

# PCRC Rule Advisory Committee

## Draft Rule – Parts A-D

### September 29, 2022

- The PCRC Draft Rule Advisory Committee met on September 29, 2022
- Department of Ecology (Ecology) staff hosted the meeting on Zoom.
- [SmartComments](#) are available for Revised Draft Parts A – D, Version 9 to be posted the week of October 10th
- Final comments on the Draft Rule are due by November 1, 2022.

### Advisory Board members:

Chris Cary: Tree Top, Inc

Emily Alexander: Darigold

Holly Chisa: Northwest Grocery Association

John Cook: Niagara Bottling

Megan Daum: American Beverage Association

Kate Eagles: Association of Plastic Recyclers

Kyla Fisher: Ameripen

Christopher Finarelli: Household & Commercial Products Association

Brennan Georgianni: American Cleaning Institute

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

Not present:

Charles Knutson: Amazon

### Agenda

- Introductions
- Overview of rule adoption timeline
  - Comments due 11/01/22
  - ECY 2023 workload analysis 01/2023
  - Economic analysis- first quarter 2023
  - Rule proposal in state register ~March, 2023
  - Registration deadline – April, 2023
  - 60-day public comment/hearings- April-May, 2023
  - Invoices and requests for adjustments to minimum PCRC rate due – June, 2023
  - Rule adoption ~September, 2023 (must be less than 180 days after rule proposal)
  - Trash bag and beverage reporting – January – April 2024
- Parts A-B discussion
- Fee calculation presentation – Lori Peterson
- Part C-D discussion

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

## Group Discussion

### General:

- The committee discussed Version 8 for the September 29<sup>th</sup> meeting. Ecology will post and share the revised Version 9 for [SmartComment](#) the week of October 10th. You may comment on either version.
- Ecology will send an email to the advisory committee as well as an email to our email subscriber list when Version 9 is available for comment.
- Revisions in Version 8 are noted in the comments section of the document.
- Going forward all references to post-consumer recycled content will be “PCRC”
- We are seeking input on the registration process and database. A survey will be sent to the [PCRC GovDelivery subscriber list](#).

### Input on Part A –:

- “Covered product” definition
  - Members discussed categories of products specifically excluded from the definition of covered product, and the need for clarity over which aspects of the law exclusions apply for a given product.
  - In summary:
    - “PCRC products” are excluded only under circumstances and processes outlined in WAC 173-925-070(1)(a-f) and then, only from the PCRC minimum percentage requirements.
    - Exclusions from “covered products” are excluded from all requirements (registration, reporting, fees, and PCRC minimums). These exclusions include:
      - Federally regulated drugs (prescription and OTC)
      - Dietary supplements
      - Medical devices or biological products required to be sterile
      - Refillable containers
      - Liners, caps, corks, closures, etc.
        - Ecology added “Aerosols regulated under 49 CFR § 178.33b” to this list of exclusions in Version 9.
  - Member requested that the language should state “covered products *and packaging*” for clarity.
  - Member expressed concern about the inclusion of PCRC in biohazard waste bags used to contain infectious, soiled, or contaminated medical linens and waste.
    - Ecology added these types of bags to the list of exclusions from the draft definition “covered products” in Version 9.
    - **Please provide feedback on this revision.**
  - Member added that the exclusion of drugs and non-prescription drugs should include “as regulated by the FDA”
    - Ecology added this to the draft language in Version 9
  - Members discussed bio-based plastics and compostable plastics. They discussed the differences between bio-based plastics, petrol-based plastics, compostable plastics and plastics with oxo-degradable additives. They discussed which of these can contain PCRC and

whether or not these types of plastics can contain PCRC or should be considered substitutes for PCRC.

- These are not called out in rule and are not likely to be. Factors such as environmental/carbon impacts of bio-based vs petrol-based plastics, technologies for mixing bio-based plastic into petrol-based plastic as PCR, consumer education for proper sorting, product function, and life cycle analyses would be necessary to consider.
    - Some expressed the need to clarify about bio-based plastics in relation to this law, one way or another. This may not be in the scope of the rule
  - Member explained the two different categories of bio-based plastics, noting that some biodegradable plastics are fully petroleum based.
  - Member stated that if the intent of the law is to reduce the production of plastic from fossil fuels, bio-based plastics are a good solution
  - Ecology requests that the committee provide more information about the ways bio-plastics and compostable plastics pertain to compliance with this law, and suggested language to address this topic. This information may be helpful as we draft PCRC Law guidance.
- Definition of “beverage”:
    - Member noted the need for consistency with other states, particularly noting exclusions from “beverage” in a number of other states’ bottle bills
      - Another member countered that the statute is not based on or intended to function as a bottle bill.
    - Members agreed on the exclusion of syrups and liquid concentrates from the definition of beverages.
    - After the meeting, a member asked whether juices containing vitamin C (ascorbic acid) are considered dietary supplements excluded from the law. Based on additional research after the meeting, Ecology found that these products are not excluded unless they contain a “supplement facts” box on the container, indicating that the product is a dietary supplement.
  - Definition of “plastic beverage container”:
    - Member stated that the “plastic beverage container” remains too broad and suggested providing clarity that cups and thermoforms are not included—suggests removing “other rigid plastic containers”
      - Ecology added “plastic cups and thermoforms” the list of items excluded from the draft definition of “plastic beverage container” in Version 9
    - Suggested including similar language that is in (18) “HHCP and PCP containers,” where neck is smaller than the base. Could include some other things that are not included in plastic beverage container.
  - “Post-consumer recycled content” definition
    - Ecology received previous feedback that exclusions from “post-consumer recycled content” should only include “*virgin* industrial and pre-consumer sources”. The purpose is to allow, for example, a pre-form that contains PCRC, to be re-ground and counted as PCRC in the post-consumer mix.

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- Ecology noted that even if PCRC were included in pre-consumer or industrial sources, it would be very difficult to track and measure.
- Another member supported this concern.
- Rule language will likely continue to exclude all “industrial and pre-consumer sources”
- Members pointed out ambiguity in the wording of the PCRC definition
  - Member commented that we need clarity that plastic trash bags are included as PCRC since they are recovered, washed, and incorporated into PCRC. Member suggests that the phrase “used for the empty plastic packaging of a covered product” should say something like “incorporated into a plastic trash bag, plastic beverage container, plastic household cleaning container, or plastic personal care product container.” Otherwise, the definition doesn’t define PCRC relative to trash bags at all and – as far as rigid and beverage containers are concerned – the term “empty plastic packaging” isn’t defined
    - Ecology will review this language based on this feedback. Ecology revised the draft definition in the Version 9 draft.
  - Member states that wording of first sentence is unclear. Need to add clarity that PCRC refers to any post-consumer recycled resins that are incorporated into new products.
    - Clarified that PCRC does not have to come from covered product sources. Only has to come from post-consumer sources.
- Personal Care Products
  - Clarified that the law applies only to personal care products sold in containers between 8 oz and 5 gallons, and that producers do not need to report any products sold in less than 8 oz containers.
- Federal preemptions/FIFRA exclusions:
  - References for statute and current rule language:
    - RCW covered product definition:
      - RCW 245.010(4)(a) "Covered product" means an **item** in one of the following categories **subject to minimum postconsumer recycled content requirements**...
      - (b) "Covered product" does not include any type of container or bag for which the state is preempted from regulating content of the container material or bag material under federal law.
  - Draft rule covered product definition (divided into two definitions):
    - (4) (a) "**Covered products**" means all beverages, trash bags, personal care products, and household cleaning products that are subject the requirements of this chapter, including registration, reporting, fee payment, and PCRC minimum percentages, regardless of whether they are subject to PCRC minimum requirements in accordance with the timeline in 173-925-040(3)(a).
    - (b) Covered products does not include:
      - (i) Rigid plastic containers or bottles that are federally regulated for the containment, protection, delivery, presentation, or distribution of;
      - (ii) A prescription or non-prescription drug;
      - (iii) Dietary supplements as defined in this section
      - (iv) 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.
      - (v) Aerosols regulated under 49 C.F.R. § 178.33b .\*

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

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

*\*Considering this addition to the exclusions*

(22)(a) "PCRC Products" means packaged items in one of the following categories which are required to meet and report PCRC minimum requirements according to the timeline in 173-925-040(3)(a):

- **RCW requirement to annually document excluded products, but to continue reporting and registering:**

RCW 70A.245.020(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): (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*

- **Draft rule language around temporary exclusions from PCRC based on federal health and safety standards:**

(1) (a) *The department must grant a temporary exclusion from the minimum PCRC requirements when the inclusion of PCRC for the following year is technically infeasible due to federal health and safety standards for the containment, protection, delivery, presentation, or distribution of products 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, or other federal laws.*

(b) *In order for the department to consider and grant temporary exclusions from PCRC requirements, producers must annually submit documentation that identifies the health and safety standards cited in (1)(a) of this section that render the inclusion of PCRC infeasible for a type of PCRC product packaging.*

(i) *Producers must submit documentation of excluded products to the department no later than December 31 of the year before the minimum PCRC percentage requirements take effect for a given category.*

(c) *To be excluded from the PCRC minimum requirements, producers must annually submit information documenting that the PCRC products are excluded, including:*

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

(ii) *Excluded product brand names*

(iii) *Total resin weight of PCRC product packaging temporarily excluded from PCRC requirements.*

(iv) *Description of the PCRC product category or container for which exclusion applies;*

(v) *Citation of the federal regulation(s) that renders inclusion of PCRC in the material composition of the product packaging infeasible; or*

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

*(d) Federal regulations cited to document exclusion from PCRC requirements must be specific to the requirements for material composition of the packaging or bag material.*

*(e) The weight of products excluded according to this subsection must be included in the reported total pounds of resin.*

*(f) A person who submits documentation of excluded product packaging to Ecology must comply with the PCRC requirements of this chapter until Ecology confirms the exclusion.*

- Member expressed concern around products regulated or registered under FIFRA, including feasibility concerns around how PCRC will interact with products. Comments that the preemptions discussed in the definition of “covered product” should override the requirements in RCW 70A.245.020(8) and should automatically exclude all FIFRA products.
  - Members cited Supreme Court rulings believed to set a legal standard for FIFRA preemption based on the language in [7 U.S. Code § 136v](#) which states, for FIFRA products, any state “shall not impose or continue in effect any *requirements* for labeling or *packaging* in addition to or different from those required” under federal law.
  - Ecology’s interpretation is that the requirements that are subject to preemption must be specific to the material content of the container, not the design, labeling, or other unrelated requirement.
  - Member stated that preemption is in federal jurisdiction and only a federal judge can determine this. Feels that RCW 70A.245 goes beyond what is allowed in FIFRA and that FIFRA regulated or registered products must be preempted. Advises against looking to state law on this as it is a federal issue.
  - Some members contest that the federal law should preempt the whole area of packaging, not just PCRC requirements.
- Ecology agrees that there are some containers that should be excluded based on documented technical feasibility issues that would contradict federal laws around the material content of packaging.
  - We interpret the law’s full exclusion from the definition of “covered product” to apply only to those federal laws that broadly and clearly preempt state PCR content requirements, without regard to any question of the technical feasibility of complying with the federal law while also meeting state PCRC requirements.
  - At present, we are unaware of any such federal laws other than perhaps some of the laws that apply to the products automatically excluded from all the requirements of the chapter by exemption from the definition of “beverage container” and “plastic household cleaning product or personal care product container” (plastic bottles that are medical devices, medical products that are required to be sterile, and nonprescription and prescription drugs, dietary supplements as defined in RCW 82.08.0293, and packaging used for those products.)
  - One type of product which may be considered for automatic exclusion from all requirements is plastic aerosol containers. The federal laws around these types of products are specific to PCRC. Ecology is considering adding aerosols to the list of items excluded from the definition of covered products.

- Another member notes that federal laws and technological advancements in packaging can always change, which supports the need for annual demonstration of technical infeasibility on the basis of federal law requirements.
- Importantly, exclusion from PCRC requirements on this basis does NOT exclude products from meeting the other requirements of the law, including registration and fees.
  - Ecology is working with our legal team to determine whether producers must pay fees on products excluded from PCRC requirements based on the technical infeasibility process detailed above.
    - Member disagrees with the interpretation that products demonstrated to be temporarily excluded based on technical infeasibility must pay fees on the weight of those products.
    - Member noted that the issue of whether or not products excluded on this basis must pay a registration fee is not insignificant. Questions why a preempted product should have to pay to register, noting that the costs associated with this will be passed on to the consumer.
- Members expressed concern about the uncertainty in Ecology's annual discretion to accept or deny a producer's documentation/demonstration of exclusion based on technical infeasibility to meet federal health and safety standards.
  - For example, a producer could operate under the assumption that their product is excluded from PCRC requirements and find themselves out of compliance if Ecology disputes that exclusion.
  - Members suggested that, to address this issue, Ecology maintain a published list of products considered excluded based on federal preemption.
  - Ecology can consider creating this resource, but it would not replace the requirement for producers to annually document and demonstrate technical infeasibility to include PCRC in certain federally regulated products. It may take several years of registration for Ecology to ascertain specific products from producers' annual demonstrations of exclusion.
  - It is likely that the process for annual demonstration to receive temporary exclusion would be built into the registration and reporting database for the department to review. If the producer does not cite the federal regulatory requirement and technical achievability rationale demonstrating that PCRC cannot feasibly be included in the packaging, then the PCRC minimums would still apply.
- Ecology would like to better understand members' concern over the requirement to annually demonstrate exclusions from PCRC requirements. Is the concern over the requirement to continue registering and reporting products demonstrated to be excluded? Is the concern around the uncertainty associated with Ecology's discretion to exclude certain products on this basis?
- Ecology and other members request references to federal laws that specifically address and disallow the inclusion of recycled content in packaging. These can be explicit, as they are in the federal regulations for aerosol containers, or they can be implicit, as they

relate to PCRC inclusion causing a product to for example, fail certain package testing requirements

### Definition of “Producer”

- Member discussed scenarios under which a manufacturer that produces for a variety of producers would ideally report on behalf of all those brands. Member supported this by explaining that resin is not purchased for individual brands, and that allowing for third party registration allows for a transparent report based upon mass balance attribution.
  - States that this is the process they follow for all brands under CA’s PCRC law
  - Ecology asks whether there is an issue, if you are registering on behalf of all brands, with naming those brands in your registration? We need this information in order to determine producer compliance.
  - Ecology asked, if manufacturers are registering on behalf of producers, are they intending to pay the required fees for all the brands that they registered for?
    - Member responded that there is no problem listing brands, and that costs will be distributed among brands.
  - Ecology asks, if equally distributing PCRC data via mass balance attribution, how can the accuracy of a single brand’s resin weight be maintained? If a producer’s resin data cannot be individually accounted for, it may be that mass balance reporting on behalf of a number of producers is prohibited, but that individual producers can submit data calculated from mass balance attribution to an entity registering on their behalf.
    - Ecology requests clarifying language to make this provision more clear.
    - Another member concurs that mass balance must be determined at the producer/brand owner level.
      - Another member explains that this would be a burden to ascertain
- For this year’s implementation, Ecology considered the producer any person who accepts contractual responsibility for decisions about the material composition of the packaging of a covered product. The updated draft rule definition of producer more specifically limits the responsibility of a producer to brand owners. For this reason, a manufacturer registering on behalf of a brand does not mean that the manufacturer is the responsible producer. The brand owner is still responsible for compliance and for registering any other products not manufactured by the person registering products on their behalf.
  - Member reiterates that Ecology should re-open the definition of producer, explaining that while a retailer owns the brand, they may not have control over the packaging. Member feels that the “producer” definition has strayed from the law. Points out that OR and other states do not point to the brand owner.
  - Ecology maintains that if a brand owner does not have control over the packaging, this is something brand owners will have to discuss with their contracted manufacturers.

### Part B – Fee calculations

- Member asked if producers could expect to see a credit for recent fee changes on the invoice and whether it would be specific as to why the credit was received?
  - Ecology will provide some limited information on invoices, but will also add supplementary information included with invoice.

Input on Part B – Registering and Reporting:

- Member sought clarity on what Ecology considers a “late producer?”
  - Technically, anyone who registers after the April 1 deadline is a late producer, which means their resin data can’t be incorporated in the calculation and equitable distribution of fees. For the purpose of enforcement, late producers would still be granted the enforcement process and timeline established in the Part D enforcement section.
  - Member suggested using “noncompliant producer” instead of “late producer”
- Member commented on the significantly higher fees in WA compared to other PCRC law states.
  - Washington’s law requires Ecology to collect fees to cover the agency’s cost of oversight and implementation.
  - Member commented that, in general, we could anticipate the costs will drop in a couple of years.
    - In general, that seems likely, especially as rulemaking efforts are completed. But a number of factors including staff workload to consider exemption requests, amending this law to add new products to the PCRC minimums, actual efforts for enforcement and compliance costs, and unforeseen technical challenges could prevent costs from significantly decreasing.

Part C – PCRC Calculation and Requirements

- Member asked if Fee calculations would be altered for this year based on changes in interpretation that change how the law applies to them, since this covers fee calculations.
- Third party certification/verification
  - Member asked whether 3<sup>rd</sup> party certification just verifies the inclusion of PCRC resin.
    - Ecology is not authorized to require 3<sup>rd</sup> party certification under the law, so we added the self-attestation language in addition to the option to get 3<sup>rd</sup> party certified. Ecology cannot provide a list of approved 3<sup>rd</sup> party certifiers, as that would create concerns around favoritism and bias.
      - The Association of Plastic Recyclers (APR) offers help as a resource on this topic. Concerned that some may not adhere to PCRC requirements.
    - Ecology hopes to address this with language around authority to audit.
      - Member expressed that 3<sup>rd</sup> party certification would be a regulatory and financial burden that brings no value. Assures that producers plan on self-reporting and do not want to add complexity and cost to meeting requirements.
        - Other members support allowance for self-attestation of accurate data
  - Member asks if eco-modulation can be included in the calculation of fees?
    - The law does not provide Ecology with the authority to consider eco-modulation of fees. The Department can only establish the equitable distribution of fees to cover costs.
    - Member argues that the language in RCW could be interpreted to allow the Dept. to keep the door open to recalculate how fees are assigned. “Equitable” could include producers that are using PCRC at or above the requirement
    - Ecology investigated other variables that we could use to adjust the fees, but ultimately found that the language was too vague.

- Confidentiality:
  - If registering on behalf of other producers, annual requests for confidentiality may create danger for breach of confidentiality with brands that want to keep their PCRC suppliers confidential
    - Ecology is working with legal advisers to see if we can allow granted confidentiality to carry year to year (rather than having to renew the request annually).
      - Multiple members support the streamlining of this process.

Input on Part D – Enforcement:

- Member noted the law’s specific language against allowing producers of trash bags to request annual PCRC adjustments. Does not understand why this industry would be excluded from that option. Producers of trash bags need some kind of options when PCRC requirements are not feasible.
- Attendee explains that the PCRC (LDPE / LLDPE - #4) is currently not readily recycled or available in the US market, so the availability of this PCRC for manufacturing trash bags / can liners / waste bags is not available in quantities to meet PCRC requirements.
  - The law is explicit that trash bag producers may not request annual adjustments, and Ecology can’t speak to the intent of that language. The law would have to be amended to address this.
  - Ecology could address this by applying discretion and considering supply shortages when assessing penalties, waivers, penalty reductions, and compliance plans.

Other items:

- Final draft rule language (version 9) will be released before mid-October
- Final comments on the draft rule language are due by 11/1/2022

## Meeting to-do items

- Version 9 [SmartComments](#) open soon for Revised Draft A –D
- Send a notice to the interested parties email list when version 9 is posted.
- Final comments deadline – November 1, 2022

## 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 board members)

### Interested Parties

Isaac Hull, Karin Beraitis, Harvey Remz, Brad Lovaas, Sam Schlaich, Alissa Wesche, Grant Nelson, Nell Henry, Alex Alston, Kevin Mayo, Lauren Janes, Rebecca Lau, Dylan O'Brien, Jennifer, Varela, Viola Johnson Jacobs, Laurie Pan, Ken Jenke, Jennifer Ziegler, Scott Sigmon, Andy Weinstein, Kim Holmes, Michelle Zhao, Omar Terrie, Mary Vihstadt, Kris Quigley, Brendan Flanagan, Allison David, Sabrina Correll, Stacie Jacobs, Frank Leach, Margaret Brown, Mike Sauer, Ross Holthouse, Taylor Loeber, Clarence Rasquinha, Patrick Santelli, Lindsay Stovall, Jared Rothstein, Michael Pratt, Rod Whittaker, Max Martin, Andrew Brown, Jameson Salmon, Adrian Tan, Melissa Brice, Lucy Pierce, Rebecca Thomas, Tim Shestek, Intisar Surur, Joseph Kim, Alexandra Savino, Charlie Schwarze, Molly Blessing, Victoria Peipert, Charmaine Rodriques, Jessica Koval, Tina Wiechman, David Aremu, Jan Kapp

### State Agency Staff

Caleb Carlson, Shannon Jones, Ali Kingfisher, Janine Bogar, Christina Kullberg, Chery Sullivan, Lori Peterson, Tina Schaefer, Kara Steward