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January 26, 2022

Cooper Garbe
Washington State Department of Ecology
Submitted via Electronic Upload

Re: Comments on Draft Chapter 173-446 WAC, Climate Commitment Act Program Rule

Dear Mr. Garbe:

On behalf of bp America Inc. ("bp"), thank you for the opportunity to participate in the Washington Department of Ecology's ("DOE") rulemaking process implementing the Climate Commitment Act ("CCA"), S.B. 5126. bp submits these comments in connection with the informal comment period on DOE's draft rule for the CCA Program, Chapter 173-446 WAC (the "Draft Rule").

In 2020, bp set an ambition to reach net zero by 2050 or sooner, and to help the world get there too. One of bp's aims for helping the world achieve net zero is advocating for reasonable and workable policies to achieve this goal.

To that end, bp supported the enactment of the CCA, a ground-breaking piece of legislation that creates a comprehensive and market-based cap-and-invest program to curb emissions. The CCA will address climate change by incentivizing and rewarding low carbon innovation across the economy while also providing the certainty businesses need to invest in these technologies. Along with the complementary requirements in Washington's new, comprehensive "360-degree" approach for achieving net zero by 2050—including the Clean Fuels Program, the Clean Energy Transformation Act, and the forthcoming Greenhouse Gas Assessment for Projects ("GAP") Rule—bp believes that the CCA can become a model for other states looking to accelerate their own low carbon transition.

bp appreciates DOE providing opportunities for early engagement in the development of the CCA Program by opening an informal comment period, hosting webinars, and sharing draft language. The following comments on the January 4, 2022 version of the Draft Rule and DOE's webinar presentations reflect our view of how the CCA Program can best incentivize investments in low carbon technologies and promote regulatory certainty and administrative efficiency for both DOE and covered entities.

Comments on DOE's Draft Rule

1. Covered Entities

bp requests that DOE clarify how companies that qualify as covered entities under more than one category will participate in the CCA Program. In the Draft Rule, the definition of "covered entity" states that "[e]ach facility, supplier, or first jurisdictional deliverer serving as an electricity importer is a *separate* covered entity." Draft WAC 173-446-020(cc)(emphasis added). Based on this definition, the listing of covered entities at Draft WAC 173-446-030(1), and the registration process at Draft WAC 173-446-050, it is possible that a refinery could be registered as two separate entities (i.e., a facility and a supplier of fossil fuel other than natural gas) that have two separate compliance obligations. We encourage DOE to allow parties that are both facilities and suppliers to register and operate as a single entity. This arrangement would be consistent with DOE's authority under Section 10(8) of the CCA to "by rule authorize refineries, fuel suppliers, facilities using natural gas, and natural gas utilities to provide by agreement for the assumption of the compliance obligation for fuel or natural gas supplied and combusted in the state." RCW 70A.65.080(8). This arrangement could, among other things, improve administrative efficiency by avoiding the need for transfers among entities with the same parent company. *See* Draft WAC 173-446-410.

2. Covered Emissions

- Biofuels: Section 10(7) CCA provides that "[t]he following emissions are exempt from coverage in the program, regardless of the emissions reported under RCW 70A.15.2200 or provided as required by this chapter: . . . Carbon dioxide emissions from the combustion of biomass or biofuels." RCW 70A.65.070(7). Draft WAC 173-446-040(2)(a)(i) provides that covered emissions do not include "[c]arbon dioxide emissions from the combustion of biomass or biofuels from any facility, supplier, or electric power entity." The Draft Rule defines "biofuels" as "fuels derived from biomass that have at least 40 percent lower GHG emissions based on a full lifecycle analysis when compared to petroleum fuels for which biofuels are capable as serving as a substitute." Draft WAC 173-446-020(1)(o).

  bp believes that additional explanation is needed regarding how emissions from biofuels will be defined and excluded from an entity's covered emissions. Many renewable fuels are made by co-processing biomass-based feedstocks with traditional feedstocks and finished renewable fuel products vary in their biomass content. For instance, pure, unblended renewable diesel is referred to as R100, and a blend of 20% renewable diesel and 80% petroleum diesel is referred to as R20. A fuel containing a blend of 5% renewable diesel and 95% petroleum diesel is referred to as R5.

  We recommend that DOE clarify that, for a co-processed blend, such as R5 or R10, the 40% emissions reduction test applies only to the renewable portion of the blend. In other words, so long as the renewable portion of the blend results in lifecycle GHG emissions that are 40% lower than the emissions from petroleum fuels, then the

renewable portion of the blend qualifies for the exclusion from covered combustion emissions under Draft WAC 173-446-040(2)(a)(i). Further, DOE should clarify how the exclusion will be calculated. In particular, DOE should explain that, consistent with Draft WAC 173-446-040(2)(a)(i), covered entities may subtract the renewable portion of the blend and report the combustion emissions associated only with the remaining petroleum portion of the blend.

In addition, bp requests that DOE confirm that emissions from the combustion of biofuels are excluded from a fuel supplier's covered emissions and revise Draft WAC 173-446-040(3)(c)(i) accordingly. *See* Draft WAC 173-446-040(3)(c)(i) ("The following emissions are covered emissions for suppliers of fossil fuel . . . [e]missions from the combustion of biomass-derived fuel . . .).

- Sustainable Aviation Fuels: Aviation emissions account for 11 percent of the United States' transportation-related emissions,[1] and the production of sustainable aviation fuel ("SAF") presents a significant opportunity for Washington's "360-degree" approach to make progress towards achieving net zero by 2050. The Clean Fuels Program recognizes the importance of SAF by providing, in its current draft form, that "alternative jet fuel" is an "opt-in" fuel for which fuel providers may receive "CFP credits." Draft WAC 173-424-130(3)(b). Consistent with the CCA, meanwhile, the Draft Rule exempts emissions from the combustion of all aviation fuel, regardless of whether it is derived from petroleum or biomass feedstocks. RCW 70A.65.080(7)(a); Draft WAC 173-446-040(2)(b)(i); Draft WAC 173-446-200(2)(d). Although emissions from the combustion of aviation fuel are not covered emissions under the CCA, bp encourages DOE to consider whether the CCA Program may complement the Clean Fuels Program in incentivizing the production of SAF. Further encouraging the production of SAF would help achieve the legislature's intent of encouraging "industries to continue to innovate, . . . use lower carbon products, and be positioned to be global leaders in a low carbon economy." RCW 70A.65.005(6). bp believes this is an important issue and would welcome the opportunity to discuss potential recommendations with DOE.

- Carbon Removal Technologies: Draft WAC 173-446-040(3)(a)(ii)(B)(I) provides that covered emissions for reporting facilities do not include carbon dioxide that is collected and supplied offsite and is "permanently removed from the atmosphere either through long term geologic sequestration or by conversion into long lived mineral form." *See also* Draft WAC 173-446-040(3)(d)(ii)(A) (excluding the same emissions from the covered emissions of suppliers of carbon dioxide).

  bp recommends that this exemption be expanded to encourage businesses to employ additional carbon removal technologies. For example, this language needs to include other carbon capture and utilization technologies. Indeed, bp notes that, at the federal level, the Biden administration has made a commitment to "accelerating the responsible development and deployment of CCUS to make it a widely available,

[1] *See, e.g.*, https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/09/fact-sheet-biden-administration-advances-the-future-of-sustainable-fuels-in-american-aviation/.

increasingly cost-effective, and rapidly scalable solution across all industrial sectors."[2] The CCA should likewise encourage the development of all facets of CCUS technology, including utilization.

- Carbon Dioxide Supply: bp recommends that DOE clarify the treatment of emissions associated with carbon dioxide that is captured and supplied to offsite consumers. Draft WAC 173-446-040(3)(a)(ii)(B)(II) provides that covered emissions for reporting facilities do not include "[c]arbon dioxide collected and supplied offsite that the facility owner or operator can demonstrate to Ecology's satisfaction . . . is part of the covered emissions of another covered party under this chapter."

  As explained in our comments on the Proposed Update to Chapter 173-441 WAC, bp captures carbon dioxide from its processes and supplies it to a number of third-party distributors in Washington state. The carbon dioxide is ultimately utilized by a variety of end users. Based on the language in Draft WAC 173-446-030, it does not appear that third-party distributors are "covered entities." However, it appears that third party distributors may be able to participate as opt-in entities. *See* Draft WAC 173-446-050(2); *see also* WAC 173-441-020(p)(ii). DOE should clarify whether emissions from captured and supplied carbon dioxide are the responsibility of reporting facilities or potential third-party distributors which opt-in to the CCA Program.

3. Allowances

bp has a number of comments related to the proposed methodology for assigning no cost allowances to emissions-intensive, trade-exposed ("EITE") facilities.

- Baseline Alternate Years: The methodology for establishing an EITE facility's baseline utilizing "alternate years" from the 2015 to 2019 period should be further explained in the Proposed Rule. Draft WAC 173-446-220 is unclear regarding whether the baseline:
  - must be based on five total years of operation, such that "alternate years" would be substitutes for years in the 2015 to 2019 baseline;
  - can be based on more than five years, such that the "alternate years" would supplement the 2015 to 2019 baseline; or
  - can be based on fewer than five years, such that facilities would have flexibility to request any combination of years between the 2012 to 2019 period.

  The relevant language in the CCA is open to interpretation. Specifically, the CCA states that 2015 to 2019 data must be used "unless the emissions-intensive, trade-exposed facility can demonstrate that there have been abnormal periods of operation that materially impacted the facility and the baseline period should be expanded to include years prior to 2015." *See* RCW 70A.65.110(3)(b)(ii) (discussing the mass-based baseline); RCW 70A.65.110(3)(c)(i) (discussing the carbon intensity baseline).

[2] *See* Council on Environmental Quality Report to Congress on Carbon Capture, Utilization, and Sequestration at 6, https://www.whitehouse.gov/wp-content/uploads/2021/06/CEQ-CCUS-Permitting-Report.pdf.

Accordingly, we encourage DOE to carefully consider how it defines this baseline period.

- Production Data for Allowances Based on Carbon Intensity: bp is concerned that it will not be possible, as a practical matter, to provide the production data required to establish a carbon intensity baseline. Draft WAC 173-446-220(1)(a)(ii) states that EITE facilities that wish to be allocated no cost allowances must submit the product data "described in WAC 173-441-050(3)(n)." In the Proposed Update to WAC 173-441, DOE has proposed that the production metric for petroleum refineries be: "Complexity weighted barrel as described in CARB MRR section 95113(l)(3) as adopted by 7/1/2021."

  bp raised concerns with use of this California-specific production metric in its comments on the Proposed Update to Chapter 173-441 WAC.[3] The Cherry Point Refinery has never had to comply with CARB MRR section 95113, which would have required implementing and calibrating new meters and equipment installed during a scheduled turnaround. Accordingly, it may be difficult, if not impossible, to provide past production data that complies with these requirements.

  bp requests that DOE allow petroleum refineries to provide alternate production data. If DOE sets the carbon intensity baseline for a petroleum refinery based on an alternate production metric, DOE should use that same production metric when conducting the annual true up for allocating no cost allowances to avoid distorting the results. *See* Draft WAC 173-446-220(2). We would welcome the opportunity to work with DOE and other refinery operators in the state to discuss potential alternate production metrics.

- Opportunity for Review: Relatedly, bp is concerned that the Draft Rules do not provide EITE facilities an opportunity to confer with DOE or seek reconsideration if DOE sets an allocation baseline that is different than the baseline estimated by the EITE facility. Consistent with the CCA, the Draft Rule provides each EITE an opportunity to submit its carbon intensity baseline. RCW 70A.65.110(3)(c); Draft WAC 173-446-220(1)(a). However, based on the Draft Rule, bp understands that the EITE facility's submitted carbon intensity baseline may be subject to change by DOE.

  The Draft Rule states that DOE may base an EITE facility's allocation baseline on: 1) information submitted by the EITE facility; 2) information reported under WAC 173-441; 3) an assigned emissions level under WAC 173-441; *or* 4) "or other sources of information deemed significant." Draft WAC 173-446-220(1)(b)(i). DOE also notes that it "may adjust submitted information as necessary." *Id.*

  The allocation baseline is a critical determination, as DOE proposes that it be used to determine EITE facilities' no cost allocations for the first three compliance periods (i.e., 2023 to 2034). *See* Draft WAC 173-446-220(2)(b). Accordingly, if DOE elects to use data other than that provided by the EITE facility to determine the baseline, bp requests

[3] bp Comments on Proposed Update to Chapter 173-441 WAC, Reporting of Emissions of Greenhouse Gases at 3 (submitted Nov. 16, 2021).

that DOE provide the EITE facility an opportunity to review the allocation before it is finalized and to seek reconsideration and/or provide supplemental information in response. bp recognizes that the CCA requires DOE to "review and approve" each EITE facility's baseline carbon intensity for the first compliance period by November 15, 2022 and encourages DOE to consider providing EITE facilities with a draft baseline by October 15, 2022. *See* RCW 70A.65.110.

4. Offsets

bp requests that DOE further consider the definitions of the following terms related to offsets.

- "Additional": bp is concerned that the Draft Rule's language requiring offset projects to provide GHG reductions or removals that exceed GHG reductions or removals "that would otherwise occur in a conservative business-as-usual scenario" could have unintended consequences. Draft WAC 173-446-020(1)(a); *see also* Draft WAC 173-446-510(1)(a)(i). We note while an additionality requirement does appear in the CCA, the specific phrase "conservative business-as-usual scenario" does not. *See* RCW 70A.65.170(20(b)(ii). Without further explanation, this phrase could cause delays and discourage development of offset projects because it is open to multiple interpretations. bp recommends that DOE consider carefully defining "conservative" and "business as usual." We would be happy to work with DOE and other covered entities in crafting definitions for these terms.

- "Direct Environmental Benefits": bp notes that there is conflict between the definitions of "environmental benefits" and "direct environmental benefits in the state" that could result in confusion regarding what offset projects comply with the rule. Consistent with the CCA, "environmental benefit" is defined through the related definition of "environmental harm" to include activities that prevent or reduce "exposure to pollution, conventional or toxic pollutants, environmental hazards, or other contamination in the air, water, and land." Draft WAC 173-446-020(1)(ss),(tt); *see also* RCW 70A.65.010(31),(32) (citing RCW 70A.02.010). The definition of "environmental benefit" also includes activities that "[m]eet a community need formally identified to a covered agency by an overburdened community or vulnerable population" that is consistent with the Washington Environmental Justice Statute. Draft WAC 173-446-020(1)(ss)(iii) (citing RCW 70A.02).

  The Draft Rule's definition of "direct environmental benefit in the state," however, is much narrower in scope. The Draft Rule adopts the California Cap & Trade Regulations' definition of that term, which focuses solely on air and water quality. Draft WAC 173-446-020(1)(ii); *see also* Cal. Code Regs. tit. 17, § 95802(a). To ensure that the CCA Program Rule is consistent with the CCA—and to incentivize covered entities to address other environmental harms and advance environmental justice in Washington state—bp recommends that DOE make the definition of "direct environmental benefits in the state" consistent with the CCA and the Draft Rule's definition of "environmental benefits."

5. Protection of Confidential Business Information and Trade Secrets

The Draft Rule does not include any discussion of what, if any, information will be treated as confidential or trade secrets and exempt from disclosure under the Washington Public Records Act, Chapter 42.56 RCW. In order to protect the integrity of the market, ensure appropriate protection for its participants, and provide predictability, bp believes that the CCA Program Rule should take necessary precautions to protect confidential business information ("CBI") and specifically address what types of information is exempt from disclosure and how CBI be protected from disclosure upon request.

Comments in Response to DOE's Rulemaking Webinars

1. "One-Stop" Shop Rulemaking (Slide 26, November 8, 2021 Webinar)

DOE's preference is that the Chapter 173-446 WAC rulemaking be a "one-stop" shop that puts "all the nuts and bolts" of the cap-and-invest program into one place. DOE requested at the November 8, 2021 webinar that stakeholders share their view on this issue.

bp shares DOE's preference. bp believes that the placement of all cap-and-invest program rules in one place—to the extent practicable—will facilitate compliance with the CCA, especially in its early stages.

2. Cap-and-Invest Account Registration (Slide 30, November 8, 2021 Webinar)

DOE notes that once an entity receives a notice of registration, it will have "30 days to provide information to Ecology to enable Ecology to set up the required accounts for you and provide you access to those accounts." The information entities must provide includes, among other requirements, corporate association disclosures and account representative designations. Draft WAC 173-446-100, *et seq.*

Compiling the required information within 30 days could pose administrative difficulties for both entities and DOE. bp recommends that DOE provide at least 60 days for entities to provide the required information.

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We hope these informal comments are helpful in DOE's deliberations. bp looks forward to continuing to collaborate with DOE on the final version of the Draft Rule, other rulemakings promulgated pursuant to the CCA, and future DOE rulemakings on the Clean Fuels Program and the GAP Rule.

Please feel free to contact me at kenard.taylor@bp.com or 219-370-3310 if you would like to discuss further.

Sincerely,

Ken Taylor