AWEC

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July 15, 2022

Joshua Grice
Department of Ecology
Air Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Submitted by online form at ecology.wa.gov

Re: Alliance of Western Energy Consumers' Comments on CR-102 Proposed Rule (Chapter 173-446 WAC – Proposed Climate Commitment Act Program Rules)

Dear Mr. Grice,

The Alliance of Western Energy Consumers (AWEC) appreciates the opportunity to provide comments on the proposed rule language provided by the Washington Department of Ecology (Ecology) for WAC 173-446 implementing Washington State's cap and invest program pursuant to the Climate Commitment Act (CCA).

AWEC is a trade organization whose members include many of the State's largest employers and consumers of electricity and natural gas. Many of AWEC's members also own facilities designated as covered energy-intensive and trade-exposed entities (EITE) under the CCA. AWEC's members are responsible for providing tens of thousands of highly paid, technical, family-wage jobs across a broad range of industry sectors such as agriculture, aeronautics, air products, metals, pulp and paper, and more. Thanks to Washington's abundant hydro resources, they also have some of the cleanest processes in terms of carbon emissions in the world.

AWEC appreciates the additional 15 days that Ecology provided for reviewers to submit formal comments on the proposed rule, and some of the changes made to address stakeholder concerns from the draft proposed rules. AWEC views this rulemaking as a critical regulatory undertaking in implementing the CCA, which is intended to provide societal environmental benefits. Implementation does, however, have important economic impacts on consumers, businesses, and the Washington state economy. AWEC's members spend millions of dollars each month on energy to manufacture products that are sent all over the world. As such, AWEC views this rulemaking from the lens of ratepayers of other covered entities and general market participants, and as covered entities themselves by virtue of their activities as EITEs.

AWEC's comments in this rulemaking focus on:

- Ensuring that AWEC members' respective electric utilities subject to the Washington Clean Energy Transformation Act (CETA) obtain sufficient allowances to offset their

"cost burden" in full, as intended by the CCA's recognition of CETA as the compliance mechanism for electric utilities subject to both laws.[1]
- Ensuring that AWEC members' respective natural gas utilities obtain sufficient no-cost allowances for the benefit of all ratepayers.[2]
- Regardless of utility type, revenues from no-cost allowances allocated to utilities and sold at auctions should be returned to customers through rate mitigation efforts.[3]
- Finally, guarantee the protection of EITE facilities from experiencing leakage of emissions, economic activity, and jobs.

To this end, AWEC has identified several key issues and recommendations that if implemented, will contribute to achieving previously stated objectives: compliance flexibility, cost containment, affordability, and mitigation of macroeconomic effects.

Issues and Recommendations Related to Utility Ratepayers

<u>Recommendations Related to General Requirements (WAC 173-446-000s)</u>

- **Renewable Natural Gas should be treated the same as renewable electricity sources.**

Renewable natural gas (RNG) will be a primary pathway for natural gas utilities' compliance with the CCA and proposed WAC 173-446-020(1)(o) provides a definition of biomass-derived fuel.

Recommendation: Ecology should clarify in the definition of "biomass-derived fuel" at WAC 173-446-020(1)(o) that fuels such as RNG purchased to comply with the CCA program do not have to be tracked to the specific end-user of where the RNG is delivered. This clarification is consistent with Washington's long-standing renewable portfolio standard for electricity. RNG, like renewable electricity, is purchased on behalf of customers, but it is impracticable to track the actual gas molecules or electrons to a specific location upon delivery. This 'book and claim' concept is well accepted in environmental markets and will foster growth in renewable energy sources.

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[1] *See* RCW 70A.65.120(1). No-cost allowances are allocated to consumer-owned electric utilities and investor-owned electric utilities upon consideration, in part, of the "cost burden" resulting from the inclusion of covered entities in compliance periods as set forth in RCW 70A.65.120(2). "Cost burden" means "the impact on rates or charges to customers of electric utilities in Washington state for the incremental cost of electricity service to serve load due to the compliance cost for greenhouse gas emissions caused by the program. Cost burden includes administrative costs from the utility's participation in the program." RCW 70A.65.010(21).

[2] RCW 70A.65.130.

[3] For electric utilities, RCW 70A.65.120(4) provides that "[t]he 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." For natural gas utilities, RCW 70A.65.130(2)(a)-(c) require a certain level of no-cost allowances to be consigned to auction for the benefit of customers, the revenues from which must be returned by providing nonvolumetric credits on ratepayer utility bills in accordance with statutory requirements.

Recommendations Related to Program Account Requirements (WAC 173-446-100s)

- **The final rules must include procedures that facilitate no cost allowances for electric utilities that are neither covered entities nor opt-in entities.**

Electric utilities that are under the 10,000 MTCO2e/year reporting threshold in WAC 173-441 (i.e., utilities without greenhouse gas emissions (GHG) reporting requirements) must register to receive no cost allowances under proposed WAC 173-446-053(1). Due to the definitions of "covered entity" and "opt-in entity" in WAC 173-446-020, such utilities would need to register as general market participants in order to receive statutorily guaranteed no-cost allowances.[4]

Proposed WAC 173-446-150(1)(b) could be read to restrict the setup of limited holding accounts to covered entities or opt-in entities only (i.e. not extend to general market participants). Such treatment would preclude utilities participating as general market participants from obtaining a limited use holding account and consigning their allowances to auction for the benefit of ratepayers, contrary to legislative intent. As such, clarification to proposed WAC 173-446-150(1)(b) is needed to ensure that all utilities subject to CETA have a procedural path forward in the rules to obtain and utilize no-cost allowances.

Recommendation: Strike "as a covered or opt-in entity" from proposed WAC 173-446-150(1)(b), as follows "(b) For each electric utility and each natural gas utility registering in the program ~~as a covered or opt-in entity~~, Ecology will also set up a limited use holding account. Electric utilities and natural gas utilities must transfer their no cost allowances to the limited use holding account in order to consign them to auction for the benefit of ratepayers as described in WAC 173-446-300(2)(b)."

Recommendations Related to Allowance Budgets and Distribution of Allowances (WAC 173-446-200s)

- **Utility regulators and governing boards should determine the cost burden effect of the cap and invest program on electricity customers, rather than Ecology.**

RCW 70.65.120(2)(a) requires Ecology to adopt rules establishing the methods and procedures for allocating allowances for consumer-owned and investor-owned electric utilities, which take into account the cost burden of the program on electricity customers, in consultation with the Department of Commerce and the utilities and transportation commission. Cost burden is defined as "the impact on rates or charges to customers of electric utilities in Washington state for the incremental cost of electricity service to serve load due to the compliance cost for GHG emissions caused by the program. Cost burden includes administrative costs from the utility's

[4] RCW 70A.65.090(3) prohibits an opt-in entity from receiving free allowances allocated to electric utilities under RCW 70A.65.120.

participation in the program."[5] RCW 70.65.120(2)(b) requires Ecology to allocate no-cost allowances consistent with a forecast of each utility's supply and demand, and the cost burden resulting from the inclusion of these covered entities in the first compliance period. The forecast must be "approved by the appropriate governing board or the utilities and transportation commission."[6]

Proposed WAC 173-446-230(1) provides that no cost allowances allocated to electric utilities for the compliance period are based on the "cost burden effect of the program." Ecology would determine the "cost burden effect of the program" for each utility based on forecasts for supply and demand.[7] Forecasts for supply would be determined by Ecology based on a utility's generation resource fuel type that it determines will be used by the electric utility to comply with CETA.[8] Emissions factors for certain resources – namely natural gas and coal – are hard-coded in the rule (i.e. not resource-specific, even if information is known), or for unknown or unknowable fuel type source or unspecified market purchases, the unspecified emission factor is determined using procedures identified in WAC 173-444-040. Forecasts for demand would be utility-supplied retail electric load.[9] Ecology would then determine the overall cost burden effect from emissions for each utility based on these inputs. Notably, for the first compliance period, Ecology has not included administrative costs in the cost burden effect, as discussed below.[10]

One allowance is allocated for each metric ton of emissions of the cost burden effect for each electric utility for each emissions year.[11] As such, the accuracy and integrity of utility-specific forecasts is of the utmost importance in ensuring that eligible utilities receive the appropriate level of no-cost allowances.

Proposed WAC 173-446-230 raises several concerns. First, the proposed rule affords Ecology a level of discretion not contemplated by statute in calculating the cost burden effect of the program. As drafted, the rule allows Ecology to disregard input by utilities and, perhaps most importantly, their governing board or regulator, when forecasting supply, demand, and administrative costs. This is in contravention to RCW 70A.65.120(2)(b), which requires Ecology to adopt an allocation schedule by rule for the first compliance period based on a forecast approved by the appropriate governing board or the Utilities and Transportation Commission (UTC), of each utility's supply and demand, and the cost burden resulting from the inclusion of

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[5] RCW 70A.65.010(21).
[6] RCW 70A.65.120(2)(b)-(d).
[7] *See* WAC 173-446-230(1)(a)-(c).
[8] WAC 173-446-230(1)(b). Ecology's determination would be based on a list of several sources "in the order necessary to most accurately determine the resource mix that will be used by the electric utility…" *Id.* Among the sources is a forecast approved by the appropriate governing body or UTC for the specific purpose of informing the cost burden effect calculation, so long as it is consistent with CETA requirements. WAC 173-446-230(2)(b)(i).
[9] WAC 173-446-230(1)(a).
[10] WAC 173-446-230(1)(f).
[11] WAC 173-446-230(1)(e).

the covered entities. If no such forecast is approved by the governing board or UTC for purposes of CCA compliance, Ecology could then exercise its judgment on the appropriate forecast for supply, demand and cost burden to use, consistent with proposed WAC 173-446-230(1); however, the rule should be clarified that this is a fallback provision and not a substitute for a forecast approved by the appropriate governing board or the UTC. To the extent that there are compliance consequences (i.e. the allocation of too few no-cost allowances) following a utility's inability to obtain an approved generation resource fuel type forecast, ratepayers should be held harmless.

Second, regarding the forecast for retail electric load as set forth in subsection (1)(a), it is unclear from the rule where the information from this forecast will be derived, and whether Ecology would retain discretion to alter retail load forecast obtained from other sources. Because no-cost allowances are allocated based in part on a demand forecast, the utilities, subject to approval from their respective regulating bodies, are the appropriate entities to provide this information to Ecology and it should not be subject to amendment.

Third, regarding the generation resource fuel type forecast, subsection (1)(b) provides that Ecology will make a determination "based on" a number of sources "in the order necessary to most accurately determine the resource mix that will be used" for CETA compliance. This could be read to mean that Ecology will not utilize *any* of the forecasts that a utility may have provided in a Clean Energy Action Plan, Clean Energy Implementation Plan, Integrated Resource Plan, power cost forecast, or through some other means, or will potentially favor one forecast over another, some of which have different outcomes for resources. This is beyond the statutory discretion afforded Ecology in RCW 70A.65.120(2)(b), and places Ecology in the shoes of entities that are better suited to make determinations about a reasonable fuel type forecast. Determining the appropriate generation resource fuel type forecast used for purposes of allocating no-cost allowances should be left to each utility, subject to approval by its governing board or the UTC.

Fourth, regarding emissions factors to determine the emissions associated with the projected generation mix as set forth in subsection (1)(c), this provision of the rule as currently drafted does not allow for resource-specific emissions factors to be considered when known. Standard emissions factors for coal and natural gas – particularly those that are hard-coded into rule – do not take into account operational variances such as heat rate and cycling to balance the intermittent nature of more renewables.

Finally, AWEC understands the utilities to also have concerns with Ecology's proposed equation for the cost burden effect, finding it too simplistic and inadequate to determine the cost burden effect of the program in accordance with statutory requirements. We further understand that the utilities may propose a standardized cost burden effect calculation template to be used by electric utilities, which would be filled out and submitted for approval to either their respective governing board or the UTC, as appropriate. Once approved, the calculation would be transmitted to Ecology for no cost allowance allocation purposes. As previously stated, the utilities are best positioned, subject to approval from the appropriate governing board or UTC, to forecast the cost burden effect of CCA compliance. As such, Ecology should adopt a rule that relies on utility-supplied information that has been reviewed and approved by its governing board or UTC, as appropriate.

Recommendation: WAC 173-446-230 should be revised to align with the requirements of RCW 70A.65.120, which requires approval of utility forecasts for supply, demand, and cost burden by either the appropriate governing body or the UTC. Such forecasts should incorporate Bonneville Power Administration (BPA) purchases, resource-specific emissions factors, and an operational adjustment factor to reflect the compliance costs associated with balancing purchases and to cover uncertainties associated with hydro-electric variability across a compliance period. To the extent that a utility does not have an approved forecast from a governing board or the UTC, then Ecology could use the methodology set forth in WAC 173-446-230(1) to determine its own forecast for the purpose of allocating no-cost allowances.

- **No-cost allowances to cover administrative costs should be part of the first compliance period.**

As indicated above, the cost burden of CCA compliance includes administrative costs from the utility's participation in the program.[12] Proposed WAC 173-446-230(1)(f) provides that additional allowances for the administrative costs of the program will be allocated beginning in the second compliance period, and the calculation of such costs would be "determined by Ecology based on a three-year rolling average of program costs derived from audited financial statements from utilities with a cost burden from the program."[13] In order to translate average administrative costs into the appropriate number of allowances, Ecology would use the mean allowance auction price from the same three-year period.[14]

However, as with most new programs, the administrative costs are likely to be greater at the beginning – during the first compliance period – because initial, upfront capital and operational costs will be incurred at that time. Administrative costs in the second compliance period will likely be lower. Regardless of this fact, administrative costs are statutorily defined as a cost burden, and should therefore be included in the cost burden effect used for allocating allowances in the first compliance period.

Recommendation: Proposed WAC 173-446-230(1)(f) should be amended to include allocation of no-cost allowances to cover administrative costs starting in the first compliance period, and

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[12] RCW 70A.65.010(21).
[13] WAC 173-446-230(1)(f).
[14] WAC 173-446-230(1)(f).

should be based on a forecast of reasonable anticipated administrative costs as determined by the utility's governing body or the UTC, as appropriate.

- **Ecology should add a "true-up" mechanism for no-cost allowance allocation.**

RCW 70A.65.120(1) contains direction to mitigate the cost burden on customers of utilities already subject to CETA. As described above, no-cost allowances for electric utilities are based on a forecast process. Given certain risks of the program, including a potential shortfall between forecasted electricity demand, actual electricity generation (including imports necessary to balance load which produces a compliance obligation), varying administrative costs, potential changes in emissions factors for specific resources (when known), electrification and others, additional measures are necessary to ensure that the cost burden to customers is mitigated as intended by RCW 70A.65.120(1).

The addition of a "true-up" mechanism for no-cost allowances necessary to mitigate the cost burden of compliance would address the inherent risk between forecast emissions (used for allocating no-cost allowances) and actual compliance obligations. This risk is otherwise not addressed in the rules, but nevertheless contributes to the cost burden of compliance. Moreover, this risk is not asymmetrical – a forecast of emissions could also result in an over-allocation of allowances to a utility. This could depress auction prices and send inaccurate price signals to participants.

Recommendation: A provision should be added that trues up the number of allowances provided to an electric utility if its forecast does not align with the electric utility's actual generation mix during the compliance period.

- **The distribution of no-cost allowances to natural gas utilities should be adjusted to minimize impacts to customers in the initial implementation period.**

RCW 70A.65.130(1)(a) provides Ecology with discretion to determine the amount of no-cost allowances allocated to natural gas utilities that "decline proportionately with the cap" in consultation with the UTC.

Proposed WAC 173-446-240(2)(a)(i) sets the total no-cost allowances allocated to natural gas utilities at 93% for emission year 2023, with an additional 7% decline each year through 2030. Subsection (2)(b) then adjusts the no-cost allowances for emissions years 2031 through 2042 by an additional 1.8% per year of allocation baseline. Subsection 2(c) adjusts down an additional 2.6% per year for emissions years 2043 through 2049.

As noted in the comments of the gas utilities, if gas rates increase rapidly, some customers could switch to other more carbon intensive heating products—which is inconsistent with the goals of the CCA. AWEC supports achieving emissions reductions but remains concerned that the steep decline in the no-cost allowance allocations for gas utilities in the first compliance period fails to account for weather, customer demand or the time needed to realistically explore energy efficiency and add renewable energy supply to private and municipal gas distributers' gas portfolios.

Recommendation: Ecology should revise WAC 173-446-240(2) so that no-cost allowances provided to gas utilities are reduced less in the first compliance period (2023-2036) and more in later compliance periods. Starting the program with more no-cost allowances for gas utilities would—consistent with the CCA—minimize program impacts on gas customers and provide gas utilities time needed to transition to cost effective low-carbon options.

- **Distribution of no-cost allowances should begin before auctions begin in 2023.**

As proposed, WAC 173-446-260(1) provides that Ecology will distribute vintage 2023 no-cost allowances to mass-based EITE facilities, natural gas utilities, and electric utilities that have authorized accounts in the electronic compliance instrument tracking system by September 1, 2023.

Auctions in 2023 are slated to begin before the proposed September 1, 2023, distribution date, which has the effect of at least two auctions occurring before distribution. This means that consignment opportunities are missed, which reduces utility flexibility. Ecology has not provided a justification for this approach, especially considering that: (1) mass-based EITE emissions data are based on a baseline from 2015-2019 that Ecology must approve by November 1, 2022; (2) allowances allocated to natural gas utilities are based on 2015-2021 emissions data reported to the EPA and already provided to Ecology on or before March 31, 2022; and (3) allowances allocated to electric utilities are based on forecasted emissions, which also already exist.

Recommendation: Ecology should distribute vintage 2023 no-cost allowances to mass-based EITEs, natural gas utilities, and electric utilities before auctions begin in 2023.

<u>Recommendations Related to Allowance Auctions (WAC 173-446-300s)</u>

- **Revenues from allowances consigned to auction must be used for the benefit of ratepayers as determined by the UTC or governing body.**

RCW 70A.65.120(4) provides 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." Similarly, RCW 70A.65.130(1) makes clear that "<u>For the benefit of ratepayers</u>, allowances must be allocated at no cost to covered entities that are natural gas utilities."

Proposed WAC 173-446-300(2)(b)(iv) provides that "revenues for allowances sold at auction must be returned by providing nonvolumetric credits on ratepayer utility bills, prioritizing low-income customers, or used to minimize cost impacts on low-income, residential, and small business customers through actions that include, but are not limited to, weatherization, decarbonization, conservation and efficiency services, and bill assistance." The rule makes no distinction between revenues for allowances sold from electric utilities and natural gas utilities.

AWEC supports direct guidance to electric utilities on how revenues from allowances sold at auction should directly benefit ratepayers; however, the proposed rule should nevertheless be amended. All customer classes, including commercial and industrial customer classes, should proportionately benefit from auction revenues not allocated to low-income customers given that they also bear the costs of compliance in rates. There is no statutory basis to exclude certain customer classes from the distribution of benefits, which could be the effect of WAC 173-446-300(2)(b)(iv) as proposed. Further, there is also no statutory basis to prioritize residential (other than low-income) and small business customers, nor is there statutory support for Ecology's preference for the use of revenues to pursue weatherization, decarbonization, conservation and efficiency services. Rather, RCW 70A.65.120(1) makes clear that freely allocated allowances to electric utilities are, first and foremost, to be used "to mitigate the cost burden of the program on electricity customers."

For natural gas utilities, AWEC supports the rule as written, given that it mirrors the statutory requirements for revenues from allowances sold at auction for natural gas utilities, as set forth in RCW 70A.65.130(2)(b).

Recommendation: Given the legislature's intent to mitigate the cost burden on customers related to CCA compliance for utilities subject to CETA, WAC 173-446-300(2)(b)(iv) should be amended to require revenues for electric utility allowances sold at auction to be returned to customers exclusively by credits on ratepayer utility bills, with the first priority to mitigate rate impacts to low-income customers in accordance with RCW 70A.65.120(4). If, however, Ecology prefers a less prescriptive approach for electric utilities, then it should eliminate all direction on how allowance revenues are used, including its apparent prioritization of residential and small business customers. As stated above, prioritizing a subset of customers beyond low-income customers is contrary to RCW 70A.65.120(4), and does not reflect that all customers classes bear the costs of CCA compliance. To the extent allowance revenues are used for purposes other than rate mitigation, that decision belongs with the UTC or the governing body of a consumer-owned utility, not with Ecology.

- **The final rules should reflect Ecology's statutory obligation to sell price ceiling units for entities that do not have sufficient eligible compliance instruments in their holding and compliance accounts for the next compliance period.**

In the event that no allowances remain in the allowance price containment reserve, RCW 70A.65.160(2) requires Ecology to issue price ceiling units for facilities obligated to comply with CCA. Purchases are limited to entities that do not have sufficient eligible compliance instruments in their holding and compliance accounts for the next compliance period, and may only be made in an amount necessary to meet compliance obligations for the current compliance period.

Proposed WAC 174-446-385(6) provides conditional language – "if ecology agrees to sell price ceiling units" – which affords Ecology a level of discretion that is not provided in statute. Ecology's proposed rule seems targeted at ensuring that there is a bona fide shortage, presumably to encourage compliance. While this could be understandable, it is important that utilities have certainty when it comes to access to compliance instruments, as the costs of compliance are ultimately borne by ratepayers. Ecology could institute other mechanisms to address any such concerns, including penalty authority pursuant to WAC 173-446-610(5).

Recommendation: Amend WAC 174-446-385(6) to reflect statutory requirements that Ecology issue price ceiling units for facilities obligated to comply with CCA.

Issues and Recommendations Related to EITE Entities

In crafting the CCA, the Legislature best understood the importance of balancing the need to address climate change while at the same time protecting against the possibility of leakage of emissions, economic activity, and jobs. This is evident in the specific EITE covered facility compliance pathways – be that through allocation of no cost allowances, more moderate emission reduction requirements, and even use of technological feasibility.

AWEC supports the broader comments submitted by the EITE community to Ecology in response to proposed WAC 173-446. This includes industries like pulp and paper, steel, aerospace, aluminum, oil refining, glass, concrete, food processing, and more. The collective effort reflects a compilation of analysis and work dating back to the legislative drafting of the underlying statute. In addition, the following highlights key issues from the other EITE letters submitted to Ecology:

- **General Costs / Economic Analysis**

Ecology produced the *Preliminary Regulatory Analyses*, which was not made available for public discussion or review during the short pre-rule public engagement. To date, Ecology has yet to release the math or analysis behind the *Preliminary Regulatory Analyses*, allowing covered entities and the public the opportunity to scrutinize the methodology and inputs into the analysis. This is unusual in significant rule making efforts by Ecology.

The resulting work makes it difficult to scrutinize the work developed by consultants on behalf of Ecology. Instead, we have had to rely on a plain reading of the text and findings.

During the 2021 Legislative Session, legislators relied on a fiscal note that was in-part prepared by Ecology.[15] The forecasted cost of allowances under the cap-and-trade program was approximately $23.00 per allowance. The Preliminary Regulatory Analyses now estimates $58.00[16] per allowance. While Ecology has since released additional information highlighting lower cost allowance pricing[17] – it appears the program will cost significantly more to comply with than originally forecasted when it was being debated in the legislature, which will likely drive higher consumer costs. Given this likely outcome, it is all the more important that Ecology ensure the greatest flexibility for covered entities to comply with the underlying program.

- **WAC 173-446-060 – New or Modified Covered Entities**

The section specifies that an entity would become covered by the program (i.e., a "covered entity") upon formal notice from Ecology that the entity "is expected to exceed" the applicability thresholds. This is a significant overreach – an entity should only become a covered entity once it has met the applicability thresholds or opts in, not because Ecology suspects that an entity will exceed the applicability thresholds. Nothing in the CCA gives Ecology the authority to forecast covered entities.

- **WAC 173-446-130 – Designation and Certification of Account Representatives**

Much of the information required to be provided for account representatives is considered personal and confidential by many entities, and in many cases would seem to be totally unnecessary to provide Ecology as an environmental regulatory agency, regardless of who the company is designating as account representative.

  - E.g., home address and email address; two identification documents including at least one with a photo AND a notarized attestation of authenticity; confirmation that the representative has a deposit bank account with a US financial institution.
  - E.g., attestation from an attorney confirming the link between the representative and the registered entity.

Can Ecology provide evidence of other programs requiring the same standard of designation and certification?

[15] WA Office of Financial Management – Fiscal Notes, SB 5126, April 19, 2021, https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63273
[16] WA Dept. of Ecology, Revised Preliminary Regulatory Analyses, https://apps.ecology.wa.gov/publications/documents/2202019.pdf
[17] WA Dept. of Ecology, Washington Climate Commitment Act – Summary of economic and market modeling and analysis of the proposed cap and invest program, https://ecology.wa.gov/DOE/files/1c/1c0a21ac-c88d-43df-8d35-a1b6c84aba5d.pdf?utm_medium=email&utm_source=govdelivery

- **Proposed WAC 173-446-220(1)(b) should be revised to track the process prescribed by the legislature for review and approval of an EITE facility's carbon intensity baseline.**

RCW 70A.65.110(3)(c) succinctly prescribes the process for derivation of the baseline for an EITE facility. By September 15, 2022, the facility "shall submit its carbon intensity baseline for the first compliance period to the department." By November 15, 2022, Ecology "shall review and approve each emissions-intensive, trade-exposed facility's baseline carbon intensity for the first compliance period."

The Proposed Rule takes a different approach. Where the legislature directed Ecology to review and approve a baseline submitted by the EITE, based on production and GHG emissions data from that facility, WAC 173-446-220(1)(b) directs Ecology to "assign an allocation baseline" using any process and any data that Ecology deems "significant." This broad language would invite Ecology to derive a baseline from criteria other than the facility's performance. This provision would violate the CCA (by exceeding the authority conveyed to Ecology under the statute), and deprive EITE entities of the ability to predict and plan for their compliance obligations.

Recommendation: To address this problem and conform Ecology's role in the process to the statute, proposed WAC 173-446-220(1)(b)(i) should be replaced in its entirety with language that tracks the review-and-approve language in RCW 70A.65.110(3)(c).

  - WAC 173-446-220(1)(b)(iv) requires that at least three years used for the baseline be consecutive. The CCA, however, does not provide literal instruction for Ecology to assume the 2015-2019 mass and production information should be <u>averaged</u> to compute the carbon intensity, but rather refers to reliance on emission and production information from "2015 through 2019." Individual EITEs are best positioned to select the appropriate carbon intensity metric. Both the statute and this preliminary regulation allow for consideration of "alternate years" or "abnormal periods of operation" and the agency should expect the facility presentation of a carbon intensity value may select the most favorable single year combination. It is entirely possible that a facility could have had non-consecutive abnormal years so that a five-year period would not contain three consecutive normal years. While still impractical, it is more reasonable to require two consecutive years in the baseline calculation.

Ecology should be erring on the side of flexibility to ensure the greatest opportunity to establish a meaningful path to compliance.

- **Ecology should revise WAC 173-446-220(2)(d) to follow the statutory standards governing upward adjustment of the number of no cost allowances awarded to an EITE.**

RCW 70A.65.110(3)(f) discusses upward adjustments to EITE facilities' carbon intensity benchmarks. Subsection (f) discusses two grounds for adjustments. First it states that Ecology *may* make adjustments prior to the beginning of the second, third, or subsequent compliance periods, based on the facility's demonstration that additional reductions are not "technically or economically feasible." That demonstration may include a best available technology analysis. Subsection (3)(f) then states:

> The department shall by rule provide for emissions-intensive, trade-exposed facilities to apply to the department for an adjustment to the allocation for direct distribution of no cost allowances based on its facility-specific carbon intensity benchmark or mass emissions baseline. The department *shall* make adjustments based on:
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> (i) A significant change in the emissions use or emissions attributable to the manufacture of an individual good or goods in this state by an emissions-intensive, trade-exposed facility based on a finding by the department that an adjustment is necessary to accommodate for changes in the manufacturing process that have a material impact on emissions;
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> (ii) Significant changes to an emissions-intensive, trade-exposed facility's external competitive environment that result in a significant increase in leakage risk; or
>
> (iii) Abnormal operating periods when an emissions-intensive trade-exposed facility's carbon intensity has been materially affected so that there these abnormal operating periods are either excluded or otherwise considered in the establishment of the compliance period carbon intensity benchmarks.

WAC 173-446-220(2)(d)(ii) improperly co-mingles the two different statutory adjustment mechanisms summarized above. Subsection 2(d)(ii) accurately incorporates the discretionary adjustment criteria in (3)(f) but it omits the statement that "the department shall make adjustments" from the second segment of (3)(f). It also erroneously suggests that any request for adjustment must include one of the three showings that (3)(f) mandates for mandatory adjustments. It also limits the timing of a mandatory adjustment application to the beginning of the second or subsequent compliance periods, a restriction that the statute does not apply to mandatory adjustments.

Recommendation: These concerns could be fully addressed by summarizing the two allocation adjustment processes in (3)(f) in separate subsections of WAC 173-446-220(2)(d). A new subsection (2)(d)(iii) could summarize the mandatory adjustment process, leaving the discretionary adjustment process for technical or economic infeasibility in (2)(d)(ii).

Conclusion

In conclusion, AWEC appreciates the work that Ecology has done to implement CCA requirements on the compact schedule required by the legislature. We look forward to Ecology adopting meaningful clarifications to the proposed rule to adequately address the issues raised.

/s/ Bill Gaines
Bill Gaines
Executive Director
Alliance of Western Energy Consumers