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

Dear Ms. Sant:

On behalf of bp America ("bp"), thank you for the opportunity to provide comments on the Washington State Department of Ecology's ("Ecology's") Proposed Greenhouse Gas Assessment for Projects Rulemaking (the "GAP Rule"). This letter provides comments on the three documents Ecology released on March 2, 2021, for an informal comment period.[1]

As with our previous comments, these are submitted in furtherance of our support for the GAP Rule process and are informed by bp's six Proposed GAP Rule Principles shared in our August 7, 2020, letter.[2] bp's ambition is to become a net zero company by 2050 or sooner, and to help the world reach net zero. Consistent with that ambition, bp is actively advocating for well-designed policies addressing greenhouse gas ("GHG") emissions.

[1] *See* Draft GAP Rule Conceptual Framework for Informal Review (hereinafter "Conceptual Framework"); Draft GAP Rule Language for Informal Review (Definitions and Applicability) (hereinafter "Draft GAP Rule Language"); and Draft GAP Rule Questions on Mitigation.

[2] bp suggested that the GAP Rule should: (1) be economy-wide and complement other federal and state greenhouse gas regulations; (2) encourage the transition to a low carbon future; (3) avoid unintended consequences like discouraging safety and efficiency projects or causing carbon leakage; (4) establish mitigation requirements that are reasonable and achievable; (5) provide clear direction on the scope and methods of calculation for GHG emissions; and (6) leverage industry and other stakeholders' experience and expertise. *See* Proposed GAP Rule Principles (Aug. 7, 2020) (hereinafter "bp Aug. 2020 GAP Rule Letter").

A successful transition to a net-zero economy will require new levels of collaboration across all stakeholders—including industry; consumers; and state, tribal, and local governments—aided by technology developments and well-designed government policy. bp welcomes Ecology's efforts to clarify how state and local agencies should analyze and mitigate greenhouse gas ("GHG") emissions through the GAP Rule, which we believe can play an important part in helping the State of Washington achieve its GHG reduction goals.

In the attached comments, bp identifies a number of key issues relevant to drafting the GAP Rule. As expressed in our previous comments, bp supports a tiered or scalable GAP Rule that imposes increasing levels of administrative burden in proportion to the scope of the project and the extent of GHG emissions (see attached figure).[3] bp believes that this strategy is consistent with Ecology's goal to address GHG emissions from "large fossil fuel and industrial projects,"[4] and will ensure that the regulated community has the flexibility necessary to facilitate the transition to a net-zero economy. These comments also identify a number of areas that bp believes could be best addressed by a technical working group convened by Ecology, where industry and other stakeholders with expertise would have the opportunity to work together with Ecology and other state regulators on the range of complex technical issues necessary for successful implementation of the GAP Rule.

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

Sincerely,

James Verburg

Senior Environmental Engineer

[3] bp comments on the Proposed Greenhouse Gas Assessment for Projects Rulemaking (WAC 173-445) at 4 (submitted Jan. 5, 2021) (hereinafter "bp Jan. 2021 GAP Rule Letter"); bp comments on the Proposed Greenhouse Gas Assessment for Projects Rulemaking (WAC 173-445) at 4 (Nov. 19, 2020) (hereinafter "bp Nov. 2020 GAP Rule Letter").

[4] *See* Conceptual Framework at 7, 16 ("***Large*** fossil fuel and industrial projects have the potential to emit high amounts of GHGs, which result in adverse environmental impacts. . . . It is expected to apply to proposals for industrial and fossil fuel projects that emit ***large*** amounts of GHGs.") (emphasis added).

Comments on GAP Rule Informal Comment Period Documents

Applicability & Screening

1. Applicability to Industrial and Fossil Fuel Projects

bp has supported Ecology applying the GAP Rule economy-wide,[5] but understands that Ecology's stated intention, at least for now, is for the GAP Rule to apply only to industrial and fossil fuel projects.[6] However, the current proposed regulatory language does not make this clear. bp recommends that Ecology clarify which types of activities will qualify as industrial and fossil fuel projects covered by the GAP Rule through the use of definitions and examples.

2. Scope of Emissions Considered for Numeric Screening Threshold

Ecology proposes a numeric, project-specific screening threshold of 10,000 MT CO2e/year. At the same time, Ecology has stated that the GAP Rule should only apply to "projects that emit large amounts of GHGs."[7] To ensure that the GAP Rule is focused on large GHG-emitting projects, bp recommends that the screening threshold be limited to scopes 1 and 2 emissions.[8] If Ecology elects to include certain scope 3 emissions (specifically, emissions from "outputs"[9]) in calculating whether a project exceeds the screening threshold of 10,000 MT CO2e/year, such an approach could exponentially increase the number of projects subject to the GAP Rule, would extend the GAP Rule's coverage far beyond large-emitting projects, and would be burdensome both for stakeholders and regulators.

At an existing facility such as Cherry Point, even minor operational changes that could necessitate a County permit, and which would produce only slight increases in on-site GHG emissions, may exceed the 10,000 MT CO2e/year threshold. For example, a distillation improvement project requiring a land disturbance and/or commercial building permit(s) from the County may allow a refinery to shift production from 1,600 barrels/day of jet fuel to diesel fuel without increasing overall product output or scopes 1 and 2 emissions. Such a project would

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[5] bp comments on the Proposed Greenhouse Gas Assessment for Projects Rulemaking (WAC 173-445) at 4 (July 17, 2020) (hereinafter "bp July 2020 GAP Rule Letter").

[6] Conceptual Framework at 7, 16.

[7] *Id.* at 16.

[8] Scope 1 emissions are direct emissions from owned or controlled sources, scope 2 emissions are indirect emissions from the generation of purchased energy, and scope 3 emissions are all indirect emissions (exclusive of scope 2 emissions) including upstream and downstream emissions. *See* GHG Protocol, FAQ (last visited Mar. 21, 2021).

[9] *See* Conceptual Framework at 16; Draft GAP Rule Language at 5–6.

only exceed the 10,000 MT threshold if the threshold includes scope 3 "outputs" emissions. [10]

Moreover, at an existing facility, the GHG emissions of the project must be compared against "baseline" conditions at the facility. There may be substantial changes in outputs over the timeframe relevant for the baseline (e.g., five years), both in terms of the volume and type of outputs (e.g., as relevant to a refinery, diesel vs. gasoline vs. jet fuel vs. coke), which would make the analysis substantially more cumbersome if Ecology requires consideration of outputs at the screening phase.

If Ecology insists on considering scope 3 "output" emissions at the screening phase, we strongly suggest that Ecology adopt a significantly higher threshold tailored specifically to "outputs." Without this adjustment, the GAP Rule will sweep well beyond "projects that emit large amounts of GHGs."

3. Numeric Screening Test for Existing Facilities

As an initial matter, bp had difficultly interpreting how the proposed regulatory language regarding applicability would apply to modifications at an existing facility. The proposed language seems more geared to the circumstances of an entirely new facility (i.e., a "greenfield" project). For example, the Conceptual Framework indicates only GHG emissions associated with a change (e.g., replacement, modification, or expansion) at an existing facility would be part of the screening process.[11] However, the draft rule language also states: "All calculations must be on an annual potential to emit [("PTE")] basis."[12] It is unclear if the proposal requires comparison of the PTE before and after the project for a specific modified emission unit, or whether it applies more broadly to any equipment at a facility that may be affected by the project, such as a boiler that provides a small amount of additional steam even if the boiler itself is not modified as part of the project (e.g., "affected" units under WAC 173-400-810). bp will follow up with specific suggestions for how to tailor the screening test to existing facilities in a subsequent comments.

4. Project-Based Screening

Regardless of the industry sectors to which the GAP Rule ultimately applies, Ecology can avoid unintended and counterproductive consequences by limiting the environmental assessment of certain types of projects to disclosure of their scopes 1 and 2 emissions at the screening phase (see Issue #2).

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[10] The difference between jet fuel and diesel fuel emissions factors in 40 C.F.R. Part 98, Subpart MM, Table MM-1 accounts for the increase in scope 3 emissions if production is shifted from jet to diesel.

[11] Conceptual Framework at 16.

[12] Draft GAP Rule Language at 5.

First, we recommend that Ecology recognize that changes made to comply with Environmental, Safety, & Health ("ES&H") mandates are inappropriate for additional GHG emissions assessment because they are required to maximize employee safety and/or reduce facility or product emissions, and are highly unlikely to result in significant adverse environmental impacts. Requiring additional GHG assessment for these projects could have the counterproductive effect of delaying necessary ES&H upgrades. bp accordingly recommends that legally required ES&H projects and safety improvement projects be exempted from additional GHG assessment. For example, projects required to meet federal fuels regulatory standards, such as installation of new equipment to limit the benzene content of gasoline in order to comply with EPA's Mobile Source Air Toxics Rule, are time-sensitive to implement and non-discretionary.

Second, projects that support decarbonization by expanding production of lower carbon intensity fuels should be excluded from additional environmental assessment because of their known GHG emissions benefits. bp is proud of the investments it has made and the results it has achieved in developing renewable fuels at its Cherry Point Refinery—including becoming the first and only refinery in the Pacific Northwest capable of manufacturing renewable diesel from biomass-based feedstocks.[13] bp's renewable diesel is recognized by regulators such as CARB as reducing GHG emissions on a lifecycle basis by approximately 70%, as compared with the petroleum-based diesel that it displaces in the transportation fuel supply.[14] Therefore, this type of low carbon intensity fuels project results in a substantial net reduction in overall global GHG emissions notwithstanding relatively smaller increases in on-site (scope 1) emissions and possibly scope 2 emissions.

In pursuit of our ambition to become a net zero company by 2050 or sooner, bp aims to drive towards lower carbon intensity fuels and achieving a 50% cut in the carbon intensity of products bp sells. bp supports such carbon intensity reduction projects at the Cherry Point Refinery. The overall GHG emissions benefits of these projects are proven through well-established GHG emissions lifecycle analysis models such as GREET.[15] Accordingly, it is reasonably certain that these projects would and should not require mitigation under the GAP Rule because they actually reduce overall GHG emissions (see Issue #12). Moreover, these projects are critical to bp's compliance strategy for meeting state-level low carbon fuels standards ("LCFSs") and, for that reason, are time-sensitive to implement.

In the interest of incentivizing lower carbon intensity fuel projects, bp recommends that project proponents not be required to conduct the additional time- and resource-intensive environmental assessment that could render these projects

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[13] bp, Cherry Point Refinery (last visited Mar. 21, 2021).

[14] Cali. Air Res. Bd., LCFS Pathway Certified Carbon Intensities (last visited Mar. 21, 2021).

[15] Note that a model such as GREET addresses a specific product's lifecycle emissions, but will not provide all emissions data necessary to conduct analysis of the probable scopes 1, 2, and 3 emissions of a particular proposed project (e.g., an equipment modification project) at an existing facility.

economically unfeasible. Establishing a streamlined approach to these projects would further Ecology's and bp's shared goal of reducing net GHG emissions worldwide.

Environmental Assessment

5. Scope of Emissions for Environmental Assessment

bp believes that probable direct and indirect emissions (i.e., scopes 1 and 2, and in some instances scope 3 emissions) are appropriate for consideration in the environmental assessment performed under the GAP Rule for projects that pass the screening tests (see Issues # 3 and 4).[16] Below, we recommend a tiered approach to ensure that this analysis can be implemented most effectively and efficiently, and in a manner that best furthers the GAP Rule's intent.

6. Lifecycle Analysis Requirement

bp recommends a tiered approach for conducting a lifecycle analysis ("LCA") based on the scale of a project's potential scope 1 and scope 2 emissions—an approach that promotes efficiency for decision-makers and project applicants while maximizing opportunities for meaningful environmental review. A tiered approach is appropriate because LCA is a time- and resource-intensive exercise that requires analyzing scopes 1, 2, and 3 emissions. Put another way, it requires analysis of both upstream and downstream GHG emissions, and considers both direct (i.e., on-site manufacturing and operations) and indirect effects. Scopes 1 and 2 emissions are readily quantifiable in the near-term and can be calculated with some level of certainty. In contrast, calculating scope 3 emissions, particularly upstream scope 3 emissions, is inherently a more complicated, time intensive analysis and can result in highly speculative estimates. While this is a well-recognized challenge for all project proponents, it is particularly true at a refinery—where feedstock sources, crude slates, suppliers, product requirements and methods of transportation are often in flux, and the drive for innovation in lower carbon intensity fuels promotes constant change.

Accordingly, the time and effort involved in completing an LCA—both on the part of the project applicant and the decision-maker—should be reserved for larger, more significant projects that have the potential to result in substantial GHG emissions. To this end, bp recommends that Ecology establish a secondary threshold for requiring an LCA that is significantly higher than that of the screening threshold—for example, 75,000 MT CO_2e/year.[17] Projects that are subject to the GAP

[16] *See* bp Jan. 2021 GAP Rule Letter at 5; bp Nov. 2020 GAP Rule Letter at 3.

[17] bp previously recommended this threshold in its November 2020 letter because it is consistent with EPA's threshold for determining whether best available control technology ("BACT") analysis is required. *See* bp Nov. 2020 GAP Rule Letter at 4–5. For purposes of the Prevention of Significant Deterioration ("PSD") permit program under the Clean Air Act, EPA considers projects less than 75,000 MT CO_2e/year as de minimis. *See* Revisions to the

Rule but fall below the 75,000 MT CO2e/year threshold would still conduct environmental assessments, but given the smaller size of these projects, bp believes a simpler and more cost-effective form of review is appropriate. For example, for projects below this secondary threshold, quantification of scopes 1 and 2 emissions and qualitative discussion of scope 3 emissions may be sufficient.[18] By employing this tiered approach, the GAP Rule would ensure that administrative burdens are commensurate with potential environmental impacts, and that the SEPA review process is completed in a timely manner.[19]

7. Baseline and No Action Alternative

Ecology states that both the baseline and no action alternative will include consideration of "state and federal GHG reduction limits." For an existing facility, bp understands that the baseline is a backwards-looking assessment of the recent

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Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas (GHG) Permitting Regulations and Establishment of a Significant Emissions Rate (SER) for GHG Emissions Under the PSD Program, 81 Fed. Reg. 68,110, 68,113 (Oct. 3, 2016) ("A 75,000 tpy CO2e GHG SER, based on our technical analysis, represents a level of GHGs, below which there is trivial or no value in conducting a BACT analysis for GHGs because we would not expect to obtain meaningful GHG reductions from requiring application of BACT at all such sources. In addition, there does not appear to be a basis to set a GHG SER level above 75,000 tpy CO2e based on . . . the fundamental principles for establishing a *de minimis* exception to a statutory requirement.")

[18] The Obama Administration Council on Environmental Quality ("CEQ") final GHG guidance under the National Environmental Policy Act, which is currently under review by the Biden-Harris Administration, acknowledged that quantification of GHG emissions is not required in all circumstances. *See* CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews at 11–12 (Aug. 1, 2016) (When determining whether to quantify GHG emissions, "[a]gencies should be guided by the principle that the extent of the analysis should be commensurate with the *quantity of projected GHG emissions* and take into account available data and GHG quantification tools that are suitable for and commensurate with the proposed agency action.") (emphasis added). Where quantification is infeasible or not appropriate, CEQ recommended conducting qualitative analyses. *See id.* at 4, 10, 13, 16.

[19] RCW § 43.21C.0311, Notes (2017) ("The legislature finds that the analysis of environmental impacts required under the state environmental policy act adds value to government decision-making processes in Washington state and helps minimize the potential environmental harm coming from those government decisions. However, the legislature also recognizes that excessive delays in the environmental impact analysis process adds uncertainty and burdensome costs to those seeking to do business in the state of Washington. Therefore, it is the intent of the legislature to promote timely completion of state environmental policy act processes. In doing so, the legislature intends to restore balance between the need to carefully consider environmental impacts and the need to maintain the economic competitiveness of state businesses.").

and current GHG emissions of the facility (i.e., the existing environment),[20] and that the no action alternative is a forward-looking assessment projecting emissions into the future as a continuation of the baseline without the proposed project (i.e., the "business as usual" case).[21]

While acknowledging the importance of incorporating future conditions, bp notes that GHG reduction requirements under yet-to-be-enacted state and federal laws, or set forth under existing laws that are general, economy-wide, and not specific to particular types of facilities or projects, may be difficult to incorporate into a no action alternative with any degree of certainty. If not carefully designed, consideration of future conditions could create the appearance of inconsistencies among similar projects reviewed under the GAP Rule. Accordingly, bp recommends that Ecology consider developing standardized methodology for consideration of future conditions. This methodology should also be used when projecting the future GHG emissions of the proposed action to ensure that there is an "apples-to-apples" comparison. For example, if the carbon intensity of grid electricity will decline substantially over the 40-year life of a project, that should be taken into account in estimating emissions from both the no action alternative and the proposed project.

Specific to baseline conditions at existing facilities, bp recommends that the GAP Rule include flexibility to ensure that baseline years are representative of conditions at the facility. For example, a reasonable rule-of-thumb for a baseline may be to average the GHG emissions of the facility over the prior five years; however, facilities should have flexibility to exclude a year that is not representative. Given depressed gasoline and diesel demand due to COVID-19, for example, it may make sense to exclude the year 2020 from the baseline as non-representative. Other examples may include years in which a refinery has a major turnaround or significant operational disruptions.

In sum, for existing facilities, establishing an appropriate baseline is a complex but critical step for every phase of the GAP Rule. bp believes this is one of several issues that would be appropriate for consideration by a technical working group.

8. Facility Operational Emissions

As a general matter, bp supports Ecology's inclusion of and reliance upon existing GHG emissions reporting frameworks, where possible, to ensure that conducting GHG emissions analyses—particularly for smaller-scale projects—is not unnecessarily burdensome. Ecology proposes that "facility operational emissions"

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[20] Conceptual Framework at 18 ("Baseline condition. The environmental assessment will use current (existing) conditions as the baseline for GHG emissions. The future potential GHG emissions from the project will be compared to the baseline to determine the potential impacts.").

[21] *Id.* ("[T]he No Action Alternative will evaluate future conditions without the project and with consideration of state and federal GHG reduction limits.").

should be calculated consistent with WAC 173-441-120, which generally incorporates 40 C.F.R. Part 98, but Ecology also proposes to include a number of categories that are not directly addressed in WAC 173-441, including employee commuting and local transportation impacts.[22] Strategies to standardize and simplify aspects of the environmental assessment would be helpful, particularly as there is no consensus on a methodology for calculating emissions associated with employee commuting and local transportation impacts.

Further, within Part 98, many subparts contain multiple options for preparing emissions calculations with greater granularity of data.[23] In general, it would not be appropriate for a proposed project to use the higher tier, more refined emissions calculation methods as data for a project or facility that does not yet exist. Determining which specific calculation methodologies to use should be at the project proponent's discretion based on available information.

With respect to construction and decommissioning GHG emissions, bp recommends that Ecology offer project proponents a set of conservative default values and/or guidance for estimating these emissions. For example, establishing look-up tables based on square footage constructed, weight of equipment installed, or proportion of estimated construction costs, could streamline this potentially complex and time-consuming exercise. Further, decommissioning GHG emissions are a difficult concept to apply to projects at existing facilities such as refineries, where there may be no particular time at which newly-installed equipment would be retired rather than replaced in-kind. To simplify, Ecology could allow project proponents to use a conservative default decommissioning GHG emissions value based on a percentage of construction emissions.

Of course, Ecology could always allow proponents to analyze these emissions at a more granular level if desired. To the extent it may be difficult to generate these default values, Ecology should consider convening a technical working group to address these issues and/or allow project proponents to independently develop streamlined approaches to right-size the analysis of these types of GHG emissions, as they are rarely a key emissions driver over the lifetime of a project.

9. Framework for Conducting Lifecycle Analysis

As an initial matter, bp reiterates its suggestion that Ecology convene a technical working group to establish a workable framework for conducting LCAs. Such a framework should be designed to ensure that: (1) the results of LCAs are consistent and comparable across different projects and across industries; (2) the assessment effort is fit-for-purpose and focused on key drivers of project lifecycle impacts; and (3) the approach Ecology requires is consistent with the ISO

[22] *Id.* at 20.

[23] *See, e.g.*, Subpart C Tiers 1 through 4, 40 C.F.R. § 98.33.

standards.[24] However, additional clarity beyond the ISO 14040 and 14044 standards is necessary to achieve these goals. For example, Ecology could provide guidance regarding the specifics of a sensitivity analysis to narrow the wide range of parameters proponents could evaluate under the ISO 14044 standard.

In addition, consistent with the suggestion above regarding streamlining of construction and decommissioning emissions, bp recommends that Ecology consider strategies for conducting LCAs to streamline the analyses. For example, establishing conservative default assumptions for certain types of upstream emissions associated with raw materials acquisition, manufacturing, and processing may be appropriate. These and other issues warrant additional technical discussion prior to accepting public comment on the GAP Rule's proposed language.

10. Energy Analysis

bp recommends that Ecology define the particular category of projects for which a quantitative and qualitative energy analysis is necessary and not redundant of an LCA, as the LCA typically already will analyze energy demand and related GHG emissions associated with the project. For a wide array of projects at existing facilities that have modest increases or decreases in energy demands, an additional energy analysis would be inappropriate, as there would not be a "shift in energy use on a larger scale."[25] In addition, with respect to "geographic carbon leakage," it is not expected that the broad trends typically addressed in carbon leakage analysis would be relevant to small-scale projects.

Based on the outcome of an LCA, it would be reasonable for a project proponent to evaluate whether an additional "energy analysis" would provide any new and useful information. Requiring an "energy analysis" for every project, where no such showing can be made, would be counterproductive by overly complicating the assessment and involving unnecessary burden and expense. At a minimum, this additional "energy analysis" should not be required for projects below the 75,000 MT CO2e/year secondary threshold that we recommended above, for purposes of conducting a full LCA.

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[24] With respect to (3), there are inconsistencies in the language the Conceptual Framework uses and how those concepts are understood under the ISO standards that warrant further consideration. For example, the Conceptual Framework states the LCA "will describe the uncertainties associated with the project's GHG emissions in the LCA estimates, including uncertainty related to data and uncertainty related to methods and models." Conceptual Framework at 23. Under the ISO 14044 standard, an uncertainty analysis has a specific, distinct meaning from the description above. It is unclear whether Ecology is calling for an additional type of uncertainty analysis in lieu of the ISO standards, or something else.

[25] Conceptual Framework at 24. As noted in our August 2020 letter, carbon leakage is generally defined as "the counterproductive phenomenon in which the unilateral regulation of GHG emissions in one region/area results in emission producing activities moving to another region/area, undermining the effort to reduce GHG emissions." bp Aug. 2020 GAP Rule Letter at 2 n.1.

Mitigation

11. Scope of Emissions Mitigated

As explained in our January 2021 comments, bp recommends that under the GAP Rule and the Washington State Environmental Policy Act ("SEPA") more generally, GHG mitigation requirements should be primarily focused on GHG emissions from sources that project proponents own or control. bp therefore suggests focusing mitigation requirements on scopes 1 and 2 emissions resulting from proposed projects.

Though important, analyzing scope 3 emissions—whether projected in the SEPA document or reported on an annual basis—will necessarily require a considerable degree of speculation. This analysis may be especially difficult for projects involving modifications of equipment at an existing facility, given the constant fluctuation in a refinery's feedstock sources, suppliers, and methods of transportation, coupled with constantly changing product demand considerations. Imposition of clear and consistent mitigation requirements for scope 3 emissions across projects (as well as across industries) would be extremely challenging in light of these factors. Thus, while bp supports including certain scope 3 emissions at the assessment phase of the GAP Rule, which serves important information disclosure purposes (see Issue #5), we believe it is impractical and inappropriate to inject this degree of speculation and uncertainty into the mitigation framework. As you know, the mitigation requirements must be approached carefully, as this is where the GAP Rule could impose millions of dollars of additional costs on projects. These added costs potentially could drive beneficial decarbonization investments away from Washington state.

In addition, as we pointed out in our January 2021 comments, there are statutory and constitutional limits on agencies' authority to impose mitigation under SEPA and the GAP Rule.[26] SEPA reflects the requirements of nexus and proportionality that are applicable to environmental and land use law in Washington.[27] Before imposing mitigation, agencies must "consider whether local, state, or federal requirements and enforcement would mitigate an identified

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[26] bp Jan. 2021 GAP Rule Letter at 6–7.

[27] U.S. Const. Amend. V; Wash. Const. art. I, § 16; RCW § 82.02.020 (local government must demonstrate that mitigation is "reasonably necessary as a direct result of the proposed development"); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (government may not condition the approval of a permit on a monetary payment "unless there is a 'nexus' and 'rough proportionality' between the government's demand the effects of the proposed land use"); *see, e.g.*, *City of Fed. Way v. Town & Country Real Est., LLC*, 161 Wash. App. 17 (2011) (evaluating challenges to mitigation measures under RCW 82.02.020 and SEPA).

significant impact."[28] SEPA only grants authority to impose mitigation on applicants "to the extent attributable to the identified adverse impacts."[29] Furthermore, many, if not most, scope 3 emissions are generated by the activities of out-of-state third parties. Bringing these out-of-state activities within the ambit of the GAP Rule risks overreaching, given constitutional prohibitions on regulating extraterritorial economic activities or discriminating against interstate commerce.[30]

In sum, bp acknowledges the importance of addressing scope 3 emissions to meet the State's and bp's own climate goals.[31] However, bp believes that SEPA is not the most appropriate regulatory mechanisms to equitably, efficiently, and defensibly address scope 3 emissions. Accordingly, bp recommends that the GAP Rule's GHG mitigation requirements focus on scopes 1 and 2 emissions that can be calculated with a greater degree of certainty, are directly attributable to project proponents, and more comfortably fall within the scope of Ecology's authorities. bp recommends that the State of Washington address scope 3 emissions through other regulatory mechanisms that, for example, incentivize reductions in the carbon intensity of a fuel producer's product mix or place a price on carbon emissions economy-wide and as close to the point of regulation as is administratively feasible (e.g., well designed cap-and-invest, low carbon fuel standards, and/or carbon pricing mechanisms).

12. Projects Subject to Mitigation

In furtherance of bp's proposed tiered structure and consistent with SEPA, Ecology's SEPA Rules, and the Conceptual Framework, bp recommends that Ecology only require mitigation when it is determined that a proposed project will have ***significant*** GHG emissions.[32] To provide the regulatory certainty desired by the regulated community, bp recommends that Ecology address two key issues related to determining which projects will require mitigation: (1) defining a

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[28] WAC 197-11-660(1)(e); Richard L. Settle, The Washington State Environmental Policy Act, A Legal and Policy Analysis, § 18.01[2][e] (2020 Ed.) ("Even if SEPA authorized redundant mitigation, it probably would violate constitutional substantive due process or RCW 82.02.020, as interpreted by the Washington courts. Moreover, duplicative mitigation exactions may be regulatory takings, because they would not be reasonably necessary as a direct result of the proposed action or roughly proportional to the impacts of the proposed project.").

[29] WAC 197-11-660(1)(d); *see also* WAC 197-11-060(4)(e) (acknowledging that the range of impacts analyzed may be wider than those mitigated depending on the extent to which the "adverse impacts are attributable to the applicant's proposal, and the capability of applicants or agencies to control the impacts in each situation").

[30] U.S. Const. art. I, § 8, cl. 3.

[31] *BP sets ambition for net zero by 2050, fundamentally changing organization to deliver* (Feb. 12, 2020).

[32] Conceptual Framework at 9 (noting that "[u]nder RCW 43.21C.060, agencies with governmental actions, such as permits, have discretionary authority to require mitigation for significant adverse environmental impacts").

significance threshold; and (2) determining whether a project exceeds that threshold.

bp recommends that Ecology consider establishing a threshold that includes a quantitative standard (or standards) for when the GAP Rule's mitigation requirements apply. If Ecology establishes procedures to conduct consistent and uniform environmental assessment procedures for projects subject to the GAP Rule, a numeric threshold could provide the regulated community with the ability to predict and plan for the potential financial impacts of the GAP Rule.

bp also recommends that the mitigation threshold allow agencies to take into consideration compliance with other GHG emissions reduction regulations or requirements. For example, the California Environmental Quality Act regulations direct agencies to consider the "extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of [GHG] emissions" when determining significance.[33] This language has been relied on to find that projects do not have significant GHG emissions when they will comply with the state-wide cap-and-trade program.[34]

bp further recommends that Ecology provide clear guidance on what measures can be used by project proponents and agencies to demonstrate reductions in GHG emissions that are part of the project and may contribute to a project not exceeding the mitigation threshold. Consistent with the Conceptual Framework,[35] bp recommends that Ecology clarify that the following considerations are appropriate for determining whether a project exceeds the threshold:

- Design features that limit the proposed project's GHG emissions, including, for example, energy efficient technologies, use of renewable energy resources, or enforceable production or operational limits;

- Other local, state, or federal requirements and enforcement (e.g., implementation of best available control technology ("BACT") under the Clean Air Act) that would mitigate the GHG emissions resulting from the proposed project;[36] and

- At existing facilities, comparison of the proposed project to the no action alternative (as defined above in Issue #7) to demonstrate, for example, how the project improves the efficiency of facility operations or reduces the

[33] 14 CCR § 15064.4(b)(3).

[34] *See, e.g., Ass'n of Irritated Residents v. Kern Cnty. Bd. of Supervisors*, 225 Cal. Rptr. 3d 463 (Cal. 5th Dist. Ct. App. 2017).

[35] Conceptual Framework at 27.

[36] WAC 197-11-660(1)(e) ("Before requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.").

carbon intensity of a refinery's product mix by substituting lower carbon intensity fuels for higher carbon intensity fuels.

bp believes that integrating these considerations into the determination of whether a project exceeds the mitigation threshold will be critical to ensuring that the GAP Rule incentivizes, and does not discourage, investments necessary to support the transition to a net-zero economy.[37]

13. Mitigation Strategies

Ecology proposes that all projects subject to the GAP Rule will be required to prepare a "mitigation plan."[38] To better understand Ecology's intentions for the mitigation plan, bp recommends that Ecology clarify the following comments made in the Conceptual Framework:

- Ecology states that the mitigation plan will be based on annual actual emissions, then states that the mitigation plan must "identify the quantity of GHG emissions to be mitigated (in CO2e) for each year of construction and operations."[39] It is unclear how the plan could specifically identify quantitative mitigation requirements, as future actual emissions will be unknown at the time the plan is created. bp recommends that Ecology clarify that a mitigation plan may include estimates of future GHG emissions that would require mitigation, while leaving the determination of specific mitigation requirements for a later stage based on actual annual emissions.

- Ecology explains that the "mitigation plan applies for the ***lifetime*** of the project, and therefore may go beyond the ***life span*** considered in the environmental assessment."[40] Our understanding is that Ecology is contemplating that, in some instances, a project may remain in place after the life span initially contemplated in the environmental assessment. Under such circumstances, mitigation requirements would continue to apply. Please confirm if this is correct.

bp recommends that Ecology provide project proponents and agencies flexibility in the strategy for mitigating emissions. For large-scale, new greenfield projects, Ecology's proposal of requiring the annual reporting and tracking of mitigation measures under a single plan should provide a flexible method of compliance that imposes mitigation based on actual emissions. This method would allow project proponents and agencies to more seamlessly integrate advances in emissions calculation methodologies, changes in the operations of the proposed facility, and new regulatory schemes relevant to GHG emissions reductions. For

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[37] Similar considerations informed our recommendation in favor of omitting additional GHG analysis for particular types of projects at the screening phase (see Issue #4).

[38] Conceptual Framework at 7, 16.

[39] *Id.* at 27, 30.

[40] *Id.* at 30 (emphasis added).

certain projects at existing facilities, a streamlined approach may be more appropriate. Specifically, bp recommends that for smaller-scale projects, Ecology allow for an advance mitigation scheme involving a one-time mitigation project or payment, based on a conservative estimate of GHG emissions requiring mitigation. This approach would reduce the administrative burden on a facility like bp's Cherry Point Refinery, which would potentially be responsible for monitoring and implementing multiple project-specific mitigation plans.

14. Mitigation Types, Locations, and Preference

bp supports Ecology's proposal in the Conceptual Framework to provide flexibility in the types of mitigation that may be used under the GAP Rule, including funding projects directly and purchasing offsets through established carbon markets.[41] bp also supports Ecology's proposal in the 2020 webinars to provide flexibility in the location of those mitigation measures, to occur in-state, nationally, or internationally.

As noted in our January 2021 comments, bp believes that the GAP Rule mitigation requirements should reflect the global nature of climate change.[42] Recognizing that GHG emissions have global, rather than localized impacts, bp encourages Ecology to permit use of out-of-state mitigation measures, as there may be limited availability of in-state projects. In addition, in-state mitigation projects may be significantly more expensive than out-of-state alternative mitigation measures, which could unreasonably increase the costs of mitigation and impede projects that support the decarbonization of Washington's economy.[43] Nonetheless, bp supports a preference for in-state mitigation measures where reasonable and feasible.

To guide when in-state mitigation is appropriate, bp recommends that Ecology direct agencies to consider: (1) comparing the costs of local or in-state mitigation measures to out-of-state mitigation measures and establish a cost cap (e.g., no more than 125% the average cost of purchasing credits/offsets); and (2) providing project proponents greater credit for mitigation projects that occur locally and/or achieve co-benefits, including other environmental, economic, or resilience benefits, that are not required under SEPA or other requirements.

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[41] Conceptual Framework at 27–28.

[42] *See generally Ctr. for Biological Diversity v. Cal. Dep't of Fish & Wildlife*, 195 Cal. Rptr. 3d 247, 257 (2015), *as modified on denial of reh'g* (Feb. 17, 2016) ("[T]he global scope of climate change and the fact that carbon dioxide and other greenhouse gases, once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local. For many air pollutants, the significance of their environmental impact may depend greatly on *where* they are emitted; for greenhouse gases, it does not.").

[43] WAC 197-11-660(1)(c) ("Mitigation measures shall be ***reasonable*** and capable of being accomplished.") (emphasis added).

15. Mitigation Criteria

Ecology has repeatedly stated that it intends to require mitigation to meet the following five criteria: (1) real; (2) permanent; (3) enforceable; (4) verifiable; and (5) additional. In defining these terms, bp recommends that Ecology carefully consider how to avoid unintended consequences with respect to the following two terms in particular.

- "Permanent": bp encourages Ecology to recognize technological advances and regulatory frameworks that ensure the "permanence" of carbon capture, utilization, and storage projects ("CCUS") and natural climate solutions (e.g., forestry projects), which will likely play significant roles in transitioning to a net-zero economy.

- "Additional": bp also encourages Ecology to carefully define the concept of additionality so as to avoid: (1) imposing duplicative mitigation requirements; and (2) precluding project proponents from undertaking mitigation projects with co-benefits. bp acknowledges that project proponents generally should not be able to claim mitigation credit for projects intended to offset GHG emissions from other projects. In other words, project proponents should not be able to "double count" mitigation projects for different sources of GHG emissions. However, as discussed above (see Issue #12), the GAP Rule should ensure that project proponents do receive credit for mitigation requirements imposed under other authorities for the same source of GHG emissions. In addition, project proponents should have the flexibility to: (1) implement large-scale mitigation projects to offset GHG emissions from more than one project reviewed under the GAP Rule; and (2) receive mitigation credit for more than one resource area when a project will have co-benefits, as discussed above (see Issue #14).[44]

16. Extent of Mitigation

In the Conceptual Framework, Ecology seems to indicate that project proponents may only be required to mitigate a "portion" of the GHG emissions disclosed in the environmental assessment.[45] However, Ecology has not yet discussed what portion of GHG emissions will be mitigated under the GAP Rule. While supporting agency discretion and voluntary mitigation consistent with the Ecology SEPA Rules,[46] bp also believes that establishing criteria or guidance on how

[44] For example, where a wetlands restoration project would both restore wetlands habitat and reduce GHG emissions, project proponents should be able to receive credit for both their GHG emissions and wetlands impacts.

[45] Conceptual Framework at 27 ("The rule will also establish methods for quantifying the ***portion*** of GHG emissions to be mitigated for projects at existing facilities.") (emphasis added).

[46] WAC 197-11-660(1)(c).

to approach this determination could improve the predictability of the GAP Rule and allow industry to better plan for the potential costs of a project. For example, Ecology could recommend mitigation of emissions to: (1) a certain percentage below the "no action alternative"; or (2) below a specific numeric or percentage threshold. Once Ecology provides further information, bp looks forward to providing specific suggestions on how to address this important issue.

Miscellaneous Topics

17. Exclusivity of the GAP Rule

This rulemaking process presents an opportunity for Ecology and all interested stakeholders to work together to establish a state-wide solution for a global problem. As Ecology has recognized, the GAP Rule "supports the state energy strategy by providing for a consistent and comprehensive assessment of GHG emissions for projects and providing for alignment for the state's GHG reduction limits."[47] Accordingly, the GAP Rule should establish state-wide, exclusive GHG emissions assessment standards and mitigation requirements applicable to all SEPA agencies, including at the local government level. This is an important issue that deserves careful consideration, as a patchwork of conflicting GHG emissions assessment and mitigation requirements by other state or local agencies would undermine the GAP Rule's uniformity and could cause counterproductive consequences, as extensively discussed in bp's July 2020 comments.

18. Interaction With Other Potential State-Wide GHG Emissions Reduction Programs

In a similar vein, bp requests that Ecology provide additional clarity on how the GAP Rule will interact with other potential state-wide legislation aimed at reducing GHG emissions, including, for example, cap-and-invest, low carbon fuel standards, and carbon pricing mechanisms. As discussed above (see Issue #11), these programs can and should be complementary to the GAP Rule framework to avoid counterproductive and/or duplicative mitigation requirements. As one example, a refinery that has already addressed the anticipated GHG emissions of a renewable fuel project through its cap-and-invest credits—and/or to satisfy obligations under a low carbon fuel standard—could find that the additional, duplicative mitigation requirements of the GAP Rule make the project uneconomical. To prevent these programs from compromising their shared goal of reducing GHG emissions, Ecology should carefully consider how these multifaceted Washington State programs will interact with each other.

[47] Conceptual Framework at 11.

Figure: Proposed GAP Rule Tiered Structure