

WSR 23-10-062

PROPOSED RULES

DEPARTMENT OF ECOLOGY

[Order 21-09—Filed May 2, 2023, 8:28 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-22-111.

Title of Rule and Other Identifying Information: The Washington department of ecology (ecology) proposes new chapter 173-925 WAC, Post-consumer recycled content in plastic containers. This new chapter implements RCW 70A.245.010 through [70A.245.]050 and [70A.245].090 RCW.

For more information on this rule making, visit <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-925>.

Hearing Location(s): On June 8, 2023, at 10:00 a.m. PST. Register in advance for the online hearing <https://waecy-wa-gov.zoom.us/meeting/register/tZcsdeytqTojHtQHdBZHJwVh58F-Si6NToW3>; and on June 15, 2023, at 1:00 p.m. PST. Register in advance for the online hearing <https://waecy-wa-gov.zoom.us/meeting/register/tZIqumtrDgqGNaoWkTz9C0zvtePB7awTOBD>. Ecology is hosting this event online and will provide a summary of the proposed rule, a question-and-answer session, and a formal hearing. You may attend this event from any device with internet access. **Please register in advance. After registering, you will receive a confirmation email containing information about joining the meeting.**

Date of Intended Adoption: October 29, 2023.

Submit Written Comments to: Shannon Jones, Send US mail to: Department of Ecology, Solid Waste Management Program, P.O. Box 47600, Olympia, WA 98504-7600, email recycledcontent@ecy.wa.gov, website <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-925>, e-Comment portal <https://swm.ecology.commentinput.com/?id=gDMcK>, by July 1, 2023.

Assistance for Persons with Disabilities: Contact ecology Americans with Disabilities Act coordinator, phone 360-407-6831, for Washington relay service or TTY call 711 or 877-833-6341, email ecyADAcordinator@ecy.wa.gov, visit <https://ecology.wa.gov/accessibility>, request for reasonable accommodation form <https://ecology.wa.gov/About-us/Accountability-transparency/Accessibility/Request-for-reasonable-accommodation>, by May 31, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The new rule will implement the requirements in chapter 70A.245 RCW, Recycling, waste, and litter reduction, to establish a post-consumer recycled content (PCRC) program for covered products. Producers of covered products will have to meet the PCRC requirements as well as annually register, pay agency fees, and report.

The law requires ecology to:

- Prepare an annual workload analysis identifying the agency cost to implement, administer, and enforce the law, and offer the analysis for public comment.
- Adopt rules that establish a PCRC program for producers of covered products and require them to annually register, pay agency fees, and report.

The rule will:

- Define terms and clarify intent of the law.

- Establish equitable producer fees required to fund ecology's administration and oversight of the PCRC program for covered products.
- Specify the information producers are required to provide at registration and in annual reports.
- Establish the process ecology will follow for:
 - o Conducting audits and investigations of producers' annual reports.
 - o Measuring the amount and methods for assessing PCRC.
 - o Reviewing and adjusting PCRC rates.
 - o Excluding certain plastic containers or elements of containers from PCRC requirements.
 - o Determining technical feasibility of meeting PCRC rates.
 - o Establishing corrective action requirements for producers out of compliance.
 - o Determining penalty reductions.

Reasons Supporting Proposal: The 2021 legislature passed chapter 70A.245 RCW to increase recycled content in specific types of plastic packaging to improve plastic packaging collection, processing, and markets. Rules are required to establish the process and procedures for regulatory compliance, producer payment of annual fees, and ecology oversight.

Many consumer brands have committed to voluntary recycled content standards for their plastic bottles, but very few have met those commitments. Mandated PCRC requirements are presumed to motivate increased recovery of plastic packaging in order to provide recyclable feedstock for producers to meet these requirements. Use of recycled content plastic will reduce the production and use of virgin plastic to manufacture plastic containers, thereby reducing associated greenhouse gas emissions.

The law provides for adjustment of the PCRC targets, exclusions from meeting the targets under certain conditions, and corrective action plans to help noncompliant producers reach the targets, as well as penalty reductions.

Statutory Authority for Adoption: Chapter 70A.245.020 and [70A.245].090 RCW, Recycling, waste, and litter reduction.

Statute Being Implemented: RCW 70A.245.010 through [70A.245].050 and {70A.245}.090 RCW, Recycling, waste, and litter reduction.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of ecology, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Shannon Jones, Lacey, WA, 360-742-9874.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Shannon Jones, Department of Ecology, Solid Waste Management Program, P.O. Box 47600, Olympia, WA 98504-7600, phone 360-742-9874, for Washington relay service or TTY call 711 or 877-833-6341, email recycledcontent@ecy.wa.gov.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; rules only correct typo-

graphical errors, make address or name changes, or clarify language of a rule without changing its effect; and rule content is explicitly and specifically dictated by statute. Scope of exemption for rule proposal:

Is partially exempt:

Explanation of partial exemptions: Ecology baselines are typically complex, consisting of multiple requirements fully or partially specified by existing rules, statutes, or federal laws. Where the proposed rule differs from this baseline of existing requirements, it is typically subject to (i.e., not exempt from) analysis required under the Regulatory Fairness Act (RFA), chapter 19.85 RCW, based on meeting criteria referenced in RCW 19.85.025(3) as defined by the Administrative Procedure Act in RCW 34.05.310. The small business economic impact statement (SBEIS) below includes a summary of the baseline for this rule making, and whether or how the proposed rule differs from the baseline. We identify relevant RFA exemptions (if any) for each set of requirements.

The proposed rule does impose more-than-minor costs on businesses.

SBEIS

This SBEIS presents the:

- Compliance requirements of the proposed rule.
- Results of the analysis of relative compliance cost burden.
- Consideration of lost sales or revenue.
- Cost-mitigating action taken by ecology, if required.
- Small business and local government consultation.
- Industries likely impacted by the proposed rule.
- Expected net impact on jobs statewide.

A small business is defined by RFA as having 50 or fewer employees. Estimated costs are determined as compared to the existing regulatory environment, the regulations in the absence of the rule. The SBEIS only considers costs to "businesses in an industry" in Washington state. This means that impacts, for this document, are not evaluated for government agencies.

The existing regulatory environment is called the "baseline" in this document. It includes only existing laws and rules at federal and state levels.

This information is excerpted from ecology's complete set of regulatory analyses for this rule making. For complete discussion of the likely costs, benefits, minimum compliance burden, and relative burden on small businesses, see the associated regulatory analyses document (**Ecology publication no. 23-07-031, April 2023**). We have retained section numbers to facilitate cross-referencing.

COMPLIANCE REQUIREMENTS OF THE PROPOSED RULE, INCLUDING PROFESSIONAL SERVICES: Baseline for this rule making: The baseline for our analyses generally consists of existing rules and laws and their requirements. This is what allows us to make a consistent comparison between the state of the world with and without the proposed rule.

For this rule making, the baseline includes:

- RCW 70A.245.010 Definitions.
- RCW 70A.245.020 Postconsumer recycled content.

- RCW 70A.245.030 Producer reporting requirements.
- RCW 70A.245.040 Penalties for postconsumer recycled content requirements—Penalty.
- RCW 70A.245.050 Penalties for registration, labeling, and reporting.
- RCW 70A.245.090 Department duties—Rule making.

The proposed rule: 2.3.1 Adding or Clarifying Definitions Necessary for Implementation of the Rule: We don't expect the proposed definitions to result in significant impacts in the aggregate. The proposed definition of a producer provides more clarity on the scope of producers relative to the baseline interpretation:

- **Producer:** This definition would shift compliance burden to brand owners of products manufactured by other entities. Overall compliance burden would be the same, but redistributed to different parties, including retailers that are brand owners. Associated costs and/or benefits are reflected in estimates that are based on the number and types of producers. Affected industries, as well as output and employment impacts of costs distributed across them, are discussed in Chapter 7.

The proposed definition of a household cleaning product provides more clarity on the scope of covered products depending on baseline interpretation:

- **Household cleaning product:** The baseline includes "household cleaning product" as a subset of its definition of "household cleaning and personal care product" but does not offer any specificity. The proposed definition would clarify what is meant by "household" in this context, and would potentially expand the coverage of the program, depending on the interpretation of the baseline statutory language. Associated costs and/or benefits are reflected in estimates that are based on the number and types of producers.

The impact of these proposed definitions depends on the context of how they are used in the rest of the rule, and their resulting costs and/or benefits (see sections below). Other proposed definitions would add or clarify technical terms needed to implement the proposed rule. This section of the proposed rule provides clarifications, which are exempt under RCW 34.05.310 (4) (d).

2.3.2 Setting requirements for registration and reporting: We expect this section of the proposed rule to result in costs of additional producer effort during registration and reporting, and benefits of full information about producers to facilitate accurate data and any needed interactions related to implementation and enforcement. The proposed rule would not require all producers to certify their reports beyond attestation as to their accuracy (this would be a decision made by the producer) and this flexibility would also impact ecology oversight costs by affecting the need for data checking, audits, and other quality assurance activities. This section of the proposed rule includes elements dictated by statute, which are exempt under RCW 34.05.310 (4) (e).

2.3.3 Establishing fee allocation methods and billing procedures: This section of the proposed rule would establish the methods and procedures required for rule implementation regarding fee calculation, allocation, billing adjustments, and due date setting for the payments. We expect this section of the proposed rule to result in costs

of producer fees, as well as benefits of meeting the statutory requirement to fully fund program costs, and the added value they provide to producers in meeting the baseline law. Transparency in the fee process also potentially improves the ability of producers to plan. Division of fees into the program administration and oversight fee categories gives producers confidence that they are only paying into the portion of oversight which actively applies to them within a given reporting year (meaning producers not yet required to meet PCRC minimum requirements would only have to pay the overall program administration fee and not the PCRC oversight fee). This section of the proposed rule includes elements dictated by statute, which are exempt under RCW 34.05.310 (4) (e).

2.3.4 Adding specific requirements for PCRC weight calculations:

This section of the proposed rule would establish standard options for PCRC weight and percentage calculation for reporting. We do not expect these additional specifications to result in costs as compared to the baseline, as:

- The statute requires the reporting itself, with the implicit expectation that it be accurate.
- The proposed rule facilitates compliance by specifying data calculation methods that meet accuracy requirements, but also allows producers to use alternative methods if they are accurate.

We do not expect this section of the proposed rule to result in benefits beyond reducing potential time it might take under the baseline for producers and ecology to align data and expectations (which would result in additional interactions and potentially delay verification of compliance or identification of issues with compliance). This section of the proposed rule includes elements dictated by statute, which are exempt under RCW 34.05.310 (4) (e). It also clarifies language, which is exempt under RCW 34.05.310 (4) (d).

2.3.5 Establishing requirements for temporary exclusion and adjustment requests: We expect this section of the proposed rule to result in costs of providing necessary documentation in support of exclusions and adjustments. It would also result in benefits of better balance between the compliance requirements and economic conditions that may limit the ability of producers to comply with the rule. Market or technical barriers to compliance could result in noncompliance and failure to achieve the goals of the law. If companies comply with the proposed rule despite significant market or technical barriers, it could instead result in upward pressure on product prices or even in shortages (depending on the ability of consumer demand and prices to adjust to changes in the volumes of products supplied in Washington). This section of the proposed rule includes elements dictated by statute, which are exempt under RCW 34.05.310 (4) (e).

2.3.6 Limit timing for providing necessary audit documentation:

This section of the proposed rule would facilitate producers providing audit documents with enough information for ecology to verify compliance status. Producers could incur costs associated with providing needed documentation for the audit without delays that they may have incurred under the baseline. This section of the proposed rule includes elements dictated by statute, which are exempt under RCW 34.05.310 (4) (e). It also clarifies language, which is exempt under RCW 34.05.310 (4) (d).

2.3.7 Specifying procedures for warnings and penalties for non-compliance: We expect this section of the proposed rule to result in benefits of clear expectations of how many notices ecology will send

before taking further enforcement action. As a result, it potentially affects the timing of when producers incur the costs of coming into compliance and benefits of earlier compliance. Baseline elements are specifically dictated by statute and exempt under RCW 34.05.310 (4)(e). This part of the proposed rule also addresses internal government operations, which are exempt under RCW 34.05.310 (4)(b).

COSTS OF COMPLIANCE: EQUIPMENT: Compliance with the proposed rule, compared to the baseline, is not likely to impose additional costs of equipment.

COSTS OF COMPLIANCE: SUPPLIES: Compliance with the proposed rule, compared to the baseline, is not likely to impose additional costs of supplies.

COSTS OF COMPLIANCE: LABOR: 3.2.2 Setting requirements for registration, reporting, and de minimis notifications: We expect this section of the proposed rule to result in costs of additional producer effort during registration and reporting. There would also be costs associated with de minimis notifications.

Range of impacted producers: We estimated a range of producers potentially covered by the proposed rule.

- To estimate a low-end number of likely producers of covered PCRC products, we identified 297 producers that have registered with ecology as of January 2023 under the law. This included 262 producers who had already registered with ecology in addition to 35 other producers that were identified by brands in retail stores and public engagement attendees.
- To estimate a high-end number of likely producers of covered PCRC products, we began by identifying industries that were most likely to have businesses covered by the proposed rule. This resulted in a starting population of 8,107 businesses globally. Using the Dun & Bradstreet database, we filtered this population for:
 - o Twenty-two different industry North American Industry Classification System (NAICS) codes (see section 7.6).
 - o Businesses making over \$1,000,000 annually in United States sales.
 - o A low financial stress marketing score: A proprietary multivariate index developed by Dun & Bradstreet, and an indicator of business vulnerability to increased costs, market pressures, and other disruptions. We filtered out high financial stress marketing scores as a proxy for small producers in other states or other countries that were not likely to export to Washington.
- This number was then scaled down depending on how competitive the market for the product was and the Washington market share. For example, a small number of grocery stores own a large percentage of the products sold at these locations, so we estimated that only 1.2 percent of these businesses were likely to have covered products. This resulted in a high-end estimate of 623 producers of covered PCRC products.

According to ecology's record, of those 262 registered with ecology, 155 met de minimis status (only 40.8 percent required to comply). So, we estimate the high end and low end range of producer need to comply as 40.8 percent of 297 to 40.8 percent of 623 (i.e., 121 to 254).

Correspondingly, we expect the remaining 176 (297 minus 120) or 369 (623 minus 254) businesses to meet de minimis status requirements or to simply not be covered by the rule. As we could not discern the two in our data, we chose to potentially overestimate these costs.

Registration and reporting costs: We estimated an annual cost of registration and reporting of approximately \$123 for a single producer required to comply with PCRC requirements. Based on this per-producer cost, we estimate total annual costs of registration and reporting between approximately \$14,823 and \$31,115 for all producers. The 20-year present value of the range of total annual costs is \$272,873 to \$572,808.

De minimis notifications: Ecology requires de minimis producers to annually notify ecology of their de minimis status; however, they are exempted from annual reporting and registration requirements.

We estimate an annual cost of approximately \$31 (per entity) for de minimis notification. Based on the above ranges of de minimis producer (i.e., 176 to 369), we estimated total annual costs of de minimis notification between approximately \$5,391 and \$11,302 for all producers. Ecology reflects streams of costs and benefits over time using present values, which adjust future impacts for inflation and the opportunity cost of having funds later instead of now. The 20-year present value of the range of total annual costs for all producers is between approximately \$99,243 to \$208,072.

Total costs for registration, reporting, and de minimis notification: Across the full range of likely producers of covered PCRC products, we estimated a total annual cost of reporting, registration, and de minimis notification approximately \$20,213 to \$42,417. The corresponding 20-year present values are approximately \$372,116 to \$780,880.

3.2.3 Establishing fee allocation methods and billing procedures: This section of the proposed rule would establish the methods and procedures required for rule implementation regarding fee calculation, allocation, billing adjustments, and due date setting for the payments. We expect this section of the proposed rule to result in costs of producer fees that match the value of the benefits they fund (since fees equal program costs, and wages are a way to approximate the value of services provided; see Chapter 4).

We estimated these costs based on ecology's current workload analysis required under statute (fiscal year (FY) 2024 - July 2023 through June 2024). Ecology estimated total workload costs of approximately \$578,000 during FY 2024. These total costs are the sum of \$299,000 in program administration costs (including the cost of rule making), and \$279,000 in PCRC oversight costs.

For each producer, ecology's workload analysis used the producer-reported total covered product plastic resin weight and weight of plastic resin subject to PCRC requirements, and calculated the share of program costs incurred by producers belonging to each covered product category based on producer registration data (pounds of plastic) submitted in calendar year (CY) 2022.

The workload analysis notes that, "At the time of registration during CY 2022, ecology did not require beverage container producers to specify which portions of their plastic resin weight data were related to the subsets of beverage containers that wouldn't be required to meet PCRC requirements until CY 2028 (187 mL wine bottles and dairy milk containers). The amount of plastic resin attributed to dairy milk containers and 187 mL plastic wine bottles is unknown. When this plastic weight is provided separately during registration in CY 2023, it will reduce the amount of plastic resin in the beverage containers category, compared to the current data. Fees will be calculated based on the registration data submitted by April 1, 2023."

Based on the above note, we assumed that the distribution of fee burden would change each year an added category of products is required to meet PCRC minimums. Household and personal care product industries would assume a share of the PCRC oversight costs beginning with the FY 2026 workload analysis, and producers of dairy milk and 187 mL wine products would have a share of PCRC oversight costs beginning with the FY 2029 workload analysis. Since the quantities of plastic resin and PCRC plastic resin are currently unknown for the dairy milk and 187 mL wine product category, we made a range of assumptions in Chapter 7 reflecting potential redistributions across the industries that would pay fees under the proposed rule.

The costs illustrated in the workload analysis table represent total costs for each category of product. Each producer within a given product category would have a unique fee covering a portion of the category costs, based on each producer's weight of plastic resin for the category. The workload analysis provides the estimated cost per total pound of plastic resin in Washington state. The estimated program administration cost is \$0.0015 per pound of total plastic resin (PCRC and virgin plastic), and the estimated PCRC oversight cost is \$0.0016 per pound of total plastic resin for eligible product categories. FY 2023 actual fees ranged from roughly \$11 for producers with the lowest plastic resin weights, to nearly \$90,000 for producers with the highest plastic resin weights in the registration data submitted in CY 2022.

Of the currently estimated costs of \$578,000 in FY 2024, approximately \$96,000 is attributed to the completion of rule making and the development of the PCRC reporting portal. These costs would be removed from the workload analysis in future years. However, we also anticipate an increased workload beginning in FY 2026 related to increased need for compliance support and auditing and enforcement actions, currently estimated to be \$66,000 per year. The fiscal note for the current law accounted for one-time and future costs and estimated ongoing annual costs of \$664,944 beginning in FY 2026. This estimate provides a high-cost basis for conservatively estimating future fee impacts for members of the regulated community.

We calculated 20-year present value costs of \$11.9 million for this element of the proposed rule. Present values convert streams of costs or benefits over time to a single comparable current value, accounting for inflation as well as the opportunity cost of having funds later versus now. Ecology uses a long-run average real (inflation-adjusted) discount rate in present value calculations, which is currently 0.89 percent.

Comparison of equity under the baseline and proposed rule: Under both the baseline and proposed rule, fees must be sufficient to fund program administration and oversight. This means total fees would be the same under the proposed rule and the baseline. The difference in the proposed rule is in how fees are allocated across producers, based on resin weight. While the baseline does not define an allocation structure, we assumed baseline requirements for equitable distribution could be interpreted as charging each producer an equal share of total fees.

The proposed rule specifies the equations by which the two costs in the workload analysis are distributed among registered non de minimis producers based on their total weights of plastic resin for covered products sold or distributed in Washington state the previous calendar year, as submitted during annual registration or reporting.

Each producer has a unique fee proportionate to the producer's reported plastic resin weights.

In CY 2022, ecology estimated total program administration costs of \$603,144 in the FY 2023 workload analysis, for which no PCRC oversight costs were estimated. Of the total producers who registered in CY 2022, 108 exceeded the de minimis thresholds and were required under law to pay a fee to cover the total estimated costs. Fees were allocated using reported total plastic resin weight and ranged between roughly \$11 for the producers with the smallest plastic resin weights, to nearly \$90,000 for producers with the highest weights of plastic resin. If all fee-paying producers had been required to pay an equal fee, the fee for each producer to cover FY 2023 estimated costs would have been nearly \$5,585 for each producer. Assuming this would be the fee amount under baseline conditions, the rule's method for distributing costs as a fee resulted in cost savings for 87 producers with plastic resin weights under the mean plastic resin weight value across all 108 fee-paying producers, and cost increases for 21 producers with plastic resin weights above the mean value. The tables below summarize average fee impacts for producers by weight range and total weight relative to the mean value.

Table 1. Fee impacts of rule cost distribution by registered plastic resin weight ranges, compared to an equal fee for each producer, based on FY 2023 fees:

<i>Total Plastic Resin Weight Range</i>	Number of Producers in Range	Average Fee (Rule-Based Calculation)	Average Fee Based on Number of Producers Only	Average Fee Cost Impact of Rule
<i>2,001 - 200,000 lbs.</i>	50	\$181.84	\$5,584.67	-\$5,402.83
<i>200,001 - 500,000 lbs.</i>	16	\$1,007.27	\$5,584.67	-\$4,577.39
<i>500,001 - 1,000,000 lbs.</i>	13	\$2,185.88	\$5,584.67	-\$3,398.79
<i>1,000,001 - 1,500,000 lbs.</i>	5	\$4,166.96	\$5,584.67	-\$1,417.71
<i>1,500,001 - 2,000,000 lbs.</i>	3	\$4,807.69	\$5,584.67	-\$776.98
<i>2,000,001 - 3,000,000 lbs.</i>	5	\$7,467.01	\$5,584.67	\$1,882.35
<i>3,000,001 - 10,000,000 lbs.</i>	13	\$19,866.30	\$5,584.67	\$14,281.64
<i>10,000,001 - 30,000,000 lbs.</i>	3	\$72,888.15	\$5,584.67	\$67,303.48

Table 2. Fee impacts of rule cost distribution by plastic resin weights compared to the mean resin weight value among all producers, compared to an equal fee for each producer, based on FY 2023 fees:

<i>Above/Below Mean Weight?</i>	Number of Producers	Average Fee (Rule-Based Calculation)	Average Fee Based on Number of Producers Only	Average Fee Cost Impact of Rule
<i>Above</i>	21	\$24,488.64	\$5,584.67	\$18,903.97
<i>Below</i>	87	\$1,021.64	\$5,584.67	-\$4,563.03

Based on total annual costs of approximately \$664,944 from the fiscal note, the following tables summarize the cost impacts of the rule-based fee distribution, assuming the same set of producers and resin weight from the FY 2023 fee calculations.

Table 3. Fee impacts of rule cost distribution by registered plastic resin weight ranges, compared to an equal fee for each producer, based on ongoing annual cost estimates from the fiscal note:

<i>Total Plastic Resin Weight Range</i>	Number of Producers in Range	Average Fee (Rule-Based Calculation)	Average Fee Based on Number of Producers Only	Average Fee Cost Impact of Rule
<i>2,001 - 200,000 lbs.</i>	50	\$200.47	\$6,156.89	-\$5,956.42
<i>200,001 - 500,000 lbs.</i>	16	\$1,110.48	\$6,156.89	-\$5,046.41
<i>500,001 - 1,000,000 lbs.</i>	13	\$2,409.85	\$6,156.89	-\$3,747.04
<i>1,000,001 - 1,500,000 lbs.</i>	5	\$4,593.92	\$6,156.89	-\$1,562.97
<i>1,500,001 - 2,000,000 lbs.</i>	3	\$5,300.30	\$6,156.89	-\$856.59
<i>2,000,001 - 3,000,000 lbs.</i>	5	\$8,232.11	\$6,156.89	\$2,075.22
<i>3,000,001 - 10,000,000 lbs.</i>	13	\$21,901.87	\$6,156.89	\$15,744.98
<i>10,000,001 - 30,000,000 lbs.</i>	3	\$80,356.50	\$6,156.89	\$74,199.61

Table 4. Fee impacts of rule cost distribution by plastic resin weights compared to the mean resin weight value among all producers, compared to an equal fee for each producer, based on ongoing annual cost estimates from the fiscal note:

<i>Above/Below Mean Weight?</i>	Number of Producers	Average Fee (Rule-Based Calculation)	Average Fee Based on Number of Producers Only	Average Fee Cost Impact of Rule
<i>Above</i>	21	\$26,997.82	\$6,156.89	\$20,840.93
<i>Below</i>	87	\$1,126.32	\$6,156.89	-\$5,030.57

3.2.5 Establishing requirements for temporary exclusion and adjustment requests: We expect this section of the proposed rule to result in costs for producers related to providing the necessary documentation in support of exclusions and adjustment requests. We note that businesses or industries would undertake these activities only if they expected a net benefit (a net cost-savings) of doing so, either due to avoiding noncompliance or avoiding lost sales due to necessary changes in products and/or business practices to comply.

Temporary exclusions: Producers may submit an annual temporary exclusion request (RCW 245.70A.20 [70A.245.020]) to ecology to get temporary exclusion from the minimum PCRC requirement for the upcoming year for any types of covered products in plastic containers for which a producer demonstrates that the achievement of PCRC requirement in the container material is not technically feasible to comply with federal health and safety requirements. However, we could not confidently assess how frequently exclusion requests would occur. We assumed that producers would file temporary exclusion requests in two situations: To avoid the noncompliance associated with technical infeasibility, or for very specific types of federally regulated products. As compared to the baseline, temporary exclusion requests would result in minimal additional costs. We estimate an annual cost of approximately \$245 for filling a temporary exclusion request for a single producer.

CalRecycle follows that, at a maximum, 74 percent of affected entities would file for reduction in noncompliance penalties based on producers' progress in meeting PCRC minimum requirements. However, currently, we do not have detailed information regarding technical barriers to achieving minimum PCRC rates. This results in uncertainty about the proportion of affected producers that would benefit from temporary exclusion requests.

To address this uncertainty, we assumed three different scenarios regarding the percentage of producers (75 percent, 50 percent, and 25 percent) that would submit exclusion requests.

In addition, we conducted sensitivity analysis to estimate the increased (decreased) cost due to increase (decrease) in exclusion requests over time. First, we assume that over 20 years, the exclusion request [rate] would drop from 75 percent to five percent (decreases annually by five percent and remains constant once it reaches five percent) and estimate a 20-year present value cost of \$148,836 to \$298,215 for exclusion requests. Similarly, we estimate a 20-year present value annual cost of \$471 to \$972,411 for exclusion requests assuming exclusion requests increase from 75 percent up to 95 percent (increase annually by five percent and remains constant once it reaches 95 percent) over 20 years.

Adjustments: Producers or PCRC product industry representatives may annually submit requests for consideration by ecology to temporarily adjust the annual PCRC minimum percentages for the following year. However, this adjustment request would occur no more frequently than annually, and the activity would start beginning January 1, 2024, or when rule making is complete, whichever is sooner.

We estimate a total annual cost of approximately \$6,309 for submitting adjustment requests (submitted by an industry group), with an average annual cost of approximately \$25 to \$54 for a single producer. However, producers may ultimately submit one element of the activities listed in the above table, or a subset of these research activities (b-e in the table above), depending on the nature of their reason for submitting an adjustment request. This means our estimates are likely to be overestimates of actual costs of adjustment requests.

We estimate the 20-year present value of adjustment request costs for industries with producers of covered products, across all product categories, as about \$116,140. Based on this, we estimated the 20-year present value adjustment request costs per producer of about \$457 (low) to \$960 (high) on average.

COSTS OF COMPLIANCE: PROFESSIONAL SERVICES: Compliance with the proposed rule, compared to the baseline, is not likely to impose additional costs of professional services.

COSTS OF COMPLIANCE: ADMINISTRATIVE COSTS: Where applicable, ecology estimates administrative costs (overhead) as part of the cost of labor and professional services above.

COSTS OF COMPLIANCE: OTHER: 3.2.6 Limit timing for providing necessary audit documentation: This section of the proposed rule would facilitate producers providing audit documents with enough information for ecology to efficiently verify compliance status without delays (within 30 days, compared to no time limit under the baseline). Producers could incur costs associated with provision of the needed documentation within the time limit, relative to when they might submit it under the baseline. We note that the proposed rule does not add requirements regarding what information must be provided during audits, just that it must be provided by the time limit. If producers were to provide documentation within 30 days under the baseline, regardless, this section of the proposed rule would not have any impacts.

We could not confidently assess how frequently this element of the proposed rule would result in avoided delays in provision of audit information, or the degree to which delays would be reduced. We note, however, these would not be significant additional costs, as compared to the baseline, but rather opportunity costs of equivalent expenditures at different times.

3.2.7 Specifying procedures for warnings and penalties for non-compliance: We expect this section of the proposed rule to result in benefits of clear expectations of how many notices ecology will send

before taking further enforcement action. As a result, it potentially affects the timing of when producers incur the costs of coming into compliance.

We could not confidently assess how frequently noncompliance would occur and result in multiple warnings and/or penalties, or the degree of noncompliance (and associated costs of coming into compliance). We note, however, these would not be significant additional costs, as compared to the baseline, but rather opportunity costs of expenditures at different times, as producers would be expected to comply under the baseline regardless of the proposed rule.

COMPARISON OF COMPLIANCE COST FOR SMALL VERSUS LARGE BUSINESSES: We calculated the estimated per-business costs to comply with the proposed rule, based on the costs estimated in Chapter 3 of this document. In this section, we estimate compliance costs per employee.

Businesses that are most likely required to comply with the rule are larger businesses that own brands for beverages, household cleaners, personal care products, and trash bags. There are fewer small businesses (companies that have 50 or fewer employees) that have their own brand, sell more than \$1 million or one ton of plastic resin in Washington state (exceeding the de minimis threshold) to be impacted by the rule.

The average affected small business likely to be covered by the proposed rule employs approximately 17 people. The largest 10 percent of affected businesses employ an average of 12,165 people. Based on cost estimates in Chapter 3, we estimated the following compliance costs per employee.

Table 5. Compliance costs per employee:

<i>Type of cost (or total cost)</i>	Low	High
<i>Small business cost per employee</i>	\$2,136	\$6,113
<i>Largest business cost per employee</i>	\$2.99	\$8.54

We conclude that the proposed rule is likely to have disproportionate impacts on small businesses, and therefore ecology must include elements in the proposed rule to mitigate this disproportion, where legal (including the stated objectives of the law on which the rule is based) and feasible.

CONSIDERATION OF LOST SALES OR REVENUE: Businesses that would incur costs could experience reduced sales or revenues if the proposed rule significantly affects the prices of the goods they sell. The degree to which this could happen is strongly related to each business's production and pricing model (whether additional lump-sum costs would significantly affect marginal costs), as well as the specific attributes of the markets in which they sell goods, including the degree of influence each firm has on market prices, as well as the relative responsiveness of market demand to price changes.

We used the REMI E3+ model for Washington state to estimate the impact of the proposed rule on directly affected markets, accounting for dynamic adjustments (e.g., price levels and wages, employment, purchases of inputs and services, population, and labor force attributes) throughout the economy. The model accounts for: Interindustry impacts; price, wage, and population changes; and dynamic adjustment of all economic variables over time.

The results of the REMI E3+ model show that the rule would minimally impact a variety of businesses (see 7.6 below) and that it would initially cost less than \$1,000,000 in output (total amount of goods and services produced by Washington businesses) across all sectors in

the state annually. This would be a minor annual impact to output from directly impacted industries and would not significantly affect total statewide output across all industries.¹ While industries would incur direct costs of compliance, which would put downward pressure on their output, these impacts would not significantly differ from their baseline output. The table below lists the percentage impacts to output, as compared to the baseline, reflecting impacts between zero percent and about 1/100th of one percent.

Table 6. Impact to the value of statewide and industry output:

<i>Industry</i>	Initial Output Impact	Output Impact in 10 Years	Output Impact in 20 Years
<i>All industries</i>	0.00%	0.00%	0.00%
<i>Soap, cleaning compound, and toilet preparation manufacturing</i>	0.00%	-0.001%	-0.001%
<i>Plastics product manufacturing</i>	0.00%	-0.001%	-0.001%

MITIGATION OF DISPROPORTIONATE IMPACT: RFA states that: "Based upon the extent of disproportionate impact on small business identified in the statement prepared under RCW 19.85.040, the agency shall, where legal and feasible in meeting the stated objectives of the statutes upon which the rule is based, reduce the costs imposed by the rule on small businesses. The agency must consider, without limitation, each of the following methods of reducing the impact of the proposed rule on small businesses:

- (a) Reducing, modifying, or eliminating substantive regulatory requirements;
- (b) Simplifying, reducing, or eliminating recordkeeping and reporting requirements;
- (c) Reducing the frequency of inspections;
- (d) Delaying compliance timetables;
- (e) Reducing or modifying fine schedules for noncompliance; or
- (f) Any other mitigation techniques including those suggested by small businesses or small business advocates."

We considered all the above options, the goals and objectives of the authorizing statutes (see Chapter 6), and the scope of this rule making. We limited compliance cost-reduction methods to those that:

- Are legal and feasible.
- Meet the goals and objectives of the authorizing statute.
- Are within the scope of this rule making.

Modifying regulatory requirements, changing reporting requirements, reducing the frequency of inspections, or delaying compliance timetables would not meet statutory objectives or are not feasible and within the scope of this rule making.

Finally, we included the following elements of the law, in the proposed rule, to reduce costs to small businesses. Businesses are not required to meet annual reporting, PCRC, or fee requirements of covered products if they are below the de minimis threshold. The de minimis threshold considers sales, distribution, or import in or into Washington that:

- Generates less than \$1,000,000 in gross revenue in a single category of a covered product annually.
- Sells or distributes less than one ton of a single category of a covered product annually.

We note also that to the extent that small producers (in terms of resin weight) are owned by small businesses, their costs would also be smaller. This is particularly the case for fees, which the proposed rule would reduce for small producers, compared to an assumed equal allocation of fees across all producers.

SMALL BUSINESS AND LOCAL GOVERNMENT CONSULTATION: We involved small businesses and local governments in our development of the proposed rule, using:

- Four informational webinars in February and March 2022.
- Seven rule advisory committee meetings that were open to all interested parties and provided opportunities for comments in April, June, July, and September 2022.
- More than 15 individual meetings requested by stakeholders.
- Seventeen emails to subscriber list and listserv, which had 1,134 subscribers at the time of this analysis.
- Online access to each revised version of the draft rule language with opportunities to provide comments.

NAICS CODES OF INDUSTRIES IMPACTED BY THE PROPOSED RULE: The proposed rule likely impacts the following industries, with associated NAICS codes. NAICS definitions and industry hierarchies are discussed at <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2017>.

311411 Frozen Fruit, Juice, and Vegetable Manufacturing
 311421 Fruit and Vegetable Canning
 311930 Flavoring Syrup and Concentrate Manufacturing
 312111 Soft Drink Manufacturing
 312112 Bottled Water Manufacturing
 722513 Limited-Service Restaurants
 311351 Chocolate and Confectionery Manufacturing from Cacao Beans
 311920 Coffee and Tea Manufacturing
 445298 All Other Specialty Food Retailers
 424490 Other Grocery and Related Products Merchant Wholesalers
 311511 Fluid Milk Manufacturing
 311514 Dry, Condensed, and Evaporated Dairy Product Manufacturing
 424430 Dairy Product (except Dried or Canned) Merchant Wholesalers
 312130 Wineries
 424820 Wine and Distilled Alcoholic Beverage Merchant Wholesalers
 325611 Soap and Other Detergent Manufacturing
 325612 Polish and Other Sanitation Good Manufacturing
 325620 Toilet Preparation Manufacturing
 456120 Cosmetics, Beauty Supplies, and Perfume Retailers
 326111 Plastics Bag and Pouch Manufacturing
 445110 Supermarkets and Other Grocery Retailers (except Convenience Retailers)
 455110 Department Stores

IMPACT ON JOBS: We used the REMI E3+ model for Washington state to estimate the impact of the proposed rule on jobs in the state, accounting for dynamic adjustments throughout the economy.

The proposed rule would result in transfers of money within and between industries, as compared to the baseline. The modeled impacts on employment are the result of multiple small increases and decreases in employment, prices, and other economic variables across all industries in the state.

The results of the model show an estimated one job lost annually across all industries in Washington from the implementation of this rule. It should be noted that the REMI E3+ model does not account for jobs that may be created because of the overall implementation of the

statutory and rule requirements and estimates employment impacts of only the elements of the rule in which ecology had discretion. Industries outside of those with covered products may be impacted, as the REMI model is a model of the entire state economy. Industries that are typically highly impacted include those with higher sensitivity to changes in prices and market activity, such as construction and local government revenues. As shown in the table below, most of the industries in Washington are minimally impacted by the rule and were modeled to experience job losses of between zero and one full time employee.

We note that the employment impacts above are modeled based only on compliance costs and do not reflect any broader or systemic changes that result from the law or proposed rule. Improvements in local economic activity related to a circular plastics economy would mitigate these estimated losses through employment and economic activity resulting from:

- Plastics recycling and processing.
- Production and marketing of PCR [PCRC] resin.
- PCRC or plastic-alternative packaging.
- Market adjustments to consumer products and their packaging.

¹ REMI E3+ baseline forecast, model version 3.0.0.

A copy of the statement may be obtained by contacting Shannon Jones, Department of Ecology, Solid Waste Management Program, P.O. Box 47600, Olympia, WA 98504-7600, phone 360-742-9874, email Shannon.Jones@ecy.wa.gov, recycledcontent@ecy.wa.gov.

May 2, 2023
Heather R. Bartlett
Deputy Director

OTS-4533.2

**Chapter 173-925 WAC
POST-CONSUMER RECYCLED CONTENT IN PLASTIC CONTAINERS**

**PART A
GENERAL REQUIREMENTS**

NEW SECTION

WAC 173-925-010 Purpose. (1) Washington state law mandates minimum post-consumer recycled content (PCRC) requirements for plastic beverage containers, trash bags, and household cleaning and personal

care product containers. This requirement supports new and existing end markets for PCRC material and helps ensure that plastic packaging and other packaging materials are reduced, reused, and recycled.

(2) This chapter implements post-consumer recycled content (PCRC), RCW 70A.245.010 through 70A.245.050 and 70A.245.090 (1), (2), and (4).

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NEW SECTION

WAC 173-925-020 Applicability. This chapter applies to producers that offer for sale, sell, or distribute in or into Washington state:

- (1) Beverages in plastic containers;
- (2) Plastic trash bags;
- (3) Household cleaning products in plastic containers; or
- (4) Personal care products in plastic containers.

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NEW SECTION

WAC 173-925-030 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) (a) **"Beverage"** means liquid products intended for human or animal consumption sold in a quantity more than or equal to two fluid ounces and less than or equal to one gallon. This includes, but is not limited to, any of the following:

- (i) Water and flavored water;
- (ii) Beer or other malt beverages;
- (iii) Distilled spirits;
- (iv) Artificial or nondairy milks and creamers;
- (v) Juices, including those derived from concentrate;
- (vi) Mineral water, soda water, and similar carbonated soft drinks;

- (vii) Dairy milk; or
- (viii) Wine;

(b) "Beverage" does not include:

- (i) Liquid in a concentrated form;
- (ii) Syrup;
- (iii) Powder concentrates or instant drink powders;
- (iv) Infant formula;
- (v) Medical food; or

(vi) Fortified oral nutritional supplements used for persons who require supplemental or sole source nutritional needs due to special dietary needs directly related to cancer, chronic kidney disease, diabetes, or other medical conditions.

(2) **"Beverage manufacturing industry"** means an association that represents beverage producers.

(3) **"Biomedical waste"** means, and is limited to, the following types of waste:

(a) "Animal waste" is waste animal carcasses, body parts, and bedding of animals that are known to be infected with, or that have been inoculated with, human pathogenic microorganisms infectious to humans.

(b) "Biosafety level 4 disease waste" is waste contaminated with blood, excretions, exudates, or secretions from humans or animals who are isolated to protect others from highly communicable infectious diseases that are identified as pathogenic organisms assigned to biosafety level 4 by the centers for disease control, national institute of health, biosafety in microbiological and biomedical laboratories, current edition.

(c) "Cultures and stocks" are wastes infectious to humans and includes specimen cultures, cultures and stocks of etiologic agents, wastes from production of biologicals and serums, discarded live and attenuated vaccines, and laboratory waste that has come into contact with cultures and stocks of etiologic agents or blood specimens. Such waste includes, but is not limited to, culture dishes, blood specimen tubes, and devices used to transfer, inoculate, and mix cultures.

(d) "Human blood and blood products" is discarded waste human blood and blood components, and materials containing free-flowing blood and blood products.

(e) "Pathological waste" is waste human source biopsy materials, tissues, and anatomical parts that emanate from surgery, obstetrical procedures, and autopsy. "Pathological waste" does not include teeth, human corpses, remains, and anatomical parts that are intended for final disposition.

(f) "Sharps waste" is all hypodermic needles, syringes with needles attached, IV tubing with needles attached, scalpel blades, and lancets that have been removed from the original sterile package.

(3) "**Brand**" means a name, symbol, word, logo, or mark that identifies a product and attributes the product to the brand owner as the producer.

(4) (a) "**Covered products**" means all beverages, trash bags, personal care products, and household cleaning products sold in plastic containers that are subject to, or will become subject to (according to the timeline in WAC 173-925-040 (4)(a)), the requirements of this chapter, including registration, reporting, fee payment, and PCRC minimum percentages.

(b) "Covered products" does not include:

(i) Rigid plastic containers or bottles that are used for the containment, protection, delivery, presentation, or distribution of:

(A) Prescription or nonprescription drugs as defined in RCW 18.64.011(14) and regulated by the United States Food and Drug Administration;

(B) Dietary supplements as defined in this section;

(C) Medical devices or medical products required to be sterile, as regulated by the United States Food and Drug Administration under 21 C.F.R., Parts 200, 300 and 800;

(D) Aerosols in plastic containers that are subject to 49 C.F.R. Sec. 178.33b;

(ii) Plastic trash bags used for biomedical waste as defined in this section;

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

(5) **"Dairy milk"** means a beverage made exclusively or principally from milk obtained from one or more milk-producing animals. Dairy milk includes, but is not limited to:

(a) Whole milk, low-fat milk, skim milk, cream, half-and-half, condensed milk; or

(b) Cultured or acidified milk, kefir, or eggnog.

(6) (a) **"De minimis producer"** means an entity that annually sells, offers for sale, distributes, or imports in or into the country for sale in or into Washington state:

(i) Less than one ton in aggregate of a single category of covered product each calendar year; or

(ii) A single category of a covered product that in aggregate generates less than \$1,000,000 each calendar year in gross revenue from sales of covered products into Washington state.

(b) These thresholds are to be calculated at the level of the "entity" as defined in subsection (9) of this section.

(c) Meeting the qualifications of de minimis producer in one single category of covered products does not preclude a producer from meeting requirements for other covered product categories for which they are above the de minimis threshold.

(7) **"Department"** means the Washington state department of ecology.

(8) **"Dietary supplement"** as defined by RCW 82.08.0293 means any product, other than tobacco, intended to supplement the diet that:

(a) Contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in this subsection;

(b) Is intended for ingestion in tablet, capsule, powder, soft-gel, gel-cap, or liquid form, or if not intended for ingestion in such form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

(c) Is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label as required pursuant to 21 C.F.R. Sec. 101.36, as amended or renumbered as of January 1, 2003.

(d) "Dietary supplements" does not include a product labeled with both a "supplement facts" box and a "nutrition facts" box.

(9) **"Entity"** means an individual and any form of business enterprise, including all legal entities that are affiliated by common ownership of 50 percent or greater, including parents, franchises, subsidiaries, and commonly owned affiliate companies.

(10) (a) **"Household cleaning products"** means products labeled, marketed, or otherwise indicating that the purpose of the product is to clean, freshen, or remove unwanted substances, such as dirt, stains, and other impurities from possessions, objects, surfaces, interior or exterior structures, textiles, and environments associated with a household. These items include:

(i) Liquid soaps, laundry soaps, detergents, softeners, surface polishes, and stain removers;

(ii) Textile cleaners, carpet and pet cleaners, and treatments;
or

(iii) Other products used to clean or freshen areas associated with a household.

(b) "Household" when used in the term "household cleaning products" denotes products marketed at least in part for residential or individual consumer use, but does not include products marketed solely for use in institutions such as hospitals and schools, or in commercial or industrial settings.

(11) **"Household cleaning and personal care product manufacturing industry"** means an association that represents companies that manufacture household cleaning and personal care products.

(12) **"Infant formula"** means a food which purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

(13) **"Medical food"** means a food which is formulated to be consumed or administered enterally under the supervision of a physician and which is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation.

(14) **"Oral nutritional supplement"** means a manufactured liquid, powder capable of being reconstituted, or solid product that contains a combination of carbohydrates, proteins, fats, fiber, vitamins, and minerals intended to supplement a portion of a patient's nutrition intake.

(15) **"Personal care product"** means a product intended or marketed for use to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance, including:

(a) Shampoo, conditioner, styling sprays and gels, and other hair care products;

(b) Lotion, moisturizer, facial toner, and other skin care products;

(c) Liquid soap and other body care products; or

(d) Other products used to maintain, improve, alter, or enhance personal care or appearance.

(16) (a) **"Plastic beverage container"** means a factory-sealed bottle or other rigid container that is:

(i) Capable of maintaining its shape when empty;

(ii) Comprised of one or multiple plastic resins; and

(iii) 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 bladders or pouches that contain a beverage.

(17) **"Plastic household cleaning container and plastic personal care product container"** means a rigid bottle, jug, tube, or other container capable of maintaining its shape when empty and with a neck or mouth narrower than the base of the container, and:

(a) A minimum capacity of eight fluid ounces or its equivalent volume;

(b) A maximum capacity of five fluid gallons or its equivalent volume;

(c) Comprised of one or multiple plastic resins; and

(d) Containing a household cleaning or personal care product.

(18) (a) **"Plastic trash bag"** means a bag that is made of plastic, is at least 0.70 mils thick, and is designed and manufactured for use as a container to hold, store, or transport materials for disposal or recycling. "Plastic trash bag" includes, but is not limited to, a garbage bag, recycling bag, lawn or leaf bag, can liner bag, kitchen bag, or compactor bag.

(b) "Plastic trash bag" does not include compostable bags meeting the requirements of chapter 70A.455 RCW and plastic carryout bags meeting the requirements of chapter 70A.530 RCW.

(19) **"Plastic trash bag manufacturing industry"** means an association that represents companies that manufacture plastic trash bags.

(20) (a) **"Post-consumer recycled content (PCRC)"** means the plastic resin incorporated into plastic packaging or bags for a PCRC product, that is derived specifically from recyclable material generated by households or by commercial or institutional facilities in their role as end users of plastic products and packaging which is no longer used for its intended purpose.

(b) "PCRC" includes returns of material from the distribution chain.

(c) "PCRC" does not include plastic that is separated from the waste stream during manufacturing, such as scrap or other materials that are generated and reused during the same process.

(21) **"PCRC products"** means items in the following categories which are actively required to meet and report PCRC minimum requirements in the product packaging for a given year according to the timeline in WAC 173-925-040 (4) (a):

(a) Beverages in plastic beverage containers;

(b) Plastic trash bags; or

(c) Household cleaning products and personal care products in plastic containers.

(22) **"Producer"** means the entity responsible for compliance with all requirements of this chapter for covered products sold, offered for sale, or distributed in or into Washington state.

(a) 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, except as follows:

(i) 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.

(ii) If the covered product lacks identification of a brand, the entity that specified the material composition of the covered product packaging is the producer.

(iii) If there is no identifiable person described above, the entity who imports or distributes the covered product in or into the state, including through online sales, is the producer.

(b) 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 subsection (10) of this section.

(23) **"Resin"** means polymer compounds used to make plastic packaging such as bottles or films.

(24) (a) **"Third-party representative"** means a person acting as agent for a producer for the purpose of registering the producer, sub-

mitting reports, and paying the fees required of the producer by this chapter.

(b) Third-party representatives do not assume full responsibility for compliance as a producer.

(25) "**Ton**" means the United States customary short ton, equal to 2,000 pounds.

(26) "**Workload analysis (WLA)**" means a document posted for public comment each year by January 31st, summarizing the department's estimated costs for the forthcoming fiscal year, July 1st to June 30th of the following year, to implement, administer, and enforce the post-consumer recycled content requirements per RCW 70A.245.020(3).

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PART B PRODUCER REGISTRATION AND FEES

NEW SECTION

WAC 173-925-040 Annual registration and reporting requirements.

(1) (a) Producers of covered products distributed, imported, sold, or offered for sale in or into Washington state must annually register using the department's registration and reporting system.

(b) Third-party representatives may submit data on behalf of a producer or group of producers, including information required in subsection (2) of this section for each producer, but the producer as defined in WAC 173-925-030(22) is the party responsible for compliance and subject to potential enforcement actions outlined in WAC 173-925-080 through 173-925-100.

(c) De minimis producers are not required to meet annual registration, reporting, PCRC, or fee requirements of covered products, but must annually indicate their de minimis status in the department's on-line registration and reporting system to notify the department that they meet the de minimis threshold.

(d) If a producer's supplier or distributor entities have agreed to report on behalf of a producer for a subset of the products that would otherwise be attributable to the producer, the category is only considered de minimis if it still meets minimum resin weight or revenue threshold after being added to other product category data provided by the entity as defined in WAC 173-925-030(9).

(2) Producers must annually submit the following registration information to the department:

(a) General information, including:

(i) Producer name, mailing address, website, and tax identification number;

(ii) Contact person name, email, and telephone number; and

(iii) List of all brand and sub-brand names under which the covered products are sold, and, if applicable, any unique tax identification numbers not provided in (a) (i) of this subsection.

(b) Plastic resin data for each covered product category in WAC 173-925-060(1) sold or offered for sale in or into Washington state in the prior calendar year, including total pounds of plastic resin within each covered product category.

(c) Identification and resin weight of PCRC products temporarily excluded from PCRC minimum requirements based on criteria in WAC 173-925-070(1).

(d) Attestation that all reported data accounts for all covered products sold in or into Washington and confirms that the percentage of PCRC calculated for PCRC products sold in Washington is accurately allocated in accordance with subsection (3) of this section.

(3) (a) Producers or representatives reporting on behalf of producers may use national or regional covered product resin data for reporting in subsection (2) of this section. The data must be allocated to Washington on a per capita or other accurate basis for calculation, and the producer or reporting representative must demonstrate that the percentage of PCRC for the product category sold into Washington is the same as the PCRC percentage calculated for the nation or region.

(b) Producers submitting information based on regional or national data in place of Washington state data must account for all products in its calculations and must provide the following to the department:

(i) Justification for using national or regional data instead of state level data; and

(ii) Documentation of the methodology and source data used to prorate the regional or national data.

(4) (a) Producers must annually report PCRC percentages for PCRC products in addition to the covered product registration requirements in subsection (2) of this section, beginning on the following dates:

(i) April 1, 2024, for plastic trash bags and plastic beverage containers other than plastic dairy milk containers and 187 milliliter plastic wine containers; and

(ii) April 1, 2026, for plastic household cleaner and personal care product containers; and

(iii) April 1, 2029, for plastic dairy milk containers and 187 milliliter plastic wine containers.

(b) PCRC annual reports must include:

(i) The amount in pounds of virgin plastic and the amount in pounds of PCRC by resin type used within a single PCRC product category sold, offered for sale, or distributed in or into Washington state; and

(ii) The total PCRC resin as a percentage of the total weight of plastic reported for a single covered product category.

(5) For PCRC annual reports, producers must certify that the PCRC percentages for PCRC products sold, offered for sale, or distributed in or into Washington state comply with the requirements of this chapter. The PCRC certification may include one or both of the following:

(a) Independent third-party certification: Submit to the department the certification from a qualified International Organization for Standardization (ISO) accredited, or other qualified accrediting body subject to department review, with the results of the PCRC analysis for each category of PCRC products; or

(b) Self-certification: Submit to the department attestation that the information reported by the responsible official is true and accurate to the best knowledge of the producer.

(6) (a) If a producer or third-party representative believes the information provided to the department as required by this chapter is

confidential business information (CBI), in whole or in part, they may request that the department treat the information as CBI as provided in RCW 43.21A.160.

(b) The director of the department shall consider requests to treat registration and reporting information as CBI.

(c) A decision by the director of the department to grant protection of CBI will be based upon information provided by the producer sufficient to demonstrate that the release of the information to the public or a competitor may affect adversely the competitive position of the producer.

(d) A decision by the director of the department to grant protection of CBI shall remain effective until a producer is otherwise notified or until additional information is requested by the department.

(7) (a) Registration and reporting as required by the PCRC product category timeline established in subsection (3) (a) of this section is considered delinquent if not completed by April 1st of each calendar year.

(b) Failure to meet the registration and reporting timeline requirements is cause for a notice of noncompliance per WAC 173-925-080 through 173-925-100.

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NEW SECTION

WAC 173-925-050 Producer annual fee calculation and payment.

(1) All producers of covered products sold or offered for sale in or into Washington state are required to pay an annual fee calculated by the department based on the department's published workload analysis (WLA) and fee distribution calculations described in this section.

(2) By January 31st of each year, the department will publish for public comment the annual WLA for the next fiscal year (July 1st through June 30th). The WLA provides the department's estimated annual cost in the following two workload categories:

(a) Ecology program administration costs include the department's costs to support producer registration, manage and maintain the registration and reporting system and department website, prepare the annual workload analysis and fee calculation, conduct rule and guideline updates, and implement any requirements that would apply to all producers of covered products, regardless of their PCRC requirements.

(b) Ecology PCRC oversight costs include the department's costs to provide compliance monitoring and technical assistance for producers submitting PCRC product reports required to meet minimum PCRC requirements for the prior calendar year.

(3) (a) Producer fees are calculated based on the producer's reported total pounds of covered product plastic resin data submitted during annual registration or reporting by April 1st, as shown in the calculation formulas below.

(i) Ecology program administration costs are allocated to each producer based on the producer's share of the total pounds of all covered product resin (virgin and PCRC) sold in or offered for sale in or into Washington during the prior calendar year as illustrated in equation 1(a) below.

Equation 1(a), Program Administration Fee

$$\text{Program Administration Fee} = \text{Ecology Program Administration Cost} \times \left[\frac{\text{Individual Producer Resins for Covered Products}}{\text{Washington Resin Totals for Covered Products}} \right]$$

Program Administration Fee = Fee for all producers registered for covered product categories, excluding de minimis producers.

Ecology Program Administration Cost = Estimated annual workload cost for the department to administer the program as a whole, such as producer registration, management and maintenance of the registration and reporting database and department website, preparation of the annual workload analysis and fee calculation, rule and guideline updates, and any requirements that would apply to all producers of covered products.

Individual Producer Resins for Covered Products = One registered producer's total pounds of all plastic resins (PCRC and virgin) used in all covered products sold or offered for sale in Washington state during the previous calendar year.

Washington Resin Totals for Covered Products = Total pounds of all plastic resins (PCRC and virgin) used in all covered products sold or offered for sale in or into Washington state for the prior calendar year.

(ii) Ecology PCRC product oversight costs are allocated based on each producer's share of the total pounds of all plastic resins (PCR and virgin) used in the PCRC product categories sold in or offered for sale in or into Washington state in the prior calendar year as illustrated in equation 1(b) below.

Equation 1(b), PCRC Oversight Fee

$$\text{PCRC Oversight Fee} = \text{Ecology PCRC Oversight Cost} \times \left[\frac{\text{Individual Producer Resins for PCRC Products}}{\text{Washington Resin Totals for PCRC Products}} \right]$$

PCRC Oversight Fee = Fee for producers submitting PCRC reports for PCRC products.

Ecology PCRC Oversight Cost = Estimated annual workload cost for the department to provide compliance monitoring and technical assistance to producers submitting PCRC reports for PCRC products.

Individual Producer Resins for PCRC Products = One registered and reporting producer's total pounds of all plastic resins (PCRC and virgin) used in all PCRC products sold or offered for sale in or into Washington state during the previous calendar year.

Washington Resin Totals for PCRC Products = Total pounds of all plastic resins (PCRC and virgin) used in all PCRC products sold or offered for sale in or into Washington state for the prior calendar year.

(iii) Each producer will be invoiced a Total Producer Fee, based on the sum of the producer's individual Program Administration Fee and PCRC Oversight Fee, as shown in equation 1(c).

Equation 1(c) Total Producer Fee

$$\text{Total Producer Fee} = \text{Program Administration Fee (Equation 1(a))} + \text{PCRC Oversight Fee (Equation 1(b))}$$

Total Producer Fee = Fee for each producer submitting registration and reporting data for covered products. For producers of covered product categories not yet required to submit PCRC reports, the PCRC

oversight fee amount is zero, and only the program administration fee amount applies.

(b) De minimis producers are not required to pay annual fees, and resin data submitted by de minimis producers in their annual de minimis notification is not included in the calculations described above.

(4) (a) The department may adjust annual billing for the following reasons:

(i) Difference between actual revenue and costs for the most recent prior closed fiscal year;

(ii) Registration and reporting data submitted by producers after the April 1st deadline; or

(iii) Revised resin weight data.

(b) Any adjustment to billing as described in (a)(i) of this subsection will be distributed among all producers using their proportions of the total fee amounts from the appropriate billing cycle.

(c) For adjustments made under the conditions of (a)(ii) of this subsection, producers who register or report after April 1st will be billed for the adjusted annual fee in the next billing cycle. The invoice for the next billing cycle will include the fee for that year, plus the adjusted fee for the previous year, for which registration or reporting was submitted late. The fees for producers who had registered by April 1st will be adjusted in the following billing cycle with a credit for their proportionate share, based on individual plastic resin weights, of applied changes resulting from the late registration(s) of other producers.

(d) For adjustments made in response to (a)(iii) of this subsection, fees will not be adjusted for revised resin weight data submitted after April 1st until the following annual billing cycle.

(i) Producers will be responsible for paying the fees calculated using the data submitted for that year.

(ii) Producers will be responsible for ensuring that their data is accurate.

(iii) Resin weight data should be reported in pounds and appropriately prorated when derived from national or regional totals.

(e) In the event that a significant error is discovered, the department will notify producers of the estimated impact for the forthcoming billing cycle.

(5) (a) Producer annual fees are due 30 days after the department sends a billing statement.

(b) Annual fees shall be deemed delinquent if they are not received by the first invoice billing due date.

(c) If a producer's annual fee payment is delinquent, the producer will be notified by certified letter and have 30 days to pay the invoice before the department takes further action.

(d) Accounts that remain delinquent will be submitted to a collection agency. The collection agency will charge the producer a service fee, in addition to the delinquent amount due.

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Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

PART C
POST-CONSUMER RECYCLED CONTENT (PCRC) PRODUCTS

NEW SECTION

WAC 173-925-060 PCRC product requirements. (1) Producers must annually meet no less than the minimum PCRC percentages, on average, for the total weight of PCRC product plastic containers sold, offered for sale, or distributed in or into Washington state in their respective PCRC product categories beginning on the dates below:

(a) Beverages, (except those listed in (d) of this subsection):

- (i) January 1, 2023: 15 percent;
- (ii) January 1, 2026: 25 percent; and
- (iii) January 1, 2031: 50 percent.

(b) Plastic trash bags:

- (i) January 1, 2023: 10 percent;
- (ii) January 1, 2025: 15 percent; and
- (iii) January 1, 2027: 20 percent.

(c) Household cleaning and personal care products:

- (i) January 1, 2025: 15 percent;
- (ii) January 1, 2028: 25 percent; and
- (iii) January 1, 2031: 50 percent.

(d) Dairy milk and wine in 187 milliliter plastic beverage containers:

- (i) January 1, 2028: 15 percent;
- (ii) January 1, 2031: 25 percent; and
- (iii) January 1, 2036: 50 percent.

(2) (a) For the purposes of reporting PCRC, producers may calculate resin weight and PCRC percentage from the following sources:

(i) PCRC derived from mechanical recycling using post-consumer materials;

(ii) PCRC from nonmechanical processing of post-consumer materials calculated using an existing and recognized international or multinational third-party certification system which incorporates chain of custody, and certified mass balance attribution as identified in ISO 22095:2020; or

(iii) Other sources or methods that the producer demonstrates to the department to have a comparable degree of accuracy.

(b) Plastic sold or marketed for use as fuel feedstock may not be included in PCRC reports to the department.

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NEW SECTION

WAC 173-925-070 Exclusions or adjustments to PCRC requirements.

(1) (a) The department must grant a temporary exclusion from the minimum PCRC requirements for the following year when a producer demonstrates it is technically infeasible to meet minimum PCRC requirements

for a type of covered product while also complying with federal health and safety standards applicable to the product or its packaging. Those federal standards include 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 minimum percentage requirements producers must annually submit their temporary exclusion request for the coming calendar year to the department by September 1st in order to have a decision from the department by December 31st.

(i) Identifies the applicable health and safety standards that make the achievement of minimum PCRC requirements infeasible for a type of PCRC product; and

(ii) Documents and convincingly supports, with validated testing data or the sworn declaration of a qualified engineer, as appropriate, the producer's claim that it is technically infeasible to meet the minimum PCRC requirements during the following year while still meeting applicable federal health and safety standards.

(c) The producer's annual request must also include:

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

(ii) Products and brand names for which the exclusion is requested;

(iii) Total resin weight of PCRC products estimated to be sold, offered for sale, or distributed in or into Washington for which the producer requests temporary exclusion from PCRC requirements.

(d) Federal regulations cited must be specific to the material composition of the packaging or trash bag material.

(e) The weight of any PCRC products that are granted the temporary exclusion according to this subsection must still be included in the producer's reported total pounds of resin.

(2) (a) By January 1st of each year, the department may review and determine temporary adjustments to the annual PCRC minimum percentage required for a type of container, PCRC product, or PCRC product category for the following calendar year.

(b) By April 1st, producers or PCRC product industry representatives may annually submit requests for consideration by the department to temporarily adjust the annual PCRC minimum percentages for the following year. These requests must provide the following information:

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

(ii) Year(s) for which the temporary adjustment is requested;

(iii) A thorough explanation by qualified experts supporting the producer's or PCRC product manufacturing industry's claim that a temporary adjustment to the minimum PCRC percentage for a type of container, PCRC product, or PCRC product category is needed;

(iv) Supporting documentation including changes in market conditions, recycling collection rates, product quality or shelf life issues, production line issues, capacity of recycling and processing infrastructure, domestic and global PCRC resin bale availability, transportation barriers, public health emergencies, work stoppages, catastrophic events, and/or other relevant factors;

(v) Progress made by the producers of PCRC products in achieving the requirements of this chapter;

(vi) Estimated time period that the identified factors impacting PCRC minimum feasibility are expected to extend; and

(vii) Any additional information the producer or the department deems necessary and relevant to support the basis for the request.

(c) For household cleaning product and personal care product containers, temporary adjustments may not be lower than 10 percent.

(d) For plastic trash bags the PCRC minimum percentage requirement may not be adjusted below the minimum requirements.

(e) For all PCRC product categories, annual adjustments may not exceed the minimum requirement for the current reporting year.

(3) Producers granted a temporary exclusion or adjustment to the PCRC requirements must continue to register, report, and pay fees according to the requirements of covered products in WAC 173-925-040 and 173-925-050.

(4) A producer or the manufacturing industry for a PCRC product may appeal a decision by the department pursuant to this subsection to the pollution control hearings board within 30 days of the department's determination, pursuant to chapter 43.21B RCW.

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PART D ENFORCEMENT

NEW SECTION

WAC 173-925-080 Penalties and audits by the department. (1) Any producer that does not meet the registration, reporting, or PCRC minimum requirements of this chapter is subject to penalties as specified in WAC 173-925-090 and 173-925-100.

(2) The department may conduct audits and investigations for the purpose of ensuring producer compliance.

(a) In the event of an audit, producers must provide documents to the department within 30 days of the request.

(b) Audit materials the department requests from producers may include documents and records that:

(i) Verify reported PCRC percentage data;

(ii) Confirm reported pounds of plastic resin by product type sold, offered for sale, or distributed in or into Washington state;

(iii) Demonstrate producer de minimis status;

(iv) Verify the national or regional data used to determine reported plastic resin; and

(v) Additional information requested by the department pertinent to verifying compliance with this chapter.

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NEW SECTION

WAC 173-925-090 Noncompliance warnings and penalties. (1) If the department determines that a producer is out of compliance with the registration or reporting requirements of this chapter, the department will notify the producer in writing.

(a) The first written notice of noncompliance to the producer serves as a notice of the violation. That notice will be mailed to the producer by certified mail. The notice will outline the actions required by the producer to come into compliance within 30 days of certified mail receipt of the notice.

(b) Failure of the producer to comply within 30 days of receiving the first notice will result in the department sending a second notice by certified mail.

(c) The department must send two notices prior to assessing a penalty for noncompliance. The department may assess the producer a penalty up to \$1,000 for each day of noncompliance beginning with the first day of noncompliance recorded in the first notice.

(d) Failure to comply with the penalty notice may result in additional action by the department.

(2)(a) Producer PCRC penalty notifications will be mailed to the producer by certified mail.

(b) Penalties may be appealed to the pollution control hearings board within 30 days from the certified mail stamped receipt date to pay the PCRC penalty receipt, pursuant to chapter 43.21B RCW.

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NEW SECTION

WAC 173-925-100 Minimum PCRC penalties. (1) If the department determines that a producer is out of compliance with the minimum PCRC requirements of this chapter, the department will notify the producer in writing.

(a) The department will use the producer's reported PCRC data to determine compliance status and may use information obtained through an audit.

(b) Each PCRC product category's minimum PCRC percentage rates as outlined in WAC 173-925-060(1) apply to the penalty amounts assessed.

(c) The following producer-reported data by covered product category will be used to calculate penalties for noncompliance in accordance with equations in (d) of this subsection:

- (i) Total pounds of all plastic resin;
- (ii) Total pounds of PCRC plastic resin by type.

(d) Penalties will use the following formulas by PCRC product category:

(i) Equation A - Determine actual PCR rate achieved:

$$\text{Total pounds of PCRC plastic resin} / \text{total pounds of all plastic resin} = \text{Actual PCRC rate achieved}$$

(ii) Equation B - Determine PCRC penalty:

$$[(\text{Total pounds of all plastic resin} \times \text{minimum PCRC rate}) - (\text{Total pounds of all plastic resin} \times \text{actual PCRC rate achieved})] \times 20 \text{ cents} = \text{PCRC penalty}$$

(e) The department will calculate producer PCRC penalties by June of each year based on the PCRC minimum dates outlined in WAC 173-925-060(1).

(f) Producer PCRC penalty notifications will be mailed to the producer by certified mail.

(g) Penalties may be appealed to the pollution control hearings board within 30 days from the certified mail stamped receipt date to pay the PCRC penalty receipt, pursuant to chapter 43.21B RCW.

(2) (a) Producers may request penalty reductions or alternatives to PCRC minimum penalties to be considered by the department based on the information provided in the producer request that describes the following factors:

(i) Documentation of anomalous market conditions, including disruption in, or lack of supply of recycled plastics;

(ii) Date the product was manufactured, showing that the production preceded the PCRC minimum requirements for that PCRC product category;

(iii) Unforeseen circumstances such as a public health emergency, natural disaster, or state of emergency; or

(iv) Other relevant and documented factors that a producer deems has prevented them from meeting the requirements.

(b) Producers may submit a request to the department to implement a corrective action plan in lieu of or in addition to assessing a penalty under this section. The corrective action plan details how the producer will come into compliance with the requirements of this chapter.

(c) Producers may submit a request to the department for a penalty payment plan or extension of the penalty payment deadline.

(3) Penalties may be appealed to the pollution control hearings board, pursuant to chapter 43.21B RCW.

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Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.