



July 15, 2022

City of Enumclaw Comment Letter – Proposed Rule Chapter 173-446 WAC
Climate Commitment Act Program (the “Program”)

My firm represents the City of Enumclaw (the “City”). While the City lauds the goals of the Program, the goals should not be used to adopt rules that exceed the legislative scope of the applicable enabling and authorizing statutes of what constitutes a “Covered Entity” pursuant to RCW 70A.65.080. Ecology has stated to City staff that, the City is a “covered entity” but has not provided the statutes that have been used to make that determination. Such “hide-the-ball” determinations are not consistent with the due process provisions of state and federal law nor case law interpreting the obligations of entities engaging in formal rule making procedures as it does not afford the City a meaningful opportunity to comment. Additionally, such determinations appear to be arbitrary and capricious and without basis in law or in fact. Therefore, the City reserves the right to make additional comments and supplement its response.

RCW 70A.65.080 states in relevant part,

- (1) A person is a covered entity as of the beginning of the first compliance period and all subsequent compliance periods if the person reported emissions under RCW 70A.15.2200 for any calendar year from **2015 through 2019**, or if additional data provided as required by this chapter indicates that emissions for any calendar year from 2015 through 2019 equaled or exceeded any of the following thresholds, or if the person is a first jurisdictional deliverer and imports electricity into the state during the compliance period:
- (a) Where the person owns or operates a facility and the facility's emissions equal or exceed **25,000 metric tons of carbon dioxide equivalent**;*[...]* (emphasis added)

The City has not exceeded 25,000 metric tons of carbon dioxide equivalent for the coverage period of 2015 to 2019. Therefore, by the plain language of RCW 70A.65.080, the City legally cannot be considered a covered entity. The proposed rule WAC 173-446-030 is consistent with this enabling statute. However, Ecology is not interpreting the proposed rule consistent with the enabling statute. Pursuant to WAC 173-446-030, a Supplier is a covered entity if it exceeds 25,000 metric tons of carbon dioxide equivalents for any calendar year from in the covered period between from 2015 through 2019. Therefore, since the City has not exceeded 25,000 metric tons of carbon dioxide equivalent for the period of 2015 through 2019, it is axiomatic that the city cannot be a covered entity. Therefore, Ecology’s determination that the City is a covered entity is inconsistent with both the enabling RCW and the proposed rule.

In one conversation, Ecology stated that WAC 173-446-050 may be applicable. The operable language is as follows: Any reporter under chapter 173-441 WAC reporting at least 25,000 metric tons of emissions per calendar year for 2015 or any year thereafter that meet the applicability conditions in WAC 173-446-030 or 173-446-060 is a covered entity. The plain language of this proposed rule indicates that to be a covered entity, the City must also meet the definition of a covered entity pursuant to the provisions of



WAC 173-446-030 or WAC 173-446-060. WAC173-446-050 is not a separate or independent basis for determining what constitutes a covered entity. As set forth above, the City is not a covered entity pursuant to 173-446-030. Additionally, 173-446-060 is for New or Modified covered entities after July 1, 2023 and is also not applicable. Therefore, even assuming WAC 173-446-050 was a separate basis for determining covered entities, since WAC 173-446-050 cites to WAC 173-446-030 and 173-446-060; both statutes must be read in conjunction. As the City is not a covered entity under either 173-446-030 or 173-446-060; Ecology's determination that the City is a covered entity is not consistent with the plain language of either the enabling statute or the proposed rule.

Based upon this legal analysis, the City is requesting Ecology make the determination that the City is not a covered entity. Please feel free to contact me should you have any additional questions.

Sincerely,

/s/

Brett C. Vinson
Enumclaw City Attorney