Ken Taylor
Environmental, Social & Carbon Superintendent
bp Cherry Point Refinery

bp America, Inc.
4519 Grandview RD
Blaine, WA 98230

July 13, 2022

Joshua Grice
Washington State Department of Ecology
Submitted via

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

Dear Mr. Grice:

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

bp's ambition is to become a net zero company by 2050 or sooner, and to help the world reach net zero, too. Consistent with bp's ambition, we are actively advocating for policies that address greenhouse gas ("GHG") emissions.

As we reach the end of the rulemaking development, bp wishes to recognize DOE staff for their efforts and for proficiently managing stakeholder engagement. We look forward to working with DOE as the Final Rule is promulgated and to helping the State reach its GHG reduction goals in the coming years.

With respect to the overall rulemaking, we suggest that DOE consider the attached comments. It is our hope that these comments will assist DOE in creating a CCA Program that is predictable and implementable, incentivizes investments in technologies that will drive decarbonization, minimizes carbon leakage, and syncs harmoniously with existing cap-and-trade programs. 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

bp's Comments on the Proposed Rule

bp has grouped its comments into three categories. First, we reiterate certain comments made in our January 26, 2022 letter on the Draft Rule ("Draft Rule Comments") that we believe were not adequately addressed in the Proposed Rule. Second, we comment on a number of new issues the Proposed Rule raised. Third, we briefly acknowledge changes in the Proposed Rule that are consistent with bp's prior suggestions. We commend these changes and encourage DOE to retain them in the Final Rule.

I. Additional Information on Prior Draft Rule Comments

1. Covered Emissions: "Biofuels" Definition

Consistent with our previous comment on the Draft Rule, bp recommends inclusion of language that would clarify the treatment of co-processed fuels. The CCA and the Proposed Rule define biofuels as "fuels derived from biomass that have at least 40 percent lower GHG emissions based on a full life-cycle analysis when compared to petroleum fuels for which biofuels are capable as serving as a substitute." RCW 70A.65.010(12); Proposed WAC 173-446-020. To help incentivize increased production of biofuels, which will reduce life cycle GHG emissions, Section 10(7) of the CCA provides an exemption for "[c]arbon dioxide emissions from the combustion of biomass or biofuels." RCW 70A.65.080(7).

Many renewable fuels are made by co-processing biomass-based feedstocks with traditional feedstocks, where the 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. Under the Proposed Rule, it is unclear whether the requirement that "biofuels" have at least 40 percent lower GHG emissions on a life cycle basis applies to the entire blend or only to the renewable portion of that blend. As we suggested in our Draft Rule Comments, DOE should make it clear in the Final Rule that the 40% test applies only to the renewable portion. Similarly, only the renewable portion, and not the entire blend, should be entitled to the exemption under RCW 70A.65.080(7). We understand that this is consistent with DOE's intent but recommend that the Final Rule make this clear for avoidance of doubt.

Notably, California's cap-and-trade regulations are explicit in this respect. Section 95852.1.1 explains which fuels qualify as "biomass-derived fuels," and provides that "[o]nly the portion of the fuel that meets one of [the section's biomass criteria] will be considered a biomass-derived fuel." 17 California Code of Regulations ("CCR") § 95852.1.1(a). bp recommends that DOE's Final Rule should also be explicit in this regard.

2. Carbon Sequestration & Removal

bp recognizes the crucial role of Carbon Capture, Utilization, and Sequestration ("CCUS") in reaching climate goals. Indeed, the U.S. Council on Environmental Quality recently recognized that "[t]here is growing scientific consensus" that CCUS technologies and permanent

sequestration are "likely needed to prevent the worst impacts of climate change."[1] The International Energy Agency ("IEA") also concluded that "reaching net zero will be virtually impossible without CCUS."[2] Net-zero pathways published by IEA,[3] the Intergovernmental Panel on Climate Change,[4] and the White House[5] all rely heavily on CCUS technologies. In Washington state, too, the legislature has declared that it "is the policy of the state to prioritize carbon sequestration in amounts necessary to achieve the carbon neutrality goal established in RCW 70A.45.020, and at a level consistent with pathways to limit global warming to one and one-half degrees." RCW 70A.45.100(1).

The Proposed Rule addresses CCUS projects in two primary ways. First, Ecology proposes to exempt "[s]equestered carbon dioxide" from covered emissions. *See* Proposed WAC 173-446-040(2)(a)(iii). Second, WAC 173-446-505, 525, and 530 establish the requirements for sequestration offset projects. bp believes that the CCA Program can best facilitate development of CCUS technologies in Washington if the following two revisions are made in the Final Rule.

- Definition of "Sequestration": bp recommends that DOE revise the definition of "sequestration," which applies to both the scope of covered emissions and offsets. Proposed WAC 173-446-020 defines "sequestration" as "the removal of carbon dioxide from the atmosphere and storage of carbon in GHG sinks or GHG reservoirs through physical or biological processes." By limiting the definition of "sequestration" to "removal of carbon dioxide from the atmosphere," bp is concerned that the Proposed Rule could create confusion as to whether "sequestration" also includes technologies that will capture GHG emissions on-site *before* they are released into the atmosphere.

  Specifically, bp recommends that DOE adopt a definition of "sequestration" that is consistent with federal definitions that include capture of carbon dioxide from facilities.[6] bp recommends that DOE define "sequestration" as:

  > "the capture of carbon dioxide from a facility to prevent it from reaching the atmosphere, or removal of carbon dioxide from the atmosphere, and storage of carbon in GHG sinks or GHG reservoirs through physical or biological processes."

  bp recognizes that DOE may have adopted its proposed definition from the California cap-and-trade regulations. *See* 17 CCR § 95802(a) (defining "sequestration" in the same manner); RCW 70A.65. However, bp believes that DOE can promulgate a definition that clarifies what is intended without impeding linkage with California.

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[1] 87 Fed. Reg. 8,808-8,809.

[2] *Special Report on Carbon Capture Utilisation and Storage*, Int'l Energy Agency (Sep. 2020).

[3] *Net-Zero by 2050: A Roadmap for the Global Energy Sector*, Int'l Energy Agency (Oct. 2021).

[4] *Special Report on Global Warming of 1.5 ºC*, Intergovernmental Panel on Climate Change (Oct. 2018).

[5] *The Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050*, U.S. Exec. Office of the President & U.S. Dept. of State (Nov. 2021).

[6] In a recent amendment to the Outer Continental Shelf Lands Act, Congress defined "carbon sequestration" as "the act of storing carbon dioxide that has been removed from the atmosphere or captured through physical, chemical, or biological processes that can prevent the carbon dioxide from reaching the atmosphere." 43 U.S.C. 1331(s). In addition, the U.S. Environmental Protection Agency EPA's Class VI, GHG Reporting Rule, and RCRA regulations define "[c]arbon dioxide stream" to mean "carbon dioxide that has been captured from an emission source . . ." *See* 40 CFR 146.81; 40 CFR 98.6; 40 CFR 260.10.

- Exemption from Covered Emissions: Proposed WAC 173-446-040(2)(a)(iii) provides an exemption from covered emissions for "[s]equestered carbon dioxide when it can be demonstrated to ecology's satisfaction that it qualifies as permanent sequestration, as defined in WAC 173-407-110, either through long-term geologic sequestration or by conversion into long-lived mineral form." By limiting the exemption to "long-term geologic sequestration or conversion into long-lived mineral form" that uses a "containment system," the Proposed Rule risks excluding other technologies and practices that permanently sequester carbon, including certain forms of carbon utilization. As an example, a covered entity that succeeds in utilizing captured carbon dioxide in manufactured cement will have permanently prevented the carbon dioxide from ever reaching the atmosphere, but it is not clear that this kind of CCUS technology would be recognized under the language of the Proposed Rule. Other building materials, including concrete, construction aggregates, and polymers can similarly be used to permanently sequester carbon.

  bp therefore recommends that DOE revise the exemption to delete the language that unnecessarily restricts the method of permanent sequestration, while incorporating the confidence standard in WAC 173-407-110. Specifically, we propose that the exemption for "[s]equested carbon dioxide" in WAC 173-446-040(2)(a)(iii) be drafted as:

  > "Sequestered carbon dioxide when it can be demonstrated to ecology's satisfaction with a high degree of confidence that substantially ninety-nine percent of the greenhouse gases will remain contained for at least one thousand years ~~that it qualifies as permanent sequestration, as defined in WAC 173-407-110, either through long-term geologic sequestration or by conversion into long-lived mineral form~~."

  Revising the language in this manner would be consistent with the Washington legislature's policy to incentivize permanent carbon sequestration in all its forms, as expressed in RCW 70A.45.100: "[I]t is the policy of the state to promote the removal of excess carbon from the atmosphere through voluntary and incentive-based sequestration activities in Washington including, but not limited to, on natural and working lands and *by recognizing the potential for sequestration in products and product supply chains*." (emphasis added).

3. Allowances: Opportunity for Engagement on the EITE Allocation Baseline

bp restates its concern that the Proposed Rule does not provide Emissions Intensive Trade Exposed ("EITE") facilities an opportunity to confer with DOE, seek reconsideration, or appeal if DOE sets an allocation baseline that is different than the baseline calculated by the EITE facility using DOE's methodology.

Determining an EITE's baseline is a fundamental step in the CCA framework, one that will have consequences for many years. In particular, it is used to determine EITE facilities' no cost allowance allocations for the first three compliance periods (i.e., 2023 to 2034). *See* Proposed WAC 173-446-220(2)(b). DOE will also consider the number of no cost allowances issued to EITEs when determining the amount of allowances that will be auctioned, which is critical for those entities that do not receive no cost allowances. *See* Proposed WAC 173-446-300(3).

Consistent with the CCA, the Proposed Rule provides each EITE an opportunity to submit its carbon intensity baseline based on a specific formula. RCW 70A.65.110(3)(c); Proposed WAC 173-446-220(1)(a). However, DOE's Proposed Rule, which authorizes DOE to "assign" an EITE's baseline, would seem to allow DOE to materially and unilaterally *change* the carbon intensity baseline from what was proposed without consultation with the affected entity.[7] Nor does it provide for any kind of process for reconsideration or appeal. Proposed WAC 173-446-220(1)(b).

Like the Draft Rule, the Proposed Rule allows DOE to premise an EITE facility's allocation baseline on: (1) information submitted by the EITE facility; (2) information reported under WAC 173-441, Reporting of Emissions of Greenhouse Gases; (3) an assigned emissions level under WAC 173-441; *or* (4) "*or other sources of information deemed significant*." Proposed WAC 173-446-220(1)(b)(i) (emphasis added). Moreover, DOE "may combine information from multiple sources and use *professional judgement* to adjust data sets and conform to this chapter when calculating subtotal baselines . . . depending on . . . the agency's best professional judgment." Proposed WAC 173-446-220(1)(b)(i) (emphasis added).

We understand that DOE has reserved this authority for the sole purpose of verifying the accuracy of the information submitted by the EITEs. bp recommends that the text of the Final Rule expressly state as much. In addition, if DOE elects to use data other than that provided by the EITE facility, bp respectfully requests that DOE provide the EITE facility with an opportunity to review the allocation before it is finalized, provide supplemental information in response, and seek reconsideration or appeal.

bp appreciates the tight timelines DOE must meet in approving allocation baselines.[8] We therefore recommend two options for establishing a consultative period, which should not impinge on DOE's ability to carry out its duties in a timely way:

- Post-Approval: DOE should establish an administrative reconsideration or appeal procedure that occurs after DOE approves EITEs' baselines in November 2022, but before DOE distributes the no cost allowances in September 2023. The intervening nine-month period would provide sufficient time for DOE to adjust the baselines, to the extent needed.

- Pre-Approval: Alternatively, DOE could clarify that it is willing to accept a draft of this information early (e.g., 15-30 days before the end-date) to allow for EITEs to potentially consult with DOE regarding any adjustments to their proposed carbon intensity baseline before making their formal submissions. However, given the complexity of the information being requested, we expect few EITEs will be prepared to provide this

[7] By contrast, the statute only gives DOE authority to "review and approve" the carbon intensity baselines that are submitted by EITEs. RCW 70A.65.110(3)(c).

[8] Specifically, the CCA provides EITE facilities until September 15, 2022 to submit its carbon intensity baseline, and requires DOE to "review and approve" each EITE facility's baseline carbon intensity for the first compliance period only two months later—by November 15, 2022. RCW 70A.65.110(3)(c). DOE must then consider the amount of no cost allowances distributed when setting the auction amounts, the first of which we understand may occur in the first half of 2023. However, DOE does not propose to distribute the vintage 2023 no cost allowances to EITE facilities until September 1, 2023. Proposed WAC 173-446-260(1),(2).

information in advance of the deadline, so consider the post-approval option the more robust approach.

4. Offsets: Additional

bp remains concerned that the Proposed Rule's requirement that offset projects provide GHG reductions or removals exceeding those "that would otherwise occur in a *conservative business-as-usual scenario*" could have unintended consequences. Proposed WAC 173-446-020 (definition of "additional") (emphasis added); *see also* Proposed WAC 173-446-510(1)(a)(i) (offset projects using DOE compliance offset protocols must "not otherwise occur in a conservative business-as-usual scenario"). The Proposed Rule does not define the terms "conservative" or "business-as-usual," and it is unclear how DOE would apply these terms and whether a framework exists to apply them consistently.

bp recommends that DOE either define these terms directly within the rule at WAC 173-446-020 (Definitions) or add language requiring offset protocols to include a definition of those terms at WAC 173-446-505 (Requirements for compliance offset protocols). If DOE elects to do the former, bp recommends that DOE consult California's cap-and-trade regulations, which use both terms in a similar fashion as the Proposed Rule. *Compare* Proposed WAC 173-446-020 ("'Project baseline' means, in the context of a specific offset project, a conservative estimate of business-as-usual GHG emission reductions . . . .), *with* 17 CCR § 95972(a)(3) (providing that a compliance offset project must "[e]stablish a project baseline that reflects a conservative estimate of business-as-usual performance or practices for the offset project type."). California's regulations define both terms in 17 CCR § 95802 as:

- "Business-as-Usual Scenario" means the set of conditions reasonably expected to occur within the offset project boundary in the absence of financial incentives provided by offset credits, taking into account all current laws and regulations, as well as current economic and technological trends.

- "Conservative" means, in the context of offsets, utilizing project baseline assumptions, emission factors, and methodologies that are more likely than not to understate net GHG reductions or GHG removal enhancements for an offset project to address uncertainties affecting the calculation or measurement of GHG reductions or GHG removal enhancements.

In adopting these definitions, the California Air Resources Board ("ARB") responded to members of the public who commented that it is often impossible to know with certainty whether reductions from any offset project are "additional." ARB defended its proposed offset language, reasoning that use of "conservative" methods—*i.e.*, where GHG reductions are more than 50% likely to be understated—is a safeguard to counterbalance the inherent uncertainty of conducting additionality calculations.[9]

Covered entities that operate in California are already familiar with these terms and would be able to predict with reasonable certainty how they will apply in Washington. Moreover,

[9] ARB, *Final Statement of Reasons for Rulemaking, California's Cap-and-Trade Program*, at 823-24 (October 2011), available at https://www.arb.ca.gov/regact/2010/capandtrade10/capandtrade10.htm.

establishing consistency with California's regulations would facilitate future linkage between Washington and California.

5. Offsets: "Direct Environmental Benefits"

bp observed a conflict in the Draft Rule between the definitions of "environmental benefits" and "direct environmental benefits in the state" that could have caused confusion over which offset projects qualify for the CCA Program. Specifically, while the CCA's and Draft Rule's definition of "environmental benefits" broadly covered activities concerning air, water, land, and community needs involving overburdened or vulnerable populations, the Draft Rule's definition of "direct environmental benefits in the state" focused solely on air and water quality. DOE revised the definition of "direct environmental benefits in the state" to include "land" and resolved this discrepancy. *See* Proposed WAC 173-446-020.

bp recommends that DOE also make conforming changes in the substantive section addressing direct environmental benefits, Proposed WAC 173-446-595. We specifically recommend the following change to Proposed WAC 173-446-595(2)(a) to ensure consistency with the CCA:

> Such a determination must be based on a showing that the offset project or offset project type provides for either:
> (i) The reduction or avoidance of emissions of any air pollutant that is not credited pursuant to the applicable compliance offset protocol in the state of Washington; or
> (ii) A reduction or avoidance of any pollutant that is not credited pursuant to the applicable compliance offset protocol that could have an adverse impact on land or waters of the state of Washington.

6. Confidential Information

bp identified the need for language addressing what information prepared for participation in the CCA Program would be exempted from disclosure under the Washington Public Records Act, Chapter 42.56 RCW. bp appreciates DOE adding new language in response to this comment. *See* Proposed WAC 173-446-390; Proposed WAC 173-446-020 (defining "Market sensitive information"). For purposes of predictability and efficiency, bp recommends: (1) revisions to the proposed confidentiality language, and (2) the addition of procedures to ensure the protection of confidential information from disclosure.

First, bp recommends two changes to the language describing what information is confidential and exempt from disclosure. DOE should consider providing a more descriptive list of information that will be treated as confidential and exempt from public disclosure.

- Definition of "Market Sensitive Information": DOE has proposed that "financial, proprietary, and other market sensitive information" will be treated as confidential and exempt from disclosure. Proposed WAC 173-446-390. DOE has proposed a definition of "[m]arket sensitive information," but rather than identifying specific kinds of information that will be withheld, it includes a balancing test. Proposed WAC 173-446-020 ("the public interest in disclosure is outweighed by the public interest served by maintaining confidentiality of such information, on the basis that its disclosure would be reasonably expected to have an effect on the price or value of allowances or offset credits and/or

enable a registered entity to engage in market manipulation such as bidder collusion, market cornering, or extortion of other market participant"). Failing to identify specific types of information that will be withheld will create an unnecessary burden on DOE, which will have to review requests, and market participants, who may have to take action in court to protect information.

To reduce this burden, bp recommends providing a more specific listing of the information that that will qualify as "market sensitive information" that will be considered confidential and exempt from disclosure. For example, as recognized in the California cap-and-trade regulations, much of the corporate association information submitted to DOE under Proposed WAC 173-446-100 is treated as confidential. *See* 17 CCR § 95912(f) (explaining that auction eligibility information submitted under 17 CCR § 95912(d)(4)—including the existence of director or indirect corporate associations, and allocations of purchase limits and holding limits among associated entities—will be treated as confidential); *see also* ARB, C*ap-and-Trade Regulation Instructional Guidance, Chapter 3.1.A* (Feb 2015), available online at: https://bit.ly/3xVzqxW ("ARB recognizes that corporate association information may contain confidential, proprietary information, and protects confidential information to the extent permitted by law.").

- Other Categories of Confidential Information: bp also recommends that DOE expand the confidentiality language in Proposed WAC 173-446-390. DOE should make clear that the exemptions from disclosure established under the Washington Public Records Act, Chapter 42.56 RCW, apply to information prepared in compliance with the CAA Program rule. We note that this is particularly important given that DOE is now requiring submission of enhanced production data under WAC 173-441-050 for purposes of establishing an EITE's allocation baseline under Proposed WAC 173-446-220(1)(a). That production data is likely to qualify as Confidential Business Information under RCW 70A.15.2510. In addition, consistent with the California cap-and-trade regulations, DOE should consider protecting information collected about individuals required for registration (Proposed WAC 173-446-055(3)(a)(i),(ii),(vii)). *See* 17 CCR § 95830(f). We specifically recommend the following changes to Proposed WAC 173-446-390:

> (5) Financial, proprietary, and other market sensitive information . . . pursuant to a linkage agreement~~.~~;
> (6) Personal information submitted under WAC 173-446-055(3)(a); and
> (7) Any information that is protected from disclosure under Chapter 42.56 RCW and other statutes that exempt or prohibit disclosure of specific information or records in accordance with RCW 42.56.070(1).

Second, we recommend that DOE establish a process that will enable entities to claim information as confidential. We recommend that DOE integrate language like that in the Washington GHG Reporting Rule to provide persons submitting information to DOE pursuant to the Final Rule the opportunity to claim confidentiality. *See* WAC 173-441-150(3)("Any person submitting information to ecology under this chapter may request that ecology keep information that is not emissions data confidential as proprietary information under RCW 70A.15.2510 or because it is otherwise exempt from public disclosure under the Washington Public Records Act (chapter 42.56 RCW). All such requests for confidentiality must meet the requirements of RCW

70A.15.2510."). We note that a similar provision is included in the California cap-and-trade regulations. *See* 17 CCR § 96021(b).

In addition, bp recommends that DOE establish an administrative process that provides market participants with an opportunity to protect their information in advance of disclosure. The Public Records Act model rules indicate that the practice of many agencies is to provide affected third parties ten days' notice to allow them an opportunity to obtain an injunction to prevent disclosure. *See* WAC 44-14-04003(12). Such notice will be critical because DOE cannot unreasonably delay disclosure of non-exempt records, and market participants will be submitting confidential information not previously submitted to and reviewed by DOE.

II. New Comments on Proposed Rule

1. Covered Emissions: Accounting Process

bp is concerned that the Proposed Rules do not appear to provide a process for covered entities to confirm their compliance obligations with DOE. Proposed WAC 173-446-040 provides a detailed listing of emissions that are covered and exempted from the CCA Program and provides for allotment of emissions among entities that could report the same emissions to avoid double counting. Many of the exemptions require the covered entity to "demonstrate to ecology's satisfaction" that the exemption applies or that the emissions should be allocated to another party. Proposed WAC 173-446-050(2),(3).

Regarding the exemptions, some of the required information may be submitted as part of the annual GHG reports pursuant to WAC 173-441. *See, e.g.*, Proposed WAC 173-446-050(2)(b) (aviation fuels and watercraft fuels); WAC 173-441-122(5)(d)(xi). However, that is not the case for all of the exemptions. *See, e.g.*, Proposed WAC 173-446-050(2)(a)(iii) (sequestered carbon dioxide), (b)(v) (petroleum products not combusted or oxidized). In addition, there appears to be no process to request that DOE review or resolve a dispute between covered entities regarding the allotment.

As proposed, it appears that the first opportunity for a covered entity to submit a full accounting of its covered emissions would be when the covered entity submits its compliance instruments. *See* Proposed WAC 173-446-600. However, if DOE disagrees with a covered entity's accounting of its covered emissions, this could cause inadvertent violations under Proposed WAC 173-446-610. This is especially problematic given the enforcement provisions proposed by DOE (commented on below in Section II.7), which provide that "correction is not possible" in the event of a violation and the submission of four penalty allowances for every one compliance instrument. Proposed WAC 173-446-610(1); *see also* Proposed WAC 173-446-220 ("One compliance instrument is equal to one metric ton of carbon dioxide equivalent.").

To avoid inadvertent penalties and provide more predictability for covered entities, bp recommends that DOE provide covered entities with an opportunity to request that DOE verify their covered emissions before the compliance deadline. The covered entities could submit any information necessary to demonstrate that emissions should be exempted or attributed to another entity that is not required to be submitted under WAC 173-441. bp recommends that the Final Rule include a deadline for covered entities to request this verification, which could be

concurrent with the submission of their annual reports on March 31 pursuant to WAC 173-441-050(2)(a)(i). bp also recommends that the Final Rule include a deadline for DOE to respond to a request for verification. This process will provide covered entities with additional certainty regarding their compliance obligations.

2. Covered Emissions: Petroleum Products Exemption

bp appreciates DOE including language exempting GHG emissions related to the supply of certain petroleum products that will not ultimately be combusted or oxidized. Proposed WAC 173-446-040(1)(b)(v) (referring to 40 C.F.R. Part 98, Table MM-1). bp recognizes this is an important exemption because WAC 173-441 requires suppliers of petroleum products to *assume* combustion and oxidation when reporting those GHG emissions. WAC 173-441-010(5)(a)(i) ("In addition to the CO_2 emissions specified under 40 C.F.R. § 98.392, all refiners that produce liquefied petroleum gas must report the CO_2, CO_2 from biomass-derived fuels, CH_4, N_2O and CO_2e emissions that would result from the complete combustion or oxidation of the annual quantity of liquefied petroleum gas sold or delivered, except for fuel products for which a final destination outside Washington state can be demonstrated.").[10] However, bp has two concerns with the proposed test for the exemption, that "the supplier [must] demonstrate to *ecology's satisfaction* that the product is not combusted or oxidized." Proposed WAC 173-446-040(1)(b)(v) (emphasis added).

First, we are concerned that, as drafted, this exemption will not be adequate to prevent the double counting of emissions associated with intermediate products. bp, like other refineries in Washington, produces intermediate products that are sold to other refineries in Washington. Those refineries use the intermediate products to create other petroleum products that may be supplied and combusted or oxidized in Washington. Based on the Proposed Rule, we understand that both bp, as the supplier of the intermediate product, and the third-party supplier of the finished product, will be reporting GHG emissions related to the intermediate product's combustion. We recommend DOE amend this exemption to read in pertinent part: " . . . is not combusted or oxidized, or that will be further processed to produced refined products or other blending components."

Second, the proposed test creates unnecessary administrative burdens for both covered entities and market participants to demonstrate combustion or oxidation on a product-by-product basis. To reduce this burden, bp recommends that the rule identify a list of products that presumptively will not be "combusted or oxidized." For example, petrochemical feedstocks and asphalt. For any products not on the list, bp recommends that DOE specify the types of information that covered entities may submit.

3. Allowances: Adjustments to EITE No Cost Allowance Based on Best Available Technology

[10] 40 C.F.R. § 98.392 ("Suppliers of petroleum products must report the CO_2 emissions that would result from the complete combustion or oxidation of each petroleum product and natural gas liquid produced, used as feedstock, imported, or exported during the calendar year. Additionally, refiners must report CO_2 emissions that would result from the complete combustion or oxidation of any biomass co-processed with petroleum feedstocks.").

bp believes that the Proposed Rule's definition of "best available technology" ("BAT") requires additional clarity. The Proposed Rule, like the Draft Rule, defines BAT as "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. BAT must be technologically feasible, commercially available, economically viable, not create excessive environmental impacts, and be compliant with all applicable laws while not changing the characteristics of the good being manufactured." Proposed WAC 173-446-020; *see also* RCW 70A.65.010(10).

BAT is a key term for EITEs. In the Proposed Rule, DOE added a provision regarding upward adjustments of EITE reduction schedules—thereby increasing the number of EITE no cost allowances—for EITE facilities that demonstrate that additional reductions in carbon intensity or mass emissions are not technologically or economically feasible. *See* Proposed WAC 173-446-220(2)(d)(ii). This new provision states that "Ecology may base the upward adjustment on the facility's best available technology analysis." Because upward adjustments may be issued or denied on the basis of BAT, it is critical that DOE define this term clearly and create an objective framework for ensuring consistent, predictable BAT determinations.

Other Washington environmental laws and regulations do not define the term BAT. Nor do they specify the meaning of several key concepts used in the term's definition. For example, it is unclear what it means for a technology to be "economically viable" or when a technology creates "excessive environmental impacts." Similarly, it is unclear when a technology crosses the threshold of being "technologically feasible" or "commercially available." Likewise, it is unclear how the concept of "goods of comparable type, quantity, and quality" would apply, especially in the context of renewable fuels (e.g., is an R5 fuel "comparable" to an R20 or R40 fuel?). Without further clarity, bp is concerned that it will be difficult for DOE to apply its BAT analysis in a predictable manner.

bp is also concerned that the Proposed Rule's discretionary language regarding BAT will lead to inconsistent outcomes. The Proposed Rule provides that DOE "may base the upward adjustment" on a facility's BAT analysis. Proposed WAC 173-446-220(2)(d)(ii). The Proposed Rule does not specify in what instances it may be appropriate for DOE to consider BAT, nor does it specify what information a facility must provide in its BAT analysis. As such, the Proposed Rule leaves open the possibility that two EITE facilities seeking upward adjustments—both of which provide DOE with the required operational and carbon intensity information required in Proposed WAC 173-446-220(2)(d)(ii)(A)-(C)—may be treated differently, with one facility's request being conditioned on BAT while the other's request is not.

While recognizing that DOE has defined BAT consistent with the CCA, bp encourages DOE to provide more guidance about the meaning of this term. DOE could include definitions of the key terms used in the definition of BAT in WAC 173-446-020. Alternatively, DOE could identify whether somewhat analogous terms used in Washington (e.g., best available control technology ("BACT") or reasonably available control technology ("RACT")), or in other jurisdictions are an appropriate point of reference.[11]

[11] We note that Colorado does define the term "greenhouse gas best available emission control technology" ("GHG BAECT") similarly: "a GHG emission control technology for a GHG emission-unit based

4. Allowances: Program Baseline Discretion

bp also has concerns with the new language regarding the calculation of subtotal baselines that gives DOE discretion to deviate from the methods for allocating emissions for covered entities in Proposed WAC 173-446-040. *See* Proposed WAC 173-446-200(2) ("Ecology may elect not to apply all methods in WAC 173-446-040(3) when calculating subtotal baselines since the total program baseline is the sum of the subtotal baselines."). The reporter- and sector-specific subtotal baselines are important because they are combined to establish the total program baseline. Proposed WAC 173-446-200(a). In addition, we expect that the subtotal baselines will likely be used to assess each sector's contribution to achieving the state's GHG emission reduction limits at RCW 70A.45.020 when submitting reports to the Legislature. RCW 70A.65.070(3) (explaining the need for potential adjustments to allowance budgets to help covered entities "achieve their proportionate share" of emission reduction limits).

Allowing the subtotal baselines to be calculated differently than the entities' covered emissions would potentially distort calculations regarding each reporter's and sector's contributions to GHG emissions reductions. DOE would potentially attribute emission reductions to a sector not responsible for reducing those emissions under the CCA Program. For example, in the proposed language, DOE states that "when calculating subtotal baselines, ecology may attribute fuel product combustion described in WAC 173-446-040(3)(a)(ii)(A) to facilities instead of reallocating those emissions to fuel suppliers." Proposed WAC 173-446-200(2); *see also* Proposed WAC 173-446-040(3)(a)(ii)(A) (establishing that on-site combustion of fuel products described in WAC 173-441-122(5) are not covered emissions for facilities). Therefore, though fuel suppliers may be responsible for reducing or offsetting emissions associated with fuel product combustion on an annual basis, DOE will continue to attribute those emissions to the facilities. If DOE excludes these emissions from the facility's covered emissions but then includes them as part of their subtotal baseline, it will impede DOE's ability to assess program progress. Accordingly, we recommend that subtotal baselines be set consistent with emissions allocations that entities will strive to reduce.

5. Offsets: Natural Climate Solutions

bp supports the use of natural climate solutions ("NCS"), which are nature-based solutions that focus on actions to reduce GHG emissions through nature conservation, restoration, and improved land management. bp believes that many types of NCS offset projects would meet the CCA's objectives to reduce GHG emissions while benefitting communities that have borne and are now bearing the disproportionate impacts of environmental burdens, including climate change. Voluntary registries have developed offset protocols for these NCS projects. We encourage DOE to adopt these offset protocols to enable development of these projects.

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on the maximum degree of GHG reductions achievable on a case-by-case basis, taking into account energy, environmental and economic impacts . . . ." 5 Colo. Code Regs. § 1001-26:B.II. Under Colorado's regulations, however, EITE entities that install GHG BAECT and utilize best available energy efficiency practices are rewarded with a direct allocation that covers 95% of their emissions for five years. Colo. Rev. Stat. § 25-7-105(1)(e)(IX)(A).

6. Offsets: Superseded Protocols

bp requests clarification on the inclusion of references to superseded California offset protocols in the Proposed Rule. DOE proposes to adopt the current and prior versions of the California offset protocols for livestock projects, U.S. forest projects, and ozone depleting substances ("ODS"). *See* Proposed WAC 173-446-505(3)(a), (b), (c). bp appreciates the potential flexibility offered through this language, but believes this language could cause confusion for offset project developers and covered entities-particularly given DOE's goals for linkage with California. bp requests that DOE clarify in the response to comments included in the explanatory statement for the Final Rule: (1) DOE's intent in allowing use of superseded offset protocols, and (2) under what circumstances it is appropriate to use a superseded California offset protocol.

7. Offsets: Ozone Depleting Substances

Relatedly, bp recommends that DOE include additional exceptions in the Final Rule related to the California offset protocol for ODS. The Proposed Rule adopts both the 2011 and 2014 protocols, and then proposes numerous exemptions to those protocols to facilitate use in Washington. Proposed WAC 173-446-505(3)(c). bp recommends the addition of language that would make HCFC-22 (*i.e.*, R-22) an eligible gas from refrigerant sources. Like the refrigerants specified in the California protocols, HCFC-22 is subject to phase-out under the Montreal Protocol and Title VI of the Clean Air Act. In addition, HCFC-22 is included in the recently updated American Carbon Registry ODS methodology.[12] Inclusion of HCFC-22 as an ODS refrigerant source would critically unlock a significant quantity of potential offset credits.

To implement this change, bp recommends inserting the following language in Proposed WAC 173-446-505(3)(c):

> (i) Exceptions to adopting the Ozone Depleting Substances Compliance Offset Protocol, November 14, 2014, by reference:
> . . .
> (K) Section 2.2.1(b) is amended to include HCFC-22.
> (~~K~~L) Section 3.2(d.) is not adopted.
> (~~L~~M) Section 3.5.(c.) is not adopted.
> (N) Appendix B, Table B.1. Parameters for ODS Refrigerants is amended to include HCFC-22 as follows:

ODS	100-yr Global Warming Potential (t CO_2e/t ODS) (GWP_i)	10-year Cumulative Emission Rate (%/10 years) (ER_{refr})	Substitute Emissions (t CO_2e/t ODS) (SE_i)
HCFC-22	1,810	72%	389

8. Enforcement: Penalties

[12] American Carbon Registry, *ACR Methodology for the Destruction of ODS and High GWP Foamsv.1.2*, pp. 12, 55 (Nov. 2021), available online at: https://bit.ly/3IxMKxG.

bp is concerned with the extreme nature of the penalties imposed for the failure to submit a sufficient number of compliance instruments. DOE has proposed that a violation will automatically accrue if a covered entity fails to submit a sufficient number of compliance instruments on the compliance deadline. Proposed WAC 173-446-610(1). In the event of such a violation, "correction is not possible" and entities will be required to submit four penalty allowances for every one compliance instrument that it failed to submit. *Id*. In addition, if the entity fails to submit those penalty allowances within six months of the missed compliance deadline, DOE "must" issue an order or penalty of up to $10,000 per day per violation, with each metric ton of CO_2e being a *separate* violation. Proposed WAC 173-446-610(2).

DOE is proposing an ambitious cap on emissions in the early years of the program, which may make obtaining sufficient allowances difficult for entities not directly receiving allowances. In addition, as explained in this comment letter, determining an entities' compliance obligations will be a complicated endeavour. Therefore, some inadvertent errors—on the part of covered entities or DOE—are likely (if not inevitable) in the program's early years.

bp appreciates DOE proposing to provide some leniency in the first compliance period by reserving the discretion to "reduce the amount of the penalty by adjusting the monetary amount of a civil penalty or reducing the number of penalty allowances." Proposed WAC 173-446-610(8). However, bp believes that this provision is not sufficient. bp strongly recommends that DOE revise the current language establishing that the failure to submit sufficient compliance instruments by the compliance deadline will be an automatic and non-correctable error. For example, the California Cap and Trade regulations provide that violations accrue "every 45 days after" a missed compliance deadline. 17 CCR § 95014. We recommend a similar provision be included in the Final Rule.

9. Enforcement: Withholding EITE No Cost Allowances

bp also has concerns with the new enforcement language in the Proposed Rule for EITEs. While acknowledging that DOE's efforts to ensure compliance will be critical to maintaining the integrity of the CCA Program, we encourage DOE to reconsider the extreme and unworkable penalty of withholding all no cost allowances for any non-compliance with the GHG Reporting Rule. Specifically, DOE proposes to withhold all no cost allowances if an EITE fails to provide "timely and accurate verified reports under WAC 173-441-050 and this chapter." Proposed WAC 173-446-220(2)(e). DOE will not distribute the no cost allowances until "the facility is in compliance." *Id*.

bp believes these penalties are extreme because WAC 173-441 already includes enforcement provisions in the event of non-compliance. WAC 173-441-090 establishes that failure to submit timely and accurate reports, along with other errors, are subject to enforcement under the Washington Clean Air Act (RCW 70a.15). In addition, in Proposed WAC 173-446-610, DOE proposes that if it discovers under-reporting of GHG emissions pursuant to WAC 173-441 that the covered entity fails to correct by November 1 (the compliance instrument deadline), then the covered entity must submit four penalty allowances for every one compliance instrument it failed to submit. Proposed WAC 173-446-610(11)(b). These proposed provisions would therefore penalize covered entities for the same error three times.

bp also believes these penalties are unworkable because there are no time limitations imposed on DOE for identification and resolution of such errors, which subjects covered entities to substantial uncertainty. First, the Proposed Rule does not include a deadline for DOE to inform the EITE of their "noncompliance" related to their submission of reports. Therefore, the EITE could be deprived of a reasonable opportunity to come into compliance in advance of the scheduled distribution date for no cost allowances. In addition, it will also complicate DOE's calculations regarding the number of allowances to be auctioned, given that the number of no cost allowances distributed should directly affect the number of allowances available at auction. Second, the Proposed Rule fails to impose any deadline for DOE to review reports submitted to resolve "noncompliance" and make determinations that the EITE has come into compliance. EITEs could experience significant delays while DOE performs its reviews. Third, the Proposed Rule fails to identify any limitations period on DOE's discovery of errors. This subjects EITEs to indefinite uncertainty, as DOE could hypothetically withhold allowances as a result of an error discovered in a report from 5 years prior.

In recognition of the importance of timeline and accurate GHG reporting to the CCA Program, bp recommends that DOE consider the following modifications to the enforcement provisions that are intended to avoid unnecessary disputes and complications for market participants:

- Proportionate Penalties: In the event of an inaccuracy, rather than withholding *all* of the EITE's no cost allowances, DOE could withhold only the number of no cost allowances associated with the GHG emissions in question.

- Opportunity to Cure: Prior to withholding allowances, DOE could inform the EITE of the non-compliance and provide them with an opportunity to correct the error. If the EITE is unable to correct the error, they could be required to return the allowances within a set period of time.

- Timelines: Alternatively, DOE could establish timelines for identification and resolution of noncompliance. As a point of reference, we encourage DOE to look to the California Low Carbon Fuel Standard's regulations, which provide a detailed, time-certain process for resolving noncompliance. *See* 17 CCR § 95495.

III. Draft Rule Comments DOE has Addressed

bp recommends that DOE retain the following language in the Final Rule that addresses issues that bp raised in comments on the Draft Rule.

1. Covered Emissions: Biofuels Allotment

bp recommended that DOE clarify how to interpret the allotment of emissions provision in Draft WAC 173-446-040, specifically with respect to biofuels. bp noted that there appeared to be conflicting language, where Draft WAC 173-446-040(2)(a)(i) excluded certain biofuel combustion emissions from covered emissions, but Draft WAC 173-446-040(3)(c)(i) appeared to allot those same emissions to suppliers of fossil fuels other than natural gas. The Proposed Rule continues to allot emissions from "any fuel product," which includes biomass-derived fuels, to suppliers of

fossil fuels other than natural gas. Proposed WAC 173-040-446-040(3)(c)(i).[13] However, bp believes this issue has been resolved through the inclusion of new language in the introductory paragraph of the allotment provision, which clarifies that the allotment section "does not expand the definition of covered emissions." Proposed WAC 173-040-446-040(3). This new language makes clear that the question whether certain emissions are covered or excluded is definitively governed by WAC 173-446-040(1),(2).

2. Covered Emissions: Carbon Dioxide Supplied

bp recommended that DOE clarify in WAC 173-446-040(3)(a) 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. DOE revised Proposed WAC 173-446-040(3)(a)(ii)(B) to clarify that a facility's covered emissions do not include carbon dioxide that is collected and supplied off-site and that is part of the covered emissions of another "covered entity." Because "opt-in entity" is defined as "not a covered entity," Proposed WAC 173-446-020, DOE's revision addressed bp's concern.

3. Allowances: Baseline Alternate Years

bp recommended that DOE further clarify in WAC 173-446-220 how EITE facilities could establish their baseline using "alternate years" from the 2015 to 2019 period. Specifically, the Draft Rule did not specify how many alternate years could be used by a facility or whether a facility could choose alternate years. DOE revised Proposed WAC 173-446-220(a)(v) to address this issue by proposing that facilities can use between three and five years for their baseline, at least three of which must be consecutive.

4. Allowances: Production Data for Allowances Based on Carbon Intensity

bp expressed its concern with the Draft Rule's incorporation and retroactive application of California-specific production data through reference to the at the time Proposed WAC 173-441-050 to establish carbon intensity baselines. The Cherry Point refinery has never had to compile this data—specifically, the complexity weighted barrel data described in Section 95113 of ARB's Regulation for the Mandatory Reporting of GHG Emissions. It would be difficult, if not impossible, to provide this information for past years because its collection will require new meters and equipment. DOE resolved this issue in the Final WAC 173-441 by providing reporters flexibility in reporting production data. DOE also revised Proposed WAC 173-446-220(1)(a) to establish the inclusion of barrels for baselines.

[13] The Proposed Rule incorporates the definition of "fuel product" from the Reporting of Emissions of Greenhouse Gases rule, Chapter 173-441 WAC, which defines the term as "petroleum products, biomass-derived fuels, coal-based liquid fuels, natural gas, biogas, and liquid petroleum gas as established in 40 C.F.R. Part 98, Subparts LL through NN. Renewable or biogenic version of fuel products listed in Tables MM-1 or NN-1 of 40 C.F.R. Part 98 are also considered fuel products." WAC 173-441-020(i).