EARTHJUSTICE

December 1, 2020

Via Public Comment Portal, ecology.wa.gov
Fran Sant
Rulemaking Lead, GAP Rule
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

RE: Comments on Chapter 173-445 WAC, Greenhouse Gas Assessment for Projects (GAP) Rule.

Dear Ms. Sant:

Thank you for the opportunity to participate in the development of Ecology's Greenhouse Gas Assessment for Projects (GAP) Rulemaking. The GAP Rule will govern how large industrial and fossil fuel projects assess and mitigate their greenhouse gas emissions under the State Environmental Policy Act (SEPA). This comment letter focuses on mitigation requirements.[1]

SEPA requires that permitting officials include mitigation proposals in assessments of major projects, and authorizes permitting officials to make mitigation measures a mandatory condition of approval. RCW 43.21C.031; RCW 43.21C.060. Ecology is tasked with issuing rules that implement SEPA, RCW 43.21C.110, including rules that govern the mitigation standards and requirements for the large fossil fuel and industrial projects covered by the GAP Rule.

Washington, and every other jurisdiction, must reduce our greenhouse gas emissions dramatically, and as quickly as possible, to avoid climate catastrophe. The large fossil fuel and industrial projects covered by the GAP Rule would dramatically increase greenhouse gas emissions in Washington and beyond. Most would also increase emissions of other pollutants that harm human health, often in communities that already bear a disproportionate share of pollution. These projects must be subject to the most complete and rigorous mitigation requirements to ensure that they lead to reductions in both greenhouse gas emissions and environmental inequities.

We cannot allow our carbon footprint to increase at this critical moment. And we cannot equitably address our climate crisis without addressing in tandem existing health disparities and other inequities that our largest climate polluters cause.

[1] Many of the undersigned groups previously submitted a comment letter, dated October 14, 2020, that addressed other topics in the GAP Rule including assessment methods.

NORTHWEST OFFICE 810 Third Avenue, Suite 610 SEATTLE, WA 98104

T: 206.343.7340 F: 206.343.1526 NWOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

I. ENVIRONMENTAL JUSTICE AS THE CENTRAL PRINCIPLE

Mitigation for the GAP rule should center environmental justice to ensure that those that will be most harmed by climate change, receive the benefit of efforts to mitigate GHG emissions. Failing to center environmental justice will only further exacerbate existing inequity, and could saddle highly impacted communities with even more pollution.

The Environmental Justice Taskforce defined the term "environmental justice" as:

> "The fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. This includes using an intersectional lens to address disproportionate environmental and health impacts by prioritizing highly impacted populations, equitably distributing resources and benefits, and eliminating harm."[2]

The Department of Ecology should center environmental justice in the mitigation requirement by:

(1) Ensuring maximum co-pollutant emissions reductions, and mitigating GHG impacts at the facility;
(2) Documenting cumulative impacts of the project on adjacent communities;
(3) Prioritizing highly impacted communities for GHG mitigation projects; and
(4) Involving local and affected communities in developing mitigation projects.

A. Disproportionate burdens unfairly harm the most vulnerable.

As poignantly stated by Governor Jay Inslee, "climate change and pollution disproportionately harm low-income communities and communities of color—and are major contributors to ongoing economic and racial inequality."[3] Climate change will likely worsen existing health issues for Native American and Alaska Native communities due to the loss of traditional foods and practices, climate-induced displacement, storm damage and flooding, smoke inhalation, decreased food security, and damaged water and sanitation systems. [4]

---

[2] Environmental Justice Taskforce, *Recommendations for Prioritizing EJ in Washington State Government*, at 35 (Oct. 2020).
[3] J. Inslee, Twitter.com, (Jul. 29, 2019), https://twitter.com/JayInslee/status/1155850308678909955, last accessed on Nov. 17, 2020.
[4] National Climate Assessment, Chap. 14 (2018), https://nca2018.globalchange.gov/chapter/14/.

Communities disproportionately burdened by poor environmental quality will also face increased climate risks. [5]

Here in the Pacific Northwest low-income populations in urban and rural environments, as well as tribes, and farmworkers are among those that have higher exposure to climate impacts, and are less able to adapt.[6] Climate change can affect the health, well-being, and livelihoods of these communities directly by increasing the risk of acute health impacts, as well as chronic impacts such as food insecurity.[7]

People of color in Washington State already experience disproportionately higher exposures to air pollution than white people.[8] Airborne toxic chemicals, including common co-pollutants emitted at industrial and fossil fuel facilities, causes a host of health problems. These environmental hazards and polluting facilities are disproportionately located in communities of color and low-income communities.[9] Air pollution that causes damage to respiratory systems can also increase the risk of death if a person contracts the coronavirus.[10] In Washington, census tracts with greater environmental health disparities also have greater percentages of BIPOC communities—an impact that can lower life expectancy by almost six years.[11]

Further, climate change will worsen air quality, an impact that will disproportionately impacts communities of color. Climate change will worsen ozone health impacts by making meteorological conditions increasingly conducive to forming ozone over most of the United States—likely causing an increase in premature death, hospital visits, lost school days and acute respiratory system illnesses.[12] Wildfires will emit fine particles and ozone precursors that again will increase the risk of premature death, and adverse chronic and acute cardiovascular and

---

[5] National Climate Assessment, "Health," Chap. 14 (2018), https://nca2018.globalchange.gov/chapter/14/.
[6] National Climate Assessment, "Northwest," Chap. 24 (2018), https://nca2018.globalchange.gov/chapter/24/.
[7] *Id*.
[8] J. Colon, "The Disproportionate Burden of Fossil Fuel Air Pollution on Communities of Color in Washington," Front & Centered (Jun. 15, 2016), https://frontandcentered.org/wp-content/uploads/2016/08/Fossil-Fuel-Pollution-Communities-of-Color.pdf.
[9] Sheats, N., *Achieving Emissions Reductions For Environmental Justice Communities Through Climate Change Mitigation Policy*, 41(2). 2017. William & Mary Envt'l Law & Policy Review 377 (Winter 2017).
[10] S. Reilly, "Air pollution linked to 9% higher virus death rate," E&E News, Sep. 11, 2020, https://www.eenews.net/stories/1063713515#:~:text=The%20study%20links%20a%20modest,the%20journal%20Environmental%20Research%20Letters.
[11] Environmental Justice Taskforce, *Recommendations for Prioritizing EJ in Washington State Government*, at 15 (Oct. 2020).
[12] N. Fann, et al., *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*, "Chapter 3: Air Quality Impacts," U.S. Global Change Research Program (2016), https://health2016.globalchange.gov/low/ClimateHealth2016_03_Air_Quality_small.pdf.

respiratory health problems.[13] These wildfires will particularly affect the health of outdoor workers including farmworkers and construction workers, who also will deal with the impact of extreme heat as weather warms.[14] Extreme heat will also create heat islands in poorer urban neighborhoods that have less street tree canopy cover than more affluent ones.[15] Flood risk will affect coastal communities, for example, the Quinault Indian Nation village of Toholah is already planning on relocating due to rising tides and river flooding.[16] Large portions of the culturally diverse neighborhoods of South Park and Georgetown in Seattle are also at risk of flooding.

Further, climate change will increase the levels of airborne allergens, and cause associated increases in asthma and other allergic illnesses.[17] Asthma is reaching epidemic proportions among children in the United States, and particularly among black children.[18] Here in Washington, Native Americans and Alaska Natives have higher prevalence of asthma than non-Hispanic whites, and have significantly higher rates of death.[19] Asthma hospitalization rates are higher in urban areas than rural areas, and people with lower income and fewer years of school are more likely to have asthma.[20]

B. <u>What not to do:</u>

Climate change policies that ignore environmental justice exacerbate environmental inequities and health harms. Policies that allow a facility to mitigate for local GHG emissions by purchasing mitigation credits elsewhere, "do[] not ensure emissions reductions at any specific location, [and] it can even allow increases in emissions at some locations."[21] For example, in a high profile policy, California adopted a plan for reducing greenhouse gas emissions that ignored

---

[13] *Id*.
[14] H. Roop, et al., *An Unfair Share: Exploring the Disproportionate Risks from Climate Change Facing Washington State Communities*, University of Washington Climate Impacts Group (2018), https://frontandcentered.org/wp-content/uploads/2018/08/AnUnfairShare_WashingtonState_August2018.pdf.
[15] Got Green, Puget Sound Sage, *Our People, Our Planet, Our Power*, at 28 (March 2016), https://frontandcentered.org/wp-content/uploads/2016/06/OurPeopleOurPlanetOurPower.pdf.
[16] U.S. Envt'l Prot. Agency, "Quinault Indian Nation Plans for Relocation," *Climate Change Adaptation Resource Center*, https://www.epa.gov/arc-x/quinault-indian-nation-plans-relocation.
[17] *Id*.
[18] C. Gammon, "Pollution, Poverty and People of Color: Asthma and the Inner City," *Scientific American*, Jun. 20, 2012, https://www.scientificamerican.com/article/pollution-poverty-people-color-asthma-inner-city/.
[19] Wash. Dept. of Health, *The Burden of Asthma in Washington State*, at iii (Feb. 2013), https://www.doh.wa.gov/Portals/1/Documents/Pubs/345-240-AsthmaBurdenRept13.pdf.
[20] *Id.*
[21] Sheats, N., *Achieving Emissions Reductions For Environmental Justice Communities Through Climate Change Mitigation Policy*, 41(2). 2017. William & Mary Envt'l Law & Policy Review 377 (Winter 2017).

equity concerns of environmental justice communities. Recent studies show that ignoring equity had the effect of allowing an increase in fossil fuel production, greenhouse gas emissions, and air pollution emissions in low-income communities and communities of color.[22] The highest GHG emitting facilities in California, including petrochemical facilities and cement factories, are predominantly located in communities of color, and 52% of these top-emitting facilities actually increased their emissions under California's policy.[23] The majority of facilities had higher annual average local GHG emissions after implementation of the policy, as compared to two years prior to implementation.[24] This local increase in GHG emissions was accompanied by an increase in hazardous air co-pollutants including PM2.5, NOx, SOx, and VOCs.[25] This is because facilities found it cheaper to purchase credits to offset GHG emissions, than to adopt technologies that reduced GHG emissions at the facilities.[26]

The health benefits of reducing greenhouse gas emissions could result in economic benefits of hundreds of billions of dollars each year by the end of the century.[27] Yet, because California's policy failed to center environmental justice in its approach, local communities did not gain these health benefits—and in fact suffer worsened air quality. This is because "[l]arge GHG emitters that might be of most public health concern were the most likely to use offset projects to meet their obligations under the cap-and-trade program."[28] The California example shows that failing to set strong standards for mitigation that center environmental justice and prioritize reducing local emissions first, actually worsens pollution hotspots.

C. Centering environmental justice and getting it right:

Our coalition recommends the following actions to center environmental justice in the GAP rulemaking:

---

[22] L. Cushing, et al., *A Preliminary Environmental Equity Assessment of California's Cap-and-Trade Program*, USC Dornsife Program for Environmental and Regional Equity, (2016), https://dornsife.usc.edu/assets/sites/242/docs/Climate_Equity_Brief_CA_Cap_and_Trade_Sept2016_FINAL2.pdf.
[23] L. Cushing, "Carbon trading, co-pollutants, and environmental equity: Evidence from California's cap-and-trade program (2011-2015)," PLOS Medicine 15(7), (2018), https://doi.org/10.1371/journal.pmed.1002604.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] National Climate Assessment, Chap. 14 (2018), https://nca2018.globalchange.gov/chapter/14/.
[28] L. Cushing, et al., *A Preliminary Environmental Equity Assessment of California's Cap-and-Trade Program*, USC Dornsife Program for Environmental and Regional Equity, (2016), https://dornsife.usc.edu/assets/sites/242/docs/Climate_Equity_Brief_CA_Cap_and_Trade_Sept2016_FINAL2.pdf.

*Recommendation 1***:** Environmental justice must be at the center of any project's mitigation plan.[29] Addressing GHG emissions while deepening environmental disparities is unacceptable. For this reason, mitigation should first look at site-specific and local measures to reduce both greenhouse gasses and co-pollutants to the maximum extent possible. The most direct and simple way to achieve emissions reductions in environmental justice communities is to force a polluting facility to meet a reduced GHG emissions rate without the use of emissions credits, and thus contribute to an absolute reduction in emissions.[30] Thus, before off-site or non-local mitigation is even considered, the project should first maximally reduce GHGs and co-pollutant emissions from the facility.

Recommendation 2: To ensure that mitigation addresses impacts from the project and reduces existing disparities, the mitigation analysis will have to include a cumulative impact analyses that identifies environmental health risk as a factor of environmental burdens and vulnerable populations.[31] The Washington Environmental Health Disparity Map is one example.[32]

Recommendation 3: Mitigation projects should focus first on communities directly impacted by co-pollutants emitted by the project, and reduce GHG emissions in those communities. If there are no local opportunities to reduce emissions, then mitigation should occur in **highly impacted communities**. "Highly impacted community" is defined in the Washington Clean Energy Transformation Act as "a community designated by the department of health based on cumulative impact analyses in RCW 19.405.140 or a community located in census tracts that are fully or partially on 'Indian country' as defined in 18 U.S.C. Sec. 1151."[33] Mitigation projects should be developed in coordination with the community.

Recommendation 4: Project proponents must develop mitigation plans in partnership with impacted communities. The Environmental Justice Taskforce recently issued a report to the legislature and the Governor that included recommendations for addressing structural barriers to community engagement.[34] The Department of Ecology should look to the extensive

---

[29] Got Green, Puget Sound Sage, *Our People, Our Planet, Our Power*, at 28 (March 2016), https://frontandcentered.org/wp-content/uploads/2016/06/OurPeopleOurPlanetOurPower.pdf.
[30] *See* Sheats, N., *Achieving Emissions Reductions For Environmental Justice Communities Through Climate Change Mitigation Policy*, 41(2). 2017. William & Mary Envt'l Law & Policy Review 377 (Winter 2017).
[31] Front & Centered, "Washington's Environmental Task Force Considering Initial Recommendations," https://frontandcentered.org/washingtons-environmental-justice-task-force-considering-initial-recommendations/.
[32] Washington Environmental Health Disparities Map, https://www.doh.wa.gov/DataandStatisticalReports/WashingtonTrackingNetworkWTN/InformationbyLocation/WashingtonEnvironmentalHealthDisparitiesMap.
[33] RCW 19.405.020(23).
[34] Environmental Justice Taskforce, *Recommendations for Prioritizing EJ in Washington State Government*, at 10-11, 61-67 (Oct. 2020).

recommendations in this report and develop a community engagement plan that can be used for collaboratively developing mitigation projects.

II. PROJECTS MUST MITIGATE BELOW ZERO EMISSIONS TO ACHIEVE REDUCTIONS CONSISTENT WITH A CLIMATE TEST

The GAP Rule should require that each environmental assessment of a proposed project include a climate test analysis.[35] This climate test analysis must require the use of the best available science in comparing project emissions to necessary reductions. Under this test, lifecycle emissions from each project will be compared to the reduction goals that are most relevant based on the specific source of emissions.

This climate test should form the basis for a project's mitigation obligations under the GAP Rule. Any major new source of greenhouse gas emissions, such as GAP Rule projects, must mitigate for all of its direct and indirect greenhouse gas emissions *and* its fair share of the reductions we need. The degree of additional reduction that each project must achieve will depend on the best available science for each project and sector. Washington's greenhouse gas emission reduction targets will likely be one of the sources that constitutes the best available science for in-state emissions. Where the best available science demonstrates that Washington's targets do not go far enough for a particular project or sector, a project must achieve greater reductions than those envisioned by the targets.

Ecology has proposed to require projects to mitigate their emissions and no more. This would preserve the status quo, and there is broad scientific consensus that maintaining our current level of emissions will lead to catastrophic warming. Every new major project covered by the GAP Rule must contribute to the dramatic reductions we need.

III. PROJECTS MUST MINIMIZE EMISSIONS FIRST AND MITIGATE SECOND

The GAP Rule should require project proponents to minimize emissions through changes to the project's configuration first, and then to mitigate for remaining emissions second. Project proponents must prioritize measures that minimize emissions of other pollutants that harm human health and the environment, as discussed above in our recommendations on equity. This means that measures such as cleaner technology must be included in the first step, minimizing emissions through changes to the project's configuration, and the project must then include mitigation for the emissions associated with the cleanest version of the project.

Additionally, mitigation measures should not be included in the base calculation of emissions from the facility. Mitigation should be considered separately, and after calculating greenhouse gas emissions from the project.

---

[35] Our prior comment letter, dated October 14, 2020, describes the proposed climate test analysis in greater detail.

IV. ECOLOGY MUST REQUIRE COMPLETE MITIGATION

A. Projects must mitigate for all emissions, including upstream and downstream emissions that occur outside of Washington.

Ecology must require projects to mitigate all of their greenhouse gas emissions, including upstream and downstream emissions. Upstream and downstream emissions are caused by the project; the fact that they do not come out of the facility's smokestack does not change their contribution to climate change. Especially for linear projects or export projects, upstream and downstream emissions can dwarf emissions at the facility itself (if there even is a facility). Omitting these emissions from the mitigation requirement would turn a blind eye to their real-world consequences and the project's role in causing them. Exempting any portion of a project's emissions from the mitigation requirement is incompatible with a sustainable climate future.

Similarly, projects must mitigate all of their emissions regardless of whether these emissions occur within Washington or elsewhere. Greenhouse gas emissions lead to warming in Washington and the rest world, regardless of where they are emitted. There is no principled scientific basis for exempting out of state emissions. Washington must take responsibility for all emissions caused by projects permitted here, regardless of where those emissions occur.

B. The GAP Rule must set standards for tracking and adjusting emissions.

Ecology has proposed to require mitigation based on actual emissions, which means the mitigation requirement may be adjusted over the life of the project if emissions increase or decrease. The standards for tracking and adjusting a project's emissions should be established as part of the GAP Rule to ensure consistency and rigorous standards. These tracking and adjustment standards should not be determined by the permitting authority on a case by case basis. Additionally, these standards must incorporate conservative assumptions whenever there is any scientific uncertainty.

The GAP Rule should also incorporate a requirement that if a project's actual emissions increase beyond a certain threshold – for example, a five percent increase over emissions anticipated in the SEPA document – the project must reopen the permit to analyze and impose new requirements, including changes to the project configuration and/or new mitigation requirements. This trigger to reopen the permit must include increases in upstream and downstream emissions.

C. Projects must mitigate all gross emissions.

Ecology must base a project's mitigation requirement on its gross emissions, or the actual direct and indirect emissions attributable to a project. Net emission theories based on global market performance over many decades have no place in the GAP Rule because they are inherently too speculative. Ecology must ensure that a project's emissions are actually mitigated, rather than hoping that reductions will happen somewhere else as a result of global market dynamics.

While net emission theories should not form any part of the analysis under the GAP Rule, basing the mitigation requirement on net emission theories would be particularly problematic. Ecology has proposed to base a project's mitigation requirement on actual emissions, as opposed to potential emissions that will form the basis for the forward-looking SEPA analysis. If a project's actual emissions are different than forecast, the mitigation obligation would change as well.

If the mitigation obligation is based on net emission theories, this means that the project proponent will have to redo its global economic analysis at regular intervals (presumably annually) to demonstrate whether the project's net emissions are more or less than were forecast. Since predictions about the global market are subject to wide uncertainty bands, these revised calculations of actual emissions could lead to enormous and unpredictable swings in a project's mitigation obligations. It could also lead to the need to fully reopen a project's permit regularly when these swings exceed the trigger for reopening.

Avoiding this uncertainty by allowing project proponents to rest on their initial net emissions forecast when it proves to be wildly inaccurate would be even worse than the cost and uncertainty inherent in routinely updating a global market analysis. If the mitigation obligation is based on a net emissions forecast that turns out to be wrong, the only way to prevent the project from contributing to catastrophic climate change is to change the mitigation obligation.

Ecology should base a project's mitigation obligation on its direct and indirect gross emissions instead of speculative global forecasts.

D. Modifications

Modifications of projects covered by the GAP Rule must mitigate for any potential increase in emissions enabled by the modification, including upstream and downstream emission increases. Because modifications can enable significant increases in a project's capacity and emissions, increased emissions following a modification should presumptively be attributed to the modification and be included in the mitigation obligation. These increases must be attributed to the modification regardless of whether they were included in the project application, were the foreseeable result of changes in use, and/or were expansions of the intended use of the modification.

V. MITIGATION PROJECTS MUST PRIORITIZE EQUITY, OCCUR IN WASHINGTON, AND BE SUBJECT TO RIGOROUS STANDARDS

As discussed above, equity must be the central consideration in developing mitigation proposals. Mitigation projects must also be subject to the most rigorous criteria to ensure that emission reductions are real, permanent, verifiable, enforceable, and additional.

Mitigation projects should also be subject to the following additional criteria.

A. All mitigation must occur in Washington

Ecology should require that all mitigation projects under the GAP Rule occur in Washington. Mitigation must benefit impacted communities in Washington, and out of state projects will not meet this foundational criteria. Additionally, Ecology must ensure that all mitigation projects achieve emission reductions that are real, permanent, verifiable, enforceable, and additional, and it will be far more challenging for Ecology to monitor and verify projects that occur elsewhere.

B. Mitigation projects must provide good jobs

Mitigation projects must comply with the prevailing wage standards set by the Washington State Department of Labor and Industries.

C. Mitigation for energy sector projects should achieve emission decreases in the energy sector, unless a community-led process prioritizes projects in other sectors.

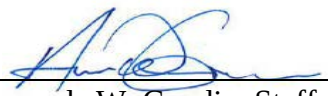
Fossil fuel and other energy sector projects covered by the GAP Rule must presumptively achieve emission reductions in the energy sector.

The exception to this requirement should be narrow. Ecology should enact robust standards requiring project proponents to solicit community feedback, as discussed above. If a community-led process prioritizes mitigation projects, those projects should receive priority regardless of sector. The standards for community engagement must include significant safeguards to ensure that communities understand the full range of options and are not pressured or misled by project proponents to select out of sector mitigation that the project proponent prefers. Absent a community-led prioritization for out of sector projects, all mitigation for energy projects should occur in the energy sector.

* * *

Thank you again for the opportunity to participate in this critical rulemaking. Ensuring complete and equitable mitigation for large fossil fuel and industrial projects is critical to preventing catastrophic climate change and decreasing environmental inequities. We look forward to participating in future stages of this rulemaking.

Sincerely,



Amanda W. Goodin, Staff Attorney
Jan E. Hasselman, Staff Attorney
Jaimini Parekh, Senior Associate Attorney
Earthjustice

Deric Gruen
Co-Director
Front and Centered

Lovel Pratt
Marine Protection and Policy Director
Friends of the San Juans

Stephanie Hillman
Sr. Campaign Representative
Sierra Club

Rebecca Ponzio
Climate and Fossil Fuel Program Director
Washington Environmental Council/Washington Conservation Voters

Dan Serres
Conservation Director
Columbia Riverkeeper

David Perk
Leadership Team
350 Seattle

Mike Petersen
Executive Director
The Lands Council

Michael Lang
Conservation Director
Friends of the Columbia Gorge