

WASHINGTON DEPARTMENT OF ECOLOGY PREPARING NEW RULE TO ASSESS GREENHOUSE GAS EMISSIONS

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This April, the Washington State Department of Ecology (Ecology) is expected to release a draft of its new rule titled Greenhouse Gas Assessment for Projects (GAP Rule). The GAP Rule could have major impacts on local governments and industries, such as port authorities, oil and gas refining, pulp and paper plants, manufacturing, and chemical producers. Intended to standardize the process for assessing greenhouse gas (GHG) emissions by major “industrial and fossil fuel” projects, the GAP Rule aims to create a consistent method for evaluating GHG emissions and a process for imposing mitigation measures. The GAP Rule would implement the Washington Clean Air Act and the State Environmental Policy Act (SEPA) during the environmental review process.¹ However, because many details on the GAP Rule have yet to be clarified, the eventual impact of the rule on affected sectors and industries is still unclear. Nevertheless, what the GAP Rule does clearly mandate is an increased focus on identifying all project-related GHG emissions, which in turn will likely result in efforts by Ecology to impose more comprehensive GHG mitigation requirements during SEPA review.

K&L Gates will be following this rulemaking closely and is ready to assist clients in understanding how this rule will affect their business and existing projects.

AN OVERVIEW OF THE GAP RULE

Ecology began developing the GAP Rule in response to Governor Jay Inslee's Directive 19-18, which instructed Ecology to adopt rules to add additional considerations of climate change risk in environmental assessments for major industrial projects and major fossil fuel projects by 2 September 2021.² The governor's directive followed a series of decisions by the Shoreline Hearings Board rejecting Ecology's attempts to analyze and regulate GHG under SEPA and other statutes.³ The GAP Rule proposed by Ecology is intended to implement SEPA and the Washington Clean Air Act. It will exist as a stand-alone rule under Chapter 173-445 WAC.⁴ The rule will apply to new facilities requiring environmental review or changes to existing facilities that require environmental review. However, the focus of the rule is designed to apply specifically to major fossil fuel and industrial projects. The goal of the GAP Rule is to strengthen and standardize the consideration of climate change risks, vulnerabilities, and impacts when evaluated in environmental assessments and to achieve the goal of no net increases in GHG emissions attributable to a project by using appropriate mitigation.

The GAP Rule is expected to include three components: (1) initial screening of projects, (2) environmental assessment methods, and (3) mitigation. These elements are described in more detail below.

Initial Assessment

The initial assessment component is a screening process to determine whether a project will be subject to the GAP Rule. The initial assessment sets a threshold of 10,000 metric tons of CO₂ per year. Where a covered facility meets or exceeds this threshold—via direct or indirect emissions—it is subject to the rule. This screening threshold will take into account facility on-site emissions, feedstocks/inputs, and products/outputs. For instance, even if a facility's on-site emissions are less than 10,000 metric tons of CO₂, facility inputs and outputs (identified by Ecology as fossil fuels and electricity) may still qualify the project for the GAP Rule if a single input or output—or combination thereof—exceeds 10,000 metric tons of CO₂ emissions. Of note, even if the GAP Rule does not apply, evaluation of GHG is still required on a case-by-case basis under SEPA.

Environmental Assessment Methods

The new environmental assessment protocol is the essence of the GAP Rule. For projects that meet the initial screening threshold, an environmental assessment must be performed that consists of the following elements: (1) an assessment of on-site emissions, (2) an “energy analysis,” and (3) a life cycle analysis.

The assessment of on-site emissions is relatively straightforward and consists of quantifying direct operational emissions, indirect operational emissions, and construction and decommissioning emissions. The on-site emissions analysis uses existing state GHG reporting methods to gauge on-site emissions and, in that respect, overlaps somewhat with the analysis in the initial screening assessment. However, unlike the initial screening assessment, the on-site emissions assessment portion of the environmental assessment does not account for GHG emissions related to inputs and outputs; those factors are considered in the other elements of the environmental assessment, discussed below.

The energy analysis component of the environmental assessment is more complex. As now conceived, the energy analysis element will analyze the potential downstream impacts of a project that: (1) increases the flow or capacity of energy supply, (2) creates a new route or line of energy supply, or (3) creates a new type or form of energy supply, if GHG emissions may be affected. The energy analysis may also be used to account for geographic leakage of GHG, i.e., if the project results in moving GHG emissions out of state. Finally, the energy analysis may also include a review of potential market effects of the project, i.e., the implications of a shift in energy supply. While the scope of the energy analysis is far from clear, it appears that Ecology is intending for the analysis to capture GHG emissions that may be associated with the creation of different forms of energy, e.g., refined petroleum, electricity, or potentially biofuels or other new types of energy supplies.

The life cycle analysis evaluates the 20-year and 100-year global warming potentials for all GHG associated with the subject facility. The life cycle analysis component will rely upon a framework established by the International Organization for Standardization (ISO). A typical GHG life cycle analysis includes an accounting of the upstream and downstream emissions associated with the project, including transportation, leakage, and market and indirect emissions implicated by the project. The ISO standards proposed by Ecology will set requirements for collecting, calculating, and validating data, and will guide the selection impact categories and category indicators. The life cycle analysis will also include a review of market and geographic leakage effects, as Governor Inslee's directive specifically requested Ecology include these components in the new rule. These upstream and downstream emissions are interrelated and complex, not usually included in a standard GHG life cycle analysis, and are typically time and resource intensive. Ecology is still considering whether to base the life cycle analysis on gross

emissions (emissions associated only with the project) or net emissions (project emissions relative to alternative market scenarios).

Mitigation

The final component of the GAP Rule is to ensure no net increases in GHG emissions attributable to a covered facility through implementation of mitigation measures. The environmental assessment process for covered facilities will define the emissions subject to mitigation, in contrast to the case-by-case method used for projects that do not meet the GAP Rule screening threshold. To offset those emissions, project applicants would develop a GHG mitigation plan, which would include the basis, criteria, and location of mitigation projects. Ecology has stated that mitigation will be allowed through direct funding of mitigation projects, as well as by purchasing carbon offsets from qualified and verified carbon markets.

IMPLICATIONS OF THE GAP RULE

While the GAP Rule strives to provide greater consistency when qualifying and allocating GHGs for projects, many questions still exist as to the scope of the rule. For instance, Ecology has yet to offer a definition of what would be considered a “fossil fuel” or “industry” project subject to the rule. Furthermore, the scope of the energy assessment, as described, seems to imply that project proponents may be held responsible for the GHG emissions created by third-party suppliers over whom they have no control. Additional questions remain as to whether the GAP Rule would be triggered if an already-permitted facility applies for a permit unrelated to air quality, such as a land use permit. In addition, the complexity and scope of the proposed energy analysis and life cycle analysis raises concerns over whether GHG emissions may be double-counted in the process of taking inventory of all upstream, downstream, and indirect GHG impacts. Finally, can Ecology limit the application of its new methodology for scrutinizing GHG under SEPA, or will that methodology be extended by the Shoreline Hearings Board, the Pollution Control Hearings Board, or courts to additional facilities not expressly covered by the GAP Rule?

Ecology has proposed to publish the draft GAP Rule in April 2021, which may resolve some of the questions raised in scoping process. However, given the complexity and breadth of this new rule, industries that will likely be subject to the GAP Rule should be alert to the opportunity to comment on the rulemaking this summer.

FOOTNOTES

¹While the GAP Rule does not amend SEPA, Ecology is relying on SEPA and the Washington Clean Air Act to provide authority to promulgate the GAP Rule. See Wash. Dep't Ecol., Preproposal Statement of Inquiry, WSR 20-10-057 (Apr. 30, 2020), <https://ecology.wa.gov/DOE/files/d1/d1ed2cac-ce23-4ad2-a6a5-dfdeb8839823.pdf>.

²Environmental Assessment of Greenhouse Gas Emissions, Directive of the Governor 19-18 (Dec. 19, 2019), <https://www.governor.wa.gov/sites/default/files/directive/19-18%20-%20ECY%20Climate%20Rules%20%28tmp%29.pdf>.

³See, e.g., Order on Summary Judgment, Quinault Indian Nation v. City of Hoquiam, SHB No. 13-012c (Nov. 12, 2013); Order on Motions for Partial Summary Judgment, Columbia Riverkeeper v. Cowlitz Cty., SHB No. 17-010c (Sept. 15, 2017).

⁴See generally Wash. Dep't of Ecology, Chapter 173-445 WAC, <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-445>. Ecology has published a series of slides and summaries describing the development of the GAP Rule and its proposed scope and effect.

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