

J.R. Simplot Company

The attached comments are on behalf of the J.R. Simplot Company regarding Chapter 173-446, Washington Department of Ecology proposed rule to implement the Climate Commitment Act Program.



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SENT VIA ONLINE PUBLIC COMMENT FORM AT :
<https://aq.ecology.commentinput.com/?id=6Nx2J>

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

Dear Mr. Grice:

On May 16, 2022, the Washington Department of Ecology published a proposed rule to implement the Climate Commitment Act (CCA). The J.R. Simplot Company (Simplot) has significant operations in the State of Washington that would be regulated directly by this rule or have increased costs for energy and related operational needs due to the implementation of the Proposed Rule. Thus, this rulemaking is of direct interest to Simplot and we provide the following comments.

I. BACKGROUND

Passage by the Washington State Legislature of the Climate Commitment Act (CCA), RCW 70.65, established provisions for a market based, cap and invest program to regulate greenhouse gas (GHG) emissions in the State of Washington. The cap established by the legislation requires Washington to reduce statewide emissions of GHG, relative to 1990 levels, 45% by 2030, 70% by 2040, and 95% by 2050.

To meet this emissions trajectory the Legislature directed the Washington Department of Ecology (Ecology) to adopt rules to implement a declining cap on greenhouse gas emissions, establish mechanisms for the sale, no-cost distribution and tracking of tradable emissions allowances, along with compliance and enforcement measures. The CCA also directed Ecology to design allowance auctions to enable for eventual linkage to similar cap and trade programs in other jurisdictions like California and Quebec. The proposed program rule, 173-446 WAC (Proposed Rule), detailing the requirements of the cap and invest statute was filed May 16, 2022 by the Washington Department of Ecology (Ecology).

Implementation of WAC 173-446 will have important economic consequences on consumers, the competitiveness of Washington businesses in both domestic and international markets and on the Washington economy. This includes the Simplot operations in the State of Washington: a port facility for fertilizer, extensive fertilizer warehouse and distribution (retail) sites, farming, a beef cattle feedlot, and three

vegetable processing plants. Processed food products from these facilities are sold throughout the U.S. and *especially* into international markets.

Thus, this proposed rule will have a direct economic impact on these specific State of Washington facilities and other parts of Simplot that utilize the products grown and made in the State of Washington. Two of these three vegetable processing plants are directly subject to the proposed rule; both are designated as Emissions Intensive, Trade Exposed (EITE) facilities. As such they will annually receive a declining share of no-costs allowances to limit the risk of GHG emissions leakage, reduce compliance cost and maintain economic competitiveness of their products in U.S. and international markets. Other impacts on the company include significant cost increases to highway fuels used to transport finished goods.

II. OVERVIEW OF COMMENTS

Simplot's overarching interests in this rule making are for Ecology to adopt a rule that provides compliance flexibility that enable meaningful, and affordable reductions of GHG, protects the economy from allowance price volatility, contains compliance costs, and does not undermine the competitiveness of our Washington businesses. The EITE provisions of the Proposed Rule are especially important to maintaining the competitiveness of our Washington businesses. Towards that purpose, Simplot offers the following comments on the Proposed Rule.

III. SPECIFIC PROPOSED RULE COMMENTS

IIIA. Definitions (WAC 173-446-020)

Definition Biomass Derived Fuels: the definition of biomass derived fuels appears to conflict with the Climate Commitment Act:

RCW 70A.65.080. (7) The following emissions are exempt from the coverage in the program,...

(d) Carbon dioxide emissions from the combustion of biomass or biofuels;

The definition of biomass derived fuel specifies that a "fuels(s) derived from biomass must have at least 40 percent lower GHG emissions based on a full life-cycle analysis when compared to petroleum fuels...." There are fuels derived from biomass such as methane capture from landfills, food processing, wastewater treatment facilities, or feedlots/confined feeding operations. Such fuels need to be included in the definition of bio-derived fuels, without the "40 percent restriction", so that these carbon dioxide emissions are exempt as a covered emissions source under the program rule. Such a definition is consistent with the statute.

Definition of Curtailed Facility: This definition requires clarification to account for the fact that some facilities operate multiple product lines, which may shut down independently of one another for maintenance, capital equipment upgrades, or shifting market conditions. Without clarification in the rule, these temporary occurrences could result in Ecology making an unjustified downward adjustment in the allocation no-cost allowances for the facility. Ecology should specify in the definition:

“no-cost allowances will not be reduced due to a reduction of emissions due to temporary changes in production processes.”

III.B. Covered Emissions (WAC 173-446-040)

WAC 173-446-040 (3)(a)(i)(C), provides that emissions from the on-site combustion of a fuel product where the fuel product was generated or modified on-site and not purchased in its combusted form from a supplier are covered emissions. Does this paragraph apply only to non-CO₂ GHG emissions, or does it include CO₂ emissions? To be consistent with the statute, it should apply only to non-CO₂ emissions. As discussed earlier in these comments, RCW 70A.65.080 makes it clear that carbon dioxide emissions from the combustion of biomass are not a covered emission. Note: it needs to be realized that for certain biofuels (such as biogas or methane recovery), usually require some level of treatment prior to use. Often this includes water and sulfur removal.

III.C. Exiting the Program (WAC 173-446-070)

Additional detail is needed as to the specifics of a process to exit this program. Questions that need to be addressed include:

- What information is required to apply for exiting the program?
- Can an exiting covered entity choose to participate in the program under a different status?
- What is the basis of Ecology determining “that a covered entity must remain a covered entity to ensure equity among all covered entities”?
- What is the process for an entity appealing such a determination by Ecology?
- What happens to any unused allowances?

III.D. Allowances for EITE Facilities (WAC 173-446-220)

As described in the “overview” section of these comments, provisions for EITE are extremely important so that such facilities can be competitive in the global marketplace. Thus, From Simplot’s perspective a number of changes in the Proposed Rule for the determination and adjustment of allowances is needed.

Baseline Determination for Complex Facilities. As written Ecology's calculation of a carbon intensity baseline for a facility [WAC 173-446-220(1)] would likely be based on an overall plant average, overlooking the fact that a single facility may have multiple product lines with widely varying carbon intensities. Provisions should be made in the program rule to allow EITEs the option to report carbon intensity baselines for different products or production lines within the same facility. For example, a facility may shut down an entire line for a period of time and transfer production to another line; or, a line may be modified in a way that changes the production rate. This would account for the possibility of widely differing emission intensities for different products. As production levels for different products may shift dramatically from year to year, adjusting the allocation of no-cost allowances to account for different product mixes and production line processes of EITE entities would be more accurate/appropriate. It would also decrease the likelihood that Ecology would under allocate no-cost allowances in inadvertently undermine the cost competitiveness of the covered EITE entity.

Baseline Determination – Revision of Past Emission Data. The Proposed Rule [WAC 173-446-220-(1)(a)], requires that the EITE entities baseline will be determined based on emissions data from 2015 through 2019 reported through the WAC 173-441 program. The historical GHG emissions reported under Washington's GHG reporting program were intended to contribute to tracking Washington's progress in achieving legislatively mandated emission reduction goals for the state, not individual entities. With the passage of RCW 70.65, and implementation of the CCA program rule, GHG emissions data are being reported for a very different purpose, i.e., entity compliance with an enforceable emissions reduction requirement. Ecology should allow this data to be revised, if necessary or enabled through more precise emissions measurement technologies or accounting systems, allowing other later years to be used if these superior systems were implemented after 2015; or, Ecology should allow other data (more precise or appropriate than that submitted for WAC 173-441) to be submitted in addition to the previously reported data.

Baseline Determination and Adjustments. The proposed rule [WAC 173-446-220(1)(b)] grants Ecology significant discretion in determining an EITE's carbon intensity baseline and to make adjustments "as necessary" based on data submitted by the entity. However, the Proposed Rule is not consistent with the statute.

As provided in RCW 70A.65.110 (3)(a) of the CCA, the EITE facility's allowance allocation baseline for the first compliance period is equal to its carbon intensity baseline for years 2015 - 2019. RCW 70A.65.110(2)(c)(a) specifies that the EITE entity shall calculate its carbon intensity for the for the distribution of free allowances. By September 15, 2022, each EITE shall submit its carbon intensity for the first compliance period to Ecology and by November 15, 2022, Ecology shall "review and approve" each EITE's baseline carbon intensity. RCW 70A.65.110 (3)(c)(ii). Nowhere does the CCA require Ecology to independently calculate an EITE's carbon intensity and use its own calculation to assign an allocation baseline.

WAC 173-446-220(1)(b) sets a different process for assigning the allocation baseline whereby Ecology calculates the EITE's carbon intensity using data from multiple sources, adjusting data sets according to Ecology's professional judgement, and using other data sources Ecology deems significant. The CCA directs the EITE and not Ecology to calculate the carbon intensity or mass-based baseline and the rule must be consistent.

The Proposed Rule needs to be modified to provide for a baseline determination consistent with the statute. Furthermore, if Ecology does make adjustments to the baseline determination by the regulated entity, the Proposed Rule needs to define a formal process by which regulated entities may appeal Ecology's determination, or requiring Ecology to inform the EITE what additional information may be required to approve the carbon intensity baseline submitted by the entity.

Baseline Determination – New EITE Facility. The Proposed Rule [WAC 173-446-220(b)(v)(A)] does not address the possibility of a new EITE facility in which there is no historical emission data for a baseline determination. For new facilities, baseline should be based on the emissions from the first three years of operation once the facility has achieved expected production.

Upward Adjustments - Best Available Technology. Language found in RCW 70A.65.110(3)(f) allows an upward adjustment to the compliance period benchmark based on an EITE facility's best available technology (BAT) analysis. Specifically, the statute states:

“..the department may make an upward adjustment in the next compliance period's benchmark for an emissions.....based on the facility's demonstration to the department that additional reductions in carbon intensity or mass emissions *are not technically or economically feasible.*” (emphasis added).

However, language in the Proposed Rule [WAC 173-446-220 (2)(d)(ii)] that attempts to accommodate this provision falls short insofar as it does not define the process for applying for a BAT adjustment, nor does it define the criteria for making an adequate BAT adjustment application. Instead, the Proposed Rule confuses the best available technology adjustments with manufacturing and market factors. The adjustment for Best Available Technology is an important provision and the supporting process details should be completed. Such a technology evaluation should cover the following topics, and such language should be incorporated into the rule:

- Source of emissions.
- Description of potential technologies to reduce emissions including the status of the technology (i.e., proven – in use, pilot demonstration, etc.) and the potential reduction in emissions that could be achieved.

- What changes would need to occur at the facility to implement the technology and the cost of such technology?
- Effects/impacts from the use of the technology, such as other environmental impacts (water use, solid waste generation, use of toxic materials) and changes to energy requirements.
- For each potential technology, a summation that covers the following:
 - Potential emission reductions
 - Is the technology feasible?
 - Other effects and impacts.
 - Costs, including costs to address effects and impacts of the technology and the changes needed at the facility to implement the technology.
 - How the cost of such technology impacts market position and potential “leakage”.

Upward Adjustment – Manufacturing & Markets. RCW 70A.65.110(3)(f) provides two upward adjustments to an EITE’s benchmark. The prior comment addressed the Best Available Technology adjustment. The second adjustment is specified for three circumstances (as found in RCW 70A.65.110(f)(a), (ii), and (iii)):

- (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 these abnormal operating periods are either excluded or otherwise considered in the establishment of the compliance period carbon intensity benchmarks.

As described in our earlier comment, the Proposed Rule in WAC 173-446-220(2)(d) does not recognize the legislative intent to provide these two separate adjustments. The statute provides a second potential adjustment for the reasons listed above. [Note: none of these three submittals has anything to do with economic or technical infeasibility or best available technology analysis.] The Proposed Rule needs to be modified to reflect that the statute has two provisions for an upward adjustment of allowances.

Facility Curtailment/Shutdown. The Proposed Rule [WAC 173-446-220(2)(d)(v)] states that for a closed facility then “all unused allowances will be transferred to the emissions containment reserve.” Simplot recommends that a provision be included in the rule that allows for the transfer of allowances for circumstances where a company may shut down a facility but build near by a new facility that

produces the same products or modify a nearby facility for the same purpose. Such a transfer provision would be helpful for supporting continued economic development.

III.E. Distribution of Allowances to Electric Utilities (WAC 173-446-230)

The Proposed Rule [WAC 173-446-230] notes that the allocation to electric utilities may be consigned to auction and revenues used for the benefit of ratepayers. Simplot urges Ecology to explicitly state that revenues from the sale of allowances associated with power produced and sold to EITE facilities should be used to dampen the rate increases they would otherwise expect of the program. Absent this, EITE facilities will only see partial protection from cost increases due to their direct emissions, but could be fully exposed to embedded allowance prices in the electricity they purchase from utilities if a large percentage of the utility allowance sales is directed to other customer classes or used for special programs that do not benefit EITE plants.

III.F. Allowance Auctions (WAC 173-446-300)

To allow EITE facilities to begin analysis and planning of emission reduction projects as soon as possible, Ecology should move the first allowance auction to a date immediately after the first allocation of free allowances. The auction will provide immediate, and necessary, allowance price transparency, and narrow the range of uncertainty for those EITE entities contemplating capital investments to lower emissions.

III.G. Offsets (WAC 173-446-500/173-446-510)

Offsets can provide the opportunity for economic reductions in greenhouse gas emissions and help an EITE facility meet its compliance obligations. Towards that purpose, we propose several changes to the Proposed Rule.

Potential Offsets Should Be Expanded. Offsets are an important compliance instrument that encourage voluntary GHG emissions reductions by both covered and non-covered sectors of the economy and can help to contain compliance costs. Ecology in the Proposed Rule [WAC 173-446-500] has aligned the proposed rule language with the offset provisions of California's cap and trade regulation requirements. While Simplot supports the alignment of Washington's offset program protocols with California's, we believe that the list of projects Ecology deems eligible to generate offset credits is too limiting. In keeping with Washington's goal that offset provide direct environmental and economic benefit to the state, the eligible offset projects list should be expanded to include offsets from nitrous oxide reductions from improved fertilizer application programs. The American Carbon Registry (ACR) and Verified Carbon Standard (VCS) have previously

approved a methodology for measuring and verifying GHG emissions reductions from reducing the amount of nitrogen used to fertilize crops.

Adoption of this methodology in the CCA program rule could result in voluntary emissions reductions in the agricultural sector, an additional source of revenue for Washington farmers and have the added benefit of contributing to improved water quality.¹

Offset Invalidation. Current Offset rules place too much risk on the Offset buyer as the Proposed Rule indicate that Offsets can be invalidated a full *eight years* after issuance. Therefore, long after the projects are developed, approved, validated, purchased, and submitted as a compliance instrument, the buyer can still lose their full investment in the offset, even while following all rules in the management of the purchase. This risk is harmful to not only buyers, but sellers, who will see the value of their Offsets diminished by the associated risk. Therefore, we suggest Ecology adopt an offset “buffer pool”, similar to the buffer account used for forestry projects defined in WAC 173-446-570. Such a pool could be developed by collecting a small percentage of newly developed offsets to build a stockpile, held in reserve and drawn from to replace any offsets subsequently deemed invalid. This would spread the risk for buyers and developers and remove an impediment for offset development in Washington.

Offset Requirements. Ecology has included language in the Proposed Rule [WAC 173-446-510 (1)(d)(i)] that could unintentionally decrease interest in developing needed offset projects. Ecology is proposing additionality requirement language that requires Offsets to come from projects where “...GHG removal enhancements are not required by law, regulation, or any other legally binding mandate applicable in jurisdiction in which the offset project is located and would not otherwise occur in a “conservative business-as-usual scenario”. The term “conservative business as usual scenario” does not appear in the CCA statute, RCW 70.65, and is not defined in the program rule. At best the term is unnecessarily ambiguous, and at worst materially increases the risk that Ecology can arbitrarily invoke the term to deny eligibility of an otherwise compliant offset project. It is not clear how Ecology would even determine what a “conservative business-as-usual scenario” is for determining additionality. Moreover, inclusion of the term increases perceived risk to developers that will cause a decrease in developer interest in pursuing needed projects. The phrase “in a conservative business as usual scenario” serves no meaningful compliance purpose and should therefore be deleted.

IV. COMMENTS ON ECONOMIC ANALYSIS

The Washington Department of Ecology retained VIVID Economics to perform an economic analysis if the Proposed Rule. The economic analysis indicated the impact of

¹ See: [ACR Approves MSU-EPRI Carbon Offset Methodology for Emission Reductions from Agricultural Nitrous Oxide — American Carbon Registry](#)

the CCA on motor gasoline prices was going to be relatively small, i.e. an increase of less than 1% over the entire period of the regulations; .79% 2030; .24% by 2040 and .12% by 2050.

Fuel use by light duty vehicles is the largest source of carbon dioxide emissions in Washington state. Consumer demand for motor fuels is also very price inelastic. The costs of allowances needed to comply with the CCA will increase the price of motor gasoline but in the near term it will not be enough to reduce demand and lower carbon dioxide emissions.

It is very likely transportation fuel suppliers will have to pay higher prices than projected by Ecology in order to obtain sufficient allowances to comply with the CCA program rule cap. Analyses show that in order to obtain sufficient compliance allowances the price transportation fuel suppliers will have to pay will approach the Allowance Reserve ceiling price set by the program. This price is currently estimated by Ecology to be \$71/MTCO_{2e} in 2023. If fuel suppliers have to purchase allowances at the ceiling price motor gasoline and on road diesel prices can be expected to increase dramatically by \$0.50 to \$0.70 in the first compliance period. (As a rule-of-thumb we can expect motor gasoline prices to increase by approximately 8-tenths of one cent per gallon for each dollar per ton increase in the price of an allowance.)

Such dramatic increases motor gasoline could result in consumer backlash and lead to political pressure to make major revisions in the design of the rule and the rule's allowance allocation formula. This in turn will lead to regulatory instability and uncertainty and undermine business confidence and ability to plan and invest in long-term compliance strategies.

Given this, Ecology should consider the following:

1. Linkage with California should be a clear, long-term goal. However, linkage should be delayed for the first several years of the program in order to:
 - a. Maintain a separate price floor and ceiling, without interactions with neighboring markets complicating the efficacy of these price policies.
 - b. Ensure that revenues from the sale of allowances stay within Washington (avoid the problem of purchasing allowances from neighboring states that could have lower price ceilings).
2. Set a lower Allowance Reserve ceiling price that will enable transportation fuel suppliers to gradually "phase in" the carbon price into the on-road fuel market and mitigate dramatic and volatile increases in prices. The design goal should be to minimize price increases in the first compliance period and gradually increase them over time so that by the end of the second compliance period decade they match the California price ceiling, thereby enabling linkage.
3. Longer term investments to lower emissions depend on predictable and stable allowances prices and regulatory certainty. Allowance price volatility and

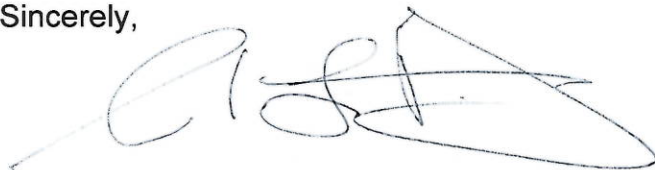
compliance cost unpredictability are likely to have the effect of dramatically slowing, if not halting entirely, company decisions to make the large investments needed to meet carbon dioxide emissions reduction compliance requirements in the long-term. Such a situation will be a hinderance to economic development in the State of Washington.

V. SUMMARY

RCW 70A.65.005(6) of the CCA states that the legislature intends to create a climate policy that recognizes the special nature of EITEs and that climate policies must be appropriately designed in order to avoid leakage. Free allowances at a reasonable declining rate, a BAT compliance option, access to funding for decarbonization projects, and other flexibilities and incentives will help avoid leakage and preserve the competitiveness of Washington's industries.

The types of policies described above are particularly important to the agribusiness sector. Food and fertilizer products are very price sensitive; CCA will increase manufacturing costs in the State of Washington. Thus, it is vital that the agricultural and crop input products produced remain cost competitive in national and international markets. Otherwise, cuts in production and jobs or production may cease in Washington altogether. As noted earlier in these comments, Simplot has extensive business operations in the State of Washington; there are opportunities for significant additional investment. However, such investment is dependent upon Washington's regulatory environment, including this rule, allowing these operations to be competitive in the global marketplace. Simplot encourages careful consideration by Ecology of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alan L. Prouty', written over a light blue horizontal line.

Alan L. Prouty
Vice President, Environmental & Regulatory Affairs

C:
Association of Washington Business
Food Northwest