



Washington State comments

For maintaining or modifying and strengthening key provisions of HR 2454
(All Sections and Page numbers refer to HR 2454 as passed by the House)

PRIORITY AMENDMENTS

General

Based on our analysis of the House bill, there are at least 11 plans due from the states to various federal agencies on a number of important topics ranging from energy efficiency goals to adaptation planning. While the subject matter of the various plans makes sense, the lack of coordination at the state and federal level does not. For example, the policies and programs in the state adaptation plans described under Section 453 (page 1291) will have significant effects on ecosystem health and natural resources, which are the focus of the natural resource adaptation plans in Section 478 (page 1335), yet these are two separate and distinct planning processes.

Clarification of roles and coordination among the federal agencies that will approve and oversee these state climate plans is critical. The Senate has an opportunity to avoid creating regulatory silos that can undermine early and successful implementation of our national climate goals. Doing so would ensure greater efficiency and coordination by and within each state, and improved coordination by and among the lead federal agencies.

Consolidating these plans is also an opportunity to formalize the federal-state partnership so many of us have been advocating. States have been leaders in spearheading and implementing many new and effective climate action programs. We have learned that coordination among our state agencies, especially energy and environment, is critically important to the success of such programs.

Title 1, Clean Energy

Renewable Electricity Standard

- Maintain RES that is at least as strong as in HR 2454.

Definition of “biomass”

- Rather than the definition of “renewable biomass” in Section 101 (a)(15) (page 21), we recommend the Senate **use the definition “renewable biomass” definition from S. 1462** passed by the Senate Energy and Natural Resources Committee [Sec. 133(b)(1) of S. 1492] **with the following suggested amendment** to that definition and to the definition of “Federal land.” The amended definition will effectively protect Inventoried Roadless Areas. Old growth forests must be protected through good management practices as well as through removing small or ecologically inappropriate trees that can place an entire forest at risk from wildfires, insects and diseases in dry, disturbance-prone forests. The definition in HR 2454 does not allow for the *very selective* removal of material in order to improve the health of old growth forests, especially those in dry environments, placing them at greater risk from the impacts of climate change.
 - **Amend the definition of “biomass”** in Section 133(1)(b)(1)(K)(ii)(I)(bb) and (II) (S 1462, p. 127) by removing the sawtimber size restrictions. There is no common definition of “sawtimber.” With advancements in milling technology, this timber can be a tree as small as six inches in diameter. Using these trees for *sawtimber* is great where there are *sawmills*, but greatly limiting where there are not. Biomass markets may be the only way to defray the costs of ecosystem restoration work needed to improve forest health

and reduce wildfire emissions. In addition, in the many places throughout the interior west where no sawmills remain, “sawtimber” is a meaningless term.

- **Amend the definition of “federal land”** in Section 133(1)(b)(B)(3)(i) (S. 1462, page 129) by adding **“(III) Inventoried Roadless Areas”** to the existing list of excluded categories.
- **Amend the definition of “federal land”** in Section 133(1)(b)(B)(3)(ii) (S. 1462, page 130) by deleting the following phrase **“does not exceed the minimum size standards for sawtimber and”**

Transmission Planning and Siting. Section 151(b) (page 180) that adds a new Section 216B to the Federal Power Act. This section outlines how FERC may permit the construction or modification of a transmission facility within the Western Interconnection. We see little benefit in FERC preempting state transmission line permitting processes. Particularly troubling is that FERC may preempt a state if it

- 1) did not issue a decision within one year of receiving a completed application
- 2) denied the application or
- 3) appended conditions on its approval that “unreasonably interfere” with the project.

(see Section 216B (b)(7)).

Similarly, FERC may permit a transmission line if it was identified “as needed in significant measure” to meet the demand for renewable energy. The State of Washington believes that this section gives FERC complete latitude to preempt any state siting conditions no matter how timely or well reasoned. Under subsection (c), *State Recommendations on Resource Protection*, FERC is only required to “consider” issues identified by the state or local authorities. In addition, the major hurdle for permitting transmission in the West has been securing permits across federal lands. Enabling FERC to preempt state siting processes will not fix the underlying problem of untimely federal permitting decisions.

If the Senate retains the provisions from the House bill that allows FERC to preempt state siting decisions, Washington state **strongly urges the Senate to include** parameters for how the Commission will determine the facility is needed “significant measure” to meet demand for renewable energy as well as how the Commission will determine a state’s conditions “unreasonably” interfere with development of the facility. In addition, we strong urge **following language be added** to Section 216B(b)(7)(A) so that FERC will not act to preempt states while they are waiting for federal permits to be issued:

“(A) did not issue a decision on an application seeking approval for the siting of the facility within 1 year after the date the applicant submitted a completed application to the state, *including all necessary federal agency permits.*”

Title II, Energy Efficiency

Building Energy Efficiency Programs. Section 201 (page 320) amends Section 304 of the Energy Conservation and Production Act. Washington state supports the establishment of a national building code for energy efficiency and believes such a code should consider the building materials’ carbon life cycle to account for the net stored carbon in wood products. We recommend the Senate **amend Section 201 (Sec. 304) (b)(2)(B)(ii)** (page 326) as follows:

- (ii) COST EFFECTIVENESS CALCULATIONS – Calculations of life cycle cost-effectiveness shall be based on life cycle cost methods and procedures under section 544 of the National Energy Conservation Policy Act (42 U.S.C 8254), but shall incorporate to the extent feasible externalities

such as impacts on climate change, **the carbon life cycle of building products**, and on peak energy demand that are not already incorporated in assumed energy costs.

Transportation Planning. Section 841 adds a new section to the Clean Air Act Section 222, *Greenhouse Gas Reductions Through Transportation Efficiencies*, which deals with transportation planning (page 510). This section also amends Title 23 of U.S. Code Sections 134 and 135, the metropolitan planning and statewide planning provisions of federal surface transportation law. We fully support coordination between EPA and DOT on transportation planning and believe that transportation planning should take into account greenhouse gas emissions. However, we are concerned that adding this to the Clean Air Act could lead to the creation of a new, parallel set of transportation planning requirements. This could easily result in disjointed and confusing requirements for states and metropolitan planning organizations. We believe that planning changes must be consistent with and made part of the transportation planning provision in Title 23 and Title 49, and that duties for transportation planning reside with US DOT with EPA having authority to set the emission targets. To that end, we recommend that the Senate **amend this requirement** to give the rulemaking responsibility to US DOT under Title 23 and Title 49 and direct that the rulemaking be done in coordination with the states and metropolitan planning organizations and in consultation with EPA .

Title III, Reducing Global Warming Pollution

State Authorities. We strongly urge the Senate to maintain the savings clauses contained in HR 2454, including:

- Sections 334 and 335 (page 1017 and 1018), which preserve state authority, preempting only state “cap-and-trade” programs.
- State authority to adopt or enforce renewable electricity or energy efficiency laws (Section 101 at page 52); state renewable energy standards (Section 102 at page 53); state demand management, demand response and regulation of load-serving entities (Section 144(e) at page 166); state regulation of electricity rates (Section 721(d) at page 724); and state unfair competition, antitrust, consumer protection, securities and commodities laws (Section 341(a) at page 1042, adding a new Section 401(e) to the Federal Power Act).

Consultation between EPA and the Regional Initiatives. Of critical importance is a requirement that EPA must consult with the states that are participating in one of the three regional cap-and-trade initiatives when it is developing the rules for the cap-and-trade program as well as when the agency begins its implementation. The agency will have a huge workload to develop the regulations in a very short time. The regional initiatives want EPA to be successful and can provide a great deal of assistance to the agency. We all stand ready to do so. We recommend the Senate **amend Section 721(h)** (page 734) as follows:

(h) Regulations (1) Not later than 24 months after the date of enactment of this title, the Administrator shall promulgate regulations to carry out the provisions of this title.

(2) In the development of any regulations required to implement the Safe Climate Act and in the implementation of the Act, the Administrator must consult with the states in the Regional Greenhouse Gas Initiative, the Western Climate Initiative and the Mid-West Governors Accord.

Limit on offsets. Washington state remains concerned that the number of offsets allowed in Section 722(d)(1)(A) (page 740) is extraordinarily high. We believe that **the majority of reductions should come from within the capped sectors**. This will result in job creation here in our country, jobs that cannot be

exported. Offsets will divert capital needed to transform our existing energy infrastructure, and in the case of international offsets, will send energy consumer dollars overseas. We also recommend the Senate **require 1.25 offset credits for 1 emission allowance** for all offset projects, not just international offset projects. This will also promote investment in greenhouse gas reduction strategies and technologies for capped sources.

Confidential Business Information. Washington state is concerned that Section 713 (b)(1) (N) (ii) & (ii) (page 718), dealing with sharing of emissions data that is claimed to be confidential business information (CBI), could impede the sharing of information necessary for states and tribes to conduct timely monitoring, oversight and investigation. It also could impose administrative burdens on EPA, since the agency is required by the provision to make individualized determinations that each state or tribe has protections for CBI that are "equivalent to protections applicable the Federal Government." We recommend to the Senate alternative language modeled after 40 CFR section 2.2301(h)(3) that specifies the circumstances under which EPA can share with states CBI obtained under several Clean Air Act provisions. The proposed language is set forth below in underline and strikeout:

(N) subsequent to implementation of policies developed under subparagraph (M), provide for immediate dissemination, to States, Indian tribes, and on the Internet, of all data reported under this section as soon as practicable after electronic audit by the Administrator and any resulting correction of data, except that data shall not be disseminated under this subparagraph if-

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“(i) its nondissemination is vital to the national security of the United States, as determined by the President; or

“(ii) it is confidential business information that cannot be derived from information that is otherwise publicly available and where disclosure would likely cause substantial harm to the competitive position of the person providing the information and that would cause significant calculable competitive harm if published, except that—

“(I) data relating to greenhouse gas emissions, including any upstream or verification data from reporting entities, shall not be considered to be confidential business information; and

“(II) data that is confidential business information shall be provided to a State or Indian tribe within whose jurisdiction the reporting entity is located, ~~if the Administrator determines that such State or Indian tribe has in effect protections for confidential business information that are at least as protective as protections applicable to the Federal Government;~~

(a) if the State or Indian tribe has first furnished to the Administrator a written opinion from the requesting State agency’s chief legal officer or counsel, or comparable tribal legal counsel, stating that under applicable State or tribal law the State or Indian tribe has the authority to compel a business which possesses such information to disclose it to the State or tribe, or

(b) each affected business is informed of disclosures under this part which pertain to it, and the State or Indian tribe has shown to the satisfaction of an EPA legal office that the State’s or Indian tribe’s use and disclosure of such information will be governed by

State or tribal law and procedures which will provide adequate protection to the interests of affected businesses.

Allowances for Electricity Consumers. Section 783 outlines how the allowances shall be distributed among electricity distributors. The formula for distribution is based on emissions and sales. In Washington, the local distribution companies are also generators of electricity. Washington state is concerned about how this formula may impact those utilities with a large amount of hydroelectricity in their portfolios. While much is being done to develop other forms of renewable energy, nothing can replace in any measure the amount of electricity in Washington that comes from water. As climate change continues to impact our hydroelectric resources, these utilities will be forced more and more into the market where they will likely have to purchase electricity with greenhouse gas emissions yet it is unclear that they will be able to receive allowances sufficient to offset any increased costs to their retail ratepayers. We would like to work with the Senate Committee staff to ensure hydroelectric utilities have an opportunity to receive allowances on par with other utilities as their resource is diminished.

Coal-Fueled Power Plants. Section 116 (page 104) creates a national performance standard for new coal fired power plants. Washington state believes that an incentive should be provided for existing coal fueled power plants to meet that performance standard. We suggest the Senate **include language** that would not reduce the allowances to a coal-fueled power plant, including a merchant coal unit, if there is a reduction in emissions

- 1) as a result of the a coal plant voluntarily entering into a binding agreement with the state in which it operates to meet either that state's or the national performance standard; and
- 2) where such agreement requires that the value of the allowances received for the emissions associated with those megawatt hours are invested in the plant in order to meet the performance standard.

Supplemental Agriculture and Renewable Energy Incentives Programs. Sec. 788 (page 938) creates an allowance-funded program to provide incentives for emissions reduction or carbon sequestration activities for agricultural producers. We recommend the Senate **maintain this critical program and extend it** to apply to forest landowners. Washington state believes that in addition to the elements currently included for agriculture, we need a program to incentivize avoided conversion, including lands that are part of the Conservation Reserve Program. We also recommend that these allowances be available not only for *prospective* actions that will reduce or sequester carbon but also for the *early adoption* of improved agriculture and forestry practices. We would also support the inclusion of Senator Shaheen's (NH) Forest Carbon Incentives Program Act (S. 1576) in a comprehensive climate and energy bill. Like agriculture, we believe it is important to provide benefits to small private forest landowners who undertake actions that sequester additional carbon and avoid emissions from conversion but may not be able to participate in the offsets market.

Exemptions from Other Programs. New or modified facilities should start out with as small a greenhouse gas footprint as possible. Section 831 (page 962) would prevent EPA from applying some provisions of the Clean Air Act to facilities that emit greenhouse gases. We recommend the Senate **amend this section** to direct the agency to develop performance standards along the lines of the performance standard for coal-fueled power plants in the House bill or otherwise use the provisions of the Act with appropriate thresholds for CO₂ rather than prohibit the applicability of the Clean Air Act.

This is the best way to avoid creating a perverse incentive to keep the most polluting and cheapest energy plants in operation at the expense of cleaner technology and environmental benefit.

Regulation of the Carbon Market. Any cap-and-trade program will create a new CO₂ allowance trading market. Washington state believes that strict regulation, oversight, and enforcement of this new market is critical. We support the numerous provisions in HR 2454 that provide strong enforcement authority to federal regulatory agencies.

We have heard that the Senate may use S. 1399 as the basis for the market oversight provisions of the Senate climate and energy bill. We support many provisions of that measure, including placing regulatory responsibility for the commodities market with the Commodities Futures Trading Commission (CFTC) rather than with the Federal Energy Regulatory Commission (FERC).

There are several instances, however, in which S. 1399 is substantially weaker than comparable provisions in HR 2454. Given the size of many of the entities that will be participating in the market and the high dollar volumes likely to be traded, Washington state believes that strong, meaningful sanctions are needed to deter potential violations and market tampering. Thus, we support the stronger provisions in HR 2454 and encourage the Senate to include them. Specifically,

- **Civil penalty for violation of any market rule.** Section 341 (a) adds Section 401(b)(3)(A)(iii)&(iv) to the Federal Power Act (p. 1030). These provisions allow for a civil penalty of not more than \$1 million per day per violation as well as disgorgement and restitution. Washington state has found that disgorgement of unjust profits and restitution to entities harmed by violations can be vital tools in civil enforcement actions.
- **Cease and Desist.** Section 341(a) adds Section 401(b)(3)(C) to the Federal Power Act (page 1031). This provides clear “cease and desist” authority for federal agencies to enjoin violations or threatened violations.
- **Criminal Fines for knowing or willful violation of market manipulation provisions.** Section 402 amends Chapter 47 of title 18 US Code Section 1041 (p. 1045). This provides for penalties of not more than \$5 million (\$25 million for an organization) or imprisonment for not more than 20 years or both.

Early Action. Section 795 of HR 2454 provides a mechanism for entities that make reductions to their greenhouse gas emissions before the cap-and-trade program starts to receive compensation in the form of allowances. The state of Washington strongly supports this provision, and we ask that Senate retain it.

Title IV, Transitioning to a Clean Energy Economy

Ensuring Real Reductions in Industrial Emissions. Washington state strongly supports the emission allowance rebate program (Sections 763 and 764, Page 1102) that will help protect our trade dependent energy intensive manufacturing base during this transition to a clean energy economy. We encourage the Senate to retain this provision.

Adaptation. Overall, Washington state supports the provisions of HR 2454 relating to adaptation and urges the Senate to include strong adaptation provisions in its bill. However, we are concerned that

the focus of the natural resource adaptation plans is too narrow. In Washington state as in much of the West, water supply is a critical natural resource for more than fish and wildlife. The current language reflects neither the broad concerns around water resource impacts nor the special concerns of the Western States. We recommend that a **new subsection be added Section 480** (page 1345) that would read:

“25 percent shall be available to State natural resource agencies for natural resource adaptation activities on State and private forest lands and to carry out natural resource adaptation activities related to water conservation and management activities.”

(Adjust the percent available to state wildlife agencies accordingly to 59.4%.)

Title V Agriculture and Forestry Related Offsets

Washington state supports the offset program created in Title V, which gives USDA the lead role for forestry and agriculture offsets. We agree that the legislation should explicitly exclude forestry and agriculture from the definition of “capped sector” on page 1390. We also agree with the Initial List on page 1393 and with extending the crediting period for forestry projects to 20 years. We ask that the Senate retain these provisions and seek to structure both programs in a similar manner. As a general principle, both programs should have the same integrity and result in real and measurable reductions in greenhouse gases. Specifically,

- Title III is explicit that offset credits do not constitute a property right; this provision is not included in Title V. **This critical oversight in Title V must be corrected.**
- USDA should have two years to establish its program as does EPA.
- USDA should be required to make the verification report for an offset project publicly available as is required of EPA.
- Consideration should be given to sharing some members between the two offset advisory boards created under this legislation. This could ease the development of a common approach by both agencies in the development and implementation of their respective offset programs, which in turn will help bolster the market for offset credits.
- USDA should be given the ability to delegate its authority to state or tribal governments to conduct audits of offset projects, credits and the practices of third-party verifiers. Title III provides EPA with this authority.
- We recommend that USDA be required to undertake the same consultation with the states that participate in the Regional Greenhouse Gas Initiative, the Western Climate Initiative and the Mid-West Governors Accord in the development and implementation of its offset program as we have recommended for EPA.

Forestry Offsets. Washington state recommends to the Senate an amendment to address the variations in state forest practices so that the playing field will be level for these types of offset projects. **Amend Section 504, Requirements for Domestic Agricultural and Forestry Practices** (page 1396) by adding a new subsection (a)(3):

(3) In establishing the methodologies under subsection (a)(2)(A) and (B), the Secretary shall take into account variations in state forest practices or forest practices acts so that offset project developers in those states with more protective requirements are not disadvantaged relative to offset project developers in other states.

Subtitle C – Miscellaneous

International Indirect Land Use Changes. The prohibition on EPA’s inclusion of international indirect land use changes when calculating whether or not a fuel meets the renewable fuel standard of the federal Clean Air Act (Section 211(o)) **should be eliminated**. If this is not politically feasible, the Senate should **require EPA to use conservative estimates** of effect rather than mid-level or aggressive estimates. There is no dispute that indirect land use effects are real; the only issue is how accurately they can be measured. This prohibition will encourage new and continued use of damaging biofuels rather than ensuring the use of biofuels that have both economic and environmental benefits. It also conflicts with other provisions in the bill to reduce or eliminate international deforestation.

OTHER AMENDMENTS FOR CONSIDERATION

Title 1, Clean Energy

Definition of “biomass.” We recommend the Senate use a consistent definition of “renewable biomass” (recommended definition provided on page 1 of these comments) that is applicable across the RES, RFS, and the cap-and-trade program. All of these need to function in an integrated way, thus a common definition is critical. **Amend Section 553** (page 1425), which allows EPA and FERC to amend the definition of biomass, to combine 553(b)(1) and (2), specify that EPA, FERC and the Secretary of Agriculture must jointly propose the modification to the definition, and require the agencies use the same definition.

Transmission Planning and Siting. Amend Section 152 (page 190), Net Metering for Federal Agencies, to give the states two years rather than one year as provided in the House bill to review the new standard added as a new paragraph (6) to the Public Utilities Regulatory Policies Act.

Add a new amendment to the Section 216(b) of the Federal Power Act, Siting of Interstate Electric Transmission Facilities, to allow state siting authorities one year for review of an application for a construction permit after all federal agency permits and approvals have been granted. This could be accomplished with the following amendment to subsection (b)(1)(C)(i) of the FPA, Construction Permits:

*(C) a State commission or other entity that has authority to approve the siting of the facilities has
(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor **together with any necessary final federal permits**, whichever is later...”*

Title III, Reducing Global Warming Pollution

Reporting Imported Power. According to North American Electric Reliability Corporation, the electricity power grids that serve the West, Mid-West and Northeast regions in the US are interconnected with Canada. The Western grid is also connected to Mexico. This means that power generated in Canada and Mexico is part of the electricity that serves the US market. Washington state believes that the emissions associated with this imported power should be reported. This is consistent with the design of the Western Climate Initiative’s economy-wide cap-and-trade program. While much of the power that comes out of Quebec, Ontario and British Columbia is likely clean hydropower, that is not the case

throughout the provinces or Mexico. We recommend **the following amendment to Section 713(b)(1)(A), Greenhouse Gas Registry** (page 711) a new subparagraph (v):

(v) greenhouse gas emissions associated with power generated outside of the United States that is imported for consumption in the United States.

Offset Project Types. Section 741 Environmental Considerations (page 803) references forestry and other land management related offset projects as types of project the Administrator may list. A similar provision is in Title V at Section 510 (page 1411). Therefore, **this section should be deleted to avoid confusion.**

Title IV, Transitioning to a Clean Energy Economy

Adaptation. Section 475 (page 1320) creates the Natural Resources Climate Change Adaptation Panel. **We recommend the inclusion of either the Department of Agriculture or the Natural Resources Conservation Service (NRCS)** on the Panel. Both will play a major role in the implementation of any climate response strategy with owners of working farm and forest lands. Their input on the development of an adaptation strategy will be crucial to the success of any strategy for working farm and forest lands.

We are concerned that the level of funding envisioned under HR 2454 for adaptation is insufficient. To achieve the intended results of the adaptation and natural resource adaptation plans will require a great deal of coordination between and among local, state, tribal and federal agencies.