

February 1, 2022

Ms. Katie Wolt
Rulemaking Lead
Washington Department of Ecology
300 Desmond Dr SE, Lacey, WA 98503

Re: Formal Comment on draft rule Chapter 173-446A WAC, Criteria for Emissions-Intensive, Trade-Exposed Industries

Dear Ms. Wolt:

Thank you for the opportunity to provide formal public comment on the development of criteria for identifying emissions-intensive, trade-exposed (EITE) facilities through Chapter 173-446A WAC. As a statewide advocacy organization, the Washington Environmental Council works to develop, advocate, and defend policies that ensure environmental progress and justice by centering and amplifying the voices of the most impacted communities. We have worked on carbon pricing for over a decade here in Washington and are committed to realizing a just and equitable implementation of the Climate Commitment Act.

The Climate Commitment Act is a critical part of our state's overall set of tools for achieving our climate goals and improving the health and well-being of Washingtonians. The content of this rule regarding emission-intensive, trade-exposed industry ("EITE") designation and evaluation is an important component of how the law prevents emission leakage and ensures no additional harm to communities. The rule must also be accountable to the overall intent of the law. We submit the following feedback with this in mind.

Refine and include all necessary information for potential EITE classification

We appreciate the inclusion of information that will assist Ecology in determining impacts to overburdened communities and tribal nations, including census tract information and Environmental Health Disparities Map rankings. However, given the generous treatment of facilities once they are designated EITEs, we continue to recommend that Ecology ensure a more robust set of information is required in considering a designation. This includes:

- Additional facility information: How long the facility plans to be in operation; legacy pollution issues related to the operation of existing facilities; and any criteria pollutants related to the facility.
- A more robust definition of 'overburdened communities' and its related information: We recommend that Ecology cross-reference the definition of 'overburdened community' as defined in the CCA, as being developed through Section 3 of the CCA, and under the HEAL Act with what is proposed in this rule per the Environmental Health Disparities Map. Information will be needed beyond the census tract. For example, it is important to incorporate impacts to "populations, including Native Americans or immigrant populations, who may be exposed to environmental contaminants and pollutants outside of the geographic area in which they reside

*based on the populations' use of traditional or cultural foods and practices*¹. Integrating these definitions and processes into this rule will help the implementation of the law be more cohesive, provide more thorough information to the Environmental Justice Council, and ensure the most comprehensive approach.

- Going beyond census tract to evaluate information related to impacts: The draft rule also requires each petition to include an *“Indication if the census tract in which the facility is located is covered or partially covered by tribal lands”*. Potential impacts to tribal lands, resources, and treaty rights are farther reaching than whether the census tract in which a facility is located is covered or partially covered by tribal lands. The rule must therefore require additional information to determine potential impacts to federally recognized tribal nations, and the process for determining this information must be developed in consultation with tribal nations, as required by RCW 70A.65.110(8).

Enable engagement with the Environmental Justice Council

Thank you for acknowledging and strengthening the important role of the Environmental Justice Council with the addition of subsection (2)(c): *“Ecology must consider a facility's location relative to overburdened communities and recommendations, if any, from the Environmental Justice Council when evaluating a petition. Ecology may deny a petition based on this consideration upon a determination that air quality in overburdened communities would be unacceptably impacted.”* This addition describes how the Environmental Justice Council's statutory role will be integrated into the process of evaluating a facility's petition for EITE classification. In order for the Environmental Justice Council to have the information needed to carry out its role, the rule should also include a requirement to notify the Council of each individual petition for EITE classification. This will allow the Environmental Justice to determine its recommendations, if any, in a timely and informed manner.

Consult with Tribal Nations

While the draft rule includes a requirement for a facility petitioning for EITE classification to indicate if the census tract on which the facility is located is covered or partially covered by tribal lands, the rule lacks requirements for engagement with tribal nations, as required by law (RCW 70A.65.005(7) and RCW 70A.65.110(8)). The rule should define what process will be followed for the implementation of this part of RCW 70A.65, with meaningful consultation consistent with the Centennial Accord.

WAC 173-446A should also provide a clear plan for developing protocols with tribal nations for newly constructed facilities. We urge Ecology to work with tribal nations to ensure consistency and integrity in the consultation of federally recognized tribal nations impacted by both existing and new facilities.

Clarify how information will be utilized to determine EITE classification

This rule should strengthen and clarify how the information being submitted informs whether or not the facility receives EITE designation. Subsection 2(c) provides a good start. The rule should be further developed to address the process for tribal consultation regarding impacts to tribal lands, resources, and treaty rights, as well as around pollution impacts and overburdened communities per the above section.

¹ RCW 70A.65.010(54)(a)(iii) *Protecting, restoring, and sustaining Washington's environment.*



Evaluate and adapt emissions intensity and trade exposure

We have some concerns about the draft rule's approaches to calculating both emissions intensity and trade exposure. Overall, the proposed equations establish a broad tent that would likely have the impact of qualifying most manufacturing facilities not automatically given EITE status by the CCA to instead receive that status through petition under this rule. We urge Ecology to carefully consider potential unintended consequences embedded in its emissions intensity calculation that could inadvertently incentivize increased emissions by individual facilities in order to qualify as an EITE. Additionally, the rule's trade exposure equation attempts to apply objective criteria to the complex realities of international trade. The ultimate goal of determining trade exposure is to avoid leakage. Assessing the risk of leakage involves inherently subjective judgements that must be made in spite of many unknowns. Because of this, we recommend that Ecology explicitly build into this rule a way to continue to evaluate the impact of its trade exposure calculations and assumptions over time in order to evaluate and adapt as needed.

Establish a review of EITE designation and clarify the ability to remove EITE designation as needed

The current draft rule does not describe if or how an EITE designation will be evaluated over time. Receiving an EITE designation comes with significant benefits within the market-based program and should be treated as a distinct designation rather than a long-term status. We recommend that Ecology build into this rule a way to review and possibly remove the designation of EITE status. Review of the designation should be informed by the processes required by Section 3 of the Climate Commitment Act regarding pollution levels, the status of overburdened communities, and the role of the Environmental Justice Council.

Address existing EITE facilities

Finally, the facilities that are automatically classified as EITE based on their NAICS code per the Climate Commitment Act are not currently required to report environmental health disparity information, potential impacts to overburdened communities, or information about impacts to tribal lands, resources, and treaty rights. The rule should add this content as part of creating a more cohesive and consistent approach to EITEs and require that all EITEs submit this information for consistency across the Climate Commitment Act. This information should then inform other parts of the implementation of the CCA.

We appreciate the importance and groundbreaking nature of the Climate Commitment Act and all the work required to stand up the program in a just and equitable way. We are committed to working with, and supporting, the Department of Ecology in rulemaking and in the long-term success of this nationally recognized law. Thank you for the opportunity to provide comments and all the work to date to move this law forward.

Sincerely, Rebecca Ponzio & Caitlin Krenn

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