March 31, 2021

Fran Sant
Rulemaking Lead
Washington State Department of Ecology
PO Box 47600
Olympia, Washington 98504-7600

Re: Greenhouse Gas Assessment for Projects, Rulemaking Informal Comment Period

Dear Ms. Sant,

This letter is in response to the Washington State Department of Ecology's (Ecology's) request to receive input and feedback during the informal comment period for the Greenhouse Gas Assessment for Projects (GAP rule), Washington Administrative Code (WAC) 173-445, rulemaking process. We are submitting these comments on March 31, 2021, as noted in the "Public input & events listing" section of the Ecology website, but note that the discrepancies in posted deadlines has caused some confusion; we presume these comments will be considered timely with the March 31, 2021, 11:59 p.m. deadline. 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.

Based on the preliminary materials Ecology has provided, we are concerned that:

1. The use of such a rule to address greenhouse gas (GHG) emissions in Washington could be problematic in light of the decision in *Association of Washington Business v. Ecology*[1] wherein the State Supreme Court found that the Clean Air Rule (CAR) did not grant Ecology authority to regulate indirect GHG emissions of "nonemitters" or "indirect emitters" that import and distribute petroleum or natural gas products.
2. Placing the rule in Title 173 WAC creates confusion as to whether SEPA is the enabling authority. We do not believe application of this rule can extend into the SEPA regulations in order to displace the discretionary substantive SEPA authority of local lead agencies, particularly regarding but not limited to facilities that are not mandatory GHG reporters.

[1] *Association of Washington Business v. Ecology*, 195 Wn.2d 1 (2020).

3. The Legislature's state-wide GHG reduction targets do not support the imposition of the duty to attain state-wide reduction targets onto an individual proposal, and these targets cannot be the supporting authority for development and adoption of the GAP rule because Revised Code of Washington (RCW) 70A.45.020(1)(e) explicitly states that it does not provide any additional regulatory authority.
4. The draft framework materials provided by Ecology note multiple statutes as "supporting authority" for the rule; however, notwithstanding those statutes reflecting the same spirit as the GAP rule, it is unclear how the rulemaking is authorized by those similarly spirited statutes, none of which provide express authority to allow the GAP rule's imposition of mandatory mitigation or denial of projects that overrides the substantive authority of SEPA lead agencies.
5. It appears that the rule relies solely on Governor's Directive #19-18, but the directive does not provide statutory authority.
6. An economic impact assessment has not yet been provided for review, input, and comment from the public and interested stakeholders.

Given the issues with regulatory authority, we suggest that it may be useful to pursue a legislative path rather than a rulemaking path. Additionally, due to the onerous and costly nature of the analyses proposed in Ecology's preliminary materials, we are apprehensive of the potential for unfair financial and timeline burdens to be placed on both applicants and local jurisdictions. It will be impossible for smaller jurisdictions and many governmental entities with SEPA lead agency responsibility to comply with this rulemaking. With a legislative path, a fiscal analysis could be provided to better illuminate potential issues and solutions.

The preliminary comments in the remainder of this letter are organized around the three rulemaking documents for which Ecology requested input be provided. While the opportunity to comment is appreciated, the unanticipated release of additional preliminary rulemaking materials and the additional comment period did not provide adequate time for us to review and comment on the large quantity of policy and technical materials that were provided. Therefore, we were unable to adequately review all of the materials—in particular, the numerous and very lengthy protocols and reference materials linked within the documents. In addition, much of the technical information is difficult to understand for project applicants and SEPA lead agencies without a related technical background in GHG analysis, and we request that future materials from Ecology include the necessary explanatory support to make the review and commenting process less onerous.
We suggest that the principles in Washington Executive Order 05-03 on Plain Talk could help Ecology draft materials that use more clear language to help citizens, businesses, and local jurisdictions understand the proposed draft rule.

The comments below are based on our current understanding of the rulemaking focus and progress to date; our understanding can be improved and more nuanced comments can be provided with

explicit draft rule language, specific implementation procedures and requirements, and the requested economic impact assessment information. If the draft rule will be of a similar technical and detailed nature with many associated reference documents, we request that an expanded review and comment period of 90 days be provided, and request that the Plain Talk messages and support requested above be provided by Ecology to make the draft rule materials more accessible to those without a technical background in GHG analysis.

We also note that the timelines showing the agency's anticipated next steps for public input and involvement in the rulemaking were removed from Ecology's rulemaking website, then were returned with changed timelines and no specific dates for next steps. The information on the agency's website appears to change frequently without notifications. We request that advance notice be provided to the public and interested parties regarding when the draft rule (and/or additional preliminary rulemaking materials) will be published and when related comment period(s) are expected to occur. We understand that this is not a formal comment period on the proposed rulemaking, and we look forward to future opportunities to continue to learn about the proposed rule and provide comment.

Document 1 Ecology's GAP Rule Framework Document

Purpose of the GAP Rule

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. As noted above, the Legislature's GHG limits cannot be the supporting authority for development and adoption of the GAP rule because RCW 70A.45.020(1)(e) explicitly states that it does not provide any additional regulatory authority.

We are also concerned that for proposals that are not subject to the State's mandatory GHG reporting requirements, this rule would encroach upon the local SEPA lead agencies' discretion provided by SEPA.

The Framework Document describes the three sections of the GAP rule, including environmental assessment methods for GHG emissions to be used during the SEPA review process. It is unclear whether this is separate from application of the GAP rule, or if there would be a GAP rule process and a SEPA process.

Regulatory Context

Governor's Directive #19-18

As noted above, with no statutory authority, the rulemaking seems to rely exclusively (and improperly) on the Governor's Directive for authority.

RCW 43.21C, State Environmental Policy Act (SEPA), and WAC 197-11, SEPA Rules

This section of the Framework Document indicates that "the GAP rule does not exempt any projects from considering GHG emissions in an environmental review. For projects where the GAP rule does not apply, GHG emissions will still need to be considered, in a manner determined by the SEPA lead agency." This confusing and unclear guidance seems to imply that no project types are exempt, which appears to conflict with the language in the Rule Applicability section of the Framework Document.

This section also states, "This authority is supplemental to all other existing authority and may be utilized regardless of whether the proposal meets permit requirements", which would indicate that agencies could impose limitless requirements on project proponents. This assertion would be contrary to the Nollan-Dolan-Koontz[2] constitutional body of limitations for when conditions for development become a take of private property.

RCW 70A.45, Limiting GHG Emissions, and WAC 173-441, Reporting of Emissions of Greenhouse Gases

This section of the Framework Document indicates that "For projects where the GAP rule applies, the GHG reporting rule is also expected to apply for at least some portion of the project emissions" but "The GHG reporting rule does not require the reporting of life cycle emissions." Does this mean that in such cases the GHG reporting rule would only apply to on-site emissions, but the GAP rule would be applied more broadly? How will the calculations for off-site emissions, including upstream and downstream, be different than in WAC 173-441, and why? How will this impact mitigation requirements? What is the assessment for determining sufficiency for GHG analysis for projects not subject to the rule?

WAC 463-80, Carbon Dioxide Mitigation Program for Thermal Electric Generating Facilities

This section of the Framework Document indicates that "SEPA substantive authority would allow mitigation in addition to what is specifically required under WAC 463-80, provided the requirements for use of that authority in RCW 43.21C.060 are met." Contrary to the next statement that "Therefore, the GAP rule would be complementary to WAC 463-80," this text does not make the code sections

[2] See *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

complementary, but rather is an additive requirement and would override a local jurisdiction's substantive SEPA authority.

WAC 173-400, General Regulations for Air Pollution Sources

Similar to the prior section, this section of the Framework Document indicates that "SEPA substantive authority would allow mitigation in addition to what is specifically required in air permits under WAC 173-400, provided the requirements for use of that authority in RCW 43.21C.060 are met. Therefore, the GAP rule would be complementary to WAC 173-400." As noted above, this would also override local jurisdictions' substantive SEPA authority.

Definitions

We note that some of the definitions included in the Definitions section of the Framework Document were not included in Ecology's document of draft GAP rule language for the Definitions and Applicability sections. The following comments relate to definitions that are in this section of the Framework Document but that are not reflected in that second document:

- **Best Available Control Technologies (BACT):** The definition is unclear whether BACT would rely on USEPA and Washington Clean Air Act BACT determinations.
- **Downstream GHG emissions:** The definition references emissions that "may" occur, which is not compliant with SEPA. The definition is also very open-ended, and it is unclear how far a project proponent or SEPA lead agency would need to go in considering whether something is a "product" or "output" of a project.
- **Environmental impact statement (EIS):** The definition as presently written is not consistent with the existing statutory definition.
- **Life cycle:** Including "to final disposal" is vague, overly speculative, and hard to defend under SEPA's reasonably foreseeable requirement.
- **Life cycle analysis or life cycle assessment (LCA):** It is unclear whether "potential environmental impacts" would include other (non-GHG) life cycle environmental impacts.
- **Significant:** The definition as presently written is different than the more complete definition of "significant" in WAC 197-11-794. Why is this not consistent with WAC 197-11-794, and how is this reduced definition intended to work in the context of GHG emissions?

Rule Applicability

The Rule Applicability section of the Framework Document includes lists of project types to which the GAP rule would and would not apply, but this language was not carried forward to Ecology's document of draft GAP rule language for the Definitions and Applicability sections. It is unclear why, but we trust that the agency will ensure that it appears in the draft rule. Further, as noted in the Regulatory Context comments above, it appears that no project types could be exempted. If this is

not the agency's intent, then the Framework Document and the draft rule language need to be clarified.

If the list of exempt project types will be carried forward to the rule Applicability section, we note that the list currently states that the rule would not apply to "highway, road, or passenger rail projects." The *Seattle Times* recently reported on Ecology's own analyses that showed transportation emissions were the main reason Washington's GHG emissions rose in the most recent year for which totals were available.[3] Fossil fuel and industrial projects in Washington account for a very small amount of the State's GHG emissions, and most projects in Washington are a contributor at some level. It is troubling that the GAP rule purports to significantly advance reductions to the State's GHG inventory yet, in reality, it exempts the largest source of emissions. Without addressing the largest emitters, it appears that the State plans to rely on the denial of permits for projects within this smaller group of emitters to achieve its GHG reduction goals. Otherwise, those larger sources of emissions would not be exempted. Simply because individual projects may be easier to target for emissions does not justify the discrepancy in treatment of sources of GHG emissions. The State Supreme Court previously ruled against using the CAR to reach hard-to-regulate indirect emitters by targeting industrial facilities, and we have concerns that the proposed GAP rule is another way to place the burden of emissions regulation onto specific facilities instead of developing a fair system of regulation.

If these exemptions are carried forward into the rule, the linear/transportation exemption should be redefined to include all similar projects, including navigation, rail (passenger or otherwise), road, and multi-modal projects so that the rule is consistently applied across all transportation project types. Currently it appears only State projects would be exempted under the "highway, road, or passenger rail projects" exemption. If the exemption is not extended and 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 of its approach and be able to communicate clear guidance. The example scenarios depicted in Appendix B of the Framework Document are too simplified and do not provide sufficient, clear, and transparent information to understand how the rule will be specifically applied and implemented in other kinds of projects, including complicated linear transportation projects. 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 before a final rule is adopted. For example, if a project includes a new rail line, would GAP rule review need to include elements like mining of crushed rock, the energy used (fuels, electricity) for that mining, manufacturing of the rail and rail

[3] Bernton, Hal, 2021. "Washington state greenhouse gas emissions rose in 2018 due to transportation." *Seattle Times*. January 14, 2021. Available at: https://www.seattletimes.com/seattle-news/environment/washington-state-greenhouse-gas-emissions-rose-in-2018-due-to-transportation/.

ties, employee vehicle trips at the facilities, delivery methods, construction of the rail line at the site, and estimated and/or potential future train trips? Please clarify.

Initial screening process

It is unclear how the 10,000 metric tons CO_2e applicability level is to be calculated. Will it be based solely on on-site emissions? Whether the answer is "yes" or "no," this needs to be clear. Are we correct in understanding that all projects that are subject to SEPA review will undergo this evaluation before determining whether they are exempt? The Framework Document and Ecology's presentations indicated that the GAP rule was expected to only apply to the approximately 150 facilities in Washington that are currently above this level based on the GHG Reporting Rule, but the 10,000 metric tons CO_2e applicability level was not carried forward to Ecology's document of draft GAP rule language for the Definitions and Applicability sections. We had understood that the GAP rule was intended to be applicable just to major industrial and fossil fuel projects, but these draft materials appear to instead include all projects in this screening process.

Furthermore, does this screening mean that any project that emits more than 10,000 metric tons when accounting for inputs and outputs is, by definition, a "major industrial or fossil fuel project"? For example, would a brewery that uses natural gas be considered a "major industrial project" if it emits more than 10,000 metric tons CO_2e regardless of the fact that most craft breweries are not typically viewed as major industrial projects? The rule language needs to be clear so as to avoid unintended consequences that sweep facilities into the rule that are meant to be exempted. To keep with Ecology's indications that the GAP rule would apply to the facilities reporting under the GHG Reporting Rule as major industrial and fossil fuel projects, we suggest the same screening process used in WAC 173-441 be used for the GAP rule using only on-site (Scope 1 and 2) emissions.

What is the determination for an "infrastructure expansion" and how would this be applied?

It is unclear how GHG emissions from potential combustion or oxidation of organic compounds will be calculated as part of the "initial screening process" for rule applicability.

Applicability calculations

The applicability calculations in the Framework Document are not clear.

We are also unclear how Clean Energy Transformation Act (CETA) projects are necessarily below the GAP rule applicability level.

Environmental Assessment

Analysis conditions

It is inappropriate to contemplate potential project "No Action Alternative" conditions where "Washington State GHG reduction limits will be met." This speculation is prohibited by SEPA. Furthermore, the State continues to miss its reduction targets. This section also suggests that "If these limits change, then the updated information should be included in the analysis of the No Action Alternative." We oppose the rule's apparent requirement that lead agencies must ignore the facts about the environment as it exists when a proposal is put forth and instead speculate. This is inconsistent with a fundamental tenet of SEPA review.

Global warming potential values

The Framework Document references 100-year global warming potential (GWP) and in the applicability calculations section references WAC 173-441-040. We understand this 100-year GWP to be the only standard established by regulation. Until and unless Washington regulations change, the 100 GWP/AR approach used for GHG emissions reporting must be used in the GAP rule for estimating a project's emissions. Nevertheless, this section of the Framework Document also states the rule will require the assessment to use both 20-year and 100-year GWPs, the only authority for which is the Governor's Directive. We understand that a directive cannot require rulemaking that the statutes themselves do not allow. The Framework Document provides no information about which GWP would be used in order to craft mitigation. The mitigation element of the rule appears drafted to impose significant burdens and potentially extraordinary expense on an applicant, and the rule cannot remain silent on this important point. We believe that the GWPs that must be studied under the rule must be clearly stated and that the rule should require the same GWPs as those currently required for GHG reporting, otherwise the State would be comparing apples to oranges, namely: AR4/100-year GWP for GHG reporting compliance and AR5/20- or 100-year GWP (it is unclear which) for GAP rule compliance.

It is unclear what happens to the other portion of projects that do not meet the applicability threshold of the rule, given that the Regulatory Context section of the Framework Document only provides that "[f]or projects where the GAP rule applies, the GHG reporting rule is also expected to apply for at least some portion of the project emissions." What is meant by this? Also, as noted previously, it is also unclear how the rule's calculations will be "consistent" with federal reporting rules. This should be explained in plain language so that project proponents, permitting and SEPA lead agencies, as well as other stakeholders, can understand it.

Environmental assessment parameters

In spite of containing a bullet titled "Geographic and life cycle boundaries," and in spite of later sections that reference this section to imply that geographic boundaries have been established, no geographic bounding information appears in the Framework Document for the rule.

The geographic scope of analysis is an important element of the GAP rule. It 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 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 without proper geographic boundaries. For example, if a proposed Washington facility's input product comes 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.

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 this degree of speculation.

The degree of likelihood needed in determining the first use boundary is unclear. We are worried that inclusion of first potential use would likely often require information that is not or cannot be known by or available to the proposed project's proponent. Again this invites impermissible speculation. 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. The rule should focus on limiting analysis to construction and operation at a facility, but not analysis of products that pass through a facility.

Facility emissions

The facility operational emissions analysis uses the existing state GHG reporting methods in WAC 173-441-120, and thus overlaps with the initial screening process. Similar concerns are raised in this second overlapping analysis.

It is also unclear why decommissioning emissions would require additional permits or new environmental review if decommissioning was considered in the original review. If decommissioning

will instead be reviewed later, then decommissioning emissions should not require mitigation up front.

If looking ahead to a future decommissioning, it is impossible for a proponent today to know what that remote future will be, at least decades from now. The speculative nature of so distant a future commends that this calculation be conducted at such time as demolition permits are required, not up front.

Life cycle analysis (LCA) of GHG emissions

The Framework Document fails to explain how judgments will be made by the practitioner performing the analysis regarding which data or assumptions the practitioner is to use for assessing the significance of impacts, or how the mitigation measures will be incorporated into a permit, particularly if it is to be done through an agency's use of its substantive SEPA authority, as appears to be the case.

This section states that "[t]he use of other GHG emission accounting methods and tools that have been developed or approved by other government agencies, standards bodies, or that have been substantially validated through peer review processes would be allowed as part of the assessment." We request that the rule provide, for both clarity and consistency, specific examples of software, methods, or models that are routinely applied and widely regarded as standard in the LCA industry. Example models we are aware of that are widely used and well-regarded are GREET and GHGenius. Also, if the agency intends to rule out certain models, these bounds need to be provided in the rule guidance. Otherwise, the "clear, consistent, comprehensive and transparent" objectives of Ecology regarding development of this rule will not be met, and the rule will stand in the way of competent project review rather than assist it.

The Framework Document does not make clear whether a market alternative assessment of the No Action Alternative will be part of the LCA. If the statement in the Framework Document that "market effects are not necessarily part of a LCA" is correct, how does that not undermine the No Action Alternative comparisons for projects? More comprehensive thought should be given to these provisions, and the Framework Document and the GAP rule should be accordingly revised for clarity and consistency.

There seem to be inconsistencies within the Framework Document on the important issue of geographic carbon leakage. Please clarify this in future GAP rule documentation. In this section we are particularly concerned about the suggestion to "include a sensitivity analysis that considers different leakage rates that accounts for bottom-up and top-down accounting methods using the most recent available science" as these methods are disputed and the most recent science may not be the best available science.

Energy analysis

This section states that the energy analysis is to be both quantitative and qualitative, and intended to "identify where energy will change and describe the likelihood and potential magnitude of a shift in energy use on a larger scale" and "identify potential changes in energy use and the effect of increased renewable capacity or new technologies." The potential scope and degree of speculation encompassed in these proposed analyses are immense, as to both qualitative and quantitative requirements. The request for a "qualitative description of the potential changes in energy supply resulting from the project" is particularly speculative.

The energy analysis is also depicted to require "Itemization and quantification of all energy inputs and outputs of the projects […] This includes the generation of electricity, heat, steam or cooling purchased from a third-party." We are concerned that this statement may reflect an intent to evaluate applicants based on GHG emissions calculations that are not permitted to account for the significant benefits of cleaner fuel source substitutions, renewable and low-carbon design features of projects, and displacement of emissions from both BACT and coal-based projects. We request that the rule instead include, in clearly understandable and measurable terms, the means and metrics to reward project proponents who incorporate innovative designs and new or improved technologies that would reduce global GHG emissions over existing technologies. SEPA itself provides for this. Furthermore, incentivizing investment in technologies that will increase efficiency and make progress toward the State's larger GHG reduction goals should be acknowledged by having a clear GAP rule that includes means for project proponents to demonstrate the benefits of lower-carbon projects, market substitution, and efforts to reduce overall GHG emissions. The approach to this situation in the GAP rule is of critical importance. In that vein, we believe that the State's GAP rule should clearly state that it will evaluate project GHG emissions and mitigation from a global perspective, including those that would result in significant reductions in global GHG emissions due to direct displacement resulting from the project. We must be able to incentivize technological advancements toward our decarbonized future.

The energy analysis also appears to ask for preference to be given to certain producers of power based on location, and the statements relative to geographic carbon leakage would raise issues with Article I, Section 8 of the U.S. Constitution, frequently referred to as the "Commerce Clause."

Mitigation Plan

Ecology also requested input on mitigation in the third document, and some of our responses are condensed in that section for this letter. The following comments relate to concerns with the Mitigation Plan presented in this section of the Framework Document that are not reflected in the questions in the third document.

SEPA does not mandate mitigation. It is up to the SEPA lead agency and the permitting entity to decide whether mitigation is warranted. We do not believe the Governor's Directive has the authority to direct Ecology to modify this provision of SEPA. We believe that the inverse is true: the GAP rule must acknowledge and operate within the SEPA discretion given to lead agencies. Moreover, the rule cannot require mitigation for every project that falls under the GAP rule; without considering the measures recognized under SEPA for project mitigation that are built into the proposal, the requirement for absolute GAP rule mitigation is too broad and has the potential to double up on the mitigation. The rule needs to incorporate these legal tenets.

We are concerned that the rule's requirement that mitigation be "additional" could be used to attempt to require mitigation that more than fully mitigates for all project impacts (i.e., mitigation below zero). As noted above, the Nollan-Dolan-Koontz line of cases regarding unconstitutional takings should apply to prohibit this.

This section of the document also contains several large lists of links to very lengthy protocols and reference materials. We are concerned that Ecology has not test-applied each of these protocols to understand how and if they are appropriate or how they would inform the examples given in the Framework Document. In turn, those protocols could be applied to more complex real-life examples of projects that the rule is intended to apply to. It is unreasonable to ask public commenters to be able to review and understand this quantity of technical materials, much less in a short comment period. For example, we are not able to determine the types of sequestration that would be allowed as part of mitigation plans, whether plans could include the purchase of offset credits from mitigation banks, and whether improving maintenance or facility and infrastructure upgrades to reduce waste could be included. If the State wants this rule to have measurable positive effects, it needs to be more clear and transparent.

We are also unclear on whether actions such as wetland creation could be a part of GAP rule mitigation plans or if it would be considered double-dipping with other project mitigation. This question is further complicated by the statement in the Framework Document that the rule will require mitigation to be prioritized for "communities that are affected by other impacts from the project, such as local transportation, water quality, or other air quality impacts."

Additionally, the rule must include a requirement that prioritization of mitigation projects be included as a factor to be considered in the cost of mitigation.

Consistency with SEPA

This section states "If a project is not required to do the environmental assessment under the GAP rule, GHG emissions would still be considered under SEPA on a case-by-case basis. This means projects are not exempt from having to consider GHG emissions if they are not covered by the GAP

rule." There is a lack of clarity here that could lead to misunderstandings over the rule's applicability to different kinds of projects, and subsequent potential for SEPA challenges. If a SEPA lead official is left to contemplate the potential for a SEPA challenge on every potential future project based on this broad application of the GAP rule, SEPA lead agencies—especially smaller jurisdictions—are placed in an impossible position.

Rule Implementation

By noting that "mitigation projects will be identified annually, and the mitigation plan will be updated as needed to reflect changes in project availability and approved by the agency issuing the permit requiring the mitigation" we are concerned that every permit agency will be asked to participate in evaluating whether the annual mitigation plan is acceptable. How is this requirement expected to work with the authority of regional air agencies? Does this also mean that mitigation will be an ongoing process for the life of each project? Under what authority does the GAP rule propose this, and how does it synthesize with the laws and regulations under SEPA that significantly and clearly limit the reopening of a final SEPA document?

This section also notes that "projects often have many permits from federal, state, and local agencies and using SEPA substantive authority, any of these could include mitigation for GHG emission impacts." Is this meant to suggest that each permit for a project may have a different mitigation requirement, or is it saying SEPA substantive authority prevails over the local, state, and federal permitting agencies' abilities to impose conditions as mitigation? SEPA does not rule over federal permits. Consequently, this is unclear and confusing.

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. The rule, as currently presented, would not appear to result in the kind of progress that is needed to reach the State's goals and would place an undue burden on Washington businesses. The degree of complexity and uncertainty that could result from the current construction of the rule is more likely to undermine the State's goals, by driving industries out of Washington or even out of the country to areas where regulators are willing to approve projects after little or no consideration of GHG emissions. This does not aid in progress toward our decarbonized future, but rather drives these industries elsewhere. We believe that Washington is very effective at regulating environmental impacts including emissions, and that facilities here are more likely to be environmentally responsible. Consequently, there is an increased likelihood that projects sited, built, operated, and regulated here will make positive contributions to climate change issues. A well-crafted GAP rule could provide the certainty needed by industry to plan projects in Washington that work with the State's vision of the future.

Document 2 Ecology's Draft GAP Rule Language for the Definitions and Applicability Sections

Definitions

We request the following terms from Governor's Directive #19-18 be defined if they are to be used in the context of the proposed GAP rule: induced load, growth, indirect effects, and attributable to the project.

As noted above, some of the definitions included in the Definitions section of the Framework Document were not included in this document of draft GAP rule language for the Definitions and Applicability sections. The following comments relate to definitions that were in the draft rule language document, with other comments detailed previously in the Framework Document section:

- **Facility:** Based on the definition as drafted, does this mean that upstream pipeline leakage only applies to ownerships/control within Washington State?
- **Organic compound:** It is indefensible that food and other substances for consumption are non-organic compounds. It is also unclear how food waste would be subject to this definition and treated by the GAP rule. If Ecology simply wants to exempt facilities that use food and other organic waste to produce energy (e.g., as facilities favored under CETA), the rule should state a clear exemption.
- **Output or product:** It is unclear what constitutes an intermediate product or co-products downstream.
- **Project or proposal:** This definition is vague, circular, and unclear as to how it incorporates the broad definition of "facility."

Applicability

As noted above, some of the information on rule applicability that is included in the Framework Document was not included in this document of draft GAP rule language for the Definitions and Applicability sections. The following comments relate to the information in the draft rule language document, with other comments detailed previously in the Framework Document section:

- This document does not have the various exemptions that were noted in the Framework Document. Will such exemptions be carried through to the draft GAP rule? It appears from this document that the GAP rule could be applied to a great many municipal project types and many private industries beyond fossil fuels. While the Framework Document specifies that the rule does not exempt any projects from considering GHG emissions, there remains significant uncertainty in how projects that are subject to the GAP rule are defined.
- The scope of the Applicability section is so broadly written that the rule is unlikely to be consistently applied.

- Much of this information is difficult for SEPA lead agencies without a related technical background in GHG analysis to understand, and we request that future materials from Ecology include the necessary support to smaller jurisdictions so that they may conduct their review and commenting process in a manner that is less onerous while remaining compliant.

Document 3 Ecology's Questions on Mitigation

What GHG emissions should be included in the mitigation plan? All GHG emissions identified in the environmental assessment (upstream, in-state, and downstream)? Only in-state GHG emissions? Upstream out-of-state GHG emissions from inputs or feedstocks for project? Downstream out-of-state GHG emissions that occur as products or outputs of a project?

The proposed rule will not be contained in the SEPA regulations in WAC 197-11. However, if the rule is suggesting that mitigation be imposed through SEPA, it can only be imposed through a permit using an agency's discretion under SEPA. If a proposal is subject to reporting under WAC 173-445, the rule should be modified to clearly articulate that only direct and on-site emissions associated with the project and capable of being managed 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 for purposes of analysis alone. Even with clarifications we expect to see in the draft rule, there is still a significant potential for any upstream or downstream mitigation requirements to overlap with or double count for other states' or countries' rules for analysis of the production of raw materials, mitigation imposed by those other states or countries, and first use of outputs that pass through Washington facilities. This is inequitable and we are concerned that the State lacks the power to impose mitigation on Washington projects for indirect consequences beyond the State's territorial jurisdiction. For proposals that will not be subject to Ecology's GHG emissions reporting requirements, 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.

How should mitigation for GHG emissions from projects which support decarbonization be considered? For example, should the amount of mitigation for such projects be decreased or eliminated based on the projects' contribution to a future decarbonized economy? How should projects which support decarbonization be defined? What information would be needed from the applicant to demonstrate that the project supports decarbonization? Are there certain categories or types of projects that should be considered as supporting decarbonization and why? What standards, conditions, and processes should be used to make the determination?

We appreciate that this question points to the potential that Ecology may be recognizing the need for fair treatment and encouragement of projects with "built-in" mitigation and the potential benefits to be gained by rewarding technological advances that reduce net GHG emissions and produce real progress toward a future decarbonized economy. We believe 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.

One juncture where this can occur, and which should be reflected in the GAP rule as it is done in the SEPA regulations, is at the project permit submittal review stage. Many projects will result in reduced global GHG emissions. Because climate change caused by GHG emissions is a global issue, a project that affirmatively improves that situation should receive credit for its contribution to global decarbonization. Indeed, all projects—even solar and wind—will result in some level of local emissions. The discussion of this potential should occur at a pre-application stage, which should inform review of the project going forward. The rule must apply even-handedly so that all decarbonization contributions are counted and credited fairly. Recognizing, as mitigation, project design that reduces impacts is already the law under SEPA, and the GAP rule cannot modify that. Facilities that are not mandatory GHG reporters are entitled to benefit from having considered avoidance and minimization in their proposals under SEPA. A ready example of how this is accounted for is when a facility proponent plans to use innovative technology to reduce global emissions even though there may be local emissions. The net impact on climate change is a positive one, and considering that GHGs do not hover in the air over a facility within the state but, rather, intermingle with other molecules that are dispersed around the globe, this is the only truly accurate and equitable way to account for such improvements.

This approach also aligns with the well-established process in WAC 197-11-768, which requires applicants to show that they have followed the mitigation sequence and worked first to avoid and minimize impacts. Mitigation sequencing is a well-established principle across state regulatory schemes and should be applied and credited in the GAP rule as well. All such methods should be expressly provided for in the ultimately adopted rule, where they should be included and assessed in a net emissions analysis that will provide credit in any subsequently developed mitigation plan.

If an applicant wants to use out-of-state mitigation, what evidence should be required to demonstrate that in-state mitigation is not available?

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 out-of-state without additional requirements for evidence. Additionally, if the GAP rule will extend the environmental assessment beyond state boundaries, state boundaries should also not be relevant to the mitigation planning.

Furthermore, 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. Technology is changing rapidly, and there is a need for agencies to be nimble and adaptive, enabling them 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 global marketplace for GHG mitigation. The rule should allow for a system of crediting/banking credits from innovative and beneficial projects—whether in-state or out-of-state—so they can be used to mitigate for other projects later and provide greater progress on the global problems of climate change.

Thank you for the additional opportunity to provide preliminary input and feedback. In closing, we note that the rulemaking documentation provided to date continues to raise concerns as to whether the resulting GAP rule will be clear, functional, defensible, and science-based. We reiterate the prior request from our letter dated December 15, 2020, that Ecology engage a technical working group of stakeholders and experts as a next step during preliminary rulemaking.