



RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Department of Ecology AO # 15-10

Permanent Rule Only

Effective date of rule:

Permanent Rules

- 31 days after filing.
- Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes
 - No
- If Yes, explain:

Purpose:

The purpose of this rulemaking is to establish greenhouse gas (GHG) emission standards for certain large emitters and reduce GHG emissions to protect human health and the environment.

Ecology is adopting a new rule, Chapter 173-442 WAC – Clean Air Rule and amending Chapter 173-441 WAC – Reporting of Emissions of Greenhouse Gases.

- Chapter 173-442 WAC establishes emission standards for GHG emissions from certain stationary sources located in Washington State, petroleum product producers and importers, and natural gas distributors. Parties covered under this program will reduce their GHG emissions over time. The rule provides a variety of options to reduce emissions.
- Chapter 173-441 WAC changes the emissions covered by the reporting program, modifies reporting requirements, and updates administrative procedures to align with Chapter 173-442 WAC – Clean Air Rule.

Citation of existing rules affected by this order:

Repealed: N/A
 Amended: Chapter 173-441 WAC, Reporting of Emissions of Greenhouse Gases
 Suspended: N/A

Statutory authority for adoption: Chapter 70.94 RCW; Chapter 70.235 RCW

Other authority : N/A

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR # 16-12-098 on May 31, 2016.
Describe any changes other than editing from proposed to adopted version:

See Attachment A

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

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Date adopted: September 15, 2016

CODE REVISER USE ONLY

NAME
Maia D. Bellon

SIGNATURE

TITLE
Director

OFFICE OF THE CODE REVISER
 STATE OF WASHINGTON
 FILED

DATE: September 15, 2016
TIME: 8:23 AM
WSR 16-19-047

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Federal rules or standards:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Recently enacted state statutes:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>

The number of sections adopted at the request of a nongovernmental entity:

	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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The number of sections adopted in the agency's own initiative:

	New	<u>29</u>	Amended	<u>7</u>	Repealed	<u>0</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	<u>2</u>	Amended	<u>7</u>	Repealed	<u>0</u>
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The number of sections adopted using:

Negotiated rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Pilot rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Other alternative rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>

Attachment A: Differences between the Revised May 31, 2016 Proposed Rule and Final Adopted Rule

RCW 34.05.325(6)(a)(ii) requires Ecology to describe the differences between the text of the proposed rule as published in the *Washington State Register* and the text of the rule as adopted, other than editing changes. We must also state the reasons for the differences between the proposal and the adopted rule.

There are differences between the proposed rule filed on May 31, 2016 and the adopted rule filed on September 15, 2016. Ecology made these changes for the following reasons:

- *In response to comments we received.*
- *To ensure clarity and consistency.*

Ecology did not make any changes to the proposed rule that are substantially different from the original proposal. In making this determination, Ecology considered the following factors:

- *The extent to which a reasonable person affected by the adopted rule would have understood that the published proposed rule would affect his or her interests.*
- *The extent to which the subject of the adopted rule or the issues determined in it are substantially different from the subject or issues involved in the published proposed rule.*
- *The extent to which the effects of the adopted rule differ from the effects of the published proposed rule.*

Ecology did not make any revisions to the proposed rule that change who is covered or otherwise affected by the rule. We believe a reasonable person affected by the proposed rule would also be affected by the adopted rule. A reasonable person not affected by the proposed rule would not be affected by the adopted rule. Ecology believes this supports our conclusion that we did not make any substantive changes to the proposed rule.

Ecology did not make any changes to the subject of the adopted rule or issues determined in it. We believe the subject matter of the adopted rule is identical to the subject matter of the proposed rule: establishing GHG emission reduction standards. The issues involved in this subject matter are identical between the proposed and adopted versions of the rule and include:

- *Scope*
- *Definitions*
- *Applicability*
- *Baselines*
- *Energy Intense Trade Exposed (EITEs)*
- *General compliance issues (timelines, reduction requirements, regulatory orders, etc.)*
- *Compliance options*
- *Emission Reduction Units*
- *Limitations on generating emission reductions*
- *Third-party verification*
- *Registry*
- *Reserve*

- *Other requirements*
- *Enforcement*
- *Confidentiality*
- *Severability*
- *Amendments to Chapter 173-441 WAC*

Ecology believes this supports our conclusion that we did not make any substantive changes to the proposed rule.

Finally, Ecology considered the extent to which the effects of the adopted rule differ from the effects of the published proposed rule. Most of the changes made to the adopted version of the rule simply clarify Ecology's original intent. The effects of these changes are consistent between the proposed and adopted versions of the rule. Ecology made many of these changes at the suggestion of stakeholders and other public commenters. We evaluated those changes to determine if they were a "substantial" change. We determined they were not. These changes are:

- *Instead of requiring all EITEs to use the production-based efficiency metric, the adopted rule now allows EITEs to choose to be treated as non-EITEs. We made this change at the request of multiple commenters. As this provision merely provides an option, we do not think it rises to the level of a "substantial" change to the rule. See WAC 173-442-020(1)(m)(ii).*
- *The adopted rule adds an exemption for natural gas distributors selling product that is used as a feedstock to produce another product, such as methanol. We made this change at the request of a commenter and believe it is consistent with the other exemptions listed in the proposed rule. We do not think this change rises to the level of a "substantial" change to the rule. See WAC 173-442-040(3)(a).*
- *The adopted rule adds clarifying instructions on how to adjust a natural gas distributor's baseline when other covered parties enter or exit the program. We made this change in response to comments. It clarifies our original intent and does not change requirements. We do not think this change rises to the level of a "substantial" change to the rule. See WAC 173-442-050(3)(c).*
- *The adopted rule added bounds on the required emission reductions for EITEs. These bounds were not included in the proposed rule. The most stringent reduction requirement for the least efficient EITE facilities will be no more than 2.7 percent per year. The least stringent reduction requirement for the most efficient EITE facilities will be no less than 0.7 percent per year. We made this change at the request of multiple commenters. We believe this clarifies Ecology's original intent and does not rise to the level of a "substantial" change to the rule. See WAC 173-442-070(3)(b)(i) and (ii).*
- *The adopted rule added two new protocols that will be accepted for generation of emission reduction units (ERUs). These protocols were not listed in the proposed rule. These new protocols are "Landfill Methane Collection and Combustion" and "Nitric Acid Production Project Protocol." These provisions were added at the request of commenters. As these provisions merely provide additional options, we do not think they rise to the level of a "substantial" change to the rule. See WAC 173-442-160(7)(d) and WAC 173-442-160(8)(e).*
- *The adopted rule added another type of accreditation for third party verifiers. This accreditation was not listed in the proposed rule but was requested by a commenter. As this provision merely provides an option, we do not think it rises to the level of a "substantial" change to the rule. See WAC 173-442-220(6)(a)(iii)(E) and WAC 173-441-085(7)(a)(iii)(E).*

The following describes the exact changes made to the final adopted rule and explains Ecology's reasons for making them. Where a change was made solely for typographical or editing purposes (including subsequent renumbering), we did not include it in this section. We did include clarifications made in response to comments.

Table 1: Changes Made to Adopted Rule

Section in Final Rule	Change made	Reason for change
173-442-020(1)(b)	Adds new definition for “allowance”	Stakeholders expressed confusion about the meaning and requested the definition be added
173-442-020(1)(m)(ii)	Adds new option for EITEs to choose to not be treated as EITEs	EITE stakeholders requested the ability to opt out of EITE provisions
173-442-020(1)(n)	Clarifies definition of “ERU” is an emission reduction for accounting purposes	Clarifies meaning
173-442-020(1)(s)	Rewords “aggregate emission reduction limit” as “aggregate emission cap”	Clarifies meaning
173-442-020(1)(t)	Rewords “external program” as “GHG emission reduction program”	Clarifies meaning
173-442-030(1)	Clarifies applicability is triggered by three-year rolling average	Clarifies meaning
173-442-030(3)	Clarifies to indicate emission reduction requirements apply when the average emissions exceed the compliance thresholds listed in Table 1	Stakeholders asked for clarification about when the requirements applied to covered parties
173-442-030(3) Table 1	Adds notation clarifying 2017–2019 compliance year applies for three-year rolling average starting in 2012	Stakeholders asked for clarification about when the requirements applied to covered parties
173-442-040(2)(b)(ii)	Changed wording from final “distribution” to “destination”	Commenters asked for clarification to address concerns about meaning
173-442-040(3)(a)	Adds exclusion for natural gas used to make a product and clarifies that natural gas supplied to voluntary parties is treated the same as other covered parties	Commenters requested additional exclusion applicable to natural gas feedstocks and clarification that voluntary parties are treated the same as other covered parties
173-442-040(4)(a)	Clarifies the referenced “implementation plan” is for the federal CPP	Clarifies original intent
173-442-050(3)(c)	Adds clarifying language allowing for baseline adjustments for natural gas distributors due to entrance or exit of covered parties.	Commenters requested change to prevent double counting emissions
173-442-060(1)(b)	Adds language clarifying when “Annual decrease” becomes applicable	Commenter requested clarification
173-442-060(2)	Clarifies the contents of a regulatory order	Commenters requested clarification
173-442-070(1)	Clarifies that EITEs must only report their own production data, not production data from other companies in their industry sector	Commenters were confused about whether they were required to produce data for other companies—new wording clarifies original intent
173-442-070(2)	Removes applicability section, now clarified in WAC 173-442-030(3)	Commenters found original wording confusing—removes wording to clarify original intent
173-442-070(2)(c)	Removes obsolete reference	Removed 173-442-070(2) as noted above
173-442-070(3)	Changes terminology from “efficiency reduction rate” to “efficiency improvement rate”	Commenters found the original wording counterintuitive—new wording clarifies original intent
173-442-070(3)(a)(i)(A)	Clarifies that GHG emissions data must be comparable to that reported under Chapter 173-441 WAC or WAC 173-442-070(1)	Clarifies that production data submitted by the facility can be used to calculate the efficiency intensity distribution
173-442-070(3)(b)(i)	Clarifies wording regarding “greater,”	Commenters found the original

Section in Final Rule	Change made	Reason for change
	places upper bound on required emissions reductions of 2.7% for least efficient facilities, and corrects regulatory reference	wording confusing or counterintuitive—new wording clarifies original intent and responds to commenter requests to add upper limit
173-442-070(3)(b)(ii)	Clarifies wording regarding “less,” places lower bound on required emissions reductions of 0.7% for most efficient facilities, and corrects regulatory reference	Commenters found the original wording confusing or counterintuitive—new wording clarifies original intent and responds to commenter requests to add lower limit
173-442-070(3)(b)(iii)	Adds clarifying wording and corrects regulatory reference	New wording clarifies original intent
173-442-070(3)(b)(iv)	Clarifies wording regarding “greater,” places upper bound on required emissions reductions of 2.7% for least efficient facilities, and corrects regulatory reference	Commenters found the original wording confusing or counterintuitive—new wording clarifies original intent and responds to commenter request to add upper limit
173-442-070(3)(b)(v)	Clarifies wording and corrects regulatory reference	Commenters found the original wording confusing or counterintuitive—new wording clarifies original intent
173-442-070(4)(b)	Clarifies terminology in Equation 1	Commenters found the original wording confusing or counterintuitive—new wording clarifies original intent
173-442-110(2)	Clarifies that an “activity” may generate ERUs, just like a “project” or “program”	Clarifies original intent
173-442-110(3)	Rewords description of external markets	Clarifies original intent
173-442-140(3)(b)	Rewords nature of ERU possession	Clarifies original intent
173-442-150(1)(e)	Clarifies that ERUs must be in addition to existing reduction requirements and must also meet additionality requirements of applicable protocol	Clarifies original intent that ERUs from projects must meet requirement of listed protocols where applicable
173-442-150(1)(e)(ii)(C)	Adds language referring to carbon dioxide mitigation standards from an EFSEC site certificate	Clarifies original intent to account for both ways EFSEC standard has been applied
173-442-160(2)(c)	Clarifies that emission reduction projects at a stationary source must not be used to generate ERUs that are already counted	Clarifies original intent to avoid double counting emission reductions for on-site projects
173-442-160(3)(a)(i) 173-442-160(3)(a)(ii) 173-442-160(6)(a) 173-442-160(6)(b) 173-442-160(6)(c) 173-442-160(7)(a) 173-442-160(7)(b) 173-442-160(7)(c) 173-442-160(7)(d) 173-442-160(8)(a) 173-442-160(8)(b) 173-442-160(8)(c) 173-442-160(8)(d)	Clarifies that all protocols must use a version approved no later than September 1, 2016	Clarifies to avoid confusion about which protocols are acceptable
173-442-160(3)(b)	Rephrase terms for commute trip reduction	Clarifies original intent
173-442-160(5)(a)(iv)	Deletes provision	Commenters requested removal of provision requiring use of megawatt hours
173-442-160(5)(c)	Corrects regulatory references	Clarifies original intent
173-442-160(5)(c)(i)(A)	Clarifies applicability to electrical conservation projects	Clarifies original intent
173-442-160(5)(c)(ii)	Adds natural gas efficiency units may	Commenters requested use of

Section in Final Rule	Change made	Reason for change
	remain in therms	therms instead of megawatt hours
173-442-160(7)(d)	Adds "Landfill Methane Collection and Combustion" protocol to acceptable list	Commenters requested adding this protocol—consistent with original intent
173-442-160(8)(e)	Adds "Nitric Acid Production Project Protocol" to acceptable list	Commenters requested adding this protocol—consistent with original intent
173-442-170(2)	Clarifies use of allowances to generate ERUs	Commenters found the original wording confusing—new wording clarifies original intent
173-442-170(2)(a)	Clarifies use of allowances cannot exceed limits on percentages in Table 3	Commenters found the original wording confusing—new wording clarifies original intent
173-442-170(2)(a) Table 3	Changes title to add clarity	Commenters found the original wording confusing—new wording clarifies original intent
173-442-170(2)(b)	Clarifies use of allowances by vintage year cannot exceed the percentage limits in Table 4	Commenters found the original wording confusing—new wording clarifies original intent
173-442-170(2)(b) Table 4	Changes title to add clarity	Commenters found the original wording confusing—new wording clarifies original intent
173-442-170(3)	Clarifies requirement to invalidate allowances	Commenters found the original wording confusing—new wording clarifies original intent
173-442-200(3)	Clarifies requirement is for each MT CO ₂ e	Clarifies original intent
173-442-200(6)(d)(ii)	Adds missing cross reference for EITEs	Clarifies original intent
173-442-220(1)	Removes reference to 173-442-150(2)	Reference obsolete
173-442-220(1)(b)	Removes reference to 173-442-150(2)	Reference obsolete
173-442-220(6)(a)(iii)(E)	Adds additional acceptable accreditation	Commenters asked for expanded accreditation to include omitted program—extends original intent
173-442-240(1)(a)(ii)(C)	Changes terminology in Equation 2	Clarifies original intent
173-442-240(2)	Clarifies terminology regarding aggregate emissions cap	Clarifies original intent
173-442-240(2)(b)	Clarifies retirement options for ERUs	Commenters asked for clarification
173-442-240(2)(c)(i)	Expands data collection requirement	Broadened to offer flexibility to meet original intent
173-442-240(2)(c)(ii)	Removes requirement that purchases apply only to Washington customers	Broadened to offer flexibility to meet original intent
173-442-240(3)(b)(iii)	Adds "activities" to "projects" and "programs"	Clarifies original intent
173-442-240(3)(b)(iv)	Clarifies ERU awards from committee are subject to Ecology approval	Clarifies original intent
173-442-330(1)	Adds provision for whether permit is required	Stakeholders requested clarification to avoid unintended consequence and meet original intent
173-442-340(3)	Deletes provision that violation is for each day	Removed unnecessary reference to daily violations—covered by statutory provisions
173-441-020(1)(f) 173-441-020(1)(h)(i) 173-441-020(1)(j)(ii) 173-441-020(3) 173-441-050(9) 173-441-080(1) 173-441-120 Table 120-1 173-441-120(2)(e)	Updates 40 C.F.R. Part 98 adoption by reference dates to September 1, 2016 throughout	Provides consistency with statutory requirement

Section in Final Rule	Change made	Reason for change
173-441-120(2)(e)(vii) 173-441-120(2)(h)		
173-441-020(1)	Clarifies distinction between “facility” and “supplier”	Clarifies original intent in response to comments
173-441-050	Clarifies all applicable MT CO ₂ e must be included in the report	Clarifies existing requirement
173-441-085(7)(a)(iii)(E)	Adds additional acceptable accreditation	Requested by commenters
173-441-120 Table 120-1	Adds clarifying language about facility definition	Clarifies in response to comments
173-441-120(2)(h)(ii)	Changes wording from final “distribution” to “destination”	Commenters found the original wording confusing—new wording clarifies original intent