December 15, 2020

Fran Sant and Diane Butorac
Rulemaking Leads
Washington State Department of Ecology
PO Box 47600
Olympia, Washington 98504-7600

Re: Greenhouse Gas Assessment for Projects, Rulemaking CR-101

Dear Ms. Sant and Ms. Butorac,

This letter is in response to the Washington State Department of Ecology's (Ecology's) request to receive informal input and feedback during the ongoing CR-101 phase for the Greenhouse Gas Assessment for Projects (GAP rule), Washington Administrative Code (WAC) 173-445, rulemaking process.

The Ports of Longview, Kalama, Woodland, and Vancouver are submitting the comments herein regarding the proposed Ecology rulemaking as it may relate to their shared functions and concerns along the Lower Columbia River, and related to potential issues that the Ports foresee with the rulemaking based on their frequent roles as State Environmental Policy Act (SEPA) lead or co-lead agencies. Each of these ports may also have additional comments submitted under separate cover, with additional perspectives on the proposed rulemaking.

We understand that this is not a formal comment period on the rulemaking, and we look forward to continuing to work with Ecology during development of the draft and final rule. Broadly, we see a need for a rule that provides project proponents and SEPA lead agencies with a clear path to assessing greenhouse gas (GHG) emissions, including how analyses will occur, the boundaries of analysis, what outcomes from the analysis will be regulated, and what constitutes a significant impact under SEPA from GHG emissions. We are concerned about the potential for a lack of clarity that could lead to misunderstandings over the rule's applicability to different kinds of projects, and subsequent potential for SEPA challenges.

We hope Ecology will consider working with stakeholders during preliminary rulemaking to ensure the rule is developed in a manner that makes progress toward the State's larger GHG reduction goals and enables Washington's industries, Ports, and regulatory agencies to all continue to operate with ease and clarity. We request a rule that includes the means to reward project proponents who

incorporate innovative designs and new or improved technologies that would reduce local or global GHG emissions over existing technologies.

The preliminary comments in the remainder of this letter are focused on responses to several of Ecology's specifically requested areas for input to rule development and are based on our current understanding of the rulemaking focus and progress to date. Note that more information and detail from Ecology regarding the specific implementation procedures and requirements of the rule is needed to adequately understand these topics and provide nuanced responses. We understand that you are not responding to questions at the stakeholder meetings or the questions and issues that are raised in response to your request for input during this stage, but we note that this process results in an opaque process and less inclusive rulemaking. We request that you consider adding an opportunity for more open information exchange with stakeholders, experts, and the public during preliminary rulemaking—such as a technical working group—to enable the exchange of data and understanding that would inform a more well-crafted, science-based, implementable rule.

Responses to Ecology's Environmental Assessment Questions

What are best practices in estimating construction-related emissions from SEPA or NEPA that we should consider for the rule?

Washington needs a clear rule, with well-defined standards, procedures, and sideboards, to ensure a clear process with an understandable and obtainable outcome for both project applicants and regulators. Sideboards should include limiting construction-related emissions assessments to Washington State's borders.

Have you used the ISO 14040/44 standards to conduct a life cycle analysis? If so, where do you believe the rule needs additional specificity to make implementing the standards practical or feasible?

Regarding the ISO standards, we request that Ecology include specific guidance in the rule to reduce the need for project proponents and SEPA lead agencies to interpret life cycle analysis methodologies, boundaries, and assumptions on their own. The ISO standard alone does not have sufficient detail for conducting and interpreting assessments consistently. Notably, the ISO standard is not tailored to incorporate the concepts, legal provisions, limitations, or judicial caselaw relating to SEPA. As a result, it lacks content, concepts, and mechanisms that must be observed by state law. Because SEPA prohibits speculation, it will be incumbent on Ecology to be extremely concise and consistent in its drafting of its rule to ensure that it goes beyond the shortcomings of the ISO standards' application to a GHG life cycle analysis under the rule.

Furthermore, due to the onerous and costly nature of these analyses, we request a reasonable life cycle analysis threshold be included so that conducting a full life cycle analysis would only be required on projects with higher projected emissions. A second-tier threshold (i.e., a threshold considerably above the 10,000 metric tons CO_2e per year threshold for rule applicability) at which a life cycle analysis is required would strike a balance between the need for a more detailed analysis where GHG emissions are most likely to be substantial but not burden smaller, more clear-cut projects with a similar costly and intensive analysis. This tiered threshold composition of the rule would provide further encouragement for project proponents to design projects to reduce their projected emissions below the threshold at which a life cycle analysis would be required, and would likely result in additional net emissions reduction benefits for the State.

It would also be helpful for Ecology to provide several hypothetical case studies that demonstrate the application of the analysis and the projected outcomes for a variety of proposals. We currently find it hard to determine where the lines will be drawn (e.g., would construction of a dredging project be subject to life cycle analysis?). If a SEPA lead official is left to decide whether the life cycle analysis is or is not needed because the rule is not clearly defined on this point, we foresee the possibility for greater issues with SEPA challenges.

Are there special considerations we should take into account for projects that may lack a central facility or clear "on site" emissions (e.g., linear projects)?

Ecology's draft materials state that the rule would not apply to "highway, road, or passenger rail projects." We request that this linear/transportation exemption be redefined to include all similar projects, including navigation, rail, road, and multi-modal projects so that the rule is consistently applied across project types.

If any linear projects or projects without a central facility and clear "on site" emissions are to be included in the rule, we suggest Ecology conduct detailed case studies on those linear projects to better understand the various ramifications and be able to communicate clear guidance. The scenarios depicted in the draft materials that have been presented to date seem to be very simplified and do not provide sufficient information to understand how the rule will be specifically applied and implemented. Running specific case studies on a variety of these project types should reveal the potential issues that need to be addressed and associated efficiencies that can be realized.

Is it more important to focus on the net emissions or on the gross emissions of a project? What should be the role of global economic analysis (e.g., developing a project global supply and demand curve) in the assessment?

Generally, a net emissions focus seems more appropriate to large projects. Net emissions analysis for large projects could help the rule be better designed to encourage innovation and incentivize

investment in technologies that will increase efficiency and make progress toward the State's larger GHG reduction goals. This could include means for project proponents to demonstrate the benefits of lower-carbon projects, market substitution, and efforts to reduce overall GHG emissions, instead of only a narrow focus on gross emissions for larger projects. Given the complexity of a net emissions analysis and an applicant's discretion whether to pursue the design of a proposal to specifically attain net emissions reductions, we ask the agency to provide discretion to the applicant regarding whether or not a net emissions analysis should be undertaken.

A global economic analysis is not appropriate for most applications of a GAP rule and smaller projects, but could be useful for assessing very large projects that displace a current GHG source (e.g., significant replacement of a global coal use with a cleaner fuel source). As noted previously, a tiered approach may be a useful framework for parts of the GAP rule, with these larger, more detailed analyses only applied where appropriate. It is also important to note that project proponents frequently lack control over the end uses of their products, which presents challenges in applying a global economic analysis to many projects due to the uncertainty of the end use of their products.

The Ports are centers of advancement in responsible economic development in Washington. As such, we are additionally concerned about potential issues with double-counting GHG emissions under Ecology's proposed rule. For example, if a proposed Washington facility's input products come from Canada, where they were likely already subject to more stringent emissions assessment and mitigation standards, assessing these input products/feedstocks again when they arrive at the facility is an undue burden on Washington businesses. This over-regulated situation would be more likely to *undermine* the State's goals, by instead driving industries out of the state or out of the country to areas where they may be subject to much lower or no emissions assessment and mitigation standards. Conversely, a well-crafted, reasonable, and easily interpreted rule will help us work together to reduce emissions while continuing to create opportunities and jobs within the state.

In a related vein, the rule must contain a mechanism that will account for future legislative or regulatory changes that will inform how future proposals must address GHG emissions. This rule, in whatever form it is ultimately adopted, will not be the end of the State's efforts to rein in GHG emissions. It is imperative that the rule not become an anachronism or an immutable encumbrance that prevents a proponent/operator from taking advantage of different means to reduce GHGs in the future whether through scientific or technological advances or through legal mechanisms.

What should the role of economics play in the Energy Analysis? Is it enough to note where supplies of energy will change, or should the price effects of those changes feed into a dynamic price model (or similar analyses)?

The complications presented by global politics, consumer behaviors, and many other factors make it necessary to have a broader conversation about this topic.

What should the time period for the assessment be? Under SEPA, the analysis usually considers the typical operational lifespan of a project and construction but the time period could be longer to align with the GHG emission limits, or for other reasons.

The GAP rule needs methodology that is aligned with Washington's requirements for reporting on GHGs, using the same metrics and time periods for all projects, and that are backed by science, time-tested through application, and treated with regulatory consistency.

Furthermore, the SEPA analysis standards should be consistently applied, and an expanded time period for the GAP rule would not be appropriate. The term "reasonable likelihood" under SEPA means that the significant impact is not remote or speculative. The GAP rule needs to be applied to the typical operational lifespan of a project and construction, as in other areas subject to a SEPA analysis.

Should the rule identify starting and ending points of the life cycle analysis for project inputs and outputs? This could be at specific points, or the rule could provide more general direction, depending on the project type.

The geographic scope of analysis should be limited to state lines so there are clear boundaries, and to avoid overlap with other states' or countries' rules for their own analysis. The rule should also focus on limiting analysis to construction and operation at a facility, but not analysis of products that pass through a facility. For example, a new car import facility should not need to address GHG emissions from ultimate use of the cars. Similarly, a bulk or liquid product rehandling facility should not need to address ultimate disposition of a product because the facility that processes/uses the product would need to account for those emissions. The more distant an input or output is from the proposed project, the more speculative the analysis becomes and the greater the potential for double-counting. As noted previously, SEPA analysis does not allow for speculation.

At what point should the analysis terminate downstream? Should the first potential use be included in the life cycle analysis as the end point?

> *For example, in the case of fossil fuels the combustion of that fuel if some other use is not known, or if the first potential use is not demonstrable?*
>
> *For non-fossil fuel products should the first potential use be considered to be the first use, or analyzed as multiple uses, or a final end use of the product?*

We are concerned that inclusion of first potential use would likely often require information that is not known by or available to the proposed project's proponent. Additionally, project proponents often have no control over the end use, including no ability to constrain potential end uses. Requiring such attenuated analysis would result in further speculation and, as previously noted, we

recommend that the rule should focus on limiting analysis to construction and operation at a facility, but not analysis of products that pass through a facility.

Responses to Ecology's Mitigation Questions

What types of emission should mitigation address? On-site emissions, in-state emissions (on-site, upstream and downstream), upstream out-of-state emissions?

We note that the proposed rule will not be housed in the SEPA regulations in WAC 197-11. Insofar as proposals that are subject to regulation under WAC 173-445 are those that must report GHG emissions, the rule should specify that only direct and on-site emissions that are associated with the project and able to be controlled by the project proponent should be subject to mitigation through the SEPA process. As noted previously, there is substantial difficulty with addressing upstream and downstream emissions. Specifically, there is a significant potential for any upstream or downstream mitigation requirements to overlap with other states' or countries' rules for analysis of the production of raw materials, associated mitigation requirements, and first use of outputs that pass through Washington facilities. For proposals that are not subject to GHG emissions reporting, regulatory authority properly lies with the SEPA lead agency to determine whether to impose mitigation requirements and whether proposed mitigation is sufficient. In all cases, it is important to note that the rule must not be so restrictive that it results in impacts that are not capable of being mitigated.

The Washington State Legislature has established GHG reduction goals for the future; how should these GHG reduction goals influence the mitigation plan?

With the passage of Engrossed Second Substitute House Bill No. 2311, Chapter 79 in 2020, the Washington State Legislature updated the state-wide GHG reduction goals, but did not establish regulatory limits or create any new or additional regulatory authority for any state agency. It is difficult to understand how these state-wide goals would or legally could, under the Nollan-Dolan-Koontz constitutional body of limitations, be applied to a mitigation plan for individual project proponents under the GAP rule. Ecology has stated that "the focus of this rule will be on fossil fuel and industrial projects per the Governor's Directive 19-18." Fossil fuel and industrial projects in Washington account for a very small amount of the State's GHG emissions, and most projects in the state are a contributor at some level. It would be inappropriate to use the State's larger GHG reduction goals for this more narrowly focused rule that focuses on a small subset of projects.

Should mitigation vary for different types of projects, such as factories, export facilities, or linear projects like pipelines or electricity lines?

No, mitigation should be consistent and focused on GHG impacts of a project regardless of the type. Mitigation for impacts above the level of significance should be provided equally, in accordance with clear guidance to be established in the GAP rule. It is important that rulemaking address all potential

GHG sources within Washington State equally including requiring the same type and level of mitigation for any GHG sources. As noted above, for proposals that are not subject to the State's mandatory GHG reporting requirements, it is SEPA lead agencies alone who have the discretion and authority to determine whether to impose mitigation requirements and whether proposed mitigation is reasonable and sufficient. This question illustrates the concerns we have raised above regarding the lack of clarity in which projects the rule will apply to and the potentially low thresholds that could trigger its application.

If the environmental assessment includes a net emissions analysis, how should this be treated in the mitigation plan?

The lack of express language and a very clear presentation of what this 'net' versus 'gross' question is driving at suggests that Ecology needs to revisit the concept and present it more clearly. Without the benefit of such clarity, we note that avoidance and minimization measures—such as those achieved through designing with materials that have a smaller emissions footprint, upgrading existing facilities instead of demolishing and replacing or constructing an additional new facility, or providing an alternative to a higher-emission market or process—are arguably more important than mitigation, and methods should be provided in the ultimate rule to include these measures in a net emissions analysis and provide credit in any mitigation plan. This approach aligns with the well-established process in WAC 197-11-768 of the SEPA regulations to require applicants to show that they have followed the mitigation sequence and worked first to avoid and minimize impacts. While facilities subject to the GHG reporting requirements may be treated differently under the rule currently being developed, other facilities that are not mandatory GHG reporters are entitled to benefit from having considered avoidance and minimization in their proposals under SEPA.

We are especially concerned with a proposed requirement for some sort of net emissions analysis and how it would be able to provide fair treatment and encouragement of projects with "built-in" mitigation, such as a project that replaces an older process of higher GHG emissions with modern, more efficient technologies and operations that would result in lower net emissions and achieve the intent of the rule.

How should emissions involving projects that modify an existing facility be calculated?

Analysis of modifications to an existing facility is another area where it would be useful for Ecology and stakeholders to collaborate to conduct detailed case studies on a variety of possible circumstances, to better understand potential issues with the GAP rule's application before the rule is drafted. This exercise could help illuminate complicating factors that a project proponent may or may not have the ability to control and help Ecology answer questions about how to better design the GAP rule. For example, if a port were to conduct maintenance dredging at a berth and/or upgrade a

portion of the facility to increase export efficiency, would they only be required to analyze the construction or would they also be required to examine the potential emissions of additional vessels that may visit in the future? If a ferry terminal operator replaced a dolphin structure, would they need to estimate emissions and develop mitigation for potential future changes to ferry vessels?

Again, we point out the need to reward technological advances that reduce net GHG emissions. The most effective way to meet the State's long-term goals is to reduce GHG emissions before they occur and avoid or minimize the need for mitigation. Project proponents should be encouraged to modify existing facilities to incorporate lower-emitting technological advancements and other changes to project configurations and operations as one way to accomplish the reduction goals.

What process should be used to track and verify emissions subject to mitigation?

Ecology should continue tracking and verification of GHG emissions for those facilities that are mandatory GHG reporters and should do so through the existing GHG reporting requirements. Through WAC 173-441, there is already a well-established process for facilities that are required to report emissions. We believe it is inappropriate to introduce an additional process for projects that do not require an air permit. This question raises a variety of concerns about what would trigger the additional tracking and how such an additional process would be administered and enforced.

We do not believe this rule can extend its application into the SEPA regulations in order to displace the discretionary substantive SEPA authority of local lead agencies regarding facilities that are not mandatory GHG reporters. That said, if the GAP rule were to require additional tracking and verification of emissions from facilities currently not required to report emissions, would the applicable SEPA official (i.e., from a port or local agency) be tasked to ensure that requirements to monitor, verify, and administer GHG emissions are met? If so, would this require each agency to have in-house GHG emission expertise to perform this type of analysis? If the agency is required to do the analysis, who is responsible for the additional staff load and financial considerations associated with the analysis? The complications and risk associated with these considerations would likely be insurmountable for many SEPA lead agencies on projects where an air permit is not required.

To address these considerations and have a resulting rule that will be implementable by all affected parties, we request that the GAP rule include the following:

- A clear definition of precisely what facilities are subject to this rule
- A clear definition of what level of GHG emissions will be subject to mandatory mitigation
- A clear definition of what constitutes a significant impact under SEPA for GHG emissions
- Acceptable mitigation options, including multiple pathways to achieve GHG mitigation and associated expectations for what the mitigation will accomplish
- A uniform method of reporting and verifying GHG emissions for those facilities that must report

How would changes to calculation methods or emissions be handled?

The intent of this question is unclear. We generally encourage Ecology to produce a rule that provides for predictability in mitigation obligations. If the rule is left open to ongoing calculations and adjustments, the resulting uncertainty for project proponents and SEPA lead officials will be very difficult to manage. In all events, however, credence and weight should be given to state, national, or provincial government-maintained inventories, data, and methodologies, the development of which uses generally consistent standards unless and until there is scientific, industry, and governmental consensus for significant changes to the standards used to develop such inventories and data.

How should mitigation projects be prioritized?

As noted previously, we believe that permitting agencies should be making the determinations about whether and what mitigation is appropriate, and this level of detail should not be included in the GAP rulemaking. There should be flexibility in the types of mitigation projects that are allowed rather than a system for prioritizing specific kinds of mitigation projects in the GAP rule. Technology is changing rapidly, and there is a need for agencies to be able to allow project proponents to mitigate with currently unidentified sequestration or other beneficial methods that may be developed in the future.

This flexibility can additionally provide an accelerant for innovation in low- or no-emission technologies, motivate investment in developing mitigation opportunities and mitigation banks, and create a thriving marketplace for GHG mitigation. The rule should allow for a system of crediting/banking credits from innovative and beneficial projects so they can be used to mitigate for other projects later.

Additionally, as noted previously, the highest priority should always be a focus on efforts to avoid and minimize GHG emissions.

Are there types of mitigation projects which should or should not be included?

Many types of mitigation projects should be included, such as GHG offset mitigation banks, tree planting, technology substitutions, GHG displacement methods, and facility and infrastructure upgrades including relevant methods for reducing waste, improving maintenance, and improving project siting. Additionally, because GHG emissions contribute to global problems, there should not be geographic limitations placed on mitigation projects. More effective progress on global climate issues can be made by allowing mitigation investments to be leveraged globally.

Thank you for the opportunity to provide this preliminary input and feedback. In closing, we reiterate that the rulemaking process to date, a lack of information as to how a rule would be applied to various projects, and the lack of a draft rule to review have presented challenges for providing detailed input in response to Ecology's questions. We request that you engage a technical working group of stakeholders and experts during preliminary rulemaking, to result in the crafting of a clear, functional, defensible, and science-based rule.