July 15, 2022

Mr. Joshua Grice
Climate Rule Supervisor
Washington Department of Ecology
300 Desmond Dr SE, Lacey, WA 98503

Re: Climate Solutions comments relating to the proposed program rule for the Climate Commitment Act.

Dear Mr. Grice,

Climate Solutions thanks you for the opportunity to submit comments and recommendations on the proposed program rule for Chapter 173-446 WAC, the Climate Commitment Act Program. Climate Solutions is a clean energy nonprofit organization working to accelerate clean energy solutions to the climate crisis. The Northwest has emerged as a hub of climate action, and Climate Solutions is at the center of the movement as a catalyst, advocate, and campaign hub.

The Climate Commitment Act ("CCA") is an essential part of Washington's decarbonization policy regime and its successful implementation is critical for achieving the state's greenhouse gas emissions requirements, as well as establishing a nationwide precedent for how such policies can be equitably designed and implemented. The CCA was not only designed to put Washington on a pathway to achieving its statutory greenhouse gas emissions reduction requirements, but also to improve air quality, invest in communities across Washington, and to ensure benefits to overburdened communities.

To ensure the law achieves its intended outcomes around greenhouse gas emissions, air quality, and equity, we offer the below comments on program design, no-cost allowance allocations, data collection in overburdened communities, and linkage considerations.

I. The final rule should maintain Program stringency by ensuring no-cost allowance allocations do not exceed the mandatory program cap.

The CCA is a transformational policy that puts an economy-wide cap on greenhouse gas emissions from Washington's largest emitters by requiring Ecology to set annual allowance budgets "to achieve the share of reductions by covered entities necessary to achieve the 2030, 2040, and 2050 statewide emissions limits established in RCW 70A.45.020." The reduction requirements established in RCW 70A are 45% by 2030, 70% by 2040 and 95% by 2050,

relative to 1990 levels. To achieve its intended outcome, it is critical that the final rule maintains the stringency of the mandatory cap in the Program.

As drafted, the proposed rule does not address the likely conflict between the Program's total annual allowance budget and the allocation of no-cost allowances to specific covered entities, such as emissions intensive, trade exposed Industries ("EITEs") and electric utilities. Without clarity, the proposed rule would likely violate the statute's requirement to achieve these statutory greenhouse gas reduction limits because the total allocation of free allowances would exceed the entire allowable emissions for all covered entities under the mandatory cap.

To the extent that RCW 70A.65.120—the provision that allocates no-cost allowances to EITEs for a portion of a facility's total compliance obligation—appears to support such an allocation, that section directly conflicts with the total caps required under RCW 70A.65.070(2), and with the entire purpose of the cap and invest program. The Department of Ecology ("Ecology") must resolve this apparent conflict by clarifying in the final rule that it will not allocate no-cost allowances to covered entities if in excess of the program's overall annual allowance budget in any year.

A. Though unlikely to occur in the short-term, the conflict should be resolved in this rulemaking.

The proposed rule lays out the process for determining annual allowance budgets through 2049. It would be unreasonable to adopt a rule with a 2049-time horizon without addressing conflicts that are highly likely to occur within that timeframe. The CCA contemplates that Ecology will make "additional adjustments to annual allowance budgets as necessary to ensure successful achievement of the proportionate emission reduction limits by covered entities" outside of the minimum statutory timelines for reconsidering the relevant provisions. It also requires Ecology to "determine and make public the circumstances, metrics, and processes that would initiate the public consideration of additional allowance budget adjustments to ensure successful achievement of the proportionate emission reduction limits." To give regulated entities, voluntary participants, and markets certainty about the future of the program, Ecology should explain how it will address this potential conflict between annual allowance budgets and the no-cost allowance allocations.

B. Ecology should resolve the conflict in favor of the total program cap and the central emission reduction goal of the CCA.

The conflict between total program annual allowance budgets and free allocations to specific industries should be resolved in favor of the CCA's primary goal of reducing air pollution and carbon emissions from covered entities in the aggregate. To do so, the final rule must provide

that individual allowance allocations can never exceed the total cap. The legislative context, as well as principles of statutory interpretation support this outcome.

The Legislature was apparently aware of the conflict when it enacted the CCA because it required Ecology to submit agency request legislation “that outlines a compliance pathway specific to emissions-intensive, trade-exposed businesses for achieving their proportionate share of the state’s emissions reduction limits through 2050.” The Legislature knew there was no guarantee of future amendments, and therefore knew that Ecology could be called upon to implement the CCA as originally enacted. Ecology’s resulting request legislation did not pass the Legislature, and therefore Ecology must implement the CCA as it exists, including resolving the apparent conflict between meeting the state’s greenhouse gas reduction goals as required and the allocation of allowances to certain covered entities. Even if the conflict is inherent in the CCA itself, it is unreasonable for Ecology to adopt a rule that perpetuates that conflict without acknowledging it. Rather, Ecology has a duty to the Legislature, regulated entities, other stakeholders, and the public to explain how Ecology will apply the statute if it is not amended.

The “fundamental purpose” of statutory interpretation “is to ascertain and carry out the intent of the legislature.”[1] And, as the Washington Supreme Court instructs, “when passing laws that protect Washington’s environmental interests, the legislature intended those laws to be broadly construed to achieve the statute’s goals.”[2] The central goal of the CCA is to reduce greenhouse gas emissions by covered entities in proportion with the state’s overall emissions limits. The rest of the act should be construed liberally in support of that goal.

Given the conflict between the mandated goals and the details of free allowance allocation, the latter must give way in order to “broadly construe” the CCA “to achieve [its] goals.” When possible, the meaning of statutory language is determined by the wording of the relevant section. However, that rule gives way if it “leads to a conflict or incongruity when compared with other portions of the act.”[3] In resolving such “conflicting statutory language, ‘the primary objective . . . is to ascertain and carry out the intent and purpose of the legislature in creating it.’”[4] In this case, free allowances in excess of the program cap would dramatically undermine the very purpose of the CCA.

---

[1] *Quinault Indian Nation v. Imperium Terminal Services, LLC*, 187 Wash.2d 460, 468 (citing *In re Marriage of Schneider*, 173 Wash.2d 353, 363 (2011)).

[2] *Quinault Indian Nation v. Imperium Terminal Services, LLC*, 187 Wash.2d 460, 468 (citing *Kucera v. Dep’t of Transp.*, 140 Wash.2d 200, 212 (2000); *Leschi Imp. Council v. Wash. State Highway Comm.*, 84 Wash.2d 271 277 (1974) (plurality)).

[3] *See State v. Vosgien*, 82 Wash.685, 687 (1914) (quoting Endlich, *Interpretation of Statutes*, § 41).

[4] *Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 210 (2005) (quoting *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239 (2002)).

II. The final program rule should include a trigger price for the Emissions Containment Reserve.

RCW 70A.65.140 describes the importance of an Emissions Containment Reserve ("ECR"), stating "to help ensure that the price of allowances remains sufficient to incentivize reductions in greenhouse gas emissions, the department must establish an emissions containment reserve and set an emissions containment reserve trigger price by rule." As indicated by the Legislature, the ECR is a useful mechanism for maintaining the ability of the program to carry out its intended goal and reduce emissions when allowance prices fall and the market signal to reduce emissions is weak. It does so by reducing the supply of allowances when prices fall lower than originally projected.

For the ECR to function, the program rule must include a trigger price. The law requires Ecology set a trigger price, stating that "the price must be set at a reasonable amount above the auction floor price and equal to the level established in jurisdictions with which the department has entered into a linkage agreement." While statute permits Ecology to suspend the trigger price if it may enter into a linkage agreement with a jurisdiction that lacks an ECR trigger price, the Legislature clearly indicated its intent for the Program to rely on an ECR with a trigger price set by Ecology. Without a trigger price, the ECR loses its functional ability to incentivize emissions reductions when allowance prices are low.

In the short run, an ECR and trigger price is likely to be an important tool for ensuring Washington will actually see emissions reductions in a linked program. California currently has a large bank of unused allowances, and Washington's reliance on California's banked allowances could prevent Washington from achieving its own statutory greenhouse gas requirements. In evaluating linkage, Ecology is required to assess whether "the aggregate number of unused allowances in a linked program would reduce the stringency of Washington's program and the state's ability to achieve its greenhouse gas emissions reduction limits." As a part of linkage, Ecology should require an ECR as a condition of linkage with other jurisdictions to maintain the integrity of the Program.

In the long run, an ECR is likely to be an important tool even without linkage. The interaction of CCA and other complementary policies—such as the Clean Energy Transformation Act, the Clean Fuel Standard, the Zero Emission Vehicle Program, and increasingly stringent building energy codes—is important to consider as these policies put downward pressure on allowance prices. The ECR provides some certainty against unexpected price declines, which includes any interaction with other policies and programs.

In addition to including a trigger price, the design of the ECR is also critical. To ensure that the ECR is functional and adequately addresses potential short-term and long-term supply issues, we agree with the recommendation by Resources for the Future to not define the ECR as a separate account, but rather define the ECR as the 10% of allowances that can be removed from any allowance auction at the ECR trigger price. Ecology can still make allowances available to new EITEs or by auction to new entrants as required by law but should otherwise retire remaining allowances.

III. No-cost allowance allocations to utilities should be transparent, incentivize emission reductions, benefit low-income ratepayers, and acknowledge other statutory requirements.

In order to protect electric utility customers from duplicative costs, the Legislature provided electric utilities with no-cost allowances to mitigate the cost impact of the program. The no-cost allowance allocation methodology to electric utilities will impact overall market liquidity, the Program's ability to achieve the emissions cap at a low cost, and has the potential to reduce an electric utility's incentive to reduce emissions if not structured appropriately. It is important that this allocation methodology aligns with a utility's greenhouse gas emissions reduction trajectory under current law, that the methodology is transparent, and that it maintains an incentive to reduce emissions beyond the forecast.

A. Electric utility allowance allocations should be based on projected compliance with the Clean Energy Transformation Act.

Under the Clean Energy Transformation Act ("CETA"), Washington's electric utilities must supply their customers with 100% renewable and non-emitting electricity by 2045. The CCA acknowledges the requirements of CETA and provided electric utilities that are subject to CETA with allowances at no-cost "in order to mitigate the cost burden of the program on electricity customers." Ensuring a methodology that captures the intent of the integration of CETA and CCA is essential for appropriately allocating no-cost allowances and achieving the state's clean electricity requirements.

The forecast for determining electric utility no-cost allowance allocations will have a significant impact on the market of the cap-and-trade program, particularly in the first few years. The CCA relies heavily on CETA to reduce greenhouse gas emissions in the electricity sector, which is the basis for providing no-cost allowances to electric utilities. The intent of this provision of the CCA is to avoid duplicative cost impacts to customers in the implementation of both CCA and CETA, not to provide utilities with no-cost allowances to cover their entire compliance obligation absent a CETA requirement. Given the legislative intent and interaction of the two statutes, the no-cost allowance allocation should be based on the CETA requirements and a

utility's projected compliance pathway for CETA. Utilities subject to CETA are required to file Clean Energy Implementation Plans ("CEIPs") every four years. CEIPs must propose "specific targets for energy efficiency, demand response, and renewable energy," as well as "interim targets for meeting the standard . . . during the years prior to 2030 and between 2030 and 2045." The forecast used for no-cost allowance allocations should be transparent and accessible, and the CEIP has a public process that can be relied upon to ensure the no-cost allowance allocation is understood by the public. Plans go through a public process and are formally approved by the Washington Utilities and Transportation Commission ("Commission"), providing oversight in the utility CETA compliance planning process. Ecology's methodology for allocating allowances to electric utilities should rely heavily on a utility's compliance plan as approved by the Commission in the CEIPs.

B. *Any no-cost allowances in excess of a utility's compliance obligation should be prohibited from being transferred to another regulated entity.*

Allowances allocated to electric utilities at no cost "may be consigned to auction for the benefit of ratepayers, deposited for compliance, or a combination of both." Similarly, allowances allocated to gas utilities at no cost "must be consigned to auction for the benefit of ratepayers . . . deposited for compliance, or a combination of both." This requirement in statute is clear that both electric and natural gas utilities must use the no-cost allowances for their own individual utility compliance obligations or consigned to auction for the benefit of their own ratepayers.

The proposed rule aligns with the statute in requiring that electric utilities deposit the no-cost allowances for compliance or consigned to auction, and additionally clarifies that electric utilities may transfer the no-cost allowances to electric generating facilities. While the rule does not indicate any other transfers are permitted, the proposed rule allows multiple registered entities within a "direct corporate association" to share a single "consolidated entity account" in the program. Given both an electric utility and a natural gas utility could share a consolidated entity account, the proposed rule creates an opportunity for no-cost allowances allocated to one covered entity to be able to be used by a separate entity, simply because the two entities are affiliated. This use would not be allowed if the same two covered entities were not affiliated and should be prevented in the final rule. For example, a gas utility should not have access to an electric utility's no-cost allowances simply because it affiliated with an electric utility, while other gas utilities not affiliated with an electric utility has no access to such allowances. The presence or absence of such an affiliated entity has no relationship to the policies around utility no-cost allowance allocations that motivated the legislature in enacting RCW 70A.65.

The final rule should clarify that if both a natural gas utility and an electric utility share a single consolidated entity account because they are part of a direct corporate association, no-cost allowances are prohibited from being transferred between these separate entities. In the event

that electric or natural gas utilities receive no-cost allowances in excess of their total emissions during a compliance period, each individual utility should be required to use allowances for their own compliance only or consign them to auction for the benefit of their customers. While both natural gas and electric utilities will have a compliance obligation under the program, natural gas and electric customers are distinct with natural gas and electric utilities conducting distinct ratemaking processes and no-cost allowances from one utility should not subsidize compliance for another utility. This is true generally in utility ratemaking.[5] It also appears that the legislature intended to keep electric and gas ratepayer bases separate in the CCA specifically. For example, the legislature's stated intent in allocating allowances to electric utilities is "to mitigate the cost burden of the program *on electricity customers*." Extending the benefits of those allowances to an affiliated gas utility or gas customer would overstep the intent of that section. Similarly, customer bill credits funded with the proceeds of natural gas utility allowances are generally available "exclusively for customers at locations connected to a natural gas utility's system on July 25, 2021" and "may not be provided to customers of the gas utility at a location" connected after that date. This restriction would make little sense if the legislature intended to share the benefits of gas utility allowances with electric customers.

The legislature specifically required that utilities use allowances for their own compliance or consign them to auction for the benefit of their ratepayers, and the final rule should acknowledge that each utility business has a distinct base of ratepayers that should not cross-subsidize one another, regardless of corporate associations. To do so, Ecology should clarify in the final rule that no-cost allowances allocated to an electric utility may only be deposited for compliance against the compliance obligation of the electric utility (or electric generating facility receiving a permitted transfer) and not be transferred to a separate covered entity, and vice versa for a natural gas utility.

C. The no-cost allowance allocation to electric utilities should not remove the economic incentive to reduce emissions beyond the forecast.

Despite electric utilities receiving no-cost allowances for a portion of their compliance obligation, the allowance price should still be incorporated into utility planning and real-time operations. In a cap and invest program, there is a cost associated differential between emitting facilities and clean energy facilities. The no-cost allowance allocation methodology should maintain that cost differential. Even if utilities receive allowances at no-cost, there is still an opportunity cost to sell an allowance if the utility is able to reduce emissions at a lower cost than the sale of an allowance. Incorporating the allowance price into dispatch and operations is

[5] *See, e.g.*, *Washington Utilities & Transportation Commission v. Avista Corporation*, Final Order 09, WUTC Docket Nos. UE-190334, UG-190335, and UE-190222 (Mar. 25, 2020) at 35-36, *available at* https://apiproxy.utc.wa.gov/cases/GetDocument?docID=2460&year=2019&docketNumber=190334 ("In general, we find that it is appropriate to avoid inter-business subsidization" between gas and electric utilities).

critical for the overall efficiency of the program and to ensure economy-wide emissions reductions at the lowest cost.

The utility no-cost allowance allocation methodology will impact whether the program maintains a cost (or opportunity cost) associated with using emitting resources. If a utility can reduce emissions beyond their forecasted emissions at a lower cost than the allowance price, the most cost-effective outcome is for the utility to reduce emissions and sell any no-cost allowances they were allocated. However, if Ecology creates a process by which allowance allocations are trued up with actual emissions at the end of each year or compliance period, it will remove any incentive for a utility to reduce emissions beyond forecast. Having a fixed emissions forecast without a true-up will maintain an incentive to continue reducing emissions at no cost to the utility while improving the efficiency of the program.

D. Electric utility allocations need not cover 100% of the cost burden.

The CCA does not require Ecology to provide no-cost allowances to electric utilities to cover 100% of their cost burden, nor was it the legislative intent. The CCA provision for allocating no-cost allowances to electric utilities was intended to "*mitigate* the cost burden of the program on electricity customers." In contrast, for gas utilities, the CCA requires that a minimum percentage of no-cost allowances be consigned to auction for the benefit of customers, "including at a minimum *eliminating* any additional cost burden to low-income customers from the implementation of this chapter."

The words "mitigate" and "eliminate" have different meanings; the former means "to make less severe or painful,"[6] while the latter means "to put an end to or get rid of[.]"[7] As the Washington Supreme Court has held, "[w]here certain statutory language 'is used in once instance, and different language in another, there is a difference in legislative intent.'"[8] This is especially likely to hold true in the situation at issue here, where the two phrases come from parallel sections within a single act. However, the proposed rule ignores the legislature's distinction by interpreting "mitigate" in the electric utility allocation section to mean "eliminate."

The legislature's use of "mitigate" and "mitigation" elsewhere in the CCA and other climate legislation also support reading it to require only reduction, not elimination. Specifically, with respect to benefits of free allowances that must go to electric ratepayers, the legislature required that "the first priority [is] the mitigation of any rate impacts to low-income customers." If the

[6] "Mitigate," *Merriam-Webster.com Dictionary*, Merriam Webster, https://www.merriam-webster.com/dictionary/mitigate (accessed July 10, 2022).
[7] "Eliminate," *Merriam-Webster.com Dictionary*, Merriam Webster, https://www.merriam-webster.com/dictionary/eliminate (accessed July 10, 2022).
[8] *Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Waqsh.2d 353, 366 (2020) (quoting *Seeber v. Pub. Disclosure Comm'n*, 96 Wash.2d 1355, 139 (1981)).

legislature intended that electric utilities be given sufficient allowances to eliminate their cost burden, there would be no need for them to prioritize relief from that burden for low-income customers.

In reality, providing electric utilities with enough no-cost allowances to eliminate their entire cost burden would actually *increase* the costs borne by low-income customer under the program as a whole. By eliminating the entire electric utility cost burden for all customers, Ecology would be subsidizing electric rates for ratepayers who can better absorb added costs, while reducing the supply of allowances and driving up the costs of greenhouse gas emissions reductions in other sectors. In turn, those sectors are likely to pass the costs on to their customers, including low-income electric customers, through increased prices for the products produced by those industries. Most importantly, the majority of the non-electric covered emissions come from natural gas and vehicle fuels. A disproportionate share of a low-income household's income goes to pay for those commodities to meet their essential needs, such as heat, hot water, and transportation. Ecology can reduce this regressive effect by allocating no-cost allowances to electric utilities based on a projected CETA compliance and focus any consigned revenue on reducing the cost burden borne by low-income customers.

E. Emissions rates should be based on the actual emission rates from generating facilities.

The greenhouse gas emissions rate for natural gas plants varies based on a number of factors. Gas plants used primarily for meeting peak power demand often have a significantly higher emissions factor than combined-cycle gas plants. Gas plants have also become significantly more efficient over time as technology continues to improve, so the year in which a gas plant was constructed has a large impact on the emissions factor. Finally, natural gas turbines can operate on both fossil natural gas as well as renewable natural gas, which will impact a gas plant's true emissions.

Given the variability of emissions rates for gas plants, emissions rates for electric generating stations should not be based on generic emissions factors, but rather based on actual facility emissions rates when determining an electric utility's no-cost allowance allocation. The proposed rule uses a generic emissions factor, and one that is higher than the average emissions factor for gas plants in Washington, which poses a significant risk for over-allocation. Given the impacts of over-allocation described above, Ecology should use specific emissions rates to increase the accuracy of forecasting a utility's actual compliance obligation.

Should Ecology decline to use specific emissions rates, at a bare minimum the final rule should rely on a generic emissions factor that reflects the average gas plant emissions rate in

Washington. If Ecology chooses this methodology, emissions factors should be updated over time to reflect efficiency improvements in generating facilities.

F. *Consigned revenues from no-cost allowances to natural gas and electric utilities must first be spent to benefit low-income ratepayers.*

The statue is clear that consigned revenues must prioritize mitigating any rate impact to low-income customers. RCW 70A.65.120(4) states that the "benefits of all allowances consigned to auction under this section must be used by consumer-owned and investor-owned electric utilities for the benefit of ratepayers, with the first priority the mitigation of any rate impacts to low-income customers." Electric utilities will receive no-cost allowances for a large portion of their compliance obligation under the program. While we anticipate little rate impact for electric utility customers from the program, we strongly support prioritizing low-income customer investments to reduce any potential cost impact. Investments should prioritize clean energy solutions that also reduce a customer's overall energy burden permanently, such as energy efficiency programs, distributed energy investments, or other customer-side solutions. We recommend including language in the final rule to clarify that electric utilities must prioritize low-income customers when spending revenue from consigned allowances.

Natural gas utilities will receive a declining portion of allowances needed for their compliance obligation, and unlike electric utilities, are required to consign an increasing share of their no-cost allowances to auction for the benefit of ratepayers. The requirements for natural gas utilities are distinct, requiring that "no cost allowances must be consigned to auction for the benefit of customers, including at a minimum eliminating any additional cost burden to low-income customers from the implementation of this chapter." While the intent is clear, the final rule should also clarify that gas utilities must prioritize low-income ratepayers in spending revenue from consigned allowances. Similar to electric utilities, we recommend these investments focus on long-term clean energy solutions that have the ability to eliminate the cost burden of the program, while also reducing the overall energy burden.

G. *The final rule should only allocate no-cost allowances to natural gas utilities, consistent with the statute.*

Ecology should clarify in the final rule that only natural gas companies that serve the public as utilities may receive free allowances. The CCA provides no-cost allowances natural gas utilities, but the term "natural gas utility" is not defined in statute. However, the Commission defines "gas utility" as "any business entity (e.g., corporation, company, association, joint stock association, or partnership) or person, including a lessee, trustee, or court appointed receiver, that is subject to the commission's jurisdiction and that owns, controls, operates, or manages any gas plant in

Washington and manufactures, transmits, distributes, sells, or furnishes gas *to the public for compensation*."[9]

This definition is consistent with other Washington statutory and case law that a company is not a utility unless it holds itself out to serve the general public.[10] However, the proposed rule does not align with the statutory language, granting no-cost allowances to "each *supplier* of natural gas," rather than limiting the allocation to natural gas utilities. Under the CCA statute, "suppliers" are "entities that that produce, import, or deliver, or any combination of producing, importing, or delivering, a quantity of fuel products in Washington" exceeding the threshold for GHG reporting." Unlike a utility, nothing in the definition of "supplier" requires such a company to serve the public. As a result, the proposed rule would allocate no-cost allowances to gas companies that are not utilities, either now or in the future and would exceed Ecology's authority.

V. The final rule must ensure that sufficient allowances are set aside to account for all voluntary renewable energy purchases in Washington.

Large electricity customers are voluntarily buying clean electricity in increasingly large quantities. We appreciate the Legislature's intent to maintain the requirement that voluntary purchases be additional to any other requirements of the state through the creation of the Voluntary Renewable Electricity Reserve Account. However, we are concerned that the proposed rule could fall short of maintaining additionality of voluntary renewable electricity purchases if the reserve is not sufficiently charged.

The proposed rule allocates only 0.33% of the annual allowance budgets for the first compliance period into the voluntary renewable account, which appears to be low based on the growth in the voluntary market, and the rule lacks flexibility to adapt if the voluntary renewable electricity market continues to expand. To address this issue, we recommend a process for an annual true-up to ensure allowances are retired on behalf of all voluntary renewable energy purchases.

---

[9] WAC 480-90-023 (first emphasis in original; second emphasis added).

[10] *See* RCW 80.01.040(3) (empowering WUTC to regulate rates and practices of businesses "supplying any utility service or commodity ***to the public*** for compensation" (emphasis added). In *Inland Empire Rural Electrification, Inc.. v. Dep't of Pub. Servs. of Wash.*, the Washington Supreme Court explained:

> A corporation becomes a public service corporation, subject to regulation by the [WUTC's predecessor agency], only when, and to the extent that, ***its business is dedicated or devoted to a public use***. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

199 Wash. 527, 536-37 (1939) (citations omitted) (emphasis added).

Without a true-up, the voluntary renewable energy reserve account could be exhausted and reduce the climate benefits of additional voluntary renewable electricity purchases.

If Ecology includes a true-up, it would also be appropriate to release and auction any unused allowances in the voluntary renewable energy reserve from each emissions year after the deadline for retirement requests has passed and allowances have been retired against all eligible voluntary renewable purchases for the year. This would promote market liquidity without jeopardizing renewable buyers' intended climate benefits.

Ecology should also require electric utilities to report information on voluntary renewable purchases that may be eligible for the voluntary renewable electricity allowance retirement. Public data on voluntary renewable electricity purchases is not readily available, but utilities have relevant data from their voluntary renewable energy programs. Requiring such reporting will make the most of information that utilities already hold and will protect electric customers' expectation of reducing greenhouse gas emissions when they invest in renewable electricity.

VI. The final rule must ensure air quality improvements and sufficient data collection to identify impacts to overburdened communities, and Ecology must actively involve the Environmental Justice Council and consult with Tribal nations.

With the CCA, the Legislature created a program that not only caps greenhouse gas emissions and invests in clean energy technologies, but also improves air quality, reduces health disparities from air pollution, provides direct and meaningful benefits to vulnerable populations and overburdened communities, and respects Tribal sovereignty. This is clear in several provisions of the CCA, including the creation of the Air Quality and Health Disparities Improvement Account, the intent section, and repeated requirements that investments must provide direct benefits to overburdened communities and cannot violate Tribal treaty rights. As such, it is important that the rule ensures the program actually achieves these goals.

To track whether the program is achieving its intended outcomes, Ecology must first gather sufficient data to adequately address potential impacts on overburdened communities. We recommend that Ecology require all covered entities to provide sufficient information in order for Ecology to assess the impacts of the program, including their proximity to Tribal lands, treaty protected areas, and overburdened communities. This information should be included on the publicly available program website so that it is readily available to the public.

Under the statute, EITEs are allocated no-cost allowances to cover the majority of their baseline emissions. The rule establishes the initial process and how allowance allocations may change over time. Ecology should strengthen this section of the rule (WAC 173-446-220) to properly assess impacts on overburdened communities, involve the Environmental Justice Council

("EJC"), and ensure transparency. Per RCW 70A.65.110 (8), protocols regarding EITE facilities built after July 25, 2021 "must include consideration of the products and criteria pollutants being produced by the facility, as well as the local environmental and health impacts associated with the facility. For a facility that is built on tribal lands or determined by Ecology to impact tribal land and resources, the protocols must be developed in consultation with affected tribal nations." This should apply to *all* EITEs, not just those recently built. Under WAC 173-446A, Ecology must notify the EJC of new petitions to be classified as an EITE. Similarly, this rule should specify that Ecology must notify the EJC when an EITE is seeking an adjustment to its allowances. These adjustments should also be publicly disclosed.

Additionally, Ecology should actively involve the EJC in the final rules on overall program design to ensure benefits and no harms to overburdened communities. Ecology staff has engaged little with stakeholders outside the formal comment process during the development of the proposed rule. While that is not a legal requirement, Ecology should certainly not apply that same policy to the EJC and should engage with the Council more deeply throughout the process of developing the final rule between now and October 1. The EJC was given a specific role by the Legislature, and Ecology must not exclude the EJC from its work beyond the formal comment period. This rule should further specify how Ecology will engage the EJC in development, implementation, evaluation of the full program. Currently, the proposed rule does not clearly outline how Ecology will consult with the EJC or ensure adequate data is collected and shared with them. For example, Ecology should share data and analyses on the number of allowances and their vintages in various accounts, on allowance adjustments, on how baselines are determined, and on how utilities spend revenue from no-cost allowances consigned to auction so that the EJC can fully evaluate the program and shape its recommendations.

We also strongly encourage direct government-to-government consultation with Tribal nations about the program's design and implementation. Nineteen Tribal governments played a critical role in shaping and passing the statute. Washington has established several agreements with federally recognized Indian tribes to facilitate government-to-government relations, including the Centennial Accord (1989) and New Millennium (1999) agreements in addition to the recently enacted HB 1753. Ecology should implement CCA in accordance with these government-to-government consultation requirements.

VII. Ecology must acknowledge conditions and criteria from the statute to link with other systems.

Several elements of the proposed rule are specifically designed for a future linkage with the programs in California and Québec. However, Ecology has not sufficiently explained what criteria and process it will apply when pursuing linkage, and how these criteria align with the requirements in statute. The CCA requires Ecology to adopt rules to implement RCW

climate solutions
accelerating the transition to our clean energy future

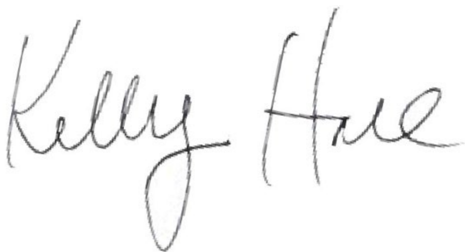
70A.65.060 through 70A.65.210, which includes governing linkage. Yet the proposed rule contains no information about how Ecology will actually implement that section.

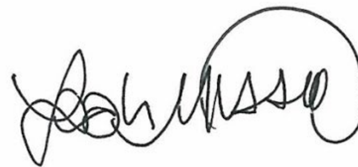
The statute requires that a linkage agreement must: “(b) Ensure that the linking jurisdiction has provisions to ensure the distribution of benefits from the program to vulnerable populations and overburdened communities; (c) Be determined by the department to not yield net adverse impacts to either jurisdictions' highly impacted communities or analogous communities in the aggregate, relative to the baseline level of emissions; and (d) Not adversely impact Washington's ability to achieve the emission reduction limits established in RCW 70A.45.020.” It is critical that Ecology lays out a public process for determining the criteria and considerations for linkage with other jurisdictions, and how these statutory requirements will be assessed. While linking with other jurisdictions has the opportunity to lower emissions at a reduced cost, linkage must not negatively impact overburdened communities and Washington must continue to reduce in-state emissions aligned with its statutory greenhouse gas emissions requirements.

Conclusion

Climate Solutions thanks you again for the opportunity to submit comments and recommendations on the proposed program rule for the Climate Commitment Act. The Climate Commitment Act is a keystone climate policy, and its successful implementation is critical for achieving Washington’s greenhouse gas emissions requirements, improving air quality in communities across Washington, and investing in Washington’s overburdened communities. We look forward to continuing to work with you on the final rule and overall implementation of the Program.

Sincerely,





Kelly Hall
Washington Director
Climate Solutions

Leah Missik
Washington Transportation Policy Manager
Climate Solutions