



July 15, 2022

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Air Quality Program  
P.O. Box 47600  
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Re: Comments on proposed rule Chapter 173-446 WAC, Climate Commitment Act Program

Dear Mr. Grice:

Thank you for the opportunity to provide comments on the development of the Climate Commitment Act Program through Chapter 173-446 WAC. As a statewide advocacy organization, Washington Environmental Council works to develop, advocate, and defend policies that ensure environmental progress and justice by centering and amplifying the voices of the most impacted communities. We have worked on carbon pricing for over a decade and are committed to realizing a just and equitable implementation of the Climate Commitment Act.

We would like to thank Professor Sanne Knudsen at the University of Washington School of Law,<sup>1</sup> Michael Lazarus and Derik Broekhoff of the Stockholm Environment Institute,<sup>2</sup> and Walker Stanovsky and Craig Gannett of Davis Wright Tremaine LLP<sup>3</sup> for their support and guidance on preparing our comments.

Chapter 173-446 WAC establishes the foundation for our state's new cap-and-invest program, and its content will dictate how effectively the law supports achieving our statewide climate goals and improving the health and well-being of all Washingtonians. To further these objectives, we offer several recommendations, organized into the following sections:

- 1) Incorporate consideration and review of impacts to overburdened communities across the program rule.
- 2) Clarify Ecology's responsibilities to engage with and support the Environmental Justice Council's role.

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<sup>1</sup> <https://www.law.uw.edu/directory/faculty/knudsen-sanne-h>

<sup>2</sup> <https://www.sei.org/>

<sup>3</sup> <https://www.dwt.com/about>



- 3) Make sector-specific changes to enable adaptive management and clarify Ecology's role and authority.
- 4) Increase public transparency of Ecology's processes and decisions.
- 5) Uphold existing requirements for tribal consultation.
- 6) Ensure success of the cap trajectory and structure program according to best practices.
- 7) Maintain specific changes from informal draft rule.
- 8) Apply overall approach recommended in comments to future linkage rule.

**1) Incorporate consideration and review of impacts to overburdened communities across the program rule.**

In passing the Climate Commitment Act, the legislature did more than create a cap-and-invest program in the State of Washington. It created a program that will help achieve our greenhouse gas reduction requirements while respecting tribal sovereignty and without exacerbating health disparities in communities already suffering from disproportionate impacts of environmental pollution. We know the legislature intended to do this because it said so: “[W]hile enacted carbon policies can be well-intended to reduce greenhouse gas emissions and provide environmental benefits to communities, the policies may not do enough to ensure environmental health disparities are reduced and environmental benefits are provided to those communities most impacted by environmental harms from greenhouse gas and air pollutant emissions.”<sup>4</sup>

Having acknowledged the potential for carbon policies to exacerbate existing disparities, the legislature emphasized that “climate policies must be appropriately designed.”<sup>5</sup> The Department of Ecology was entrusted with the responsibility of doing just that. Importantly, Ecology's responsibility does not end with program design. The legislature calls on Ecology “to conduct environmental justice assessments to ensure that funds and programs created under this chapter provide direct and meaningful benefits to vulnerable populations and overburdened communities.”<sup>6</sup> In other words, the legislature intended Ecology to both: a) design an equitable cap-and-invest program; and b) assess that design to ensure it is working appropriately.

These statements of intent do not exist in isolation. The legislature's stated intent is reflected in many of the Climate Commitment Act's statutory commands and across requirements for major aspects of the

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<sup>4</sup> RCW 70A.65.005(4)

<sup>5</sup> RCW 70A.65.005(6)

<sup>6</sup> RCW 70A.65.005(7)



program, including allowance allocation,<sup>7</sup> offsets,<sup>8</sup> linkage,<sup>9</sup> and funding.<sup>10</sup> In fact, the Act repeatedly requires Ecology to consider, evaluate, or avoid impacts to overburdened communities in program design, review, and implementation.

Additionally, and importantly, almost all of these provisions are nondiscretionary – they provide that Ecology *must* ensure in these various elements of the program that program implementation is not exacerbating existing disparities. Both the pattern and the strength of the legislature’s commands are instructive: they provide relevant context to the current rulemaking, because they demonstrate that the legislature intended Ecology to integrate measures to minimize impacts on overburdened communities throughout the Act, including in program elements subject to this rulemaking.

The legislature anticipated that the cap-and-invest program could impact overburdened communities and put in place protections, to be integrated into the program design, to address and reduce these impacts. In particular, the statutory section “Cap on greenhouse gas emissions”<sup>11</sup> requires Ecology to submit a report to the legislature every four years to assess the program’s implementation and outcomes “*relative to the state’s emissions reduction limits, overburdened communities, covered entities, and emissions-intensive, trade-exposed businesses.*”<sup>12</sup> Importantly, this requirement is included specifically in the section of the Act that establishes the requirement for Ecology to “*implement a cap on greenhouse gas emissions from covered entities and a program to track, verify, and enforce compliance through the use of compliance instruments.*”<sup>13</sup> That program is the focus of this rule.

This is not the only place in the Act where the legislature anticipates the need to assess the impacts of the cap-and-invest program on overburdened communities. Independent from the reporting requirement in RCW 70A.65.060(5), the legislature separately requires the Environmental Justice Council to provide recommendations regarding the development and implementation of the statutory sections that are the subject of this rulemaking. Linkage agreements, offsets, designation of EITEs, and administration of allowances are all specifically listed as elements of the program requiring a recommendation from the Environmental Justice Council.<sup>14</sup> This is important because it again shows that the legislature anticipated these programs could have impacts on overburdened communities and vulnerable populations.

In considering the pattern and strength of the Act’s commitment to reducing environmental health disparities and providing environmental benefits in overburdened communities, one additional point is worth emphasizing: the legislature did not relegate its concerns about the impacts of this program on

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<sup>7</sup> RCW 70A.65.110(2) and 70A.65.110(8)

<sup>8</sup> RCW 70A.65.170(2)(a) and RCW 70A.65.010(31)

<sup>9</sup> RCW 70A.65.210(3)(b), RCW 70A.65.210(3)(c), and RCW 70A.65.060(3)

<sup>10</sup> RCW 70A.65.230, RCW 70A.65.260, RCW 70A.65.280

<sup>11</sup> RCW 70A.65.060

<sup>12</sup> RCW 70A.65.060(5)

<sup>13</sup> RCW 70A.65.060(1)

<sup>14</sup> RCW 70A.65.040(2)(a)(1)



overburdened communities to a single section. Accordingly, neither should Ecology. Put more directly, Ecology cannot fulfill its responsibilities towards overburdened communities and vulnerable populations through RCW 70A.65.020 alone. Ecology's responsibilities for designing and assessing a program are distinct from Ecology's responsibilities under RCW 70A.65.020. Undoubtedly, RCW 70A.65.020 is an important feature of the Climate Commitment Act's dedication to reducing pollutant loads in overburdened communities. But it isn't the only part of the Act that expresses that commitment. Additionally, the tools of RCW 70A.65.020 – ultimately expanding air quality monitoring, establishing air quality targets, and achieving reductions in in criteria pollutants – are not substitutes for designing a cap-and-invest program that integrates concerns for overburdened communities into the program itself.

All this underscores the importance of Ecology retaining a focus on three foundational questions in the current rulemaking: (1) How is Ecology ensuring that the cap-and-invest program will avoid replicating or aggravating environmental health disparities?; (2) How is Ecology planning to assess the impacts of the program on overburdened communities?; and (3) What data or information should Ecology be collecting from covered entities as part of the cap-and-invest program so that Ecology and the Environmental Justice Council can properly fulfill their assessment responsibilities under the Act?

Based on the overall context and specificity of the Act's statutory commands, we provide the following comments and recommendations to ensure Ecology has the needed tools and clarity to review and evaluate impacts of the program on overburdened communities.

- Integrate language that acknowledges responsibility for environmental health disparities: As set out in the introductory comments above, Ecology's responsibility for ensuring the Climate Commitment Act does not replicate or exacerbate environmental health disparities extends to the design of the cap-and-invest program. An articulation of that responsibility, and a commitment to gathering information necessary to assess the fulfillment of that responsibility, should therefore be integrated more directly into the current rule in the form of explicit requirements within the cap-and-invest program.

We recommend including language in WAC 173-446-010 that indicates Ecology understands its responsibility in implementing the cap-and-invest program to ensure that *“environmental health disparities are reduced and environmental benefits are provided to those communities most impacted by environmental harms from greenhouse gas and air pollutant emissions.”*<sup>15</sup>

- Assess impacts of the program on overburdened communities: When read as a whole, the statute is clear that the program should benefit overburdened communities and not cause environmental harm. Yet, the draft program rules do not clearly articulate how this will be achieved. In particular, the program rule does not provide a clear enough commitment to Ecology's ongoing responsibility to overburdened communities in the implementation of the various program elements.

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<sup>15</sup> RCW 70A.65.005(4)



We recommend that Ecology add a new section to the program rule establishing an explicit review process to assess how the program is impacting overburdened communities and ensuring Ecology has the information required to conduct that review. This process should be: 1) separate from the “Improving Air Quality in Overburdened Communities” initiative; 2) inclusive of the full range of overburdened communities as defined by the law; and 3) focused on disparities of impacts across the entire program. This process will then inform Ecology’s mandatory reporting to the legislature required by RCW 70A.65.060(5), the Environmental Justice Assessment per RCW 70A.65.030, and support the work of the Environmental Justice Council per RCW 70A.65.040.

- Collect and disclose information for review and accountability: Ecology has a statutory responsibility to review outcomes of program implementation relative to overburdened communities.<sup>16</sup> Additionally, gathering sufficient data to meaningfully assess impacts on overburdened communities is a necessary step in order to assess whether disparities are being reduced and benefits are being achieved. To these ends, Ecology should require adequate information to inform the review of the program and evaluation of any disparities:
  - WAC 173-446-050: Add an additional subsection requiring covered and opt-in entities to provide information on their impacts on and proximity to overburdened communities and tribal lands and resources; the pollutants they are responsible for; and if there are violations under any permits they hold.
  - WAC 173-446-150 (3): Add language requiring Ecology to publicly post on its website the information it collects regarding each covered and opt-in entity’s impacts on and proximity to overburdened communities and tribal lands and resources; the pollutants they are responsible for; and if there are violations under any permits they hold.

## **2) Clarify Ecology’s responsibilities to engage with and support the Environmental Justice Council’s role.**

The statute is clear that the Environmental Justice Council must make recommendations to the legislature, agencies, and governor in the development of the program, including, but not limited to, *“linkage with other jurisdictions, protocols for establishing offset projects and securing offset credits, designation of emissions-intensive and trade-exposed industries under RCW 70A.65.110, and administration of allowances under the program.”*<sup>17</sup> Yet, the proposed rule does not clearly articulate that Ecology will consult with the Environmental Justice Council, nor does it adequately require Ecology to develop information that will help the Environmental Justice Council perform its statutorily required duties. The Environmental Justice Council has the authority to determine its process for engagement

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<sup>16</sup> RCW 70A.65.060(5)

<sup>17</sup> RCW 70a.65.040(2)(a)(1)



with, and recommendations to, Ecology in this regard. At a minimum, this rule should be strengthened to:

- Include explicit requirements for Ecology to engage with the Environmental Justice Council in the development, implementation, and evaluation of the full program, across the breadth of the rule.
- Track information about the environmental and health impacts of all EITE facilities to inform Council review.
- As described in sections 1 and 3 of this comment letter, require information of covered entities that will inform and enable review by Ecology and the Environmental Justice Council.
- Provide a mechanism by which the Environmental Justice Council can request, and Ecology commits to provide, information that the Council deems necessary to meeting its responsibilities under the Act with respect to RCW 70A.65.040.

**3) Make sector-specific changes to enable adaptive management and clarify Ecology’s role and authority.**

- Clarify and strengthen Ecology’s role of providing oversight and review of all Emissions-Intensive, Trade-Exposed (EITE) facilities.
  - WAC 173-446-220:
    - Per RCW 70A.65.110 (3)(a) that enables Ecology to use data considered within the section, Ecology should add a new subsection (vii) to WAC 173-446-220 (1)(a) for “*Owners or operators of an EITE facility who wish to be allocated no cost allowances*” that requires submittal to Ecology of information on facility’s proximity to overburdened communities and tribal lands, pollution emitted from facilities, and any violation of permits. There is no articulation of how the Environmental Justice Council will review or assess changes to no cost allowance allocations to EITEs over time. This limitation and lack of process is not sufficient per RCW 70A.65.040 (2)(a)(i). To address this, Ecology should add language that it will notify and engage with the Environmental Justice Council when setting allocation baselines for EITE facilities, allocating no cost allowances to EITE facilities, and considering adjustments to no cost allowance allocations for EITE facilities.
    - Require consideration of environmental and health impacts and impacts to tribal lands and resources when setting the allocation baseline for *all* EITE facilities, in order to create consistency and fairness across the program.
    - Require consultation with affected tribal nations for *any* facility on tribal lands or determined by Ecology to impact tribal lands and resources.



- Add language requiring consideration of environmental and health impacts and impacts to tribal lands and resources during consideration of changes to the allocation of no cost allowances to any EITE facility.
- WAC 173-446-220 (2)(d)(ii): This element of the rule is critically important, because it will set the foundation for Ecology to exercise the authority given in RCW 70A.65.110(3)(f) to make an upward adjustment to an EITE facility's benchmark based on a best available technology (BAT) analysis. Given the Act's definition of BAT<sup>18</sup>, Ecology's authority to choose a BAT analysis necessarily includes the authority to deny adjustments that "create excessive environmental impacts." We recommend that Ecology add the following language (in red underlined text) to address this need:
  - WAC 173-446-220 (2)(d)(ii): *Prior to the beginning of either the second, third, or subsequent compliance periods, Ecology may make an upward adjustment in the next compliance period's reduction schedule for an EITE facility based on the owner's or operator's demonstration to ecology that additional reductions in carbon intensity or mass emissions are not technically or economically feasible. Ecology may not adjust the reduction schedule to levels above the first compliance period reduction level. Ecology may not make an upward adjustment to the reduction schedule of a facility if the department determines that the fuels, processes, and equipment used by the facility create excessive environmental impacts. Owners or operators of any EITE facility that wish to have an upward adjustment of their reduction schedule must submit the following information to ecology electronically in a format specified by ecology...*
  - WAC 173-446-020: We urge Ecology to make the following changes to improve the accuracy of the definition of best available technology (in red underlined text):  
*"BAT" means a technology or technologies that will achieve the greatest reduction in GHG emissions, taking into account the fuels, processes, and equipment used by facilities to produce goods of comparable type, quantity, and quality. Best available technology must be technically feasible, commercially available, economically viable, not create excessive environmental impacts harm, and be compliant with all applicable laws while not changing the functional characteristics of the good being manufactured.*
- Clarify Ecology, UTC and Commerce responsibilities, information exchange, and information gathering in utility sections of the program rule.
  - Strengthen electric utility section (WAC 173-446-230) in the following ways:

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<sup>18</sup> RCW 70A.65.010(10)



- Standardize and increase transparency for electric utility no cost allowance allocation:
  - Ecology should use an accurate forecast to determine the allocation of no cost allowances to electric utilities.
  - Include a public process to review the development of the forecast.
- Rule should clarify that allocations are based on the pathways established by the Clean Energy Transformation Act (RCW 19.405) at the time of passage (2019).
- Rule should ensure effective interaction between implementation of the Clean Energy Transformation Act and the Climate Commitment Act by having prices set by the Climate Commitment Act reflected in the actual market dispatch, operations, and planning for utilities.
- The rule should provide guidance and establish reporting requirements for consumer-owned utilities on the use of the value of no cost allowances and engage with the UTC on its regulation of investor-owned utilities' use of the value of no cost allowances.
- Add language to ensure electric utilities first use revenue from consigned allowance sales to benefit low-income ratepayers.
- Add the following clarifying language (in red underlined text):

*(5) Allowances allocated at no cost to electric utilities may be consigned to auction for the benefit of electric utility ratepayers, transferred at no cost to an electric generating facility as described in WAC 173-446-425, deposited for compliance, or a combination of these uses. While no cost allowances may be held for future use, they may not be traded or transferred other than as authorized to WAC 173-446-425.*
- Strengthen natural gas utility section (WAC 173-446-240) in the following ways:
  - Add clarifying language that UTC has regulatory authority over natural gas utilities and should work with Ecology on oversight and information associated with this section of the rule.
  - Add language that UTC, with guidance from Ecology, shall create guidance on how natural gas utilities use their consigned revenue for the benefit of natural gas ratepayers. UTC should track how this revenue is used and provide this information to Ecology for overall program evaluation.
  - Ensure that the language around natural gas utility revenue from consigned allowance sales truly benefits low-income ratepayers.
  - Add the following clarifying language (in red underlined text):

*(3) No cost allowances allocated to natural gas utilities may be consigned to auction for the benefit of natural gas ratepayers, deposited for compliance, or a*





*combination of both. No cost allowances allocated to natural gas utilities may not be traded, transferred, or sold.*

- Provide guidance and establish reporting requirements for consumer-owned utilities on the use of the value of no cost allowances and engage with UTC on its regulation of investor-owned utilities' use of the value of no cost allowances.
- Clarify that only natural gas companies that serve the public as utilities may receive no cost allowances. The Climate Commitment Act provides for allocation of free allowances only to *“covered entities that are natural gas utilities.”*<sup>19</sup> The statute does not define “natural gas utility,” but UTC defines “gas utility” in WAC 480-90-023. The UTC definition is consistent with other Washington statutory and case law that a company is not a utility unless it holds itself out to serve the general public.

The Proposed Rule would depart from the statutory mandate, purportedly granting free allowances to *“each supplier of natural gas,”*<sup>20</sup> rather than each natural gas utility. Unlike a utility, nothing in the law’s definition of supplier requires such a company to serve the public. This appears to open the door to free allowances for gas companies that are not utilities, either now or in the future (for example, if Washington were to adopt direct access, also known as retail choice, for gas supply). This would exceed Ecology’s authority under RCW 70A.65.130.

In the final rule, Ecology should correct this deficiency by: (1) replacing all references in WAC 173-441-240 to “natural gas suppliers” or “suppliers of natural gas” with reference to “natural gas utilities”; and (2) adding a definition in WAC 173-446-020 as follows: “Natural gas utility” has the same meaning as “gas utility” in WAC 480-90-023, except that for purposes of this chapter, a natural gas utility need not be subject to the jurisdiction of the utilities and transportation commission.

#### 4) Increase public transparency of Ecology’s processes and decisions.

- WAC 173-446-200: Make baseline and subtotal baseline data transparent and build in an opportunity to correct the baseline — Ecology is proposing to use data provided by the greenhouse gas accounting reporting system, data provided by facilities themselves, and data or estimates obtained or made by Ecology to set the total program baseline. Since the baseline is a foundational structure from which the rest of the program is based, it is critically important that Ecology identify data gaps and ensure that the baseline number is not artificially inflated based on those gaps. While

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<sup>19</sup> RCW 70A.65.130 (1)

<sup>20</sup> WAC 173-446-240 (1)(a)



we understand the importance of a durable baseline for market predictability, Ecology should have a clear and transparent way to understand and adjust this baseline if in the future, the emission factors are proven to be inaccurate and/or the data is not as clear as assumed. This will allow the baseline to function as intended, with a correct number of allowances in the system. Additionally, the initial baseline that is set should include known data gaps into its assumptions. The rule should also establish requirements for Ecology to publicly disclose the data used to establish subtotal baselines and the total program baseline.

- WAC 173-446-040 (4): Add language that requires public disclosure of any adjustments, clarifications, or added specificity to categories of covered and not covered emissions under this section. This will help the public track trends and/or identify any systemic issues with program coverage.

**5) Uphold existing requirements for tribal consultation.**

All processes in the rulemaking and all actions resulting from the Climate Commitment Act must respect tribal sovereignty and treaty rights. To this end, this rule must explicitly incorporate Ecology's existing obligation to proactively and meaningfully engage and consult with federally recognized tribes, with sufficient time and information made available.

**6) Ensure success of the cap trajectory and structure program according to best practices.**

- WAC 173-446-220: The statute requires Ecology to set annual allowance budgets, *"to achieve the share of reductions by covered entities necessary to achieve the 2030, 2040, and 2050 statewide emissions limits established in RCW 70A.45.020,"* with *"progressively equivalent reductions year over year."*<sup>21</sup> The mandatory emissions reductions are 45% by 2030, 70% by 2040, and 95% by 2050, relative to 1990 levels.<sup>22</sup> At this time, the proposed rule does not adequately address future allocations of no cost allowances to EITEs after the third compliance period. Under RCW 70A.65.110(4)(b), EITEs will continue to receive no cost allowances at 94% of initial emissions if the legislature does not adopt a compliance obligation for EITE facilities by December 1, 2027. This will almost certainly lead to an over allocation of no cost allowances in excess of the program cap, undermining the very purpose of the law.

The legislature integrated its acknowledgement of this conflict into the statute, instructing Ecology to submit agency request legislation in 2022 outlining *"a compliance pathway specific to emissions-intensive, trade-exposed businesses for achieving their proportionate share of the state's emissions*

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<sup>21</sup> RCW 70A.65.070(2).

<sup>22</sup> RCW 70A.45.020(1)(a)(ii), (iii), and (iv).



*reduction limits through 2050.*<sup>23</sup> Clearly, the legislature knew there was no guarantee of future amendments and so called upon Ecology to implement the Climate Commitment Act as originally enacted. Ecology's resulting request legislation did not pass,<sup>24</sup> and therefore Ecology must implement the Climate Commitment Act as it exists, including resolving this conflict between meeting the state's GHG reduction goals as required and the allocation of no cost allowances to EITE facilities. The program rule should address this conflict in a way that prioritizes reducing emissions from EITEs. While the legislature still has the authority to address this issue, Ecology should include in the rule language that provides: a) clarity that no cost allowance allocations can never exceed the total cap; and b) an approach for resolving this conflict.

- WAC 173-446-340: The rule suspends the emission containment reserve (ECR) trigger price, with reference in the Preliminary Regulatory Analysis that suspending the ECR trigger price will keep auction prices down. Rather than suspending the ECR trigger price, we recommend maintaining it and designing it properly to meet Washington's needs. A properly designed ECR could allow for a rule-based approach to adjusting allowance supply in response to market signals about allowance scarcity, which reduces uncertainty and lowers administrative costs. Additionally, maintaining the ECR trigger price will allow Ecology to provide balance in the prices of allowances, better control the overall prices of the program, and maintain autonomy in meeting our state's statutory obligations.

#### **7) Maintain specific changes from informal draft rule.**

The following changes between the informal draft rule and the current formal draft rule are important to maintain:

- WAC 173-446-300 (2)(iv)(A): *The customer benefits provided from allowances consigned to auction under this section must be in addition to existing requirements in statute, rule, or other legal requirements.*
- WAC 173-446-300 (2)(iv)(B): *Except for low-income customers, any customer bill credits under this subsection are reserved exclusively for customers at locations connected to a natural gas utility's system on July 25, 2021. Bill credits may not be provided to customers of the gas utility at a location connected to the system after July 25, 2021.*

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<sup>23</sup> RCW 70A.65.060(4).

<sup>24</sup> See generally legislative materials related to HB 1682 (2022), available at <https://app.leg.wa.gov/bills/summary?BillNumber=1682&Year=2021&Initiative=false>.



**8) Apply overall approach recommended in comments to future linkage rule.**

Given Ecology's stated plan to develop a future rule focused on linkage, we encourage Ecology to approach that rule with a focus on the priorities enumerated in this comment letter related to consideration and review of overburdened communities, engaging with the Environmental Justice Council, upholding existing requirements for meaningful tribal consultation, requiring adequate information, and making that information publicly accessible in order to guide future evaluation and adaptive management of the program.

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Finally, this comment letter is complementary to a separately submitted letter from Washington Environmental Council and The Nature Conservancy of Washington focused on the offset sections of Chapter 173-446 WAC.

The work Ecology is doing now to establish a strong program rule, and the policies and practices that will flow from this program rule, are critical to the long-term success of the Climate Commitment Act. We appreciate the focus and resources Ecology is putting toward developing this rule and remain steadfast in our commitment to ensuring the law achieves its intended outcomes.

Sincerely,

Rebecca Ponzio and Caitlin Krenn

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