2012). While we are not determining whether each of these comments is significant, we note that there may have been significant comments for which Ecology did not address a federal applicable requirement and that such failure may have resulted in a flaw in the permit. Comments relating to the radionuclide elements of Attachment 2 may be significant because they may pertain to whether Subpart H has been properly addressed in the Hanford Title V Permit. Accordingly, we expect that Ecology would respond to such significant comments as part of the permit record as Ecology responds to this objection.

As a general matter, as discussed above in response to Claims 1 and 2, Washington statutes and regulations authorize Ecology to issue and enforce Subpart H contained in Attachment 2. As the title V permitting authority, Ecology is required to ensure that Subpart H is adequately addressed in the Hanford Title V Permit. We recognize that in responding to comments on Attachment 2, Ecology cited to the EPA’s October 2012 Letter and the Ecology/Health July 2010 Letter as the bases for its inability to address changes to Attachment 2. Ecology’s citation to these letters as a full response to these comments, particularly as they may pertain to Subpart H, suggests a misinterpretation of a permitting authority’s obligations in the title V permit issuance process.

Washington has identified R.C.W. Ch. 70.98, NERA and the regulations adopted thereunder, as an “applicable requirement” under its title V operating permit program. *See* W.A.C. 173-401-200(4)(d); *see also* R.C.W. 70.94.161(10)(d) (stating that “every requirement in an operating permit shall be based upon the most stringent of the following requirements,” and including R.C.W. Ch. 70.94 and the rules adopted thereunder). The two letters relied on by Ecology in its response to comment on the Hanford Title V Permit make the point that there is no requirement under title V or part 70 that Ecology or Health provide an opportunity for public comment on a license issued under R.C.W. Ch. 70.98 and W.A.C. Ch. 246-247, which Ecology has determined is required to be included in the title V permit for Hanford as a matter of state law. *See* W.A.C. 246-247-002(6). The EPA continues to agree with this conclusion.

Ecology’s response, however, is inconsistent with the fact that Subpart H is defined as a federal applicable requirement under part 70 (*see* 40 C.F.R. § 70.2) and under Ecology’s title V operating permits program (*see* R.C.W. 70.94.161(10)(a) and W.A.C. 173-401-200(4)(a)(iv)). Title V and the part 70 regulations, as well as Ecology’s title V regulations, do require a public comment opportunity on how Subpart H is addressed for a particular source in a particular title V permit. In other words, while the underlying requirements of Subpart H are not subject to public comment under title V, the application of Subpart H to a particular source is. This question was not addressed by the letters referred to by Ecology, and Ecology’s reliance on these letters to respond to comments on the application of Subpart H to the Hanford Site in the Hanford Title V Permit is misplaced.

There are several ways Ecology can address the CAA requirements regulating radionuclides (specifically Subpart H) under its existing statutory and regulatory scheme consistent with the public participation requirements of title V of the CAA and Ecology’s title V operating permit program. For example, Ecology could attach an addendum to the Hanford Title V Permit to correct any omissions or errors – if any – contained in the license with respect to Subpart H, since Ecology also has authority to enforce the NESHAP. Health could also defer final issuance of the NERA license until Ecology completes a public participation process on a draft title V permit for the Hanford Site that includes a draft NERA license as an attachment to the title V permit so that any public comments on the draft title V permit that relate to how Subpart H is addressed in the license and as an attachment to the title V permit can be addressed by Ecology (with assistance from Health) in responding to comments on the draft title V permit. Alternatively, if the NERA license is final when Ecology includes the license as an attachment to the draft title V permit that is put out for public comment, Ecology could work with Health in responding to the substance of any comments that relate to how Subpart H is addressed in the title V permit (including the license as an attachment). To the extent a public comment raises an issue that requires a revision to the license before issuance of a title V permit that meets the requirements of the CAA and Ecology’s title V program with respect to Subpart H, and Ecology believes it does not have authority to make those revisions in the title V permit itself, Ecology could defer issuance of the title V permit until the license is revised and can be included as an attachment to the final title V permit. Under this latter option, however, Ecology would also need to be mindful of the timeframes for permit issuance under title V of the CAA and Ecology’s title V operating permits program. The EPA observes that there may be other ways that Ecology and Health could collaborate to adapt the licensing and permitting processes to ensure that Hanford Title V Permit is revised as necessary in response to any significant comments on federal

applicable requirements.¹⁷

For the foregoing reasons, the EPA grants the Hanford Title V Petitions as to Claim 3B.

Claim 4. Petitioner Claims that Permit Issuance Procedures Prevent Access to Judicial Review

This section responds to the claims in Section II.B-5 on pages 29-35 of the 2013 Petition.

Petitioner's Claim. The Petitioner claims that the procedures by which the provisions of the Renewal 2 Permit relating to radionuclide air emissions were issued did not recognize the right of a public commenter to seek judicial review in state court as required by the CAA and federal title V regulations. According to the Petitioner, this is because the key terms of Subpart H for the Hanford Site are contained in Attachment 2 to the Renewal 2 Permit, which is the NERA License that was issued by Health. The Petitioner claims that the NERA License that was included as Attachment 2 was issued without the opportunity for public comment more than a year before Ecology issued the remainder of the Renewal 2 Permit in 2013. Because public comments are a prerequisite to judicial review in state court in Washington, the Petitioner contends, the provisions of Attachment 2 are not subject to judicial review in state court. The Petitioner also claims that because the NERA License was issued by Health and not Ecology, it is beyond the jurisdiction of the Pollution Control Hearing Board (PCHB), the quasi-judicial body that is the exclusive means of administrative appeal for title V permits in Washington and also not subject to appeal in state court because appeal to the PCHB is a prerequisite to judicial review in Washington. 2013 Petition, at 32-34.

EPA's Response. For the reasons stated below, I deny the Petitioner's request for an objection to the Hanford Title V Permit on this claim.

The Petitioner did not demonstrate that the procedures by which the Renewal 2 Permit was issued prevented the opportunity for the public to seek judicial review in state court as required by the CAA and the title V regulations. As the Petitioner notes in his 2013 Petition, the title V program requires an opportunity for judicial review in state court of the final permit action by the applicant, any person who participated in the public comment process pursuant to the CAA and 40 C.F.R. § 70.7(h), or any other person who could obtain judicial review of such action under state law. *See* 40 C.F.R. § 70.4(b)(3)(x); *see also* CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6). The Attorney General Opinion explains that the Washington Clean Air Act and its implementing regulations make the judicial review procedures of R.C.W. Ch. 43.21B applicable to appeals of title V permits in Washington. *See* R.C.W. § 70.94.161(8); W.A.C. 173-401-735(1); Attorney General Opinion, at 20-21. A title V permit in Washington can be appealed to the PCHB, an independent quasi-judicial board, and the right of appeal is available to anyone who commented

¹⁷ 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. *In re Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition No. VI-2011-06 and VI-2012-07 (June 19, 2013), p. 14, at n. 10. The EPA also explained its view that a state's response to an EPA objection triggers a new EPA review and petition opportunity. *Id.* at 14-15.

on the draft title V permit. R.C.W. 42,21B.110(1)(d); W.A.C. 173-401-735(1) and (2); Attorney General Opinion at 21. Decisions of the PCHB are reviewable in superior court in Washington. *See* R.C.W. 43.21B.180; Attorney General Opinion, at 23.

The Petitioner contends that the structure of the Renewal 2 Permit, which incorporates the NERA License as Attachment 2, takes away the right to judicial review because there was no public comment opportunity on the NERA License and the PCHB does not have authority to hear appeals concerning NERA licenses in any event. As discussed above in connection with Claims 1 and 2, however, Ecology included Attachment 2 “as permit terms and conditions” of the Renewal 2 Permit, making the terms of the NERA License also terms and conditions of the title V permit issued by Ecology. The Attorney General confirmed that the title V permit issued to DOE for the Hanford Site “will be required, issued, and enforced pursuant to the authorities set forth in Ch. 70.94 R.C.W. and its implementing regulations, including specifically Ch. 173-401 W.A.C.” The Petitioner in fact participated in the public participation process for the Renewal 2 Permit and commented on terms and conditions in Attachment 2, which were included as permit terms and conditions of the Renewal 2 Permit. The Petitioner neither shows that he sought and was denied the opportunity for judicial review on the Renewal 2 Permit, nor has the Petitioner demonstrated that Washington’s laws preclude an opportunity for judicial review on the Renewal 2 Permit. It is important to note that the Petitioner’s comments on the Renewal 2 Permit relating to judicial review made only general statements that Attachment 2 was issued under NERA and thus not subject to judicial review in state court. Therefore, Ecology’s responses to those comments—stating that the requirement for judicial review of title V permits in section 502(b)(6) of the CAA does not require judicial review of the underlying permits, licenses, or orders that constitute applicable requirements included in a title V permit—is not incorrect. Indeed, Ecology goes on to correctly respond that “Judicial review of an air operating permit is limited to review of the [title V permit] and whether or not it includes all requirements and otherwise meets the requirements of Title V.” 2013 RTC at 4-5.

Consistent with the discussion in response to Claim 3, however, Ecology must provide an opportunity for judicial review on any claims that a title V permit issued by Ecology that includes a NERA license as an attachment as a means of addressing federal applicable requirements fails to comply with the requirements of title V and part 70.¹⁸ On this point, the EPA agrees with the Petitioner when he states that “Terms and conditions contained in Permit Attachment 2 (License FF-01) implementing the requirements of 40 C.F.R. Part 61, Subpart H

¹⁸ The EPA is aware of a PCHB decision issued on summary judgment of an appeal by the Petitioner of a previous title V permit issued by Ecology to DOE for the Hanford Site that also included a NERA license as Attachment 2 of that title V permit. *Green v. State of Washington Department of Ecology, and United States Department of Energy*, PCHB No. 07-012, Summary Judgment Order (August 22, 2007) (2007 PCHB Order). In that Order, the PCHB stated that “To the extent Mr. Green challenges prior requirements imposed by Health in issuing the License [which the PCHB found had been incorporated by Ecology into the title V Permit for the Hanford Site], such challenges are outside the scope of the [title V] air operating permit program and beyond the jurisdiction of this Board.” *Id.*, at 13. The EPA does not disagree with that conclusion as stated, and, indeed, the EPA has previously advised the Petitioner on previous occasions that neither title V nor the part 70 implementing regulations require an opportunity for judicial review of a license issued by Health under its own authority. EPA’s September 2009 Letter, at 2; EPA’s October 2012 Letter, at 6. But, as stated above, Ecology must provide an opportunity for judicial review to the extent a claim relates to whether the portion of a NERA license incorporated into a title V permit and implementing federal applicable requirements meets the requirements of title V and part 70.

are subject to the full requirements of the CAA including the requirements for judicial review in state court.” 2013 Petition, at 33. The Petitioner has not demonstrated, however, that he either has been denied the right to seek judicial review or would be precluded from seeking the right to seek judicial review on such claims.

For the foregoing reasons, the EPA denies the Hanford Title V Petitions as to Claim 4.¹⁹

Claim 5. Petitioner Claims that Ecology’s Statement of Basis was Inadequate Related to Its Authority to Regulate Radionuclides in the Hanford Title V Permit

This section responds to the claims in Section II.B-6 on pages 35-40 of the 2013 Petition and Section 3.5 on pages 31-35 of the 2014 Petition. We view these claims as related and are responding to them together.

Petitioner’s Claim. The Petitioner claims that Ecology did not provide the legal and factual basis for regulating radionuclides at the Hanford Site pursuant to NERA rather than under the state’s approved title V program and the federal title V regulations. 2013 Petition, at 37-39; 2014 Petition, at 33-34. The Petitioner also claims that Ecology did not respond to specific comments the Petitioner raised during the public comment period asserting the same alleged deficiency (that Ecology did not provide the legal and factual basis for regulating radionuclides pursuant to NERA rather than under title V). 2013 Petition, at 38-39; 2014 Petition, at 33-34. In support of this claim, the Petitioner asserts that all radionuclide terms and conditions reside in Attachment 2 of the Hanford Title V Permit, the NERA License that was issued by Health, and only Health is authorized to enforce NERA and its regulations; that Ecology has no authority under NERA and therefore cannot enforce the terms and conditions of Attachment 2; and that Ecology’s response to comments does not address the specific concern of a statement of basis deficiency raised by the Petitioner in his public comments. 2013 Petition, at 37-39; 2014 Petition, at 32-34.

EPA’s Response. For the reasons stated below, I deny the Petitioner’s request for an objection to the Hanford Title V Permit on these claims.

Part 70 requires that the permitting authority provide a statement of basis that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions. 40 C.F.R. § 70.7(a)(5). Washington’s title V program also has this requirement. *See* W.A.C. 173-401-700(8). The draft Hanford Title V Permit was accompanied by a statement of basis for the main body of the permit and then also a statement of basis for each of the three attachments, including Attachment 2, which is the NERA License.

In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet a procedural requirement, such as accompanying a permit by a statement of basis meeting the requirements of 40 C.F.R. § 70.7(a)(5), the EPA considers whether the petitioner has demonstrated that the permitting authority’s failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See In re Onyx Environmental Services*, Order on Petition No. V-2005-1 (February 1, 2006), at 14. In this case, the Petitioner commented

¹⁹ The Petitioner’s claims that a NERA license is not a federal or state “applicable requirement” is addressed in response to Claim 1 above.

during the public comment period that Ecology did not provide the legal and factual basis for regulating radionuclides at the Hanford Site pursuant to NERA rather than under the state's approved title V program and the federal title V regulations. Ecology responded by referring to previous correspondence from the EPA and Ecology to the Petitioner in which both agencies stated that the NERA License was not subject to the public participation and judicial review provisions applicable to title V permits and that Ecology had authority to enforce requirements in a NERA license issued by Health that were included in a title V operating permit issued by Ecology. 2013 RTC, #s 111, 117 and 133; 2014 RTC, #s 10 and 19. The Petitioner also claims that Ecology's response did not adequately address his comments relating to the adequacy of the statement of basis for the Hanford Title V Permit.

As discussed in response to Claims 1 and 2 above, we do not agree that Ecology issued the provisions of the Hanford Title V Permit regulating radionuclides under the authority of NERA. Instead, as discussed above, although the NERA License was issued in the first instance by Health, by including the NERA License as Attachment 2 to the Hanford Title V Permit, Ecology issued the terms and conditions of the NERA License under the authority of R.C.W. 70.94 and Washington's title V permit regulations, W.A.C. Ch. 173-401. In any event, the Petitioner has not demonstrated how Ecology's failure to better explain in the statement of basis the legal and factual basis for addressing requirements for radionuclides under Subpart H in Attachment 2 to the Hanford Title V Permit or Ecology's responses to comments relating to the allegedly inadequate statement of basis resulted in a flaw in the Hanford Title V Permit.

For the foregoing reasons, the EPA denies the Hanford Title V Petitions as to Claim 5.

Claim 6. Petitioner Claims that the Permit Does Not Include Applicable Clean Air Act Requirements for Radionuclides

This section responds to the claims in Sections 3.6 and 3.7 on pages 35-46 of the 2014 Petition. We view these claims as related and are responding to them together.

Petitioner's Claim. The Petitioner claims that a title V permit must contain federally-enforceable limitations for every hazardous air pollutant (HAP) listed in CAA § 112(b)(1) that the source emits and that, because neither the EPA nor Ecology have established a specific emission limit for radon emissions emanating from the Hanford Site, the EPA or Ecology was required to establish a case-by-case emission limit for such emissions under CAA § 112(j) in the Hanford Title V Permit that would be equivalent to the limit that would apply to radon emissions from the Hanford Site had an emission limit been timely promulgated. 2014 Petition, at 35. The Petitioner further contends that Ecology did not establish a case-by-case limit in the Hanford Title V Permit under CAA § 112(j), and also did not explain its reasons for not doing so in the statement of basis and response to comments. *Id.*, at 37-39.

The Petitioner also asserts that the Columbia River should be regulated in the Hanford Title V Permit because it is a diffuse and fugitive source of radionuclides attributable to the Hanford Site and Subpart H regulates diffuse sources such as evaporation ponds, breathing of buildings and contaminated soils, citing to a Memorandum of Understanding between the EPA and DOE

(EPA-DOE MOU) in support of his claim.²⁰ *Id.*, at 43-44. The Petitioner also cites to the definitions of “emission unit,” “fugitive emissions,” and “potential to emit” in 40 C.F.R. § 70.2, as well as the provisions of 40 C.F.R. §§ 70.3(d)²¹ and 70.6(b)(1), in support of his claim that any “potential to emit” fugitive radionuclides attributable to the Hanford Site must be included in the Hanford Title V Permit, along with monitoring, recordkeeping and reporting to assure compliance with such requirements. *Id.*, at 41, 43. Alternately, the Petitioner claims that Ecology was required to provide the legal and factual basis for not regulating the Columbia River under Subpart H and CAA § 112(j)(5) in the statement of basis or response to comments. *Id.*, at 45.

EPA’s Response. For the reasons stated below, I deny the Petitioner’s request for an objection to the Hanford Title V Permit on this claim.

As an initial matter, the EPA does not agree, as the Petitioner asserts, that a title V permit must contain federally-enforceable limitations for every HAP that a title V source emits, even if the HAP is not addressed by regulation. Instead, title V and part 70 require that a title V permit must contain all federal “applicable requirements,” as that term is defined in 40 C.F.R. § 70.2, that apply to the source’s emissions of HAPs. *See, e.g.*, 42 U.S.C. § 7661a(5)(A) (“A requirement that a permitting authority have adequate authority to...issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter;”); 40 C.F.R. §§ 70.1(b) (“All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements.”); 70.6(a)(1) (a permit must include “Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.”); *see also* W.A.C. 173-401-100(2); W.A.C. 173-401-605(1). Contrary to the Petitioner’s assertion, the definition of “potential to emit” in 40 C.F.R. § 70.2, coupled with the requirement in 40 C.F.R. § 70.7(b)(1) that “All terms and conditions in a part 70 permit, including any provisions designed to limit a source’s potential to emit, are enforceable by the Administrator and citizens under the Act,” does not impose a requirement that all HAPs emitted by a source are subject to a federally-enforceable emission limitation. The phrase “including any provisions designed to limit a source’s potential to emit” refers to provisions designed to limit potential to emit that meet the definition of a federal “applicable requirement” or are otherwise established in accordance with title V and part 70.

We also disagree that CAA § 112(j)(5) requires Ecology to establish a case-by-case emission limit for radon emissions from the Hanford Site. Section 112(j) applies to “categories or subcategories of sources *initially listed* for regulation” pursuant to CAA § 112(c). *See* 42 U.S.C. § 7412(e)(1) (emphasis added); *see also* 42 U.S.C. § 7412(j)(2) (applying section 112(j) “[i]n the event that the Administrator fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to subsection (e)(1) and (3)”). In accordance with

²⁰ “Memorandum of Understanding Between the U.S. Environmental Protection Agency and the U.S. Department of Energy Concerning The Clean Air Act Emission Standards for Radionuclides 40 C.F.R Part 61 Including Subparts H, I, O & T,” signed on September 29, 1994, by Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, and on April 5, 1995, by Tara J. O’Toole, DOE Assistant Secretary for Environment, Safety and Health, at § 5.

²¹ The Petitioner cited to 40 C.F.R. § 70.4(d), but the language he quotes is in 40 C.F.R. § 70.3(d).

CAA § 112(c), the EPA promulgated an “initial” list of sources for regulation in 1992 but specifically excluded sources emitting radionuclides on several grounds, including that the EPA had already promulgated NESHAPs for sources of radionuclides (including radon).²² *See 57 Fed. Reg.* 32576, 31585, 31586 (July 16, 1992).²³ Accordingly, there is no requirement for a case-by-case determination for radon emission limits from the Hanford Site under CAA § 112(j) in the Hanford Title V Permit.

With regard to the Petitioner’s claim that the Columbia River should be regulated as a source of radionuclides in the Hanford Title V Permit, the Petitioner has not demonstrated that the permit unlawfully “overlooks the Columbia River as a source of diffuse and fugitive emissions of radionuclides” that must be regulated under the Hanford Title V Permit. By its terms, Subpart H applies to operations at DOE “facilities,” which is defined as “all buildings, structures and operations on one contiguous site.” 40 C.F.R. § 61.91(b). The Columbia River is not a building, structure or operation and thus not part of the DOE facilities subject to Subpart H. Moreover, the Hanford Site is regulated as a “major source” under the title V program. “Major source” is defined in the Part 70 regulations in part as “any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control (or persons under common control))....” 40 C.F.R. § 70.2; *see also* W.A.C. 173-401-200(34). “Stationary source,” in turn, is defined as building, structure, facility or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.” 40 C.F.R. § 70.2; *see also* W.A.C. 173-401-200(19). The Petitioner has not demonstrated that the Columbia River is a stationary source under common control with DOE and we see no reason to conclude that it is part of the title V major source subject to the title V permit for the Hanford Site.^{24 25}

With respect to the Petitioner’s claims that neither the statement of basis nor the response to comments adequately addresses the alleged failure of the Hanford Title V Permit to establish a CAA § 112(j) standard for radon or to address the Columbia River as a diffuse and fugitive source of radionuclides from the Hanford Site, the Petitioner has not demonstrated that any alleged failure to more fully address these issues resulted or may have resulted in a flaw in the Hanford Title V Permit. As discussed above, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet a procedural requirement, such as accompanying a permit by a statement of basis meeting the requirements of 40 C.F.R. §

²² *See 54 Fed. Reg.* 51654 (Dec. 15, 1989); 40 C.F.R. Part 61, Subpart H (NESHAP for non-radon radionuclides from DOE facilities); 40 C.F.R. Part 61, Subpart Q (NESHAP for radon from DOE facilities).

²³ To the extent that the Petitioner challenges the initial listing of sources under CAA § 112(c) or the substance of Subparts H and Q, these challenges are untimely and outside the scope of title V in any event.

²⁴ To the extent the Petitioner alleges that Ecology was required to establish an emission limit for radionuclides (including radon) from the Columbia River under CAA § 112(j)(5), as discussed above, there is no obligation to establish case-by-case limits under that section because sources of radionuclides, including radon, were not listed under CAA § 112(c) and the EPA therefore was not required to promulgate emission standards under CAA § 112(d) for sources of radionuclides as a source category.

²⁵ Other actions are underway at the Hanford Site to protect the Columbia River from contaminated groundwater pursuant to regulatory authority under the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act and the Atomic Energy Act. *See, e.g.*, Hanford Site Groundwater Monitoring Report for 2013, DOE/RL-2014-32, Revision 0, August 2014, Executive Summary, Introduction, available at http://higrv.hanford.gov/Hanford_Reports/Hanford_GW_Report/index.html#.

