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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

July 14, 2022

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

Re: Comment on proposed rule Chapter 173-446 WAC, Climate Commitment Act Program

Dear Mr. Grice,

The Swinomish Indian Tribal Community ("Swinomish Tribe" or "Tribe") appreciates the opportunity to provide comments on the development of the Climate Commitment Act Program through Chapter 173-446 WAC. The Swinomish Tribe is a federally recognized Indian tribe and political successor in interest to certain tribes and bands that signed the 1855 Treaty of Point Elliott, which among other things reserved fishing, hunting, and gathering rights in vast areas of land and water in northern Puget Sound and beyond, and established the Swinomish Reservation on Fidalgo Island in Skagit County, Washington. The Tribe operates under a constitution originally approved in 1936 that created the Swinomish Senate as an elected body to self-govern and manage the affairs of the Tribe including natural resources protection, policy development, and regulatory authority. As with many other tribes and reservations, the regulatory relationships with other jurisdictions are complex.

In the 167 years since the establishment of the Swinomish Reservation, economic development—notably unchecked by concern for Tribal Treaty rights or meaningful consultation—has introduced significant environmental health and justice concerns. The present-day Swinomish People now find themselves in the confluence of two major sources of automotive pollution (the Interstate-5 Highway and State Route 20 Highway), marine vessel pollution and interference from shipping traffic in the Puget Sound, and diesel locomotive pollution from BNSF tracks bisecting the Reservation. Equally concerning, two major petroleum refineries are located less than two (2) miles away from the Reservation and the Tribal

Community. Both refineries are classified as major sources of Hazardous Air Pollutants (HAPs). The Tribe has suffered from unauthorized releases of HAPs in recent years. Additionally, two other major petroleum refineries, also classified as HAPs, are located approximately 15 miles north of the Reservation, and marine vessel traffic to and from those refineries also causes pollution and intersects and interrupts the Tribe's Usual & Accustomed Area and tribal fishers' exercise of Treaty fishing rights, among other effects.

The Tribe has reviewed with interest the comments submitted by the Washington Environmental Council and The Nature Conservancy, particularly with respect to offsets, and expresses its general support of those submissions. Given the Swinomish Tribe's unique role and concerns, as described above, the Tribe also submits the comments herein to emphasize the importance of prioritizing environmental justice for overburdened communities, tribal treaty rights, and respect for tribal sovereignty. The comments contained herein provide a non-exhaustive summary of the Tribe's concerns, with more comprehensive feedback available through the Government-to-Government consultation process.

1) Incorporate consideration and review of impacts to overburdened communities across the program rule.

In passing the Climate Commitment Act, the legislature did more than create a cap-and-invest program in the State of Washington. It created a program that will help achieve our greenhouse gas reduction goals while respecting tribal sovereignty and without exacerbating health disparities in communities already suffering from disproportionate impacts of environmental pollution. We know the legislature intended to do this because it said so: *"[W]hile enacted carbon policies can be well-intended to reduce greenhouse gas emissions and provide environmental benefits to communities, the policies may not do enough to ensure environmental health disparities are reduced and environmental benefits are provided to those communities most impacted by environmental harms from greenhouse gas and air pollutant emissions."*[1]

Having acknowledged the potential for carbon policies to exacerbate existing disparities, the legislature emphasized that *"climate policies must be appropriately designed."*[2] The Department of Ecology ("Ecology") was entrusted with the responsibility of doing just that. Importantly, Ecology's responsibility does not end with program design. The legislature calls on Ecology *"to conduct environmental justice assessments to ensure that funds and programs created under this chapter provide direct and meaningful benefits to vulnerable populations and overburdened communities."*[3]

We recommend including language in WAC 173-446-010 that indicates Ecology understands its responsibility in implementing the cap-and-invest program that ensures that *"environmental*

[1] RCW 70A.65.005(4)
[2] RCW 70A.65.005(6)
[3] RCW 70A.65.005(7)

health disparities are reduced and environmental benefits are provided to those communities most impacted by environmental harms from greenhouse gas and air pollutant emissions."[4]

- Collect and disclose information for review and accountability: Ecology has a statutory responsibility to review outcomes of program implementation relative to overburdened communities.[5] Integral to reducing disparities and achieving benefits is gathering sufficient data to meaningfully assess impacts on overburdened communities. To these ends, Ecology should require adequate, consistent information to inform the review of the program and evaluation of any disparities:
    - *Information to guide evaluation of impacts*
        - Ecology should require all covered and opt-in entities to provide information about their impacts to overburdened communities and to tribal lands and treaty rights; the pollutants they process and/or manage; and if there are any violations under any permits they hold.

- Assess impacts of the program on overburdened communities: When read as a whole, the statute is clear that the program should benefit overburdened communities and not cause environmental harm. Yet, the draft program rules do not clearly articulate how this will be achieved. In particular, the program rule does not provide a clear enough commitment to Ecology's ongoing responsibility to overburdened communities in the implementations of the various program elements.

We recommend that Ecology add a new section to the program rule establishing an explicit review process to assess how the program is impacting overburdened communities and ensuring Ecology has the information required to conduct that review. This process should be: 1) separate from the "Improving Air Quality in Overburdened Communities" initiative; 2) inclusive of the full range of overburdened communities as defined by the law; and 3) focus on disparities of impacts across the entire program. This process will then inform Ecology's mandatory reporting to the legislature required by RCW 70A.65.060(5), the Environmental Justice Assessment per RCW 70.A.65.030, and support the work of the Environmental Justice Council per RCW 70A.65.040.

2) Add sector-specific changes to enable adaptive management to clarify Ecology's role and authority.

[4] RCW 70A.65.005(4)
[5] RCW 70A.65.060(5)

We believe that Ecology's role of providing oversight and review of all Emission Intensive, Trade Exposed ("EITE") should be strengthened and clarified. This could be accomplished by modifying WAC 173-446-220 to:

- Include language in proposed rule that clarifies that Ecology will consider proximity to overburdened communities and tribal lands; the pollutants they process and/or manage; and if there are any violations under any permits they hold as part of the data considered per RCW 70A.65.110 (3)(a);
- Add language that Ecology will notify and engage with the Environmental Justice Council in the designation of EITEs, the admission of allowances of the program, and any changes in EITE allowances. Currently there is no articulation of how the Environmental Justice Council will review or assess changes to EITE allowances over time. This limitation and lack of process is not sufficient per RCW 70A.65.040 (2)(a)(i).
- Require consideration of environmental and health impacts and impacts to tribal lands and resources when setting the allocation baseline for *all* EITE facilities, in order to create consistency and fairness across the program;
- Require consultation with affected tribal nations for *any* facility on tribal lands or determined by Ecology through the government-to-government consultation process to impact tribal lands and resources; and
- Add language requiring consideration of environmental and health impacts and impacts to tribal lands and resources during consideration of changes to the no cost allowance allocation of any EITE facility.

3) Strengthen and uphold Tribal Sovereignty and Tribal engagement in all aspects of Offsets considerations.

It is essential that program rules are shaped by input from Tribal Nations and uphold tribal sovereignty, as determined by the Tribe. Consultation with tribes is necessary to ensure rules respond to the needs of tribes and draw from their expertise and traditional ecological knowledge. The rules should well-position tribes to develop offset projects, thereby accessing the offset limit for projects on federally recognized tribal lands. The following topics require careful attention and close coordination with Swinomish and other Tribal Nations to find solutions:

- **Tribal Sovereignty and Waiver of Sovereign Immunity:** Although Ecology has chosen not to adopt the waiver of sovereign immunity requirement from California's compliance offset protocols, we are aware that Ecology is exploring other ways for the state to hold Tribal Nations legally accountable for implementation of carbon offset projects. Other potential options, such a requirement for consent to jurisdiction, amount to the same infringement on tribal sovereignty. Given the sensitivity of this subject, Ecology must engage with Tribal Nations on a Government-to Government basis to find a solution that maintains tribal sovereignty, potentially drawing from viable examples in other state programs.

- **Eligibility of Tribal Lands for Urban Forestry:** The draft rule modifies the CARB Compliance Offset Protocol Urban Forest Projects to limit eligibility as follows: **"**Only offset projects located in the United States and its territories are eligible under this protocol." The rule specifically excludes existing language in the California Air Resources Board ("CARB") protocol for eligibility of lands owned by tribes or owned by any entity within the external borders of Indian Lands. Many tribal lands include urbanized or densely populated areas that could otherwise be well-suited for urban forestry projects. This exclusion is highly problematic, and both limits the ability of Tribal Nations to fully participate in offset projects and misses opportunities for carbon sequestration and co-benefits. Similar exclusions on tribal lands are applied to the Livestock Projects Protocol and the Ozone Depleting Substances Compliance Offset Protocol. It is critical that Ecology remove these amendments to CARB protocols in order to allow Tribal Nations to participate in all offset project types.

- **Tribal consultation in aggregation, additional carbon offset protocols, and linkage:** The full participation of Tribal Nations in carbon offsets will require developing aggregation protocols and new carbon offset protocols for project types of interest to tribes. Ecology must develop a forum and process for gathering input from Tribal Nations to shape such program developments. For example, a mechanism exists for engagement with small forest landowners to develop recommendations about aggregation— but not tribes. This gap needs to be addressed. Consultation with Tribal Nations will also important in considering and developing any linkage agreements in the future.

4) Revise terminology to be consistent with existing state law.

"Significant adverse environmental impact" requires a definition in the rule. While numerous different definitions for adverse environmental impact exist in law and federal guidance, many focus on long-term and/or measurable impacts to species or biological communities. In addition to impacts to biodiversity, we recommend aligning the definition of "environmental impact" with the definition of "environmental harm" in the proposed rule, which includes impacts related to community health, e.g., exposure to pollution and contamination, health and economic impacts from climate change, and importantly, "loss or impairment of ecosystem functions or traditional resources or loss of access to gather cultural resources or harvest traditional foods." Particularly in Washington, it is critical that carbon offset projects do not limit the rights of Tribal Nations to hunt and gather in traditional lands, fish in usual and accustomed fishing areas, or exercise other reserved treaty rights. Internationally, restriction or loss of access to land and natural resources has been a concern in implementation of forest-related projects under the REDD+ framework (Reducing Emissions from Deforestation and Forest Degradation). We recommend explicitly including loss or reduction of access to land and natural resources as an adverse impact offset that all CCA projects must be required to avoid.

Regarding the timing of review, the proposed rule does not specify *when* analysis of adverse environmental impact will occur. We suggest analysis occur during the project development phase of a project, prior to listing of the project, and be submitted as part of the offset project listing information. At this stage, an assessment can shape project design, and Ecology can make

a decision to list a project only after determining there will be no adverse environmental impacts after mitigation. We recommend carrying out this analysis in tandem with analysis of Direct Environmental Benefits (DEBS), as similar information will be required. And, to achieve the rule's intent to mitigate impact, analysis should include both an assessment of the potential impact of a proposed project without mitigation measures, and assessment of the impact of alternatives and mitigation measures.

Thank you for your consideration of the Tribe's brief comments, we hope that they will support Ecology in ensuring offsets and rules to implement the CCA are equitable, effective and uphold tribal sovereignty.

Sincerely,

Amy Trainer, Environmental Policy Director
Swinomish Indian Tribal Community