

# PCR Rule Advisory Committee

## Draft Rule – Part C

### August 18, 2022

- The PCR Draft Rule Advisory Committee met for a follow-up meeting on August 18, 2022 to cover items we didn't have time to discuss in the July 28, 2022 meeting.
- Department of Ecology (Ecology) staff hosted the meeting on Zoom.
- [SmartComments](#) are available for Revised Draft Parts A - D (complete draft)

### Advisory Board members:

Emily Alexander: Darigold

Holly Chisa: Northwest Grocery Association

Kyla Fisher: Ameripen

Christopher Finarelli: Household & Commercial Products Association

Brennan Georgianni: American Cleaning Institute

Sally Jefferson: The Wine Institute

Lauren Shapiro: Personal Care Products Council

Heather Trim: Zero Waste Washington

Not present:

Chris Cary: Tree Top, Inc

John Cook: Niagara Bottling

Megan Daum: American Beverage Association

Kate Eagles: Association of Plastic Recyclers

Charles Knutson: Amazon

Carolyn Logue: Washington Food Industry Association

Mark Smith: Clorox

### Agenda

- Introductions
- Overview of rule adoption timeline
- Part C discussion
- Additional topic discussion

PowerPoint slides available on [PCR Rule Website](#)

### Group Discussion

\*highlighted sections indicate revised language or questions where further review and comments are requested

Temporary adjustments and exclusions from annual PCR content minimums (WAC 173-925-070):

- Member requested draft language in either rule or guidance outlining anticipated turn-around time for Ecology to respond to requests for adjustments to PCR content requirements.
  - Typically the agency requirement is 60 days.

## PCR Content Draft Rule Advisory Committee - Notes Summary

- Member pointed out that in statute, exclusions are granted only for the following year, and need to apply the year before. Member suggested making sure that this is explicitly reflected in the rule language.
- Members asked whether product quality/shelf life, market recycling rates, or production line issues related to elevated PCR content would be considered as factors when requesting PCR adjustment requests.
  - These are several among many types of justification that could be documented and provided when submitting requests for adjustment.
  - Ecology requests input on the types of documentation that could feasibly be provided by producers. What kinds of sources do you use as a producer to track these types of supply chain issues?
- Ecology revised draft language to clarify that PCR requirement adjustments can be initiated by Ecology or producers and a set of factors detailed in the draft rule will be considered. See revised draft language below:
  - (2) (a) The department may annually review and make adjustments to the annual PCR content minimum percentage required for a type of container, covered product, or category of covered product.*
  - (b) Producers may submit requests for adjustments to the annual PCR content minimum percentages. These requests must provide information including:*
    - (i) Producer name, mailing address, and contact information;*
    - (ii) Year for which the temporary adjustment is requested;*
    - (iii) Reasons a temporary adjustment to the minimum PCR content percentage for a covered product or covered product category is needed in order to feasibly meet the requirements;*
    - (iv) Supplemental documentation including documented changes in market conditions, recycling collection rates, capacity of recycling and processing infrastructure, and/or domestic and global PCR content bale availability.*
    - (v) Progress made by producers in achieving the requirements of this chapter.*
    - (vi) Estimated time period that the identified factors impacting PCR feasibility are expected to extend; and*
    - (vii) Any additional information the producer or the department deems necessary to support the request.*
  - (c) For household cleaning product and personal care product containers, this adjustment may not exceed the requirement for the current reporting year and may not be lower than 10%.*
  - (d) The PCR content minimum percentage requirement may not be adjusted for plastic trash bags.*
- Requests for exclusions and adjustments were combined in one subsection in the Version 6 draft. They are now separated and re-drafted (further explanation below) in individual subsections. Ecology requests review and input on the \_\_\_\_\_ that are reflected in WAC 173-925-070 in the next notes section.
  - Under the most recent draft definitions section, federally regulated products were excluded by default from the requirements of the law/rule and were not required to be registered and reported to Ecology.

- Based on further review, the RCW language in the requests for exclusion section of the law (RCW 70A.245.020(8)) states that exclusions for federally regulated products would need to be temporarily granted on an annual basis instead of automatically excluded from all covered products. This language also states that those products must still be registered and reported to Ecology and that producers must annually demonstrate that the products are excluded based on the applicable federal regulations. The specific federal exclusions are spelled out in the RCW as follows:

*(8) The department must temporarily exclude from minimum postconsumer recycled content requirements for the upcoming year any types of covered products in plastic containers for which a producer annually demonstrates to the department by December 31st of a given year that the achievement of postconsumer recycled content requirements in the container material is not technically feasible in order to comply with health or safety requirements of federal law, including the federal laws specified in subsection (7)(b)(v)\* of this section. A producer must continue to register and report consistent with the requirements of this chapter for covered products temporarily excluded from minimum postconsumer recycled content requirements under this subsection.*

*\*(7)(b)(v) The technical feasibility of achieving the minimum postconsumer recycled content requirements in covered products that are regulated under 21 C.F.R., chapter I, subchapter G, 7 U.S.C. Sec. 136, 15 U.S.C. Sec. 1471-1477, 49 C.F.R. Sec. 178.33b, 49 C.F.R. Sec. 173, 40 C.F.R. Sec. 152.10, 15 U.S.C. Sec. 1261-1278, 49 U.S.C. 5101 et seq., 49 C.F.R. Sec. 178.509, 49 C.F.R. Sec. 179.522, 49 C.F.R. Sec. 178.600-609, and other federal laws; and*

- Newly drafted rule language reflects this revised interpretation by:
  - Re-drafting the exclusions in the definition of “covered product”, “beverage container,” and “household cleaning product and personal care product container,” to remove redundancy in product exclusions.
  - Removing the federally regulated products from those exclusions as follows:

*(b) "Covered product" does not include:*

*(i) Rigid plastic containers or bottles that are federally regulated 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 required to be sterile, as regulated by the United States Food and Drug Administration under 21 Code of Federal Regulations, Parts 200, 300 and 800.*

*(ii) Refillable containers sufficiently durable for multiple rotations of their original or similar purpose, and are intended to function in a system of reuse; or*

*(iii) Liners, caps, corks, closures, labels, and other items added externally or internally, but otherwise separate from the structure of the bottle or container.*

- Adding additional registration requirement for producers to demonstrate any product exclusions (if applicable) from that year's PCR content minimums (added in the registration requirements section, Part B, 173-925-040(2)(c) as follows:

*(c) Identification of any products that must be temporarily excluded from PCR content minimum requirements based on criteria in WAC Part C, 173-925-070(1).*

*(i) Cite applicable federal regulation; and*

*(ii) Explain why it is not technically feasible to include the minimum PCR content in a covered product due to health or safety requirements of federal law.*

- Re-drafting the temporary exclusions section in Part C, 173-925-070 as follows:

*(1) (a) The department must grant a temporary exclusion from the minimum PCR content requirements in the following year for those containers or covered products annually demonstrated by producers to be technically infeasible for compliance due to health and safety standards for products federally registered for the containment, protection, delivery, presentation, or distribution of products regulated under 21 C.F.R., chapter I, subchapter G, 7 U.S.C. Sec. 136, 15 U.S.C. Sec. 1471-1477, 49 C.F.R. Sec. 178.33b, 49 C.F.R. Sec. 173, 40 C.F.R. Sec. 152.10, 15 U.S.C. Sec. 1261-1278, 49 U.S.C. 5101 et seq., 49 C.F.R. Sec. 178.509, 49 C.F.R. Sec. 179.522, 49 C.F.R. Sec. 178.600-609, and other federal laws.*

*(b) No later than December 31st of the year that PCR content percentage requirements take effect or increase for a given category, producers must demonstrate that the covered products are excluded based on any of the above conditions.*

*(c) Producers of products temporarily excluded from the annual minimum PCR content percentage requirements for a given reporting year must continue to register and report those products according to the requirements in Part B (2) and (3) of this chapter.*

*(d) Annual requests for temporary exclusion of federally registered products must include:*

*(i) Producer name, mailing address, and contact information;*

*(ii) Year for which the temporary exclusion is required;*

*(iii) Description of the covered product category or container for which exclusion is required;*

*(iv) Identification of the federal regulation(s) that apply to the container, covered product, or category of covered product; and*

*(v) Any additional information the producer or the department deems necessary to support the request.*

#### **Verification of data**

- Member asked what type of documentation would be sufficient for verifying data.
  - Ecology requests suggestions for sources of information that stakeholders use.

- For certification/third party verification, members discussed BlueGreen/RMS certifications be sufficient, and would like clear guidance on allowable third party certification practices to be posted to the web.
  - Ecology cannot identify specific certification systems or produce a list of those that are allowed. Ecology will provide clear criteria for reputable/approved certification systems in guidance document.

**Input on “co-branding” scenarios:**

- Ecology requested input on scenarios involving co-brands as they related to producer responsibility. Shannon described examples from WA E-cycle program as follows:
  - There were TVs sold as SpongeBob. Even though Emerson Radio Corp is cobranded and shown on the back of the TV, Nickelodeon registered. They are the owner of SpongeBob and didn't contest registration. It was sold as a Nickelodeon SpongeBob TV.*
  - There were DC Comic Batman TVs. DC Comics/Warner Brothers refused to register and felt the responsible party was Emerson Radio Corp (similar to the SpongeBob TV). They felt the Batman logo is just “art” and not a brand. They were considered non-compliant since they wouldn't register.*
  - There were Google Nexus branded tablets cobranded with Asus. We negotiated between Google and Asus and required Google to register because Nexus was the dominant brand.*
- Member described how this relates to the critical nature of the definition of “producer”. The member explained that contract agreements for the development of a product may determine whether the brand is the “producer” versus a logo on the product/packaging. Member stated that the producer definition should not be so restrictive to allow room for figuring out who is truly responsible for the direction of the packaging. Member would like to have further discussion on the definition of “producer” with the rest of the committee since many were absent from this meeting.
  - Ecology requests additional input as to how this would be applied to de minimis producers.
  - Another member suggested a combination of both guideposts for producer responsibility in the rule and opportunities for brands/producers to make their case, using data or legal documentation (contracts, for example) to establish their identity as a producer or not.
  - Member stated that there are a number of producers working across states and trying to align with requirements under each state’s laws. Having some flexibility to comply consistently among these laws would help.
  - Another member clarified that this consideration would relate to the definition of producers.

**Input on “plastic aerosol containers” exclusion:**

- See section above on temporary exclusions for certain federally regulated product. New language would require an annual demonstration and documentation of the federal law that prevents producer from incorporating the minimum PCR content into their container. There is not an automatic exclusion from the WA PCR requirements related to the federal regulations. Instead, exclusions based on federal regulations must annually be demonstrated and temporarily approved by Ecology.
- One member reiterated that any blanket exclusions related to technical production criteria would be problematic, because packaging designs will continue to change.
- Member pointed out that DOT has a standard definition for aerosols and that federal law states that PCR cannot be used. Potential solution would be to cross-reference the federal law in the rule. That way if this changes down the road, the rule would update accordingly.
  - Under the RCW and the revised language this situation would require the producer to annually provide documentation and references to the federal laws that prohibit plastic aerosol containers from incorporating PCR content into their packaging containers. If applicable and appropriately cited, Ecology must temporarily grant that exclusion for the following year.
  - These products would still have to be registered, reported, and incorporated in fee calculation. Oversight of this might also impact workload analysis costs.
- One member pointed out, regarding federal regulations exempting products, the CARES act has brought about a lot of FDA actions that are not regulations. FDA guidance on drug volume reporting, for example. Non-binding, but can be used for exercising enforcement discretion. Is there a way that we can make it clear in the rule language that it is intended to cover enforceable requirements at the time? Maybe instead of “federal regulations,” “federal statute, registration, or regulations?”
  - Ecology addresses this by revising the requirement in congruence with the RCW and requiring producers to annually demonstrate whether or not federal regulations render their products technically unable to meet PCR content requirements. Since these exclusions are temporary and must be demonstrated every year, any changes in statute, registration, or regulation could be cited.

**Input on Part D – Enforcement:**

- Audits of Information
- Process for Non-Compliance
- Penalties
  - Calculation of Penalty Amount
  - Penalty Deadlines
  - Adjustments to Penalties
  - Corrective Action Plans
- One member asked for specifics on the type of information needed for an audit of compliance.
  - This information would likely be outlined by the department at the time of an audit, but is described in the requirements.

## Meeting to-do items

- Register for [September 29, 2022, 9:00 am – 12:00 pm \(PST\)](#) Zoom meeting where we will discuss Draft Rule part D- Enforcement.
- [SmartComments](#) are open for Revised Draft A –D

## For more information:

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

## List of Attendees (excluding committee members)

Interested Parties	State Agency Staff
Aimei Wu	Alaina Young, Ecology
Alejandra Viso	Shannon Jones, Ecology
Alissa Wesche	Alli Kingfisher, Ecology
Allison David	Christina Kullberg, Ecology
Charmaine Rodriques	Heather Curtis, Ecology
Clarence Rasquinha	Kara Steward, Ecology
Isaac Hull	Chery Sullivan, Ecology
Jan Kapp	Tina Schaefer, Ecology
John Chelminiak	Lori Peterson, Ecology
Ken Jenke	
Kevin Mayo	
Kirk Spiegel	
Laurie Pan	
Mary Vihstadt	
Max Martin	
Pamela Barrow	
Rebecca Lau	
Sabrina Correll	
Scott Sigmon	
Shea Logan	
Stephanie Collier	
Taylor Loeber	
Tom McBride	
Viola Johnson Jacobs	