



July 16, 2021

Colin McConnaha
Manager, Office of Greenhouse Gas Programs
Oregon Department of Environmental Quality
Via email to CapandReduce@deq.state.or.us

Re: Comments on Climate Protection Program Rulemaking Advisory Committee Meeting No. 7

Dear Mr. McConnaha:

The Green Energy Institute at Lewis & Clark Law School is a nonprofit energy and climate law and policy institute within Lewis & Clark's top-ranked environmental, natural resources, and energy law program. We greatly appreciate the opportunity to participate in the Rulemaking Advisory Committee (RAC) for the Department of Environmental Quality's (DEQ) Climate Protection Program, and respectfully submit these comments on issues raised in RAC meeting 7.

Part I of our comments aims to respond to some of the specific issues and discussion questions raised during the seventh and final CPP RAC meeting. Part II describes some persisting concerns we have about the proposed rules.

I. Comments on RAC Meeting 7

A. Declining Emissions Threshold for Non-Natural Gas Fuel Suppliers

We support DEQ's proposal to reduce the applicability threshold for non-natural gas fuel suppliers from 200,000 metric tons CO₂e (MTCO₂e) in 2022 to 25,000 MTCO₂e in 2031. While we would prefer the program to apply a 25,000 MTCO₂e threshold to non-natural gas fuel suppliers starting in 2022, the proposed declining threshold would reduce regulatory burdens on small businesses while ensuring that the vast majority of transportation-related greenhouse gas (GHG) emissions are covered under the program's declining emissions cap.

B. Compliance Instrument Reserve

DEQ's proposal to gradually reduce the number of compliance instruments deposited into the compliance instrument reserve seems reasonable given the probability that demand for reserved compliance instruments will decline as the cap and applicability thresholds decline. However, we disagree with DEQ's proposal to distribute excess compliance instruments as the reserve size decreases. Given the magnitude and urgency of the climate crisis, it is imperative the DEQ take every opportunity to maximize ambition and integrity under the program. A shrinking compliance instrument reserve provides an opportunity to strengthen the program by eliminating unused compliance instruments. However, the proposal to distribute excess compliance instruments would

not only fail to increase ambition under the program, it would weaken the integrity of the cap and delay progress in reducing emissions. We strongly urge DEQ to *retire* any excess compliance instruments from the reserve.

C. The Emissions Cap Trajectory and Targets

We support DEQ's proposal to establish interim 2035 and final 2050 emissions targets. However, we encourage DEQ to adopt interim and final targets that reflect the emissions reduction goals presented in Governor Brown's Executive Order 20-04 and achieve a 45% reduction in emissions below 1990 levels by 2035 and an 80% reduction in emissions below 1990 levels by 2050. We also want to reiterate our concerns that the program lacks flexibility to adjust the cap downward if emissions decrease more quickly than the cap trajectory declines. We recognize that DEQ aims to provide a certain level of regulatory certainty for covered entities, and we understand that the agency wishes to restrict its discretion to alter the cap on an *ad hoc* basis. However, the program rules should contain objective criteria to either trigger a downward adjustment of the cap or limit compliance instrument distributions if emissions decline at a faster rate than the cap declines. If emissions from a specific industry or sector decline more quickly than the emissions cap, there is a significant risk that the industry or sector will receive an over-allocation of compliance instruments, which would likely delay or deter emissions reductions in other sectors (through trading) or in future compliance periods (through banking). The rules should therefore ensure that no covered entities are allocated more compliance instruments than their reported emissions. We strongly encourage DEQ to include a mechanism for withholding compliance instruments from distribution and/or adjusting the cap downward if the cap exceeds reported emissions by a certain percentage.

D. BAER Assessments and Determinations

We continue to urge DEQ to mandate that sources subject to BAER achieve specified and meaningful reductions in GHG emissions that are consistent with the GHG reduction targets established by statute and EO 20-04. While mandatory emissions reductions from all emitting sectors and sources will be necessary for Oregon to achieve its climate goals, we do appreciate DEQ's proposal to remove the BAER assessment provisions directing sources to rank their preferred BAER strategies or identify strategies a source deems "infeasible" to implement. BAER determinations must be made by applying objective criteria to identify the most effective strategies for maximizing emissions reductions. Covered sources should not have discretion to select BAER strategies that fail to maximize emissions reductions, and we support DEQ's decision to remove these overly subjective considerations from the proposed rules.

However, we do not support DEQ's proposal to consider impacts on the type or quality of goods produced when selecting the specific actions required by a BAER determination. This proposal implies that DEQ will have the discretion to select strategies that will not reflect or achieve the "best available emissions reductions" from a specific source or industry. Is DEQ proposing to make *ad hoc*, subjective determinations that a certain product's value or importance outweighs the societal and environmental need to rapidly reduce GHG emissions in accordance with the best available science? Even when viewed from a purely economic standpoint, this proposal seems designed to place the economic interests of industrial facilities over those of the state as a whole, which has and will continue to incur tremendous costs from the impacts of climate change. And these economic costs

are vastly outweighed by the climate impacts on Oregon's communities and natural environment. While it is difficult to assign responsibility for a specific climate event to the emissions from a specific source or industry, it is clear from Oregon's GHG emissions reporting data that certain industries bear a greater share of this responsibility than others. The CPP should not place greater weight on the economic interests of industries that have disproportionately contributed to the climate crisis than it does on the communities and individuals that are disproportionately impacted by the climate crisis.

To maintain the integrity of the program, we encourage DEQ to reject the proposal to consider impacts on the type or quality of goods produced when making BAER determinations. We also strongly encourage DEQ to impose mandatory GHG emissions limits on stationary sources subject to BAER that are consistent with the GHG reduction targets established by statute and EO 20-04.

E. Community Climate Investments

We appreciate DEQ's efforts to strengthen the Community Climate Investments (CCI) program by clarifying the prioritization of projects that achieve significant GHG emissions reductions, reduce co-pollutant emissions, and benefit impacted and Black, Indigenous, and People of Color (BIPOC) communities. DEQ's proposal to achieve one-to-one GHG reductions on an aggregate basis, rather than a project-by-project basis, seems like a reasonable approach to ensure that CCI projects achieve the dual objectives of reducing emissions and benefiting impacted communities. We also want to express our strong support for the requirement that CCI projects reduce GHG emissions. During the rulemaking process, many stakeholders, including regulated fuel suppliers, timber and agricultural industries, and forest and land use advocates, have pressured DEQ to extend CCI eligibility to carbon sequestration projects that offset, rather than reduce, emissions from fossil fuels and other industrial processes. We have significant concerns about the potential for sequestration projects to achieve real, measurable, additional, verifiable, and permanent offsets of fossil carbon emissions. Given the urgency of the climate crisis, we strongly urge DEQ to retain the current CCI eligibility requirements.

We want to emphasize that the biogenic process of carbon sequestration is incredibly important for mitigating the impacts of human-caused climate change, and we support efforts to increase carbon sequestration through other state agencies and programs. However, there are important distinctions between the process of carbon sequestration and the use of carbon sequestration *offsets* as a compliance mechanism under GHG reduction programs like the CPP. Most significantly, carbon offsets do not prevent fossil GHG emissions, nor do they reduce atmospheric GHG concentrations. Under perfect conditions, carbon offsets result in climate inertia: one ton of fossil GHGs is emitted into the atmosphere, and one ton of carbon is sequestered through natural processes. Under other less-than-perfect conditions that are more common in the real world, carbon offsets achieve less neutral outcomes. Many carbon offset projects *delay* climate progress: one ton of fossil carbon is emitted today, and one ton of carbon is sequestered years or even decades in the future. Carbon offset projects also have the potential to *contribute* to climate change by failing to permanently offset the fossil emissions they were issued for. This is becoming more common as forest offset projects succumb to wildfires, illegal deforestation, or other human or natural causes. And carbon sequestration projects can fail to achieve offsets that are additional (*e.g.*, offset credits are given for projects that already existed or would have occurred regardless of their sequestration potential) or

real, measurable, and verifiable (e.g., a project's sequestration potential is over-estimated or under-realized, or cannot be verified by third-party auditors).

Due to the potential for carbon sequestration projects to delay climate progress or even contribute to climate change, carbon offsets are an inappropriate mechanism for demonstrating compliance with the CPP, and sequestration projects should not be eligible for CCI credits under the program. However, we encourage DEQ to collaborate with other state agencies and public and private stakeholders to identify opportunities to increase carbon sequestration on Oregon's public and working lands. We also encourage DEQ to monitor biogenic carbon emissions resulting from wildfires and other climate events. If these emissions continue to increase at current rates, DEQ should consider lowering the CPP's interim or final emissions targets to help mitigate the rise in biogenic carbon emissions.

F. Compliance Instrument Distribution

We are very concerned by DEQ's recent proposal to include emissions from biofuels in its compliance instrument distribution methodology. DEQ has indicated that replacing fossil fuels with biofuels represents a potential compliance pathway for regulated fuel suppliers, and it is unclear why DEQ should provide an extra incentive to pursue this one form of compliance over any other compliance activities. What is the rationale for allocating additional compliance instruments for biofuels, but not for compliance strategies that reduce demand for fossil fuels, such as electrification or energy efficiency?

Moreover, because DEQ lacks authority to regulate carbon emissions from biofuel combustion, it would be inappropriate to distribute compliance instruments for biofuel emissions that are not and will not be subject to regulation under the program. This proposal is particularly concerning given the fact that biofuel combustion *does* produce GHG emissions (though these emissions will not be covered under the cap), while many other compliance options *do not* produce GHG emissions. To illustrate the implications of this proposal, consider a hypothetical example where two natural gas utilities each emit 100 tons of CO₂. If utility A reduces its emissions by 50 tons by investing in energy efficiency, and utility B reduces emissions by 50 tons by replacing a portion of its fossil natural gas with "renewable" natural gas (RNG), both utilities will have regulated emissions of 50 tons CO₂. In reality, however, utility B's real-world emissions will be higher than 50 tons, because RNG emits carbon when combusted. Despite this discrepancy in real-world emissions and Oregon's regulatory exemption for biogenic emissions, DEQ is proposing to include utility B's RNG emissions in its calculations for determining each utility's proportional compliance instrument distributions. Thus, while both utilities have regulated emissions of 50 tons, utility A would receive fewer compliance instruments for the following compliance period, and utility B would receive *additional* compliance instruments. Under this scenario, utility B could potentially receive *more* than 50 compliance instruments, which would effectively exempt utility B from any compliance obligations and grant it excess compliance instruments to bank or trade. This outcome would effectively penalize utility A for investing in energy efficiency rather than RNG, despite utility A's lower real-world emissions.

We encourage DEQ to retain its previous proposal to distribute compliance instruments on the basis of entities' proportional (anthropogenic) GHG emissions, and strongly urge DEQ against including biofuel emissions in its compliance instrument distribution methodology.

G. Enforcement

We support DEQ's proposed enforcement approach, including the clarification that each metric ton of emissions that is not accompanied by a compliance instrument or CCI credit will represent a separate violation. We also appreciate the clarifications that operating without a CPP permit and failing to comply with a permit or BAER requirements will constitute Class I violations of the CPP.

II. Additional Comments on the Proposed Rules

We want to reiterate some of the key concerns and recommendations we have raised in previous comments submitted throughout the rulemaking process. The currently proposed exemptions for certain stationary source emissions and the permissive treatment of emissions from new industrial facilities undermine the integrity and ambition of the CPP. Moreover, these provisions present serious equity concerns and raise doubts about the program's ability to protect vulnerable communities and populations. We urge DEQ to remove these constraints from the draft rules and add additional safeguards to prevent future increases in stationary source emissions and ensure that all sources and sectors under DEQ's jurisdiction achieve meaningful emissions reductions that are consistent with Oregon's climate targets.

A. Eliminate Exemptions for Emissions Under DEQ's Jurisdiction

Because many GHG-emitting sectors and processes are exempt from emissions regulations under state law, Oregon will only achieve its climate targets if the CPP covers emissions from as many sources and sectors as possible. However, the current iteration of the proposed rules includes exemptions for emissions from natural gas-fired power plants that are not otherwise regulated under the 100% Clean Electricity mandates established by HB 2021, emissions from the combustion of liquid fuels or propane by industrial facilities, and emissions from stationary sources that are owned and operated by interstate pipeline companies. These exemptions present serious equity concerns for the communities that are disproportionately impacted by the emissions from these facilities.

We strongly urge DEQ to strengthen the CPP's equity protections and increase the ambition and integrity of the program by eliminating the exemptions for unregulated, merchant-owned power plants; stationary source emissions from the combustion of liquid fuels or propane; and stationary sources owned or operated by an interstate pipeline. DEQ has legal authority to regulate emissions from these stationary sources, and the agency should exercise this authority and regulate these significant sources of emissions under the CPP.

B. Deter Development of New Stationary Sources That Would Undermine Oregon's Climate Progress

If new, emissions-intensive industrial facilities come online in Oregon after the CPP goes into effect, the emissions from these facilities would present significant equity impacts, threaten the integrity of

the program, and undermine the state's climate progress. Despite these risks, the current iteration of the proposed rules exempts new facilities from regulation under the program's emissions cap and effectively enables unlimited increases in GHG emissions from the industrial sector. While new sources that expect to exceed the 25,000 MTCO₂e emissions threshold would be subject to the CPP's BAER rules for stationary sources, the BAER requirements for new sources are less stringent than the requirements for existing sources because they allow proposed sources to use unverified estimates of sources' "reasonably anticipated" emissions and fuel use in their BAER assessments. And the proposed rules do not impose any binding limits on GHG emissions from new or existing stationary sources.

The CPP should deter, rather than enable, development of new stationary sources that would undermine Oregon's efforts to equitably reduce GHG emissions. To do so, we encourage DEQ to revise the rules to reduce the applicability thresholds for proposed new sources from 25,000 MTCO₂e to 5,000 MTCO₂e and specify that any proposed sources exceeding that threshold would be both subject to the BAER requirements *and* covered under the program's declining emissions cap.

Unless DEQ adds these safeguards to the rules, the CPP will serve as a symbolic welcome mat for big industrial polluters that desire convenient access to ports and rail infrastructure and want to avoid more stringent emissions regulations imposed by other West Coast states. Both California's cap and trade program and Washington's cap-and-invest program establish declining caps on GHG emissions from industrial facilities, and the CPP should impose mandatory, declining limits on industrial emissions as well. New industrial facilities are almost always sited in environmental justice (EJ) communities that are home to predominantly lower-income and/or BIPOC households that face disproportionate impacts and threats from pollution and the impacts of climate change. It is imperative that the CPP include protections for Oregon's impacted and vulnerable residents and include strong deterrents for constructing new industrial facilities in EJ communities. Subjecting new facilities to the CPP's declining emissions cap would provide such a deterrent.

Climate change represents an urgent and growing crisis in Oregon, and the CPP will provide the state with an important tool to reduce emissions from the transportation, building, and industrial sectors. We strongly encourage DEQ to strengthen the CPP draft rules to maximize ambition, preserve integrity, and protect and support equity through the requirements and implementation of the program. We appreciate your consideration of our comments and recommendations.

Sincerely,

Amy Schlusser

Staff Attorney

The Green Energy Institute at Lewis & Clark Law School