

WSR 22-01-217

PROPOSED RULES

DEPARTMENT OF ECOLOGY

[Order 21-05—Filed December 22, 2021, 8:55 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-16-110.

Title of Rule and Other Identifying Information: Ecology is proposing a new rule, chapter 173-446A WAC, Criteria for emissions-intensive, trade-exposed industries, to implement portions of the Washington Climate Commitment Act (E2SSB 5126) or Greenhouse gas emissions—Cap and invest (chapter 70A.65 RCW).

For more information on this rule making visit <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-446A>.

Hearing Location(s): On January 25, 2022, at 10:00 a.m., webinar. Presentation, question and answer session followed by the hearing. We are holding this hearing via webinar. This is an online meeting that you can attend from any computer using internet access. Join online and see instructions <https://watech.webex.com/watech/onstage/g.php?MTID=ee10c952215967de2da5661b0183667ec>. For audio call US Toll number 1-415-655-0001 and enter access code 2461 674 9008. Or to receive a free call back, provide your phone number when you join the event.

Date of Intended Adoption: June 1, 2022.

Submit Written Comments to: Katie Wolt, send US mail to: Department of Ecology, Air Quality Program, P.O. Box 47600, Olympia, WA 98504-7600, email Katie.wolt@ecy.wa.gov, online <https://aq.ecology.commentinput.com/?id=uRYGW>, by February 1, 2022.

Assistance for Persons with Disabilities: Contact ecology ADA coordinator, phone 360-407-6831, for Washington relay service or TTY call 711 or 877-833-6341, email ecyADACoordinator@ecy.wa.gov, visit <https://ecology.wa.gov/accessibility> for more information, by January 18, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This rule making proposes to:

- Establish criteria to identify emissions-intensive, trade-exposed industries (EITE) that will be eligible for no-cost emission allowances.
- Consider the locations of potential EITE industries in relation to overburdened communities while developing the criteria.
- Include requirements necessary to support the above items, the overall objectives of the statute or chapter, or the goals of the Climate Commitment Act (CCA).

Reasons Supporting Proposal: In 2021, the legislature passed the CCA, which establishes a cap and invest program to help achieve Washington's goal of greenhouse gas limits by 2050. Ecology will undertake three separate rule makings to address the requirements in the law.

This rule making implements part of section 13 of the CCA, which identifies industries classified as EITE. The rule making also establishes objective criteria to allow additional businesses consideration for EITE classification. The CCA also directs ecology to consider, while developing the objective criteria, the locations of potential EITE facilities in relation to overburdened communities.

EITE industries emit a significant amount of greenhouse gases and operate in competitive markets.

The CCA identifies 13 specific industries as EITE:

1. Metals manufacturing.
2. Paper manufacturing.
3. Aerospace product and parts manufacturing.
4. Wood products manufacturing.
5. Nonmetallic minerals manufacturing.
6. Chemical manufacturing.
7. Computer and electronic product manufacturing.
8. Food manufacturing.
9. Cement manufacturing.
10. Petroleum refining.
11. Asphalt paving mixtures and block manufacturing from refined petroleum.
12. Asphalt shingle and coating manufacturing from refined petroleum.
13. All other petroleum and coal products manufacturing from refined petroleum.

Facilities that meet the EITE criteria may be eligible to receive an allocation of allowances for the covered emissions at those facilities at no cost. Ecology is responsible for providing criteria that accurately identifies and classifies new EITE businesses.

Statutory Authority for Adoption: Washington Climate Commitment Act (E2SSB 5126), chapter 316, Laws of 2021, codified as RCW 70A.65.110.

Statute Being Implemented: Washington Climate Commitment Act (E2SSB 5126), chapter 316, Laws of 2021, codified as RCW 70A.65.110.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

Name of Proponent: Department of ecology, governmental.

Name of Agency Personnel Responsible for Drafting: Emily Bruns, 300 Desmond Drive S.E., Lacey, WA 98503, 360-338-2360; and Implementation: Luke Martland, 300 Desmond Drive S.E., Lacey, WA 98503, 360-764-3666.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Katie Wolt, Department of Ecology, Air Quality Program, P.O. Box 47600, Olympia, WA 98504-7600, phone 360-407-6998, for Washington relay service or TTY call 711 or 877-833-6341, email Katie.wolt@ecy.wa.gov.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(4).

December 22, 2021
Heather Bartlett
Deputy Director

OTS-3493.1

NEW SECTION

WAC 173-446A-010 Scope. This rule establishes objective criteria for both emissions' intensity and trade exposure for the purpose of identifying emissions-intensive and trade-exposed facilities.

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NEW SECTION

WAC 173-446A-020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise. If a section does not provide a definition, the definition found in the definitions from chapter 316, Laws of 2021, and from chapter 173-441 WAC apply in order of precedence.

"Manufacturing facility" means a facility, as defined in WAC 173-441-020, that produces a physical product as its primary activity.

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NEW SECTION

WAC 173-446A-030 Emissions-intensive and trade-exposed manufacturing facilities. The provisions of this chapter apply to manufacturing facilities that are covered entities under chapter 316, Laws of 2021 (the Climate Commitment Act) regarding classification as emissions-intensive and trade-exposed.

(1) **Facilities classified as emissions-intensive and trade-exposed.** Facilities engaged in one or more of the processes described by the industry descriptions and codes in the North American Industry Classification System (NAICS) in Table 030-1, as that code is reported under chapter 173-441 WAC, are classified as emissions-intensive and trade-exposed. Use the six digit NAICS codes when available in Table 030-1, otherwise use the shorter NAICS codes listed in Table 030-1 substituting the values in the full reported six-digit NAICS code for "X".

Table 030-1: NAICS Codes and Descriptions for Emissions-Intensive and Trade-Exposed Industries

NAICS Code	Industry Description
331XXX	Metals manufacturing, including iron and steel making, ferroalloy and primary metals manufacturing, secondary aluminum smelting and alloying, aluminum sheet, plate, and foil manufacturing, and smelting, refining, and alloying of other nonferrous metals
322XXX	Paper manufacturing, including pulp mills, paper mills, and paperboard milling
3364XX	Aerospace product and parts manufacturing
321XXX	Wood products manufacturing
327XXX	Nonmetallic mineral manufacturing, including glass container manufacturing
325XXX	Chemical manufacturing
334XXX	Computer and electronic product manufacturing, including semiconductor and related device manufacturing
311XXX	Food manufacturing

NAICS Code	Industry Description
327310	Cement manufacturing
324110	Petroleum refining
324121	Asphalt paving mixtures and block manufacturing from refined petroleum
324122	Asphalt shingle and coating manufacturing from refined petroleum
324199	All other petroleum and coal products manufacturing from refined petroleum

(2) Facilities with NAICS codes reported under chapter 173-441 WAC which are not listed in Table 030-1 may petition ecology to be classified as emissions-intensive and trade-exposed according to the process in WAC 173-446A-040.

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NEW SECTION

WAC 173-446A-040 Process to determine emissions-intensive and trade-exposed classification. An owner or operator of a manufacturing facility that is not classified as emissions-intensive and trade-exposed according to WAC 173-446A-030 may petition ecology to be classified as emissions-intensive and trade-exposed by following the process described in this section. An owner or operator may submit a petition and ecology may issue a determination before emissions year 2027, and use that determination for allowance allocations for the second compliance period, but no determination under this section is effective for the owner or operator of that facility until emissions year 2027. The following requirements apply to the submission, review, and approval or denial of a petition:

(1) **Petition submittal.** An owner or operator must submit a petition, electronically in a format specified by ecology, that meets the following conditions before ecology may review the petition and issue a determination.

(a) An owner or operator must submit a complete petition no later than 180 calendar days prior to January 1st of the first emissions year the owner or operator wishes the facility to be classified as emissions-intensive and trade-exposed.

(b) The petition must include sufficient information, as described in (c) of this subsection, for ecology to determine whether the petitioner meets the criteria for classification as emissions-intensive and trade-exposed. Ecology will notify the owner or operator within 30 calendar days of receipt of a petition of any additional information ecology requires to review the petition. A facility is not classified as emissions-intensive and trade-exposed until the petition is approved by ecology.

(c) The petition must include, at a minimum, the following information:

(i) The name, address, email address, telephone number, and facsimile transmission number (if any) of the person submitting the petition;

(ii) Identifying information as specified in WAC 173-441-050 (3)(a), (c), (i), and (j) of the facility that the owner or operator is petitioning to be classified as emissions-intensive and trade-exposed;

(iii) Annual total production data for each primary product manufactured by the facility. The annual total quantity of each primary product manufactured at the facility as well as the quantity exported outside of Washington state for the five years immediately preceding the petition submission date must be submitted. If the facility has been operational for fewer than five years, submit annual total production data for each product since the facility has been operational;

(iv) The facility's annual on-site GHG emissions data. Annual on-site GHG emissions data for the five years immediately preceding the petition submission date as reported per WAC 173-441-120 must be submitted. If the facility has been operational for fewer than five years, submit annual on-site GHG emissions data as reported per WAC 173-441-120 since the facility has been operational;

(v) Submit information on the location of the facility relative to overburdened communities. Using the Washington state department of health's environmental health disparities map, submit the total environmental health disparities ranking for the census tract in which the facility is located. Indication if the census tract in which the facility is located is covered or partially covered by tribal lands must also be submitted;

(vi) Any other supporting data or information as requested by ecology; and

(vii) The person completing the petition must sign and date the petition.

(2) **Ecology review of the petition.** A manufacturing facility must receive ecology approval before it is classified as emissions-intensive and trade-exposed. Ecology will issue a determination within 90 calendar days after receiving a complete petition.

(a) To be classified as emissions-intensive and trade-exposed, the facility must:

(i) Be a manufacturing facility located and operating in Washington state;

(ii) Be covered under chapter 316, Laws of 2021 (the Climate Commitment Act) or projected to be covered under chapter 316, Laws of 2021 (the Climate Commitment Act);

(iii) Not be classified as emissions-intensive and trade-exposed under WAC 173-446A-030; and

(iv) Meet the criteria for emissions' intensity and trade exposure pursuant to subsection (2)(b) of this section.

(b) Ecology must apply the following criteria when evaluating a petition:

(i) Emissions' intensity of the facility.

(A) Use Equation 040-1 to determine the emissions' intensity of the facility. If the annual average emissions' intensity is greater than 25,000 MT CO₂e/year, the facility is deemed emissions-intensive.

$$EI = \frac{\sum_{i=1}^n AE}{n}$$

Eqn 040-1

Where:

EI = Average emissions intensity (MT CO₂e/year)

AE = Average emissions (MT CO₂e/year) from on-site GHG emissions data submitted pursuant to subsection (1)(b)(iv) of this section.

n = number of years of data per subsection (1)(b)(iv) of this section.

(ii) Trade exposure of the facility.

(A) Use Equation 040-2 to determine the trade share of the facility. If the trade share is greater than or equal to 15%, the facility is deemed trade-exposed.

$$TS = \frac{Import + Export}{Shipment + Import}$$

Eqn 040-2

Where:

TS = Trade share (%)

Import = Average value of total physical arrivals of merchandise from foreign countries, whether such merchandise enters the U.S. customs territory immediately or is entered into bonded warehouses or free trade zones under Customs and Border Protection (Customs) custody, for the facility's six-digit NAICS code submitted pursuant to subsection (1)(c)(ii) of this section, taken from the U.S. International Trade Commission DataWeb, for the five years immediately preceding the date of petition submittal, as available (U.S. Dollars)

Export = Average value of goods physically moved out of the U.S. to foreign countries that are grown, produced, or manufactured in the U.S. and commodities of foreign origin that have been changed in the U.S., for the facility's six-digit NAICS code submitted pursuant to subsection (1)(c)(ii) of this section, taken from the U.S. International Trade Commission DataWeb, for the five years immediately preceding the date of petition submittal, as available (U.S. Dollars)

Shipment = Average value of products at the national level sold by manufacturing establishments based on net selling values, free on board plant, after discounts and allowances are excluded, for the facility's six-digit level NAICS code submitted pursuant to subsection (1)(c)(ii) of this section, taken from the Annual Manufacturing Survey compiled by the U.S. Census Bureau for the five years immediately preceding the date of submission of the petition, as available (U.S. Dollars)

(c) Ecology must consider a facility's location relative to overburdened communities and recommendations, if any, from the Environmental Justice Council when evaluating a petition. Ecology may deny a petition based on this consideration upon a determination that air quality in overburdened communities would be unacceptably impacted.

(3) **Appeal of determination.** An approval or denial issued by ecology in response to a written petition filed under this subsection is a determination appealable to the pollution control hearings board per RCW 43.21B.110 (1) (h).

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NEW SECTION

WAC 173-446A-050 Severability. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances is not affected.

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