The Washington Climate Commitment Act
Policy Memo

Overview

With the passage of S.B.5126, the Climate Commitment Act (CCA), Washington became the second state to create a comprehensive cap-and-invest program. Washington worked to improve upon the California model by limiting the role of offsets, and requiring robust air quality and environmental justice provisions. It also directs the funds generated towards a wide array of climate mitigation and adaptation programs. Like many climate policies, cap-and-invest is complex. This policy memo provides an introduction to the Climate Commitment Act and its key components. It can be used as a starting point for legislators interested in replicating Washington's model, but is no substitute for the actual law.

> **"This policy does not fit in a 3-second ad."**
>
> Joe Fitzgibbon, Washington State Representative and Co-Author of the CCA

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1. Intent

Overview: Having a clear legislative intent section at the beginning helps ensure that the legislation is properly implemented and provides direction in the event of a lawsuit.

- Examples of intentions from the CCA include:
  - Reducing emissions based on current science
  - Minimize leakage from Emissions-Intensive Trade Exposed Industries (EITEs)
  - Pursue significant reductions of emissions and air pollutants in overburdened communities, as well as provide direct and meaningful benefits to these communities with the goal of eliminating statewide disparities.
  - Empower the Environmental Justice Council created by the HEAL Act to provide recommendations
  - Prevent job loss and provide protective measures for any workers adversely impacted by the transition to a clean energy economy.
  - Create equitable community engagement and tribal consultation plans
- Climate Commitment defined: "the process and mechanisms to ensure a coordinated and strategic approach to advancing climate resilience and environmental justice and achieving an equitable and inclusive transition to a carbon neutral economy."

2. Covered Entities

Overview: Prior to determining who should be covered under a cap-and-invest program, the state should have a good sense of which sectors and businesses significantly contribute to emissions and set an emissions baseline over which the entity must participate in the program. States can prepare for this process by creating strong data collection and emissions tracking programs.

- The CCA covers facilities that emit 25,000 metric tons of carbon dioxide equivalent or more per calendar year.
- Some examples of the covered entities in the CCA include: electric generators or deliverers of imported electricity, fossil fuel suppliers, landfills, and railroad companies. Each state should determine the classes of regulated entities to the most thorough extent possible.
- The Department of Ecology should ensure that multiple covered entities do not have a compliance obligation for the same emissions.
- Entities that are not otherwise covered by the CCA can choose to opt in.

3. Cap and Allowance Mechanics

Overview: A prerequisite to the CCA was Washington's greenhouse gas reduction targets. Passed in 2020, H.B.2311 updated the state's statutory reductions to 45% by 2030, 70% by 2040, and 95% by 2050 under 1990 levels, achieving net zero by 2050. The CCA is designed to ensure that these targets are reached by instituting a declining cap on emissions. In a cap-and-invest system, covered emitters are then responsible for buying "allowances" for the greenhouse gasses they emit. However, each year the amount of allowances available will decrease, forcing the emitters to reduce their climate pollution accordingly. Setting up a successful cap-and-invest system thus requires a state to set reduction targets and come up with a schedule for meeting them.

- An allowance is the authorization to emit one metric ton of carbon dioxide equivalent.
- The Department of Ecology is tasked with creating a cap on greenhouse gas emissions in alignment with statutory emissions requirements. The program should include:
  - » Annual allowance budgets that limit emissions from covered entities
  - » Definitions of which entities are covered or may opt-in
  - » How to distribute emissions allowances
  - » Details of an allowance price containment reserve. A price containment reserve is used to adjust the cost of an allowance when the market would otherwise make them financially unattainable
  - » Details of an emissions containment reserve. An emissions containment reserve ensures that the cost of allowances remains high enough to encourage emissions reductions and prevent emissions overrun
  - » Details on the use of offsets
  - » Details of compliance obligations for covered entities, as well as the authority of the Department to enforce the program
  - » Creation of an account for the money generated from the auction of emissions allowances
  - » How to oversee the sale and transfer of allowances by the department
  - » How to allocate allowances to EITEs
- The Department must conduct ongoing monitoring and evaluation of program implementation, with a report to the legislature and Environmental Justice Council every four years. This report must include progress on the state's emissions reductions targets, overburdened communities, covered entities, and EITEs.
- The Department must establish an emissions baseline, based on 2015-2019 data, of the share of state emissions contributed by the covered entities. This baseline shall be used to adopt annual allowance budgets for covered entities' share of statutory reductions. Use of offsets must not prevent achieving the targets. The Department has the authority to adjust allowance budgets as necessary to ensure achievement of the emissions reduction targets.

4. Auction Process

Overview: “Compliance instruments” refer to allowances or offsets. Compliance instruments are purchased by covered and opt-in entities during an auction process. It is the sale of these instruments that creates the “invest” part of cap-and-invest. Unless otherwise specified, regulated and opt-in entities have to purchase compliance instruments equivalent to their annual emissions.

- The Department of Ecology must host an auction up to four times per year, not including any necessary reserve auctions.
- The Department must hire an independent contractor to run the auction, and a financial services administrator to manage the bid guarantees.
- The Department shall promulgate rules to prevent bidder collusion and market manipulation. An entity may not buy more than 10% of the allowances offered during an auction or issued in a single year. No entity may buy more allowances than would exceed their holding limit.
- The Department shall design auctions for maximum potential to link with auctions in other jurisdictions.
- The amount of allowances offered should be in line with the need to achieve the state’s statutory emissions reductions targets.

5. Offsets

Overview: Offsets are a method to invest in programs that sequester greenhouse gasses, such as nature-based climate solutions, to “offset” the amount of emissions a specific entity is producing. Offsets are controversial and should not be viewed as a substitute for preventing emissions at their source. However, offsets are a way to invest in climate solutions over time. For industries that are difficult to decarbonize, they can invest in other climate solutions while pursuing technology to reduce their emissions. Washington has tried to address this issue by counting offsets as allowances under the cap, i.e. when an offset is used, a corresponding allowance is removed from the pool of allowances available.

The best-designed offset programs require offsets to be real, permanent (e.g. the trees must not be cut down and harvested at a later date), quantifiable (e.g. there must be a way to determine the harvested at a later date), quantifiable (e.g. there must be a way to determine the baseline amount of carbon in the soil and the additional amount sequestered by the program), and additional (they must provide extra emissions reductions, not fund mitigation efforts that would have already happened).

- In the CCA, all offsets must provide direct environmental benefits to Washington or a linked jurisdiction.
- Offsets must be real, permanent, quantifiable, verifiable, and enforceable. They must be additional. Offsets must be certified by a recognized registry.
- During the first compliance period, covered entities can cover up to 5% of their allowance through offsets. Half of those must be for projects directly benefiting the state. In the second compliance period, covered entities can cover 4% of their allowance through offsets, three quarters of which must be from projects directly benefiting the state. The Department can reduce the three quarters requirement if it is not attainable.
- The Department can reduce offset availability for specific entities based on recommendations from the Environmental Justice Council or air quality concerns. Offset availability can also be reduced if an entity is likely to violate its emissions permits.
- The CCA also created a Tribal Carbon Offset Assistance Grant Program to help tribes to design and implement offset projects on tribal land.

6. Enforcement

Overview: The CCA requires covered and opt-in entities to pay for their emissions or purchase offsets. If an entity does not obtain enough compliance instruments, it is important that the state enforce the law by imposing a penalty.

- All entities are required to obtain compliance instruments to cover their emissions obligations.

- If an entity does not submit sufficient compliance instruments by the specified dates, the initial penalty is to obtain an additional 4 allowances for every one compliance instrument that is missing within 6 months.
- If the entity fails to submit the 4:1 penalty allowances, the Department of Ecology must impose a monetary penalty of up to $10,000 per day per violation.
- The Department may issue a penalty of up to $50,000 per day per violation for bidder collusion, providing false or withholding information, or violation of auction or registration requirements.

7. Governance Structure for Implementation

Overview: Because climate change impacts all aspects of our lives and society, it is important to have a whole-of-government approach in addressing it. Washington state had already passed a number of climate laws prior to the CCA. By requiring the governor to create a comprehensive governance structure, the legislature is helping to ensure that the laws are implemented properly. The role of the Environmental Justice Council and provisions around tribal consultation are also critical aspects of governance under the CCA (see sections 10 and 12 of this document).

- The governor must create a structure to implement the CCA and other climate-related statutes to achieve statutory emissions goals. The structure must be holistic, scientifically-based, support an equitable transition, build climate resilience, and address emissions from all sources.
- The governance structure must include:
  - » a strategic plan for aligning existing laws and policies with statutory greenhouse gas emissions limits
  - » common state standards and procedures for addressing greenhouse gasses and climate resilience
  - » a funding prioritization process
  - » a statewide strategy update for climate risks and resilience
  - » a community engagement plan
  - » a gap analysis of state law
  - » an initial policy and budget recommendations to the legislature on what is needed for CCA implementation.

8. Linkage with Other Jurisdictions

Overview: The larger the jurisdictions and entities covered under a cap-and-invest regime, the more cost-effective it is. The CCA is designed to allow Washington State to link its markets with other cap-and-invest markets, providing the other jurisdictions meet specified requirements. Any legislators hoping to design a program that can link with Washington State will want to pay close attention to this section (Section 24).

- Prior to linking with another jurisdiction, the Department must evaluate the cost-effectiveness to Washington residents and carry out an environmental justice assessment. The process must include a notice and hearing. The Department must ensure that the linking jurisdiction has mechanisms to provide benefits from the program to vulnerable populations. Linking must help realize the intent of the CCA and not cause net harm to either jurisdictions' impacted communities.
- This section should state explicitly that the state maintains authority over their own program.
- A linkage agreement must include details for:
  - » common administration
  - » joint auctions
  - » greenhouse gas emission limits and the role of offsets
  - » holding limits
  - » a procedure to make amendments to the linkage agreement
  - » a public participation procedure.

9. Investment Funds

Overview: Cap-and-invest provides an obvious source of funding for climate-related projects to manage the transition. If cap-and-invest works as anticipated, revenues from the program will eventually cease as fossil fuels are phased out. For that reason, it's best to invest the funds in climate mitigation programs, rather than providing only dividends that household budgets become dependent on.

- Legislators can provide requirements for how the funds will be used. Some leading examples from the bill include:
  - » A minimum of 35% of investments must provide direct and meaningful benefits to vulnerable populations within the boundaries of the identified overburdened communities. Explicitly state a goal of eliminating disparities.
  - » Fund administrators must report to the Environmental Justice Council (established by the HEAL Act).
  - » Monies spent can't be used to violate tribal rights.
  - » Labor standards must be maintained.
  - » Investments must not cause damage and should create benefits to ecosystems and increase resilience to climate change.
  - » Money must be appropriated.
- The Environmental Justice Council must provide recommendations for the investment plans and level of funding for priority populations.
- There are many ways to use the funds for climate mitigation, adaptation, and pollution reduction. The bill creates several different accounts for different types of investments (see sections 27, 29, 30, and 31). Examples of programs the bill funds include:
  - » reducing emissions from the transportation sector
  - » reducing climate and pollution impacts to improve health outcomes in overburdened communities
  - » improvements to air quality by reducing criteria air pollutants
  - » deploying renewable energy sources and community renewable energy
  - » electrification, reducing emissions, or improving efficiency of buildings, industry, agriculture, landfills, or waste-to-energy
  - » market transformation for appliances
  - » economic transition support for communities reliant on fossil fuel jobs
  - » addressing energy burden
  - » mitigation and adaptation on tribal lands (including community relocation)
  - » blue carbon, ocean acidification, flood prevention, clean water, stormwater management, water supply and aquatic habitat improvement and protection management, water supply and aquatic habitat improvement and protection
  - » carbon sequestration
  - » healthy forest and wildfire resilience
  - » preventing land conversion

10. Environmental Justice Council, Assessment, and Community Engagement Plan

Overview: The CCA relies heavily on the HEAL Act (Healthy Environment for All, S.B.5141). The HEAL Act was enacted earlier in 2021, and creates an Environmental Justice Council and procedure for engaging with overburdened communities. It also provides a format for assessing disproportionate impacts across the state. The Environmental Justice Council helps shape regulatory proceedings and advises how monies from the CCA should be spent. The environmental justice provisions of the CCA that rely on major portions of the HEAL Act include Sections 3 and 5.

- Under the CCA, "overburdened community" is defined as "a geographic area where vulnerable populations face combined, multiple environmental harms, pollutants or contaminants through multiple pathways, which may result in significant disparate adverse health outcomes of effects."
  - » This definition is complementary to the definition used under the HEAL Act.

- It also includes populations who may be exposed to environmental contaminants outside of their residential area based on the use of traditional or cultural foods and practices.

- The Environmental Justice Council is tasked with:
  - providing recommendations for overall program development, including linkage, offset management, and designation of EITEs
  - proposing investment plans and evaluating funding levels for vulnerable populations, low income individuals, and impacted workers
  - analyzing policy efficacy and designing criteria for program evaluation
  - setting goals for environmental health and copollutant emissions reductions in overburdened communities
  - providing recommendations for meaningful consultation and public participation
- The Department can use the process created through the HEAL Act to identify overburdened communities in carrying out the CCA.
- The Department must create a community engagement plan under the HEAL Act with a specific focus on emitters in overburdened communities. The plan must include monitoring and evaluation of criteria pollutants and outreach methods.

11. Air Quality Program

Overview: One of the major critiques of California's cap and trade program is that it has the potential to exacerbate pollution hotspots in environmental justice communities. While the data is mixed, there is a valid concern that heavily polluting plants might simply buy allowances to keep emitting and not clean up their operations, especially across fleets owned by a single entity. Washington's CCA seeks to prevent this problem by requiring robust monitoring and improvements to air quality.

- The Department of Ecology must identify overburdened communities and then conduct air quality monitoring of criteria pollutants. The Department must identify the major sources of pollutants, notify the major sources of the finding, and then designate the source(s) as a high priority emitter for remediation.
- Based on the air quality monitoring findings, the Department must engage in rule-making and enforcement to improve the overburdened communities' air quality to the most protective level, either:
  - National Ambient Air Quality Standards as designated by the US EPA; or
  - comparable air quality to nearby communities that lack the damaging levels of air pollutants.
- Enforcement of a stationary source must be proportionate to the source's emissions.
- The legislature intends that, per biennium, $20 million from CCA-generated funds must be directed towards the Air Quality and Health Disparities Improvement Account. This account must fund monitoring of criteria air pollutants and the establishment of baseline greenhouse gas emissions data. The funds can be spent on programs within the capital and/or transportation budget.

12. Tribal Rights

Overview: Tribes are sovereign governments. If states want to be meaningful partners to tribes, they need to enshrine rights to free, prior, and informed consent in statute. As a minimum or intermediary, states can work with tribes to co-define equitable consultation strategies. Parameters for tribal consultation were outlined in the CCA as passed by the legislature, but Gov. Inslee vetoed that section due to concerns about the government-to-government relationship. The following year, the legislature passed H.B.1753 in order to resolve the governor's concerns and provided a consultation framework. Unless otherwise indicated, this section of the memo presents the policy as originally passed by the legislature.

- Agencies that allocate funding or administer grants appropriated from CCA revenue must develop a consultation framework with federally recognized tribal governments. This framework must include best practices and communication protocols. Agencies must do consultation for all programs potentially impacting tribal resources, rights and interests, or land.
- State agencies must designate a trained tribal liaison to lead the consultation process. The liaison must submit an annual report to the governor on activities involving tribes.
- If consultation is not carried out, the impacted tribe(s) has the right to have projects halted until consultation is adequately carried out.
- Tribal governments or the Department of Archaeology and Historic Preservation can stop a project if it will adversely impact cultural resources, archaeological sites, or sacred sites.
- The Department of Ecology must create a program for funding and/or technical assistance for offset projects on tribal lands. The legislature intends that this program be appropriated $5 million on a biennial basis.
- The legislature intends that $50 million be appropriated per biennium from CCA funds to support mitigation and adaptation for tribes, including the relocation of tribes at risk of flooding and sea level rise.
- Ten percent of funds generated from the CCA are required to go directly towards projects formally supported by a tribe. That 10% can be in addition to the 35% requirement to invest in disproportionately burdened communities.
- H.B.1753 added funding to give tribes capacity to engage in the government-to-government dialogue process.
- H.B.1753 addresses Gov. Inslee's legal concerns by limiting the scope of tribal consent. It clarifies that consultation and the right to halt projects is limited to projects impacting treaty rights. Thus the CCA consultation protocol does not apply to lands or sacred sites where tribes do not explicitly hold treaty protections. It is important to recognize that many tribal resources and values are not formally recognized through treaties, and those that are have been systematically undermined. As other states embark on policymaking, they should also take care to understand the intricacies of which tribal resources and values are and are not protected by treaty, and maximize protections wherever possible.

13. Energy-Intensive Trade-Exposed Industries (EITEs)

Overview: State legislators walk a tightrope in seeking to reduce greenhouse gas emissions. On the one hand, the most stringent regulations are necessary to ensure that emissions actually get reduced. On the other hand, there is a risk that heavily-emitting industries with few technological alternatives may choose to relocate to other states where the regulations are less stringent, thereby shifting, rather than reducing, emissions. This shifting of emissions is known as "leakage." Energy-Intensive Trade-Exposed Industries, or EITEs, fall into this tricky category. In the case of the CCA, the Department of Ecology is required to submit a request for legislation to the legislature, which needs to act to clarify the rules for EITEs.

- Examples of EITEs include manufacturing of metals, paper, nonmetallic minerals, chemicals, and cement.
- The CCA creates two methods for calculating allowances:
  - » Allowances must be equal to baseline carbon intensity using data from 2015-2019, multiplied by the facility's actual production for each calendar year during the compliance period.

- For facilities that cannot feasibly determine a carbon intensity benchmark, the facility can use a mass-based baseline using data from 2015-2019 that does not vary based on changes in production.

- During the first compliance period, the Department of Ecology must provide EITEs with free allowances equal to their baseline. For the second and third compliance period, the amount of free allowances reduces by 3%. The legislature must act to change the number of free allowances after the third compliance period.
- If an EITE exceeds the allowances provided by its baseline, it must purchase the additional compliance instruments.
- If a facility demonstrates that additional reductions in carbon intensity or mass emissions are not technically or economically feasible, the Department may adjust the number of free allowances upward. The Department must consider the best available technology in making this determination.
- By the end of 2026, the Department must submit to the legislature a report on appropriate emissions benchmarking and leakage prevention for EITEs. The legislature should act to clarify the requirements for EITEs as technologies progress and new information becomes available.