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Sent by electronic mail: fran.sant@ecy.wa.gov

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Subject: Comments on “Draft GAP Rule Conceptual Framework” and related documents

Dear Ms. Sant,

The Western States Petroleum Association (WSPA) appreciates the continued opportunity to provide input on the Washington Department of Ecology’s (Ecology) *Greenhouse Gas Assessment for Projects* (WAC 173-445) rule documents. WSPA is a trade association that proudly represents companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas, and other energy supplies in Washington and four other western states.

Ecology can be complimented for sharing the Conceptual Framework, Draft GAP Rule Language, and Mitigation Questions documents, and then soliciting comments on each. This is an important and necessary step. The realities of the COVID pandemic have limited the traditional agency/stakeholder interactions which inevitably serve to refine a developing rule. WSPA expects the comments presented below will provide value for Ecology’s continuing efforts in producing a balanced, reasonable, and effective regulation.

There are a few key areas of concern and uncertainty that we believe are significant to highlight before setting forth our detailed comments.

First, while WSPA appreciates the opportunity to have met with Ecology to discuss regulatory authority for this rulemaking, WSPA still questions Ecology’s authority, particularly with regard to indirect greenhouse gas (GHG) emissions. As further highlighted below, Washington statute and case law do not authorize Ecology to regulate indirect GHG emissions and this should be taken into consideration when further developing the rule.

Second, WSPA remains concerned by Ecology's use of the 10,000-metric ton (mt) CO₂e GHG applicability level. WSPA expects this threshold to capture many projects that are not otherwise considered major. Based upon an initial analysis, some WSPA member companies estimate the 10,000 mt applicability threshold (pending a more complete definition) could require approximately half of the facility's annual permitted projects to trigger the GAP rule, depending upon how broadly indirect emissions need to be considered. A very broad consideration of indirect emissions could bring in essentially all permitted projects under the rule. WSPA recommends collaboration between Ecology and other key stakeholders to define the term "major" as referenced in Directive 19-18.

Third, Ecology should comprehensively consider and evaluate all statutes, rules and laws (both already established and proposed) that currently mitigate or govern GHG emissions. Without a comprehensive examination of rules and requirements, project proponents will likely be faced with increased costs and uncertainty. It would be beneficial to all parties involved – Ecology, project proponents, and businesses – to have clear and defined mitigation options that are not duplicative and do not conflict with one another.

Below WSPA has outlined in detail its concerns regarding Ecology's regulatory authority, as well as technical feedback and suggestions regarding the three documents Ecology provided.

Legal Feedback

As we have discussed with Ecology previously and further explain below, Washington statutes do not authorize Ecology to regulate indirect GHG emissions. Furthermore, the Washington Supreme Court notes this lack of authority in striking down a previous rule in which Ecology attempted such regulation. Thus, based both on existing Washington statutory and case law, WSPA believes Ecology lacks the authority to promulgate and enforce the GAP rule, especially as it relates to indirect GHG emissions.

Existing Statutes and Case Law Do Not Provide Ecology the Authority to Regulate Indirect Emissions

Although Ecology has not published the actual GAP rule language, based on publicly available information about the rule that Ecology has provided, it appears Ecology lacks authority to promulgate and enforce the rule. The Washington Supreme Court made clear in *Association of Washington Business v. Washington State Dept of Ecology*, 195 Wn.2d 1, 17, 455 P.3d 1126 (2020) that the agency does not have statutory authority under the Washington Clean Air Act CAA) to regulate businesses whose products indirectly emit greenhouse gases.

According to the most recent document published by Ecology, titled “Draft GAP Rule Questions on Mitigation,” dated March 2021, Ecology is considering including “all GHG emissions identified in the environmental assessment (upstream, in-state, and downstream)” in the mitigation plan. In another document titled, “DRAFT GAP Rule Conceptual Framework for Informal Review,” dated March 2021, Ecology provides further detail about the development of the mitigation plan. Specifically, the document states that the rule “will require the mitigation plan identify the type(s) of mitigation used” and would “allow for mitigation of GHG emissions by funding projects directly and/or buying offsets through established carbon markets.”

According to Ecology, a new project that meets the applicability threshold and merely transports fossil fuels would nevertheless be required to develop a mitigation plan for GHG emissions that occur upstream and downstream. These additional steps would be required even though the project itself does not directly emit GHGs. This type of requirement is precisely what the Washington Supreme Court invalidated in *AWB*.

Appendix B to the “Draft GAP Rule Conceptual Framework for Informal Review” provides an example of how the GAP rule will apply to a new fossil fuel export facility that receives fossil fuel by rail, stores the fuel on site, and exports the fuel by ship. Under the draft GAP rule, as part of the third step, the project applicant or lead agency will perform an environmental assessment based in part on a lifecycle assessment. For the lifecycle assessment, the applicant must identify and report the GHG emissions from the fossil fuel extraction and the GHG emissions from transportation of the fuel to the first potential user, and then analyze the GHG emissions based on combustion by the end user.

The project applicant or lead agency would then have to enforce a mitigation plan which reduces the indirect GHG emissions. The example provided in the GAP rule documents is the type of regulation that the Washington Supreme Court determined Ecology lacked statutory authority to implement and enforce. See *AWB*, 195 Wn.2d at 17, “We therefore hold that the Rule exceeds Ecology’s authority under the Act and is invalid to the extent it purports to regulate via emission standards businesses that do not directly emit greenhouse gases, but whose products ultimately do.”

No Statute Authorizes the GAP Rule

As a state agency, Ecology is “limited to the powers and authority granted to it by the legislature.” *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980). Therefore, before it may regulate indirect GHG emissions, Ecology must be authorized by the legislature to do so.

In the CR-101 (Preproposal Statement of Inquiry) filed by Ecology on April 30, 2020 which announced the initiation of the GAP rulemaking process, Ecology cites the following statutes for authority to issue the GAP rule: Chapter 43.21C RCW (State Environmental Policy Act), Chapter

70A.15 RCW (Washington Clean Air Act), and Chapter 70A.45 (Limiting Greenhouse Gas Emissions).

None of these statutes, however, expressly authorizes Ecology to regulate indirect GHG emissions. As explained in Ecology's recent documents, the GAP rule does not amend the SEPA rule. Instead, Ecology envisions that the methods described in the GAP rule will "supplement" SEPA and may be used by SEPA lead agencies in the SEPA process. WSPA cannot locate the SEPA statutory language that grants Ecology the authority to regulate and mitigate indirect GHG emissions.

Similarly, RCW 70A.45 (Limiting Greenhouse Gas Emissions) does not grant Ecology the authority to regulate indirect GHG emissions. The legislature has expressly stated that Ecology must "submit a greenhouse gas reduction plan for review and approval to the legislature." RCW 70A.45.020(1)(b).

Nor does Chap. 70A.15 RCW provide authority for the GAP rule, even though Ecology referenced that RCW 70A.15.3000(2)(a) "authorizes Ecology to adopt rules establishing 'air quality' ". In *AWB*, Ecology cited to the Washington Clean Air Act for authority to regulate indirect GHG emissions under the same statute. The Supreme Court rejected this argument and held that it was an "improper emission standard when applied to businesses that do not directly emit greenhouse gases." *AWB*, 195 Wn.2d at 17.

In short, none of the statutes cited by Ecology authorizes it to promulgate the GAP rule.

The Washington Legislature Contemplated and Withheld Authority Ecology Now Claims It Has in the GAP Rule

In 2020, the Washington Legislature considered House Bill 2472. According to the bill's purpose and intent section, the legislature found that "upstream greenhouse gas emissions, storage, distribution, and energy used for extraction, processing, and transporting fossil fuels are often absent or underrepresented in analyses of fossil fuel project development." The bill thus sought to authorize Ecology to establish a cumulative GHG emissions rate associated with fossil fuel production, gathering, processing, storage, distribution, and combustion.

HB 2472 also would have authorized Ecology to adopt rules under SEPA to establish standards for the mitigation of GHG emissions for a specific project. The bill directed Ecology to adopt a

related rule to specify the global warming potential associated with a proposed project's fossil fuel emissions over a 20-year period and 100-year time frame. The Washington Legislature, however, rejected HB 2472 and has never provided Ecology the authority it sought in that bill.

The provisions in HB 2472 are nearly identical to the directives contained in Governor Jay Inslee's letter dated December 19, 2019, in which he ordered Ecology to adopt the GAP rule.

Gov. Inslee's letter states that the GAP rule should include the following provisions:

- 20-year and 100-year global warming potentials for all greenhouse gases attributable to the project, as provided by the most recent international assessment.
- An assessment of any induced load or growth in fuel or energy consumption or electricity generation from the project.
- Criteria for assessing upstream and likely downstream lifecycle emissions attributable to the project, including transportation, leakage, and market and indirect effects; and
- Methods, procedures, protocols, criteria or standards for mitigation of greenhouse gas emissions, as necessary to achieve a goal of no net increase in greenhouse gas emissions attributable to the project.

Washington legislators introduced HB 2472 because they recognized Ecology lacked statutory authority to regulate indirect GHG emissions. Yet the Legislature remained unwilling to grant Ecology the required in authority in 2020. If the final GAP rule language regulates indirect GHG emissions, it is likely to meet a fate similar to the Clean Air Rule.

In short, based on both existing Washington statutory and case law, WSPA believes that Ecology lacks the authority to promulgate and enforce the GAP rule as it relates to indirect GHG emissions and this should be taken into consideration as Ecology further develops the rule.

Technical Feedback and Suggestions

GAP Rule Conceptual Framework

Comment #1:

Governor Inslee's Directive specifies regulation development targeting "major" projects emitting GHG. WSPA expects 10,000 mt CO_{2e} GHG/year from a project proposal to capture many projects that are not otherwise viewed as major projects. It would be really helpful for Ecology to develop a summary of projects to assess reasonableness of this standard as a

gateway to the GAP rule.

Based upon an initial analysis, some WSPA member companies estimate the 10,000 mt applicability threshold (pending more complete definition) could require approximately half of the facility annual permitted projects to trigger the GAP rule.

Discussion:

- It will be especially important for Ecology to present the annual expected number of proposals and corresponding GHG emissions along a spectrum, to help define project size. For example, based on the recent history of Clean Air Act permitting and SEPA analyses, how many projects emitting 10,000 mt to 25,000 mt might be expected, how many in the 25,000 mt to 100,000 mt tranche, how many between 100,000 and 1,000,000 mt, etc.? As an alternate to using current information, Ecology could utilize the information on the number of projects above 10,000 mt evaluated by Ecology and the other SEPA lead agencies while Ecology was implementing its former GHG SEPA Guidance.
- Another benefit of this analysis is it will yield important information to assess the economic benefit/cost of GAP implementation (transaction costs, mitigation costs, quantification of cost through GHG mitigation).
- The alignment of the 10,000 mt threshold to the WAC 173-441 GHG emission reporting level, and the fact that over 150 facilities in Washington emit above that quantity do not tie to the number and character of the future project proposals. The Conceptual Framework statement on page 10 which asserts the GHG Reporting Rule “*provides a view of the types of projects that would likely be covered by GAP*” seems partially correct, but as noted above, the current proposed GAP applicability level and definitions are expected to capture many more development projects in the GAP rule.
- In terms of the language provided so far, it is not clear how applicability would be determined; and currently it is not clear how an entity would comply.
- Ecology has described the GAP rule as being authorized by the SEPA statute (RCW 43.21C) and will be compatible with the SEPA regulation (WAC 197-11). While there is still some uncertainty for this authorization, the application of SEPA rules for project permitting may be difficult under the current definitions. For example, the SEPA rule requires the lead agency to review the Environmental Checklist developed for a proposal and other information to make a Threshold Decision. If the judgment is that

the proposal is “likely to have a significant adverse environmental impact” a Determination of Significance is posted. The SEPA rule maintains that an environmental impact statement (EIS) is required for “major actions significantly affecting the quality of the environment” (WAC 173-11-330). Preliminary GAP provisions parallel this sequence with the applicability level effectively defining “significance” and that touching off the obligation for the full environmental assessment (effectively, an EIS focused on GHG emission increases).

- However, the challenge for a lead agency will be to demonstrate how or why an increase of 10,000 mt/year from a proposal constitutes a “likely...significant adverse environmental impact.” Ten thousand metric tons is an exceedingly small contribution to the anthropogenic CO₂e Washington emissions each year (in fact, about 1 10,000th of the 2019 total). The lead agency will be obliged to articulate the significant adverse environmental impacts that Washingtonians might expect to experience. Note that SEPA and GAP determinations are against individual project proposals, not the collection of all projects over time.
- Notwithstanding our legal position regarding Ecology’s lack of authority to regulate indirect emissions, WSPA also has concerns the GAP regulation might be triggered even in the absence of direct GHG emission increases. As an example, if a refinery adds a new fractionation tower (a piece of equipment that extracts a fraction of compounds from a product like gasoline) and storage tank to extract a group of hydrocarbons to be sold to the chemical industry, very little to zero direct GHG emission increases would occur. However, if we were to count the downstream emissions from the use of the extracted product, the applicability threshold for triggering compliance with the GAP Rule would likely be met by simply counting the GHG emissions increase associated with these indirect downstream emissions. This is an example of a project with minimal GHG emissions (and little direct GHG emissions) that would likely trigger a complex review process through the GAP rule.
- Prior to rule proposal, WSPA suggests an additional workshop between Ecology and other stakeholders to really dig into the planned use of important terms in the “applicability level” definition and work through the range of typical project proposals to characterize the reach of the GAP rule more fully.

Comment #2 – Unify various statutes, rulemakings and project needs.

Discussion:

- Many recent laws, proposed rulemakings and projects want (and need) to have sufficient GHG reduction mitigation opportunities to function properly and allow projects to move forward with a long-term goal towards net carbon zero. This includes the GAP rule, the Washington Clean Air Rule, Clean Energy Transformation Rule (CETA), and proposed legislation like a Cap and Invest.
- In addition, pages 8-12 of the Concept Framework detail some of the existing GHG oversight requirements. There are numerous other regulatory demands that as implemented will have co-pollutant influence on the emissions of GHG (industry specific NSPS and NESHAPs, NAAQS attainment plans, Regional Haze, and more). This has been a large area of uncertainty and is a key area that we request additional collaborative discussion and focused analysis, as part of this rulemaking.
- A suggested action will be to ensure any final GAP rule will recognize and accommodate the shifting regulatory landscape and its effect on project proposals and the GAP Applicability Level. For example, CETA is designed to drive down GHG from fossil fuel-fired electrical generation. A project proposal with significant GHG from purchased electricity will presumably see those emissions drop by 2030, and perhaps to below the GAP applicability level. Instead of forcing a project through what will be a complex GAP review process, the final rule should establish an off-ramp which can take account of known, coming GHG reductions.

Comment #3 – WAC 173-485 Petroleum Refinery Emission Requirements (Page 11):

- The statement provided in this section should be amended to reflect that this regulation requires RACT for GHG emissions at the five Washington refineries.

Comment #4 -- Definition of Applicability Level (Page 13):

- Ecology proposes to use the term “applicability level” as a quantified threshold for subjecting a project to the GAP rule, which is then tied to a non-quantified “amount of activity”_metric. It would be helpful if Ecology instead establishes the numeric threshold as part of the definition of applicability level.

Discussion:

- For a project proponent, the current construct linking “Activity” to “Activity data” to “Applicability level” to “approximately 10,000 metric tons” is not obvious. It would be helpful to clarify or narrow the term to a simple numeric value.

Comment #5 – Ecology should utilize the Washington State Clean Air Act definition of BACT for this GAP regulation.

Discussion:

- The CAA definition includes consideration of “energy, environmental, economic feasibility and other costs” as criteria in determining BACT. The suggested GAP rule definition is customized from this to focus only on known and future technologies/techniques/practices that are economically feasible. There are other important considerations of energy usage or efficiencies, environmental co-benefits or costs, or related considerations that would benefit the decision mix. Where the expanded WAC-173-400 definition of BACT would expand opportunities, we recommend that it be included in the GAP rule.

Comment #6 – Definitions (Pages 13, 14, 16). “Facility”, “Project or Proposal”, “Project facility or project facilities,” and “Initial screening process” may also add to the number of projects evaluated under the GAP rule, especially depending on the emission limit that becomes the GAP applicability level.

Discussion:

- The definition of “facility,” and the term “project facility or project facilities,” and their use in “Initial screening process” phrase, in general at this point create uncertainties in the GAP applicability procedure.
- First, how will the phrase “...organic compounds used at the project facility, as inputs used by the project, and as outputs from the project,” be applied? It will be helpful to get clarification and be provided an example to illustrate the agency’s intent.
- Second, as discussed above, given our assumptions on the applicability level determination process and against a 10,000 mt/years threshold, refineries could expect to trigger the GAP process frequently as they make typical minor modifications to equipment, or minor changes to the mix of products produced. This would likely not be because of direct emission increases, but rather due to downstream or associated

“output” emission increases. For example, refineries have the capability to make changes in their product mix in a variety of ways. One way is through adjusting how intermediate products flow in the refinery to maximize one product over others. Another way is through purchase of intermediate products from others to increase the output of one or more products while decreasing the production of another to address potential changing market conditions. Some of these changes can be made without physical changes to the refinery, though if the refinery has a criteria pollutant emission limit on a particular processing unit that would be exceeded due to the change, Clean Air Act permitting requirements would apply. There are refineries that will have to increase capacity in fluidized catalytic cracking units, hydrocrackers or even desulfurization units in order to make the desired product. These last changes normally require a NSR permit to be issued, though there may be minimal new direct emissions from the change. Additionally, long-term changes in product mix, together with safety and other environmental upgrades, are usually undertaken as part of the major maintenance program every 3-5 years. Elements of these programs may require both New Source Review (NSR) and SEPA review. We provide these examples to demonstrate the potential for a significant number of projects requiring GAP evaluation at the low 10,000 tpy threshold.

Comment #7 -- Definitions and Applicability document.

The proposal needs to be clearer in all ways on how modifications and expansions of existing facilities are evaluated. The applicability test discusses using the post project potential-to-emit but does not discuss what this is compared to. How are emissions from existing, but modified emission units, addressed?

Discussion:

- Ecology has previously talked about modifications comparing a post-project emission change against a pre-project emission rate (actual emissions?). It would be helpful to provide more explanation

Comment #8 – The “Initial screening process” (Page 16):

Informs that a project emitting more than “approximately 10,000 metric tons of CO₂e” will be subject to GAP. What is the agency’s intention in adding the word “approximately” in defining the applicability level?

Discussion:

- Applicability criteria for screening and mitigation needs to be clear and presented in only one location in the rule. The definition of applicability level should be offered and then used in a consistent manner throughout the rule.

Comment #9– Environmental Assessment – Analysis Conditions (Page 18):

Ecology should provide definitions of “baseline conditions” and “future potential emissions” that provide context on how actual and potential emissions will be considered.

Discussion:

- The WAC 173-441 GHG emission inventories are based on actual emissions. Washington GHG emission reduction goals in RCW 70A.45 are based on actual emissions compared to a 1990 baseline. It would seem the Baseline Condition and the future emissions should be based on actual emissions. Stated differently, the regulatory relevance of comparing the potential-to-emit or future potential from a project proposal to the actual emissions in a baseline condition is an “apples and oranges” comparison.
- The proposal uses the terms potential to emit and future potential to emit. These terms have specific meaning and application in the federal Prevention of Significant Deterioration (PSD) program. The reasons for use of these terms in that program should be considered carefully before using them here. WSPA recommends that the terms from the PSD and other federal and state air quality permitting be used to update the rule text on determining applicability.

Comment #10 – No Action Alternative (NAA) conditions (Page 18):

It is unclear what the regulatory value is in assessing a NAA. Ecology should explain the purpose of NAA.

Discussion:

- First, it seems obvious that the NAA will mean zero increased GHG emissions. Given that agencies are applying the GHG reduction goals adopted in 2020 as requirements, it seems this conceptual GAP rule language could be used to rationalize that a proposed project with an increase in emissions > 10,000 mt increase, with mitigation, cannot be

accepted. Ecology's rule drafting should not lead to this potential interpretation or outcome.

- Second, this NAA concept should recognize there will be project work to comply with other federal/state regulations (for example, the installation of thermal treatment systems -- flares and incinerators -- to convert VOC emissions to CO₂). These pollution control projects may result in an increase of GHG emission but are a necessary part of meeting other aspects of the Clean Air Act. Without understanding in detail how this NAA concept will be applied in the GAP rule, Ecology should acknowledge there will be criteria pollutant emission control requirements that pre-empt the sole consideration of GHG in GAP.

Comment #11 – Global Warming Potential Values (Page 19):

The complexity and uncertainty embedded in this assessment demand is out-of-proportion to any regulatory or practical value which might be produced. The agency should reconsider this entire section.

Discussion:

- A project emitting 10,000 mt CO₂e GHG emissions will have no discernable effect on "climate change."
- Ecology's proposal says the GWP analyses will be based on IPCC/UNFCC "guidance." This sets up the dynamic where judgments are made and the wrong guidance relied on, or some governmental or science update was over-looked, or correct guidance was incorrectly utilized, etc. Any reference to IPCC/UNFCC should be specific on the issue addressed.

Comment #12 – Environmental Assessment Parameters – Geographic and life cycle boundaries (Pages 19-20):

The demand for a life-cycle analysis (LCA) of project GHG emissions greatly complicates the GAP rule assessment process and pursuing this requirement creates several challenging issues. Ecology should re-work the scope of this LCA to simplify the process.

Discussion:

- Any LCA requirement needs to consider the GHG benefits (e.g., GHG emission reductions) of a project in addition to the GHG increases. If the overall net benefit of a

project is not allowed to be considered in the LCA, this will disincentivize companies to undertake projects within the state that could overall decrease GHG emissions (e.g., renewable fuels projects). In addition, the LCA needs to consider carbon leakage. Carbon leakage occurs when there is an increase in GHG emissions in one state or country because of an emissions reduction or restriction by a second state or country with a stricter climate policy.

- A project proponent contracts to purchase a raw material and/or to sell a product. The proponent likely has no actionable control over the production of the raw material or the use of a finished product. Any requirement to evaluate what is beyond the project proponents' direct control will mean relying on un-audited information, speculation, etc.
- Ecology states that the project proponent may have to calculate up to 4 different GHG emission values. This type of requirement will generate confusion and uncertainty for the lead agency and the public on what emissions increase may be contemplated by a project.

Comment #13 – Geographic and life cycle boundaries:

The narrative description of the life cycle boundaries seems to result in double counting of some GHG emissions. Rule language should be carefully drafted to ensure this does not occur.

Discussion:

- Any GHG emissions associated with the transport/movement of a raw material or product to or from a facility, would also apparently need to be counted by the upstream or downstream facility. Ecology's rule drafting should clearly delineate boundaries for emissions accounting in the applicability level evaluation, mitigation, etc., to avoid double counting.
- Another example is a project that reprocesses used oils into fuel oil. Would the upstream analysis go to the original lube oil's point of first use, or would it extend to the development of the oil wells the crude oil came from? In this example, Ecology has already noted in its discussion of life-cycle boundaries that the use of lube oil for lubrication is the downstream end of analysis for a project that would produce virgin lube oil. If the reprocessing of used lube oil into a new product must go back to the crude oil well, there will be double counting of upstream emissions.

Comment #14 – Facility Operational Emissions (Page 20):

What is the intended geographic scope of the phrase “This also would include the footprint for linear projects, such as pipelines”?

Discussion:

- The phrase needs more definition. An example would be helpful.
- The draft rule text indicates that a pipeline might be considered to be a linear project but is silent on new or expanded electrical transmission or railroad lines, which are also linear projects.

Comment #15 – Construction and Decommissioning emissions (Pages 20-21):

Any GHG emissions from these aspects of a proposed project that might have a 30-year assumed operational life, are certainly ephemeral and almost certainly de minimus. A demand to quantify the GHG emissions from these events complicates the LCA and will force reliance on less certain and/or speculative information.

Discussion:

- Including construction and decommissioning GHG emissions will constitute an exceedingly small contribution compared to the emissions attributable to the long operational life of a project and is therefore not warranted.
- Ecology states that this analysis is to include the embedded emissions of the construction materials yet is silent on how far upstream from the last manufacturer to go in this analysis. The scope of embedded emission assessment for each potential construction material will need to be clearly defined for proponents to produce consistent emission estimates.

Comment #16 – Life cycle analysis (LCA) of GHG emissions (Pages 21-23):

The GAP Conceptual Framework direction to scope and complete a LCA using the two ISO standards is unreasonable. Ecology should abandon any reliance on ISO standards and instead design a much more limited step-by-step evaluation process that project proponents and lead agency staff can confidently implement.

Discussion:

- The two referenced ISO standards are qualitative narratives which provide variability in how the LCA scope will be designed and the analysis conducted. With the uncertainty inherent with these standards, it is reasonable that two different project proponents evaluating identical projects, can and likely will produce different and perfectly valid LCAs. Inconsistent customized LCAs could result in re-scoping and re-work, and thus more cost, lengthened review timelines, possible stakeholder appeals and, in general, a lack of confidence and uncertainty in the regulatory process.
- WSPA members have no experience with these ISO standards which will likely be true for most other private and public project proponents as well as the lead agencies tasked with evaluating the LCA product.
- As with other elements in this Conceptual Framework, completion of the LCA analysis will be beyond the ability of all but the most knowledgeable and sophisticated project proponents. As such, this will become a specialized consultant-led evaluation process with a limited number of local consultants having the capability to undertake an LCA.
- This means high cost and extended GAP evaluation timelines as the consulting community capacity becomes committed to many GAP projects in the queue. The lead agencies will also have need to access this limited consultant resource. Ecology should examine whether the demand for completeness and detail provides regulatory value worthy of turmoil, uncertainty, high cost, etc., that will surely result from the effort to confidently implement the GAP rule.
- If Ecology is insistent on using ISO standards for LCA, it again argues for a tiered GAP evaluation process. Perhaps a full LCA may be used for projects with exceptionally large GHG emission increases. But requiring the broad and complex LCA for small GHG emission projects is unreasonable and excessive. An abbreviated and discrete evaluation process needs to be provided.
- Whatever the form of the LCA requirement in the CR-102 proposed regulation, it will be helpful for Ecology to produce several LCA's on candidate projects. This will reveal what an adequate LCA includes and will serve as an essential training example for project proponents/lead agencies.

Comment #17 – Energy Analysis (Pages 23-25):

The expectations for the Energy Analysis are very detailed, unnecessarily comprehensive for most project proposals and seem to require speculation on future GHG emissions from a changing energy supply grid and new technologies.

Discussion:

- The Conceptual Framework description of the expected Energy Analysis is perhaps appropriate for an exceptionally large GHG emitting project proposal, such as a new greenfield electricity/co-generation facility, aluminum smelter, silicon metal production facility or petroleum refinery. The agency should consider a tiered GAP rule that minimizes the assessment scope for small and medium sized project proposals.
- It seems unreasonable to require analysis on GHG emissions related to raw material extraction and transport or down-stream product uses by entities that the project proponent has no contractual control over.
- Similarly, it seems unreasonable to expect a project proponent to speculate on changing GHG emission profiles by electric utilities or emission changes resulting from technology advances in the future. For electric utilities, the effects of the CETA act will result in changes to the emissions profile of electricity supplied to users, adding a level of uncertainty in projections of emissions from purchased electricity. Any LCA or Energy Analysis evaluations (and especially Mitigation demands) should be tied to confident emission counting at the time of the GAP project review.
- While it is possible for a project proponent to calculate the annual CO₂e emissions for purchased electricity, it is a value that is also calculated by the individual electric utilities and reported annually to the Washington Dept. of Commerce. Provision should be made in the rule to simply reference these reports to determine 'current' year emissions and as a basis for projections.

Comment #18 – Mitigation Plan (Pages 27-28):

Ecology identifies WAC 197-11-660 as the authority for requiring mitigation for the “specific, adverse environmental impacts clearly identified in an environmental document.” The agency evaluation of an individual project proposal will need to demonstrate the specific, adverse impacts being evaluated.

Discussion:

- SEPA requirements apply to individual project proposals. Mitigation should not be evaluated against the collective, generalized, and presumed “adverse environmental impacts” of the collective GAP-captured proposals. The lead agency will be required to detail the specific adverse environmental impacts of a proposal and then describe how the mitigation measures will directly address the environmental impact.

Comment #19 – Mitigation Plan: Actions which reduce emissions as part of the project description (Page 27):

Ecology’s proposal should credit decisions and actions which result in reduced GHG emissions.

Discussion:

- If a project proponent has an opportunity to reduce GHG emissions through a voluntary choice to alter a manufacturing process, incorporate an emerging/more energy efficient technology, fuel switching or, in time, CO₂ capture, Ecology should credit those decisions against any mitigation demand. This scenario is especially relevant for an existing facility undergoing a modification.
- Ecology’s rule drafting should ensure that LCA accounting be based on “net” emissions, not “gross.” This directive can serve to incentivize or motivate in-state GHG emission reduction projects and mitigation.

Comment #20 – Mitigation quantification (Page 27):

Common emission accounting should be expected for both assessing new/increased GHG emissions from a project proposal, and then from proposed emission mitigation. Ecology is directing emission counting on a potential-to-emit basis.

Discussion:

- The mitigation plan is submitted with the Environmental Assessment Report. This is pre-project construction and that precludes an ability to quantify actual emissions. The lead agency will need to rely on potential-to-emit calculations or informed estimates.

Comment #21 - Mitigation types and criteria (Pages 27-30):

The GAP rule should be unequivocal in recognizing any credible GHG mitigation choice that is

real and verifiable, and anywhere in the world.

Discussion:

- The origin of the “real, permanent, enforceable, verifiable, additional” as acceptance criteria should be explained. Governor Inslee’s Directive does not include those threshold criteria.
- “Climate change” is a world-wide phenomenon tied to ambient CO₂e concentrations. Logic says that any GHG mitigation project that yields emission reductions and satisfies the substantive criteria should be credited. While in-state reductions might be favored, GHG reductions from any source should be credited.
- SEPA requires that required mitigation be reasonable and capable of being accomplished. (RCW 43.21C.060). We expect that any guidance or requirements in the rule on acceptable mitigation recognize this limitation on SEPA mitigation.
- If a facility has produced GHG emission reductions from voluntary projects completed in the previous 5 years, these should be credited in any mitigation plan for a current project proposal.

Comment #22 - Rule Implementation (Page 34):

This section identified the state as lead agency; however, local air authorities or county planning agencies will serve as the lead agency for GAP rule implementation for project proposals originating from petroleum refineries.

Discussion:

- A local government will serve as the SEPA lead agency for petroleum refineries proposals. The vast majority of these projects do not result in permits issued by the Department of Ecology.

Comment #23 – Rule Implementation (Page 34):

The proposed requirement that “Mitigation will be implemented on an annual basis ...” is inconsistent with project work. Typically, a project would only need to mitigate once, not ongoing. This requirement should be removed from consideration.

Discussion:

- Directive 19-18 asks for “mitigation of greenhouse gas emissions, as necessary, to achieve a goal of no net increase in greenhouse gas emissions attributable to the project.” Presumably, the initial mitigation plan makes the best effort at showing mitigation with projects that are “real, permanent, enforceable, verifiable, and additional.” If a proposal can demonstrate complete (or nearly full) mitigation of proposal GHG emission increases, and the mitigation project(s) meets the “real, permanent,” standard, no ongoing mitigation would be required in year 2 and beyond.

Comment #24 – Rule Implementation (Page 34):

Ecology’s proposed GAP Environmental Assessment demands are broad, reference programs/protocols/resources that will be unfamiliar to project proponents and lead agency staff, require specialized expertise to accomplish, and more. Ecology should produce full-scale Environmental Assessments for several project types.

Discussion:

- Ecology’s development of a standard Environmental Assessment for the GAP rule will serve several purposes. First, it will allow the agency to calibrate the proposed rule requirements against the resource demands (labor, cost, time) to accomplish the task. WSPA suspects this effort will have a tempering effect on the scope of the GAP rule’s assessment expectation.
- A finished Ecology product will be immensely valuable to project proponents and lead agency staff to understand what constitutes an “adequate” submittal. The agency would be able to refer to its own efforts in workshops to assist in rule implementation. The two examples in the Conceptual Framework appendices A and B are appreciated but do not seem to describe the challenges in developing the assessment requirements for more common and complex projects.

Draft GAP Rule Language for Informal Review

General Comment – Many of the questions/concerns in this document have been presented with comments on the Conceptual Framework. They will not be repeated here.

Comment #1 (Page 4):

The definitions of “activity data,” “input use,” “output generation,” “input” or “feedstock,”

“output” or “product,” all need to be more fully explained.

Discussion:

- Ecology should provide examples on how these terms fit together in computing the “applicability level.”

Comment #2 – Definition of “Facility” (Page 4):

How literal does Ecology intend these terms to be applied? Explanations and examples are needed.

Discussion:

- In performing the applicability level computation, would the project proponent (or the utility) need to consider GHG emission implications arising from that incremental electrical load, and considering shifting impacts across the entire in-state electrical grid managed by the utility?

Comment #3 - Definition of “Potential to Emit” (Page 4):

The suggested GAP definition deviates from the WAC 173-400 definition of PTE by leaving out the phrase “Secondary emissions do not count in determining the potential to emission of a source.” Please explain the reasoning and distinguish between the use of “source” here and “facility” in GAP.

Comment #4 – Applicability and “Requirements” (Page 5):

The language “Applicants or lead agencies may at their discretion...” should be revised.

Discussion:

- Any project proposal with GHG emissions at less than the GAP applicability level would be well on its way to a SEPA Determination of Non-Significance (at least for CO₂e emissions).
- A lead agency DNS (at least as it applies to GHG emissions) should obviate any requirement to impose GAP provisions. This GAP regulatory language should provide clear direction to the lead agency in this area.

Comment #5 – Applicability (Pages 5-7):

This is a very difficult section to understand and apply.

Comment #6 – Applicability (Pages 5-6):

The Conceptual Framework lists the types of projects that GAP will not apply to (page 16 of that document). That list of exemptions should be included in the Applicability section of the actual regulation language.

Comment #7 – Definition of “Organic compounds applicability level” (Page 5):

As presented earlier, there is a need to better define and offer examples of the intended meaning with the phrases “...inputs used by the project, and outputs from the project.” Ecology could more fully define how far up and down the raw material, product and utility supply link must be included in the applicability level computation.

Comment #8 – Definition of “Organic compounds applicability level” and Table 1 – (Pages 5 and 7-9):

The process for quantifying GHG emissions for a project proposal must also include a renewable/renewability component that recognizes the benefits from use of renewable energy sources, for the production of renewable fuels and elimination of the fossil fuel use, and the reduction in less efficient use of fuels.

Discussion:

- These are topic areas where WSPA member facilities would like to work with Ecology to develop.

Comment #9 – “Table 1 – Applicability Values for Organic Compounds” (Pages 7-9):

A definition and explanation for this Table should be provided. As just one example, what does 1,100,000 gallons of gasoline match up to?

Comment #10 – The draft framework document states that GAP rule will only be applicable if a project triggers SEPA.

However, the draft applicability language does not mention this requirement. This initial applicability criteria needs to be clearly included in the GAP applicability language.

Draft GAP Questions on Mitigation

General Comment--Many of the questions/concerns in this document have been presented with comments on the Conceptual Framework. They will not be repeated here.

Comment #1 – The following principles should be accepted in any mitigation plan development:

- GHG emission mitigation should be required only to offset actual, direct, on-site facility emission increases attributable to a project proposal.
- Reductions in GHG emissions at an existing facility attributable to energy efficiency improvements or reduced energy use intensity should be fully credited against any mitigation requirement.
- Any credible and verifiable GHG emission reduction in the world should be accepted against a GAP mitigation requirement. Climate change is a world-wide phenomenon tied to ambient concentrations of CO₂e. Any GHG reduction, anywhere, should be credited.
- Requiring or favoring in-state reductions will limit eligible and traditional categories of GHG emissions. This reality will further disadvantage new development in the Washington industrial/manufacturing and commercial sectors, and then the utility infrastructure to support economic growth.
- A GHG emission banking program should be recognized for voluntary GHG emission reductions arising for any reason.
- As mentioned above, WSPA would encourage a broad stakeholder effort to provide unified criteria between the various statutes and rulemaking and clarify in-state opportunities for GHG mitigation opportunities in-state.

Additional Comments:

- Does the Dept of Ecology consider the requirement to mitigate GHG emission increases from project proposals to be an “emission standard”?
- Directive 19-18 specifies that any GAP regulation should require mitigation “as necessary to achieve a goal of no net increase in greenhouse gas emissions attributable to the project.” A goal is not a mandatory requirement. Ecology should address how

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- this direction is to be reflected in any GAP mitigation plan requirement. In addition, the net increase should be referenced globally, not to the project itself.
- Directive 19-18 offers no direction on whether GHG emission reductions from in-state sources should be favored over GHG emission reductions accomplished anywhere in the world. The Directive does not even refer to the RCW 70A.45 GHG emission reduction targets. Ecology should provide more clarity on the choice to require or favor in-state reductions. As noted above, WSPA recommends broad selection for the mitigation options, particularly while it remains unclear where the volume of needed credits would come from.

Thank you for considering these comments and questions. We appreciate the opportunity to provide input on this very important issue. If you have any immediate questions, please contact me via e-mail at bpooole@wspa.org or by phone at (805) 833-9760

Sincerely,



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