NUCOR®

NUCOR STEEL SEATTLE, INC.
2424 SW Andover Street
Seattle, WA 98106-1100
206.933.2222

July 14, 2022

VIA EMAIL AND ONLINE UPLOAD:

Joshua Grice, Rulemaking Lead
Washington State Department of Ecology
Air Quality Program
P.O. Box 47600
Olympia, WA 98504

Re: Comments on WAC 173-446 Proposed Rule

Dear Joshua:

Nucor Steel Seattle, Inc. (Nucor) welcomes the opportunity to comment on the proposed WAC chapter 173-446 (Proposed Rule) published on May 15, 2022 by the Washington State Department of Ecology (Ecology). We offer the comments below to address elements of the Proposed Rule – the primary regulation that will implement Washington's Climate Commitment Act (CCA) – that are unclear or otherwise problematic for Nucor, which operates an emissions-intensive trade-exposed (EITE) facility in Seattle.

I. Background

Nucor operates a Seattle steel mill that was founded in 1904. As the state's only steel mill, we are Washington's steel industry. We are also Washington's largest recycler, with the capacity to process over a million tons of scrap steel each year and produce high-quality steel with over 97 percent recycled content. We have also invested tens of millions of dollars to make our facility one of the most efficient and environmentally responsible steel plants in the world.

Most of our competition is from companies located in China and elsewhere in Asia. These companies operate with heavy government subsidies and lax environmental standards. Every ton of steel that is manufactured in our Seattle plant instead of China reduces new global GHG emissions by approximately 4,300 lbs.[1]

We sell steel in a global market with extremely low margins. We have little to no ability to pass along additional operational costs to our customers. In our market, raising prices even slightly results in a much higher percentage of lost sales, and consequently, increased steel production in China and other parts of the world with significantly higher GHG emissions per ton of steel produced. Global market forces and unfair trade practices, combined with regulatory costs that impact us and not our competition, make it challenging to produce environmentally responsible steel products from our Seattle facility at a globally competitive price.

[1] This estimate is based on comparing Nucor's carbon intensity with information from: Trevor Houser et al., Leveling the Carbon Playing Field: International Competition and U.S. Climate Policy Design 47 (2008), *available at* http://pdf.wri.org/leveling_the_carbon_playing_field.pdf.

In the CCA, the legislature recognized the significant risk of GHG emissions leakage and therefore crafted special provisions tailored to EITE facilities to avoid such leakage. It is now up to Ecology to implement the CCA in a manner that will honor that legislative commitment and address the legislature's concerns regarding EITE facilities and leakage. The legislature has done its job, but now Ecology must substantiate the details of the cap-and-invest program in a manner that reflects an understanding of EITE facilities and operations, and minimizes the risks of leakage.

II. Comments on Proposed WAC chapter 173-446

Nucor offers the following comments on the Proposed Rule.

A. Add definitions of key terms to WAC 173-446-020.

The Proposed Rule introduces several key terms that are not defined in WAC 173-446-020. The term "allocation baseline" is used 38 times in WAC 173-446-220 and -240. Nucor assumes that Ecology uses the term as an aggregate to reference the two types of baselines (carbon intensity and mass-based) that will be established for EITE facilities. The term plays such an important role in the implementation of the EITE program that it should be defined in WAC 173-446-020.

Proposed WAC 173-446-220 uses the term "product data metric" four times to regulate the form of the data used to report an EITE facility's GHG emissions. Most of those references appear in WAC 173-446-220(1)(a)(ii), which states in part that "If multiple product data metrics are listed for the facility in Table 050-1 in Chapter 173-441 WAC, the same product data metric must be used for all calculations, including annual GHG reports." The referenced table 050-1 has a column headed "production metric," but does not use the term product data metric. Ecology could help the regulated community by either substituting a less opaque term in WAC 173-446-220 ("units of production"?) or adding a definition of product data metric.

B. 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.

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).

C. Proposed WAC 173-446-220(1)(b) should be revised to clarify the rules governing establishment of a baseline for a new or expanded EITE facility.

The Climate Commitment Act provides for the allocation of no cost allowances to an EITE facility built after July 25, 2021, but the key provisions appear in two different sections of the Act. The EITE section, RCW 70A.65.110, includes this provision:

> (8) Rules adopted by the department under this section **must include protocols for allocating allowances at no cost** to an eligible facility built after July 25, 2021. The protocols 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 is determined by the department to impact tribal lands and resources, the protocols must be developed in consultation with the affected tribal nations.

The emissions containment reserve section, RCW 70A.65.140(5)(b), states that allowances equal to the greenhouse gas emissions from a new or expanded EITE facility "during the first applicable compliance period" will be provided to the facility from the emissions containment reserve account. After that, "the facility will be subject to the regulatory cap and related requirements under this chapter."

Ecology points to WAC 173-446-220(1)(b)(v)(A) as the provision governing allocation of no cost allowances to a new EITE facility. But this subsection does not directly mention new or expanded facilities, nor does it mention that a new source EITE receives no cost allowances equal to its emissions during the "first applicable compliance period," nor does it describe the meaning of the "first applicable compliance period," nor does it explain the phrase, "the facility will be subject to the regulatory cap and related requirements under this chapter."

The legislative decision to address new EITE facilities in two sections of the statute makes it difficult to track the compliance obligations of new and expanded EITE facilities. Ecology could help the regulated community by including a paragraph in -220 that describes the allocation of no cost allowances to new and expanded EITE facilities. One approach would be to include a new paragraph (B) following WAC 173-446-220(1)(b)(v)(A):

> (B) For a new EITE facility built after July 25, 2021 the first applicable compliance period shall be the compliance period during which the facility first becomes a covered entity under WAC 173-446-060. During the first applicable compliance period a new facility shall receive no cost allowances equal to the actual greenhouse gas emissions from the new facility, awarded from the emissions containment reserve account. For subsequent compliance periods Ecology shall determine the allocation baseline as provided in subsection (V)(A) of this section.

D. Ecology should follow the process specified by the Legislature for writing rules to consider factors enumerated in RCW 70A.65.110(8) in allocating no cost allowances to a new EITE facility, and to consult with Tribes on facilities impacting tribal lands.

RCW 70A.65.110(8) (quoted above) includes a sentence stating that the rules adopted by Ecology shall include protocols for allocating no cost allowances to an EITE, and that "The protocols 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." The Proposed Rule does not include any such protocols. Instead, the proposed WAC 173-446-220(1)(b)(v)(A) moves this statement, without any protocols, to the subsection that controls establishment of the allocation baseline for new EITEs.

This revision conflicts with the statute. The legislature directed Ecology to develop protocols to consider the products and pollutants emitted by a new facility in the allocation of no cost allowances, and to do it by rule. Instead, paragraph (A) improperly inserts that language into the rules for setting an allocation baseline, and it does so without any protocols to guide Ecology's discretion.

Ecology should delete from Paragraph (A) the sentence, "Ecology must consider the products and criteria pollutants produced by the facility, as well as the local environmental and health impacts associated with the facility when setting the allocation baseline." Instead, Ecology should undertake the rulemaking prescribed by RCW 70A.65.110(8) to establish protocols for consideration of those factors. For the same reason, Ecology should shift the language addressing consultation with tribal nations from Paragraph (A) to the rules governing allocation of allowances to a new EITE. The legislature directed Ecology to consult with tribal nations in developing those protocols.

E. 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:
>
> (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;

(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.

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).

F. Ecology should break WAC 173-446-220 into two separate sections.

The statutory mandates for EITE facilities are complex, and the Proposed Rule clusters the numerous regulatory provisions aimed at implementing those mandates into section -220, which runs approximately seven pages with numerous subsections. To help the regulated community understand the regulations, we suggest that Ecology break the section into two sections. The first section would be -220 and would deal with setting EITE facility baselines, i.e., would capture the provisions currently under -220(1) ("Allocation baselines for EITE entities"). The second section, which could be designated "-225," would deal with the allocation of no-cost allowances to EITE entities, i.e., would capture the provisions currently under -220(2) ("Total no cost allowances allocated to EITE facilities"). This simple renumbering would reduce the density of the rule and enhance its clarity.

G. Ecology should clarify that the obligation to transfer compliance instruments begins in 2024.

WAC 173-446-600(3) states:

(3) By 5:00 p.m. Pacific Time November 1st of each year, each covered entity and opt-in entity must transfer to ecology sufficient compliance instruments of former vintage years to cover at least 30 percent of its covered emissions for the previous calendar year.

For clarity, Ecology should insert the phrase “beginning in 2024” following the words “each year.”

H. Ecology should delete all references to “Ecology’s satisfaction” from the rule.

The Proposed Rule uses the term “to Ecology’s satisfaction” or “to the satisfaction of Ecology” 14 times to describe the obligations of a covered entity. For instance, WAC 173-446-040 exempts certain emissions from the program if a supplier or facility owner demonstrates “to ecology’s satisfaction” that specific fuels or emissions qualify for an exemption. “Ecology’s satisfaction” is not mentioned anywhere in the statute and is not a lawful basis for granting or denying any benefit or obligation under the CCA. As a practical matter, the rules vest Ecology with broad discretion in making applicability determinations. But the purpose of a regulation is to present objective criteria that enable the regulated community to understand the requirements of the program. The use of the phrase “to ecology’s satisfaction” in a regulation is arbitrary and capricious, and conflicts with Ecology’s obligations as an administrative agency that derives all of its authority by delegation from the legislature.

Ecology should strike every iteration of this phrase from ch. 173-446. In each case the deletion will not harm the enforceability of the rule, because the rule actually describes the criteria that govern Ecology’s decision. For instance, WAC 173-446-040(2)(b)(i) exempts certain aviation fuels from the program, if the supplier demonstrates “to Ecology’s satisfaction” that they are used for aviation purposes. The supplier’s obligation is to show that the fuels are used for aviation. Ecology’s satisfaction should not be part of that standard.

III. Conclusion

Nucor appreciates the opportunity to provide input on Ecology’s informal proposal for WAC 173-446. We hope to continue engaging with Ecology during the rulemaking process. In particular, we would be happy to discuss the Proposed Rule’s potential impacts on EITE entities like Nucor, including but not limited to the issue of leakage.

Please contact me if you have any questions about these comments.

Very truly yours,

Patrick Jablonski
Environmental Manager
Nucor Steel Seattle, Inc.
206.933.2238
patrick.jablonski@nucor.com

cc: Luke Martland, luke.martland@ecy.wa.gov

116023519.4 0059012-00004