UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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OCT 11 2012

OFFICE OF THE
REGIONAL ADMINISTRATOR

Mr. Bill Green
424 Shoreline Ct.
Richland, Washington 99354

Dear Mr. Green:

Administrator Jackson has asked me to respond to your petition letter captioned as "Administrative Procedure Act Petition: Concerning Repeal of Portions of 40 CFR. 61.04(c)(10) and Portions of Appendix A of 40 CFR 70" dated July 1, 2011 (Petition), which you submitted to the U.S. Environmental Protection Agency. The Petition asks the EPA to exercise its rulemaking authority to repeal:

> Portions of 40 CFR § 61.04(c)(10) delegating the Washington State Department of Health partial authority to implement and enforce the radionuclide National Emission Standards for Hazardous Air Pollutants, 40 CFR Part 61, Subparts, B, H, I, K, Q, R, T, and W (Rad NESHAPs); and
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> Portions of Appendix A of 40 CFR Part 70 granting approval to the Washington Department of Ecology and Puget Sound Clean Air Agency[1] to issue Part 70 permits containing applicable requirements developed pursuant to the Rad NESHAPs (specifically, 40 CFR Part 70, App. A, Washington, para. (a) and (f)).

As explained in more detail below, the EPA does not agree that the issues raised in your Petition are grounds for repealing the delegation of authority and program approvals that the EPA has granted to WDOH, Ecology, and PSCAA under the Clean Air Act with respect to the Rad NESHAPs. The EPA is therefore denying your request to repeal the EPA's partial delegation of the Rad NESHAPs to WDOH and your request to repeal the EPA's grant of approval to Ecology and PSCAA to implement and enforce the Part 70 program with respect to sources subject to the Rad NESHAPs.

Rad NESHAPs Delegation

Section 112(l)(1) of the CAA states:

Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement … of emission standards and other requirements for air pollutants subject to this section.… A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emission standards…but shall not include authority to set standards less stringent than those promulgated by the Administrator under this chapter.

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[1] Ecology and PSCAA are currently the only Part 70 permitting authorities in Washington that currently issue Part 70 permits to sources subject to the Rad NESHAPs. See Petition, Ex. 1, ii.

Pursuant to that authority, the EPA granted WDOH partial delegation to implement and enforce the Rad NESHAPs.[2] 71 Fed. Reg. 32276 (June 5, 2006) (final approval); 71 Fed. Reg. 9059 (Feb. 22, 2006) (proposed approval). In granting partial delegation of the Rad NESHAPs, the EPA determined that WDOH had incorporated the Rad NESHAPs by reference into its state regulations, met the criteria for straight delegation in 40 CFR 63.91(d)(3), and demonstrated that WDOH had adequate resources, including the technical expertise, to implement and enforce the Rad NESHAPs. See 71 Fed. Reg. 9061.

Ecology and the local air agencies in Washington, including PSCAA, implement the Title V operating permit program in Washington and are authorized under the CAA to issue Part 70 permits that assure compliance with all applicable requirements and meet the other requirements of Title V and the Part 70 implementing regulations. See 59 Federal Register 55813 (November 9, 1994) (final interim approval); 66 Federal Register 42439 (August 13, 2001) (final full approval).

Your Petition alleges that radionuclides are not subject to regulation under the CAA in Washington because the EPA has granted partial delegation of authority to enforce the Rad NESHAPs to WDOH, an agency that is not authorized to implement or enforce Title V or Part 70, or to issue Part 70 permits. According to the Petition, this partial delegation of authority makes WDOH "the only Washington State agency federally authorized to enforce the radionuclide NESHAPs" and "effectively bars all Washington State permitting authorities from enforcing Title V permit conditions controlling radioactive air emissions created pursuant to the radionuclide NESHAPs," in violation of CAA §502(b)(5)(E) and 40 CFR § 70.11(a). Petition, Ex. 1, ii, 1-2, 1-6. Your Petition appears to base this contention on the fact that the EPA's partial delegation of authority of the Rad NESHAPs to WDOH states that "WDOH is only delegated the Radionuclide NESHAPs. Other NESHAPs will be enforced by the Washington State Department of Ecology and the local air agencies, as applicable." See 40 CFR § 61.04(c)(10), Table, fn. 15. Your Petition further asserts that "Failure to delegate enforcement of the radionuclide NESHAPs to a permitting authority ensures no Washington State permitting authority can enforce any radionuclides NESHAPS or Title V applicable requirements created pursuant to the radionuclide NESHAPS." Petition, Exhibit 1, 1-2. In related arguments, your Petition asserts that the language in 40 CFR § 61.04(c)(10) does not allow any Washington State Part 70 permitting authority to:

> independently issue Title V permits that both contain and assure compliance with all applicable requirements, including those created pursuant to the Rad NESHAPs, as required by CAA § 502(b)(5)(A). Petition, ex. 1, 1-4; and
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> provide an opportunity for public comment, the EPA and affected state review, and Part 70 permit issuance and revision procedures as required by CAA § 502(b)(6) and 40 CFR §§ 70.7 and 70.8 for those Part 70 applicable requirements created by WDOH pursuant to the Rad NESHAPs. Petition, Ex. 1, 1-5, 1-6, 1-8, 1-9.

Contrary to the assertions in your Petition, radionuclides are subject to regulation under the CAA in Washington. Indeed, the EPA, WDOH, Ecology, and PSCAA can all enforce the Rad NESHAPs under the CAA against sources in Washington. WDOH has adopted the Rad NESHAPs by reference into its state regulations. See Washington Administrative Code 246-247-035. By granting WDOH partial

[2] The reason for partial rather than full delegation is that, although WDOH has the authority required by 40 CFR §§ 70.11(a)(3)(ii) and 63.91(d)(3)(i) to recover criminal penalties for knowing violations of the Rad NESHAPs, WDOH 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 CFR §§ 70.11(a)(3)(iii) and 63.91(d)(3)(i). See 71 Fed. Reg. 32276.

delegation of the Rad NESHAPs, the EPA has identified WDOH as the lead agency in Washington for implementing and enforcing the Rad NESHAPs under the CAA.

Ecology has also adopted the Rad NESHAPs by reference into its state regulations. See WAC 173-400-075(1). These regulations apply statewide (WAC 173-400-020) and PSCAA has authority to enforce these regulations against sources within its jurisdiction. The EPA agrees that the Rad NESHAPs are "applicable requirements" under the Part 70 program and must be included in Part 70 permits issued to sources subject to the Rad NESHAPs. 40 CFR § 70.2 (definition of applicable requirement); 40 CFR §70.6(a)(1) (standard permit requirements); WAC 173-401-200(4)(a)(iv) (definition of applicable requirement); WAC 173-401-605(1) (emission standards and limitations); see also Petition, Ex. 1, 1-1. Through the EPA authorization of Ecology and PSCAA as the Part 70 permit issuing authorities within their respective jurisdictions, Ecology and PSCAA have authority under the CAA to implement and enforce the Rad NESHAPs against sources within their respective jurisdictions when the Rad NESHAPs are included in the Part 70 permits they issue. This dual authority over radionuclide emissions in Washington is expressly acknowledged in state law. According to Revised Code of Washington 70.94.422(1), "the department of health shall have all the enforcement powers as provided in RCW, 70.94.332, 70.94.425, 70.94.430, 70.94.431(1) through (7), and 70.94.435 [Ecology's enforcement authorities] with respect to emissions of radionuclides. <u>This section does not preclude the department of ecology from exercising its authority under this chapter</u>."

Your Petition appears to interpret the language stating that "WDOH is only delegated the Radionuclide NESHAPs" (see 40 CFR § 61.04(c)(10), Table, fn. 15), to mean that only WDOH, and not Ecology or the local air agencies in Washington, have authority to implement the Rad NESHAPs under the CAA in Washington. The EPA does not agree that this is the intended or best interpretation of that language. That language simply explains that—of all the NESHAPs promulgated under Section 112 of the CAA—the EPA has only delegated the Rad NESHAPs to WDOH. All other NESHAPs identified in the Table have been delegated by EPA to Ecology and/or the local air agencies in Washington as identified in the table.

There is nothing in the language of Section 112, Title V, or their respective implementing regulations to require or suggest that the Title V permitting authority and an agency that receives delegation of Section 112 standards must be one and the same agency. Indeed, the idea that two state agencies might be responsible in a state for implementing the Rad NESHAPs with respect to Part 70 sources has been expressly acknowledged by the EPA. In guidance issued soon after the promulgation of Part 70, the EPA specifically acknowledged that not all radionuclide program activities would necessarily be carried out by the state air program. See Memorandum from John Seitz, the EPA Office of Air Quality Planning and Standards, and Margo Oge, Director, the EPA Office of Radiation and Indoor Air, to the 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, (Rad NESHAPs/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 performing these duties [implementing Part 70 permits at sources subject to the Rad NESHAPs]. Such joint efforts would have to be sufficiently described so that the EPA and the public can understand how the job will be done." The EPA memorandum includes 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.

That is precisely the situation here. WDOH, Ecology, and PSCAA have entered into memoranda of understandings (MOUs) that clarify their respective roles for implementing and enforcing the Rad NESHAPs through Part 70 permits. *See* Memorandum of Understanding between the Washington State Department of Ecology and the Washington State Department of Health Related to the Respective Roles and Responsibilities of the Two Agencies in Coordinating Activities Concerning Hanford Site Radioactive Air Emissions, dated May 15/18, 2007 (superseding the previous MOU dated December 23/29, 1993); Intergovernmental Agreement Between Puget Sound Air Pollution Control Agency and the Washington State Department of Health, effective date July 1, 1995. Under these MOUs, WDOH has the primary responsibility for regulating radioactive air emissions from facilities, whereas Ecology and PSCAA regulate all non-radioactive air emissions from subject sources and are responsible for issuing Part 70 permits to all subject sources. Radionuclide regulatory requirements are established by WDOH 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. See WAC 246-247-060 and -460(1)(d). The MOUs acknowledge that all of these agencies have authority to enforce requirements for radionuclide air emissions.

The statement in your Petition that "Once the EPA's partial approval action was complete, all impacted permits issued in Washington State need only address requirements created pursuant to WAC 246-247 [WDOH's regulations for radionuclide air emissions] in lieu of addressing requirements contained in the radionuclides NESHAPs" (Petition, Ex. 1, 1-8) is simply incorrect. The language quoted in the Petition is from a paragraph in the Rad NESHAPs/Title V Guidance discussing situations in which a state is seeking to implement and enforce some provisions of its own air toxic program "in lieu of rules resulting from the Federal program under section 112"—which is referred to in the EPA's rules and guidance as "rule substitution." Rad NESHAPs/Title V Guidance at 2. The EPA's partial delegation of authority to implement and enforce the Rad NESHAPs to WDOH makes clear that the delegation was a "straight delegation," not "rule substitution." 71 Fed. Reg. 9060. The partial delegation is based on the fact that WDOH adopted the Rad NESHAPs by reference without change into its own regulations. Id. The EPA specifically noted that, although WDOH does, as a matter of state law, have additional regulations and requirements that sources of radionuclide air emissions must meet, those additional authorities and requirements are not part of the delegation. Id.

In summary, the EPA does not agree that the partial delegation to WDOH of authority to implement and enforce the Rad NESHAPs or any language in 40 CFR § 61.04(c)(10) prohibits Washington State permitting authorities from enforcing Title V applicable requirements implementing the Rad NESHAPs. The EPA also does not agree that the partial delegation to WDOH of authority to implement and enforce the Rad NESHAPs or any language in 40 CFR § 61.04(c)(10) deprives Ecology or PSCAA of authority they are required to have under Title V or Part 70 to implement their Part 70 programs.[3] The EPA therefore denies your Petition to the extent it asks the EPA to repeal the partial delegation to WDOH of authority to implement and enforce the Rad NESHAPs.

Title V Authorities with respect to the Rad NESHAPs

The Petition also requests the EPA to repeal the EPA's approval of Washington's Part 70 program with respect to Ecology and PSCAA and the issuance of permits containing applicable requirements based on the Rad NESHAPs. Your Petition asserts that:

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[3] The argument in your Petition that the license developed by WDOH that contains the requirements of the Rad NESHAPs and is included in the Part 70 permit as an applicable requirement is not properly subject to the permit issuance, review, and revision procedures of Title V and Part 70 is also discussed in Section II below.

> Under the Washington State program radionuclides are regulated solely by WDOH through requirements created pursuant to the *Nuclear Energy and Radiation Act* (NERA). Because Title V permit requirements regulating radionuclides are developed pursuant to NERA rather than pursuant to the CAA, none of the CAA-defined administrative, public review, and judicial review process apply to these conditions. Petition, Exhibit 1, ii.

More specifically, your Petition asserts that Part 70 applicable requirements regulating radioactive air emissions are not subject to the "administrative processes" contained in Title V and Part 70, including the procedures for permit issuance and renewal, public comment, affected state review, the EPA notice, permit revisions, judicial review, appeals, permit/license content, and fees. Petition, Ex. 1, 2-3 to 2-10. 2-12, 2-13. To support this argument, your Petition cites to language in NERA stating that:

> The department of health [WDOH] is designated as the state radiation control agency...and shall be the state agency having sole responsibility for administration of the regulatory, licensing, and radiation control provisions of this chapter. RCW 70.98.050(1) (emphasis added). Petition, Ex. 1, 2-2. Your Petition appears to interpret this language as requiring that all provisions implementing the Rad NESHAPs be implemented and enforced solely by WDOH and solely under the authority of NERA.

The EPA does not agree with this interpretation. RCW 70.98.050(1) states only that WDOH is the state agency that is solely responsible for carrying out the requirements of NERA. As discussed above, Ecology has incorporated the Rad NESHAPs by reference into its state regulations and Ecology and PSCAA therefore have their own authority to implement and enforce the Rad NESHAPs and include such provisions in Part 70 permits where applicable. In legislation adopted after the language in NERA cited by your Petition, the Washington Legislature specifically required that each air operating permit contain requirements based on "RCW 70.98 [NERA] and rules adopted thereunder" when applicable. RCW 70.94.161(10)(d). RCW 70.94.422(1) makes clear that WDOH's authority "does not preclude the department of ecology from exercising its authority under this chapter [RCW Ch. 70.94]," which includes Washington's Part 70 program. In Ecology's submission of its Part 70 program to the EPA for approval, the Washington Attorney General opined that based on the applicable statutory language, "Ecology and local air authorities are also charged with regulatory authority over these same [radioactive air emissions] sources pursuant to Ch. 70.94 RCW." Attorney General's Opinion for the Washington State Department of Ecology, October 27, 1993. The MOUs discussed above clarify the roles of Ecology and PSCAA, as the Part 70 permitting authorities, and WDOH, as the lead agency for regulating radioactive air emissions in the State of Washington. As the Part 70 permitting authorities, Ecology and PSCAA issue Part 70 permits within their respective jurisdictions that contain all applicable requirements. Licenses issued by WDOH for radionuclide emissions, which incorporate the Rad NESHAPs, are incorporated into the Part 70 permits, where applicable, as applicable requirements in air operating permits. If WDOH fails to enforce the requirements of the Rad NESHAPs, Ecology and PSCAA retain their authority to regulate such sources. RCW 70.94.422(1). Ecology and WDOH recently confirmed this joint authority to enforce radionuclide provisions in Part 70 permits in a letter dated July 16, 2010. See Letter from Stuart A. Clark, Air Quality Program Manager, Ecology, and Gary Robertson, Director, Office of Radiation Protection, WDOH, to Bill Green dated July 16, 2010.

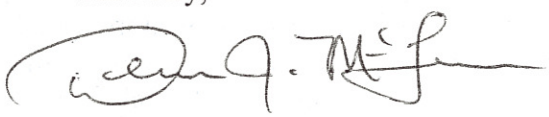
Your Petition also contends that Ecology's and PSCAA's Part 70 programs do not meet CAA requirements because there is no opportunity for public comment, judicial review, or other Part 70 administrative process for the issuance or revision of the WDOH license containing the Rad NESHAP requirements, which is later incorporated into a Part 70 permit. The EPA has previously provided you a response on these issues in a letter to you dated September 29, 2009. The promulgation and revision of

applicable requirements are not subject to the public notice, judicial review, and other administrative processes of the Part 70 program. The establishment of or changes to such underlying applicable requirements must be made pursuant to the rules that govern the establishment of such applicable requirements, in this case, the RAD NESHAPs promulgated by the EPA and the license requirements promulgated by Ecology. With a few exceptions not applicable here, Part 70 cannot be used to revise or change applicable requirements. Similarly, any challenges to such underlying applicable requirements are governed by the laws that apply to establishment of such license requirements. The requirements of Title V and Part 70, including the judicial review requirement of 40 CFR § 70.4(b)(3)(k) and the issuance, renewal, reopening, and revision provisions for Part 70 permits in 40 C.F.R § 70.7(h), do not apply as a matter of federal law to WDOH when issuing a license pursuant to WAC 246-247.[4]

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 WDOH regulating radionuclide emissions and containing the requirements of the Rad NESHAPs.[5]

For the reasons discussed above, the EPA does not agree that the issues you raise in your Petition are grounds for repealing the delegation of authority and program approvals that the EPA has granted to WDOH, Ecology, and PSCAA under the CAA with respect to the Rad NESHAPs and Part 70. The EPA is therefore denying your Petition. Should you have any questions regarding this response, please contact Julie Vergeront (for Title V) at 206-553-1497 or Davis Zhen (for Rad NESHAP) at 206-553-7660.

Sincerely,



Dennis J. McLerran
Regional Administrator

[4] We also note that many of the provisions in radionuclide licenses issued by WDOH and included in Part 70 permits for subject sources are established as a matter of state law and specifically identified in the license as "state-only." Terms and conditions so designated are not subject to the requirements of Part 70 in any event. See 40 CFR § 70.6(b)(2). To the extent the conditions in the WDOH radionuclide licenses are federally enforceable, Part 70 can still not be used to revise or change the underlying federally enforceable applicable requirements.

[5] Having concluded that 40 CFR § 61.04(c)(10) does not purport to or in fact change the meaning or requirements of CAA § 502(b), there is no need to consider your request that the EPA impose mandatory sanctions, as you requested in your March 10, 2012 letter to Arthur A. Elkins, Jr., the EPA Inspector General, or your March 13, 2012 letter to Patricia Embrey, Acting Associate General Counsel, for the Office of General Counsel, Air and Radiation Law Office.