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**Subject:** bp comments on the Proposed Greenhouse Gas Assessment for  
Projects Rulemaking (WAC 173-445)

Dear Ms. Sant:

On behalf of bp America (“bp”), thank you for the opportunity to provide comments on the Washington State Department of Ecology’s (“Ecology”) Proposed Greenhouse Gas Assessment for Projects Rulemaking (the “GAP Rule”). This letter provides comments on mitigation under the GAP Rule in response to Ecology’s October 29 and November 17 webinars.

As with our previous letters, these comments are submitted in furtherance of our support for the GAP Rule process and are consistent with the six Proposed GAP Rule Principles shared in our August 7 letter. A successful transition to a net zero economy will require new levels of collaboration across industry, consumers, tribes, and governments, aided by technology developments and well-designed government policy. bp welcomes Ecology’s efforts to clarify how state and local agencies should analyze and mitigate greenhouse gas (“GHG”) emissions impacts through the GAP Rule, which we believe can play an important part in helping the State of Washington achieve its GHG emission reduction goals.

In addition to the attached responses to Ecology’s requests for input, we offer the following general comments about GHG mitigation under the GAP Rule.

- Under the GAP Rule and the State Environmental Policy Act (“SEPA”) more generally, any GHG emissions mitigation requirements should primarily be focused on GHG emissions from sources that project proponents own or control. Consistent with bp’s “net zero” ambition, we recommend focusing mitigation requirements on the scope 1 and scope

2 GHG emissions resulting from proposed projects.<sup>1</sup> In addition, consistent with SEPA and Ecology's SEPA Rules, impact analysis and mitigation requirements under the GAP Rule should be targeted to GHG emissions that are both "probable" and "significant."<sup>2</sup>

- Other categories of GHG emissions generated by sources that project proponents do not own or control (i.e., scope 3 emissions), may be more effectively and efficiently reduced through other regulatory mechanisms that, for example, incentivize reductions in the carbon intensity of fossil fuel producers' product mix or put a price on emissions economy-wide and as close to the point of regulation as is administratively feasible.<sup>3</sup> Achieving our aims related to scope 3 emissions will be supported by state and national carbon pricing mechanisms, which is one of the reasons we are actively advocating for a carbon price.
- Relatedly, and as stated in our previous comment letters, the GAP Rule should be designed so that it can be well integrated with other existing and future state and federal regulations that address GHG emissions—including air permitting requirements and a potential carbon price—to avoid conflicts and redundancies. This is especially important when determining GHG mitigation so as to avoid duplicative or conflicting requirements.

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<sup>1</sup> bp's "net zero" ambition includes five aims to help bp get to net zero by 2050 and five aims to help get the world to net zero. Most relevant to the GAP Rule, given its project-specific focus, is "aim 1," in which we commit to be net zero in our operational emissions, which bp defines as "direct (Scope 1) and indirect (Scope 2) GHG emissions (CO<sub>2</sub> and methane) emissions on a CO<sub>2</sub>-equivalent basis (MteCO<sub>2</sub>e) as reported by BP and on the basis of operational control . . ." For additional context, we also note that in "aim 2", we commit to be net zero in our oil and gas production on an "equity share" basis. And in "aim 3," we commit to a 50% cut in the carbon intensity of our products. *See BP sets ambition for net zero by 2050, fundamentally changing organization to deliver* (Feb. 12, 2020), <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bernard-looney-announces-new-ambition-for-bp.html>.

<sup>2</sup> *See* RCW 43.21C.031 (establishing that an Environmental Impact Statement ("EIS") should be prepared when there are "probable significant, adverse environmental impact(s)"); RCW 43.21C.060 (an "action may be conditioned only to mitigate specific adverse environmental impacts which are identified in environmental documents"); WAC 197-11-060(4) (describing the types of impacts that should be considered in an environmental review under SEPA); WAC 197-11-350(2) (describing when mitigation measures can be applied instead of preparing an EIS).

<sup>3</sup> For more information about bp's position on carbon pricing, please visit our website. <https://www.bp.com/en/global/corporate/sustainability/climate-change/our-role-in-the-energy-transition/our-carbon-pricing-principles.html>; [https://www.bp.com/en-us/united-states/home/who-we-are/our-commitment/advocating-for-change-in-the-us.html#tab\\_washington-legislation](https://www.bp.com/en-us/united-states/home/who-we-are/our-commitment/advocating-for-change-in-the-us.html#tab_washington-legislation).

- While bp supports a general preference for on-site mitigation measures and direct funding of local and regional mitigation projects, we also understand that GHG mitigation obligations should reflect the global nature of climate change. Notwithstanding our preference for on-site mitigation measures and local projects, we also believe that project proponents should not be precluded from mitigating emissions through direct funding of or purchase of offsets from out of state or international projects. This will be especially true if GHG mitigation requirements are applied to out-of-state emissions.
- Ecology should ensure that the GAP Rule is consistent with its existing authorities. Lack of clear guidance on the appropriate scope and methods for GHG emissions analysis and mitigation in the environmental impact assessment process complicates projects and causes unnecessary delays. As we have previously relayed, bp is actively pursuing capital investment opportunities, including opportunities for lower-carbon, non-fossil fuel projects in its global portfolio in the coming years. In the interest of attracting investment that could help the State of Washington achieve its GHG reduction goals, we encourage Ecology to ensure that the GAP Rule falls squarely with the scope of its existing authorities so as to ensure its durability, and so that project proponents and agencies can benefit from the rule as soon as practicable.

We understand that Ecology will be providing more information about the GAP Rule for informal review before release of the draft GAP Rule in April 2021. We respectfully request that Ecology consider responding to the questions stakeholders have posed since this process began in June 2020 through a Frequently Asked Questions document. In addition to the questions that we have posed in our previous letters, we request clarification on the following:

- Ecology stated in the November 17 webinar that the GAP Rule would not apply to existing facility operations that are already permitted.<sup>4</sup> If a project at an existing facility would require a County land use permit (e.g., a land disturbance permit), but would not require modification of an *air* permit from a state or regional clean air agency (e.g., Ecology or the Northwest Clean Air Agency) because the activity would not result in any increases in emissions beyond what is already permitted, would the GAP Rule still apply? Our understanding is that the GAP Rule would not apply to the extent the air emissions were already addressed through the air permits.


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<sup>4</sup> State of Wash. Dep't of Ecology, *Greenhouse Gas Assessment for Projects (GAP) Rulemaking: November 2020 Webinar 14*, <https://ecology.wa.gov/DOE/files/b2/b2b5b19d-7b0b-49a7-a510-9e3b065d8045.pdf>.

- Ecology explains that it intends to establish a quantitative threshold for *applicability* of the GAP Rule (e.g., 10,000 MT CO<sub>2</sub>e). Does Ecology also intend to set a separate, higher quantitative threshold for when covered projects must conduct more intensive forms of GHG lifecycle analysis (LCA) as part of the GHG assessment process? Consistent with our previous comments, bp would support a tiered or scalable approach that would impose increasing levels of administrative burden in proportion to the extent of GHG emissions. In particular, bp would support a higher threshold for when intensive forms of LCA would be required.
- On a different, but related note, does Ecology also intend to establish a quantitative threshold for when GHG emissions are considered “significant” and thus trigger the requirement to conduct an Environmental Impact Statement (“EIS”)? In the interest of providing clarity and predictability to project proponents and agencies, bp would support establishing a quantitative significance threshold, at least as a presumptive matter.
- Finally, does Ecology intend to address under what circumstances it would be appropriate to reach a Mitigated Determination of Non-Significance in lieu of preparing an EIS? bp would support such an approach, as it would also provide clarity to project proponents and agencies.

Please feel free to contact me at [james.verburg@bp.com](mailto:james.verburg@bp.com) or 360-296-0692 if you would like to discuss further.

Sincerely,



James Verburg

Senior Environmental Engineer

## Responses to Ecology's Questions on Mitigation

### **Which Emissions Should be Mitigated?**

#### **1. What types of emissions should mitigation address? On-site emissions, instate emissions (on-site, upstream, and downstream), upstream out-of-state emissions, downstream out-of-state emissions?**

As relayed in our November 19 comment letter, bp believes that both direct and indirect emissions should be considered in the SEPA analysis performed under the GAP Rule. bp also believes that a reasonable scheme for mitigation should be established. However, not all indirect emissions may be appropriate for mitigation under SEPA, for the following reasons:

- Calculation of scope 3 emissions, whether projected or actual, will require a greater degree of speculation than that required for the calculation of scope 1 and 2 emissions.<sup>5</sup> The more distant the emissions source in the supply chain, the more speculative becomes the analysis. As Ecology has not yet developed (nor has it proposed) standardized methodologies for calculating projected or actual scope 3 emissions, such mitigation is unlikely to be imposed consistently across projects or industries subject to the GAP Rule. In addition to raising questions of vagueness, the lack of consistency would make it difficult to predict the potential costs of mitigation associated with a project—potentially discouraging investment in the State of Washington.
- As stated earlier in this letter, scope 3 emissions may be more effectively and efficiently reduced through other legislative or regulatory mechanisms. bp believes that emissions reduction requirements should generally be applied as close as is administratively feasible to the point of emissions, as it provides transparency to the actual emitters and encourages them to make rational economic choices to reduce those

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<sup>5</sup> See U.S. Environmental Protection Agency, Greenhouse Gases at EPA, <https://www.epa.gov/greeningepa/greenhouse-gases-epa> ("Scope 1 GHG emissions are direct emissions from sources that are owned or controlled by the [entity]. Scope 1 includes on-site fossil fuel combustion and fleet fuel consumption. Scope 2 GHG emissions are indirect emissions from sources that are owned or controlled by the [entity]. Scope 2 includes emissions that result from the generation of electricity, heat or steam purchased by the [entity] from a utility provider."); The Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard*, <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> (defining scope 2 emissions as "[e]lectricity indirect GHG emissions. Companies report the emissions from the generation of purchased electricity that is consumed in its owned or controlled equipment or operations as scope 2. Scope 2 emissions are a special category of indirect emissions.").

emissions.<sup>6</sup> As Ecology is aware, SEPA provides agencies with the authority to impose mitigation requirements on project proponents seeking government approvals in appropriate circumstances. SEPA does not give agencies authority to impose mitigation requirements on other third-party entities in a product's supply chain. Project proponents, like the Cherry Point Refinery, may have opportunities to select less carbon-intensive product suppliers (if available), but do not have the ability to control third-parties' emissions. Accordingly, while bp believes that SEPA and the GAP Rule can and should play an important role in the transition to a net zero economy, SEPA's narrowly-tailored, project-specific environmental review and mitigation regime is not an efficient or appropriate tool for addressing scope 3 GHG emissions. The GAP Rule should be complemented by other tools better designed to address scope 3 emissions. For this reason, bp continues to support efforts by the Legislature to expand the tools available to Ecology and other agencies to pursue reductions in overall GHG emissions.

- Finally, in determining the scope of any mitigation requirement, Ecology should give careful consideration to the Washington Legislature's direction to "minimize the potential to export pollution, jobs, and economic opportunities." *See* RCW 70A.45.005(3)(b). In the interest of developing a defensible GAP Rule, Ecology should also carefully consider potential statutory and constitutional constraints on its authority when establishing mitigation requirements, including, for example, potential limitations on Ecology's ability to require mitigation for GHG emissions not resulting from the proposed project,<sup>7</sup> constraints on state and local agencies' authority to regulate extraterritorial activities or to discriminate against interstate commerce,<sup>8</sup> and requirements to avoid imposing duplicative mitigation requirements.<sup>9</sup>

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<sup>6</sup> For more information on bp's carbon pricing principles, *see* <https://www.bp.com/en/global/corporate/sustainability/climate-change/our-role-in-the-energy-transition/our-carbon-pricing-principles.html>.

<sup>7</sup> WAC 197-11-660(1)(d) ("Responsibility for mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal."); *see also* WAC 197-11-060(4)(e) (acknowledging that the range of impacts analyzed may be wider than those mitigated depending on the extent to which the "adverse impacts are attributable to the applicant's proposal, and the capability of applicants or agencies to control the impacts in each situation").

<sup>8</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>9</sup> WAC 197-11-660(1)(e) (requiring consideration of whether local, state, or federal requirements and enforcement would mitigate an identified significant impact); *see generally* Richard L. Settle, *The Washington State Environmental Policy Act, A Legal and Policy Analysis*, § 18.01[2][e] (2020 Ed.) ("Even if SEPA authorized redundant mitigation, it probably would violate constitutional substantive due process or RCW 82.02.020, as interpreted by the Washington courts. Moreover, duplicative mitigation exactions may be

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

Project proponents should be given the flexibility to choose, in consultation with the agency, the appropriate strategy to implement mitigation. For projects with significant GHG emissions requiring preparation of an EIS, it may be appropriate to establish a mitigation plan implemented over the life-span of the project that is based on *actual* GHG emissions reported annually—as Ecology proposed.<sup>10</sup> However, for projects with fewer GHG emissions, a mitigation plan with annual reporting could impose significant administrative burdens for project proponents and agencies. Instead, it may be appropriate to allow for a project proponent to satisfy mitigation obligations through a one-time mitigation project or payment based on *projected* GHG emissions for the lifetime of the project (i.e., advance mitigation).

Where agencies and project proponents agree to mitigation through a plan requiring reporting of actual emissions, tracking and verification of emissions subject to mitigation should be based on the facility's mandatory annual GHG emissions reporting requirements under WAC 173-441 and 40 C.F.R. Part 98 for scope 1 emissions. For scope 2 emissions, including potentially those from purchased or acquired electricity, Ecology should either establish its own standardized methodologies for reporting or refer to other accounting protocols.<sup>11</sup> As discussed in the following question, integration with these regulatory frameworks will ensure GHG emissions calculation protocols incorporate best-available science as determined by Ecology or the U.S. Environmental Protection Agency.

## 3. How would changes to calculation methods or emissions be handled?

Where mitigation is achieved through a plan with annual reporting of actual emissions, regulatory changes to applicable GHG emissions reporting requirements should presumptively be incorporated into a facility's calculation of emissions subject to mitigation (unless shown to be inappropriate). With respect to potential changes in calculation methodologies relevant to understanding a mitigation project's GHG emissions benefits (i.e., net reductions), Ecology should

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regulatory takings, because they would not be reasonably necessary as a direct result of the proposed action or roughly proportional to the impacts of the proposed project.”).

<sup>10</sup> State of Wash. Dep't of Ecology, *Greenhouse Gas Assessment for Projects (GAP) Rulemaking: October 2020 Webinar* 8-9, 14, <https://ecology.wa.gov/DOE/files/e2/e2536da1-c5bc-4039-9d98-aca482a569f9.pdf>.

<sup>11</sup> See, e.g., The Greenhouse Gas Protocol, *GHG Protocol Scope 2 Guidance*, [https://ghgprotocol.org/scope\\_2\\_guidance](https://ghgprotocol.org/scope_2_guidance).

encourage or require parties to rely on internationally-recognized GHG emissions accounting methodologies such as the GHG Protocol for Project Accounting.<sup>12</sup>

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

For purposes of calculating potential GHG emissions in the GAP Rule applicability and environmental assessment processes, bp recommends Ecology require calculation consistent with existing regulatory requirements under the Clean Air Act and Ecology's Prevention of Significant Deterioration regulations set forth at WAC 173-400-700.

With respect to a mitigation plan for a project at an existing facility, parties should use best practices for GHG emissions accounting to estimate the GHG emissions subject to mitigation consistent with mandatory GHG emissions reporting requirements established under state and federal law. For example, if in year X, an existing refinery completes two new projects, one that is subject to the GAP Rule's mitigation requirements, and one that is not (because its emissions do not exceed the applicable threshold), it should use best practices to calculate the increased GHG emissions associated with the project subject to the mitigation requirements, while excluding impacts associated with the non-covered project.

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

bp applauds the Washington State Legislature for setting the ambitious goals of reducing statewide GHG emissions to 5 million metric tons and achieving net zero by 2050. We believe that these legislative goals may be relevant to how mitigation projects are prioritized (see response to Question 7, below).<sup>13</sup> We also believe that the GAP Rule should be drafted to ensure integration with other programs established by the Washington Legislature and Ecology that are necessary to achieve state-wide GHG emissions reduction goals.

However, consistent with court precedents, we do not believe that the *state-wide* GHG emissions reduction goals alone should be used to establish *project-specific* mitigation requirements, including by, for example, establishing significance

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<sup>12</sup> See, e.g., The Greenhouse Gas Protocol, *The GHG Protocol for Project Accounting*, [https://ghgprotocol.org/sites/default/files/standards/ghg\\_project\\_accounting.pdf](https://ghgprotocol.org/sites/default/files/standards/ghg_project_accounting.pdf).

<sup>13</sup> See, e.g., *PT Air Watchers v. State, Dep't of Ecology*, 179 Wash. 2d 919, 928 (2014) (Legislature's preference for the burning of woody biomass over other fossil fuels as expressed at RCW 70.235.020(3), recodified to RCW 70A.45.020(3), was a "legitimate reference point" for a SEPA lead agency's consideration when reaching a determination of non-significance).



thresholds.<sup>14</sup> As Ecology has recently stated, RCW 70.235 (recodified at RCW 70A.45) “does not specify regulatory requirements to reduce or limit GHG emissions that are applicable to *individual projects* (including the proposed project), industries, or sectors.”<sup>15</sup>

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

Consistent with our response to Question 1, as a general matter, a mitigation plan should focus on GHG emissions from sources owned or controlled by the project proponent (i.e., scope 1 and scope 2 emissions). However, it bears reiterating the key principle that the GAP Rule must be designed so that it encourages, rather than discourages, the transition to a low carbon future. Requiring mitigation for projects with substantial net GHG emissions *reductions* would potentially disincentive such projects and/or make them cost-prohibitive, which would stymie the State’s GHG emissions reduction goals.

On the other hand, bp acknowledges that net emissions analyses, particularly for large, new greenfield projects, have the potential to be speculative. In addition, global emissions reductions anticipated at the environmental assessment phase may not come to fruition until many years later. Accordingly, where net GHG emissions reductions can be projected with reasonable certainty, Ecology may wish to require the project proponent to substantiate the claimed reductions through periodic reporting.

### How Should the Emissions be Mitigated?

**7. How should mitigation projects be prioritized?**

As SEPA is intended to address all environmental impacts, we agree with Ecology’s proposal that the GAP Rule should establish a general preference for

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<sup>14</sup> See *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wash. App. 494, 504 (2013) (RCW 70.235.020 does not require project-specific pro-rata emission reductions in each part of the state that are proportionate to the state-wide emission reduction goals); see also, e.g., *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 218-27 (2015), as modified on denial of reh'g (Feb. 17, 2016) (California state-wide emissions reduction goals at AB 32 could be used to establish a threshold for GHG emissions significance under the California Environmental Quality Act, but determinations of consistency with those reduction goals must be supported by substantial evidence through project-specific adaptations).

<sup>15</sup> State of Wash. Dep't of Ecology, Kalama Manufacturing and Marine Export Facility Draft Second Supplemental Environmental Impact Statement (Sept. 2020), p. 24 <https://fortress.wa.gov/ecy/publications/documents/2006011.pdf> (emphasis added).

mitigation projects that have co-benefits.<sup>16</sup> In addition to benefitting tribal communities, communities affected by climate change, and environmental justice communities, priority could also be given to projects that reduce other air pollutants that have a direct impact on their surrounding community or enhance ecological systems. Prioritization of projects with co-benefits would be consistent with the Legislature's direction in establishing state-wide GHG reduction goals.<sup>17</sup>

Separate from directly funding mitigation projects or purchasing carbon offsets from carbon markets, we recommend that Ecology give priority to on-site mitigation measures that reduce facility emissions. As discussed in our previous comment letter, the GAP Rule should give appropriate credit for on-site GHG emissions reduction measures (e.g., changes to facility operations, including reduced utilization).

To the extent that Ecology intends to prioritize local mitigation projects, we recommend that Ecology establish criteria to ensure that projects are "reasonable and capable of being accomplished."<sup>18</sup> For example, the GAP Rule should ensure that local mitigation projects are comparable in cost to mitigation projects that would occur outside of the local jurisdiction or State of Washington.

## **8. Are there types of mitigation projects which should or should not be included?**

Given the global nature of climate change, the GAP Rule should allow a wide range of local, regional, national, and international projects--as proposed by Ecology.<sup>19</sup> All mitigation projects should meet the standards for mitigation established in the existing Ecology SEPA Rules and those established in the GAP

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<sup>16</sup> State of Wash. Dep't of Ecology, *Greenhouse Gas Assessment for Projects (GAP) Rulemaking: October 2020 Webinar 12*, <https://ecology.wa.gov/DOE/files/e2/e2536da1-c5bc-4039-9d98-aca482a569f9.pdf>.

<sup>17</sup> See RCW 70A.45.020, Intent—2020 c 79 ("In strengthening Washington's statutory greenhouse gas emission limits, it is the intent of the legislature to pursue these limits in a way that . . . [r]educes the burdens and creates benefits for vulnerable populations and highly impacted communities with long-term and short-term outcomes for public health, economic well-being, local environments, and community resiliency that benefits all Washington residents.").

<sup>18</sup> WAC 197-11-660(1)(c); see also WAC 197-11-440(6)(c)(iv) (noting that an Environmental Impact Statement may include discussion of the "economic practicability" of mitigation measures).

<sup>19</sup> State of Wash. Dep't of Ecology, *Greenhouse Gas Assessment for Projects (GAP) Rulemaking: October 2020 Webinar 12*, <https://ecology.wa.gov/DOE/files/e2/e2536da1-c5bc-4039-9d98-aca482a569f9.pdf>. See generally *Ctr. for Biological Diversity*, 62 Cal. 4th at 204 ("[T]he global scope of climate change and the fact that carbon dioxide and other greenhouse gases, once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local. For many air pollutants, the significance of their environmental impact may depend greatly on *where* they are emitted; for greenhouse gases, it does not.")

Rule, and follow internationally-recognized accounting and verification protocols. Regarding those standards, we support Ecology establishing requirements that mitigation projects and offsets be real, permanent, enforceable, verifiable, and additional—with appropriate definitions of each of those terms.

Ecology should include as potential mitigation carbon capture and sequestration (“CCS”) projects that adhere to regulatory requirements for permanence, one example of which is found in the regulations promulgated by the California Air Resources Board under the Low Carbon Fuel Standard.<sup>20</sup>

## Miscellaneous

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

Given the global nature of climate change, we do not believe there needs to be variation in the types of GHG mitigation projects associated with different types of projects or facilities, *per se*. At the same time, bp recognizes that GHG mitigation requirements should be flexible and capable of being tailored to particular circumstances. As noted in our previous comment letter, we recommend that Ecology carefully consider the potential for duplicative mitigation imposed on facilities and the linear infrastructure supporting those facilities.

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<sup>20</sup> See 17 C.C.R. § 95490 (incorporating by reference the California Air Resources Board Carbon Capture and Sequestration Protocol under the Low Carbon Fuel Standard (Aug. 13, 2018)).