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Washington State Department of Health

WASHINGTON STATE DEPARTMENT OF ECOLOGY

July 16, 2010

Mr. Bill Green
424 Shoreline Ct
Richland, Washington 99354

Ref: Letter, Mr. Bill Green to Attorney General Rob McKenna, *Request to modify Washington State's Air Operating Permit Program to comply with Title V of the federal Clean Air Act with respect to regulation of radioactive air emissions*, February 22, 2010

Dear Mr. Green:

The Department of Ecology (Ecology) and the Department of Health (Health) were provided copies of your correspondence with the Attorney General's office. In your letter you concluded that "Washington's AOP program is non-compliant with respect to regulation of radioactive air emissions." After reviewing the issues raised in your letter and the attached memorandum, we have concluded that Washington's Air Operating Permit (AOP) program – with regard to radionuclides – complies with the requirements of the federal Clean Air Act. The bases for our determination follow.

Your memorandum identifies three issues with Washington's EPA-approved AOP program.

1. You assert that the Washington AOP program is not in compliance with Section 502(b)(5)(E) of the Federal Clean Air Act [42 U.S.C. § 7661a(b)(5)(E)], as you believe that permitting authorities lack the authority to enforce requirements regarding radioactive air emissions.
2. You assert that the Washington AOP program is not in compliance with Section 502(b)(6) of the Federal Clean Air Act [42 U.S.C. § 7661a(b)(6)], as you believe that permitting authorities lack authority to take action on public comments regarding requirements associated with radioactive air emissions.

3. You assert that the Washington State AOP program is not in compliance with Section 502(b)(6) of the Federal Clean Air Act [42 U.S.C. § 7661a(b)(6)], as you believe that there is no opportunity for judicial review in state court of final permit actions.

In order to address these issues, it is necessary to first take a general look at the nature of an air operating permit. Congress enacted the Title V air operating permit program to collect in one document all the requirements applicable to a major source of air pollution. The single document makes it clear for sources, regulatory agencies, and the public to identify the requirements with which a facility must comply. The air operating permit is not a vehicle for adding new substantive requirements with which a facility must comply.

The requirements listed in an air operating permit include the federal and state statutes applicable to the facility, federal, and state regulations applicable to the facility, any federal or state orders issued to the facility, and federal or state permits or licenses issued to the facility. All the requirements included in an air operating permit are requirements that were developed prior to their inclusion in the air operating permit, using whatever processes were appropriate to their development. For example, the federal regulations in an air operating permit were developed by the Environmental Protection Agency (EPA) using the processes of the Federal Administrative Procedure Act.

The three issues you raise cite to statutory provisions from Title V of the Federal Clean Air Act. These provisions apply to the Title V permitting process – not to the processes for developing the various underlying requirements that are included in a Title V air operating permit. For example, the requirement in section 502(b)(6) (42 U.S.C. § 7661a(b)(6)) that the air operating permit go through a meaningful public comment process means that the public must have an opportunity to comment on the air operating permit itself. The air operating permit public comment process does not provide the public with a forum for challenging the underlying applicable requirements, such as the state and federal regulations that form the backbone of an air operating permit. During an air operating permit public comment period, the public can require the permitting agency to consider a comment, for example, that the air operating permit does not include all the requirements applicable to the permitted facility. The public cannot, however, require the agency to consider, for example, a comment that a federal regulation included in the air operating permit needs to be changed.

Issue No. 1 Ecology's authority to enforce radiological emission requirements in air operating permits

Section 502(b)(5)(E) of the federal Clean Air Act (42 U.S.C. § 7661a(b)(5)(E)) requires a permitting authority to have adequate authority to enforce air operating permits. In Washington, air quality permitting authorities include Ecology and the local air authorities. You are correct that Health is not a permitting authority under Title V of the Clean Air Act. You are concerned that the permitting authority; i.e., Ecology or a local clean air authority, does not have adequate authority to enforce the radionuclide requirements in a license issued by Health that are part of an air operating permit.

Ecology and the local air authorities have the authority to enforce all of the provisions of the State Clean Air Act, as well as all regulations developed to implement it (RCW 70.94.430 and RCW 70.94.431). The State Clean Air Act also authorizes Health to use the enforcement tools of the State Clean Air Act with respect to emissions of radionuclides (RCW 70.94.422(1)). That authorization preserves the ability for Ecology and the local air authorities to also enforce the State Clean Air Act and its accompanying regulations concerning radionuclides. *Id.* Indeed, Ecology is the source of regulations setting the limits on emission of radionuclides into the air (Chapter 173-480 WAC). Ecology's radionuclide regulations confirm that "[Ecology] or any activated local air pollution control authority may enforce the radionuclide regulations with the provisions of WAC 173-400-230, Regulatory actions; and 173-400-240, Criminal penalties" (WAC 173-480-080). In addition, this regulation acknowledges that violations of radionuclide requirements may also subject the violator to penalties as cited by Health (WAC 173-480-080).

Health and Ecology have entered into a memorandum of understanding (MOU) that outlines how the agencies will manage this joint enforcement authority for radioactive air emissions requirements at Hanford. In this MOU, Health is assigned the primary enforcement responsibility for radioactive air emissions requirements. However, the MOU provides that in extenuating circumstances, Ecology may also take enforcement action.

Issue No. 2 Ecology's authority to take action on public comments regarding radioactive air emissions

Section 502(b)(6) of the Federal Clean Air Act requires a state air operating permit program to include public notice and the opportunity for meaningful public comment on the air operating permit. You are concerned that Ecology cannot take any meaningful action in response to comments concerning radionuclide licenses issued by Health and included in an air operating permit.

As noted above, the Title V public participation provision requires that the public have an opportunity to comment on the air operating permit itself – how the air operating permit is constructed, whether all applicable requirements are included, and whether there is sufficient monitoring required in the permit to ensure compliance.[1] The Title V public participation provision does not open for comment the underlying permits, licenses, orders, or regulations included in the air operating permit. A Health license in an air operating permit is an underlying applicable requirement. Title V of the Federal Clean Air Act does not require Ecology to have the authority to take meaningful action on comments regarding the Health license any more than it requires Ecology to have the authority to take meaningful action on comments regarding the federal regulations included in the air operating permit.

In reality, although not required to by law, Ecology can, and does, relay public comments concerning Health licenses to the Department of Health. Health is then able to take actions as appropriate on those comments. Health routinely considers public comments the agency receives, including any complaints regarding whether a licensee is complying with its license conditions.

Issue No. 3 Judicial review of radioactive air emissions requirements in air operating permits

Section 502(b)(6) of the Federal Clean Air Act requires a state air operating permit program to include an opportunity for judicial review of the air operating permit. Washington law provides that review of an air operating permit must begin with an appeal to the Pollution Control Hearings Board (PCHB) (RCW 70.94.161(8) and WAC 173-401-735(1)). A person dissatisfied with a PCHB ruling may then appeal that ruling to superior court, thus obtaining judicial review.

You correctly state that the PCHB does not have jurisdiction to hear issues related to Health. Thus, the PCHB does not have jurisdiction to rule on the provisions in a license issued by Health. However, the requirement for judicial review of an air operating permit in section 502(b)(6) of the Federal Clean Air Act does not require judicial review of the underlying permits, licenses, orders, or regulations that constitute the applicable requirements included in an air operating permit. Judicial review of an air operating permit is limited to review of the AOP and whether or not it includes all the applicable requirements and otherwise meets the requirements of Title V. Indeed, just as the PCHB does not have jurisdiction over the adequacy of the provisions of a radionuclide license issued by Health, the PCHB does not have jurisdiction

[1] Washington implements those requirements through RCW 70.94.161(7) and WAC 173-401 §§ 800-820.

over the adequacy of EPA regulations included in an air operating permit, or over the adequacy of any Ecology regulations included in an air operating permit.

When Health issues a radioactive air emissions license, its actions related to that license are potentially subject to judicial review should a third party seek timely review under the Administrative Procedure Act, RCW 34.05, and meet the statutory requirements for standing to seek review.

In closing, after analyzing your concerns and our program obligations under the Federal Clean Air Act, Ecology and Health affirm that Washington's air operating permit program meets federal requirements with regard to radioactive air emission licenses issued by Health.

Sincerely,

Stuart A. Clark
Air Quality Program Manager
Washington Department of Ecology

Sincerely,

Gary Robertson
Director, Office of Radiation Protection
Washington Department of Health

cc: Kay Shirey (AGO)
Mark Calkins (AGO)
John Martell (DOH)