February 1, 2022

Washington Department of Ecology,

Dear Sir or Madam,

I am writing to communicate my comments on the revised version of WAC 173-446a issued December 22, 2021.

WAC 173-446a-020

From the context of the CCA, I do not believe that it is meant, nor is it desirable in my eyes, that electric and/or natural gas utility facilities should be included as emissions-intensive trade-exposed (EITE) facilities, even though natural gas and electricity could be viewed as "physical products." Therefore, I suggest rewriting the definition of "manufacturing facility" as follows (with underlining indicating additions and ~~strikethrough~~ indicating deletions):

> "Manufacturing facility" means a facility, as defined in WAC 173-441-020, that produces a physical product as its primary activity, wherein electric and natural gas utility facilities are not "manufacturing facilities" as meant herein.

WAC 173-446a-030

Under the Climate Commitment Act (abbreviated as "CCA" herein), a "facility" is a "physical property, plant, building, structure, source, or stationary equipment" (RCW 70A.65.010(37), and a "covered entity" is a "person," e.g., a company, "that is designated by the department as subject to RCW 79A.65.060 through 79A.65.210 (RCW 70A.65.010(23)). A "covered entity" can own and/or operate a "facility," and it is the covered entity, not the facility, that has the obligations under the CCA. Therefore, I suggest rewriting the first part of WAC 173-446a-030 as follows:

> WAC 173-446A-030 Emissions-intensive and trade-exposed manufacturing facilities. The provisions of this chapter apply to covered entities owning and/or operating manufacturing facilities that meet the requirements for program coverage laid out in RCW 70A.65.080 ~~are covered entities under chapter 316, Laws of 2021 (the Climate Commitment Act) regarding classification as emissions-intensive and trade-exposed~~.

RCW 70A.65.010(26) reads as follows:

(26) "Department" means the department of ecology.

The proposed rule uses “ecology” to refer to the Department of Ecology, for example in WAC 173-446a-030(2), as well as many other places throughout the rule. To maintain consistency with the statute and avoid confusion, I suggest that the definition of RCW 70A.65.010(26) be adopted in the rule and that “ecology” be replaced with “Department” or “the Department,” as appropriate in the specific grammatical context for each replacement. Of course, such replacements should not be made where “ecology” is used with its ordinary meaning, rather than as a short-hand for Department of Ecology.

WAC 173-446a-040

WAC 173-446a-040(1)(c)(ii) should be rewritten as follows to cover the situations where the owner and operator can be either the same entity or different entities:

> (ii) Identifying information as specified in WAC 173-441-050(3)(a), (c), (i), and (j) of the facility that the owner and/or operator is petitioning to be classified as emissions-intensive and trade-exposed;

WAC 173-446a-040(1)(c)(v) should be rewritten as follows to maintain the grammatical correctness of WAC 173-446a-040(1)(c):

> (v) ~~Submit information on the location~~ Location of the facility relative to overburdened communities. Using the Washington state department of health's environmental health disparities map, submit the total environmental health disparities ranking for the census tract in which the facility is located. Indication if the census tract in which the facility is located is covered or partially covered by tribal lands must also be submitted;

WAC 173-446a-040(1)(c)(vii) should be rewritten as follows to maintain the grammatical correctness of WAC 173-446a-040(1)(c):

> (vii) The signature of the person completing the petition ~~must sign~~ and the date the petition was signed.

WAC 173-446a-040(2)(a)(ii) should be rewritten as follows to reflect that it is the entity, not the facility, that is covered:

(ii) Be owned and/or operated by a covered entity under chapter 316, Laws of 2021 (the Climate Commitment Act) or projected to be owned and/or operated by a covered entity under chapter 316, Laws of 2021 (the Climate Commitment Act);

WAC 173-446a-040(2)(b)(i)(A) is, in my view, wrongly conceived on a basic level, although it may be harmless since it currently applies to no known facility. The Preliminary Regulatory Analysis issued along with the proposed rule reveals that all known manufacturing facilities in the state of Washington that would be covered by the CCA based on reported emissions also qualify for EITE status under the list of industries in Table 030-1 of WAC 173-446A. Preliminary Regulatory Analysis, Chapter 173-446A WAC, page 11, first bullet. Thus, the "objective criteria" outlined in WAC 173-446A are currently not applicable to any Washington manufacturing facility. Therefore, arguments about the suitability of the objective criteria may be pointless at moment. However, in view of the unpredictably of the future, I offer the comments below.

"Emissions-intensity" is a term used in carbon trading circles to refer to the emissions generated per a measure of production. Different carbon trading jurisdictions have used different formulas for computing this number, but all of them aim to determine how many MT CO2e are produced per the chosen unit of production. In the CCA, the term "carbon intensity" is used interchangeably with "emissions intensity," leading me to believe that no distinction is meant to be made between these two terms. A representative of the Department of Ecology in the public hearing on WAC 173-446A of January 25, 2022 also expressed the opinion that "carbon intensity" and "emissions-intensity" mean the same thing. If the Department has any influence over statutory language, I believe it would be much clearer to use either (not both) of these two terms throughout the statute. "Carbon intensity" is defined in the statute as follows:

(i) For the purpose of this section, "carbon intensity" means the amount of carbon dioxide equivalent emissions from a facility in metric tons divided by the facility specific measure of production including, but not limited to, units of product manufactured or sold, over the same time interval.

RCW 70A.65.110(3)(b)(i).

Further, the statute characterizes use of a so-called mass-based baseline (which is simply the CO2e emitted by a facility) in place of an carbon intensity baseline as

appropriate only when it is not feasible to determine a carbon intensity baseline with the following language:

> (ii) If an emissions-intensive and trade-exposed facility is not able to feasibly determine a carbon intensity benchmark based on its unique circumstances, the entity may elect to use a mass-based baseline that does not vary based on changes in production volumes.

RCW 70A.65.110(3)(b)(ii).

There are many reasons why Eqn 040-1 is inappropriate, and the most important one in my view is that it is inconsistent with the language of the statute and thus, arguably invalid on its face. It defines emissions intensity ("EI" in Eqn 040-1) as an amount of emissions rather than an amount of emissions per unit product. Thus, the EI of Eqn 040-1 does not even have the right units to be an emissions intensity according to the CCA! Further, as noted above, the CCA allows use of a "mass-based" baseline for emissions only when it is not feasible to determine a carbon intensity benchmark. In contrast, the proposed rule allows only the use of a mass-based baseline, regardless of whether an emissions intensity as defined in the CCA can be established.

Moreover, there are policy considerations that suggest that use of Eqn 040-1 to determine emissions intensity of a facility may be inappropriate. EITE facilities are allowed particularly generous no-cost allowances that are reduced in number more slowly than the allowances for other kinds of facilities, the rationale being that this will encourage these facilities to remain in Washington and reduce their emissions rather than moving out of state, thereby preventing "leakage." Leakage is thought to be likely when the price of a product produced under a carbon trading system is increased enough so that its sales are substantially affected.

The rule as currently written might allow a large manufacturing facility with emissions of at least 25,000 MT CO2e (and having low carbon intensity and high levels of production) to qualify for EITE status. Such a facility may have little added cost per unit production, and, thus, there is no reason to think that its products would have a substantially higher price than similar products produced outside of a carbon trading system. Therefore, there is no reason to think that such a facility would be incentivized to leave Washington if it did not have EITE status. Hence, it should not receive EITE status, since doing so would put more burden on non-EITE facilities and provide no benefits in terms of reducing emissions. Providing such pointless

incentives would seem to make failure to reach emissions reduction goals more likely.

While I have no argument with Eqn 040-2 in WAC 173-446a-040(2)(b)(ii)(A), I do wonder whether any company producing at least 25,000 MT CO2e would likely also meet the standard of trade-exposure set forth in Eqn 040-2. If the Department has any knowledge or expectations about this issue, I would be interested to know.

Thank you very much for considering these comments and thank you for your service.

Best regards,
Rosemary Sweeney