



MAKAH TRIBAL COUNCIL

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



IN REPLY REFER TO:

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

July 15, 2022

Re: Makah Tribal Council comments on the Climate Commitment Act proposed rulemaking for cap-and-invest program rules, Chapter 173-446 WAC

Dear Mr. Grice,

I am writing on behalf of the Makah Tribal Council to provide feedback on the Climate Commitment Act (CCA) proposed rulemaking for the cap-and-invest program rules, Chapter 173-446 WAC. This comment letter follows our government-to-government consultation meeting in June with Director Watson. We appreciate the productive meeting and look forward to continuing to work with the Department as the CCA is implemented. The Makah Tribe is on the frontlines of climate change impacts, facing worsening seasonal flooding and storm surge, sea level rise and erosion, and seasonal water shortages. Despite not contributing substantially to the climate crisis, the Makah Tribe has extensive experience in climate resilience policy and planning locally and at broader scales, including contributing to the Fourth National Climate Assessment and helping to pass legislation like the CCA in 2021. Climate resilience is a priority for the Makah Tribal Council and we appreciate the opportunity to provide input early in the development of this rulemaking.

Washington's cap-and-invest program must incorporate lessons learned from California and address unique needs of Washington State and Treaty Tribes. We understand that the Washington Department of Ecology (ECY) is drawing heavily on the California program to meet the statutory deadline of implementation of the cap-and-invest program by January 2023. This has resulted in duplicating much from the California program, rather than looking to adapt it to the Washington context. Washington's cap-and-invest program should incorporate lessons learned from nearly a decade of the cap-and-trade program in California on which its modeled and address the unique needs of Washington State and Treaty Tribes. We provide those recommendations below. As many of these improvements as possible should occur in the current rulemaking, in particular those related to offset project protocols, as the incentive to site offset projects on tribal lands only lasts until 2030.

However, we understand that ECY is generally in agreement that improvements to the program are needed, but that not all improvements can be made by the statutory deadline. Instead, the

intention is to adaptively manage the program. **To ensure that this adaptive management framework occurs on a schedule that addresses the urgency of the climate crisis, the current rulemaking should include a framework for adaptive management of the program.** The CCA represents a huge and far-reaching investment in climate action in Washington State. Adaptive management structures are critical to ensure that treaty resources, interests, and rights are protected from unforeseen impacts of these new policies. We also want to emphasize the critical role that our treaty fisheries and natural resources-based economy play in Makah culture, livelihood, economy, nutritional security, and community wellbeing. Our treaty fisheries make up over 50% of the Makah economy and support the nutritional and/or financial security of most people in the Makah community; they are essential to our way of life and the Makah Tribe's resilience to climate change. This is particularly important as the Makah Tribe is on the frontlines of climate change impacts, as well as being an overburdened community. **Any and all actions resulting from the implementation of this program must respect tribal sovereignty and the exercise of treaty rights. Impacts to the exercise of treaty harvest rights would disproportionately impact the Makah Tribe and must be avoided.** Adaptive management and early, ongoing, comprehensive and effective consultation protocols are critical to avoiding unforeseen impacts.

This adaptive management framework should include program assessment, at least every two years, to evaluate how well it is meeting carbon emission reduction and social equity goals and develop and/or update new protocols and programmatic elements. This framework should include specific triggers and mechanisms for producing publicly available data for assessment and for involving parties such as federally recognized Tribes and the Environmental Justice Council in program assessment and any needed course correction. This adaptive management framework should ultimately increase transparency and accountability of the program, and thus ensure success towards statutory goals.

Recommendations:

- 1. Update California offset project protocols.** One of the four offset protocols ECY is including from California has never been used because it is financially unfeasible. Without updating this protocol in a manner that addresses the financial barriers to entry, we can assume it will be financially unfeasible in Washington too. Similarly, the proposed rulemaking allows for offset project aggregation to reduce financial barriers for small landowners. However, the proposed rulemaking does not provide guidance or measures to make aggregation financially feasible. Without doing so, we expect aggregation will be cost prohibitive in WA as well. We recommend updating the four offset project protocols to make sure they meet statutory goals in Washington, including measures that remove financial barriers. WA should not borrow procedures and protocols that we know do not work.
- 2. Make offset project protocols flexible to meet tribal needs.** The most widely used offset project protocol, the US Forest Projects Protocol, prohibits clear-cuts over 40 acres. The Makah Tribe uses clear-cut sizes larger than this requirement to ensure the safety and stability of our pre-existing road infrastructure. Copying this protocol into the Washington market would likely prevent our participation in offset projects in the compliance market. The Makah Tribe has managed our forests sustainably for thousands

of years. Our sustainable management practices include a 60-year rotation, allowing forests to reach older ages than much of the domestic market. The Makah Tribe also uses clear-cuts larger than 40 acres due in part to the limits of our local geology and climate. Our steep slopes, high precipitation, and increasingly severe winter storms contribute to erosion and associated risks in our area. Selective harvest can leave an area particularly vulnerable to landslides, which can destroy trees that could have been harvested. Furthermore, the road infrastructure is not sufficient to access thousands of acres if the clear-cut size is limited to 40 acres. Adding forest roads may not be financially feasible in the near-term (i.e., in the 7 years that the CCA will incentivize offset projects on tribal lands) and also would increase erosion. Because the CCA incentives offset projects on tribal lands, we recommend addressing the variety of tribal needs and ensuring that protocols have the flexibility to meet such needs, such as expanding the 40-acre clear-cut requirement.

3. **Alternative language for accountability in offset projects.** Although the requirement to waive sovereign immunity was removed when modeling offset protocols after the California program, we remain concerned that alternative language could have the same effect. We recommend that ECY consult with Tribes individually to determine appropriate language that allows ECY to enforce compliance without violating tribal sovereignty.
4. **Improve the consultation framework.** The statute calls for “tribal consultation frameworks” but none are outlined in the proposed rulemaking. Currently, the only trigger for tribal consultation in the proposed rulemaking is for baseline calculations for Energy Intensive and Trade Exposed industries (EITEs) on tribal lands. This is inconsistent with the extensive collaborative work between Tribes, the Governor’s Office, and legislators to develop a consultation framework for any projects using CCA cap-and-invest revenue (HB 1753). In partnership with Tribes, ECY should identify decisions that require tribal consultation. A robust consultation framework should apply to these decisions and can be modeled after that in HB 1753. We continue to support free, prior, and informed consent as a standard.
5. **Set stage for protocol improvement and new protocols.** The four offset protocols do not include blue carbon and bio char, project types of high interest to the Makah Tribe and communities in Washington. We recommend including protocol for these offset project types. We understand that the development of an offset project protocol can take years and a multi-stakeholder process and may not be possible by January 2023. At a minimum, we recommend including a timeline and process for assessing, updating, and adding offset protocols, at least every two years, within an adaptive management framework for this program.
6. **Provide clarity and support for the role of the Environmental Justice (EJ) Council.** The legislative direction to the EJ Council under the CCA was a direct response from the environmental justice community based in early impacts that California saw in their program. The CCA directs the EJ Council to provide recommendations on design and implementation of the Act. However, the proposed rule engages the EJ Council directly

in decision making at one point: when reducing offset limits for underperforming facilities. There are only two other mentions of the EJ Council in the rulemaking and they pertain to notification and not decision making. Although the rulemaking does not preclude further engagement from the EJ Council, it also does not facilitate effective oversight by the EJ Council. The rule should require information sharing with the EJ Council at critical steps in CCA implementation (e.g., determining baselines for industries, calculating total allowance budgets, verification of offset projects, in determining whether new protocols are equitable). Furthermore, the rule should provide more structure (e.g., when and how) the EJ Council can inform ECY in CCA decision making. The EJ Council should also consider how the CCA could cause inequitable impacts to rural and natural resource-based communities by affecting fuel prices.

7. **Improve information sharing and transparency.** The rulemaking should explicitly build in improved processes and triggers for information sharing, transparency, and reporting – both on progress towards emissions reductions targets and compliance as well as on environmental justice-related risks and impacts to Tribes, tribal lands, waters, and resources, and other overburdened communities. Some examples include but are not limited to:
 - WAC 173-446-050: Require that Tribes be provided with information about covered entities’ proximity to overburdened communities and tribal lands as well as documentation of pollution emitted by the facility (including all air & water permit allowances) as facilities enter the program.
 - WAC 173-446-200: Require Ecology to publicly share how program baselines are established, allocated, and measured.

8. **Set allowance floor price high enough to ensure emission reduction.** Considering the exemptions (e.g., aviation) and generous allowances to some sectors (e.g., EITEs, natural gas utilities), it is critical that the allowance floor price be set high enough to achieve timely reductions in carbon emissions. If the floor price is set too low, then covered entities will not have strong incentives to reduce emissions. A third-party consultant should evaluate the effectiveness of the current allowance floor price schedule (starting at \$19.70 in 2023 and increasing by 5% plus inflation each year) at achieving emissions reductions. To the best of our knowledge, economic evaluation of different floor prices was not included in the report released on July 1, 2022. The effect of the allowance floor price on market dynamics and progress towards emissions reductions goals should be factors included in the adaptive management framework of the CCA implementation.

We understand firsthand the urgency of the climate crisis. However, battling climate change cannot come at the expense of impacts to treaty rights and resources or tribal participation in offset projects, particularly when Tribes have not contributed substantially to the crisis. It is critical that an adaptive management framework be developed in this rulemaking to ensure that the cap-and-invest program, modeled after the California cap-and-trade program, is successful in Washington. Advancing climate resilience is a top priority of the Makah Tribal Council and we look forward to continuing to work with ECY to meet carbon emissions goals through the CCA.

Please contact the Makah Tribal Council Secretary, Rosella Johnson (rosella.johnson@makah.com or 360-645-3235), with any questions or for any additional information. Thank you for the opportunity to comment on this important subject.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy J. Greene, Sr.", with a long horizontal flourish extending to the right.

Timothy J. Greene, Sr.
Chairman
Makah Tribal Council

Cc.

Tyson Oreiro, ECY Executive Director for Tribal Affairs

Kathy Taylor, ECY Air Quality Program Manager

Jordan Wildish, ECY Air Quality Program

Caroline Mellor, ECY Environmental Justice Planner, Air Quality Program

Andy Hayes, ECY Cap and Invest Policy Section Manager, Air Quality Program