

Rosemary Sweeney
January 25, 2022

Washington Department of Ecology
RE: Draft Rule WAC 173-446

To Whom It May Concern:

I am writing to provide comments on the most recent iteration of draft rule WAC 173-446 dated 01/04/2022. Given the length and complexity of it, I have not been able to read all of it in detail. Below I provide a few general comments on broad issues that seem important to me and detailed comments on the few sections of the draft rule that I had time to closely read.

GENERAL COMMENTS

Definitions

I saw no definitions for the terms listed below in either WAC 173-446-020 (or elsewhere in WAC 173-446), WAC 173-441, or WAC 173-446A. I think it likely that there are other undefined terms I have not noticed. However, I may have failed to find definitions that do exist somewhere in this long rule. Perhaps some of the definitions may reside in the CARB Offset Compliance Protocols? If so, that should be mentioned. As a mercy to readers, I think it would be wonderful to include all defined terms used in this rule in WAC 173-446-020.

“Reporting Period”

“Positive Offset Verification Statement”

“Qualified Offset Verification Statement”

“Retirement Account”.

Consistency of language usage

I believe it would be less confusing for people trying to understand the statute and this rule if the rule were to use the same language as the statute wherever possible. For example, since the statute uses “the Department” and this rule uses “Ecology” to indicate the Washington Department of Ecology, I believe the rule should shift its language usage to match that of the statute. I will show these amendments in any language I amend for other reasons, and I believe they should be

implemented throughout this rule for this particular word and any other word where an analogous discrepancy in language usage exists.

Issues not adequately addressed in WAC 173-446

WAC 173-446-510(1)(b)(iii) states that California Air Resources Board (CARB) Compliance Offset Protocols for livestock projects, urban forest projects, or U.S. forest projects should be used to calculate GHG reductions and GNG removal enhancements. No compliance protocols for other kinds of offset projects are mentioned, nor is a pathway for creating a new offset protocol described. *There are potentially other kinds of offset projects (e.g., conversion to a long-lived mineral form) that might effectively remove or sequester greenhouse gases (GHGs), and the rule should provide for the possibility of creating new offset protocols to accommodate the use of such projects as offset projects.*

In addition, I believe it is important to avoid the registration of offset projects that are not truly additional, and therefore I would like to see a more detailed description of how additionality will be determined. For example, WAC 173-446-510(1)(b) states that an Offset Project Operator or Authorized Project Designee must ensure that an offset project meets various additionality requirements including the following requirement:

The activities that result in GHG reductions and GHG removal enhancements are not required by law, regulation, or any legally binding mandate applicable in the offset project's jurisdiction, and would not otherwise occur in a conservative business-as-usual scenario;

WAC 173-446-510(1)(b)(i).

Given the potential difficulty of determining what a "conservative business-as-usual scenario" would be, I think it would be useful to provide more detail about what kind of showing would be required. How is it determined what would happen in a business-as-usual scenario at a future time? Or would it be based on business-as-usual in a past time? If so, what past time frame? Or would it be based on past business-as-usual practices in, for example, a similarly situated forest area? *Please consider adding more detail to govern this crucial aspect of offset projects.*

DETAILED COMMENTS

WAC 173-446-040 Covered emissions

In WAC 173-446-040(2)(b)(ii)(A)(I) and (II), why are “Residual fuel oil No. 5 (Navy Special)” and “Residual fuel oil No. 6 (a.k.a. Bunker C)” automatically considered to be combusted outside of the state of Washington? I don’t know whether this is a fair assumption. Please consider this question. If the assumption is not a fair one, please change language to require a showing that the fuel is (or will be) combusted outside of Washington.

WAC 173-446-040(3)(b)(ii)(B) and its subparts form a difficult bit of word salad. I suggest an amendment below that I believe makes them more understandable and more grammatical. I cannot be sure that the amendment I suggest is consistent with the intent the Department since I did not understand the original. Please consider my amendment and alter as necessary to preserve the Department’s intent. *Also, I wonder why onsite combustion of natural gas and other petroleum products is not considered to be a covered emission for a natural gas supplier. It seems like it should be a covered emission. Please explain your thinking on this.* Throughout this document I use underlining to indicate additions and ~~striketrough~~ to indicate deletions.

- (ii) The following emissions are not covered emissions for suppliers of natural gas:
 - (A) Emissions from the onsite combustion of natural gas, natural gas liquids, liquefied petroleum gas, compressed natural gas, or liquefied natural gas at any facility that is a covered or opt-in entity under this chapter.
 - (B) Emissions that would result from the full combustion of natural gas that is (1) provided by any ~~Any~~ supplier of natural gas who is not a natural gas company and has a tariff with a natural gas company to deliver to an end-use customer in the state, or (2) provided to any end-use customer in Washington who directly purchases natural gas from a person that is not a natural gas company and has the natural gas delivered through an interstate pipeline to a distribution system owned by the purchaser, wherein the natural gas is ~~may exclude emissions that would result from the full combustion or oxidation of that gas:~~
 - (I) ~~For fuel products that are produced~~ Produced or imported with a documented final point of delivery outside of Washington and combusted outside of Washington; or

- (II) Supplied to other covered or opt-in entities ~~under~~; ~~or~~
- (III) ~~Delivered to opt-in entities.~~

WAC 173-446-040(3)(c)(i) and WAC 173-446-040(3)(c)(i)(B) should be amended as follows to improve grammar.

- (i) The following emissions are covered emissions for suppliers of fossil fuels other than natural gas:
 - (A) Emissions from the combustion of any petroleum product, biomass-derived fuel, or coal-based liquid fuel except those described in subsection (3)(a)(i)(B) or (C) of this section; ~~and~~ ~~or~~
 - (B) All other reported emissions under WAC 173-441-122(5) ~~are covered emissions for the supplier unless otherwise specified in subsection (2) or (3)(b)(ii) of this section.~~

WAC 173-446-040(3)(d)(i) and (ii) should be amended as follows to improve grammar.

- (d) Allotment of covered emissions to suppliers of carbon dioxide.
 - (i) The following emissions are covered emissions for suppliers of carbon dioxide:
 - (A) Carbon dioxide supplied that does not meet the criteria specified in subsection (3)(d)(ii) of this section; ~~and~~ ~~or~~
 - (B) All other reported emissions under WAC 173-441-122(3) ~~are covered emissions for the supplier of carbon dioxide unless otherwise specified in subsection (2) or (3)(d)(ii) of this section.~~
 - (ii) ~~Carbon dioxide supplied that~~ The following are not covered emissions for the suppliers of carbon dioxide owner or operator who can demonstrate to the Department's Ecology's satisfaction that the emissions meet either or both of the following criteria are not covered emissions for suppliers of carbon dioxide:
 - (A) The emitted carbon dioxide is permanently removed from the atmosphere either through long term geologic sequestration or by conversion into long lived mineral form; ~~and/or~~
 - (B) The emitted carbon dioxide is part of the covered emissions of another covered or opt-in party under this chapter.

WAC 173-446-530 Verification of GHG Emission Reductions and GHG Removal Enhancements from Offset Projects

WAC 173-446-530(1)-(2) should be amended as follows to make it clear that all offset projects, not just those that prevent or sequester greater than or equal to 25,000 MT CO₂e, must be verified.

- (1) General Requirements. An Offset Project Operator or Authorized Project Designee must obtain the services of an Ecology-accredited verification body for the purposes of verifying Offset Project Data Reports, and Verification Statements must be submitted to the Department or to an Offset Project Registry as described in parts (2)-(4) of this subsection and in subsections WAC 173-446-535, WAC 173-446-540, and WAC 173-446-545.
- (2) Schedule for Verification of Non-Sequestration Offset Projects. The verification of GHG emission reductions for non-sequestration offset projects that produce greater than or equal to 25,000 metric tons of GHG reductions must be performed on a Reporting Period basis and cover the Reporting Period for which the most recent Offset Project Data Report was submitted unless otherwise specified in a Compliance Offset Protocol. Alternatively, for ~~For~~ Reporting Periods in which an Offset Project Data Report for a non-sequestration offset project shows that the offset project produced fewer than 25,000 metric tons of GHG reductions in a Reporting Period, the Offset Project Operator or Authorized Project Designee may choose to perform verification that covers two consecutive Reporting Periods, even if ~~for the subsequent Reporting Period~~ the offset project produced greater than or equal to 25,000 metric tons of GHG reductions in the second of these Reporting Periods. If an Offset Project Data Report results in zero GHG emission reductions, the Offset Project Operator or Authorized Project Designee may defer verification until the offset project produces an Offset Project Data Report that no longer results in zero GHG emission reductions.

WAC 173-446-580 Invalidation of Ecology Offset Credits

WAC 173-446-580(3)(a)(ii) contains the following equation in which the terms "IARBOC" and "OPDR" are not defined. Strangely, "IEcology OC," which is not in the equation, is defined. This should be amended so that all terms in the equation are defined, and definitions other terms are deleted.

$$\begin{aligned} \text{If: } & \quad IARBOC > OPDR \times 1.05 \\ \text{Then: } & \quad OR = IARBOC - ROPDR \end{aligned}$$

Where:

"OR" is the amount of overstated GHG reductions and GHG removal enhancements for the applicable Offset Project Data Report, rounded to the nearest whole ton;

"IEcologyOC" is the number of Ecology offset credits issued under the applicable Offset Project Data Report;

"ROPDR" is the number of GHG reductions and GHG removal enhancements determined by Ecology for the applicable Offset Project Data Report;

WAC 173-446-580(7)(a)(i)(A) contains the following equation in which the terms "IARBOC" and "HARBOC" are not defined. Strangely, "IEcology OC" and "HEcologyOC," which are not in the equation, are defined. This should be amended so that all terms in the equation are defined, and definitions other terms are deleted.

$$HARBOC = \left| \frac{TOTHolding}{IARBOC} \right| \text{ OR}$$

Where:

"IEcologyOC" is the number of Ecology offset credits issued under the applicable Offset Project Data Report;

"TOTHolding" is the total number of Ecology offset credits currently being held in a Compliance and/or Holding Account by each party identified for the applicable Offset Project Data Report; and

"HEcologyOC" is the total number of Ecology offset credits, rounded to the nearest whole ton, that will be removed from the Holding and/or Compliance Account of each party identified.

WAC 173-446-580(8)(a)(i) includes an equation which, if I am interpreting it correctly, requires replacement of any invalidated Ecology-issued offset credits in a "Retirement Account" with fewer than the number of credits that have been invalidated. This does not seem consistent with the statute, since the statute requires invalidated offset credits to be replaced to meet compliance obligations. See, e.g., RCW 70A.65.170(4)(c).

I don't see why this number needs to be calculated. Couldn't the party simply be required to replace the invalidated offset credits? Wouldn't this number be directly known? Such an approach is taken in WAC 173-446-580(8)(b)(i). I do not see a reason that this approach could not be taken in WAC 173-446-580(8)(a)(i) as well. Please explain.

Please reexamine this equation to ensure that it complies with the statute. A suggested amendment of WAC 173-446-580(8)(a)(i) is shown below.

- (a) If an Ecology offset credit that is issued to a non-sequestration offset project or an urban forest offset project, or that is issued to a U.S. forest offset project, and is in the Retirement Account, and it is determined to be invalid for only the circumstances listed in WAC 173-446-580(3)(a) and/or WAC 173-446-580(3)(b)(i) then:
- (i) Each party identified must replace ~~Ecology the invalid~~ offset credits in the amount calculated for the individual party, ~~according to the following equation, truncated to the nearest whole ton:~~

$$REcologyOC = (TOTRetired/IEcologyOC) * OR$$

Where:

~~“REcologyOC” is the calculated total number of retired Ecology offset credits for the applicable Offset Project Data Report, rounded to the nearest whole ton, that must be replaced by each individual party identified;~~

~~“TOTRetired” is the total number of Ecology offset credits for which Ecology transferred the Ecology offset credits from the applicable Offset Project Data Report into the Retirement Account for the individual party;~~

~~“IEcologyOC” is the number of Ecology offset credits issued under the applicable Offset Project Data Report; and~~

~~“OR” is the amount of overstated GHG reductions and GHG removal enhancements calculated for the applicable Offset Project Data Report.~~

If such an amendment is implemented, further changes consistent with the amendment will be necessary in other places in the rule. For example, the following change in WAC 173.446.580 (8)(a)(ii), among others, might be made:

- (ii) Each party identified must replace the invalidated Ecology offset credits in the amount calculated with valid Ecology offset credits . . .

WAC 173-446-585 Approval Requirements for Offset Project Registries

WAC 173-446-585(2)(b)(i)(B)-(C) should be amended as shown below to improve grammar and ensure that all of subparts (A)-(C) are clearly required for all people playing a role in an Offset Project Registry.

- (A) Identify specific activities and limits on monetary and non-monetary gifts staff, management, ~~and~~ board members must not conduct or accept to meet the Offset Project Registry’s internal ~~policies of~~ conflict of interest policy, or alternatively provide a comprehensive policy on the

- applicant's requirements for the reporting of any and all conflicts based on internal policies that guard against conflict of interest; ~~and~~
- (B) Include a requirement for annual disclosure by each staff, management, ~~and~~ board member of any items or instances that are covered by the applicant's conflict of interest policy on an ongoing basis or for the previous calendar year; ~~and~~
 - (C) ~~The applicant must have~~ Include appropriate conflict of interest and confidentiality requirements ~~in place~~ for all any of its contractors;

WAC 173-446-585(6)(f) should be amended as follows to eliminate redundancy.

- (f) ~~The authorized representative of the Offset Project Registry must attest in writing, to Ecology:~~ "I certify under penalty of perjury under the laws of the State of Washington I have authority to represent the Offset Project Registry and all information provided as part of this application is true, accurate, and complete."

WAC 173-446-610 Enforcement.

Shouldn't WAC 173-446-610(2) have a time limit for making penalty payments, as WAC 173-446-610(1) does? I appreciate that the entity of WAC 173-446-610(2) has notified Ecology that it is unable to pay the penalty, while the entity of WAC 173-446-610(1) has not. Nonetheless, I feel that the entity of WAC 173-446-610(2) should be given a longer time limit, e.g., 1 or 2 years, as opposed to no time limit to pay penalties. Otherwise, how will we ever know whether the entity of 173-446-610(2) has paid the penalty? The entity of (2) may do so in the future, and the time limit is infinite. We may never know.

Please note that the statute requires that Ecology issue an order and/or a penalty both to entities that simply don't pay penalties (as in WAC 173-446-610(1)) and to entities that notify Ecology first that they are unable to pay then don't pay (as in WAC 173-446-610(2)), although it does not provide a time limit for penalty payment to entities that notify Ecology before failing to pay. RCW 70A.65.200(2) and (3). Therefore, WAC 173-446-610(2) and (3) in their current form are at least arguably inconsistent with the statute. I give sample language for making a suggested amendment of WAC 173-446-610(2)-(3) below.

- (2) When a covered entity or opt-in entity reasonably believes that it will be unable to meet a compliance obligation, the entity shall

immediately notify Ecology. Upon receiving notification, Ecology will issue an order requiring the covered or opt-in entity to submit the penalty allowances within two years.

- (3) If a covered entity or opt-in entity fails to submit penalty allowances as required by subsection (1) or (2) of this section, Ecology must issue an order or issue a penalty of up to \$10,000 per day per violation, or both, for failure to submit penalty allowances as required by subsection (1) or (2) of this section. Each metric ton of CO₂e not covered by a compliance instrument constitutes a separate violation. The order may include a plan and schedule for coming into compliance. In weighing whether to issue a penalty, Ecology will consider whether the entity notified Ecology of its inability to meet a compliance obligation in advance and whether the entity can demonstrate that it has made concrete efforts to reduce its GHG emissions and to meet its compliance obligations. Ecology may consider any other factors it deems relevant, such as, for example, changes in the competitive market(s) for the entity's product(s), changes in the labor market, increases in production costs, lack of appropriate technology to reduce GHG emissions, etc.

CONCLUSION

Thanks much for considering my comments. I hope you find them useful.

Sincerely,

Rosemary Sweeney