DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement

Chapter 173-400 WAC

General Regulations for Air Pollution Sources and State Implementation Plan revision

Summary of rule making and response to comments

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Concise Explanatory Statement

Chapter 173-400 WAC
General Regulations for Air Pollution Sources and State Implementation Plan revision

Air Quality Program
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Olympia, Washington 98504-7600

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Introduction

The purpose of a Concise Explanatory Statement is to:

- Meet the Administrative Procedure Act (APA) requirements for agencies to prepare a Concise Explanatory Statement (RCW 34.05.325).
- Provide reasons for adopting the rule.
- Describe any differences between the proposed rule and the adopted rule.
- Provide Ecology's response to public comments.

This Concise Explanatory Statement provides information on The Washington State Department of Ecology's (Ecology) rule adoption for:

Title:	General Regulations for Air Pollution Sources
WAC Chapter(s):	173-400
Adopted date:	November 28, 2012
Effective date:	December 29, 2012

To see more information related to this rule making or other Ecology rule makings please visit our web site: http://www.ecy.wa.gov/laws-rules/index.html

Reasons for Adopting the Rule

Washington Clean Air Act, Chapter 70.94 RCW

Washington's Clean Air Act was first enacted by the state legislature in 1957. The Act has been periodically amended since that time. The most significant amendments that affect the activities covered by this rule occurred in 1965, 1971, and 1991.

The Act directs Ecology to establish rules to implement the state clean air act programs and requirements. These rules apply statewide, except where a local clean air agency has implemented its own rules for implementing programs and rules to control air pollution.

In addition to the state Clean Air Act's requirements, the federal Clean Air Act and regulations require Ecology to have in place specific programs and requirements to protect air quality. Portions of this rule are specific to fulfilling those federal requirements.

Reason for this rule proposal

Ecology is amending Chapter 173-400 WAC to assure that it is consistent with federal requirements so that Washington can gain State Implementation Plan (SIP) approval for its new source review and prevention of significant deterioration permitting programs.

Gaining SIP approval of the minor new source review and prevention of significant deterioration programs helps ensure the state is aligned and consistent with federal law while attaining and maintaining good air quality and protecting citizen's health.

After this revision is final the state will prepare and submit to the Environmental Protection Agency (EPA) a request to incorporate these revised rules into Washington's SIP. Ecology's rule must meet specific requirements of the Federal Clean Air Act and rules before EPA can adopt SIP revisions. Once EPA approves a SIP, EPA and citizens may enforce the SIP rules, requirements, and commitments in federal court.

Differences Between the Proposed Rule and Adopted Rule

RCW 34.05.325(6)(a)(ii) requires Ecology to describe the differences between the text of the proposed rule as published in the *Washington State Register* and the text of the rule as adopted, other than editing changes, stating the reasons for the differences.

There are some differences between the proposed rule filed on May 22, 2012 and extended on June 18, 2012 and the adopted rule filed on November 28, 2012. Ecology made these changes for all or some of the following reasons:

- In response to comments we received.
- To ensure clarity and consistency.
- To meet the intent of the authorizing statute.

The following content describes the changes and Ecology's reasons for making them. Where a change was made solely for editing or clarification purposes, we did not include it in this section.

- The proposed addition of new text in WAC 173-400-020(2)(a) and (2)(b) and WAC 173-400-030(3) was not made.
- WAC 173-400-020(1) was reworded by request to clarify the relationship between Local Air Authority and Ecology regulations.
- Updated adoption by reference dates for EPA rules throughout the rule to be consistent with the stated goals of the rule making.
- Revised text in WAC 173-400-075 to clearly not adopt the 40 CFR Part 63, Subparts DDDDD and JJJJJJ.
- Revised text in WAC 173-400-115 to clearly not adopt the March 2011 modifications to the New Source Performance Standards (NSPS) and emission guidelines for Commercial and Industrial Solid Waste Incinerators.
- Clarified that a newspaper of general circulation in the area of a proposed action is sufficient prominent advertisement of a proposal. This was a requested change.
- Incorporated EPA's "reasonable possibility" threshold for New Source Review (NSR) pollutants. This was a requested change.
- Various housekeeping and clarification revisions.

Commenter Index

The table below lists the names of organizations or individuals who submitted a comment on the rule proposal and where you can find Ecology's response to the comment(s). Comments are grouped by topic and numbered in ascending order. Ecology received approximately 3,000 comments from members of the public. Most of those comments were variations of three form letters from environmental non-governmental organizations (NGOs). Responses to those comments are organized by NGO. The names of the individual commenters that used the NGO form letters are available in Appendix C.

Table A: Commenter Index

Name	Affiliation	Comment Number(s)
Brian Brazil	TransAlta	12, 66
Janette Brimmer	Conservation Organizations (Washington Environmental Council, Sierra Club, Climate Solutions, NW Energy Coalition, Earthjustice)	1, 8, 11, 14, 15
Danna Dal Porto	public	3, 8, 11, 13, 16, 22, 85, 90
Elizabeth Daly	BP Cherry Point Refinery	12
Donna Ewing	League of Women Voters of Thurston County	8, 9, 11
Thom Fischer	public	86
Frank Holmes	Western States Petroleum Association	12, 17, 20, 21, 34, 37, 38, 41, 42, 43, 45, 50, 51, 55, 56, 58, 66, 70, 74
Richard Honour	The Precautionary Group	3, 11, 13, 22
Brandon Houskeeper	Association of Washington Business	12, 59, 66
Ken Johnson	Weyerhaeuser	12, 30, 34, 66
Nicole Keenan	public	8, 11
Paul Mairose	Southwest Clean Air Agency	20
Patty Martin	Microsoft Yes, Toxic Air Pollution No	3, 5, 8, 11, 13, 14, 16, 19, 20, 59, 60, 63, 64
Christian McCabe	Northwest Pulp & Paper Association	12
Rashad Morris	Washington Environmental Council	1,2, 4, 11, 14, 18
Terry Mutter	The Boeing Company	12, 21, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85
Public*	Climate Solutions	8, 9, 11, 18, 88
Public*	Sierra Club	8, 9, 11, 14, 88, 89
Public*	Sierra Club North Olympic Group	8, 11, 13, 16, 22, 87
Michael Ruby	public	8, 10, 11, 13, 14, 18, 49, 77
Darlene Schanfald	Olympic Environmental Council	3, 11, 13, 16, 22
Isabelle Spohn	Methow Valley Citizens' Council	6, 7, 8, 11, 13, 16, 22
Russell Strader	Boise Cascade Wood Products	12, 34, 66
Daniel Yoder	US Oil and Refining	12

* Names of individual commenters are available in Appendix C.

Response to Comments

Ecology accepted comments between May 22, 2012 until July 20, 2012. This section provides verbatim and summarized comments organized by topic that we received during the public comment period and our responses. (RCW 34.05.325(6)(a)(iii))

Description of comments:
The Concise Explanatory Statement responds to the identified comments in a comment-and-response format. Each comment was organized by topic or rule section, so a single comment letter or paragraph may have responses in different sections. Ecology's responses are labeled **"Response"** and are immediately following each group of comments on that topic. Both written comments received during the comment period and oral comments received during the June 27, 2012 public hearings are included and weighted equally.

Ecology received approximately 3,000 comments from the public on this rule making and SIP proposal. Most of these comments were identical to form letters issued by three environmental nongovernmental organizations. However, several hundred of these comments were modified by the individual commenters. The volume of these comments prevented Ecology from responding to each individually, but where individuals made changes they followed several consistent themes. Ecology paraphrased these themes in the response document and organized them by topic. All paraphrased text is at the beginning of each comment grouping and is in *italic text*. Original, unaltered text for every comment received by the end of the public comment period is included in Appendix A. Hearing Transcripts are included in Appendix B.

Most other comments and several public comments that varied substantially from the form letters are included as written in this document. Quoted text is clearly labeled by commenter and is in non-italic text.

Table A lists each commenter and the comment and response number(s) that addresses their comment(s).

General

Procedure

1: Two Comment Periods

The rule making and SIP submittal are interconnected. All comments should be applied to both actions.

Conservation Organizations
As these comments are submitted in opposition to both the proposed rule revisions and the proposed submission of the rule change to EPA as a SIP amendment, Ecology should include these comments in the administrative records for both actions.

Washington Environmental Council
We believe that the topics of the two hearings being proposed today are so intertwined that we don't understand why there's a need for a bifurcation of the two issues. We believe that separating these two topics at hearing and in the written testimony will only serve to limit adequate public participation. And because we know that the Department of Ecology does not want to limit public participation, we highly encourage you to accept any and all comments, whether it's at this public hearing today or whether those comments are submitted in written form; if they are related to the change to WAC 173-400 or if they're related to the adoption of that WAC into the state implementation plan, that the Department consider all comments submitted as part of either process, vice versa.

Response:

Thank you for your comments. The Rule Adoption process in the Washington State Administrative Procedures Act requires a rule adoption hearing on the text of the regulation. The state Administrative Procedures Act specifies a series of requirements for rule adoptions. The U.S. Environmental Protection Agency (EPA) regulations on State Implementation Plan (SIP) actions require a public comment period with different public notification requirements. Often the rule adoption hearing and the SIP hearing occur separately. Due to the intertwined nature of this proposal, we held the public hearings and comment periods at the same time. We consider comments submitted on the rule text to be applicable for both the rule adoption and the SIP processes.

There will be another SIP hearing on the remainder of the rule prior to its submittal to EPA for approval as an amendment to the SIP.

2: Extend the Public Comment Period and Hold a Second Hearing in Seattle

Ecology should extend the public comment period and hold a second public hearing in Seattle to give the public more opportunity to provide input.

Response:
Thank you for your comment. Ecology extended the comment period by 14 days. This extension lengthened the comment period from 44 to 58 days. This is significantly longer than EPA's standard comment period of 30 days for SIP hearings and longer than Ecology's standard practice of 21 days for rule revisions.

Written comments are just as meaningful as oral testimony given at a public hearing. Ecology believes that the hearing held in the evening in Lacey reasonably accommodated interested residents from across the Puget Sound region. The Washington Environmental Council was asked to encourage their members to submit their comments in writing if they were unable to attend the June 27th hearing in Lacey.

3: Hold an Additional Hearing Before SIP Adoption

Ecology should hold a second public hearing after the rule is finalized but before the SIP is submitted to EPA.

Precautionary Group
Request that an additional Public Hearing be held on the final rule to be adopted into the SIP following changes that may result from the public comment period.

Patty Martin
I'm going to publically request, right now, that before those rules, any changes to those rules are even considered for adoption to the SIP that there's a second public hearing. Because the citizens of this great state of Washington deserve to know exactly what would become federally enforceable.

Danna Dal Porto
I am requesting another Public Hearing on the "final" rule as adopted following these comments.

Methow Valley Citizens' Council
We request that an additional Public Hearing be held on the final rule to be adopted into the SIP following changes that may result from the public comment period. This is particularly important to our organization because it appears that the general populace in Eastern Washington has not been as aware of this process and these changes as we should have been to date. As you know, the eastern part of our state is often further removed from the legislative process than the communities on the Western side of the mountains.

Response:
Often the rule adoption hearing and the SIP hearing occur separately. Due to the intertwined nature of this proposal, we held the public comment periods at the same time and the public hearings were consecutive. The purpose of the second public hearing was to focus on the specific portions of the proposed rule – WAC 173-400-020 and 173-400-030(3) – that were being considered for submittal to EPA for inclusion in the SIP

Ecology is not including these specific provisions in the final rule. As a result, we will not be submitting a request to EPA to revise the SIP at this time.

There will be another SIP hearing on the remainder of the rule prior to its submittal to EPA for approval as an amendment to the SIP.

4: Pre-Notice Inquiry was Insufficient

The CR-101 did not specifically mention that Ecology intended to modify the definition of air contaminants. This change is significant enough to merit specific reference at that point to facilitate adequate public involvement.

Washington Environmental Council
We also have a concern with the pre-notice inquiry that was distributed in May on this proposed rule change. We believe that the pre-notice inquiry was insufficient and inadequate, and providing adequate information to the public about the content of the rules change as well as the content of the submittal to EPA. The public inquiry notice focused on new source review for the state implementation plan and it did not include the fact that there would be a change to the definition of air contaminants. And therefore, we have significant concern that the public is not adequately informed about what's going on tonight and as part of this process.

… I thought it was interesting earlier to hear that industry became actively involved in this process two months ago, which is right about the time that the pre-notice inquiry was probably being developed, and when the pre-notice inquiry for this rule proposal came out, it did not include the fact that there would be a change to the definition of air contaminants. That strikes me as slightly irregular, however I will move on.

Response:
Thank you for your comments. The CR-101 notification was filed with the Office of the Code Reviser on January 11, 2012, after an extensive review and justification process within Ecology. On May 22, 2012, the CR-102 was filed with the Office of the Code Reviser. The CR-102 included the following language in Attachment A:

Purpose of the proposal and its anticipated effects, including any changes in existing rules:
The purpose of this rule proposal is to:

- *Make the rule consistent with requirements in the Federal Clean Air Act.*
- *Support Ecology's request for EPA approval of SIP revisions.*
- *Clarify that the SIP applies to the six air contaminants for which EPA has established National Ambient Air Quality Standards (NAAQS), their pre-cursors, and those air contaminants regulated under Part C Title I of the Federal Clean Air Act.*
- *Amend the rule sections related to permits for industrial and commercial sources of air pollution including minor new source review and major new source review (Prevention of Significant Deterioration).*
- *Help emitters comply with the rule through better access to references, improved readability, and better understanding of regulations and permitting requirements.*

Ecology is proposing the rule amendments to assure that it is consistent with federal requirements. These rules would then be adopted into the State Implementation Plan (SIP) so that Washington can gain SIP approval for its new source review and prevention of significant deterioration permitting programs. Gaining SIP approval of these programs helps ensure the state is aligned and consistent with federal law while attaining and maintaining good air quality and protecting citizen's health.

5: Reissue Rule Making with Full Disclosure on Impacts

Patty Martin
"The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed … to assure that the public interest will be fully protected." 42.56.030

Ecology is deceiving the public as to the intent of this rulemaking. I am requesting that the rulemaking under review be reissued with full disclosure of its affects on air quality, including that WAC 173-460 is being proposed for removal and identifying the changes in WAC 173-400 as they affect the version federally enforceable under the SIP.

Citizens should not have to become clean air experts in order to understand what the state is proposing in their rulemaking that will affect their health.

Response:
Thank you for your comments and for expressing your concerns. Ecology has clearly stated its intent throughout this rule making process, including in the public filing of documents with the Office of the Code Reviser. We have adhered to all requirements of the state Administrative Procedures Act.

6: Rule-Making Suspension

Methow Valley Citizens' Council
It is not clear to us that the timing of these proposed rule changes is actually required by exemption criterion 3 (a) of the Governor's moratorium on rulemaking ("required by federal or state law or required to maintain federally delegated or authorized programs") as implied in Director Sturtevant's statement. Clarification on this point would be appreciated.

Director Sturtevant's assertion that "The regulated community supports this rule making because it will result in a streamlined permitting process" may be true, but it neglects to consider the fact that many people other than the affected businesses and/or industries are stakeholders in the important aspects of the Prevention of Significant Deterioration program. The "streamlining" of a permitting process may be to the benefit of those requiring a permit, but this does not

necessarily mean that it should be done - nor that it is actually mandated by the Governor's moratorium criterion 3 (a).

Response:

Thank you for your comments. Criterion 3(a) allows rule making to proceed if it is required by federal or state law or required to maintain federally delegated or authorized programs. EPA has identified specific sections of the rule which must be revised so that they can be approved as part of Washington's State Implementation Plan (SIP) for addressing air contaminants.

7: Timing of SIP Update

Methow Valley Citizens' Council
We support Washington's Clean Air laws remaining under the State Implementation Plan. There should be no time period during which our state's laws are in force without approval of the EPA of these rules as a part of the SIP.

Response:
Thank you for your comment. State rules are currently included in the State Implementation Plan. When state rules are updated they are submitted to EPA as part of a formal process for EPA to decide whether to include the updated rules into the SIP. State rules and laws remain in effect while EPA conducts the formal process of updating the SIP.

Priorities

8: Ecology's Mission

Many commenters pointed out that it is Ecology's mission to protect the environment. Key areas of concern include but are not limited to: climate change, greenhouse gas emissions, toxic air pollutants, biomass combustion, emergency generators, datacenters, sustainability, and associated health impacts including asthma and cancer. Comments included:

- *Ecology is failing to adequately live up to that duty which undermines the public's trust in the agency.*
- *The taxpayers take climate change seriously and expect the agency to resist industrial influence and expediently adopt the strongest possible environmental standards.*
- *Tough economic times are not a valid reason to roll back environmental protections that will save money in the long-term.*
- *People should be valued more than corporate profits and policy should be science based.*
- *Everyone will experience the negative impacts of inaction, especially future generations.*
- *Part of what makes Washington an attractive place to live and work is our clean air and proactive efforts on environmental protection.*
- *Washington needs to take a leading role in greenhouse gas reductions. It is not acceptable to sit back and wait for other organizations to act. Individual citizens and*

small businesses are taking action on the issue, so large industrial sources should be required to do their share.

Conservation Organizations

EPA has found that six greenhouse gases, including carbon dioxide, nitrous oxide, and methane, "endanger public health and the public welfare of current and future generations." Concentrations of greenhouse gases are increasing in the Earth's atmosphere at a rate far faster than in pre-industrial history, trapping solar energy that would otherwise be radiated back into space. This anthropogenic phenomenon is having and will have profound impacts on the health and welfare of people worldwide through increased global temperatures, more extreme weather events, severe flooding and droughts, the spread of infectious diseases, and increases in some dangerous criteria pollutants such as ozone. The University of Washington's Climate Impacts Group ("CIG") has confirmed these predictions and has outlined the expected effects for our region. The CIG determined that the temperature in the Pacific Northwest has increased by 1.5°F since 1920. Based on models developed by the Intergovernmental Panel on Climate Change ("IPCC"), the Climate Impacts Group projects an additional average increase in temperature of 2.0°F by the 2020s, 3.2°F by the 2040s, and 5.3°F by the 2080s.

The CIG warns that severe environmental impacts will likely result from the projected changes to the temperature and climate in Washington State. For example:

- Climate change in Washington will likely lead to significantly more heat- and air pollution-related deaths throughout this century; ozone pollution, a significant health threat, will be made worse by climate change.
- The more moderate projections for sea level rise for 2100 are 2 inches to 13 inches (depending on location) in Washington State and other projections are as high as 35 inches to 50 inches for 2100.
- April 1 snowpack is projected to decrease by 28% across the state by the 2020s, 40% by the 2040s, and 59% by the 2080s. As a result, seasonal streamflow timing will likely shift significantly in some watersheds.
- The Yakima basin reservoir system will likely be less able to accommodate all water users, especially junior users because. In turn, due to lack of or severe reductions in irrigation water, the average production of apples and cherries could decline by approximately $23 million (about 5%) in the 2020s and by $70 million (about 16%) in the 2080s.
- Rising stream temperatures will reduce the quality and extent of freshwater salmon habitat.
- Due to increased summer temperatures and decreased summer precipitation, the area burned by fire regionally is projected to double by the 2040s and triple by the 2080s.
- [R]egional climate model simulations generally predict increases in extreme high precipitation storm events over the next 50 years, particularly around Puget Sound.

News reports over the last year have repeatedly warned of increasing ocean acidification and the immediate negative environmental and economic impacts on Washington's aquatic species, including shellfish, which in turn has spawned a Governor's blue ribbon panel on the issue.

Consistent with these findings, state and federal leaders have recognized that continued emission of greenhouse gases significantly threatens state and national interests. For example, in 2008, the Washington State Legislature enacted a law requiring the State to "limit emissions of greenhouse gases" to 1990 levels by 2020, 25 percent below 1990 levels by 2035, and 50 percent below 1990 levels by 2050. RCW 70.235.020(1)(a). The following year, in 2009, Washington Governor Christine Gregoire issued an executive order confirming that "greenhouse gases are air contaminants within the meaning of the state's Clean Air Act and pose a serious threat to the health and welfare of Washington's citizens and the quality of the environment . . . ." That same year, EPA issued an "endangerment finding" for greenhouse gases, in which it proclaimed that "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." EPA has followed that endangerment finding with a series of rules concerning mobile source emissions, monitoring, and limits for new and modified sources of emissions of a certain size—findings and rules that recently survived an industry challenge with the court reaffirming that greenhouse gases are pollutants subject to regulation under various provisions of the Clean Air. EPA has also approved at least one other state SIP that includes provisions for addressing greenhouse gas emissions.

Against this backdrop, Washington, through the Department of Ecology, now proposes to strip important provisions from its SIP that require the regulation and control of greenhouse gas air contaminants. Washington's proposed action is contrary to law and sound public health and environmental policy.

Michael Ruby
The problems with the oil refineries, in saying that they're just a small percentage, that's certainly true. The, really the significant additions to carbon dioxide in the world, in the coming years, are going to come from China, not from Bellingham, but you have, each one has to do their own.

I just recently returned from a mission in China, organized by the State Council for Foreign Expert Affairs, which they got a whole bunch of us together to come over to China and talk to them about, the program was called Low Carbon Industries, and work with them on trying to reduce their carbon emissions. We met at the end with members of the State Council, which is China's equivalent of our cabinet, and I would like to tell you that they are extremely serious about reducing their greenhouse gas emissions; very serious. And the people we met with, the technocrats at the highest levels in the Chinese government, are extremely knowledgeable, and very serious, and very determined.

So I think it would be frankly embarrassing for Washington to say that they're not prepared to do what China is setting out to do. They're proposing a carbon cap, a coal cap, they're actually gonna put a cap on how much coal they will burn in China. They have adopted and are prepared to implement cap and trade in China. We can't do less. So we really need to be honest about the effects of this on greenhouse gas. We need to be honest about the effects of this on toxic air pollutants. And we need to say that very clearly for the public, and we need to say very clearly in any submission what exactly we're doing and what we're not doing.

Nicole Keenan

I want to just talk about what it means to actually live in air pollution. Living in New Jersey, growing up there, far more people have and had asthma, at least in my experience, than kids that I saw in Washington. Before I even started doing any of this work, I'm actually a social worker, worked with many kids and, in Washington far fewer kids that I worked with had asthma, except for in the neighborhood that I live in. So, Georgetown is actually in a study right now to see how much higher the asthma rate is in Georgetown and Soto than in other parts of the state. Most of that's probably because of moving emissions like diesel, things like that, but I do live near a lot of industry, and I just want to enforce, and talk to Department of Ecology about why it's so important for our lives and our health and for the future of children to have clean air and to push the standard beyond.

So instead of going back to whatever federal standards are, I agree with what you were saying, that we need as a state to actually stick to being leaders in our clean air and our green energy economies. And I know Department of Ecology wants to take us there, and so I hope that every rule change that you make - a, I will understand it in the future, and b - that it actually gets us closer to a clean energy economy and closer to a place where it will continue to be a clean air state where people will get off the plane in Washington and say 'I can breathe cleaner here,' which is what I usually say and hopefully will continue to as I grow old here, hopefully.

Patty Martin
I do not support any of the recommended changes proposed by Ecology because I have ceased to trust them with my health or the health of our air quality.

Response:
Thank you for your comments and for expressing your concerns. We welcome and share your passion for improving and maintaining the quality of Washington's air. We want to stress, however, that Ecology's proposed rule language would not have changed the state's authority or laws that deal with air pollution and air contaminants involved in climate change.

Under the federal Clean Air Act, EPA has developed national ambient air quality standards for six "criteria pollutants" – carbon monoxide, nitrogen oxides, sulfur dioxides, particulate matter, lead, and ozone. EPA has not identified ambient air quality standards for greenhouse gases. Therefore, the SIP does not regulate greenhouse gases. However, greenhouse gases are regulated under numerous other provisions of the Clean Air Act (as some of the commentators note) and greenhouse gases can also be regulated under Washington state law. The proposed rules do not alter these important existing authorities.

Ecology is not including the specific provisions that form the basis for your concerns in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time.

Economics

9: Addressing Climate Change is the Most Cost Effective Long-Term Solution

Ecology received comments that addressing climate change is the most cost effective long-term solution. Comments included:

- *Failing to regulate greenhouse gases is economically short sighted. The long-term environmental and health costs of inaction will substantially exceed the short-to-mid-term costs of emissions reductions. Corporate profits, including oil companies' profits, continue to set records, so it is incorrect to argue that regulation is hurting the economy.*
- *We are already seeing economic impacts from greenhouse gas emissions. Climate change is already increasing costs related to storm damage, drought, wildfire, and many other natural disasters that are amplified by our emissions. Ocean acidification is already causing Washington oyster growers to move out of state.*
- *The government should establish a price on greenhouse gas emissions to more accurately reflect the externalities of climate change.*
- *Legal costs to fight the federal court case or defend this rule making from inevitable appeal wastes taxpayer dollars that could be spent implementing RACT.*

Response:

Thank you for your comments and for expressing your concerns. We welcome and share your passion for minimizing the impacts of climate change on Washington. However, we need to be clear that the proposed rule change would not have limited Ecology's ability to regulate greenhouse gas emissions. We still recognize that greenhouse gases are air pollutants that justify regulation. Provisions of the rule already require new source review for new sources and modifications to existing sources of greenhouse gases.

Ecology is not including the specific provisions that form the basis for your concerns in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time.

Washington is a national leader in responding to the challenges of climate change. We have taken, and will continue to take, strong actions to curb greenhouse gas emissions. Here are some of them:

- Last year Gov. Chris Gregoire signed landmark legislation to end the burning of coal for power generation in Washington. Shutting down coal burning at the TransAlta power plant – the state's largest single source of greenhouse gas emissions – is a huge victory in the fight against climate change. And it's a model for other states and the federal government to follow.
- Washington was the first state to adopt standards for underground injection of carbon dioxide. Right now, we're tracking a pilot project in Eastern Washington that is testing the feasibility of permanently storing carbon dioxide underground.
- We were among the early adopters of more protective standards for greenhouse gas emissions from motor vehicles.
- We established an emission performance standard for new or expanded power plants, which limit the plants' emissions of greenhouse gases.
- We established requirements that new and expanded fossil fuel fired power plants mitigate a portion of their carbon dioxide emissions

- Ecology led the creation of a comprehensive response strategy to guide work by state agencies, local governments, businesses, and individuals to address the impacts of climate change.
- We've set requirements for greenhouse gas emitters to track and report their emissions. It's an important tool to help us understand the state's emissions profile, so we can work toward solutions for reducing those emissions.
- And the state has been a party to numerous successful lawsuits urging EPA to use its Clean Air Act authority to address greenhouse gases.

Implementation Resources

10: Resources Needed to Implement the SIP

Michael Ruby
Further, I would argue that if Ecology needs to revise the SIP to ensure compliance with the U.S. Clean Air Act, it should be directing its attention instead to Section 110(2)(E), which requires that the SIP provide necessary assurance that Ecology and the Washington local agencies have adequate resources to carry out the implementation plan. It has been my experience that the reductions in Ecology and local agency budgets over the past few years has resulted in a contraction of agency activities and a reduction in salary levels such that regulatory and permit activities and enforcement actions are endangered and the hiring and retention of competent staff is increasingly difficult.

Response:
Thank you for your comment. The commenter raises an important point for the next Infrastructure SIP submittal to ensure compliance with the federal Clean Air Act. Ecology intends to address the work load adequacy issue as part of the next SIP submittal package.

020 – Applicability and 030(3) Definitions

Definition of Air Contaminant

Ecology received comments opposing the proposed change to the definition of air contaminant and comments supporting the proposed change.

11: Keep Current Definition

Ecology received nearly 3,000 comments from the public and non-governmental organizations requesting that the agency not change the definition of air contaminant to exclude greenhouse gases or other air pollutants. Commenters want Ecology to use every tool available to regulate air pollution and are upset that the agency would willingly limit its authority. Commenters state that the proposed change could also cause long-term unintended weakening of air quality

regulation in Washington. Many commenters express that the change is not only bad policy, but illegal under state and federal law.

Climate Solutions
Reconsider Proposed Rule Modifying Chapter 173-400 WAC and the Washington SIP

I am writing to ask the Department of Ecology to step up to protect our future and health from air pollution and climate change.

I was very disappointed to learn that the Department of Ecology has proposed dismantling a very important tool for protecting the state's climate under the federal Clean Air Act.

Right now, our state has a federally-enforceable duty to put limits on ALL air contaminants, including greenhouse gases.

Why would our state voluntarily give up its duty to address greenhouse gas emissions and protect our climate?

Your proposal could leave stationary sources of air contaminants, such as oil refineries and cement kilns, free to emit unlimited amounts of greenhouse gases and other contaminants into our air. Allowing uncontrolled emissions of greenhouse gases from these sources will contribute to more extreme weather events, an increase in the occurrence of forest fires, diminished agricultural activity, a rising sea level, diminished snowpack, less water for human and commercial uses, a devastated shellfish industry, and reduced hydroelectric power generation.

This isn't the future I want for our state. Washington has been a national leader in the effort to protect our climate, but this action would put us to the back of the pack.

I am asking the Department of Ecology to reconsider its requested change and start making real progress on protecting our climate and meeting the State's climate pollution limits.

Sierra Club
It's time for clean energy solutions

I was dismayed to learn that the Department of Ecology has proposed to weaken the Washington State Implementation Plan (SIP) by limiting it to only a handful of pollutants that the state is required to regulate under federal law. I cannot believe that Ecology, which is tasked with protecting Washington's environment, would voluntarily relinquish its ability to regulate greenhouse gases under SIP. The current SIP provisions are an important tool for addressing greenhouse gas emissions and protecting our climate.

Your proposal is unacceptable because it would leave stationary sources of air contaminants, such as oil refineries, cement kilns, and power plants, free to emit unlimited amounts of greenhouse gasses and other air contaminants that would no longer be subject to federally-enforceable controls under the SIP. I am also concerned that your proposed rule change would

constitute unlawful "backsliding" in violation of Section 110(1) of the federal Clean Air Act (CAA).

Washington State claims to be a leader in the effort to protect our climate, yet so far the State has taken a few concrete actions to limit greenhouse gas emissions. Now is the time for Ecology to live up to its promises, roll up its sleeves, and use the available tools, such as the provisions of the SIP, to start making real progress towards protecting our climate and meeting the State's greenhouse gas emissions reductions goals.

Sierra Club North Olympic Group
Re: Proposed changes to Washington's Clean Air Regulations

Re: Proposed changes to Washington's Clean Air Regulations - Proposed changes to Chapter 173-400 WAC and proposal to submit portions of the rule proposal, (WAC 173-400-020 and 173-400-030(3)) to EPA for inclusion in the SIP.

Please include these comments from me on the subject proposals:

1. Do not remove from federal enforceability -- including citizens' rights to a citizen suit, the more than 150 carcinogenic Toxic Air Pollutants (Class A TAPs) and over 400 non-carcinogenic Toxic Air Pollutants (Class B TAPs) regulated under the state clean air program (WAC 173-460). With federal enforceability, the citizens retain some control over Ecology through EPA oversight and enforcement. We do not want to lose this! I want the State's clean air regulations (WAC 173-460) to remain under the SIP.

2. I oppose weakening the definition of BACT.

3. I oppose all changes to WAC 173-400 that in any way would result in making our state laws' regulations less stringent.

4. I oppose granting Ecology authority to manage the Prevention of Significant Deterioration (PSD) program.

Conservation Organizations
The Conservation Organizations strongly oppose certain changes to Chapter 173-400 and the State Implementation Plan ("SIP") proposed by the Washington Department of Ecology ("Ecology"). Specifically, the Conservation Organizations oppose Ecology's efforts to amend the definition of "air contaminant" in WAC 173-400-030(3) and to amend the applicability of the SIP provisions as provided in WAC 173-400-020, and also oppose Ecology's proposal to submit this rule change to the U.S. Environmental Protection Agency as a proposed SIP amendment. The Conservation Organizations are concerned that these proposals, if finalized and approved, would unnecessarily limit the ability of Ecology to control emissions of greenhouse gases and other pollutants under the SIP, and limit the ability of the public to ensure that such air contaminants are adequately regulated in Washington State.

The Conservation Organizations request that Ecology withdraw the proposed revisions to WAC 173-400-030(3) and WAC 173-400-020 and the proposal to submit these revisions to EPA as a SIP amendment because the proposals are inconsistent with the law, science, and sound public policy…

The State of Washington is fortunate to have SIP provisions that allow Ecology, its citizens, and its advocacy organizations to lead the way in addressing one of the most significant problems of our time—greenhouse gas pollution and climate change. Ecology's proposal to relinquish this powerful federally-enforceable SIP tool is based on questionable legal grounds, is unsupported by scientific reasoning, and is unsound public policy. The Conservation Organizations urge Ecology to withdraw its proposal to amend the definition of "air contaminants" in WAC 173-400-030(3) and the applicability provisions in WAC 173-400-020, and to abandon its effort to obtain EPA approval to limit the definition of "air contaminants" in the SIP.

Michael Ruby
I am writing to oppose the adoption of the proposed revision to WAC 173-400-020 and -030 and the submission of a request to revise the Washington State Implementation Plan (SIP) to include these two sections of the revised WAC. I suggest that there are several problems with the proposals as they are currently written.

The primary purpose of the revisions that are to be submitted to the Environmental Protection Agency (EPA) at this time appear to be to remove federal supervision of state actions except with respect to narrow aspects the U.S. Clean Air Act. Unfortunately the revisions would have greater and undesirable effects.

As written, the proposed revision would limit the application of state regulations that have been approved for inclusion in the federally-enforceable State Implementation Plan to only those pollutants (and their precursors) for which a National Ambient Air Quality Standard has been promulgated and the adopted provisions for visibility protection and prevention of significant deterioration of air quality, which might include other pollutants with specific requirements.

Although it is quite correct that EPA has sought to limit the federally-enforceable provisions of state and local regulations to those subjects that are directly within the purview of the Clean Air Act it is incorrect that the limits are as tight as is being proposed by Ecology. Ecology did not need to go this far to meet the EPA SIP guidance.

The EPA has, for example, excluded from inclusion within the SIP WAC 173-400 (4) "Odors", as this has been determined to not be an issue for federal enforcement. However, EPA has accepted and included WAC 173-400 (5) "Emissions detrimental to persons or property", the general nuisance provisions, as it can be used to enforce situations of federal concern that might be difficult to approach with the specific rules. These changes would severely limit the opportunities for enforcement of this "catch all" provision in addressing any other than the most common, and generally well-regulated, pollution issues.

It is important to note that in several portions of Section 110 of the Federal Clean Air Act it is made clear that the SIP may include not only provisions for the attainment and maintenance of

the ambient air quality standards and prevention of significant deterioration but also “any other applicable requirement of this chapter” (and other, similar wording). In fact, in some provisions it is made clear that a state may include provisions, such as indirect source review, that the federal government cannot propose in a federally-developed and imposed SIP.

Although the U.S. Supreme Court has ruled that greenhouse gases are pollutants within the scope of the U.S. Clean Air Act, it has been the considered policy of the EPA to proceed to address this issue through other means than ambient air quality standards. Action to address these pollutants by all other means by both state and federal agencies is imperative. These proposed revisions would mean that there would be no federal enforcement of possible state regulations of greenhouse gases from any sources other than those for which a New Source Performance Standard has been promulgated. The ability to enforce these provisions in federal court will be essential to successful implementation of such regulations. The proposed changes are thus potentially harmful to the mission of Ecology to protect the health and welfare of Washington residents.

Therefore I am suggesting that the proposed revised language in -020 and -030 not be adopted by Ecology and not be submitted to EPA for inclusion in the SIP.

Washington Environmental Council
So that's what this change would do. And not only would it do it for these oil refineries, it would remove this tool from the SIP forever. Or until it is re-implemented into the SIP. Now as you all saw, the last time that the SIP was changed and adopted was in 1995; that's 17 years ago. How many governors have we had in the past 17 years? How many directors of the Department of Ecology have we had in the past 17 years? How many might we have going forward? To eliminate this tool, which is an effective tool for citizens to become engaged in this process, for citizens to say, "Hey, wait a minute. Industry is not doing what they should do. Department of Ecology, it's your obligation to make sure that industry is adhering to the law and protecting our environment." This tool will be gone forever, so when you ask what the effect would be, that's what the effect would be.

Response:
Ecology is not including the specific provisions that form the basis for your concerns in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time

The definition of “air contaminant” is contained in statute, RCW 70.94.030(1). This definition is broad enough to include greenhouse gases. Ecology’s proposal does not alter this broad state law definition of air contaminant

Some commentators suggest that this proposal would have scaled back federal enforceability of State Implementation Plan provisions. That is incorrect. Since its original State Implementation Plan submittal in 1972, Ecology has always interpreted its plan as applying only to criteria pollutants and their precursors. The proposed rule language would have simply clarified this long-standing interpretation of the State’s plan.

It is important to note that this interpretation is consistent with decades of EPA interpretation of section 110 of the Clean Air Act, which governs State Implementation Plans. As early as 1979, EPA stated in an interpretive memo that "measures to control non-criteria pollutants [like greenhouse gases] may not legally be made part of a SIP." Memorandum from Michael A. James to Regional Counsels, Feb. 9, 1979. Over the years, EPA has repeatedly and consistently rejected States' attempts to include regulations in their State Implementation Plans that apply to non-criteria pollutants. When EPA last approved Washington's State Implementation Plan in 1995, EPA stated that broadly worded regulations would be federally enforceable only with respect to criteria pollutants once approved in to the plan. 60 Fed. Reg. 9802, 9808 (Feb. 22, 1995). And again in 1997, EPA stated that it was taking no action on a number of provisions proposed for Washington's plan "as these provisions are not related to the criteria pollutants regulated under the SIP." 62 Fed. Reg. 8624, 8625 (Feb. 26, 1997). Finally, in 2011, in proposing to take action on Washington's SIP, EPA again cited its long-standing interpretation in concluding that "measures to control non-criteria pollutants may not legally be made part of a SIP." 76 Fed. Reg. 16,365.

12: Support the New Definition

The SIP has always been intended to only address NAAQS issues. This change makes it clear that remains true and is necessary to avoid the unintended consequences of regulating greenhouse gas emissions through the SIP. It is bad policy to let a court case determine how Washington regulates greenhouse gases. We support the new definition of air contaminant.

The Boeing Company
Boeing strongly supports Ecology's proposed limitation of program applicability (for purposes of the State Implementation Plan) to the traditional criteria and, solely for the purposes of PSD, to the non-NAAQS PSD pollutants. While we continue to advocate for effective reductions in society's environmental footprint, we do not believe the state implementation plan is an appropriate vehicle for that effort with respect to greenhouse gases.

A reinterpretation and expansion of existing regulatory requirements to cover substances such as greenhouse gases (GHG), driven by *Washington Environmental Council v. Sturdevant*, represents a poor and likely counterproductive approach to reducing greenhouse gas (GHG) emissions. By forcing GHG emitting sources into regulatory programs that were not designed for that purpose, we risk retarding business growth, discouraging improved technology and deemphasizing broader societal behavior as the most effective path to stabilizing global atmospheric concentrations of GHG.

By clearly stating that pollutants unrelated to the established National Ambient Air Quality Standards (NAAQS) are not regulated under the State Implementation Plan (SIP) (except to the extent necessary to implement the Prevention of Significant Deterioration (PSD) permitting program), we do not limit Ecology's ability to pursue GHG emission reductions. We instead

allow Washington to refocus our GHG control strategies without reliance on tools designed, and best used, for a different purpose.

TransAlta
TransAlta supports the changes that Ecology is proposing to the definition of "air contaminant" at WAC 173-400-030(3)(b) and believes that this change should be adopted as proposed.

NWPPA
In general, NWPPA supports the proposed rule revisions presented in WAC 173-400-020 (Applicability) and WAC 173-400-030 (Definitions).

NWPPA further supports the proposed revisions to clarify that the State Implementation Plan (SIP) applies only to the six contaminants for which EPA has established National Ambient Air Quality Standards (NAAQS), and their precursors. We believe Ecology's proposed limitation of SIP applicability to traditional criteria is appropriate and do not believe the SIP is an appropriate mechanism for this effort with respect to greenhouse gasses (GHGs), as other mechanisms may be more appropriate for GHG reduction.

Weyerhaeuser
Weyerhaeuser supports proposed revisions to clarify that the State Implementation Plan applies to the six contaminants for which EPA has established National Ambient Air Quality Standards, and their precursors. These rule revisions are presented in WAC 173-400-020 Applicability and WAC 173-400-030 Definitions.

Boise Cascade
BCWP supports the proposed revisions to the definition of "air contaminant" in WAC 173-400-030 to clarify that the State Implementation Plan applies only to the contaminants, or their precursors, for which EPA has established NAAQS.

Association of Washington Business
AWB supports Ecology's proposed revisions to the definition of air contaminant in WAC 173-400-030. The proposed changes will help clarify the scope of the State Implementation Plan (SIP), focusing SIP requirements on measures needed to attain and maintain the National Ambient Air Quality Standards. This change is necessary to avoid the unintended consequences for the broader business community of regulating greenhouse gas emissions through the SIP.

Western States Petroleum Association
WSPA strongly supports Ecology's broad objectives underlying these amendments: to update Washington's major new source review programs to meet Clean Air Act requirements for State Implementation Plan ("SIP") approval and to limit the scope of the Washington SIP to achieving and maintaining the National Ambient Air Quality Standards (NAAQS) and implementing the PSD program.

WSPA supports Ecology's proposal to narrow the scope of the air contaminants regulated by the SIP to NAAQS pollutants, their precursors, and PSD pollutants for purposes of implementing the PSD program, and to submit the revised definition of "air contaminant" in WAC 173-400-030(3)

for incorporation into the SIP. Over the last forty years, Ecology and EPA have shaped the Washington SIP to achieve these statutory goals, and excluded provisions that are not related to NAAQS attainment. EPA has, over the years, taken affirmative action to exclude from the SIP regulations such as the odor standard in WAC 173-400-040 and the aluminum smelter fluoride emission standards in WAC ch. 173-415, that were not part of Washington's NAAQS attainment strategy. The sole effect of the revised definition of "air contaminant" in the Proposed Amendments will be to limit the scope of the SIP to the regulatory objectives that Ecology and EPA have pursued since 1970.

WSPA fully supports Ecology's authority to address other air quality issues through state or local regulation. The SIP, however, should be devoted to the purposes outlined by Congress in Section 110 of the Clean Air Act. The Proposed Amendments' revisions to the definition of "air contaminant" in WAC 173-400-030(3) should be adopted and submitted to EPA for SIP approval to achieve this result.

BP Cherry Point Refinery
There's a disconnect between federal rules that are in place and the state SIP, and it needs to be corrected. And there is more evidence beyond just the letter that's cited by Stu Clark as the EPA's position, that the purpose of the SIP is to address the NAAQS issues. It is to address the NAAQS. The rule change tonight doesn't change what the state's authority has. But what it does do is it brings into focus the alignment that's needed so that the EPA can approve the state SIP. So we do support the rule; it is long standing in EPA's comments on other state SIPS on other permits that they are there to protect the healthy standards which are the NAAQS, and so we support the fact that Ecology is going in this direction.

US Oil
I fully support the language changes that the DOE is proposing for the state of Washington SIP. DOE is attempting to clarify the wording in the SIP to meet its original intent of bringing Washington into compliance with the federal National Ambient Air Quality Standards (NAAQS). I believe that this clarification is being proposed at least partially in response to the suit brought against the DOE by the Washington Environmental Council (WEC). The end result of this suit, if it is successful, will require the DOE to begin regulating green house gas (GHG) emissions in the state of Washington, and in fact targets a specific industry. This is clearly not the intent of the SIP and has the net effect of WEC establishing the environmental regulations in the state of Washington, not the legislative branch and DOE as the state constitution intends. I support the DOE's proposed wording changes which will eliminate this possibility in the future.

Environmental regulations and the economic impacts of such regulations should be dictated by the state legislature and the DOE as our constitution dictates. Failure to implement this language change will allow any other entity (WEC) to effectively dictate policy. This is not right! Please correct it by the proposed changes to the SIP!

Response:
Thank you for your comments. The purpose of this proposed change was to clarify that the SIP applies to the six air contaminants for which EPA has established National Ambient Air Quality

Standards (NAAQS), their precursors, and those air contaminants regulated under Part C Title I of the Federal Clean Air Act (i.e., the air pollutants regulated under the prevention of significant deterioration (PSD) program, solely for the purposes of the PSD permitting program.

However Ecology is not including these specific provisions in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time.

13: Toxic Air Pollutants

Commenters are concerned about air pollution and the associated health impacts including asthma and cancer. They are currently experiencing significant symptoms that negatively impact everyday life. Citizens want to be protected from all air pollutants and request that Ecology implement the toughest possible standards.

Several commenters request that Toxic Air Pollutants remain a federally enforceable part of WAC 173-400. They assert that the State's Toxic Air Pollutants Program (WAC 173-460) is currently included in the SIP and this inclusion allows both EPA oversight and citizens to take contested issues before a federal court instead of only relying on a Pollution Control Hearings Board (PCHB) hearing. This is not only an additional check on Ecology, but financially preferable to citizens with limited resources as federal court costs are potentially recoverable and PCHB costs are not.

Other comments included:

- *Contrary to Ecology's position, states can adopt regulations for non-criteria pollutants under their SIP. The Clean Air Act amendments of 1990 (Senate Bill 1630, Section 112(l)), and their 1995 adoption into the SIP, supersede the 1979 EPA memorandum cited by Ecology.*
- *If Ecology intends to keep WAC 173-460 in the SIP, the rule language needs to be modified to make that clear.*
- *If Ecology weakens state rules, then Local Air Authorities can also weaken the rules in their jurisdictions.*

Precautionary Group
Rules adopted under the SIP are federally enforceable and citizens have the right to enforce those rules under the citizen suit provisions of the federal Clean Air Act (CAA). Having rules adopted into the SIP also means that the Environmental Protection Agency also enforces these rules, adding a layer of accountability that is missing from the Department of Ecology.

The rule changes proposed by Ecology claim to be re-defining the term 'air contaminant,' thereby 'clarifying' that the SIP applies only to the six criteria pollutants regulated under the National Ambient Air Quality Standards. What the agency is doing is removing from federal enforceability, including our rights to a citizen suit under the CAA, over 150 carcinogenic Toxic Air Pollutants (Class A TAPs) and more than 400 non-carcinogenic Toxic Air Pollutants (Class B TAPs) regulated under the State clean air program (WAC 173-460). Removing these

protections under the SIP engenders yet more politically-driven decisions by Ecology, with fewer protections implemented by law.

Ecology is in violation of the CAA by permitting stationary sources under rules that have not been adopted into the SIP. The CAA specifically prohibits this kind of behavior. If the SIP is revised by removing the more stringent State rules, then local air authorities have the prerogative to apply equally less stringent rules to match those of the State. It is essential that we retain our right to clean air and to the citizen suit provisions afforded under the CAA.

As involved and concerned citizens, we:

a) Oppose limiting the SIP to the six criteria pollutants and their precursors;
b) Want the State's clean air regulations (WAC 173-460) to remain under the SIP as adopted in 1995;
c) Want the extra oversight, enforcement and citizen suit provisions with WAC 173-460 under the SIP;
d) Oppose all changes to WAC 173-400 that are not more stringent or required by federal law;

Patty Martin
As I mentioned during testimony at the Public Hearing the amendments to WAC 173-400 are intended to remove WAC 173-460 from the SIP. The “clarification” that the SIP applies only to criteria pollutants, and the re-defining of “air contaminant” to limit its applicability to criteria pollutants (173-400-030(3)(b)(i) are specifically intended to remove WAC 173-460 from the SIP.

States have the prerogative to adopt their state air programs under Section 112(l) as provided under the authority of the Clean Air Act Amendments of 1990. (Pub. L. 101–549)

WAC 173-460 was approved into the SIP under Section 112(l) on February 22, 1995 for preconstruction review programs to issue federally enforceable permits. 60 FR 6807 Because WAC 173-400-110 implements the requirements of WAC 173-460, the WAC 173-460’s are necessarily a part of the SIP.

The clarification, re-definition and the comments attached to the annotated version of the rule amendments (Appendix A: Rationale for Rule Amendments, Comment [LJW3]) make it clear that the rules are intended to remove the federal enforceability of WAC 173-460. In doing so, the state removes a citizen’s right under the CAA to federally enforce the SIP through a citizen suit. 42 USC 7604(f)(4)

I object to the amendments to WAC 173-400-030(3)(b)(i) to redefine “air contaminant” and to relegate the SIP to criteria pollutants.

While WAC 173-460 is still a part of the SIP, the State of Washington is prohibited from implementing the changes to it that occurred in 2009 and the state is currently in violation of the CAA. 42 USC 7410(i); 42 USC 7604(f)(4); 42 USC 7416(2) I believe that is the motivating factor for the rule change.

Likewise, the WAC 173-400 regulations adopted under the SIP in 1995 are still federally enforceable. Any permit issued since that time under the various rule changes are in violation of the CAA. 42 USC 7410(i); 42 USC 7604(f)(4); 42 USC 7416(2)

As for the rules themselves, those that are less stringent than what is currently in the SIP cannot be adopted into it, and cannot be used to permit stationary sources. 42 USC 7410(i)

The State requires BACT determinations for all sources, major and minor. The changes to WAC 173-400 separate the two, but the less stringent changes will only apply in areas without clean air authorities. Again, because the state does not distinguish between the two, it would appear as though this is a weakening of the regulations. This is supported by the need to insert language retaining an authority's right to keep the more stringent standards. WAC 173-400-110, WAC 173-400-111, WAC 173-400-112, WAC 173-400-113

The state proposes to change the definition of BACT to include the version under 50 CFR 51.165, however, that version is less stringent than the definition under RCW 70.94.030(6) and 42 USC 7479(3). Because 70.94.030(6) is more stringent and more recent, Ecology is precluded from adopting the weaker and outdated regulation found at 40 CFR 51.165.

Because the version of WAC 173-400 that is under the SIP as adopted in 1995 remains unchanged, but the version of WAC 173-400 that is being used by Ecology for this rule amendment has undergone many changes since 1995, it is unfair and inappropriate for this rulemaking to rely on the most recent amended version of WAC 173-400. A citizen has no idea how ALL the changes to WAC 173-400 that have occurred over time will impact the SIP version of WAC 173-400 unless the changes are identified and applied to the rule as it currently exists under the SIP.

As a citizen concerned about clean air I strongly urge the state to resubmit this rule for public comment identifying how the version of WAC 173-400 under the SIP will change. Ecology's lack of transparency in this rulemaking with regard to the removal of WAC 173-460 and the changes to WAC 173-400 reeks of industrial blackmail.

"(the) State will likely become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls." H. R. Rep. No. 95–294, p. 134 (1977)

It has been my contention all along that the rule changes are to facilitate industrial growth in the state without regard to air quality. The state is in violation of the CAA and no amount of regulatory manipulation is going to change that.

Ecology's regulations regarding 40 CFR 60 IIII and emergency engines are less stringent than the WAC 173-460 and -400 requirements to apply T-BACT and BACT respectively and should be removed from the rulemaking

PSD permits should include application of WAC 173-460 toxic air pollutants.

Please insert my comments from the Public Hearing regarding the SIP, including my letter to Dennis McLerran about Stu Clark's attempt to deceive the Administrator by using a 1979 EPA Memorandum to justify the removal of the state air quality program from the SIP. The Memorandum pre-dates the CAA Amendments of 1990 that specifically allows for their adoption into the SIP.

Let it also be noted for the record that this same 1979 EPA Memorandum has been circulated to other states (with large concentrations of data centers) with the damaging effect of removing the state's clean air regulations through "corrections" issued by EPA. This is a calculated manipulation of law -- to which Ecology has acquiesced -- to circumvent a state's prerogative to more stringent standards under the SIP and a citizen's right to protection under the CAA.

Patty Martin's Oral Testimony at the Public Hearing
The state has an obligation to maintain the national ambient air quality standards, and so those are the criteria pollutants they are talking about, those six pollutants. Okay, but the state also has an opportunity and has the prerogative, under federal law that was granted to them with the Clean Air Act amendments of 1990, to also adopt their state air toxics programs under 42 U.S.C. 7412(l). And the state did that. Okay, and once those regulations are adopted under the state implementation plan, they become federally enforceable. So now, for communities like Quincy, where we know that Ecology is fudging on the rules, okay, they modified the regulations that are presently under the SIP, and in violation of the Clean Air Act. There are avenues for citizens to bring suit. Okay, under Washington law, all you can do is go to the PCHB. I've got four appeals right now before the PCHB. And even some of the language that was in the original rules that said that you had an option to go the Environmental Appeals Board, for example, under some state implementation rules, has been removed over time; it probably is still federally enforceable. But that language wasn't available to me at the time that we started asking questions, and my knowledge base is only because I have spent two years, almost two years in August now, studying the Clean Air Act so that I could stand up for my community.

So, when we reduce this to six criteria pollutants and we remove those seven hundred that are regulated, it's going to have an effect on our air. And when we take away a citizen's right to sue, right, by taking away those four sixties, we deprive, we give more power to agencies that extract their power from us, right? These are the agencies that we created to serve us. And personally am not willing to give them back that, what's the word I want --Yeah, it's not even discretion.

I don't yield my sovereignty to these agencies we created. The other thing that it does is having our rules under the SIP provides an opportunity for additional enforcement. So when Ecology is not doing what they're supposed to do under the law, when they're operating under modified, impermissibly operating under modified regulations, then you can go to the EPA, and they have the same responsibility to enforce that law that Ecology does. And EPA can hold Ecology's feet to the fire, where a citizen, without that citizen's suit provision or that oversight the EPA may not be able to do that.

So hopefully that answers your question in not too long-winded way. The other advantage is, when you bring a citizen's suit those attorneys fees are recoverable. You can recoup those

attorneys' fees, and when you go to the PCHB there is none. And so we've got two years out of pocket, okay, funding something that we should be in a federal court.

… So, with regard to those comments by Stuart Clark and his reliance on the 1979 EPA memorandum, this is the letter I've written to Administrator McLerran with the EPA.

I'm in receipt of a copy of a letter from Ecology Director Stu Clark to you, dated -- and I think I promoted Stu -- to you, dated June 21, 2012 regarding his interpretation of what is federally enforceable under Washington State Implementation Plan and what effects Ecology's proposed revisions to WAC 173.400 will have on the SIP if approved by EPA. Mr. Clark claims that the suggested language does not change the scope of Ecology's regulations or the SIP in any way. This is not true. The regulations as amended will have a devastating effects on the SIP, by removing the state program regulations WAC 173.460 adopted under the authority of Section 112(l) of the Clean Air Act 42 U.S.C. 7412(l) and relegating the SIP to regulation of the six criteria pollutants. Currently Washington's SIP includes all of WAC 173.460 and with few exceptions all of the regulations under WAC 173.400. Therefore the SIP regulates many more air contaminants than just the six criteria pollutants as Mr. Clark asserts. Citing to a 1979 EPA memorandum, Mr. Clark would have you believe that there is no statutory authority for adopting, implementing, and enforcing regulations for non-criteria pollutants under the SIP. Again, SIP is the State Implementation Plan.

Contrary to Mr. Clark's assertions, states may adopt their state program regulations under the SIP for federal enforceability as allowed under the authority of the Clean Air Act amendments of 1990. And that's Senate Bill 1630, Section 112(l), and it says each state may adopt and submit to the Administrator for approval a program for the implementation and enforcement, including review of enforcement delegations, the emission standards, and other requirements for air pollutants. The state of Washington elected to do this in 1995 under the authority of Section 112(l), adopting WAC173.460 under the SIP. I've brought those federal registers for inclusion in the record.

Mr. Clark's claim that Ecology has always understood that the SIP applies only to the six criteria pollutants is obviously, therefore, in error.

Ecology has carefully calculated the language change for inclusion into the SIP to specifically remove the more stringent requirements of WAC 173.460, and to reduce the EPA's oversight and enforcement authority. This maneuvering is an after-the-fact attempt by Ecology to legitimize their violations of the Clean Air Act in the permitting of scores of locomotive sized diesel generators in Quincy without complying with the requirements of WAC 173.460 as it exists under the SIP. The state program is fully enforceable under the SIP, requires no amendments or clarifications as Ecology alleges, and would create an environmental injustice if the rules are changed as proposed.

Please do not accept Mr. Clark's misleading assurances that the proposed changes do not have an effect.

Patty Martin's Letter to Dennis McLerran

June 25, 2012

Dennis McLerran
US EPA Region 10
1200 Sixth Avenue
Seattle WA 98101

RE: Washington SIP
WAC 173-460

Dear Administrator McLerran:

I am in receipt of a copy of a letter from Ecology Director Stu Clark to you dated June 21, 2012 regarding his interpretation of what is federally enforceable under Washington's State Implementation Plan (SIP) and what effects Ecology's proposed revisions to WAC 173-400 will have on the SIP if approved by EPA.

Mr. Clark claims that the suggested "language does not change the scope of Ecology's regulations or the SIP in any way." This is not true. The regulations as amended will have devastating effects on the SIP, by removing the State Program regulations (WAC 173-460) adopted under the authority of Section 112(l) of the Clean Air Act (CAA), 42 U.S.C. §§ 7412(l), and relegating the SIP to regulation of the 6 criteria pollutants.

Currently, Washington's SIP includes all of WAC 173-460 and, with few exceptions, all of the regulations under WAC 173-400. Therefore, the SIP regulates many more air contaminants than just the 6 criteria pollutants as Mr. Clark asserts.

Citing to a 1979 EPA Memorandum, Mr. Clark would have you believe there is no statutory authority for adopting, implementing and enforcing regulations for non-criteria pollutants under the SIP. Contrary to Mr. Clark's assertion, states may adopt their state program regulations under their SIP for federal enforceability as allowed under the authority of the Clean Air Act Amendments of 1990[1]. The State of Washington elected to do this in 1995 -- under the authority of Section 112(l), 42 U.S.C. §§ 7412(l) of the Clean Air Act (CAA) -- adopting WAC 173-460 into the SIP[2].

Mr. Clark's claim that Ecology has <u>always</u> understood that the SIP applies only to the 6 criteria pollutants is obviously in error. (emphasis added)

If the language is amended as Ecology suggests, the more protective regulations will be removed and clean air protections will be undermined immediately in areas without clean air authorities, including most all of Eastern Washington where low income and minority communities are a

[1] S. 1630 Section 112(1) Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement (including a review of enforcement delegations previously granted) of emission standards and other requirements for air pollutants

[2] 60 FR 28726; 40 CFR 52.2495

higher percentage of the population. The EPA has a responsibility under Executive Order 12898 and Title VI of the Civil Rights Act of 1964 to ensure that regulations do not disproportionately impact low income or communities of color, or prejudice communities based on the national origin, race or color of their residents.

The fact that this regulation will immediately disenfranchise rural Washington State from equal protection under the CAA is an environmental injustice.

Ecology has carefully calculated the language change for inclusion into the SIP to specifically remove the more stringent requirements of WAC 173-460 and to reduce the EPA's oversight and enforcement authority. This maneuvering is an *after the fact* attempt by Ecology to legitimize their violations of the CAA in the permitting of scores of locomotive sized diesel generators in Quincy without complying with the requirements of WAC 173-460 as it exists under the SIP.

The state program is fully enforceable under the SIP, requires no amendments or clarifications as Ecology alleges, and would create an environmental injustice if the rules are changed as proposed.

Please do not accept Mr. Clark's misleading assurances that the proposed changes do not affect the SIP.

Sincerely,

Patricia Anne Martin
Former Mayor, Quincy WA
617 H St. SW
Quincy, WA 98848
(509) 787-4275

Danna Dal Porto
I oppose limiting the SIP to 6 criteria pollutants and their precursors. The nature of emissions is such that limits should never be placed on what is considered or regulated from these emission sources.

I have studied the clean air regulations and believe they should stay under the SIP as adopted in 1995. This gives the enforcement and citizen protections provided by having WAC 173-460 under the SIP. Why would those protections be removed from the public? Changing this is a terrible injustice to residents of Washington State.

North Olympic Group
Do not remove from federal enforceability -- including citizens' rights to a citizen suit, the more than 150 carcinogenic Toxic Air Pollutants (Class A TAPs) and over 400 non-carcinogenic Toxic Air Pollutants (Class B TAPs) regulated under the state clean air program (WAC 173-

460). With federal enforceability, the citizens retain some control over Ecology through EPA oversight and enforcement. We do not want to lose this! I want the State's clean air regulations (WAC 173-460) to remain under the SIP.

Michael Ruby
So I think it's necessary for Ecology to make itself very clear what its intentions are on this before -- I think language that's been proposed does need to be modified in order to make it very clear that there is no intention of Ecology, by this language, to remove the current placement of 460 into the SIP, if that is not the intention of Ecology, and they have no desire to do that.

Methow Valley Citizens' Council
WAC 173-460: Class A Toxic Air Pollutants (currently over 150 listed) and Class B Toxic Air Pollutants (currently over 400 listed) must remain under federal enforceability (WAC 173-460.) We oppose limiting the SIP to the six criteria pollutants and their precursors, as is now proposed.

Citizens' rights to a citizen suit under the Clean Air Act must remain a right of the citizens of the State of Washington and should not be infringed upon by any of these rulemaking proposals. We request that the extra oversight, enforcement, and citizen suit provisions with WAC 173-460 remain under the SIP.

We request that the State's clean air regulations (WAC 173-460) remain under the SIP as adopted in 1995; We oppose all changes to WAC 173-400 that are not more stringent or required by federal law. In other words, we oppose any weakening of our state's current laws under WAC 173-400.

Response:
Thank you for your comments. There appears to be a misunderstanding among some commentators that Chapter 173-460 WAC is part of the State Implementation Plan. Actually, Chapter 173-460 is not and has never been part of the State plan. The Federal Register notice that has been offered as proof that WAC 173-460 is part of the State Implementation Plan addresses the inclusion of regulations by the Northwest Clean Air Agency into the plan. One section of those Northwest Clean Air Agency rules addressing sulfur dioxide is numbered 460 which appears to be the basis of the misunderstanding that Chapter 173-460 WAC is included in the State Implementation Plan.

For clarity on what regulations in Washington are currently included in the State Implementation Plan, please refer to the listing of regulations and plans contained on the EPA Region 10 SIP web pages for Washington State (http://yosemite.epa.gov/r10/airpage.nsf/7594bda73086704a88256d7f00743067/28980efb90d870f988256aff0001ebd2!OpenDocument).

Requirements of the federal hazardous air pollutant program are included through our adoption and implementation of federal regulations addressing hazardous air pollutant emissions from almost all industrial (major sources) and many commercial-scale (area sources) sources of emissions.

Also, Ecology is not including the specific provisions that form the basis for your concerns in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time. This should further clarify that nothing is changing in Ecology's regulation of toxic air pollutants.

14: Section 110(1) Backsliding and Relationship to Ozone

Many commenters indicate that narrowing the definition of air contaminant would constitute unlawful "backsliding" in violation of Section 110(1) of the federal Clean Air Act (CAA) or 42 U.S.C. 7416(2).

Commenters also state greenhouse gas emissions will increase ambient temperature. Higher ambient temperature leads to increased ozone concentrations given a fixed amount of precursor emissions. Ozone is a criteria pollutant. Parts of Washington are already approaching non-attainment for ozone, so this action may interfere with NAAQS compliance. Ecology should stop using circular logic to hide the fact that real world ozone emissions will increase if greenhouse gases are not properly regulated.

Conservation Organizations

I. WASHINGTON'S PROPOSED ACTION VIOLATES THE CLEAN AIR ACT ANTIBACKSLIDING REQUIREMENTS.

A. Greenhouse Gases Are Linked to Certain Criteria Pollutants and Their Exclusion From Washington's SIP Will Interfere With Attainment Of Standards For, and Will Stymie Reasonable Further Progress On, Ozone.

Pursuant to 42 U.S.C. § 7410(l), EPA is prohibited from approving a SIP revision that would "interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of [the CAA]." As noted above, Ecology's intention and summary of its proposed action here is to narrow the application of Washington's SIP to pollutants for which EPA has developed NAAQS and their precursors. In so proposing, Washington fails to acknowledge the current science indicating a relationship between greenhouse gases, climate change, and criteria pollutants. In light of this relationship, the proposed change, if approved, would violate Section 110(l) of the CAA, which plainly provides that EPA may not approve a revision to a SIP if the revision would interfere with any applicable requirements concerning attainment and reasonable further progress on standards, or of any other applicable requirement of the CAA.

The Conservation Organizations are unaware of any analysis by Ecology and no findings regarding the potential impacts the proposed changes would have on air quality in Washington. In fact, to the extent that this proposal negates Ecology's obligation to determine RACT for greenhouse gas emissions from refineries (the Conservation Organizations dispute that it would) or other sources, the effect of this change is to diminish air quality in Washington by allowing higher levels of pollutant emissions than the current SIP allows. In addition, Ecology's proposed

action is inconsistent with its earlier findings and statements regarding the relationship between climate change and public health. Ecology's analysis in this regard is entirely deficient and fails to conform to the plain requirements of section 110(l) to ensure that the proposed action does not violate the CAA anti-backsliding requirements.

It is well-recognized that climate change caused by greenhouse gas emissions will worsen ozone pollution across most, if not all, of the United States. A direct causal link has been consistently modeled. EPA itself has previously recognized this link and has relied upon it in making its Endangerment Finding. In fact, a number of the scientific publications identifying this link and the research related to it include EPA researchers. While the magnitude of the impact may vary geographically, the fact of the connection is consistent and generally agreed upon by experts. Finally, the EPA and the State of Delaware have formally recognized this connection when Delaware proposed, and EPA approved, SIP provisions providing for the regulation of greenhouse gas emissions as one method of addressing ozone pollution issues.

The attempt to carve greenhouse gases out of Washington's SIP by limiting the SIP to pollutants for which EPA has developed NAAQS will interfere with attainment (and/or maintaining attainment) and reasonable further progress on ozone. Failure to control and reduce greenhouse gases will allow the U.S. to continue on the most extreme track for climate change which in turn will contribute to worsening ozone pollution. Curbing greenhouse gas emissions will help combat ozone pollution and lessen the chances that Washington will struggle with attainment of standards for this pollutant that is a threat to public health. By proposing a revision to the Washington's SIP that excludes greenhouse gases, the state proposes a SIP revision that will interfere with attainment of, or reasonable further progress on attaining, ozone standards. As such, Washington's proposed change cannot be approved by EPA. The Conservation Groups urge Ecology to reconsider and withdraw its proposal to limit the definition of "air contaminant" in the SIP to exclude greenhouse gases and other non-criteria pollutants.

B. <u>The SIP, as Interpreted and Applied by the Western District of Washington, Forms the Baseline Against Which Revisions Must be Measured.</u>

Again, under 42 U.S.C. § 7410(l), EPA is prohibited from approving a SIP revision that would "interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of [the CAA]." Cases interpreting this provision have found that the existing SIP is the baseline, even if a state has not yet implemented all requirements in the existing SIP. Even where EPA set requirements that EPA later determined were more stringent than necessary to protect public health, EPA was forbidden from releasing states from those burdens because the overall purpose and goals of the CAA are to improve air quality until safe and never allow backtracking, which results in a "one-way ratchet" for air quality controls in SIPs. Here, Washington's SIP is plainly an applicable requirement of the CAA. Washington's SIP requires the state to regulate all air contaminants, including greenhouse gases. That SIP has been approved by EPA and is therefore a federally-enforceable requirement of the CAA. To weaken that SIP by removing greenhouse gases and other pollutants from the protections and requirements afforded by the SIP is to interfere with a current, existing applicable requirement of the Act. Ecology's proposed action violates the antibacksliding requirements of section 110(l) of the CAA. Such a result is consistent with the case law regarding the "one-way" ratchet effect and requirement of the CAA.

Patty Martin
I believe that Congress anticipated the influence of industry on the states, and planned accordingly, barring states from adopting less stringent requirements under their SIP:

> "the state… may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan" 42 USC 7416(2)

This prohibition prevents backsliding. The goal of the CAA is "prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source)." 42 USC 7401(a)(3) Reducing requirements of the SIP does not satisfy the "any measures" necessary to prevent pollution.

Ecology should not update incorporated by reference dates unless the updated rule is more stringent. Anything less stringent would not be adoptable into the SIP.

Patty Martin's Oral Testimony at the Public Hearing
There was a statement brought up about backsliding, and that's very consistent with federal regulations that, typically there are no, there are provisions that anti-backsliding. And I think that that may be the portion found under 42 U.S.C. 7416(2) that says that no state or local agency can have any, can enforce anything less stringent than what's in a state implementation plan.

Sierra Club
I am also concerned that your proposed rule change would constitute unlawful "backsliding" in violation of Section 110(1) of the federal Clean Air Act (CAA).

Washington Environmental Council
There's also some statement in this letter *(Department of Ecology's letter to Dennis McLerran)* that says that the new language, and I open quote, "The new language in WAC 173.400.020 and WAC 173.400.030 is approvable into the SIP because it in no way interferes with any applicable requirement concerning attainment or reasonable progress, both of which are tied to national ambient air quality standards," close quote. We know, and the science is showing, both by EPA determinations and by scientific determinations around the world, that an increase in greenhouse gases can make it more difficult to attain, to reach attainment of the max for ozone. The Puget Sound Regional Clean Air Agency is currently aware of the fact that there are portions of Tacoma and the State of Washington that are quickly approaching non-attainment of ozone standards. So I believe, and I'm representing to you before you now and in this public hearing, that the language in this letter to Mr. McLerran is also inconsistent with scientific holding.

Michael Ruby
I think that there is a difficulty, however, with this in just exactly the problems stated in Stu's letter. The letter that Stuart Clark wrote is very carefully written. I would expect no less from him. For example, let me read you this:

"Furthermore, Ecology has never relied on controlled pollutants, other than criteria pollutants, and their federally identified precursors, to make any demonstration of Washington SIP as

adequate to attain and maintain the NAAQS". That's an absolutely true statement, because the national ambient air quality standards are defined by the criteria pollutants. If it's a criteria pollutant, it has a national ambient air quality standard; if it has a national air quality standard, it is a criteria pollutant. It's totally circular.

And the federal identified precursors, of course, refers to hydrocarbons and nitrogen oxides which have been identified in the criteria document for ozone. And that is exactly what was done. However, there is an additional fact. And this is an important one, and it is very well known, and very well proven, that the occurrence of ozone exceedances, particularly in the Puyallup and northern Pierce County area, are almost directly related to the temperatures that are observed during the summer.

We also know that the general problem we're having with climate change is that we will have more frequent high temperatures during the summer. And because the ozone standard is a statistical rule, more frequent means much greater possibility that we will violate the standard, that we will not be able to do that. However, temperature is not a federally identified precursor, and temperatures were not used in the original demonstration. So, the statement is true, but very misleading in terms of our ability to maintain the ozone NAAQS. The first part of the paragraph similarly has the same problem that it says that the SIP will continue to be federally enforceable to the extent that they regulate the pollutants required of Washington to attain and maintain the NAAQS. Well that's certainly true, that's another circular statement. And this is the sort of thing that we should not be relying on. Ecology needs to really come clean and state very clearly for the people just exactly what is happening as it makes these changes.

Response:
Thank you for your comments. We do not believe that our proposal to clarify language in the SIP would constitute "backsliding" under the federal Clean Air Act. However, Ecology is not including the proposed revisions to WAC 173-400-020 and 030(3) in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time.
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15: Definition Change Would Cause Confusion and Weakened SIP

Conservation Organizations
ECOLOGY'S PROPOSED ACTION IS CONTRARY TO SOUND CLEAN AIR ACT POLICY AND WILL RESULT IN CONFUSION AND A WEAKENED SIP.

In addition to being legally indefensible, Ecology's proposed rule and SIP changes are an unnecessary retreat by this administration in the face of the problems and threats of climate change, particularly when the state has a tool in hand to start to make progress on this significant problem.

To the extent that Washington proposes this drastic SIP change over concern that determining RACT for greenhouse gas emissions from oil refineries is unduly burdensome. Washington's action is unwarranted. The task is not so onerous as to justify gutting this important provision for addressing climate change pollutants. As noted by Dr. Ranajit Sahu and the Conservation Organizations during the remedies portion of the Washington Environmental Council litigation, for refineries, much of the work has already been done by other organizations such as EPA and the California Air Resources Board (see Attached Declarations of Dr. Sahu and briefs of Plaintiffs). This research has demonstrated that efficiency technologies and strategies at the refineries are reasonable measures for controlling greenhouse gas emissions. As for other industries, Ecology, consistent with the SIP RACT requirements, can assess their emissions and technology. If there is no reasonably available technology for control of greenhouse gas emissions, the inquiry ends and Ecology's job of complying with the SIP is complete. If a technology is reasonably available, then Washington will, by requiring its use, exhibit the leadership of which it is capable and the state will make that much more progress on the significant problem of climate change. Applying the current SIP requirements to begin to reduce greenhouse gas emissions is reasonable, prudent, and important, and it does not represent an undue burden.

Contrary to Washington's history of leadership on climate change policy, this proposal, if approved, would be a retreat from the opportunity to make real on-the-ground progress towards limiting greenhouse gas emissions by using currently-available regulatory tools. After far too long, EPA has started to recognize and address the significant problem of climate change and greenhouse gas pollutants and has begun developing and implementing measures to assess and address greenhouse gas pollutants through the SIPs, as evidenced by the tailoring rule and PSD and Title V permitting requirements. While such progress on the national level is encouraging, real measurable results from these regulatory efforts are years if not decades off, and much more regulatory and legislative work is required to begin addressing the climate problem. Now is not the time to be stepping back and giving up tools. Further, the state must recognize that progress on this enormous problem cannot come with a single action or single solution; it will take all levels of federal and state government working with as many tools as possible to gain ground and avert the worst climate impacts.

Further, the problem of Ecology avoiding real greenhouse gas regulation is not limited to contributions to climate change. As EPA's own research on ozone demonstrates, all the progress made on controlling criteria pollutants could be negated or at least diminished due to the impact of climate change on pollutants like ozone. Instead of moving forward with this misguided proposal, Ecology should focus on using its existing regulatory authority which, in conjunction with actions by other state and national governments, could protect the public from the worst consequences of climate change.

Moreover, rather than clarifying SIP requirements, Ecology's proposal would exacerbate confusion regarding which pollutants are regulated for which requirements under Washington's SIP. Ecology's proposal is to limit the applicability of SIP provisions such as the RACT Standard to criteria pollutants and their precursors; however, for PSD and Title V requirements, the SIP will apply to greenhouse gases (at least to the degree required by EPA). As noted above, climate change will adversely affect ozone pollution, making it much more difficult to achieve

the NAAQS. Similarly, methane directly affects ozone formation in the atmosphere. Yet because greenhouse gases have no NAAQS, the state's action may have now fostered questions of whether they will be regulated under Washington's SIP and, if so, under which provisions. At a minimum, the proposal sets up a strange mixed standard for control of harmful pollutants. Ecology should be wary of creating such confusion and artificial divisions where there currently are none.

Ecology's proposal also creates ambiguity on whether it actually accomplishes the result Ecology appears to seek. Plainly, Ecology's proposal is a response to the direction of the federal district court order requiring Ecology to determine and apply RACT to greenhouse gas emissions from Washington refineries in accordance with the plain language of Washington's SIP. While Ecology is proposing to carve greenhouse gases out of the requirement for RACT by changing the definition of air contaminant and general applicability, Ecology has not proposed changes to the RACT Standard itself or the statutory definition of "air contaminant," which, like the current definition in the SIP, plainly includes greenhouse gases. This is significant because the RACT Standard, as approved by EPA as part of the SIP, incorporates by reference RCW 70.94.154. RCW 70.94.154, in turn, provides that in determining RACT, Ecology shall address, where practicable, all "air contaminants" deemed to be of concern for that source. Because this is a statute, the applicable definition for air contaminants as used in this provision is RCW 70.94.030, which will continue to encompass greenhouse gases regardless of whether the proposal at issue here is ever finalized. Ecology cannot, by rule, change the meaning of the statute. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 19, 43 P.3d 4 (2002) (an agency cannot amend or change a statute through administrative rule-making). This means that the SIP now references two different definitions of the term "air contaminant" and that two definitions of "air contaminant" would now potentially apply to the RACT Standard; one that Ecology would presumably claim excludes greenhouse gases, and one that indisputably includes greenhouse gases. The better result is for the state to simply withdraw this unwise proposal and make good use of this important tool instead of working so hard to avoid it.

Under the Clean Air Act ("CAA"), states are required to develop and adopt SIPs which "provide for implementation, maintenance, and enforcement" of the CAA's standards and must include enforceable emissions limits, control measures, means, or techniques for addressing air pollutants as well as schedules and timetables for compliance with the requirements of the CAA. Once a SIP is adopted, the state must submit it to the EPA for approval. A state may propose SIP requirements that are more stringent than the minimum federal CAA requirements—in that instance, as long as the SIP meets the minimum requirements, EPA must approve the SIP. Upon approval by EPA, the terms and provisions in the SIP become federally-enforceable and are considered federal law. States are obligated to follow and implement the terms of their SIPs. Any change that a state wishes to make to a SIP requirement must be adopted through a public process and submitted to EPA for approval before the state may implement such changes.

In submitting their SIPs to EPA, states are authorized and, in fact encouraged to provide clean air protections and controls beyond the bare minimums required by the CAA. EPA is required to approve any SIP that meets the basic minimum requirements, even if the SIP also extends beyond those requirements, including requirements related to greenhouse gas emissions. When a state does so, whether by requiring stricter technologies or controls for a particular

industry or pollutant, or by extending protections to cover more than criteria pollutants, a state is bound by the terms of its SIP and the SIP becomes the baseline against which future revisions are measured.

The term "air contaminants" is currently broadly defined in Washington's statutes, administrative code, and SIP to include all gases, including greenhouse gases, a definition that has been confirmed by federal court order and earlier by Governor's Executive Order. Washington proposes to change only the rule and attendant SIP provisions, not the statutory definition. A portion of the SIP that Washington also leaves unchanged concerns General Standards for Maximum Emissions for all air contaminants, WAC 173-400-040. This regulation requires that all emissions units use reasonably available control technology ("RACT") to control all air contaminant emissions. Where current controls are determined to be less than RACT, the permitting authority shall define RACT and require its installation. These requirements have been part of Washington's SIP since the mid-1990s. The SIP, with these provisions included, has been repeatedly reviewed and approved by EPA and has recently been interpreted by the U.S. District Court for the Western District of Washington as requiring Ecology to make RACT determinations for greenhouse gas emissions from oil refineries.

Washington now proposes to change its rules regarding what is considered an "air contaminant" that, under the SIP, will be subject to RACT requirements as well as other SIP provisions. The state will retain the general broad definition of air contaminant, but it also proposes to adopt sub-definitions that confusingly carve out and then recapture certain air contaminants, including greenhouse gases, depending upon the regulatory forum or requirement at issue. Specifically, Washington proposes that its SIP requirements would apply only to those "air contaminants" for which EPA has established National Ambient Air Quality Standards ("NAAQS") and their precursors, substantially narrowing and weakening Washington's SIP. However, because this change potentially runs afoul of EPA's more recent requirements for SIPs and greenhouse gas emission regulation, Washington then proposes to "recapture" many of those same air contaminants to the extent they are required by EPA to be addressed in Prevention of Significant Deterioration and/or Visibility Impairment requirements in the CAA or EPA regulations. The plain impetus for and intent of this tortured proposal is for Washington to try to escape its obligations under the current SIP to determine RACT for greenhouse gas emissions from refineries as ordered by the court in Washington Environmental Council.

Washington's proposed change to its SIP, targeted at excluding greenhouse gases from coverage by the SIP's requirements, comes in response to federal court orders and other advocacy regarding greenhouse gas emissions from oil refineries and coal-fired power plants and as such is extremely disappointing and ill-considered. Washington has consistently held itself out as a leader on addressing climate change, but this proposed action is in direct contradiction to leadership on climate. The Conservation Organizations urge the state to cease its efforts to weaken the Washington SIP and look instead to the incredible leadership opportunity afforded by the provisions of Washington's SIP to take steps on curbing one of the worst environmental problems of our time.

Response:

Thank you for your comments. Ecology supports strong action to address climate change and supports the rights of citizens to urge government to take those actions. However, the federal Clean Air Act (and the interpretation of that Act for several decades) establishes that certain tools are appropriate for certain types of pollutants. State Implementation Plans are not appropriate tools for the regulation of non-criteria pollutants, but there are numerous other provisions of state and federal law that address non-criteria pollutants. We strongly support using these appropriate tools to address greenhouse gas emissions.

As noted in response to other comments above, Ecology is not including the proposed revisions to WAC 173-400-020 and 030(3) in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time.

We understand and share the frustration with the pace of comprehensive governmental action to respond to climate change. Washington is a national leader in responding to the challenges of climate change. We have taken, and will continue to take, strong actions to curb greenhouse gas emissions. Here are some of the actions already taken:

- Last year Gov. Chris Gregoire signed landmark legislation to end the burning of coal for power generation in Washington. Shutting down coal burning at the TransAlta power plant – the state's largest single source of greenhouse gas emissions – is a huge victory in the fight against climate change. And it's a model for other states and the federal government to follow.
- Washington was the first state to adopt standards for underground injection of carbon dioxide. Right now, we're tracking a pilot project in Eastern Washington that is testing the feasibility of permanently storing carbon dioxide underground.
- We were among the early adopters of more protective standards for greenhouse gas emissions from motor vehicles.
- We established an emission performance standard for new or expanded power plants, which limit the plants' emissions of greenhouse gases.
- We established requirements that new and expanded fossil fuel fired power plants mitigate a portion of their carbon dioxide emissions
- Ecology led the creation of a comprehensive response strategy to guide work by state agencies, local governments, businesses, and individuals to address the impacts of climate change.
- We've set requirements for greenhouse gas emitters to track and report their emissions. It's an important tool to help us understand the state's emissions profile, so we can work toward solutions for reducing those emissions.
- And the state has been a party to numerous successful lawsuits urging EPA to use its Clean Air Act authority to address greenhouse gases, including a lawsuit that will result in new source performance standards for greenhouse gases from refineries.

16: Oppose Ecology Managing PSD Program

Several members of the public made the following comment:

Methow Valley Citizens' Council
We support the continued oversight of the Prevention of Significant Deterioration (PSD) Program by the Environmental Protection Agency rather than giving the Department of Ecology single review authority for PSD permits. It is important that the broad and extensive expertise of the EPA be recognized when questions arise regarding the potential deterioration of air quality in areas like the Methow Valley. This highly technical program has protected the Methow Valley's air from deterioration in the past. We have benefitted from EPA's involvement and extensive expertise with similar high mountain valleys across the U.S., given these valleys' typical weather patterns (particularly daily and seasonal inversion patterns and the impact of wood smoke upon these geographic areas), the EPA's expertise in computer modeling for these particular meteorological conditions, and the EPA's familiarity with successful regulations in communities in other states across the USA where the residents depend upon wood heat.

Despite the DNS on this proposal, a change in EPA's involvement with the PSD program could definitely have a significant adverse impact to areas such as the Methow Valley. We therefore oppose granting Ecology authority to manage the PSD program.

North Olympic Group

I oppose granting Ecology authority to manage the Prevention of Significant Deterioration (PSD) program.

Response:
Thank you for your comments. Ecology currently operates a delegated PSD program where Ecology does the permitting work, including issuance of PSD permits under oversight of EPA Region 10. We plan to submit the PSD program regulations contained in WAC 173-400 to EPA for approval into the SIP. Prior to submitting the regulations we will go through a public comment process for the SIP. If EPA approves these rules into the SIP, Ecology will continue to operate the PSD program for the state and EPA will retain its oversight of the program. Dispersion modeling would continue to be done by Ecology staff as it has been done for 25 years.

The SIP review process by EPA involves a review of the regulations, the staffing resources for permitting and enforcement, dispersion modeling expertise, demonstration of legal authority to implement the program, and a number of other similar items. EPA reviews the proposal that we would submit to make sure the proposal meets EPA's criteria then proposes to approve or disapprove in whole or part what was submitted. The proposal by EPA would be published in the Federal Register and subject to a public comment period. After the close of the public comment period, EPA reviews comments received, and based on their proposal as modified by the review comments, publishes their final action in the Federal Register as an amendment to the Washington SIP in 40 CFR Part 52, Subpart WW.

17: Support SIP Approvable NSR Program

Western States Petroleum Association
WSPA strongly supports Ecology's broad objectives underlying these amendments: to update Washington's major new source review programs to meet Clean Air Act requirements for State Implementation Plan ("SIP") approval …

Response:
Thank you for your comments.

18: U.S. District Court Case

Comments include:

- *The U.S. District Court ruling saying that Ecology is responsible for regulating climate pollution from the state's five oil refineries is a big step forward. Ecology should implement RACT for refineries, not change the rules to avoid it. It is too early to conclude that greenhouse gas RACT for refineries would be too weak to have any real world impact. Even if RACT would not be meaningful now, future technologies or regulations could make it significant, therefore the potential for this tool should remain.*
- *If Ecology intends to keep greenhouse gases in the SIP, the rule language needs to be modified to make that clear.*

Washington Environmental Council
First, on the issue of the definition of air contaminants, Washington Environmental Council believes that the reason that this issue was included in the SIP proposal was because the Department of Ecology lost a lawsuit brought by Washington Environmental Council and The Sierra Club.

When it comes to the components of the letter from Stuart Clark to Dennis McLerran, there is language in the letter that says that, and I quote, "the new language reflects Ecology's longstanding understanding of the authority of the Federal Clean Air Act concerning SIP provisions." Close quote. Now, to my knowledge, the authority that expounds on what is or is not federal law is the federal court. The federal court determined that these components that are in the current WAC, that were adopted into the SIP, are federally enforceable; that there is no inconsistency here. When you have a federal court who says to Ecology, "No, you're wrong about that interpretation," and I believe that that opinion came out in December of 2011, and then you have a letter dated June 21st, 2012 that says that, open quote, "the new language reflects Ecology's long standing understanding…" ellipses, I find that completely inconsistent and unfortunate.

… There was a question earlier about what is the effect of these rule changes and what is the effect of the adoption of these rules changes into the SIP. And I will tell you what the rule change, what the effect is. The effect is that right now the Department of Ecology is under a federal order to determine reasonable available control technologies on the state's five oil refineries. When the lawsuit began, Department of Ecology said, "No, we don't have to do that because it's not required under the SIP and Washington Environmental Council and Sierra Club

can't even sue us under the SIP." And the federal judge said, "No, you're wrong." The federal judge said, "No, you're wrong." And then this rule proposal comes out. So the change that would happen if this rule is adopted and if it is accepted into the SIP, is that the Department of Ecology would no longer be required to determine what reasonably available control technologies there are for oil refineries.

And even more importantly than that, because Ecology has said before, "You know what, if we determine what RACT is for these oil refineries, it probably won't reduce greenhouse gases that much." "Debatable," the judge said. And they presented this argument to the judge, and the judge said, "Well, don't assume. Go ahead and do the science and find out how much this would impact the oil refineries. Find out how much greenhouse gas reductions can be achieved by these control technologies." What this rule change would do would prevent Washington Environmental Council and the Sierra Club and any person in this room and any person in this state from saying, "Hey, Ecology, you're not doing your job under the law."

Michael Ruby
I think it's clear from the comments that have been made by the Washington Environmental Council, Representative, that there is a relationship between the federal court's findings and this proposal. Given that, that suggests there is a significant relationship between this proposal and whether or not there would be some forward movement on control of greenhouse gas emissions in the State of Washington. Now there are some difficulties with this, not the least of which is that the definition of air pollution under 400 would not prohibit Ecology from adopting other regulations relating to greenhouse gases, in furtherance of laws adopted by the Washington State Legislature, which essentially has instructed it to do that.

… And I think it is also necessary to indicate, in this proposed amendment, that Ecology has no desire to reduce the applicability of current Washington law to the requirements to move forward on greenhouse gas emission control.

I'd just to add one note on the comment about greenhouse gasses and whether or not regulating the next big boy on the block, which is the -- after Centralia, that’s the oil refineries -- whether that really makes a difference. And the answer is, when we were doing the modeling for Centralia, we were of course able to show that there was no impact whatsoever from Centralia on the SO2 non-attainment area in King County. There was an impact on the SO2 non-attainment area in the Southwest air quality district. At that time, we only had total suspended particulate as a particulate matter pollutant. And even though, in the process of doing the modeling I'd looked at what happens as sulphur dioxide converts to sulfate in the atmosphere to a tiny particle, and was able to show that it did have impacts in South Tacoma, there was no federal standard. There is now a federal standard, and if Centralia had not adopted the controls which they were forced to adopt, it would have, under the old modeling, it would in fact be creating a problem in Pierce County under the PM2.5 standard.

So what I'm saying is, that what's a standard today, and what we're regulating today, and that's sort of what the letter is talking about, really doesn't get us there. We need to think more globally in terms of the pollution we're dealing with because, as the science has done, and the new standards are adopted, and as we figure out a little bit more, we may find that we missed a bit.

Response:

Thank you for your comments. Commentators suggest that Ecology's action is inconsistent with the federal district court order. We respectfully disagree. The district court ruled that the air agencies are required to make reasonably available control technology determinations for greenhouse gases from refineries based on provisions that the State had chosen to incorporate into the State Implementation Plan. The court concluded that because the State chose to include broad provisions it its State Implementation Plan, it is now bound by those provisions.

We respectfully disagree that the State chose to incorporate provisions in the State Implementation Plan that are broader than criteria pollutants, and we have appealed this ruling. However, central to the court's decision is the notion that the State controls the contents of its own State Implementation Plan. We agree, and that is why we proposed taking these measures to ensure that the plan is interpreted consistently with how Ecology and EPA have interpreted the plan for many decades. However, Ecology is not including the proposed revisions to WAC 173-400-020 and 030(3) in the final rule. As a result, we will not be submitting a request to EPA to clarify the SIP at this time.

19: Environmental Justice

Air quality is regulated by a mix of state, local, and federal agencies in Washington. This action most directly impacts areas under state (Ecology) jurisdiction. Those areas have a higher percentage of low income and Hispanic populations than the state average. Weakening standards disproportionately for those populations would be an environmental injustice under the federal standards of: Executive Order 12898 and Title Six of the Civil Rights Act of 1964.

Patty Martin
Written
Ecology should remove all changes to -110, -111, -112, -113 that are less stringent than existing regulations and those of the regional clean air authorities. If not, those areas of the state without clean air authorities will be disproportionately affected. Areas without clean air authorities are located in Eastern Washington and are low-income and largely Hispanic. Imposing these new regulations will create an environmental injustice.

Hearing
If the language is amended as Ecology suggests, the more protective regulations will be removed and Clean Air protections will be undermined immediately in areas without Clean Air authorities, including most all of eastern Washington, where low-income and minority communities are a higher percentage of the population. I've also brought -- this is the section of eastern Washington that is without Clean Air authorities. Eastern Washington has a higher Hispanic population, has a relatively higher, actually has a higher low-income population, so people are disenfranchised already, and we're talking about removing Clean Air protections disproportionately for people of color and low income.

The EPA has responsibility under Executive Order 12898, which is environmental justice, and Title Six of the Civil Rights Act of 1964, to ensure that regulations do not disproportionately impact low income or communities of color, or prejudice communities based on the national origin, race, or color of the residents. The fact that this regulation will immediately disenfranchise rural Washington state from equal protection under the Clean Air Act is an environmental injustice.

Response:
Thank you for your comments. The proposed changes to sections 110 through 113 of the regulation do not result in a regulation that is less stringent than the rule that is currently in the SIP. The changes proposed in this package along with the changes that have been enacted since these rules were last submitted to EPA for adoption into the SIP in 1993 have been to either reflect directives of the Legislature or to strengthen the effectiveness of the new source review requirements to protect public health and welfare.

The WAC 173-400-112 rule in the SIP required a complex revision and replacement due to significant changes to the federal nonattainment new source review program requirements since 1993. Without the current and changes and the changes in our previous rulemaking (completed in 2011), we would be forced to utilize less protective federal permitting requirements in nonattainment areas.

WAC 173-400-020(1) State-Wide Applicability

20: State-Wide Applicability

Western States Petroleum Association
WSPA supports the proposed revisions to WAC 173-400-020(1) and the sections cited therein that clarify the applicability of Ecology rules to sources regulated by local air authorities. The five Washington petroleum refineries owned and operated by WSPA members are all regulated by local air authorities. Projects that require minor new source review under the rules of NWCAA or PSCAA should not be subject to new source review under Ecology's rules as well. Actions that are subject to the public participation rules of a local air authority should not also be regulated by WAC 173-400-171. The Proposed Amendments reduce the risk of regulatory duplication by drawing a clear line between projects subject to review under state and local rules.

SWCAA
While the proposed rule changes provide clarification in several areas in the existing rules, SWCAA believes that confusion and inconsistency has been created with the following rule language that has been excerpted, in part, from the proposed rule making as follows:

WAC 173-400-020 Applicability. (1) The provisions of this chapter shall apply statewide, except as provided in WAC 173-400-030, 173-400-036, , 173-400-075, 173-400-100, 173-400-102, 173-400-103, 173-400-104, 173-400-110, 173-400-111, 173-400-112, 173-400-113, 173-400-115, 173-400-171, 173-400-800 through 173-400-860, and 173-400-930.

SWCAA proposes that this section be revised to read as follows:

WAC 173-400-020 Applicability. (1) The provisions of this chapter shall apply statewide, except for specific subsections where a local authority has adopted and implemented corresponding local rules that apply only to sources subject to local jurisdiction as provided under chapter 70.94.141 RCW and chapter 70.94.331 RCW.

The reasons for this comment and proposed changes are as follows:

1) The number of excepted sections in the proposed WAC 173-400-020 is incomplete. If the proposed language is used, it will cause duplicate rule sections to apply to regulated facilities (i.e., WAC 173-400 and similar local agency rules). While one focus of this rule making was to provide a New Source Review section that could be approved into the SIP, there were other changes that were necessary for policy purposes, federal non-NSR consistency, clarifications, and other program issues that resolve inconsistencies. These are equally important and should not be ignored when it comes to statewide applicability (e.g. 173-400- 040, 060,070, etc). As a minimum the list of sections identified in the July 5, 2012 emailed spreadsheet from Linda Whitcher with the WAC 173-400 rules enumerated for SIP inclusion should be consulted to ensure that each of the identified WAC sections has an appropriate applicability statement included. The email table of SIP sections identified those sections Ecology intends to be included in the SIP. A copy of this can be provided if necessary.
2) The proposed language stipulates "... except as provided in...". A few of those sections cited do not have any provisions for applicability (e.g. 173-400-075, 173-400-115). Please review each of the cited sections and ensure that they all contain exactly the same exemption language.
3) Regulated facilities should have only one set of rules that apply to their facility. By having only certain sections of the WAC that do not apply to a regulated facility, the facility personnel and local agency personnel must be familiar with two sets of rules (WAC 173-400 and the local authority rules). If they are slightly different in some fashion it leads to confusion about which applies. Arguably both could apply without a disclaimer and it may be difficult or impossible for a facility to comply with both. The local agencies have the statutory authority to adopt the WAC in whole, in part, or not at all (have their own rules). The decision to adopt or not, should be a decision of each local clean air agency, not a function of how Ecology writes the WAC to apply to the local clean air agencies. SWCAA acknowledges there are a few sections of the WAC that only Ecology currently implements. One of these is the PSD rules (WAC 173-400-710 et seq.).
4) In enforcement cases before the Pollution Control Hearings Board (PCHB) and other judicial bodies, having two similar but different sets of rule language apply is difficult to litigate. Many times it is necessary for a local agency to modify rule language to address specific issues surrounding enforcement or permitting issues that Ecology is not willing to incorporate into the WAC.
5) Because the local authority's jurisdiction applies in the more heavily populated counties, it is many times necessary to have additional rule language to accommodate special situations that are not provided for in WAC 173-400. Regulation of sources and resolution of issues at the local level were envisioned under chapter 70.94.141 RCW and have existed since the Washington Clean Air Act was initially passed. Many times these special circumstances are resolved via policy. The Legislature has discouraged the use of policy and directs government agencies to

incorporate policies into their rules. Not allowing for separate and distinct local authority rules does not allow an opportunity to incorporate these policies into local authority rules.
6) WAC 173-400-930 takes a totally different approach to statewide applicability with the language "except where a permitting authority has taken a specific action determining not to adopt this section." This section should be conditioned identical to the other sections listed in proposed WAC 173-400-020 if Ecology chooses to move forward with language similar to that section.
7) Confusion is generated when preparing and implementing Title 5 permits. Having two sets of rules that apply makes the Title 5 permit cumbersome, potentially conflicting and more difficult (sometimes impossible) for the facilities to maintain compliance. Many times it is not just two sets of rules but four sets of rules - the two rules that are in the SIP and the two rules that are new or revised and are not yet in the SIP. This makes for even more confusion. Because of this situation, SWCAA highly encourages Ecology to provide provisions such that only one set of rules apply.
8) Confusion is generated when rules are submitted to EPA for inclusion into the SIP when there are two non-identical set of rules that apply in the same areas of the state. This makes for a difficult and somewhat impossible task for EPA to craft language that approves rules into the SIP. Any proposed rules and subsequent submittal to EPA should be very clear about what applies in a given jurisdiction. Possibly a table could be prepared that compares each of the local rules relative to the individual WAC sections. This would inform EPA how each of the WAC rule sections applies statewide. The goal of only one rule applies in a given section of the state dictates that each section of the WAC should be considered separately for statewide applicability, not just the NSR provisions.

For these reasons SWCAA proposes the above language to clarify the statewide applicability issue as requested by EPA.

Patty Martin
The State requires BACT determinations for all sources, major and minor. The changes to WAC 173-400 separate the two, but the less stringent changes will only apply in areas without clean air authorities. Again, because the state does not distinguish between the two, it would appear as though this is a weakening of the regulations. This is supported by the need to insert language retaining an authority's right to keep the more stringent standards. WAC 173-400-110, WAC 173-400-111, WAC 173-400-112, WAC 173-400-113

Response:
Thank you for your comments. The suggestion by the commenter is a reasonable solution to a complex issue. The commenter's proposal satisfies the concerns expressed by the other commenters on this paragraph and simplifies the complex wording of our proposal. This language clarifies the relationships of the state and local rules on many issues like different registration program requirements and thresholds, adoptions of the different subparts of 40 CFR Parts 60, 61, 62 , and 63, and different permitting fee structures and requirements. The wording proposal also solves many long-term issues about the interrelations of state and local agency rules for air operating permits.

We have implemented the proposed wording for this paragraph, but have retained the text within WAC 173-400 sections 110, 111, 112, and 113 that these sections constitute the minimum notice of construction program requirements for the state.

WAC 173-400-020(2)

21: WAC 173-400-020(2) Delegating Authority to EPA

Western States Petroleum Association

(2)[3] ~~Ecology regulations that have been or will be approved by the United States Environmental Protection Agency (EPA) for inclusion in the Washington state implementation plan apply for purposes of Washington's state implementation plan, only to the following:~~

a) ~~Those air contaminants for which EPA has established National Ambient Air Quality Standards (NAAQS) and precursors to such NAAQS pollutants as determined by EPA for the applicable geographic area; and~~

b) ~~Any additional air contaminants that are required to be regulated under Part C of Title I of the Federal Clean Air Act (relating to prevention of significant deterioration and visibility), but only for the purpose of meeting the requirements of Part C of Title I of the Federal Clean Air Act or to the extent those additional air contaminants are regulated in order to avoid such requirements.~~

The Boeing Company

Delete WAC 173-400-020(2)

[3] WSPA strongly supports Ecology's proposal to limit the scope of the air contaminants regulated by the SIP to NAAQS pollutants and precursors, and pollutants regulated under the PSD program, for purposes of implementing the PSD program. The proposed revisions to the WAC 173-400-030 definition of "air contaminant" neatly accomplish these objectives. The proposed WAC 173-400-020(2) mostly repeats the text of the revisions to the definition of air contaminant, but it also adds unnecessary statements that improperly confuse the roles of EPA and Washington in the administration of the SIP. The Washington SIP is a body of state and local rules and permits, incorporated by EPA into federal law. The proposed subsection (2) violates the Washington constitution by delegating to EPA the authority to define the scope of various Washington air regulations incorporated into the SIP, including regulations that have not yet been written. If, for instance, EPA defines a new NAAQS, the proposed subsection (2) would automatically amend *the existing* WAC 173-400-040 to regulate that contaminant for purposes of the SIP, with no further action by Ecology. The delegation to EPA of the authority to define the scope of an Ecology regulation violates art. 2 § 1 of the Washington Constitution. *See*, e.g. *Diversified Investment Partnership v. Dept. of Social and Health Services*, 113 Wn.2d 19 (1989); *State v. Dougall*, 89 Wn.2d 118 (1977).

The proposed amendments to the WAC 173-400-030(3) definition of air contaminant do not present this problem, because they reference only those air contaminants for which EPA has established NAAQS and PSD pollutants as of today (and consistent with the definition of NAAQS listed in WAC 173-400-030(49)). If EPA adopts a new NAAQS next year, Ecology will need to update its rules to regulate that contaminant in the Washington SIP. That burden may be inconvenient, but Ecology routinely updates its incorporations by reference of EPA rules, and knows very well how to pick up updates to federal programs while protecting Washington's sovereignty.

WAC 173-400-020(2)(b)

The Boeing Company
Boeing also supports Ecology's reservation of its current authority to write voluntary orders limiting emissions of non-NAAQS pollutants for sources seeking to avoid PSD permitting as proposed in WAC 173-400-020(2)(b). This step encourages sources to take voluntary limits on emissions, thereby directly reducing potential environmental impact. A second, corollary provision is also needed to similarly reserve Ecology's authority to legally limit emissions at the request of a source seeking to avoid Title V permitting. Without this addition, the effectiveness of regulatory orders enforcing greenhouse gas limits for purposes of avoiding Title V permitting, might be subject to challenge and voluntary limits on sources will be discouraged.

Response:
Thank you for your comments. Ecology has decided to not include the proposed revision to WAC 173-400-020 in the final rule. As a result, we will not be submitting a request to EPA to revise the SIP at this time.

Definitions

BACT

22: Oppose Weakening BACT

Several members of the public made the following comments:

North Olympic Group
I oppose weakening the definition of BACT.

Precautionary Group
Oppose weakening the definition of BACT, air contaminant and emergency engine.

Patty Martin
The State requires BACT determinations for all sources, major and minor. The changes to WAC 173-400 separate the two, but the less stringent changes will only apply in areas without clean air authorities. Again, because the state does not distinguish between the two, it would appear as though this is a weakening of the regulations. This is supported by the need to insert language retaining an authority's right to keep the more stringent standards. WAC 173-400-110, WAC 173-400-111, WAC 173-400-112, WAC 173-400-113

Response:
Thank you for your comment. The definition of BACT to be used in state permitting remains unchanged from the definition that is currently included in the SIP. No changes to the definition of BACT were proposed.

Washington State's Clean Air Act requires the application of BACT to all new source review actions in the state. BACT is defined in RCW 70.94.030(6). This definition is included in the regulation without change. The state law definition of BACT will remain in the SIP as a component of the rules implementing our notice of construction program.

23: WAC 173-400-030(3)(b)(iii) "Air Contaminant"

The Boeing Company
We suggest parallel language *(WAC 173-400-020(2)(b))* in a new 173-400-030(3)(b)(iii) to achieve that end:

(iii) Any additional air contaminants that are subject to regulation under Title V of the Federal Clean Air Act but only to the extent that those additional air contaminants are regulated in order to avoid applicability of the Title V program.[4]

Response:
Thank you for your comment. Ecology has decided to not include the proposed revision to WAC 173-400- 030(3) in the final rule. As a result, we will not be submitting a request to EPA to revise the SIP at this time. Additionally, as we understand it, the commenter's suggested language change relates entirely to which pollutants are required to receive Title V Air Operating Permits. These permits are issued under the authority of WAC 70.94.161 and 162, implemented by WAC 173-401. WAC 173-400 and WAC 173-401 are separate rules with separate applicability criteria. We did not make this change because we do not believe that the definition of air contaminant in WAC 173-400 affects the pollutants that trigger the requirement for having an Air Operating Permit. Those pollutants subject to the air operating permit program are specifically listed in WAC 173-401-200(19) which references the definition of "air pollutant' in section 302 of the Federal Clean Air Act. In addition, the state Air Operating Permit program is not part of the SIP, but is approved by EPA under separate provisions of Title V of the federal Clean Air Act.

24: WAC 173-400-030(5) "Allowable Emissions"

The Boeing Company
"Allowable emissions" means the emission rate of a source calculated using the maximum rated capacity of the source (unless the source is subject to legally[5] enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

[4] The inclusion of proposed subsection (b) expressly reserving the ability of Ecology to regulate non-NAAQS pollutants such as GHG for purposes of issuing synthetic minor orders for the avoidance of PSD necessitates the inclusion of a corresponding express reservation of synthetic minor authority for purposes of avoiding the applicability of Title V. Otherwise, Ecology might be considered incapable of issuing federally enforceable synthetic minor orders under -091 limiting the emissions of GHG for purposes of avoiding Title V.

[5] *Chemical Manufacturer's Assn v. EPA* No. 891514 (D.C. Cir Sept 15, 1995) , along with *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Clean Air Implementation Project v. EPA*,

(a) The applicable standards as in 40 CFR Part 60, 61, 62, or 63;

(b) Any applicable SIP emissions limitation including those with a future compliance date; or

(c) The emissions rate specified as ((~~an~~)) a legally enforceable approval condition, including those with a future compliance date.

Response:
See response to comment #25 on WAC 173-400-030(45).

25: WAC 173-400-030(45) "Legally enforceable" (new definition)

The Boeing Company
"Legally enforceable" means all limitations and conditions which are enforceable as a practical matter by ecology, an authority or EPA. [6]

Response:
Thank you for your suggestion. We previously decided not to propose adding a definition regarding enforceability to our regulation. Such an addition now is outside of the scope of the proposed regulation. In the future, we may determine that a fine tuning of "enforceable" is appropriate and reasonable to implement.

26: WAC 173-400-030(56)(b)(iii) "Nonroad engine"

The Boeing Company
The engine otherwise included in (a)(iii) of this subsection remains or will remain at a location for more than twelve consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single position[7] ~~site~~ at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to

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No. 96-1224 (D.C. Cir. June 28, 1996), generally stand for the proposition that if (1) the Federal CAA (FCCA) does not require federal enforceability in order for a limitation to be taken into account in calculating emissions or determining applicability of particular program to a source, and (2) EPA is not able to articulate a good reason why legally enforceable state/local/tribal limits should not count too, then EPA cannot restrict consideration to federally enforceable limitations only. So while these cases focus on the definitions of PTE in various programs, there is no difference when the legal rationale underlying these cases is applied, for example, to other measures of emissions besides PTE that can depend on emission limits, such as the definition of "allowable emissions." There appears to be no statutory command nor reasoned basis to exclude limitations and conditions that are enforceable as a practical matter by Ecology or an authority from consideration in determining "allowable emissions." See also the suggested definition of "legally enforceable" inserted below.

[6] This definition is needed to explain the meaning of the phrase "legally enforceable" as already used in several places in these regulations and as additionally suggested by TBC herein.

[7] Use of "position" instead of site avoids ambiguity because "site" can be interpreted to include an entire building, structure, facility or installation.

perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. A seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at that single location approximately three months (or more) each year. This paragraph does not apply to an engine after the engine is removed from the location.

Response:
We have evaluated EPA guidance on the proposal and reviewed operation to the non-road engine within Washington and determined that the proposed work change does not add to clarity or aid interpretation. Whether we retain the current word "site" or change to "position" as proposed by the commenter, the ambiguity that the commenter proposes to minimize is still contained in the phrase following the word "site."

27: WAC 173-400-030(73) "Potential to emit"

The Boeing Company
"Potential to emit" means the maximum capacity of a source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is legally[8] enforceable. Secondary emissions do not count in determining the potential to emit of a source.

Response:
Thank you for your comment. Please see the response to comment #25 on WAC 173-400-030(45).

28: WAC 173-400-030(78) "Regulatory order"

The Boeing Company
"Regulatory order" means an order issued by a permitting authority that requires compliance with:

(a) Any applicable provision of chapter 70.94 RCW or rules adopted there under; or

(b) Local air authority regulations adopted by the local air authority with jurisdiction over the sources to whom the order is issued.

(c) A voluntary limit on a source's or emission unit's potential to emit any air contaminant to a level agreed to by the owner or operator and the permitting authority with jurisdiction over the source or emission unit, including an order issued under WAC 173-400-091.[9]

[8] See the suggested definition of "legally enforceable" inserted above.

[9] To clarify that regulatory orders may be used to create synthetic minor status and that WAC 173-400-

Response:
Thank you for the comment. We did not add the suggested text. Regulatory orders issued under WAC 173-400-091 are already orders issued under an applicable provision of Chapter 70.94 RCW, specifically RCW 70-94-141(3)

29: WAC 173-400-030(88) "Synthetic minor"

The Boeing Company
"Synthetic minor" means any source whose potential to emit has been limited below applicable thresholds by means of a legally enforceable permit, order, rule, or approval condition. [10]

Response:
Thank you for your comment. Please see the response to comment #25 on WAC 173-400-030(45).

30: WAC 173-400-030(95) "VOCs"

Weyerhaeuser
WAC 173-400-030 Volatile organic compound (VOC) – In subsection (c), there is a proposed addition allowing EPA a direct opportunity to judge the sufficiency of the information defining reactivity of VOC compounds in a sources' emission. It would seem Ecology or the permitting authority would have the necessary expertise, or could consult with EPA, to address whatever technical issues might arise. In short, is there really a need to create a decision role for EPA on this matter?

Response:
Thank you for your comment. However, we disagree that the addition of "or EPA" to this definition provides EPA an opportunity for EPA to have to express its concurrence with a decision that the proposed monitoring program for a particular compound is satisfactory. We see the construction of the requirement as meaning that if any one of the listed agencies determines that the monitoring of emissions of the negligibly reactive compound is acceptable, then the requirement is satisfied. Therefore, the suggested change has not been made.

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091 orders are "regulatory orders."

[10] See suggested definition of "legally enforceable" inserted above. "Permit" is inserted to account for EPA guidance indicating that Title V Air Operating Permits can be used to limit PTE. *See* "Options for limiting Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (CAA) ("Operating permits issued under the federal Title V operating permits program can, in some cases, provide a convenient and readily available mechanism to create federally-enforceable limits."

Section 050

31: WAC 173-400-050(4)(d)(ii)

The Boeing Company

(ii) Changes to a CISWI unit made on or after June 1, 2001, that meet the definition of "modification" or "reconstruction" as defined in 40 CFR 60.2815 (~~in effect~~ as amended through ((~~July 1, 2010~~)) ~~May 1, 2012~~ December 1, 2000[11] mean the CISWI unit is considered a new unit and subject to WAC 173-400-115, which adopts 40 CFR Part 60, subpart CCCC by reference.

Response:
Thank you for your comment. While the proposal makes some sense, this definition was not affected by the partial vacatur by the DC court. All references to the version of 40 CFR Part 60, subpart CCCC in this rule are to the July 1 2010 version for consistency.

32: WAC 173-400-050(5)(c)(i)

The Boeing Company
(A) The municipal waste combustion unit is subject to a ~~federally~~ legally enforceable order or order of approval limiting the amount of municipal solid waste combusted to less than 11 tons per day.

(B) The owner or operator notifies the permitting authority that the unit qualifies for the exemption.

(C) The owner or operator of the unit sends a copy of the ~~federally~~ legally enforceable order or order of approval to the permitting authority.

Response:
Thank you for your comment. Please see response to comment on WAC 173-400-030(45).

33: WAC 173-400-050(5)(c)(vii)

The Boeing Company
(A) The unit has a ~~federally~~ legally enforceable order or order of approval limiting municipal solid waste combustion to no more than 30 percent of total fuel input by weight.

(B) The owner or operator notifies the permitting authority that the unit qualifies for the exemption.

(C) The owner or operator submits a copy of the ~~federally~~ legally enforceable order or order of approval to the permitting authority.

Response:

[11] Last rule before vacatur by DC Circuit..

Thank you for your comment. Please see the response to comment on WAC 173-400-030(45).

Section 075

34: WAC 173-400-075(6)

Weyerhaeuser
WAC 173-400-075(6)(d) and (e) sets up a process whereby NESHAPs Subparts JJJJJJ and DDDDD would be adopted into Washington's General Air Regulation if EPA promulgates the expected revisions before this state rule-making process is finalized. Weyerhaeuser supports that idea. While EPA's promulgation of these NESHAP's is thought to be imminent, it could be delayed beyond Washington's process. In that event, Ecology should not adopt by reference the current versions of these NESHAP's (Subpart JJJJJJ from 76 FR 15554, March 21, 2011; Subpart DDDDD from 76 FR 15608, March 21, 2011). That action would create confusion and accomplish no air quality improvement gain.

Boise Cascade
BCWP supports the process proposed in WAC 173-400-075 whereby NESHAPs Subparts JJJJJJ and DDDDD would only be adopted into the General Air Regulation after EPA promulgates the revised final rules. There seems to be no value in adopting rules that would not be consistent with the revised final rules.

Western States Petroleum Association
WAC 173-400-075(6)

(a) 40 CFR Part 63 and Appendices in effect on ((~~July 1, 2010~~)) May 1, 2012, as they apply to major ((~~stationary~~)) sources of hazardous air pollutants are adopted by reference, except for Subpart DDDDD, Industrial, Commercial and Institutional Boilers and Process Heaters, and Subpart M, National Perchloroethylene Emission Standards for Dry Cleaning Facilities, as it applies to nonmajor sources. The term "administrator" in 40 CFR Part 63 includes the permitting authority.[12]

Note: EPA signed a rule notice on April 17, 2012, and is submitting it for publication in the Federal Register. EPA Docket ID Number EPA-HQ-OAR-2010-0505. The final rule is available here: http://www.epa.gov/airquality/oilandgas/actions.html. Ecology intends to adopt these revisions when finalizing this rule

[12] As of May 1, 2012, 40 CFR Part 63 included Subpart DDDDD, promulgated on March 21, 2011. At the time EPA had not yet proposed the reconsideration amendments that EPA published for comment on December 23, 2011. Ecology's proposed subsection (a) would adopt the 2011 version of Subpart DDDDD. That would be true even if EPA completes its rulemaking on reconsideration, and promulgates a final Subpart DDDDD before Ecology completes this rulemaking. Ecology's proposed subsection (e) addresses Subpart DDDDD directly, but it would not prevent subsection (a) from adopting the 2011 version of Subpart DDDDD without some formal interaction between subparts (a) and (e). The approach proposed by WSPA for Subpart DDDDD is identical to the approach Ecology is following to avoid inadvertent incorporation of the 2011 version of the area source boiler MACT rule, Subpart JJJJJJ. Subsection (c) exempts Subpart JJJJJJ from the area source rules adopted by reference, while Subsection (d) will be used to adopt the final EPA rule if EPA finishes it in time. WSPA recommends that Ecology follow the same approach with Subpart DDDDD. Our proposed amendments to Subsection (a) achieve that result.

making. The final adopt by reference date in (a) of this subsection will reflect the date this revision is published in the Federal Register.

~~The rule notice covers the following rules:~~

~~(i) 40 CFR Part 63 Subpart HH, as amended on April 17, 2012.~~

~~(ii) 40 CFR Part 63 Subpart HHH, as amended on April 17, 2012.~~[13]

The Boeing Company

Correct the reference dates of the Boiler NESHAP: WAC 173-400-075(6) incorporates a number of federal rules by reference into Washington's regulations as in effect on May l, 2012, including 40 CFR part 63, subpart DDDDD[14] and subpart JJJJJJ[15]. However, significant problems with the currently effective versions of these rules published in the Federal Register on March 21, 2011 (76 FR 15608 and 76 FR 15704) have been identified by EPA; and on December 23, 2011 EPA published the subpart DDDDD Boiler and Process Heater MACT reconsideration proposal"), and published proposed amendments to the subpart JJJJJJ area source boiler rule.. As of today, these actions have not been completed and the corrected rules may not be finalized in time for incorporation by Washington. Therefore Ecology should adopt a specific exclusion to the blanket adoption of all NESHAP in effect May 1, 2012 (WAC 173-400-075(6)(a)) in order to exclude the problematic versions of these rules in (6)(c) and (d).

WAC 173-400-075(6)

(a) 40 CFR Part 63 and Appendices in effect on ((~~July 1, 2010~~)) May 1, 2012, as they apply to major sources of hazardous air pollutants are adopted by reference, except for Subpart DDDDD, Industrial, Commercial and Institutional Boilers and Process Heaters, and Subpart M, National Perchloroethylene Emission Standards for Dry Cleaning Facilities, as it applies to nonmajor sources. The term "administrator" in 40 CFR Part 63 includes the permitting authority.

…

(d) 40 CFR Part 63, Subpart JJJJJJ -- National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial and Institutional Boilers, as in effect on July 1, 2010,~~as amended by the proposed revisions in 76 Federal Register 80544 – 80552 (December 23, 2011) for Subpart JJJJJJ: Industrial, Commercial and Institutional Boilers~~, is adopted by reference. ~~[FR DOC # 2011-31644]~~[16]

[13] The text that WSPA proposes to strike out is part of Ecology's note, not part of the proposed amendments.

[14] National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters.

[15] National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers.

[16] Significant problems with the currently effective version of Subpart JJJJJJ published in the Federal Register on March 21, 2011 (76 FR 15554)have been identified by EPA; and on December 23, 2011 EPA published proposed amendments to the subpart. As of today, this action has not been completed and the corrected rule may not be finalized in time for incorporation by Washington. Therefore, if the proposed amendments are not finalized in time, Ecology should adopt a July 1, 2010 incorporation date for this standard in order to exclude the problematic version promulgated on March 21, 2011.

Note to reader: Should EPA finalize its rules before we finalize this rule making, ecology intends to adopt the final revisions to Subpart JJJJJJ - National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers by reference when finalizing this rule making. If EPA does not finalize these revisions before ecology finalizes these rule revisions, then the draft version of Subpart JJJJJJ will not be adopted into the state rule.

(e) 40 CFR Part 63, Subpart DDDDD -- National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers, as in effect on July 1, 2010 ~~as amended by the proposed revisions in 76 Federal Register 80627 – 80627 (December 23, 2011) for Subpart DDDDD: National emission for major sources: Industrial, Commercial and Institutional Boilers~~, is adopted by reference. ~~[FR DOC # 2001-31667]~~ [17]

Response:
As the notes to the proposed rule text indicate, it has not been our intent to adopt the 40 CFR Part 63, Subparts DDDDD and JJJJJJ requirements until EPA has issued its final rule on reconsideration. As of the date that we finalized the rule language in this proposal, EPA had not issued these rules. When EPA issues its final rules on reconsideration, we intend to adopt those subparts in this section.

The language in this section has been revised to make it explicitly clear that we are not adopting 40 CFR Part 63, Subparts DDDDD and JJJJJJ.

A note in the proposed rule related to potential adoption of Subparts HH and HHH was deleted. These 2 rules were published as final rules in the Federal Register the day after we finalized the revised rule text.

Section 081

35: WAC 173-400-081(2)

The Boeing Company
Where the permitting authority determines that the source or source category, when operated and maintained in accordance with good air pollution control practice, is not capable of achieving continuous compliance with an emission standard during startup or shutdown, the permitting authority must include in the standard appropriate emission limitations, work practices, operating parameters, or other criteria to regulate the performance of the source during startup or shutdown conditions.

Response:

[17] Significant problems with the currently effective version of Subpart DDDDD published in the Federal Register on March 21, 2011 (76 FR 15608)have been identified by EPA; and on December 23, 2011 EPA published the subpart DDDDD Boiler and Process Heater MACT reconsideration proposal. As of today, this action has not been completed and the corrected rule may not be finalized in time for incorporation by Washington. Therefore, if the proposed amendments are not finalized in time, Ecology should adopt a July 1, 2010 incorporation date for this standard in order to exclude the problematic version promulgated on March 21, 2011.

Thank you for your comment. WAC 173-400-081 was not proposed for modification. No change has been made.

36: WAC 173-400-081(4)

The Boeing Company
Any emission limitation or other parameter adopted under this rule which increases allowable emissions during startup or shutdown conditions over levels authorized in Washington's state implementation plan shall not take effect under the SIP[18] until approved by EPA as a SIP amendment.

Response:
Thank you for your comment. WAC 173-400-081 was not proposed for modification. No change has been made.

Section 105

37: WAC 173-400-105(6) – Changes in Raw Materials or Fuels

Western States Petroleum Association
WAC 173-400-105(6) is a relic from an era in which Ecology sought to meet the sulfur dioxide NAAQS by limiting cumulative increases in sulfur dioxide emissions resulting from increases in the sulfur content of fuels and raw materials over the baseline reported by some sources in an "initial inventory" at some point in the 1970s. To the best of our knowledge, this provision has never been used, the initial inventories that comprise the baseline no longer exist, the exemption in the rule for fuel and raw material sulfur content increases of less than 0.5 percent cannot be applied without the initial inventories, and the PSD program now regulates many fuel and raw material changes that could result in sulfur dioxide emissions increases. WSPA supports the deletion of this paragraph from WAC 173-400-105, and from the SIP.

Response:
Thank you for your support of deletion of this subsection.

Section 110

38: WAC 173-400-110(2)

[18] These limitations and parameters should become effective as a matter of state law upon adoption under this rule, even if SIP approval is needed to make them effective under federal law.

Western States Petroleum Association

(2) **((~~Approval requirements~~))** **~~Required permits~~.Pre-construction approval requirements.**[19] The applicant must evaluate the proposed project and submit an application addressing all applicable new source review requirements of this chapter.

(a) A notice of construction application must be filed and an order of approval must be issued by the permitting authority prior to the establishment of any new source except for those new sources or modifications exempt from permitting under subsections (4), (5), and (6) of this section.

(b) If the proposed project is a new major stationary source or a major modification, located in a designated nonattainment area, and if the project emits the air pollutant or precursors of the air pollutant for which the area is designated nonattainment, and the project meets the applicability criteria in WAC 173-400- 820, then the project is subject to the nonattainment area major new source review[20] permitting requirements of WAC 173-400-800 through 173-400-860.

The Boeing Company

(2) **((~~Approval requirements~~))** **Pre-construction approval requirements ~~Required permits~~.** The applicant must evaluate the proposed project and submit an application addressing all applicable new source review requirements of this chapter 173-400 WAC.

(a) A notice of construction application must be filed and an order of approval must be issued by the permitting authority prior to the establishment of any new source or modification except for those new sources or modifications exempt from permitting under subsections (4), (5), and (6) of this section.

(b) If the proposed project is a new major stationary source or a major modification, located in a designated nonattainment area, and if the project emits the air pollutant or precursors of the air pollutant for which the area is designated nonattainment, and the project meets the applicability criteria in WAC 173-400-820, then the project is subject to the nonattainment area major new source review permitting requirements of WAC 173-400-800 through 173-400-860.

Response:

Thank you for your comments. The suggested change to the subsection title change has been made. The change in title does not change the criteria to be met.

The commenter suggests adding "or modification" to (2)(a). The change has been made to assure consistency with the remainder of the sentence which uses "or modification" also.

39: WAC 173-400-110(4)(a)(x)

The Boeing Company

[19] Ecology's proposed edit to the heading of subsection (2) conflicts with RCW 70.94.152, which specifies approval orders, not permits, as the administrative vehicle for approving new sources. The term "pre-construction approval requirements" is broad enough to encompass both new source approval orders and PSD permits.

[20] The added language is intended, not to change the content of this section, but only to serve as a useful pointer to the reader.

(x) Construction activities that ~~do~~ install or modify an emission unit or activity at a ~~not result in new or modified stationary sources or portable~~ stationary sources.

Response:
The suggested change to WAC 173-400-110(4)(a)(x) would change the exemption. The change is not made.

Section 111

40: WAC 173-400-111(1)(b)

The Boeing Company
(b) A complete application contains all the information necessary for processing the application. At a minimum, the application must provide information on the nature and amounts of emissions to be emitted by the proposed new source or to be emitted in increased amounts by a proposed modification as well as the location, design, construction, and operation of the new source or modification as needed to enable the permitting authority to determine that the construction or modification will meet the requirements of WAC 173-400-113. Designating an application complete for purposes of permit processing does not preclude the reviewing authority from requesting or accepting any additional information.

Response:
Thank you for your suggestions. The first suggested clarifying change has been made. The second suggestion was not made since the definition of new source includes modifications.

41: WAC 173-400-111(8)(c)

Western States Petroleum Association
(c) The applicant must consider the criteria in 40 CFR 52.21 (r) (4) as adopted by reference in WAC 173-400-720 or 173-400- 830(3), as applicable, when determining which new source review ~~permit~~approvals[21] are required.

The Boeing Company
(c) The applicant must consider the criteria in 40 CFR 52.21(r) (4) as adopted by reference in WAC 173-400-720 or WAC 173-400-830(3), as applicable, when determining which new source review ~~permit~~ approvals are required.

Response:
Thank you for your comment. The suggested change, which makes the text match the terminology in state law, has been made.

[21] As noted in the previous footnote, the term "approvals" includes both PSD permits and new source approval orders.

Section 112

42: WAC 173-400-112

Western States Petroleum Association

WAC 173-400-112 ((~~Requirements for~~)) Requirements for ~~N~~new sources in nonattainment areas~~ Review for compliance with regulations~~.[22] WAC 173-400-110, 173-400-111, 173-400-112, and 173-400-113 apply statewide except where a permitting authority has adopted its own new source review regulations. The permitting authority that is reviewing an application required by WAC 173-400-110(2) to establish a new source in a nonattainment area shall issue the order of approval if it determines that the proposed project satisfies each of the following requirements:

The Boeing Company

WAC 173-400-112 ((~~Requirements for~~)) New sources in nonattainment areas~~ Review for compliance with regulations~~. WAC 173-400-110, 173-400-111, 173-400-112 and 173-400-113 apply statewide except where a permitting authority has adopted its own new source review regulations. The permitting authority that is reviewing an application required by WAC 173-400-110(2) to establish a new source in a nonattainment area shall issue the order of approval if it determines that the proposed project satisfies each of the following requirements:

Response:

Thank you for your comment. However, the suggested title language deletion has not been made. The added text suggested by the commenter has been made for consistency with the title of section 113.

43: WAC 173-400-112(3)

Western States Petroleum Association

> (3) The proposed new source will employ BACT for those air contaminants not subject to LAER that the new source will emit or for which the proposed modification will cause an emissions increase exceeding the de minimus thresholds in WAC 173-400-110(5).

The Boeing Company

The proposed new source will employ BACT for those air contaminants not subject to LAER that the new source will emit or for which the proposed modification will cause an emissions increase exceeding the de minimus thresholds in WAC 173-400-110(5).

[22] Section titles are supposed to provide pointers to the subject matter discussed in a regulation. The phrase "review for compliance with regulations" adds nothing to the meaning of WAC 173-400-112, and could equally be applied to many sections of WAC ch. 173-400.

Response:
Thank you for your comment. The suggestion to include a threshold above which BACT is required is reasonable. However, this is a change to the rule that narrows the applicability of the BACT requirement for emission increases not subject to LAER. The narrowing does not necessarily reflect what Ecology might provide as operational guidance to an applicant or a permitting authority asking about this paragraph. As a result, this suggested change is not being made.

44: WAC 173-400-112(4)

The Boeing Company
(4) The proposed new source or modification will not cause any ambient air quality standard to be exceeded, will not violate the requirements for reasonable further progress established by the SIP and will comply with WAC 173-400-113 (3) and (4) for all air contaminants for which the area has not been designated nonattainment.

Response:
Thank you for your comment. The suggested edit has been made.

Section 113

45: WAC 173-400-113

Western States Petroleum Association
WAC 173-400-113 ((~~Requirements for~~)) Requirements for ~~N~~new sources in attainment or unclassifiable areas~~ - Review for compliance with regulations~~. WAC 173-400-110, 173-400-111, 173-400-112, and 173-400-113 apply statewide except where a permitting authority has adopted its own ~~minor~~ [23]new source review regulations.

The Boeing Company
WAC 173-400-113 ((~~Requirements for~~)) New sources in attainment or unclassifiable areas
~~Review for compliance with regulations.~~ WAC 173-400-110, 173-400-111, 173-400-112 and 173-400-113 apply statewide except where a permitting authority has adopted its own ~~minor~~ new source review regulations.

Response:
Thank you for your comments. We deleted the word "minor" from the rule text for consistency with the comparable language in the other sections listed. We did not make the change to the rule section title.

[23] This subsection should be identical in scope to the parallel provisions in WAC 173-400-110, 111 and 112.

46: WAC 173-400-113(3)

The Boeing Company

(3) Allowable emissions from the proposed new source or the increase in emissions from the proposed modification will not cause or contribute to a violation of any ambient air quality standard. If the projected impact of the allowable emissions from the proposed new source or the projected impact of the increase in allowable emissions from the proposed modification at any location does not exceed the levels I Table 4a, below, then the proposed new source or modification will not be considered to cause or contribute to a violation of an ambient air quality standard.[24]

Response:

Thank you for your comments. The suggestion to clarify our intent and interpretation for implementing this paragraph has been made. The suggested text is the same guidance we would provide to applicants and permitting authorities asking about how to implement this paragraph.

47: WAC 173-400-113(4)

The Boeing Company

(a) If the projected impact of the allowable emissions from the proposed new major stationary source (as defined in WAC 173-400-810) or the projected impact of the significant increase in allowable emissions from the proposed major modification (as defined in WAC 173-400-810) at any location within a nonattainment area does not exceed the following levels for the pollutants for which the area has been designated nonattainment, then the proposed new source or modification will not be considered to cause or contribute to a violation of an ambient air quality standard:

Table 4a: Cause or Contribute Threshold Values for Nonattainment Area Impacts

Pollutant	Annual Average	24-Hour Average	8-Hour Average	3-Hour Average	1-Hour Average
CO-	-		0.5 mg/m^3	-	2 mg/m^3
SO_2	1.0 µg/m^3	5 µg/m^3	-	25 µg/m^3	30 µg/m^3
PM_{10}	1.0 µg/m^3	5 µg/m^3	-	-	-
$PM_{2.5}$	0.3 µg/m^3	1.2 µg/m^3			
NO_2	1.0 µg/m^3	-	-	-	-

(b) If the projected impact of the allowable emissions from the proposed new stationary source or the projected impact of the significant increase in allowable emissions from the proposed modification ~~A project that results in a projected impact~~ inside a nonattainment area is above the appropriate value in Table 4a of this section, then the project may use an offsetting

[24] The Table 4a off-ramp should be available for minor projects as well as major projects.

emission reduction adequate to reduce the projected impacts to the above values or less. If the proposed project is a major new source (as defined in WAC 173-400-810) or major modification (as defined in WAC 173-400-810) and it is unable to reduce emissions or obtain offsetting emissions reductions adequate to reduce modeled impacts below the values in Table 4a of this section, then the permitting authority shall deny approval to construct and operate the proposed new major stationary source or major modification, unless the project meets the requirements of Section III of 40 CFR Part 51, Appendix S[25].

Response:
Thank you for your comments regarding WAC 713-400-113(4)(a). We are not including the suggestion to limit this evaluation to emissions that are "significant." This criterion does not exist in 40 CFR 51.165(b)(2) and (3).

Thank you for your comments regarding WAC 173-400-113(4)(b). We disagree that there is a disconnection. The procedures outlined in Section III of App. S provide guidance on what actions the permittee and EPA (or a state or local permitting authority) has to do in order to approve the project for construction and operation. If the criteria for approval are not met, then under that guidance EPA (or a state or local permitting authority) would be required to deny approval of the project.

In regard to the suggested addition to the last sentence of subsection (4)(b), we view the commenter's suggestion as asking that we provide criteria to avoid denial of a permit application. This is a reasonable request. We have modified this paragraph to reference the criteria in Part 51 Appendix S Section III to clarify the methods that a source could follow to avoid denial of a permit application.

48: WAC 173-400-113(5)

The Boeing Company
((~~If the proposed new source or the proposed modification will emit any toxic air pollutants regulated under chapter 173-460 WAC, then the source must meet all applicable requirements of that program.~~)) If the proposal is a new major stationary source or a major modification as those terms are defined in WAC 173-400-720, then it must also comply with WAC 173-400-700 through 173-400-750.

Response:
Thank you for your suggestion, but it does not clarify the criteria.

[25] There is a disjuncture between 40 CFR 165(b)(3)'s "shall deny" language used here and the provisions of Section III of Appendix S. Under Appendix S, sources or modifications located in an attainment or unclassifiable area that would cause or contribute to a violation of a NAAQS in a nonattainment area may still be allowed to construct if certain conditions similar to NNSR are met. We believe that Ecology may use the procedures of Section III of Appendix S in such situations, and that EPA must allow Ecology to do so. It makes no sense to deny a permit for a project in an attainment or unclassifiable area that would be allowed in a nonattainment area.

49: WAC 173-400-113(5)

Michael Ruby
The deletion of WAC 173-113(5) is reasonable at that location, but it does not aid the reader in knowing all the requirements because the intended use of the mention in -110 is insufficient. It would be best if the entire deleted language were moved to -111 (3) and added in the list there. This would give the needed notice without being excessively redundant.

Response:
Thank you for your comments. The suggested edit has been made.

Section 114

50: WAC 173-400-114(2)

Western States Petroleum Association
((~~For projects not otherwise reviewable under WAC 173-400-110,~~ **ecology** ~~or~~)) A project to replace or substantially alter emission control technology at an existing stationary source that results in an increase in emissions of any air contaminant is subject to new source review as provided in WAC 173-400-110. For any other project to replace or significantly alter control technology the permitting **authority** may:

Response:
Thank you for your comment. The suggested clarification has been made.

Section 115

51: WAC 173-400-115(1)

Western States Petroleum Association
(1) **Adoption by reference.**
(a) 40 CFR Part 60 and Appendices in effect on ((~~July 1,2010~~)) May 1, 2012, are adopted by reference. Exceptions are listed in ((~~subsection (1)~~)) (b) and (c) of this ((~~section~~))subsection.

Note: EPA signed a rule notice on April 17, 2012, and is submitting it for publication in the Federal Register. EPA Docket ID Number EPA-HQ-OAR-2010-0505. The final rule is available here: http://www.epa.gov/airquality/oilandgas/actions.html. Ecology intends to adopt these revisions when finalizing this rule making. The final adopt by reference date in (a) of this subsection will reflect the date this revision is published in the Federal Register.

~~The rule notice covers the following rules:~~[26]

~~(i) 40 CFR Part 60, Subpart KKK, Standards of Performance for Equipment Leaks of VOC From Onshore Natural Gas Processing Plants for Which Construction, Reconstruction, or Modification Commenced After January 20, 1984, and on or before August 23, 2011, as~~

[26] The text shown in strikeout is part of Ecology's explanatory note, not the regulation.

~~amended on April 17, 2012.~~

~~(ii) 40 CFR Part 60, Subpart LLL Standards of Performance for SO_2 Emissions From Onshore Natural Gas Processing for Which Construction, Reconstruction, or Modification Commenced After January 20, 1984, and on or before August 23, 2011.~~

~~(iii)~~(i) ~~40 CFR Part 60, Subpart OOOO Standards of Performance for Crude Oil and Natural Gas Production, Transmission and Distribution.~~

(b) 40 CFR Part 60, Subparts CCCC and DDDD, in effect on July 1, 2010, are adopted by reference.[27] ~~as amended by the proposed revisions in 76 Federal Register 80488 - 80530, Subpart CCCC - Standards of Performance for Commercial and Industrial Solid Waste Incineration Units (December 23, 2011), is adopted by reference. [FR DOC # 2011 31648]~~

Note to reader: Should EPA finalize its rules before we finalize this rule making, ecology intends to adopt the final revisions to Subpart CCCC - Standards of Performance for Commercial and Industrial Solid Waste Incineration Units and 40 CFR 60.17 by reference when finalizing rule making. If EPA does not finalize these revisions before ecology finalizes these rule revisions, then the draft version of Subpart CCCC will not be adopted into the state rule.

Response:
It has not been our intent to adopt, as state regulation, the Subpart CCCC regulations until EPA has issued its final rule on reconsideration. As of August 14, the last date that changes to this rule text were made, EPA had not issued that rule. Therefore, as indicated in the proposal, we have explicitly not adopted this standard.

The commenter suggests that we also specifically add subpart DDDD to this paragraph. Subpart DDDD has been specifically not adopted by reference in WAC 173-400-115(1)(c)(ii)(C). However, the version of Subpart DDDD in existence on July 1, 2010 remains in WAC 173-400-050(4).

Section 117

52: WAC 173-400-117(1)(b)

The Boeing Company
The terms "major stationary source," "major modification," and "net emissions increase" are ((~~provided~~)) defined in WAC 173-400-720 for projects located in areas designated as attainment or unclassifiable for the pollutants proposed to increase as a result of the project and ~~as~~ are defined in WAC 173-400-810 for projects located in areas designated as nonattainment for the pollutants proposed to increase as a result of the project.

Response:
Thank you for your comment. We made the suggested correction.

[27] Subparts CCCC and DDDD are EPA's CISWI standards and guidelines. The version in effect on July 1, 2010 was the version promulgated on December 1, 2000. EPA revised both rules on March 21, 2011, but Ecology does not intend to adopt the 2011 versions, which EPA is currently revising on reconsideration. The exception proposed here is necessary, because without it subsection (1)(a) would adopt the 2011 versions into WAC 173-400-115. If EPA completes its reconsideration rulemaking before Ecology adopts these rules, subsection (b) can be updated to incorporate the new version.

53: WAC 173-400-117(2)(b)

The Boeing Company
~~Submital of a~~ A notice of construction application for a major stationary source or a major modification to a stationary source in a nonattainment area, as either of those terms are defined in WAC ((~~173-400-720~~)) 173-400-810.

Response:
Thank you for your comment. We made the suggested correction.

54: WAC 173-400-117(7)

The Boeing Company
Additional requirements for projects located in nonattainment areas. In reviewing a PSD permit application or notice of construction application for a new major stationary source or major modification proposed for construction in an area classified as nonattainment as those terms are defined in WAC 173-400-810, the permitting authority must ensure that the proposed new source's emissions or the proposed modifications increase in emissions will be consistent with making reasonable progress toward meeting the national goal of preventing any future, and remedying any existing, impairment of visibility by human-caused air pollution in mandatory Class I federal areas. In determining the need for approval order conditions to meet this requirement, the permitting authority may take into account the costs of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source.

Response:
Thank you for your comments. The suggested clarifications have been made.

TBC NOTE: THE FOLLOWNG SECTION, WAC 173-400-131, WAS NOT INCLUDED IN THE PROPOSAL, BUT IS INCLUDED HEREIN BELOW SO THAT TBC CAN OFFER SUGGESTED REVISIONS TO THE ERC PROGRAM TO BE INCORPORATED INTO THE SIP WHICH IS PARTIALLY ADRESSED IN WAC 173-400-136, BELOW.

Section 131

55: WAC 173-400-131

The Boeing Company
WAC 173-400-131 Issuance of Emission Reduction Credits
(1) **Applicability.** The owner or operator of any source may apply to the permitting authority for an emission reduction credit (ERC) if the source proposes to reduce its actual emissions rate for any contaminant regulated by state or federal law for which the emission requirement may be stated as an allowable limit in weight of contaminant per unit time for the emissions units involved.

(2) **Time of application.** The application for an ERC must be made and the ERC approved under WAC 173-400-131(5) prior to any use or transfer of the ERC.[28]

(3) **Conditions.** An ERC may be authorized provided the following conditions have been demonstrated to the satisfaction of the permitting authority.

(a) The quantity of emissions in the ERC shall be less than or equal to the old allowable emissions rate or the old actual emissions rate, whichever is the lesser, minus the new allowable emissions rate. The old actual emissions rate is the average emissions rate occurring during the most recent twenty-four-month period preceding the request for an ERC. An alternative twenty-four-month period from within the previous five years may be accepted by the permitting authority if the owner or operator of the source demonstrates to the satisfaction of the permitting authority that the alternative period is more representative of actual operations of the unit or source. . A source subject to WAC 173-400-105(1) or an authority's equivalent annual emission inventory reporting requirement may use the average emissions rate occurring during the two most recent annual reporting periods.

(b) The ERC application must include a description of all the changes that are required to accomplish the claimed emissions reduction, such as, new control equipment, process modifications, limitation of hours of operation, permanent shutdown of equipment, specified control practices, etc.

(c) The reduction must be: Greater than otherwise required by an applicable emission standard, order of approval, or regulatory order and be permanent, quantifiable, and legally enforceable. Before an ERC may be used as an offset under WAC 173-400-840, the reduction must be federally enforceable.[29]

(d) The reduction must be large enough to be readily quantifiable relative to the source strength of the emissions unit(s) involved. No reductions will be rejected based on this criteria if the amount, rate and characteristics of the emission credit can be estimated through a reliable, reproducible method approved by the permitting authority.[30]

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[28] This timing limitation should be eliminated or substantially relaxed from the 180 days, so as to encourage sources to create and sustain these reductions. As long as the credit is applied for and the emission reduction is properly verified before the credit is to be used or transferred, there is no justification for an application deadline. *C.f.* OH Admin. Code 3745-111-03.

[29] *Chemical Manufacturer's Assn v. EPA* No. 891514 (D.C. Cir Sept 15, 1995) , along with *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Clean Air Implementation Project v. EPA*, No. 96-1224 (D.C. Cir. June 28, 1996), generally stand for the proposition that if (1) the Federal CAA (FCCA) does not require federal enforceability in order for a limitation to be taken into account in calculating emissions or determining applicability of particular program to a source, and (2) EPA is not able to articulate a good reason why legally enforceable state/local/tribal limits should not count too, then EPA cannot restrict consideration to federally enforceable limitations only. So while these cases focus on the definitions of PTE in various programs, there is no difference when the legal rationale underlying these cases is applied, for example, to other measures of emissions besides PTE that can depend on enforceability of emission limits, such as the definition of "allowable emissions." There appears to be no statutory command nor reasoned basis to generally exclude limitations and conditions that are enforceable as a practical matter by Ecology or an authority from consideration in creating an ERC. See also the suggested definition of "legally enforceable" inserted above. We recognize, however that the FCAA requires federal enforceability for reductions used as offsets under NNSR and therefore it would be appropriate to require that the reduction be federally enforceable before it is used as an offset.

[30] This test should not be more stringent than the generally accepted requirement that the reduction be "quantifiable." *C.f.*, OH Admin Code 3745-111-01 (E) [http://codes.ohio.gov/oac/3745-111] ("'Quantifiable' means that the amount, rate and characteristics of emissions and emission reductions can be determined or measured through a reliable and replicable method established by an applicable law or approved by the director."); and North Carolina ERC guidance at http://daq.state.nc.us/permits/erc/ercinfo.shtml ("Emission reductions are considered quantifiable if the amount, rate and characteristics of the emission credit can be estimated through a reliable, reproducible

(e) No part of the emission reductions claimed for credit shall have been used to avoid PSD (WAC 173-400-700 through 750) or nonattainment area major new source review (WAC 173-400-800 through 860) for a modification as part of a demonstration that a project's net emission increase is below an applicable significance level, nor as part of an offsetting transaction under WAC 173-400-113(4) or 173-400-830, nor as part of a bubble transaction under WAC 173-400-120.[31]

(f) No part of the emission reduction was included in the emission inventory used to demonstrate attainment or for reasonable further progress in an amendment to the state implementation plan.

(g) Concurrent with or prior to the authorization of an ERC, the applicant shall receive (have received) a legally enforceable regulatory order or permit that establishes total allowable emissions from the source or emissions unit of the contaminant for which the ERC is requested, expressed as weight of contaminant per unit time. Before an ERC may be used as an offset under WAC 173-400-840, the reduction must be federally enforceable.[32]

(h) The use of any ERC shall be consistent with all other federal, state, and local requirements of the program in which it is used.

(4) **Additional information.** Within thirty days after the receipt of an ERC application the permitting authority may require the submission of additional information needed to review the application.[33]

(5) **Approval.** Within thirty days after all required information has been received, the permitting authority shall approve or deny the application, based on a finding that conditions in subsection (3)(a) through (h) of this section have been satisfied or not. If the application is approved, the permitting authority shall:

(a) Issue a regulatory order or equivalent document to assure that the emissions from the source will not exceed the allowable emission rates claimed in the ERC application, expressed in weight of pollutant per unit time for each emission unit involved. The regulatory order or equivalent document shall include any conditions required to assure that subsection (3)(a) through (h) of this section will be satisfied. If the

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method approved by the Division".)

[31] We believe that this provision is intended to apply only when the project *nets out* of PSD or NNSR, not when the project actually goes through PSD or NNSR permitting because of a calculated significant emission increase and net emissions increase. *See, e.g.*, the North Carolina ERC guidance at http://daq.state.nc.us/permits/erc/ercinfo.shtml ("The following are not considered surplus ... 1. Emission reductions which have previously been used to *avoid* 15A NCAC 2D .0530 or .0531 (new source review) through a netting demonstration") (emphasis added).

[32] *Chemical Manufacturer's Assn v. EPA* No. 891514 (D.C. Cir Sept 15, 1995) , along with *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Clean Air Implementation Project v. EPA*, No. 96-1224 (D.C. Cir. June 28, 1996), generally stand for the proposition that if (1) the Federal CAA (FCCA) does not require federal enforceability in order for a limitation to be taken into account in calculating emissions or determining applicability of particular program to a source, and (2) EPA is not able to articulate a good reason why legally enforceable state/local/tribal limits should not count too, then EPA cannot restrict consideration to federally enforceable limitations only. So while these cases focus on the definitions of PTE in various programs, there is no difference when the legal rationale underlying these cases is applied, for example, to other measures of emissions besides PTE that can depend on enforceability of emission limits, such as the definition of "allowable emissions." There appears to be no statutory command nor reasoned basis to generally exclude limitations and conditions that are enforceable as a practical matter by Ecology or an authority from consideration in creating an ERC. See suggested definition of "legally enforceable" inserted above. We recognize, however that the FCAA requires federal enforceability for reductions used as offsets under NNSR and therefore it would be appropriate to require that the reduction be federally enforceable before it is used as an offset.

[33] Logically, if the original application contained "*all* supporting data and documentation," no further information would be required.

ERC depends in whole or in part upon the shutdown of equipment, the regulatory order or equivalent document must prohibit operation of the affected equipment; and

(b) Issue a certificate of emission reduction credit. The certificate shall specify the issue date, the contaminants involved, the emission decrease expressed as weight of pollutant per unit time, the nonattainment area involved, if applicable, and the person to whom the certificate is issued. The emission reduction credit listed in the certificate shall be less than the amount of emission reduction achieved by the source, but only to the extent necessary to comply with RCW 70.94.850. [34]

(c) The certificate of emission reduction credit shall include any expiration date of the credit.[35]

Western States Petroleum Association
WSPA endorses the Boeing Company's comments on … the need to revise WAC 173-400-131.

Response:
Thank you for your comments. However, Ecology did not propose any changes to WAC 173-400-131. These changes are outside the scope of the current rulemaking.

The changes proposed by the commenters represent a significant shift in philosophy from the ERC program that currently exists in Ecology rules. These suggested changes, such as the lifetime of an ERC, its value, requirements to submit the ERC certificate to Ecology for reissuance when ownership is transferred, etc, would result in significant operational and policy changes that require a public discussion (stakeholder process) as part of a formal rulemaking process. We have added these suggestions to our tracking system for consideration in future rule making.

Section 136

56: WAC 173-400-136

The Boeing Company
…(3)(b) The permitting authority may impose additional reasonable and scientifically justified conditions of use to account for temporal and spatial differences between the emissions units that generated the ERC and the emissions units that use the ERC to the extent that the ERC is being used to satisfy a requirement that is temporal and/or spatial in nature. [36]

[34] We believe the intent of RCW 70.94.850 is simply that the ERC not exceed the underlying emission reduction. Consistent with this understanding, note that the prior language in WAC 173-400-131(3)(a) only required that "[t]he quantity of emissions in the ERC shall be *less than or equal to* the old allowable emissions rate or the old actual emissions rate, whichever is the lesser, minus the new allowable emissions rate." (emphasis added).

[35] Limiting the effective life of ERCs will discourage emission reductions. ERCs should not expire except in connection with the termination of the underlying emission reductions. *See* North Carolina ERC Guidance at http://daq.state.nc.us/permits/erc/ercuse.shtml ("Certified ERCs are permanent until withdrawn by the owner or until withdrawn by the Director of the DAQ.").

[36] NNSR offsets need only be in the required ratio and from the same non-attainment area as the proposed

(4) **Sale of an ERC.** An ERC may be sold or otherwise transferred by its owner to any person ~~other than the person to whom it was originally issued~~. ~~Within thirty days~~ After the transfer of ownership and before use or any subsequent transfer, the certificate must be surrendered to the issuing authority. After receiving the certificate, the issuing authority shall reissue the certificate to the new owner. [37]

(5) ~~Redemption period. An unused ERC expires ten years after date of original issue~~ [38]**Discount due to change in SIP.** If reductions in emissions beyond those identified in the SIP are required to meet an ambient air quality standard, issued ERCs may be discounted as necessary to reach attainment.

(a) Issued ERCs may be discounted only if:

(i) Reductions in emissions beyond those identified in the SIP are required to meet an ambient air quality standard;

(ii) The ambient standard cannot be met through controls on operating sources; and

(iii) The state implementation plan must be revised.

(b) The discount shall not exceed the percentage of additional emission reduction needed to reach attainment. [39]

(c) ERCs may be discounted by the permitting authority only after notice to the public according to WAC 173-400-171 and the owners of affected ERCs.

(d) No discount under this section shall be effective until approval by EPA of the corresponding SIP revision required by subsection (a)(iii), above ~~by EPA~~.

(e) Just compensation shall be paid by the permitting authority imposing the discount to the owner of the ERC at the time the discount is effective.

Western States Petroleum Association

WSPA endorses the Boeing Company's comments on the proposed revisions to WAC 173-400-136...

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project; the offsets need not fully counter the impact of the project's emissions at all receptors at all times.

[37] Why is there a 30 day time limit? This should be allowed at any time before the new owner wants to use the ERC.

[38] Limiting the effective life of ERCs with a static expiration period unrelated to a termination of the underlying emission reductions will discourage emission reductions and the creation of ERCs. Other states like North Carolina and Ohio do not impose a static expiration period. *See* North Carolina ERC Guidance at http://daq.state.nc.us/permits/erc/ercuse.shtml ("Certified ERCs are permanent until withdrawn by the owner or until withdrawn by the Director of the DAQ."); and Ohio ERC Banking Program Guidance at http://www.epa.state.oh.us/dapc/ERC/general_info.aspx ("ERCs that enter the ERC banking system are not subject to a static expiration period.")

[39] The risk of discounting will discourage the creation of ERCs and the underlying emissions reductions. As this section is worded, persistent nonattainment would justify the discounting of 100% of all ERCs rendering them worthless. In this situation, no new ERCs will be created and offsets for new projects will be very difficult to find, stifling economic development. Depending on whether ERCs will expire and, if so, what their life span will be, there should be a maximum discount. For example, if the life span is limited to five years as proposed, there should no discounting allowed. If the life span is 10 years, the maximum discount should be 10%, etc.

Response:
Thank you for your comments. Ecology proposed changes to WAC 173-400-136 specifically to clarify the coordination between the usage of ERCs as contemporaneous emission reductions when used for netting purposes in a PSD or NNSR permitting action.

Thank you for your comments. However, the additional changes proposed by the commenters represent a significant shift in philosophy from the ERC program that currently exists in Ecology rules. These suggested changes, such as the lifetime of an ERC, its value, requirements to submit the ERC certificate to Ecology for reissuance when ownership is transferred, additional criteria related to the discounting of ERCs when required to attain a NAAQS, etc, would result in significant operational and policy changes that require a public discussion (stakeholder process) as part of a formal rule making process. The suggested changes have not been made, but we have added them to our tracking system for consideration in future rule making.

Section 171

57: WAC 173-400-171(1)(a)

The Boeing Company
A notice of construction application designated for integrated review with actions regulated by WAC 173-400-700 through 173-400-750~~720~~. In such cases, compliance with the public notification requirements of WAC 173-400-740 is required.

Response:
Thank you for your comment. The suggested edit has been made to clarify the current rule language.

58: WAC 173-400-171(3)(b)

Western States Petroleum Association

> Any notice of construction application for a new or modified source, including the initial application for operation of a portable source, if there is an increase in emissions of any air pollutant at a rate above the emission threshold rate (defined in WAC 173-400-030) or any increase in emissions of a toxic air pollutant above the applicable small quantity emission rate in WAC 173-460-150, and which causes an exceedance of the acceptable source impact level~~s~~ for that toxic air pollutant,[40] as regulated under chapter 173-460 WAC; or

The Boeing Company

[40] The point of the edits proposed here is to allow a permitting authority to exempt a project from public comment where the TAP emissions are below the SQERs, without forcing the applicant to model ambient impacts against the ASILs.

(b) Any notice of construction application for a new or modified source, including the initial application for operation of a portable source, if there is an increase in emissions of any air pollutant at a rate above the emission threshold rate (defined in WAC 173-400-030) or any increase in emissions of a toxic air pollutant regulated under chapter 173-460 WAC above the applicable small quantity emission rate in WAC 173-460-150, and which would have an impact on ambient concentrations [41] above the acceptable source impact levels as regulated under chapter 173-460 WAC; or

Response:
Thank you for your comments. However, we did not make the suggested change because this paragraph only addresses whether a toxic air pollutant source is required to have a public comment period. On its own, this paragraph does not trigger any additional workload by the applicant or the agency.

If dispersion modeling to determine compliance with the acceptable source impact levels (ASIL) is required for a project, then that analysis has already occurred as part of the determination of compliance with WAC 173-460, which is a component of the notice of construction application.

Under the terms of WAC 173-460, only those new toxic air pollutant sources and modifications to existing sources that cannot demonstrate that all toxic air pollutant emissions are below the applicable de minimis or small quantity emission rates would have to perform dispersion modeling to determine if the potential ambient concentration is above or below the ASILs.

59: WAC 173-400-171(4) Public Notice

The Boeing Company
Newspaper Publication: Boeing supports the broadening of public notice methods to reflect the changing communications landscape. However, the proposed changes to WAC 173-400-171 could be read to eliminate the one current and relied upon method for advertising to the public of an opportunity to review or comment on a permit action, i.e., publication of a notice in a newspaper of general circulation. Restoring language to allow publication of permit applications and hearings in the newspaper is important. Absent this express allowance, there is no way to ascertain compliance with the newly proposed requirement to provide "prominent advertisement." The permittee should not be subjected to challenges to a permit action because of later disagreement over whether the public notice was "prominent" enough to be valid. We ask that Ecology restore "published in a newspaper of general circulation" along with the newly proposed "prominent advertisement" in this section.

Advertising the mandatory public comment period. Public notice of all applications, orders, or actions listed in subsection (3) of this section must be ((~~published in a newspaper of general circulation~~)) published in a newspaper of general circulation[42] or given by other means of

[41] A source should not have to perform an ASIL demonstration to avoid triggering public comment if its TAP emissions are below the applicable small quantity emissions rates.

42 We need to make clear that publication in a newspaper of general circulation in the area affected

prominent advertisement in the area ((~~where the source or sources are or will be located~~)) affected. This public notice can be ((~~published~~))published or given only after all of the information required by the permitting authority has been submitted and after the applicable preliminary determinations, if any, have been made. The notice must be ((~~published~~)) published or given before any of the applications or other actions listed in subsection (3) of this section are approved or denied. The applicant or other initiator of the action must pay the publishing cost of providing public notice.

Association of Washington Business
AWB encourages Ecology to reconsider some of the proposed changes identified in our members letters, such as the changes to 173-400-171 Public Notice and 173-400-720(4)(b) Applicable Requirements. These member companies, and their experts, can help provide a better understanding of the cost benefits and risks associated with the technical changes being proposed.

Patty Martin
Publication of public notices (-171) needs to be in a newspaper in general circulation to the affected population. This should also include language that recognizes the official newspaper, i.e., newspaper of record, by the city affected, and require special outreach provisions for communities with large minority populations or low-come residents.

Response:
Thank you for your comments. The changes were intended to implement a recent state law requiring media neutral public notices. We have revised the text along the lines suggested by the commenter to clarify that a newspaper of general circulation remains an acceptable means of public notification.

60: WAC 173-400-171(6)(vii)

Patty Martin
There should be no "Ecology Action only" section in state regulation that is exempted from requiring a public hearing. -171(6)(vii)

Response:
Thank you for your comment. The listing of Ecology Only Actions is found in WAC 173-400-171(12). These actions are primarily actions that Ecology does in order to submit specific types of documents and plans to EPA. As specified in WAC 173-400-171(12)(b) and (c), Ecology must have a public hearing or provide an opportunity for the public to request a public hearing. As stated in the rule, if a public hearing is requested, then a public hearing must be held. This is consistent with the federal regulation referred to in WAC 173-400-171(12)(c).

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continues to be acceptable. The cost of giving notice must be kept reasonable.

A Notice of Construction approval is not an Ecology only action. In this case we are required to follow the public involvement process given in WAC 173-400-171.

61: WAC 173-400-171(10)

The Boeing Company
Notice of public hearing.

(a) At least thirty days prior to the hearing the permitting authority will provide notice of the hearing as follows:

(i) ((~~Publish the~~)) Give ~~public hearing~~ notice ((~~of public hearing in a newspaper of general circulation~~)) of the public hearing by publication in a newspaper of general circulation or by other means of by prominent advertisement in the area ((~~where the source or sources are or will be located~~)) affected; [43] and

(ii) Mail the notice of public hearing to ((~~the applicant and to~~)) any person who submitted written comments on the application or requested a public hearing and in the case of a permit action, to the applicant.

(b) This notice must include the date, time and location of the public hearing and the information described in subsection (6) of this section.

(c) In the case of a permit action, the applicant must pay all publishing costs associated with meeting the requirements of this subsection.

Response:
Thank you for your comments. The changes were intended to implement a recent state law requiring media neutral public notices. We have revised the text along the lines suggested by the commenter to clarify that a newspaper of general circulation remains an acceptable means of public notification.

62: WAC 173-400-171(11)

The Boeing Company
Notifying the EPA. The permitting authority must send a copy of the notice for all actions subject to ~~the~~ a mandatory public comment period to the EPA Region 10 regional administrator.

Response:
Thank you for your comment. We made the suggested change.

63: Explicit Notice of Public's Right to Citizen Suit in Rule

Patty Martin

[43] The cost of giving notice must be kept reasonable.

Ecology has failed to provide notice to the public of their rights to a citizen suit to federally enforce the SIP in federal court under the CAA (42 USC 7604). This information should be available in the rule.

Response:
Thank you for your comment. The suggestion is out of scope for this rule making, but we have referred it to staff to consider adding this type of information to our web page.

Section 260

64: WAC 173-400-260

Patty Martin
Ecology has removed the conflict of interest provision under WAC 173-400-260. Retain this section, and correct the citation so that it points to the correct part of the law & rules.

Response:
Thank you for your comment. We want to stress that the conflict of interest provision in WAC 173-400-260 has not been deleted or removed. WAC 173-400-260 remain as a legal requirement that must be followed. The proposed rule text provided only contains those sections of regulation that we proposed to revise in some way.

Section 560

65: WAC 173-400-560(4)(a)

The Boeing Company
(i) The owner or operator of the emission unit or source applies for coverage under a general order of approval in accordance with this regulation and any conditions of the approval related to application for and granting coverage under the general order of approval; and

(ii) The emission unit or source meets all the qualifications listed in the requested general order of approval;

(iii) delete[44] [45]

[44] PSD and NNSR sources/modifications should not be excluded from general permitting. We need general permits to deal with greenhouse gases as a regulated pollutant under PSD (and perhaps, in the future, under NNSR). The general permits themselves can specify whether and how they may be used in conjunction with a project triggering PSD or NNSR.

[45] There is no reason why the need to obtain or modify an operating permit should preclude streamlined construction permitting. This provision would exclude all existing operating permit major sources from

Response:
Thank you for your comments. At such time as EPA provides guidance or regulatory provisions that indicate that the Federal Clean Air Act and EPA PSD program regulations that allow for the issuance of General Permits for PSD sources, we consider extending this provision to cover facilities subject to PSD.

Additionally for a minor source (true or synthetic) to undertake a project that makes it a major source for AOP purposes is a significant change in our regulatory relationship with the source. We want to assure that such a change is properly evaluated and the owner provided with a full accounting of their new responsibilities.

For more information on the basis and rationale for WAC 173-400-560, refer to the Concise Explanatory Statement and administrative record for the 2005 rule making.

The suggested change has not been made.

Section 720

Ecology initiated change to WAC 173-400-720(4)(a)(v).

Adoption by reference date of the federal PSD regulations in 40 CFR 52.21.

No comment was received on the adoption by reference date of the federal regulations that is in this paragraph. Since this rule proposal went to public comment, EPA adopted amendments to the applicable rules (40 CFR 51.166 and 52.21)

Ecology updated the adoption by reference date from the July 20, 2011 date in the rule proposal to August 13, 2012. This change allows Ecology to adopt a recent EPA amendment that incorporates the ability for a source to acquire a Plant-wide Applicability Limit permit for greenhouse gases. The EPA amendments includes the ability for the PSD PAL permit to contain limitations on greenhouse gases that are below the greenhouse gas PSD significant emission rate. Along with BACT for new and modified sources, this new provision can become an important tool to aid us in limiting the increase in greenhouse gas emissions by Washington sources.

Additionally, if we did not adopt this recent amendment now, we would have to adopt it in the near future to support our request to EPA for full SIP approval of our PSD permitting program.

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general permitting even for insignificant changes, since the conditions of the general order of approval would need to eventually be incorporated into the operating permit!

66: Do Not Adopt WAC 173-400-720(4)(b)

Western States Petroleum Association

Several of the Proposed Amendments would incorporate into WAC ch. 173-400 elements from EPA comment letters that interpret the requirements of EPA's PSD regulations. For instance, Ecology proposes in WAC 173-400-720(4)(b) to adopt a Region 10 suggestion that Ecology's rules should require analysis of the impact of startup and shutdown emissions on increment protection and Air Quality Related Values.

Ecology should not adopt these and other provisions that have no counterpart in EPA's PSD regulations. The proposed edits to WAC 173-400-720(4)(b) are especially harmful, in that they create an affirmative obligation by Ecology to include in a PSD permit conditions that "assure compliance" with review requirements not found in EPA's PSD rules. The recommendation by Region 10 to incorporate these provisions into Ecology's PSD rules cites no authority at all, not even EPA guidance. EPA's views evolve over time. Ecology is perfectly capable of applying EPA guidance that interprets the requirements of the PSD program without codifying that guidance into Ecology's PSD rules.

The attached redline provides more detail on why the two amendments referenced above are not necessary, and should not be adopted.

(4) **Applicable requirements.**

(a) ~~A PSD permit must assure compliance with~~ Ecology shall issue a PSD permit if it determines that the proposed project satisfies each of the following requirements:[46]

(i) WAC 173-400-113 (((~~(3) and~~)) (1) through (4)((.));

(ii) WAC 173-400-117 - Special protection requirements for federal Class I areas((;)).

~~(b) The review of a PSD permit must also include an evaluation of the impacts of allowable emissions during stationary source startup and shutdown on:~~

~~(i) Protection of increment;~~

(ii) ~~Air quality related values;~~[47]

[46] WSPA's proposed language tracks the text of WAC 173-400-113 (first paragraph), and is consistent with the requirements of 40 CFR 52.21(j). The PSD rule does not require that a PSD permit "assurance compliance" with the SIP, the NSPS and the other regulatory requirements listed in WAC 173-400-113(1) through (4). It does require Ecology to ensure that the project satisfies the referenced requirements. Ecology can decide for a specific project whether a condition, e.g., applying the SIP SO2 standard, should be written into the PSD permit. That should not be necessary, because every source that requires a PSD permit also will require a Title V permit.

[47] No EPA rule requires that the review of a PSD permit must include an evaluation of the impacts of startup and shutdown emissions on increment protection or air quality related values. In pressing Ecology to include these provisions in its PSD rules Region 10 asks Washington to codify an interpretive position that has not been adopted into the federal PSD rules, and that has no basis beyond a Region 10 comment letter. The proposed text states that review of a PSD permit "must" include evaluation of impacts that can only be analyzed through costly dispersion modeling, and that are irrelevant to many projects. The adoption of this language would increase the cost to Ecology and project proponents of processing PSD permit applications, and create new opportunities for third party challenges. To the extent that EPA guidance requires consideration of the impacts of startup and shutdown emissions on increment protection and AQRV, Ecology will follow that guidance. For most projects these impacts will be too trivial to

The Boeing Company

Remove proposed codification of requirement to consider startup and shutdown emissions in Increment and AQRV analysis: The proposal, at 173-400-720(4)(b), codifies a requirement to consider start up and shutdown emissions in the analysis of potential impact on AQRV and increment during new source/modification permit review. Whether, and to what extent, these emissions must be included in such analysis is a developing issue and EPA has not codified this requirement in its own regulations. While this may be appropriate in some cases, for the great majority of projects these emissions are inconsequential. Formal inclusion in the analysis would be a burdensome and pointless requirement.

(4) **Applicable requirements.**

(a) ~~A PSD permit must assure compliance with~~ Ecology shall issue a PSD permit if it determines that the proposed project satisfies each of ~~A PSD permit must assure compliance with~~ the following requirements for the pollutants subject to PSD review, as applicable[48]:

(i) WAC 173-400-113 (((~~(3) and~~)) (1) through (4).

(ii) WAC 173-400-117 - Special protection requirements for federal Class I areas;

[49] (b) The review of a PSD permit must also include an evaluation of the impacts of the incremental increase in allowable emissions ~~during~~ under ~~stationary source~~ startup and shutdown conditions authorized by an emission limitation or other operating parameter adopted under this rule on:

(i) Protection of increment; and

(ii) Air quality related values.

(iii) ((~~The proposed major new source or major modification will comply with all applicable new source performance standards (40 CFR Part 60), National Emission Standards for Hazardous Air Pollutants (40 CFR Part 61), and emission standards adopted under chapter 70.94 RCW that have been incorporated into the Washington state implementation plan~~)) WAC 173-400-200 Creditable stack heights and dispersion techniques;

(iv) WAC 173-400-205 Adjustment for atmospheric conditions; and

Weyerhaeuser

WAC 173-400-720(4)(b) Applicable Requirements – This proposed subsection should not be adopted. Here's why:

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warrant the formal findings that the proposed amendment would require.

Ecology prepared a "Preliminary Cost-Benefit and Least Burdensome Alternative Analysis" on the Proposed Amendments, as required by RCW 34.05.328. That analysis includes a line by line review of the effect of each proposed change to WAC ch. 173-400. The version of WAC 173-400-720 that Ecology reviewed, however, omits subsection (4)(b). Prior to the adoption of WAC 173-400-720(4)(b), Ecology must analyze the requirements it imposes against the criteria in RCW 34.05.328, including subsection (1)(h) of that statute.

[48] The minor NSR order of approval will address these requirements for pollutants not subject to PSD review.

[49] This inserted language is in the wrong place. It has been stuck in the middle of subsection (4)(a) between (4)(a)(ii) and (4)(a)(iii).

a. Ecology's stated objective for this rule revision is to "Make the rule consistent with requirements in the Clean Air Act." Subsection -(4)(b) presents an entirely new substantive requirement, not found in 40 CFR 52.21. The agency would not achieve its objective if –(4)(b) is adopted.
b. The air quality impacts analysis delineated in –(4)(b) would be adequately and conservatively assessed during the PSD preconstruction review process. The PSD regulation (as adopted into WAC 173-400-700 through WAC 173-400-750) already requires analyses based on allowable emissions and ambient impact evaluations (meteorology and modeling). Sources rarely, if ever, operate at their allowable emission levels.
c. 40 CFR 52.21(i)(3) embodies the concept that "temporary" allowable emissions need not be required to perform "(k) Source impact analysis," or "(m) Air quality analysis," or "(o) Additional impact analysis". This is EPA acknowledging the built-in conservatism of the PSD rule and announcing that "temporary" emissions (which certainly could encompass "startup and shutdown" emissions) are unlikely to create adverse air quality impacts. Yet these analyses are exactly what the proposed WAC 173-400-720(4)(b) seeks to add. Ecology should be content that the base PSD regulation will provide an adequate assessment of air quality impacts.
d. The proposed -720(4)(b) will add some uncertainty and cost to the preconstruction review. The process is rigorous now. It does not need more uncertainty and complexity.
e. It is interesting that neither the CR-102 nor the "Preliminary Cost-Benefit and Least Burdensome Alternative Analyses," Publication No. 12-02-005, April 2012, mention these new substantive requirements. In fact, the underlined/strikethrough version of the proposed rule changes offered in Publication 12-02-005 does not even identify the proposed -720(4)(b). Ecology's presentations are incomplete. At the least, there should be an evaluation of the merits of -720(4)(b) against criteria in RCW 34.05.328. For example, how does Ecology assess the probable benefits/probable costs, whether this rule section differs from the comparable federal regulation, whether the least burdensome alternative to accomplish the air quality regulation goals has been selected, or whether the information in the rule-making file is sufficient to justify these determinations. In essence, why is Ecology proposing -720(4)(b)?

Boise Cascade
BCWP does not support the proposed changes to WAC 173-400-720(4)(b) because those changes will make the PSD process more complicated and uncertain without adding an air quality benefit. Furthermore, these proposed changes appear to be inconsistent with the Federal Clean Air Act and therefore are contrary to the objectives you have identified in the Notice of Proposed Rulemaking.

TransAlta
The addition of "(i) Protection of increment; and (ii) Air quality related values;" to 173-400-720(4)(b) goes beyond current EPA requirements for a SIP approved PSD program and goes beyond the delegated program that Ecology currently operates. Ecology should remove these proposed items from the final rules and re-number the remaining items as appropriate.

Association of Washington Business
AWB encourages Ecology to reconsider some of the proposed changes identified in our members letters, such as the changes to 173-400-171 Public Notice and 173-400-720(4)(b) Applicable Requirements. These member companies, and their experts, can help provide a better understanding of the cost benefits and risks associated with the technical changes being proposed.

Response:
Thank you for your comments. Ecology has reviewed the EPA comments received on the text found in proposed (4)(b). We have also reviewed the various comments that were received through the informal stakeholder involvement process.

The text existed in a pre-comment period draft of this rule within WAC 173-400-081. This was used to develop the Preliminary Cost-Benefit and Least Burdensome Alternative Analyses.

During PSD permitting under terms of the current EPA/Ecology delegation agreement, PSD permit reviews have included an assessment of the effect of start-up emissions on NAAQS and AQRVs. With the advent of short-term increments, the assessments have included increments. These assessments are performed under existing requirements that Ecology has adopted by reference as part of its PSD permitting program.

The originally proposed text and much more clearly the revised text we are adopting are to assure that the requirements in WAC 173-400-081 do not supersede the AQRV and PSD increment criteria in the PSD program. In evaluating WAC 173-400 in general for approvability into the SIP, and the PSD permitting program specifically, EPA became concerned that the specific text on establishing allowable emission limitations during stationary source start-up and shutdown was limited to NAAQS compliance, and the easiest interpretation of how PSD and WAC 173-400-081 worked together would lead to not evaluating increment or AQRV impacts as a result of establishing the allowable emission limitations. Since one goal of this rule revision is to allow for EPA to approve our PSD program regulations into the SIP, we have continued to contain the explicit requirement that allowable emissions during start-up and shutdown have to meet PSD increment and AQRV requirements.

67: WAC 173-400-720(4)(c)(iii)

The Boeing Company
Restore the "reasonable possibility test" in -720(4)(c)(iii)

The U.S. Court of Appeals for the DC Circuit (in New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005)) remanded the PSD rule to EPA directing them to either explain their "reasonable possibility" standard (for determining when minor modifications have to prepare a detailed analysis during pre-construction permitting demonstrating that the major modification program will not apply and have to further demonstrate through extended post construction monitoring that the conclusion of non-applicability was correct) or to come up with an alternative. EPA responded by re-writing the rule to include a detailed test for "reasonable possibility." This test represents a bright line for an applicant as to whether or not these demonstrations are required.

Ecology has indicated that it does not wish to limit "reasonable possibility" as narrowly or precisely as the revised federal rule provides. Rather, Ecology apparently intends to compel this formal analysis and post-construction monitoring by all major sources undertaking any modification where emissions may increase to any degree. Boeing believes this is an inappropriate and wasteful requirement without environmental benefit.

Without the ability to rely on the "reasonable possibility" test and EPA's definition of that test, sources face a nebulous "may result in" standard for determining whether these demonstrations are required. "May result in" is impermissibly vague in that it carries no criteria other than a theoretical possibility that emissions could reach major permitting thresholds. Imposing avoidable uncertainty will force sources to defensively go through the formal demonstration process and waste resources to monitor and report project-by- project emissions for years into the future.

Minor projects in Washington must seek approval from permitting agencies. There is little opportunity or incentive for sources to attempt to deceive these permitting authorities which are involved at each step or the permitting process.. The permitting agencies are quite capable of identifying projects that are likely to trigger major NSR and can and do require formal non-applicability demonstrations when necessary on a case-by-case basis.

The burden to sources of instituting additional procedures and processes to demonstrate that a project will not and did not lead to major emission increases, is not trivial and must be balanced against the environmental benefit it provides. Since under Washington law minor sources must apply Best Available Control Technology, and must undergo a NAAQS evaluation, we are unable to determine any environmental benefit to forcing more sources to go through the formal demonstration and monitoring process. We urge Ecology to restore the "reasonable possibility" language of 40 CFR 52.21(r)(6) in WAC 173-400-720(4) and to add back EPA's definition of that term which was deleted in an earlier rulemaking. Further, we urge Ecology to adopt the language from the EPA regulations that limit the obligations to submit the pre- construction non-applicability demonstration and the post-construction monitoring results to the source's permitting authority to EUSGUs (e.g., coal fired utility units).

EPA intentionally limited the reach of these extraordinary provisions which use major source authority to impose obligations on minor projects. Ecology should revise its regulations to adopt all of those limitations. The Washington Clean Air Act grants local permitting authorities jurisdiction over minor projects if their minor NSR programs are consistent with that Act (see RCW 70.94.141 and 70.94.152), and while it may arguably be permissible for Ecology to directly adopt these provisions verbatim from the EPA regulations as part of a delegated or approved major new source review PSD program, Ecology has no authority under state law to expand the scope of these minor source obligations for projects under the jurisdiction of a local authority.

(C) 40 CFR 52.21 (b)(50)(ii) "Any pollutant other than GHG that is subject to any standard under section 111 of the Act."[50]

[50] This is needed to prevent a situation where the first NSPS to regulate GHGs undoes the Tailoring Rule.

(D) 40 CFR 52.21(c) after the effective date of EPA's incorporation of this section into the Washington state implementation plan, the concentrations listed in WAC 173-400-116(2) are excluded when determining increment consumption.

(E) 40 CFR 52.21 (r)(6)

"The provisions of this paragraph (r)(6) apply with respect to any regulated NSR pollutant from projects at an existing emissions unit at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a ((~~reasonable possibility that a~~)) reasonable possibility [51] that a project that is not a part of a major modification that may result in a significant emissions increase of such pollutant and the owner or operator elects to use the method specified in paragraphs 40 CFR 52.21 (b)(41)(ii)(a) through (c) for calculating projected actual emissions.

(i) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

((~~(A)~~)) (a) A description of the project;

((~~(B)~~)) (b) Identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and

((~~(C)~~)) (c) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph 40 CFR 52.21 (b)(41)(ii)(c) and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(ii) If the emissions unit is an existing electric utility steam generating unit,[52] the owner or operator shall submit a copy of the information set out in paragraph 40 CFR 52.21 (r)(6)(i) to the permitting authority before beginning actual construction. This information may be submitted in conjunction with any NOC application required under the provisions of WAC 173-400-110. Nothing in this paragraph (r)(6)(ii) shall be construed to require the owner or operator of such a unit to obtain any PSD determination from the permitting authority before beginning actual construction.

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph 40 CFR 52.21 (r)(6)(i)(b); and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of

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The Tailoring Rule tweaks the meaning of the "subject to regulation" prong of the definition of "regulated NSR pollutant" in 40 CFR 52.21(b)(50)(iv), but if GHGs are regulated under an NSPS they will become a regulated NSR pollutant under 40 CFR 52.21(b)(50)(ii) at the statutory (un-tailored) major source/major modification levels.]

[51] The reasonable possibility qualifier is found in both 40 CFR 51.165 and 52.21 and should not be omitted. (We have re-inserted it below)

[52] The limitation of this provision to EUSGUs is found in 40 CFR 51.21 and 51.166

regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity of or potential to emit that regulated NSR pollutant at such emissions unit. ((~~For purposes of this paragraph (r)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in 40 CFR 52.21 (b)(1)(iii) or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.~~))

(iv) If the emissions unit is an existing electric utility steam generating unit,[53] the owner or operator shall submit a report to the permitting authority within 60 days after the end of each year during which records must be generated under paragraph 40 CFR 52.21 (r)(6)(iii) setting out the unit's annual emissions((~~, as monitored pursuant to 40 CFR 52.21 (r)(6)(iii),~~)) during the calendar year that preceded submission of the report.

(v) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the permitting authority if the annual emissions, in tons per year, from the project identified in paragraph 40 CFR 52.21 (r)(6)(i), exceed the baseline actual emissions (as documented and maintained pursuant to paragraph 40 CFR 52.21 (r)(6)(i)(c)), by a significant amount (as defined in paragraph 40 CFR 52.21 (b)(23)) for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to paragraph 40 CFR 52.21 (r)(6)(i)(c). Such report shall be submitted to the permitting authority within 60 days after the end of such year. The report shall contain the following:

(a) The name, address and telephone number of the major stationary source;

(b) The annual emissions as calculated pursuant to paragraph (r)(6)(iii) of this section; and

(c) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection)."

(vi) A "reasonable possibility" under paragraph (r)(6) of this section occurs when the owner or operator calculates the project to result in either:

(*a*) A projected actual emissions increase of at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(*b*) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(41)(ii)(*c*) of this section, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under paragraph (b)(40) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph (r)(6)(vi)(*b*) of this section, and not also

[53] The limitation of this provision to EUSGUs is found in 40 CFR 51.21 and 51.166.

within the meaning of paragraph (r)(6)(vi)(*a*) of this section, then provisions (r)(6)(ii) through (v) do not apply to the project.[54]

…

(L) Every instance where the term "federally enforceable" is used it is replaced with the term "legally enforceable" which is defined as follows: all limitations and conditions which are enforceable as a practical matter by the department of ecology, an authority or by EPA. [55]

Response:

Thank you for your comments on WAC 173-400-720(4)(c)(iii)(D) (renumbered after other edits as WAC 173-400-720(4)(b)(iii)(D)). Ecology has reviewed the points brought forward by the commenter in consideration of comments provided previously by EPA Region 10 on this section (and the identical requirements in WAC 173-400-820). As a result of these discussions, we have decided to include the reasonable possibility criteria in this version of our regulation.

The commenter indicates that our current and proposed text, which does not set a clear threshold for when these analyses need to be submitted is required, would result in unnecessary workload on both the permitting authorities and the major sources. This was not Ecology's intention, so we have clarified the language to avoid unnecessary work.

We have not included the suggestion to reference the definitions because WAC 173-400 710 specifies the definitions used in the PSD program.

We have not incorporated the commenter's suggestion to further parallel the federal language by including different requirements for power plants than all other regulated sources. We are

[54] This definition of "reasonable possibility" is currently effective in 40 CFR 52.21 and 52.166. Although EPA is reconsidering this definition, EPA has not stayed its applicability, and it has not been vacated by a court. Ecology needs to either restore the "reasonable possibility" test and this definition of "reasonable possibility," or develop alternative language making clear when minor modifications are subject to the extra requirements for projects that "may result in a significant emission increase."

[55] *See Chemical Manufacturers Assn v. EPA*, No. 89-1514 (DC Cir. Sept. 15, 1995) (vacating federal enforceability requirement of the PTE definitions in EPA's PSD and NNSR regulations). This case, along with *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Clean Air Implementation Project v. EPA*, No. 96-1224 (D.C. Cir. June 28, 1996), generally stand for the proposition that if (1) the Federal CAA (FCCA) does not require federal enforceability in order for a limitation to be taken into account in calculating emissions or determining applicability of particular program to a source, and (2) EPA is not able to articulate a good reason why legally enforceable state/local/tribal limits should not count too, then EPA cannot restrict consideration to federally enforceable limitations only. So while these cases focus on the definitions of PTE in various programs, there is no difference when the legal rationale underlying these cases is applied, for example, to other provisions associated with PTE, other measures of emissions besides PTE that can depend on emission limits, or exemptions based on emission or operating restrictions. There appears to be no statutory command nor reasoned basis to exclude limitations and conditions that are enforceable as a practical matter by Ecology or an authority from consideration in any of the provisions of 40 CFR 52.21 that use the phrase "federally enforceable."

retaining the requirement established in our version of WAC 173-400-700 through 750 that became effective in 2006 which incorporated EPA's 2003 NSR reform program. As part of that rule making and discussions in stakeholder meetings leading to the 2006 Ecology rule, we determined we would treat all sources identically.

As for WAC 173-400-720(4)(c)(iii)(L), Ecology has not implemented this suggestion. Based on comments from EPA on federal enforceability of allowable emissions versus potential to emit, we believe that the proposed approach would not be approved by EPA.

Section 730

68: WAC 173-400-730(2)(c)(ii)

The Boeing Company
Within one year of the date of receipt of the complete application and as promptly[56] ~~expeditiously~~ as possible after the close of the public comment period, or hearing if one is held, ecology shall prepare and issue the final determination.

Response:
Thank you for suggestion, but the change was not made because it is not clear that it would provide any additional clarity.

Section 740

69: WAC 173-400-740(2)

The Boeing Company
Notification of the public. ((~~Within one year of~~)) Within 60 days[57] and as expeditiously as possible after the receipt of a complete PSD application, and as expeditiously as possible after receipt of a request for extension of the construction time limit under WAC 173-400-730(6) or ((~~for~~)) after receipt of a nonadministrative revision to a PSD permit under WAC 173-400-750, ecology shall:

Response:
Thank you for your comment. The suggested change has not been made. PSD permitting is significantly more complicated than normal NOC permitting. The complication results from the

[56] PSD permits issued under WAC are "orders of approval" subject to RCW 70.94.152(9) which uses "as promptly as possible" to describe the permissible time between public comment and issuance of a final decision.

[57] PSD permits issued under WAC are "orders of approval" subject to RCW 70.94.152(9) which requires that public comment be initiated within sixty days of receipt of a complete application for an order of approval.

requirements to coordinate the permitting process with multiple agencies (such as the National Park Service, the US Forest Service, the local permitting authority, the applicant), a situation that does not exist for minor NOC permitting.

Section 750

70: Monitoring Methods in a PSD Permit

Western States Petroleum Association
Several of the Proposed Amendments would incorporate into WAC ch. 173-400 elements from EPA comment letters that interpret the requirements of EPA's PSD regulations… Ecology proposes in WAC 173-400-750 to codify EPA guidance addressing what changes to monitoring methods in a PSD permit may be adopted through an administrative revision of a PSD permit.

Ecology should not adopt these and other provisions that have no counterpart in EPA's PSD regulations... The recommendation by Region 10 to incorporate these provisions into Ecology's PSD rules cites no authority at all, not even EPA guidance. EPA's views evolve over time. Ecology is perfectly capable of applying EPA guidance that interprets the requirements of the PSD program without codifying that guidance into Ecology's PSD rules.

The attached redline provides more detail on why the two amendments referenced above are not necessary, and should not be adopted.

(3)(c)
Revisions to compliance monitoring methods that ~~provide for more frequent monitoring, replace a periodic monitoring requirement with a continuous monitoring, result in replacement of a manual emission testing method with an instrumental method, or other similar changes that based on ecology's technical evaluation of the proposal,~~ do not reduce the ((~~permittee's~~)) ability of the permittee, the permitting authority, EPA, or ((~~ecology's ability~~)) ecology to determine compliance with the emission limitations;[58]

The Boeing Company
Revisions to compliance monitoring methods that ~~provide for more frequent monitoring, replace a periodic monitoring requirement with a continuous monitoring, result in replacement of a manual emission testing method with an instrumental method, or other similar changes that based on ecology's technical evaluation of the proposal,~~ do not reduce the ((~~permittee's~~)) ability of the permittee public, the permitting authority, EPA, or ((~~ecology's ability~~)) ecology to determine compliance with the emission limitations; ((~~or~~))

(d) Revisions to reporting requirements contained in a PSD permit to coordinate reporting with reporting requirements contained in the air operating permit issued to the source or that

[58] There is no need to codify EPA guidance on what qualifies as an administrative revision. Guidance changes, and the substantive criteria in this subsection provide ample standards to inform Ecology's discretion in deciding what compliance monitoring changes can be approved as administrative revisions.

~~result in more frequent reporting by the permittee~~ do not reduce the ability of the public, the permitting authority, EPA, or ecology to determine compliance with the emission limitations; or

(e) Any other revision~~, similar to those listed above~~[59] that based on ecology's technical evaluation of the proposal, does not reduce the stringency of the emission limitations in the PSD permit or the ability of ecology, the permitting authority, EPA, or the public to determine compliance with the approval conditions in the PSD permit.

Response:

Thank you for your comments. EPA does not have any regulatory language or official agency guidance on making revisions to existing PSD permits. The entirety of this section of Ecology rule has been developed by Ecology for implementation of its PSD program.

WAC 173-400-750 has been accepted by EPA under the current PSD program delegation agreement for the processing of revisions to PSD permits. EPA provided the following comment on the current text of WAC 173-400-750 as part of its January 2012 comments to Ecology:

> "**WAC 173-400-750 Revisions to PSD permits.**
> As EPA has previously commented *(on November 19, 2010 and Nov. 24, 2004)*, paragraphs (3)(c) and (3)(d) are not SIP approvable as currently drafted. While certain revisions to compliance monitoring methods could be done as administrative revisions, a provision that allows any provision of a PSD permit to be revised administratively based on a determination by an unspecified party using unspecified criteria provides too broad of a director's discretion to be approved by EPA into a PSD SIP."

Any request to make revisions to permit terms is done only at the request of the permittee. If the permittee does not make the request for a revision to a PSD permit, then one does not occur.

The proposed revised rule text is reacting to a reasonable comment by EPA Region 10 that the current text is too nebulous to result in a consistent decisions by Ecology staff. At the time of the EPA comments, EPA was making use of the proposed amendments to 40 CFR 52.21 that would allow EPA a means to issue a "synthetic minor permit' for greenhouse gases (proposed 40 CFR 52.21(dd) , aka Tailoring Rule Step 3).

This proposal is EPA's first regulatory statement regarding revisions to NSR permits. That rule does include criteria such as proposed by Ecology.

What Ecology has proposed are the criteria that Ecology currently uses in deciding whether a requested change to a compliance monitoring method and reporting requirements are or are not

[59] Longstanding EPA guidance defines the scope of administrative changes (for which no additional public participation is required) as those involving "no increase in either emissions or impacts and no fundamental change in either the source or one of the emission units at the source." (See July 5, 1985 "Revised Draft Policy on Permit Modifications and Extensions"). Limiting administrative revisions (that do not need additional public participation) to changes that are, or are "similar to" changes in ownership, typographical errors and provisions that make the permit more stringent improperly limits the scope of "administrative change" in this guidance and unnecessarily subjects projects to additional delays for no environmental benefit.

an administrative revision to the permit. As a result, we are not implementing any federal policy or opinion in listing these criteria.

The suggestion to delete the listing of monitoring method changes that would be administrative changes will be retained.

The suggestion to add the public to the list of entities in WAC 173-400-750(3)(c) has been made. The suggested changes to subparagraphs (d) and (e) have not been made.

Section 810

71: WAC 173-400-810(17)(c)(ii)

The Boeing Company
For an emissions increase the permitting authority has not relied on it in issuing a permit for the source under regulations approved pursuant to 40 CFR 51.165, which permit is in effect when the increase in actual emissions from the particular change occurs, and for an emissions decrease, the reduction has not been relied on as part of an offsetting transaction under WAC 173-400-113(4) or 173-400-830 in issuing a permit for the source under regulations approved pursuant to 40 CFR 51.165, which permit is in effect when the increase in actual emissions from the particular change occurs[60]; and

Response:
Thank you for your comments, but we have not made the suggested change. This is the definition of "net emissions increase." Under this aspect of the applicability test offsets are not considered, only contemporaneous emission increases and decreases that have not been utilized in a previous major NSR permitting action. A contemporaneous emission decrease may also have been documented and made enforceable through issuance of an emission reduction credit.

The interpretation of the 1989 John Calcagni memo referenced by the commenter matches our understanding of what "relied upon" means. Basically if after the netting action occurs, the project is still subject to the major NSR permitting requirements, then the contemporaneous emission increases and decreases have been relied upon and are no longer available for a future netting analysis.

As the commenter indicates, under other aspects of the nonattainment NSR program, a contemporaneous emission reduction that is made federally enforceable can be used as an emission offset, or in a netting action, but not both.

[60] We believe the intent of this provision is that this exclusion only applies to decreases in circumstances where credit for the reduction has been taken in a offset transaction and not when the reduction is used to net out of new source review. *See, e.g.,* December 29, 1889 EPA Memo from John Calcagni Re: Use of Netting Credits [http://www.epa.gov/region7/air/nsr/nsrmemos/netting.pdf] ("There are situations, such as when a source nets out of review, when the permitting authority does not rely on creditable emissions increases or decreases")

72: WAC 173-400-810(17)(e)(ii)

The Boeing Company
It is legally enforceable ~~as a practical matter~~ at and after the time that actual construction on the particular change begins;

Response:
The suggested change is not made. The text is as it occurs in the federal regulation at 40 CFR 51.165(a)(1)(vi)(E)(2).

73: WAC 173-400-810(24)(a)(iii)

The Boeing Company
Any pollutant that is identified under this subsection (a) (iii) as a constituent or precursor of a general pollutant listed in (a)(i) or (ii) of this subsection, provided that such constituent or precursor pollutant may only be regulated under NSR as part of regulation of the general pollutant. For purposes of NSR precursor pollutants are the following:

(A) Volatile organic compounds and nitrogen oxides are precursors to ozone in all ozone nonattainment areas.

(B) Sulfur dioxide is a precursor to PM-2.5 in all PM-2.5 nonattainment areas.

(C) Nitrogen oxides are precursors to PM-2.5 in all PM-2.5 nonattainment areas, unless the State demonstrates to the EPA's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient PM-2.5 concentrations[61].

Response:
Thank you for your comments, but the suggested changes have not been made. Based on our investigations in developing the Washington Regional Haze SIP, Ecology determined that NO_x is a precursor to $PM_{2.5}$ found in ambient air in Washington.

74: WAC 173-400-810(24)(b)

Western States Petroleum Association
PM-2.5 emissions and PM-10 emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures. On or after January 1, 2011 ~~(or any earlier date established in the upcoming EPA ((rulemaking)) rule making codifying emission test methods for condensable particulate matter)~~,[62] such condensable particulate matter shall be accounted for in applicability determinations and in establishing

[61] *See* 40 CFR 51.165 (a)(1)(xxxvii)

[62] The stricken language references an historic rulemaking scenario that did not occur and that cannot any longer occur.

emissions limitations for PM-2.5 in nonattainment major NSR permits. Compliance with emissions limitations for PM- 2.5 issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan. Applicability determinations for PM-2.5 made prior to the effective date of WAC 173-400-800 through 173-400-850 made without accounting for condensable particulate matter shall not be considered in violation of WAC 173-400-800 through 173-400-850.

Response:
Thank you for the suggestion. After review of the March 16, 2012 proposed rule by EPA making corrections to the definition of "regulated NSR pollutant" in 40 CFR 521.166(b)(49), Appendix S to Part 51 and 40 CFR 52.21, there is support to making the change proposed. We do note that EPA has not yet changed this paragraph in 40 CFR 51.165.

75: WAC 173-400-810(25)(a)(iv)

The Boeing Company
The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is legally enforceable ~~as a practical matter~~. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

Response:
Thank you for your comment. The suggested change has not been made. The text is as it occurs in the federal regulation at 40 CFR 51.165(a)(1)(xxi)(D).

76: WAC 173-400-810(28)

The Boeing Company
Significant emissions increase means, for a regulated NSR pollutant, an increase in emissions that is significant for that pollutant(as defined in WAC 173-400-810(27)).

Response:
The suggested change has not been made. The definitions in WAC 173-400-810 are for use in the nonattainment NSR provisions. Since the definition is within the nonattainment NSR provisions, we do not believe that additional clarification is necessary.

77: The Definition of BACT Should be Consistent with the Federal Definition

Michael Ruby
The proposed definition of BACT in WAC 173-400-810(31) is not consistent with the federal definition in 40CFR51.165(a)(1)(xl)., which it is intended to mimic. Someone has accidentally inserted the marked added words: "...which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines ****if it**** is achievable for such source ..."

Response:
Thank you for catching the error. The correction has been made.

Section 820

78: WAC 173-400-820(2)

The Boeing Company
Except as otherwise provided in subsection (4) of this section, and consistent with the definition of major modification in WAC 173-400-810(15), a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases - A significant emissions increase (as defined in WAC 173-400-810(28)), and a significant net emissions increase (as defined in WAC 173-400-810(17). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

Response:
The suggested changes have not been made. Since the definitions cited are within the Nonattainment NSR provisions, and the definitions WAC 173-400-810 are specifically for use within the nonattainment NSR program, we do not believe that additional clarification is necessary.

79: WAC 173-400-820(3)

The Boeing Company
(a) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in WAC 173-400-810(23))and the baseline actual emissions (as defined in WAC 173-400-810(2)), for each existing emissions unit, equals or exceeds the significant amount for that pollutant(as defined in WAC 173-400-810(27)).

(b) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in WAC 173-400-030 (74)) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in WAC 173-400-810(2)) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in WAC 173-400-810(27)).

(c) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in (a) and (b) of this subsection as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in WAC 173-400-810(27)).

Response:
The suggested changes have not been made. Since the definitions cited are within the Nonattainment NSR provisions, and the definitions WAC 173-400-810 are specifically for use within the nonattainment NSR program, we do not believe that additional clarification is necessary.

80: WAC 173-400-820(4)

The Boeing Company

(4) Any major stationary source (as defined in WAC 173-400-810 (14)) which has a PAL for a regulated NSR pollutant shall comply with requirements in WAC 173-400-850.

Response:
The suggested change has not been made. Since the definitions cited are within the Nonattainment NSR provisions, and the definitions WAC 173-400-810 are specifically for use within the nonattainment NSR program, we do not believe that additional clarification is necessary.

81: WAC 173-400-820(5) and (6)

The Boeing Company

(5) **Reasonable Possibility** ((~~**Reasonable possibility:**~~)) The following specific provisions apply with respect to any regulated NSR pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility that ((~~there is a reasonable possibility that~~)) a project that is not a part of a major modification may result in a significant emissions increase of such pollutant, and the owner or operator elects to use the method specified in the definition of projected actual emissions contained in WAC 173-400-810 (23)(b)(i) through (iii) for calculating projected actual emissions.

…

(b) If the emissions unit is an existing electric utility steam generating unit, [63] before beginning actual construction, the owner or operator shall provide a copy of the information set out in (a) of this subsection to the permitting authority. This information may be submitted in conjunction with any NOC application required under the provisions of WAC 173-400-110. Nothing in this subsection shall be construed to require the owner or operator of such a unit to obtain any determination from the permitting authority before beginning actual construction.

…

[63] The limitation of this provision to EUSGUs is found in 40 CFR Part 51, Appendix S

(d)) If the emissions unit is an existing electric utility steam generating unit,[64] the owner or operator shall submit a report to the permitting authority within sixty days after the end of each year during which records must be generated under (c) of this subsection setting out the unit's annual emissions, as monitored pursuant to (c) of this subsection, during the year that preceded submission of the report.

(e) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the permitting authority if the annual emissions, in tons per year, from the project identified in (a) of this subsection, exceed the baseline actual emissions (as documented and maintained pursuant to (a)(iii) of this subsection), by a significant amount (as defined in WAC 173-400-810(27)) ~~the definition of significant~~ for that regulated NSR pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to (a)(iii) of this subsection. Such report shall be submitted to the permitting authority within sixty days after the end of such year. The report shall contain the following:

(i) The name, address and telephone number of the major stationary source;

(ii) The annual emissions as calculated pursuant to (d) of this subsection; and

(iii) Any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(f) A "reasonable possibility" under this subsection occurs when the owner or operator calculates the project to result in either:

(i) A projected actual emissions increase of at least fifty percent of the amount that is a "significant emissions increase," (as defined in WAC 173-400-810(28)) (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant; or

(ii) A projected actual emissions increase that, added to the amount of emissions excluded under the definition of projected actual emissions contained in WAC 173-400-810 (23)(b)(iii) sums to at least fifty percent of the amount that is a "significant emissions increase," (as defined in WAC 173-400-810(28))(without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of (f)(ii) of this subsection, and not also within the meaning of (f)(i) of this subsection, then (c) through (f) of this subsection does not apply to the project[65]

(6) ~~For projects not required to submit the above information to the permitting authority as part of a notice of construction,~~ The owner or operator of the source shall make the information required to be documented and maintained pursuant to subsection (5) of this section that is not required to be submitted by the source to the permitting authority pursuant to subsection (5) or as part of a notice of construction application or pursuant to the conditions of any order of approval available for review upon a request for inspection by the permitting authority or the general public pursuant to the requirements contained in chapter 173-401 WAC.

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[64] The limitation of this provision to EUSGUs is found in 40 CFR Part 51, Appendix S

[65] This definition of "reasonable possibility" is currently effective in 40 CFR 51.165 and Appendix S. Although EPA is reconsidering this definition, EPA has not stayed its applicability, and it has not been vacated by a court. Ecology needs to either restore the "reasonable possibility" test and this definition of "reasonable possibility," or develop alternative language making clear when minor modifications are subject to the extra requirements for projects that "may result in a significant emission increase."

Response:
Thank you for your comment on WAC 173-400-820(5). Please see response to this matter to comments on WAC 173-400-720(4)(c)(iii)(D).

Thank you for your comment on WAC 173-400-820(6). The suggested change has not been made. It is not clear that the proposed change improves clarity of the requirement.

Section 830

82: WAC 173-400-830(1)

The Boeing Company
(d) The proposed new major stationary source or a major modification of an existing major stationary source will employ BACT for all air contaminants and designated precursors to those air contaminants, except that it will achieve LAER for the air contaminants and designated precursors to those air contaminants for which the area has been designated nonattainment and for which the proposed new major stationary source ((~~or major modification to an existing major stationary source is major~~)) is major or for which the existing source is major and the proposed major modification is significant.

Response:
Thank you for your comments. The sentence has been edited to clarify our intent.

(g) If the proposed new source is also a major stationary source within the meaning of WAC 173-400-720, or the proposed modification is also a major modification within the meaning of WAC 173-400-720, it meets the requirements of the PSD program under 40 CFR 52.21 delegated to ecology by EPA Region 10, while such delegated program remains in effect. The proposed new major stationary source or major modification will comply with the PSD program in WAC ((~~173-400-720~~)) 173-400-700 through 173-400-750 for all air contaminants for which the area has not been designated nonattainment when that PSD program has been approved into the Washington SIP, and 40 CFR 52.21 will no longer apply.

Response:
Thank you for your suggestion. But since the Ecology PSD program is based on adoption by reference of much of 40 CFR 52.21, we believe that the suggested change would cause confusion.

83: WAC 173-400-830(3)

The Boeing Company
At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforcement limitation which was established

after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of regulations approved pursuant to 40 CFR 51.165, or the requirements of ~~including~~ 40 CFR Part 51, Appendix S, as applicable[66], shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Response:
Thank you. The suggested change clarifying the intent has been made. We have also added a sentence clarifying that the criteria in Appendix S do not apply after EPA has approved the nonattainment area permitting provisions in WAC 173-400-800 through 850 into the SIP.

Section 840

84: WAC 173-400-840

The Boeing Company
Emission offset requirements. (1) The ratio of total actual emissions reductions to the emissions increase shall be 1.0:1 [67] ~~1.1:1~~ unless an alternative ratio is provided for the applicable nonattainment area in subsection (2) through (4) of this section.

…

(4) In meeting the emissions offset requirements of this section for ozone nonattainment areas that are subject to sections 171-179b of the Federal Clean Air Act (but are not subject to sections 181-185B of the Federal Clean Air Act, including eight-hour ozone nonattainment areas subject to 40 CFR 51.902(b)), the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be ~~1.1:1~~ 1.0:1.

…

(7 new section) Emission offsets are required for the incremental increase in allowable emissions occurring during ~~stationary source~~ startup and shutdown condition at the new or modified emission units subject to nonattainment area major new source review an authorized by an emission limitation or other operating parameter adopted under this rule.

…

(8) (a) The baseline for determining credit for emissions reductions is the emissions limit under the applicable state implementation plan in effect at the time the notice of construction

[66] The Appendix S requirements are not "regulations approved under 51.165." Instead, Appendix S' requirements are applied directly by EPA in nonattainment areas that are not subject to a state program approved under 51.165

[67] *See* 40 CFR 51.165(a)(9)(i).

application is ~~determined to be complete~~ filed[68], except that the offset baseline shall be the actual emissions of the source from which offset credit is obtained where:

…

(b) (ii) For an existing fuel combustion source, credit shall be based on the allowable emissions under the applicable state implementation plan for the type of fuel being burned at the time the notice of construction application is filed[69] ~~determined to be complete~~. If the existing source commits to switch to a cleaner fuel at some future date, an emissions offset credit based on the allowable (or actual) emissions reduction resulting from the fuels change is not acceptable, unless the permit or other enforceable order is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emissions reduction should the source switch back to the higher emitting (dirtier) fuel at some later date. The permitting authority must ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches;

…

(9) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977). ~~This document is also~~ (available from Mr. Ted Creekmore, Office of Air Quality Planning and Standards, (MD-15) Research Triangle Park, NC 27711), or otherwise determined by EPA, through rulemaking, to be negligibly reactive (see 40 CFR 51.100(s)(1)).[70]

Response:
Thank you for your comments on WAC 173-400-840(1) and (4). The ratio given in the federal regulation as a minimum requirement ("increase shall be at least 1.0:1"). Ecology has implemented a 1.1:1 ratio in the few cases where we have implemented nonattainment NSR. Other than pointing out that we have required a slightly higher level of offset than the minimum required by EPA, the commenter has not indicated why using the minimum offset ratio is superior to the proposed ratio in assisting us to reduce emissions to expeditiously return a nonattainment area to attainment with the ambient standards. The suggested change has not been made.

Thank you for your comments on WAC 173-400-840(7). The suggested edits to this paragraph are reasonable clarifications to our intent. The allowable emissions resulting from start up and shutdown of a permitted emission unit in excess of the allowable emissions for normal operation

[68] *See* 40 CFR 51.165(a)(3)(i). The use of the completeness date is also inconsistent with other provisions in these offset regulations that use the filing date.

[69] *See* 40 CFR 51.165(a)(3)(ii)(B). The use of the completeness date is also inconsistent with other provisions in these offset regulations that use the filing date

[70] EPA has continually refined the list of negligibly reactive compounds since 1977 and now lists those compounds in 40 CFR 51.100(s)(1)

are to be covered by emission offsets. The suggested change has been made with the addition of this being the increase in allowable emissions.

Thank you for your comments on WAC 173-400-840(8)(a) and (b). Use of application completeness date as opposed to application filing date. EPA has reviewed this section along with our use of the application completeness date and not expressed a problem with our use of that concept. Ecology has successfully argued in an appeal to the state PCHB that the application completeness date is the appropriate date to lock down the applicable requirements for an application. In our experience, the filing date of the application may be months to years prior to the determination that an application is administratively complete and permitting begins. The suggested change is not made.

Thank you for your comments on WAC 173-400-840(9). Ecology has requested EPA to advise us on this outdated requirement in 40 CFR 51.165. EPA has not responded, nor have we been able to locate any guidance documents on implementation of this paragraph beyond the original document referenced. While we agree the suggested change is reasonable, we have not included it in the final rule.

Section 930

85: WAC 173-400-930

Danna Dal Porto
In studying the air emission issues, I have learned the importance of using the Best Available Control Technology (BACT). I believe that BACT is intended to be the best control technology that is site specific and is a result of modeling for emissions specific to the construction and operation of a specific emission source. I do not understand how Ecology has determined that the rating of an emission source, for example a Tier 2 engine, can be determined as BACT without taking into consideration the modeling, which must include local background and adjacent pollution sources. If I understand the proposed changes to the regulations, the definition of BACT would be weakened as well as changes be made in the definitions of air contaminant and emergency engines. In dealing with Ecology in Quincy, the definition of emergency engines has been a moving target with much confusion about stand-by engine and emergency engine confusing the public about the use of these terms. If Ecology would like to codify the meaning of these words and be consistent in their use, that would be helpful to the public but do not weaken any of the protections we have.

Response:
Thank you for your comment. However, the development of the criteria for emergency engines was not part of this rule making. The decisions underlying the criteria and requirements for emergency engines in WAC 173-400-940 are part of the rule support documentation for the 2011 WAC 173-400 rulemaking. In developing the requirements contained in this section, dispersion monitoring and conservative impact evaluations were used to define the engine emission standard and engine cumulative horsepower that can utilize this “permit by rule” condition.

This rulemaking primarily focused on the applicability or non-applicability of this section in counties covered by local air pollution control authorities and to clarify that emergency engines that are part of a major NSR project cannot utilize this option and must go through a site specific permitting process.

The Boeing Company
Align applicability language of WAC 173-400-930 Emergency Engines to match the new source requirements in WAC 173-400-110 through -113:

The current proposed revision to this section (which addresses the applicability of new source review to emergency engines) appears to require the applicant to demonstrate that their local permitting authority has deliberately rejected this section in order for local rules to apply. However, a local permitting authority's rulemaking record is unlikely to explicitly characterize the agency's actions as a decision "not to adopt" this Ecology rule, making it difficult to demonstrate the agency's intent. To be consistent with the revised language of the other sections we suggest adopting the same language used in WAC 173-400-110 through -113. Specifically, in -930:

(a) WAC 173-400-930 applies statewide except where a permitting authority has adopted its own new source review regulations. [71]

…

(c) This section is not applicable to emergency engines proposed to be installed as ~~that are~~ part of a proposed new major stationary source, as defined in WAC 173-400-710 and 173-400-810, or major modification, as defined in WAC 173-400-710 and 173-400-810[72].

…

(3)(a) (ii) Operated to provide electrical power or mechanical work during an emergency use, except as provided in WAC 173-400-930(2)(c).

Response:
Thank you for the comment on WAC 173-400-930(1)(a). The discussions with the local authorities on this section revolved around some agencies not wanting to implement this section of our rule. The implementation of section 930 goes beyond the simple implementation of a local NSR program, but is associated with the implementation of the requirements of WAC 173-460.

[71] Aligns applicability test to other sections of the rule.

[72] While emergency engines that included in a PSD or NNSR project should be subject to those major permitting programs along with the other new or modified emission units that are part of the project, the mere fact that a emergency engine will be located at a pre-existing major source should not disqualify the engine from this streamlined method of satisfying new source review.

Section 930 implements the concept of a permit to install and operate by rule only those installations that qualify. Based on this and other comments specifically addressing WAC 173-400-020(1) it is reasonable that to state that the section applies statewide unless the local agency has adopted alternative requirements for these engines. An alternative requirement may be a work practice or alternative permit by rule.

Ecology intends that the local authority must make a conscious decision to not adopt this section into its rules. We anticipate that the rule of a local agency that does not wish to implement this section would simply state that the rule does not adopt this section for implementation within the jurisdiction. Alternately, if the local authority's rule is silent on this section, then it is utilized by the local authority.

WAC 173-400-930(1)(c): Thank you. The correction proposed clarifies our intent. The suggested change has been made.

WAC 173-400-930(3)(a)(iii): The proposal to change the definition of emergency engine does not appear to us to provide any clarification or benefit. The suggested change is not made.

Other Issues

86: Support Low-Impact Hydropower

Thom Fischer
I am writing to the Department of Ecology to encourage supporting the development of renewable energy, including hydropower in Washington State.

For our state to regulate greenhouse gas emissions or remove thermal powerplants, there needs to be replacement energy projects for discontinued projects.

The Pacific Northwest has had a net loss of hydropower during the past 16 years due to the removal of hydro projects exceeding the installation of new projects. There is also a move to remove the coal fired powerplant near Chehalis with no simultaneous replacement power.

This isn't the future I want for our state. Washington has been a national leader in the effort to promote clean energy, spur innovation and investment, and protect our climate, which has put us to the front of the pack.

I am asking the Department of Ecology to consider proactive changes to support new low-impact hydropower and start making real progress on protecting our climate and meeting the State's climate pollution limits.

Response:
Thank you for your comments. We suggest that you discuss these issues with the Department of Commerce's Energy Policy Division.

87: Support for Solar Power

North Olympic Group
Germany has similar environmental conditions as Washington and is a leader in solar power. We should invest in solar power.

Response:
Thank you for your comments. We suggest that you discuss these issues with the Department of Commerce's Energy Policy Division.

88: No Coal Terminals

Comments received included:

- *Exporting coal has a variety of negative environmental and health impacts.*
- *It does not make sense to regulate greenhouse gas emissions domestically while facilitating foreign emissions by exporting coal to China.*

Response:
Thank you for your comments. While we appreciate your concerns, this issue is outside the scope of this rule making.

89: Electricity from Biomass Combustion is a Health Hazard

Sierra Club
The serious health impacts from plants burning biomass to make electricity must also be addressed. Burning biomass is opposed by the American Academy of Pediatrics, the American Lung Association, the American Heart Association, three state medical societies and more than 70,000 physicians across the country.

Response:
Thank you for your comments. While we appreciate your concerns, this issue is outside the scope of this rule making.

90: Quincy Process

Danna Dal Porto
I want to speak to the lack of cooperation I have experienced from the Department of Ecology. I was told I could only interact with one person in Ecology and I have been prevented from speaking to other Ecology experts to explain component parts of the permitting processes that have taken place in Quincy. I have sent numerous requests asking for the background and process that took place to implement the "community wide" approach that has resulted in the 100 cancers per million that has been instituted in Quincy. I have decided that Ecology has nothing to offer me to explain how that "rule" was adopted so instead of answering me, they have just ignored my requests. I have sent several messages to Director Sturdevant with questions like that

and have never been granted a reply, much less an acknowledgment. It is sad to feel that the state department with the responsibility to protect me is the department that I trust the least.

Response:
Thank you for your comments. We appreciate your concern on this issue with permitting in Quincy and have referred it to the appropriate staff members.