



New Rule & Initiatives to Limit Carbon Gaining Traction in Washington State

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On January 5, 2016, the Washington State Department of Ecology (Ecology) issued its [draft Clean Air Rule](#) (CAR) under the state's Clean Air Act (WA CAA) that will limit greenhouse gas (GHG) emissions from certain industries, particularly energy and manufacturing, and will require them to reduce those emissions over time. Public comments will be accepted on the rule through April 8, 2016. Meanwhile, Ecology will be developing a separate state implementation plan to limit GHG emissions under the EPA's Clean Power Plan, and state voters could see as many as three separate carbon tax initiatives on their 2016 ballots.

Background

Frustrated by [legislative inaction](#) on climate policy, in July 2015, Gov. Jay Inslee [directed](#) the state Department of Ecology to step up enforcement of state pollution laws and develop a cap on carbon dioxide (CO₂) emissions— actions aimed at achieving GHG reduction targets that have been [state law](#) since 2008. The proposed Clean Air Rule responds to that directive by proposing to implement the state's first limits on carbon pollution, aiming to "slow climate change and limit projected effects on our state's coastal communities, agricultural industries and drinking water supplies." ([Ecology release](#))

Ecology's proposed Clean Air Rule follows a decade-long effort to promote GHG emission reductions in Washington State. In 2006, Washington's clean energy standard, [Ballot Initiative 937 \(I-937\)](#), was passed by popular vote. I-937 required the state's large utilities to implement energy conservation practices and source 15% of their electric load from renewable resources by 2020. In 2008, the Washington legislature set overall state GHG emission targets – with deadlines of 2020, 2035 and 2050 – with Ecology subsequently adopting [mandatory GHG reporting rules](#) in 2010. In 2014, the Climate Legislative and Executive Workgroup ([CLEW](#)), comprised of five legislators and the Governor, concluded that the "2020 statutory limits will not be met without additional action, and even further actions will be required to achieve the limits in later years." The Governor issued an Executive Order in 2014 outlining a series of steps to reduce carbon pollution and promote clean energy industries, and established the Carbon Emissions Reduction Taskforce composed of 21 leaders from business, labor, health and public interest organizations. The taskforce's [recommendations](#) to design a market-based carbon regulatory program were delivered to Gov. Inslee in November 2014, and in 2015 the Governor introduced a series of legislative proposals to reduce GHG emissions. However, the 2015 Legislature did not adopt his proposals.

In the meantime, neighboring British Columbia implemented its own carbon tax in 2008; California and Quebec launched cap-and-trade programs in 2013, and later linked them; and Washington State joined the [Pacific Coast Collaborative](#). At December's COP-21 Paris talks, Ontario and Manitoba [signed](#) an MOU to link their forthcoming carbon markets with Quebec and the Western Climate Initiative; and Gov. Inslee signed several [global commitments](#) to further reduce greenhouse gas emissions in Washington.

In addition to significant state-level activity, Washington and other states now face federal mandates to control CO₂ emissions from fossil fuel-fired power plants. In October 2015, the Environmental Protection Agency (EPA) issued a [suite of rules](#) establishing emission CO₂ standards for power plants under the federal Clean Air Act sections 111(b) and (d). The new rules include: (1) the "Clean Power Plan," establishing state-by-state CO₂ emission reduction "goals" for *existing* power plants starting in 2022, and directing each state to submit to EPA by September 2018 a plan demonstrating how the state will meet its goal through enforceable emission limits; and (2) the ["Carbon Pollution Standards"](#) rule, setting CO₂ performance standards for *new, modified, and reconstructed* power plants. For a detailed review of the provisions of these rules, see [VNF's Clean Power Plan Resource Guide](#).

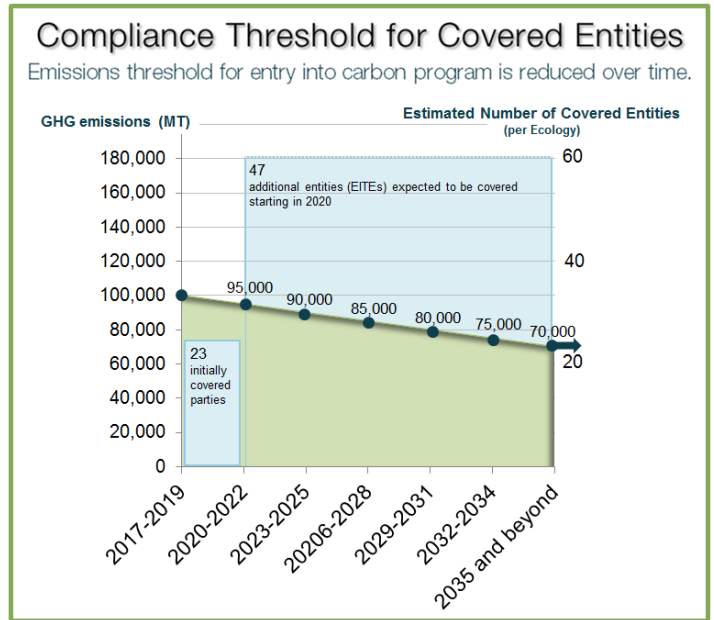
Provisions of Washington’s Draft Clean Air Rule

The [draft CAR](#) will address nearly 65% of the state’s total GHG emissions, bringing the state closer to compliance with its statutory emissions targets for 2020. As drafted, it would establish GHG emission standards for certain energy-intensive industries and entities whose GHG emissions total more than 100,000 metric tons of carbon dioxide equivalents (MT CO₂e) per year.

- Facilities covered by the program will be required to reduce their individual GHG emissions beginning in 2020. The emissions threshold for which entities are covered will be gradually reduced over time, thereby expanding the number and type of participants.

- Who the Rule Covers.** Power plants, natural gas distributors, petroleum fuel producers and importers, factories, waste facilities, and other entities that are responsible for annual emissions of 100,000+ MT CO₂e in Washington (either on the basis of their direct emissions or, in the case of natural gas distributors and petroleum producers or importers, from the combustion of their products). The draft CAR features two tiers of affected entities:

- An initial list of covered entities when the rule goes into effect in 2017 that includes the state’s power plants, refineries, natural gas distributors, and landfill and waste operators. These entities’ first compliance deadline would be in 2020.



- For “energy intense and trade exposed facilities” (EITEs) – such as pulp and paper mills, aluminum, chemical, steel, and cement facilities, other manufacturers, and petroleum fuel importers – program entry and compliance will be delayed by three years. This also includes timber giant Weyerhaeuser, the University of Washington’s Seattle campus, and the DOD’s Joint Base Lewis-McChord.
- Once an entity exceeds the emissions threshold and is entered into the program, it must continue to comply with program requirements for each year thereafter, regardless of whether it meets the emissions threshold in future years. Entities may exit the program if their GHG emissions fall below 70,000 MT CO₂e for three consecutive years.
- Entities may enter the program voluntarily to participate in the market for emission reduction credits.

- Who the Rule Excludes.** The Clean Air Rule is not applicable to emissions from suppliers of petroleum products, natural gas, or natural gas liquids or manure management. Emissions from combustion of biomass and coal-based emissions from electric generation outside the state are not covered as provided in existing Washington statutes.

- Compliance.** Each entity’s reduction target will be unique: an annual one and two thirds percent reduction from their baseline average (calculated from existing emissions reporting for 2012-2016) until its emissions fall below the rule’s compliance thresholds (which also go down over time).

- Emissions reporting, as well as calculations for establishing an entity’s baseline, will be based upon existing GHG reporting to Ecology under the WA CAA.
- The draft does not involve the distribution of allowances. However, affected entities can comply by reducing their own emissions or obtaining and submitting “emission reduction units.” Emission reduction units are generated by covered entities that reduce their emissions below required levels, as well as through investments in mitigation projects at their own facilities or elsewhere in the state that permanently reduce GHG emissions. Such units may also include credits or allowances from market-based GHG regulatory programs in certain other states.
- Under the WA CAA, Ecology can issue enforcement penalties of up to \$10,000 per violation per day.

Ecology has confirmed that the rule has the potential to link with external carbon markets, with entities being allowed to purchase offset credits or allowances from the Western Climate Initiative’s California/Canadian markets or in the Northeast’s Regional Greenhouse Gas Initiative (RGGI) to be used as emission reduction units in Washington. The rule would go into effect in 2017, with the first emissions reduction due in 2020 (or three years later for EITEs).

Competing Carbon Initiatives Headed to the State Legislature & 2016 Ballot

Before Gov. Inslee issued his 2015 order to initiate the rulemaking, a grass-roots campaign led by University of Washington economist Yoram Bauman had begun collecting signatures for an initiative that would impose a “revenue-neutral” \$25 per ton tax on fossil fuels. To offset the costs to consumers, the tax would contribute to a low-income rebate program, cut the state’s sales tax by 1 percent, and

lower certain taxes on manufacturing. CarbonWA submitted over 362,000 signatures last month, sending Initiative Measure No. 732 (I-732) to state lawmakers. The 2016 Legislature now has three options – 1) pass I-732 into law; 2) defer I-732 to voters in November 2016; or 3) revise and pass I-732, sending both the amended version and the original version of I-732 to the November 2016 state-wide ballot.

A second initiative has been forming among the energy industry, tribes, and environmental, labor, and community groups. The Alliance for Jobs & Clean Energy (AJCE) proposes a carbon tax that is not revenue-neutral, but rather invests funds from the tax into clean energy businesses. Though the group does not yet have draft language, AJCE says its policy would build upon the draft CAR. The AJCE plans to collect signatures this year and send the measure directly to the ballot.

COMPETING CARBON INITIATIVES IN DEVELOPMENT			
	Draft Clean Air Rule (CAR)	CarbonWA’s I-732 <i>(could spawn 2 ballot measures)</i>	Alliance for Jobs & Clean Energy Initiative
Method	Cap-and-trade Emissions limits with potential for fines	Carbon Tax \$25 per ton tax	Carbon Tax Per ton tax, \$ amount not yet defined
Carbon trading market?	Yes	No	Unknown

What Happens Next?

Ecology will hold several stakeholder hearings on the draft CAR and accept public comment through April 8, 2016. It [plans](#) to adopt a final rule in the summer of 2016, with the rule going into effect next year.

Interaction Between the CAR and the Federal Clean Power Plan (CPP). At the same time that Ecology is finalizing the CAR, it and other state agencies will hold stakeholder forums through June for developing a state plan to comply with the CPP (due to EPA in September 2016). Amid questions about how the Clean Air Rule will interact with CPP compliance, Ecology staff have maintained that while the draft CAR is unlikely to have a direct role in the state’s CPP compliance path, there are likely to be updates to both the draft CAR and draft plan to “harmonize” overlapping regulations, with input from the power sector.

One option under the CPP is for states with their own GHG cap-and-trade programs to submit a “state measures” implementation plan that commits the state to specific emission reduction requirements, but allows the state to implement and administer those reductions via programs that are enforceable only under state law. States adopting such a plan have to include a “federally enforceable backstop” that will apply if emissions from the affected power plants exceed certain CPP thresholds. Because the draft CAR contemplates that affected power plants could use credits from non-power plants, the draft could presage the state’s adoption of such a “state measures” plan under the CPP. The State of Washington might have more flexibility than other states to adopt such an approach because most models project that it will have little trouble meeting its CPP goals.

Linking with California? For years, observers have discussed the possibility that Washington State would develop a cap-and-trade program that could link with California’s program. Ecology’s spokesperson said that the option to obtain emission reduction credits from the California or RGGI markets was unlikely to have been proposed without an understanding that officials were open to such a linkage. However, while the CAR would allow covered entities in Washington to use allowances and offsets issued by California’s program for compliance, emission reduction units generated in Washington could not be used by entities to comply with the

California program as currently designed. Although Ecology's spokesperson said during the unveiling of the CAR that they were interested in "further linkages" with California and RGGI, the department is limited by existing statutory authority to pursue such harmonization.

If Washington were to pursue making the CAR and California programs compatible, Washington's program would have to be deemed to be at least as strict as California's cap-and-trade program, and Ecology would have to adopt provisions that allow California to enforce the cap-and-trade program against entities in Washington that violate the program. Other details such as creating a joint process for issuing, recording, and retiring emission allowances, and harmonizing reporting and compliance periods between the two programs, would also need to be addressed.

Competing Carbon Initiatives. Come November 2016, Washington voters could see up to three carbon initiatives on the ballot (the original I-732, a revised I-732 from the legislature, and the yet unnamed AJCE initiative). Though CarbonWA says the tax is revenue-neutral, state legislative staff have estimated that it could cost millions of dollars from the state general fund, and recent polls suggest that I-732 stands only a modest chance of passage. Although the chair of the state Senate's Energy & Environment Committee has stated his intention to convene a workgroup and revise I-732, most of the legislature's leadership have said that while they appreciate CarbonWA's volunteer-run effort, they oppose the initiative for its potential effect on the state budget.

It is not clear what effect passage of the CarbonWA or AJCE Initiatives on the November ballot would have on the CAR. Ecology representatives have repeatedly avoided saying whether or not the CAR will be initially compatible with any proposed measure, but have suggested that the final draft will include a mechanism to trigger a revision period in the event of a carbon initiative's passage by voters.

Conclusions

The draft CAR represents an important development in GHG policy in Washington State, in that it would impose binding GHG reduction requirements on large sources for the first time in the state's history. The CAR could also have important implications for how Washington complies with the CPP, as well as for ongoing regional initiatives to combine state- and provincial carbon markets across North America.

For advice and assistance in understanding these implications and preparing comments on the draft Clean Air Rule, the Clean Power Plan, and other ongoing regulatory initiatives, please contact our attorneys or policy professionals in the Seattle or Washington, D.C. offices of Van Ness Feldman.

For more information

Van Ness Feldman's lawyers and lobbyists have worked for decades in both the public and private sectors to create, impact, shape, implement, and comply with the nation's major energy, environmental, natural resource, and other policy. The firm is recognized as a leader in Government Relations by Chambers USA and U.S. News/Best Law Firms. Van Ness Feldman's Climate Change practice is listed as a global leader by Chambers & Partners, with our Seattle office receiving Top Tier rankings in the areas of environmental, natural resources, and land use law. For questions regarding current and proposed policy developments, please contact any member of the firm's Government Relations & Public Policy Practice at 202.298.1800.

Van Ness Feldman has also assisted a range of clients to analyze, respond to, and implement EPA's Clean Power Plan. Please contact [Kyle Danish](#), [T. C. Richmond](#), [Stephen Fotis](#), or any other professional in Van Ness Feldman's [Environmental Practice](#) for additional information.

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