PCR Rule Advisory Committee
Draft Rule – Parts A- C
July 28, 2022

- The PCR Draft Rule Advisory Committee met July 28, 2022.
- Department of Ecology (Ecology) staff hosted the meeting on Zoom.
- Comment on Revised Draft Parts A-C through SmartComments

Advisory Board members in attendance:

Emily Alexander: Darigold
Holly Chisa: Northwest Grocery Association
John Cook: Niagara Bottling
Megan Daum: American Beverage Association
Alex Alston on behalf of Kate Eagles: Association of Plastic Recyclers
Kyla Fisher: Ameripen
Christopher Finarelli: Household & Commercial Products Association
Brennan Georgianni: American Cleaning Institute
Rowland Thompson on behalf of Sally Jefferson: The Wine Institute
Carolyn Logue: Washington Food Industry Association
Lauren Shapiro: Personal Care Products Council
Mark Smith: Clorox
Heather Trim: Zero Waste Washington

Advisory board members not present:

Chris Cary: Tree Top, Inc
Kate Eagles: Association of Plastic Recyclers
Sally Jefferson: The Wine Institute
Charles Knutson: Amazon

Agenda

- Introductions
- Process overview
- Ecology equitable fee calculation summary
- Group input and discussion on parts A – C

Powerpoint slides available on PCR Rule Website

Parts A – C Group Discussion

*highlighted sections indicate language where further review and comments are requested

Input Part A

- **Definition of "beverage"**
  - Member commented on the draft addition of syrups, liquid concentrates, or other beverages that are sold in a business-to-business capacity. Member believes the intent was only to include customer-facing products.
    - Other member noted that the RCW does not exclude business – to- business sales.
    - Member responded that the draft rule language needs to clarify this. At this time, Ecology's intent is not to exclude business-to-business products that meet the definition of "beverage" unless provided with adequate justification.
  - Member agreed with revised definition of "plastic beverage container" as shown below:

Original (from RCW 70A.245.020(14):	**Current draft language (WAC 173-925.030(19):**
(14) "Plastic beverage container" means a bottle or other rigid container that is capable of maintaining its shape when empty, comprised solely of one or multiple plastic resins designed to contain a beverage. Plastic beverage container does not include: *(a) Refillable beverage containers, such as containers that are sufficiently durable for multiple rotations of their original or similar purpose and are intended to function in a system of reuse;* *(b) Rigid plastic containers or plastic bottles that are or are used for medical devices, medical products that are required to be sterile, nonprescription and prescription drugs, or dietary supplements as defined in RCW 82.08.0293;* *(c) Bladders or pouches that contain wine; or* *(d) Liners, caps, corks, closures, labels, and other items added externally or internally but otherwise separate from the structure of the bottle or container.*	*(18)(a) **"Plastic beverage container"** means a sealed bottle or other rigid container that is capable of maintaining its shape when empty, comprised of one or multiple plastic resins, and designed to contain a beverage in a quantity more than or equal to two fluid ounces and less than or equal to one gallon.* *(b) Plastic beverage container does not include:* *(i) Refillable beverage containers, such as containers that are sufficiently durable for multiple rotations of their original or similar purpose and are intended to function in a system of reuse;* *(ii) Rigid plastic containers or plastic bottles that are used as packaging for medical devices, medical products that are required to be sterile, drugs, or dietary supplements;* *(iii) Bladders or pouches that contain wine; or* *(iv) Liners, caps, corks, closures, labels, and other items added externally or internally but otherwise separate from the structure of the bottle or container.*

- **Definition of "producer."**
  - Member commented that (i) and (ii) (cited below from the draft provided prior to meeting) could apply simultaneously, and suggested removing the hierarchy within the definition of producer.

    (i)The person who has legal ownership of the brand(s), logo representing the brand(s), or brand name(s), assortments, or collections of the covered product

    (ii) The licensee of a brand or trademark, whether or not the trademark is registered in this state.

- Member asked that we compare "producer" definition to other states' definitions
  - Ecology responded that we have been looking at other states to the extent that they are applicable and consistent with our RCW.
- Ecology shared more recent "producer" revision, significantly revised since the above-noted issue around (i) and (ii) language that was shared prior to the meeting. The below definition will be in the next draft posted for input, and Ecology requests additional input:

  (23)(a) "Producer" means the entity responsible for compliance with the requirements of this chapter for a covered product sold, offered for sale, or distributed in or into this state.
  (b) The producer of a covered product is the entity that affixes its brand, or specifies that its brand be affixed, to the covered product container or retail packaging, unless one of the following is true:
  (c) If an entity is a "brand licensor," meaning it has licensed its brand to be used on a covered product that is to be sold by the licensee, then the licensee is the producer.
  (d) If the covered product lacks identification of a brand, the producer is the entity that specified the material composition of the covered product.
  (e) If there is no person described in (b), (c), or (d) of this subsection that has undertaken distribution of the product in or into this state, then the producer is the entity who imports or distributes the covered product in or into the state, including through online sales.
  (f) Producer does not include:
  (i) Government agencies, municipalities, or other political subdivisions of the state;
  (ii) Registered 501(c)(3) charitable organizations and 501(c)(4) social welfare organizations; or
  (iii) De minimis producers as defined in (10) of this sub-section.

- **<u>Definition of post-consumer recycled content</u>**
  - Member commented that both manufacturer and consumer materials, including recalled product, should be allowed in calculation.
    - Ecology believes this is addressed in the current language.
      Current draft definition: *(a) "Post-consumer recycled content" means the content of a covered product made of recycled materials derived specifically from recycled material generated by households or by commercial, or institutional facilities in their role as end users of packaged products that can no longer be used for their intended purpose. Postconsumer recycled content" includes returns of material from the distribution chain.*
      (b) "Post-consumer recycled content" does not include plastic from pre-consumer or industrial plastic manufacturing sources.
    -
    - Member noted that language is also already used in the ISO standards to represent situations where consumer products were never sold and are returned.
  - Member suggested adding the word "virgin" in front of "plastic."
    - Producers want to include virgin because other plastic resin might contain scraps.
    - Members expressed confusion over the term "resin", which is undefined. Plastic and resin terms are not interchangeable. Member suggests defining resin.
      - Ecology requests draft language suggestion
  - Question about how PCR will increase costs for consumers
    - This consideration is not in scope for rulemaking.
  - Member proposed adding a watermark on each bottle to indicate PCR plastic, but another member responded that the cost and complications of this are prohibitive.

- This consideration is not in scope for rulemaking.

- **Definition of "household cleaning products"**
  - Latest draft defines a "household" as follows:
    (11) "Household" means all of the people who occupy a residential property regardless of their relationship to one another.

  - Latest draft defines "household cleaning product" as follows:
    (12) "Household cleaning products" means all chemically formulated consumer cleaning products available for purchase by a member of a household, including, but not limited to:
    (i) Laundry soaps, detergents, softeners, surface polishes, stain removers, and air cleaners, fresheners, and purifiers;
    (ii) Textile cleaners, carpet and pet cleaners and treatments; or
    (iii) Other consumer products labeled, marketed, or described to indicate that the purpose of the product is to clean or otherwise care for any possession, fabric, component, structure, vehicle, article, surface, or area associated with the household.

  - Member commented about lack of clarity over what "cleaning" means and asked for examples.
  - Members expressed issues with the term "chemically formulated," commenting that this term is too broad.
    - Concern is that "chemically formulated products" could be applied to anything, including products out of scope – e.g. whipped cream, lubricants, paints, glue, etc.
    - Member stated that the term is acceptable, but should not be the boundary used to define the products. Instead suggests focus on "intended use" and suggests using a similar structure, rationale, and alignment with the language in the definition of "personal care product," adding that "intended use" is similar to the parameters in FDA definitions.
      - Ecology suggests amending to "chemically formulated *cleaning* products" for additional clarity.
    - Language suggestion from member:
      "removing unwanted substances, such as dirt, stains, infectious agents, clutter, and other impurities, from an object or environment. substance or agent marketed to clean."
  - Issues with the phrase "not limited to" – concern that this opens the definition to everything.
    - Member suggested that greater clarity could be achieved by either listing what is included/excluded (based on product claims) OR focusing on claims made by the product and using the phrase "not limited to", but not doing both.
    - Member stated that the definition should be limited to an object or environment.
  - Members expressed issues with the phrase "care for" – too vague. Suggests keeping the focus on "cleaning"
    - Another member added that "care for" and considerations for furniture polish could consider the concept of "beautification," which would open the potential for paint products, etc.

- Member pointed out issue with draft language about air cleaners and air purifiers– commented that these terms refer to devices.

- **Definition of "Plastic household cleaning container and plastic personal care product container"**
  - Members expressed issues with language around FIFRA and other federally regulated product exclusions.
    - Member disagrees with newly added language about Ecology's authority to conduct annual product registration review before granting exclusion. Argues that preemptions under federal pre-emption (like FIFRA) should not require review (should be automatically excluded).
      - Ecology explains that not all federally *regulated* products are federally *registered.* Believe the intent is to only apply the exclusion to *registered* products, since nearly all products are technically *regulated*.
        - Member agreed and responded the "registered" language in rule should move to the top and be more clear about registered products not in scope.
  - Members expressed issues with Ecology's language around personal care product exclusions and Ecology's addition of "drug" definition as it relates to "personal care products."
    - RCW language excludes all prescription and non-prescription drugs from the definition of "personal care products" –this includes non-prescription over-the-counter products like anti-dandruff shampoo, anti-cavity toothpaste, etc. (see examples in "Appendix" at bottom of notes to understand the potential contradictions and challenges)
    - Several members expressed concern that Ecology's interpretation and current draft language is moving too far away from RCW language and preventing producers from abiding by FDA guidance.
    - Ecology acknowledges this feedback and suggests the following revisions:
      - Remove (b) of the draft definition for "drug":

        ~~*(b) "Drug" does not include substances listed or described in the definition of "Personal care product" as defined in (17) of this sub-section.*~~
      - Alter definition such that exclusions still apply according to RCW:

        (ii) Packaging material associated with federally registered products, including the following categories of rigid plastic containers or bottles that are federally registered for the containment, protection, delivery, presentation, or distribution of:
        (A) A prescription or non-prescription drug;
        (B) Dietary supplements as defined in this section
        (C) Medical devices or a biological product, as regulated by the United States Food and Drug Administration under 21 Code of Federal Regulations, Parts 200, 300 and 800; or
        (D) Pesticides registered with the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).
        (c) Producers claiming any of the above covered product exclusions from the definition of household cleaning container plastic and personal care product containers may be required cite and document the specific federal registration or regulation that exempts each product if audited or asked by the department.

- Add new enforcement language to draft part D to outline Ecology's authority to audit and request references and documentation of the applicable federally regulated non-prescription or prescription drugs:

  (2) (a) The department may conduct audits and investigations for the purpose of ensuring producer compliance with RCW and based on the information reported or provided in registration.
  (b) Producers must provide documents upon request to the department during an audit.
  (c) Materials requested from producers may include documents and records that:
  (i) Verify reported post-consumer recycled content percentages;
  (ii) Confirm reported plastic resin weight sold in or into Washington state;
  (iii) Prove producer de minimis status;
  (iv) Verify the national or regional data used to determine reported resin data;
  (v) Document federal regulations that exempt a product from requirements of this chapter; and
  (v) Provide document for any other factor deemed relevant by the department.

- **Definition of "plastic trash bag":**
  - Member suggested further defining "compostable". Committee discussed whether the reference to RCW 70A.455 is sufficient.
  - Member suggested looking to ASTM D6400 requirements and 3rd party certification to avoid competition created by parties who may attempt to skirt compostibility standards.
    - Ecology responds that Washington state law RCW 70A.455 – "Plastic Product Degradability" already addresses this issue. Is further clarity necessary?

Input Part B

- **Averaging, Mass Balance, and 3rd Party Verification**
  - Members provided feedback that language should address averaging of PCR content percentages.
    - Members explained the difficulty in reporting on a stock-keeping unit (SKU) by SKU basis, stating that many producers therefore need to rely on mass balance attributed data. Member suggested that producers could do this by using a ratio or percentage based on content in the bottle, and certify purchased resin in a mass balance.
    - Committee discussed mass balance attribution language, finding agreement that producers may consider mass balance on a per-facility basis, and use a percentage based on the reclaim percentage in that facility, and the PCR content percentage of the reclaim in that facility.
    - Attendee provided the International Sustainability & Carbon Certification (ISCC) link. ISCC is a 3rd party verifier of the entire value chain from feedstock supplier to brand owner.
    - Since the meeting, Ecology has updated the draft language to address mass balance attribution and requests additional review:

      (2) For the purposes of reporting postconsumer recycled content, producers may calculate resin weight from the following sources:

(i) Post-consumer recycled content derived from mechanical recycling using post-consumer materials, or
(ii) Post-consumer recycled content from non-mechanical processing of post-consumer materials via mass balance attribution under an approved certification system.
(A) Post-use plastic and intermediate feedstock sold or marketed for use as fuel feedstocks may not be included in PCR content reports to the department.
(B) Post-consumer recycled content weight reported via mass balance attribution must utilize an existing international or multi-national third-party certification system, which incorporates chain of custody, attribution, mass balance, and certified mass balance attribution, and must be recognized and approved by the department.

- Providing data from national or regional averages rather than state-specific data.
  - Member explained that state-specific data is difficult to produce due to lack of control over product after it is sent to a distribution center.
  - Member stated that the only realistic way to comply will be to provide national numbers pro-rated based on state population, but agrees with language that outlines Ecology's authority to ask for the method producers use to calculate these numbers at registration.
  - Another member responded that it should be incumbent upon the producer to establish a better data collection system to adhere to the state-specific data requirements rather than calculating based on national averages.
  - This topic warrants further review, but Ecology will likely continue to allow for nationally or regionally pro-rated data.
- Third-party verification of data
  - Several members stated that this would be challenging and believe the 3rd party verification system is not yet robust enough to support this.
  - Conversely, the concern is that the law is weakened if there is no way to verify compliance.
- Confidentiality
  - Members expressed confidentiality concerns in relation to the draft requirement to provide sources of PCR resin if reporting based upon national data.
    - General consensus from this discussion is that the next draft revision should remove this registration requirement, but add language that requires an attestation of data accuracy and truth under penalty of perjury at registration, and outlines Ecology's authority to request additional data, including PCR resin source information, if audited.
  - Member expresses onerous burden in requirement to *annually* submit requests for confidentiality. Member asked for revised language to allow for a confidentiality request to be approved on a one-time basis and carried year to year. The member believes this will support regulatory certainty and reduce complexity of compliance.
    - Ecology agreed that the *annual* requirement is not explicit in the law, and will follow up by reviewing state and agency confidentiality policies.
    - Other members countered that if you submit the same requests every year and your information has not changed, then you still have regulatory certainty and the requirement is not onerous.

- Ecology reviewed the agency's criteria for granting confidentiality as required in RCW 43.21A and RCW 70A.245.030 (2).
  - The law is clear that you need request confidentiality. This provides transparency that we have to provide to the public. Ecology will continue to accept input about how that looks within the producer registration database.

- **Fee Calculation and Workload Analysis Q&A (refer to fee calculation worksheet in "Appendix" section at the end of this document)**
  - Lori Peterson, Ecology's budget analyst, provided an in-depth summary about fees and workload analysis
  - Should the fee take amounts of PCR into account? Has the Dept. taken estimates of PCR vs. virgin resins? Some companies have made significant investments in adding PCR to their products, and are concerned that they will end up subsidizing enforcement of the program.
    - We don't have data on PCR content for producers at this time. However, one of the changes in the draft rule language would consider other factors in the distribution of the fee. The draft language references timeliness, but also provides the capacity to consider other factors, such as PCR content.
  - Are fees and workload analysis are based on one-time or annual costs?
    - Fees are based on annual costs; workload analysis is prepared each January.
  - When listing producers with crossover of trash bags, beverage containers, household cleaning product containers, and personal care product containers, does the producer report as one producer?
    - Yes, each producer will submit a single report, which will provide the opportunity to submit plastic resin data for the products in each of the categories. We have the data at the category level for each producer, but the fee calculation sums the totals for each producer.
    - The fee calculation produces the same number when it is calculated at the category level, and category-specific fees are summed for each producer.
  - A tier 13 producer is paying a lot, does that mean they're responsible for 1/3 of the cost?
    - The "tier 13" referenced above relates to a table showing the distribution of fees based on a tier structure that was applied to individual fees. Each producer will have an individual fee. One of the fees in the presentation was in the range between $100,000 and $200,000, which is between one sixth and one third of the total estimated annual costs for fiscal year 2023. This fee is based on the producer's total resin.
  - As more producers come in, could those costs go down?
    - Note. This response has been updated to correct an error made in the response during the meeting. During the meeting, Lori noted incorrectly that dairy and 187 mL wine bottle producers would register later, but they are registering this year. Theoretically, the cost would shift from program administration to PCR oversight in the forthcoming years, and costs would go down as one-time start-up workloads are completed. If more producers register, costs will be shared among the added producers, which would reduce costs. If new product categories are added in statute, workload costs could temporarily increase to provide outreach and technical assistance to added

producers and potentially modify the rule and registration and reporting infrastructure, but the additional producers would also help offset costs.

- Is the $603k just the admin fee? Is there an estimate of the oversight fee?
  - The $603k was not broken out into admin and oversight costs during the initial WLA. Maybe next year, the overall costs may be similar to those estimated for this year, but they will be broken out in the two categories (admin and oversight).
- This year, are we being charged on total pounds, or reported pounds?
  - This year's fee is based on total pounds of plastic resin, regardless of its origin (recycled or not). We have not requested PCR content data during this year's registration. The fee calculation in the current draft language is also based on total pounds of plastic resin and does not consider recycled content as a factor. We plan to continue to collect total resin data in the future, along with PCR content information submitted during annual reports.
- Is the equation going to be cemented in the regulations? Could the regs change?
  - Equations would go into rule guidance, not codified in the rule. Want to keep door open to provide flexibility. Will work with our Agency government relations team to determine best path.
- Are the admin fees one-time costs?
  - These are annual costs, calculated every April.
- What fund will penalties associated with registration and reporting be paid into?
  - Penalties for not reporting or paying on time go into recycling enhancement account to support grants.
- Could we add language that directs penalties into reducing the costs of program implementation?
  - The fee language as drafted provides room to apply a late registration fee, which would be used to create credits for other producers that did register on time during the next billing cycle. This mechanism would provide an alternative to penalties and an incentive to register on time to ensure that fees are not artificially high for producers, but it would not change our estimated costs. Penalties would not be used to support our cost, but go towards grants as required by law. Our rule language could not modify this statutory requirement.

Upcoming milestones:

- Register for a follow-up Zoom meeting to discuss draft Part C on Thursday, August 18, 2022, 11:00 am – 1:00 pm (PST).
- Register for September 29, 2022, 9:00 am – 12:00 pm (PST) Zoom meeting to discuss revised draft Parts A- C, and new draft Part D- Enforcement.
- Begin collecting input and concerns for enforcement language
- Revised draft A – D will be shared with the public on September 15, 2022.
- Ecology will send a revised draft with the committee as soon as it is available.
- SmartComments are currently open for Revised Draft A–C

- Anyone may reach out Shannon Jones to schedule a meeting to individually address concerns with draft language.

For more information:

- Ecology PCR Rule (WAC 173-925) Webpage
- Rulemaking Questions: shannon.jones@ecy.wa.gov
- Join the PCR content e-mail subscriber list

Appendix:

1. **Cosmetics Containing Drug Ingredients (source)**

- A suntan product is a cosmetic, but a sunscreen product is a drug.
- A deodorant is a cosmetic, but an antiperspirant is a drug.
- A shampoo is a cosmetic, but an antidandruff shampoo is a drug.
- A toothpaste is a cosmetic, but an anti-cavity toothpaste is a drug.
- A skin exfoliant is a cosmetic, but a skin peel is a drug.
- A mouthwash is a cosmetic, but an anti-gingivitis mouthwash is a drug.
- A hair bulking product is a cosmetic, but a hair growth product is a drug.
- A skin product to hide acne is a cosmetic, but an anti-acne product is a drug.
- An antibacterial deodorant soap is a cosmetic, but an antibacterial anti-infective soap is a drug.
- A skin moisturizer is a cosmetic, but a wrinkle remover is a drug.
- A lip softener is a cosmetic, but a product for chapped lips is a drug.


FDA Regulation of Cosmetics and Person


FDA Regulation of Cosmetics and Person

2. **Fee Calculation Example worksheet -**


Fee_Illustration_RAC_20220728.pdf


Fee_Illustration_RAC_20220728.pdf

List of Additional Attendees (excluding board members)

Interested Parties

Rowland Thompson
Kara Steward
Brad Lovaas
Heather Kazmark
Caleb Carlson
Isaac Hull
Harvey Remz
Emily Alexander
Mary Vihstadt
Andy Weinstein
Heather Trim
Todd Holland
Alissa Wesche
Ken Jenke
Tim Shestek
Stephanie Collier
Katie Doyle
Christopher Finarelli
Alex Alston
Max Martin
Rod Whittaker
Brad Boswell
Megan Daum
McKenna Morrigan
Jennifer Ziegler
Margaret Brown
Elizabeth Curran
Karin Beraitis
Adrian Tan
Abel
John Cook
Holly Chisa
Lauren Shapiro
Brennan Georgianni
Frank Leach
Sabrina Correll
Michael Pleus
Omar Terrie
Charmaine Rodriques
Michelle Zhao

State Agency Staff

Alaina Young, Ecology
Shannon Jones, Ecology
Alli Kingfisher, Ecology
Lori Peterson
Caleb Carlson
Chery Sullivan
Kara Steward
Heather Curtis
Dan Weston
Janine Bogar
Tina Schaefer

Interested Parties	State Agency Staff
Lisa Zwack	
Karen Wehner	
Cliff Webster	
Jeffery Temple	
Carolyn Logue	
Kyla Fisher	
Luxi Chen	
Amber Carter	
Shea Logan	
Lauren DiRe	
Alexandra Savino	
John Chelminiak	
Dylan O'Brien	
Modesto Lebron Deoleo	
David Aremu	
Peter Godlewski	
Mark Smith	
Kevin Mayo	
Aimei Wu	