



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue  
Seattle, Washington 98101

November 24, 2004

Reply To

Attn Of:

AWT-107

W. Thomas Todd  
Department of Ecology  
P.O. Box 47600  
Olympia, Washington 98504-7600

Re: EPA's Comments on the Proposed Revisions to Ecology's Regulations

Dear Mr. Todd:

Thank you for the opportunity to review and comment on Ecology's proposed rule revisions, dated October 20, 2004. Our comments on these revisions follow:

**General Comments Regarding Usage of Terms**

EPA continues to believe that, by using the term "source," which includes nonroad engines, in its stationary source rules (including new source review (NSR)), Ecology rules can be interpreted as regulating nonroad engines as stationary sources, which is prohibited by Section 209 of the Clean Air Act (CAA). Although Section 209 of the CAA does not preclude states from regulating the use and operation of nonroad engines as provided in 40 CFR Part 89, Subpart A, Appendix A, states are otherwise prohibited from regulating nonroad engines.

If Ecology intends to keep the current definition of "source" in WAC 173-400-030, then we recommend that the term "source" only be used in WAC 173-400-035, possibly registration, or as a general term. It should not be used in WAC 173-400-110, 112, 113, 117, 560, or 700 through 750. These sections should only use the terms "new source", "stationary source", and "major stationary source". We note below where the use of the term "source" in Ecology's regulations continues to be problematic.

**WAC 173-400-030 Definitions**

**Federally Enforceable:** There appears to be a typo in the definition. Should the definition read "*... requirements within any approval established under 40 CFR 52.21 . . .*"?

**New Source Performance Standards (NSPS):** Ecology proposes to revise this definition to mean "the federal rules in 40 CFR Part 60 as adopted in WAC 173-400-115." This proposed change is confusing because Ecology has not made the same change to the definition of

“National Emission Standard for Hazardous Air Pollutants” or “National Emission Standard for Hazardous Air Pollutants for Source Categories.” Further confusion is caused by the fact that several regulations that refer to NSPS, refer to a source subject to “a new source performance standard, 40 CFR Part 60.” See WAC 173-400-100(c); 173-400-110(2)(b)(i). Note that if Ecology does intend that all references to the NSPS in its rules to refer only to those NSPS incorporated by reference in WAC 173-400-115, it will be even more important that Ecology frequently updates its incorporation by reference of the federal NSPS standards so that Ecology maintains its authority to implement SIP requirements. It will also require more frequent SIP revisions.

**Nonroad engine:** The new paragraph (c) should be deleted. This paragraph does nothing to define the term, but rather tells the reader what permit program applies to nonroad and stationary engines. Therefore, we recommend either adding the language in new paragraph (c) as an “editorial note” to the definition of nonroad engine (rather than including the language in the definition itself) or adding this clarifying language within the permitting rules themselves (i.e., WAC 173-400-035).

**Potential to Emit:** In the definition of potential to emit, Ecology proposes that “secondary emissions” be defined in the same manner as in 40 CFR 52.21, the rules for the federal PSD program, rather than citing to the definition for the SIP-approved Part D NSR program, (40 CFR 51.165(a)(1)(viii)). We do not understand the reason for the reference to the federal PSD program.

In any event, citing to either is confusing because EPA’s current definition of “secondary emissions” has been partially vacated by a court decision with respect to marine vessel emissions and an older version of the rules is in effect. (See John Calcagni’s January 8, 1990 letter, “*Clarifications on Secondary Emissions as Defined in the Code of Federal Regulations*”). It is therefore unclear what Ecology is intending by its citation to a federal definition that has been partially vacated. Therefore, we recommend that Ecology define the term “secondary emissions” in the definition of “potential to emit,” rather than citing to a federal definition. The following language would be consistent with the court decision (see also Phase I – ECY RTC~2compare comments):

"Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. Secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the major stationary source or major modification which causes the secondary emissions.

Secondary emissions may include, but are not limited to:

(A) Emissions from ships or trains located at the new or modified major stationary source; and

(B) Emissions from any off-site support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

**Prevention of Significant Deterioration (PSD):** We believe there is a typo. Should the reference to WAC 173-400-750 be to WAC 173-400-700 to 750?

**Source:** Ecology is proposing to delete the second sentence, which describes when activities are considered ancillary to the production of a single product or functionally related groups of products. EPA believes this second sentence is a useful clarification and should remain part of the definition because the meaning of “ancillary” in this context is not, to our knowledge, defined elsewhere in state or federal law.

**Stationary Internal Combustion Engine or Stationary Engine:** Although the first sentence states that a stationary internal combustion engine is any engine that is not classified as a nonroad engine or a mobile source, the second sentence greatly expands what can be characterized as a stationary internal combustion engine, by stating that it is any engine that is bolted or installed in a fixed location. In other words, the second sentence of this definition could include nonroad engines as stationary engines and thus stationary sources. As such, the second sentence must be deleted in order for EPA to be able to approve this definition. As discussed above, the CAA prohibits states from regulating nonroad engines as stationary sources.

**Temporary Source:** There appears to be a couple of typos. Should the references to the subsections be to (76) and (82) rather than (78) and (84)?

**Total Reduced Sulfur (TRS):** The specific method, as well as any alternatives, should be stated in the rule. We can not approve language that allows “*or equivalent method.*” It would be acceptable if it were written as “*EPA approved equivalent method.*” Note that while there are no TRS limits in the SIP that would be impacted by this definition, when Ecology submits its section 111(d) plan for kraft pulp mills, it may need to address this issue.

### **WAC 173-400-035 Portable and Temporary Sources**

**Subsection (1):** The CAA and EPA regulations specifically address the need for permits for portable stationary sources in section 504(e), 40 CFR 51.165(i)(1)(iii), and 40 CFR 52.21(i)(1)(viii) and clearly indicate that such sources must demonstrate compliance with PSD increments. EPA is concerned that WAC 173-400-035 is not sufficiently clear that a portable major stationary source must also comply with WAC 173-400-720 through 750. We therefore recommend that Ecology add a provision that was in a previous draft, such as:

*“Comply with the requirements of WAC 173-400-720 - 750 if the source is considered a major stationary source within the meaning of WAC 174-400-720; and,”*

In addition, as currently written, all portable and temporary stationary sources, regardless of size, must obtain an “Order of Approval.” We question whether Ecology really intended that the de minimis cutoffs not apply to portable and temporary stationary sources. If Ecology does intend to use the de minimis cutoffs in WAC 173-400-110(4) and (5), we recommend the following

revision to subsection (1): “*The owner or operator of a portable source or temporary source, not otherwise exempt under WAC 173-400-110 (4) and (5), must:*”

Note that the requirement in WAC 173-400-035 that portable and temporary sources must apply for an order of approval under WAC 173-400-110 does not appear, in and of itself, to exempt portable and temporary stationary sources under the de minimis cutoffs in WAC 173-400-110(4) and (5). This is because WAC 173-400-110(2)(a)(ii) exempts sources regulated under WAC 173-400-035.

**Subsection (1)(f):** This subsection requires the applicant to “notify the permitting authority” but does not specify what the owner or operator is required to notify the permitting authority of and when such notice is required. This provision needs to better specify what such notification must contain and when it is required.

**Subsection (2)(d):** This provision states that the permitting authority “*may condition the order of approval or the order to require notification to the permitting authority prior to each relocation.*” In a previous draft language of this rule, the requirement to notify the permitting authority of the relocation was a requirement. In order for the permitting authority to track relocation of a portable/temporary source and therefore, be able to issue site specific operating conditions, the “*may condition*” should be changed to “*shall condition.*” In addition, it is unclear how this provision relates to the notification provision of (1)(f) above.

#### **WAC 173-400-040 General Standards for Maximum Emissions**

**Subsection(1)(e):** Because these are new exceptions to the opacity standard, Ecology will need to submit a showing that these exemptions do not interfere with attainment and maintenance of the NAAQS, PSD increments, or visibility in Class I areas.

#### **WAC 173-400-050 Emission Standards for Combustion and Incineration Units**

A copy of the “*Source Test Manual - Procedures For Compliance Testing*” will need to be submitted at the time of the official SIP submittal.

**In subsection (3)**, the exception provision is a director’s discretion provision and is, therefore, not approvable as part of the SIP. Note that this exception provision was not approved in the current SIP approved version of WAC 173-400-050, state effective March 22, 1991.

## **WAC 173-400-105 Records, Monitoring, and Reporting**

**173-400-105(5):** We recommend that the introductory paragraph direct the reader to the exceptions to applicability in subsection (g), such as “*Except as otherwise provided in subsection (g), owners and operators of the following sources . . .*”

**In subsection (g)**, we understand that the intent of the revisions to this subsection is to ensure that equipment subject to continuous emissions monitoring requirements under federal law not be subject to different continuous emissions monitoring requirements under state law. If this is the case, should this provision state:

*“This subsection (5) does not apply to any equipment subject to continuous emissions monitoring requirements imposed by . . .”*

**In subsection (h)**, it is unclear the provision is intended to apply only to monitoring required under WAC 173-400-105(5) or whether it is intended to apply to all monitoring required under WAC Chapter 173-400. The heading to WAC 173-400-105(5)(h) (monitoring system malfunctions) suggests that it was intended to apply only to monitoring systems required by WAC 173-400-105(5). The reference to “this chapter” in WAC 173-400-105(5)(h), however, makes this unclear. If the reference to “this chapter” is not changed to “this section,” subsection (5)(h) must ensure that it does not relieve any person of the responsibility to comply with any requirement of 40 CFR parts 60, 61, 62 or 63 or a permitting authority’s adoption by reference of such federal standards. Note that the exemption in subsection (5)(g) does not fix the reference to “this chapter” in subsection (5)(h).

In addition, as previously stated, EPA does not believe that subsection (5)(h) contains sufficient criteria for determining when monitoring should be excused. In addition, the reference to the determination being made by “permitting authority” could be interpreted to mean that the permitting authority’s determination that the criteria are met is binding on EPA. We suggest the following language:

(h) Monitoring system malfunctions. A source is temporarily exempted from the monitoring and reporting requirements of this subsection (5) during periods of monitoring system malfunctions provided the source owner(s) or operator(s) demonstrates that the malfunction was not a result of inadequate design, operation or maintenance or any other reasonably preventable condition, and that any necessary repairs to the monitoring system are conducted as expeditiously as practicable.

Another option would be to use the language from the CAM rule, 40 CFR 64.7(c) so as to minimize duplicative, conflicting requirements on these WAC 173-400-105(5) sources that will likely be subject to CAM.

### **WAC 173-400-107 Excess Emissions**

EPA appreciates the many changes that Washington has proposed to make to WAC 173-400-107. For example, Ecology has clarified that the affirmative defense provides an excuse from penalties, but not from an action for injunctive relief; added a requirement to keep a contemporaneous record of excess emissions as a condition of relief; and clarified the contents of the written report a source must file as a condition of relief.

EPA continues to believe, however, that additional revisions are needed for WAC 173-400-107 to meet CAA requirements. EPA's interpretation of the CAA for state excess emission provisions is set forth in the Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Monitoring, and Robert Perciasepe, Assistant Administrator for Air And Radiation, to the Regional Administrators, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 20, 1999) (EPA's Excess Emissions Policy). Our remaining concerns with WAC 173-400-107 are as follows:

1. An affirmative defense to a penalty action is not appropriate where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments. See EPA's Excess Emissions Policy, pp. 2-3, Attachment pp. 3 and 5. Several states that have recently revised their excess emission rules to address this issue have added language stating that the affirmative defense is not available if the excess emissions caused or contributed to an exceedance of the NAAQS or PSD increments. See Arizona, AAR R18-2-310(B)(7) and (C)(1)(f); Maricopa County, MCESD R140-401.7 and -402.1(f); Michigan, MDEQ R 336.1916(2); Texas, TCEQ 101.222(b)(11). Washington should add similar language as a criterion for obtaining the affirmative defense.
2. An affirmative defense for excess emissions due to certain unavoidable events cannot extend to state law provisions that derive from federally promulgated performance standards or emission limits, such as NSPS or NESHAP standards. This would also apply to PSD permits issued by EPA.
3. WAC 173-400-107(4) provides an affirmative defense to a penalty action for excess emissions during startup and shutdown if certain conditions are met. Our understanding is that Washington believes this provision is consistent with CAA requirements for such startup and shutdown provisions, as discussed in EPA's Excess Emissions Policy. See EPA's Excess Emissions Policy, Attachment p. 6. After carefully reviewing subparagraph (4), however, we continue to believe that subparagraph (4) does not contain the following elements necessary to meet the requirements of the CAA:
  - a. The periods of excess emissions that occurred during startup and shutdown were short and infrequent.
  - b. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance.
  - c. At all times the facility was operated in a manner consistent with good practices for minimizing emissions.

- d. The frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable.
- e. All possible steps were taken to minimize the impact of the excess emissions on ambient air quality (not just that you minimized emissions).
- f. All emission monitoring systems were kept in operation if at all possible.

See EPA's Excess Emissions Policy, Attachment p. 6.

- 4. WAC 173-400-107(5) provides an affirmative defense for excess emissions due to scheduled maintenance provided certain criteria are met. This is inappropriate under the CAA because sources should be able to schedule maintenance that might otherwise lead to excess emissions to coincide with maintenance of production equipment or other facility shutdowns. Note, for example, that although emission limits in the New Source Performance Standards generally do not apply during startup, shutdown, or malfunction, 40 CFR 60.8(c) and 40 CFR 60.11(c), the exception does not extend to scheduled maintenance. The incentive to use appropriate scheduling/practices to avoid excess emissions during scheduled maintenance should not be diminished by providing an affirmative defense. In this regard, you should note that EPA's 1999 Excess Emissions Policy does not discuss allowing an affirmative defense for excess emissions during maintenance activities. This omission was intentional and based on our interpretation of the CAA that any excess emissions during maintenance activities should be addressed only through the exercise of enforcement discretion and not through the provision of an affirmative defense to penalties. For additional discussion of how we view maintenance activities, see the April 27, 1977 (42 FR 21472) and November 8, 1977 (42 FR 58171) Federal Register notices.

Note, however, that although EPA believes that providing an affirmative defense for excess emissions during scheduled maintenance is not consistent with the CAA, EPA does believe that a state can provide, consistent with the CAA, that excess emissions due to a malfunction that occurs during scheduled maintenance can be subject to the same affirmative defense that applies for excess emissions during malfunctions. For example, Arizona's SIP-approved excess emissions provision states:

*"If excess emissions occur due to a malfunction during scheduled maintenance, then those instances will be treated as other malfunctions subject to subsection (B)."*

See Arizona Administrative Code, R18-2-310(D).

- 5. WAC 173-400-107(6) provides an affirmative defense to a penalty action for excess emissions due to a malfunction if certain conditions are met. Our understanding is that Washington believes this provision is consistent with CAA requirements for such malfunction provisions, as discussed in EPA's Excess Emissions Policy. See EPA's Excess Emissions Policy, Attachment pp. 3-4. After carefully reviewing subparagraph (6), we continue to believe that subparagraph (6) does not contain the following elements necessary to meet the requirements of the CAA:

- a. The excess emissions were caused by a sudden, unavoidable breakdown of technology.
- b. The excess emissions did not stem from any activity or event that could have been foreseen and avoided, or planned for.
- c. To the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions.
- d. Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable.
- e. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions.
- f. All emission monitoring systems were kept in operation if at all possible.

See EPA's Excess Emissions Policy, Attachment pp. 3-4.

6. EPA's position is that a State or local authority's decision that the criteria for obtaining the affirmative defense from penalty are met is not binding on EPA or citizens because such an approach would be inconsistent with the regulatory scheme established in title I of the CAA. See 1999 Excess Emission Policy, pg. 3, Attachment pg. 2. EPA does not believe that either the current WAC 173-400-107 or with the proposed revisions to WAC 173-400-107 can be interpreted to mean that a State or local authority's decision that the criteria for the affirmative defense are met is binding on EPA or citizens. EPA's understanding is that Washington is in agreement with EPA on this issue. It would be better if WAC 173-400-107 were revised to make this explicit. In the absence of explicit language, EPA will request a letter from Washington confirming this interpretation and EPA intends to make clear in any SIP action that a State or local's determination on whether the affirmative defense is met is not binding on EPA or citizens.

#### **WAC 173-400-110 New Source Review (NSR)**

**Note:** As discussed above, by using the term "source," WAC 173-400-110 could be interpreted to apply to nonroad engines, which is contrary to the CAA. Therefore, all references to the defined term "source" should be replaced with "stationary source" in this section.

#### **WAC 173-400-110(7) Final Determination**

In subsection (b), the added language in the last sentence is confusing in that it appears to leave out minor NSR in attainment areas, potentially suggesting that such actions are not subject to WAC 173-400-171. We question whether this last sentence is even needed. One option is to strike the last sentence in its entirety and revise the second sentence to read as follows: "*A notice of construction application designated for integrated review shall be processed in accordance*

*with operating permit program procedures and deadlines in chapter 173-401 and must also comply with WAC 173-400-171.”*

### **WAC 173-400-110(9) Construction Time Limitations**

As EPA has previously stated, a permit extension in a nonattainment area for either a major stationary source or a major modification is subject to 30-day public notice and must comply with LAER as it exists at the time of the permit extension (see ECY RTC~2compare document under “other revisions”). Although WAC 173-400-110(9) states that any extension must also comply with the public notice requirements of WAC 173-400-171, WAC 173-400-171 does not include such extensions for major NSR in nonattainment areas on the list of actions subject to a mandatory public comment period. In addition, this provision does not make clear that an extension for major NSR in nonattainment areas must impose LAER as it exists at the time of the permit extension.

Adding the following language to WAC 173-400-110(9) and WAC 173-400-171 would address EPA’s concerns:

**WAC 173-400-110(9):** “A permit extension is subject to 30-day public notice and comment under WAC 173-400-171(2) if the project is either a major stationary source in a nonattainment area or a major modification in a nonattainment area. The extension of a project that is either a major stationary source in a nonattainment area or a major modification in a nonattainment area must also require LAER as it exists at the time of the extension.”

**WAC 173-400-171(2):** “Any extension of the deadline to begin actual construction of a “major stationary source” or “major modification” in a nonattainment area, or”

### **WAC 173-400-112 Requirements for New Sources in Nonattainment Areas**

#### **Usage of Terms with Respect to “Stationary Source” and “Source”**

**In subsections (1), introductory paragraph, and subsection (1)(f), definitions of “stationary source” and “source”:** We do not understand why Ecology has chosen to define the usage of the terms in two places, with one being defined in the introductory paragraph and the other as a defined term in subsection (1)(f).

In any event, both are confusing as currently written. We understand that Ecology’s intent was to clarify the usage of terms “source” and “stationary source” in WAC 173-400-112 by copying the definition of stationary source in 40 CFR 51.165(a)(1)(i). Note, however, that EPA has not yet updated the definition of “stationary source” in its implementing rules to reflect a change in the CAA’s definition of stationary source (CAA section 302(z)), which excludes nonroad

engines. Therefore, Ecology's proposed definition of "stationary source" and "source" in WAC 173-400-112 is not consistent with the CAA.

EPA recommends that Ecology revise the definition of "Stationary source" and "Source" in WAC 173-400-112 to read as follows:

*"means any building, structure, facility, or installation which emits, or may emit, a regulated NSR pollutant. A stationary source (or source) does not include emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216 of the Federal Clean Air Act."*

### **WAC 173-400-113 Requirements for New Sources in Attainment or Unclassifiable Areas**

**Note:** As discussed above, all references to defined term "source" should be replaced with "stationary source" in this section.

### **WAC 173-400-117 Special Protection Requirements for Federal Class I Areas**

**Note:** As discussed above, all references to defined term "source" should be replaced with "stationary source" in this section.

### **WAC 173-400-118 Designation of Class I, II, and III Areas**

EPA assumes that the language added in subsection (2)(b)(ii)(C) is to clarify that the local air authorities do not have authority to designate or redesignate the classification of areas of the state. As you know, it is EPA's position that Ecology and the local air authorities in Washington do not have authority to implement and enforce CAA requirements with respect to sources or activities located in Indian Country, as defined in 18 U.S.C.1151. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area.

### **Bubble Rules (120), Issuance of Emission Reduction Credits (131), & Use of Emission Reduction Credits (136)**

As currently written, these rules are not approvable for inclusion into the SIP. In order for these types of rules to be approvable, they need to be consistent with CAA requirements, as described in the Final Emissions Trading Policy Statement (see 51 FR 43814, December 4, 1986).

### **WAC 173-400-151 Retrofit Requirements for Visibility Protection**

Ecology will need to provide a justification regarding the potential relaxation of limiting the scope of the rule to only the 26 listed source categories in subsection (c) instead of all sources. Our understanding from Ecology is that failure to include the 26 source categories in the initial promulgation of the rule was an oversight and that the intent was that the state definition be consistent with the federal definition. This and the potential impact of the change will need to be explained and justified in the SIP submittal.

### **WAC 173-400-171 Public Comment**

Minor changes to subsections (1), (2) and (3) would better clarify that the internet posting specified in subsection (1) is designed to meet the public participation requirements of 40 CFR 51.161.

**In subsection (1)(a)**, we suggest replacing the term “*mandatory public notification*” with “*a mandatory public notice and comment period.*”

**In subsection (1)(c)**, the second sentence should state that “*Public notice and comment shall be provided pursuant to subsections (3) and (4) of this section . . .*”

**In subsections (1)(b) and (c)**, it would be better to use the same phrase to refer to the public comment period in both sections (“*public comment period*” seems more accurate than “*opportunity to comment*”). In addition, at the end of subsection (1)(c), we recommend clarifying that the action can be “. . . processed without further public involvement “*at the end of the 15 day posting period.*”

**In subsection (2)**, we suggest changing the caption to “***Actions subject to public notice and comment***” and stating in subsection (2)(a) that “*The permitting authority must provide public notice and a public comment period before . . .*”

**In subsection (2)(a)(ii)**, we assume the reference to 173-400-110 captures actions under WAC 173-400-112 and -113. If not, these citations should be added.

**In subsection (2)(a)**, it is unclear whether the reference to “PSD actions under WAC 173-400-730 and 173-400-740” includes issuance of PSD permitting mechanisms being used to implement NSR reform, such as Clean Unit exemptions, Pollution Control Project (PCP) exemptions, and Plant-wide Applicability Limits (PALs). This is an important issue. If such PSD avoidance mechanisms are not covered under the public involvement procedures in WAC 173-400-730(4) and -740, a category should be added to subsection (2)(a) to make clear that orders issued to designate an emissions units as a Clean Unit under 40 CFR 52.21(y), to permit a PCP under 40 CFR 52.21(z)(5), or to establish a PAL under 40 CFR 52.21(aa) are subject to the mandatory public notice and comment provisions of subsections (2) and (3).

**In subsection (2)(a)**, Ecology needs to revise the public notice and comment provisions in this subsection to clarify that a permit extension in a nonattainment area for either a major stationary source or a major modification is subject to 30-day public notice.

The following language would address EPA's concern on this issue:

**WAC 173-400-171(2)(a)(?)**: “Any extension of the deadline to begin actual construction of a “major stationary source” or “major modification” in a nonattainment area, or”

**In subsection (3)(b)(v)**, should the reference be to WAC 173-400-171(5)(b), rather than (4)(b)?

### **WAC 173-400-560 General Order of Approval**

**Note:** As discussed above, by using the term “source,” WAC 173-400-560 could be interpreted to apply to nonroad engines, which is contrary to the CAA. Therefore, all references to the defined term “source” should be replaced with “stationary source” in this section.

**In the introductory paragraph**, we recommend that language be revised to match the similar language in WAC 173-400-110 (“*Coverage under a general order of approval satisfies the requirement for new source review under RCW 70.94.152.*”). This makes clear that the source has to qualify for a general order of approval in order for it to relieve the source of the responsibility to apply for and obtain an order under WAC 173-400-110.

**In subsection (5)**, we believe there is a typo. Should “(6)(a) or (b)” be “(5)(a) or (b)”?

**In subsection (5)(b)**, In addition, this subparagraph should specify the date on which coverage under the general order of approval under this option (b) becomes effective as is done in subsection (a). In this case, coverage would presumably become effective on the 31<sup>st</sup> day after the application for coverage was received by the permitting authority unless a denial letter was postmarked before that date.

In addition, we believe there should be a provision, in the general permit regulation, requiring the permitting authority, on some periodic basis, to review general orders of approval to ensure that what is identified as BACT is still BACT and that air quality is still being protected. Therefore, we support language similar to what was in Ecology's earlier draft: “*General Orders of Approval shall be reviewed by the permit issuing authority at least once every five years from the date of announcement of the final form.*”

### **WAC 173-400-700 Review of Major Stationary Sources of Air Pollution**

**General comment:** Although Ecology has proposed, in large part, to incorporate the federal PSD regulations at 40 CFR 52.21 by reference, Ecology is proposing to make some changes in adopting the federal rule. EPA will therefore expect, as part of a request for delegation or SIP

approval of the PSD program, that Ecology submit an analysis discussing the changes made, the intent of the changes, and that the Ecology rules are equivalent to the federal PSD requirements.

**In subsection (2)(a)**, there is a typo (received). We understand from Ecology that they intend that local air authorities can apply for delegation or SIP approval to implement the Clean Unit provisions, PCP provisions, or PAL provisions only if the local authority first adopts its own rules, which would be the basis for delegation or SIP approval. As such, we recommend that the language be changed as follows:

*“Where the authority has adopted its own rule and has received delegation . . .”*

### **WAC 173-400-710 Definitions**

**In subsection (2)**, we understand that Ecology’s intent was to clarify the usage of term “source” in WAC 173-400-700 through 750 to mean “stationary source” as defined in 52.21(b)(5). As discussed above, however, EPA has not yet updated the definition of “stationary source” in its implementing rules to reflect a change in the CAA’s definition of stationary source (CAA section 302(z)), which excludes nonroad engines. Therefore, Ecology’s proposed definition of “stationary source” and “source” in WAC 173-400-112 is not consistent with the CAA.

Based on previous EPA comments, Ecology proposes to add the following clarifying language at the end of subsection (2): *“and modified by Section 302(z) of the Clean Air Act”*. Although this revision is acceptable to EPA, EPA understands that there is a concern that such language is overly broad. The following language would also address EPA’s concern:

*“All usage of the term “source” in WAC 173-400-710 through WAC 173-400-750 and in 40 CFR 52.21 as adopted by reference is to be interpreted to mean “stationary source” as defined in 40 CFR 52.21(b)(5). A stationary source ( or source) does not include emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216 of the Federal Clean Air Act.”*

### **WAC 173-400-720 Prevention of Significant Deterioration (PSD)**

As we have previously discussed, the differing roles and legal authorities of Ecology, on the one hand, and local air authorities, on the other hand, for implementing the PSD and other permitting programs is a complex one. Unless Ecology revises its rules to further clarify these issues, EPA will expect, as part of a delegation request or SIP submittal, an Attorney General’s opinion letter clarifying Ecology’s and the locals’ authority in two respects: 1) Ecology’s authority to issue orders of approval under WAC 173-400-110 and -091 to designate Clean Units, approve PCPs, and establish PALs in jurisdictions where a local air authority is implementing a program; and 2) Ecology’s authority to issue orders of approval under WAC 173-400-110 to designate Clean Units, approve PCPs, and establish PALs in jurisdictions where a local authority has adopted its own section 110 equivalent such that, as provided in WAC 173-400-110(1), section 110 does not apply in that local jurisdiction.

**In subsection (4)(a)(i)**, by not including attainment areas in this provision, Ecology rules are requiring that permits be denied in attainment areas if the source has *any* contribution to a NAAQS violation. We question whether Ecology intends this result. The EPA provision upon which this is based (40 CFR 51.165(b)(2)) provides for the use of the significant impact levels at any location that does not, or would not, meet the NAAQS.

To provide sources in all areas the benefit of modeling at the significance impact levels, this provision could be revised to read as follows:

*"This requirement will be considered to be met if the projected impact of the allowable emissions from the proposed major stationary source or the projected impact of the increase in allowable emissions from the proposed major modification does not exceed the following levels at any location that does not or would not meet the NAAQS."*

**In subsection(4)(a)(v)**, the equipment replacement provisions of NSR reform (40 CFR 52.21(cc)) are not currently in effect as a matter of federal law because they have been stayed by the court. Because these provisions do not exist as a matter of federal law, EPA would not be able to delegate the PSD program to Ecology if Ecology adopts this provision. The reference to 40 CFR 52.21(cc) must therefore be deleted from the rule language if Ecology intends to retain delegation of the PSD program.

### **WAC 173-400-730 Prevention of Significant Deterioration Application Processing Procedures**

**In subsection (2)(d)**, although we agree with including this concept, it is inaccurate as included here. First, as currently worded, there is nothing in the rule that directs which of the three dates applies. Can the permittee choose between the later date specified in the permit or 30 days after receipt of the final determination? In addition, during the time Ecology has delegation, an important caveat to the effective date of the permit occurs in the case where review is requested on the permit under 40 CFR 124.19. One option would be to more closely follow the language in 40 CFR 124.15(b), but modify 124.15(b)(2) as follows: *"Until Ecology's has a SIP approved PSD program, review is requested under 40 CFR 124.19."*

**In subsection(4)(m)**, should the reference be to WAC 173-400-117 instead of WAC 173-400-760?

**Notifying EPA:** Ecology's current rules require that the permitting authority provide EPA notice of PSD actions. See WAC 173-400-141(6). Earlier drafts of proposed revisions to Ecology's PSD rules also had a requirement that *"The permitting agency shall provide notice to EPA of every action related to consideration of all actions under WAC 173-400-720 through 750."* It is not clear why Ecology has removed this language from the proposed rule and doing so poses a problem for delegation or SIP approval.

This section needs to be retained in order to meet the notification requirements in 40 CFR 51.166(p), *Sources impacting Federal Class I area – additional requirements*. Note that 40 CFR 51.166(p)(1) requires notification to EPA by transmitting a copy of each permit application relating to a major stationary source or major modification and by providing notice of every action related to consideration of such permit to the EPA Administrator.

**In subsection (6)(b)(i)**, Ecology is requiring an applicant submit an updated BACT analysis in support of a PSD permit extension, but not an updated ambient impact analysis. A reanalysis of the PSD increment consumption and air quality impacts is appropriate before a PSD permit is extended because interim source growth in the area may have occurred and caused significant degradation of air quality. The review agency is responsible for ensuring that the source requesting an extension would not cause or contribute to a PSD increment or NAAQS exceedances.

#### **WAC 173-400-740 PSD Permitting Public Involvement Requirements**

**In subsection (2)**, there is a typo (-730(7) should be -730(6)).

**In subsection (2)(c)**, Ecology's proposed rules require that notice of the public comment period on a PSD action be sent to the U.S. Forest Service and the National Park Service, which are commonly referred to as "Class I" Federal Land Managers (FLM). 40 CFR 51.166(q)(2)(iv), however, requires that the permitting authority send a copy of the notice of public comment to all FLMs, not just "Class I" FLMs. This was the basis for the comment in our Phase I, June 3, 2002 comment letter stating that "*the references to the U.S. Forest Service and the National Park Service should be replaced with references to the Federal Land Manager, because there may well be other Federal Land Managers in certain cases.*" Ecology must revise subsection (2)(c) to require that the notice of public comment be provided to all FLMs.

#### **WAC 173-400-750 Revisions to PSD Permits**

**In subsection (1)(a)**, this provision states that Ecology may approve a change to a PSD permit condition so long as the change will not cause the source to exceed an emissions standard. We are unclear what is intended by this reference. Is the intent that the change not cause the source to exceed a state or federal emission limit other than a source-specific emission limit established in the PSD permit? The intent should be clarified.

**In subsections (4)(c) and (d)**, Ecology is intending to administratively process without the opportunity for public comment (1) revisions to compliance monitoring methods that do not reduce the permittee's or Ecology's ability to determine compliance with the emission limitation, and (2) revisions to emission limitations that do not reduce the stringency of the original emission limitation. As currently written these provisions are far too broad to be processed without public process. The determination that a change in monitoring does not reduce the ability to determine compliance or that a revision does not reduce the stringency of the emission

limit should be subject to public comment unless additional criteria are added to narrow the extent of the discretion.

Please note that these comments contain our current views based on a preliminary review of the draft rule. These views should not be considered our final position, which we will only reach through notice and comment rulemaking after the state has submitted a rule for our approval as a SIP revision.

Again, thank you for the opportunity to comment. If you have any questions or concerns regarding this letter or would like to discuss these matters further, please contact me at (206) 553-0513.

Sincerely,

Roylene A. Cunningham  
Environmental Engineer  
State & Tribal Programs Unit  
Office of Air, Waste, and Toxics

Enclosures

c: Brett Rude, Ecology