



January 22, 2024

Autumn Falls
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

By Website Submission

Re: Outdoor Industry Association Comments on Cycle 1.5 Draft Regulatory Determinations Report

Dear Safer Products for Washington Program Staff,

On behalf of the Outdoor Industry Association (OIA), we present these comments regarding the Washington Department of Ecology's Cycle 1.5 Draft Regulatory Determinations Report.

A member-based collective, OIA is a passionate group of business leaders, climate experts, policy makers and outdoor enthusiasts committed to sustainable economic growth and climate positivity while protecting—and growing access to—the benefits of the outdoors for everyone. OIA has also worked as a catalyst to lead the outdoor industry in understanding and eliminating harmful chemicals and materials from their supply chains.

Outdoor gear and apparel are designed to protect the user in a variety of circumstances. In the outdoors, qualities like water repellency, oil and grease repellency, durability, breathability, and heat resistance can make an incredible difference for comfort and survival. In extreme conditions, water repellency can be a life-saving function. The outdoor industry has used water repellent treatments to make moisture bead up and roll off outer fabric and membrane layers. Historically, these treatments have relied on per- or polyfluorinated substances (PFAS).

The outdoor industry is uniquely positioned to support Washington's vision of a thriving and environmentally responsible economy. Responsible chemical management is a critical piece of that puzzle. That's why outdoor brands have led the way in researching and deploying innovative technologies that will phase out PFAS entirely while maintaining protective qualities. Through that work, our brand leaders have developed unique expertise in the identification and phaseout of these chemicals. However, with that knowledge, we are concerned about the challenges that our members will face with the growing patchwork of state-based regulations of PFAS. We submit these comments to help Ecology in its implementation of the Safer Products for Washington Program Cycle 1.5 regulations.

I. Align Regulations with Other States

States have led the way in regulating PFAS in consumer products. From California¹ to Maine,² states have implemented a variety of regulations of PFAS. They take many forms: bans, reporting, or labeling requirements; regulation of specific PFAS or the entire chemical family; regulation of product categories or all products. Unfortunately, the result has been a patchwork that can be challenging for small and large businesses alike to navigate. As Ecology considers its own regulations for outdoor gear, apparel, and ski wax, we ask that it work to align those regulations with existing frameworks in order to ease the burden on small to medium brands, including many based in the state of Washington.

Timing:

Perhaps the most important alignment would be on timing. Outdoor gear and apparel is often designed years in advance. It is challenging to navigate different compliance dates across different jurisdictions. As Ecology considers its timelines for outdoor gear, apparel, and ski wax, consider the timelines that apply in other states. For example, California has textile regulations and New York has apparel regulations that both begin January 1, 2025.³

Definitions:

To ensure the same products face the same regulations across different states, we ask that Ecology look at states like California,⁴ New York,⁵ and Vermont⁶ that have already provided definitions for many of these product categories.

Exemptions:

Other states have codified exemptions from regulation to allow for ongoing use of PFAS in apparel applications such as military use, personal protective equipment, and outdoor apparel for severe wet conditions. In light of those consistent exemptions, we ask that Ecology align its regulations to contain the same set of exemptions in the apparel and outdoor gear sectors.

Adopt Science-Based Limits:

As outdoor brands become more sophisticated in detecting PFAS in their products, there is a growing recognition that PFAS contamination can arise in places where it was not intentionally added for performance. This kind of cross-contamination can be accounted for through a science-based maximum or safe harbor limit on Total Fluorine. For example,

¹ Cal. Health & Saf. Code § 108970, *et seq.*

² 38 M.R.S. § 1614.

³ Cal. Health & Saf. Code § 108970, *et seq.*; N.Y. Env'tl. Conserv. Law § 37-0121.

⁴ Cal. Health & Saf. Code §§ 108970(a) & (d) (defining “Apparel” and “Outdoor apparel for severe wet conditions”).

⁵ N.Y. Env'tl. Conserv. Law §§ 37-0121(4)(b) & (d) (defining “Apparel” and “Outdoor apparel for severe wet conditions”).

⁶ Vt. Stat. tit. 18 § 1691 (defining “ski wax”).

California has adopted a 100ppm Total Organic Fluorine safe harbor level to account for unintentional cross-contamination in products.⁷ Unfortunately, that statutory standard presents compliance challenges because—as described below—there is no generally accepted test method for Total Organic Fluorine (as opposed to Total Fluorine). Further, it is not clear that the 100ppm threshold was set based on research on what would constitute unintentional PFAS contamination in a product. Therefore, we ask that Ecology seek input to set a science-based standard for unintentionally added PFAS.

II. Support the Circular Economy

Many outdoor brands have led the way in building the circular economy that will define sustainability. Our brand leaders have built programs for resale, repair, recycled material use, and even full product dismantling and reuse of used materials. Unfortunately, the longstanding use of chemicals like PFAS and regulations of PFAS could threaten these circularity programs. As a result, we ask that Ecology consider key exemptions intended to support these programs, including the exemption of used goods, repairs and repair parts, warranty parts, as well as contamination arising from the use of recycled materials.⁸

III. Provide Clarity on Reporting Requirements

The Draft Regulatory Determinations Report recommends the adoption of reporting requirements for footwear, outdoor gear, ski wax, and certain apparel. In constructing that reporting requirement, we ask that Ecology consider the challenges with testing given current technological constraints and consider adopting a reporting requirement using Total Fluorine or Total Organic Fluorine as alternative reporting options.

There are no currently approved test methodologies that can provide test results for all PFAS individually. In fact, there are no EPA approved test methods for consumer products. ASTM has convened a subcommittee to discuss the issue but has yet to coalesce around test methods. As a result, any reporting requirement would impose an unknown set of requirements on outdoor brands—what test methods should they employ?

There are generally accepted test methods for Total Fluorine in consumer products.⁹ These tests may be used by brands as an indicator of PFAS content. However, those test methods are merely a screening tool—they do not tell you what PFAS is in the product, they do not

⁷ Cal. Health & Saf. Code § 108970(g)(2)(A).

⁸ Ecology has previously incorporated similar exemptions for priority products. *See* WAC 173-337-025 (exempting chemicals “present from the use of recycled materials” from the definition of “intentionally added priority chemical”); WAC 173-337-110(2)(c)(i)(A) & (B) (exempting products manufactured before date of restriction as well as repair parts or replacement parts made to refurbish or repair a product manufactured before date of restriction).

⁹ EN 14582:2016 or ASTM D7359:2018



necessarily indicate the level of PFAS in a product, and they may capture fluorine that is unconnected to PFAS content.

Private labs, meanwhile, have developed their own in-house test methods for Total Organic Fluorine in an attempt to isolate those fluorine atoms that can be attributed to PFAS. Those test methods are often proprietary and are not consistent across different labs. They are not standardized, and do not reliably isolate organic from inorganic fluorine in most of the types of samples relevant for outdoor apparel and gear. This is particularly an issue for trims and hard goods where inorganic fluorine might be present in composites.

A test for Total Fluorine can cost approximately \$150 for a material or finished product. A test for Total Organic Fluorine will cost more. Some labs provide test packages for select PFAS, but they vary in comprehensiveness and cost. Some labs offer testing for 30 PFAS, others offer testing for 60 PFAS, and still others offer testing for up to 100 PFAS. Those packages do not cover the thousands of potential PFAS. Our members have been quoted between \$200 and \$1600 to test for even a limited set of PFAS in a single component or material. An individual product may contain more than 60 materials. In constructing the reporting requirement, we ask that Ecology consider the technological limitations as well as the costs of different reporting requirements.

Ecology should take a science-based approach that matches the realities of testing in the marketplace. In light of the current capabilities, if Ecology is interested in adopting a reporting requirement, we recommend that Ecology adopt a reporting requirement that allows for reporting of *either* Total Fluorine or Total Organic Fluorine. Such information will provide the public with the information needed to make informed choices, while also providing clarity on how brand leaders can comply with those reporting obligations.

IV. Accommodate Industry-Specific Needs

Sell-Through and Legacy Inventory:

The outdoor industry faces significant inventory challenges. The industry experienced high demand during the COVID-19 pandemic, but a relative slowdown has led to inventory challenges for the industry as warehouses fill with legacy products. Older products may sit on shelves for years—and those shelves may belong to a retailer several links away from the original manufacturer.

Our brand members face the new challenge of tracking and testing legacy products that have since left their possession. Our retail members similarly face a new challenge of assessing inventory that may no longer comply with state law. Further, as brands update chemistry for existing product lines, products that once contained PFAS may no longer contain that chemistry. The need to differentiate new versions of products may require SKU or style number changes, new marketing, and new inventory tracking strategies that take time to implement. And while many PFAS free materials are available on the market

now, they were not available when products that are currently available were in their design phase, and many key suppliers are still ramping up production of high-performance PFAS alternatives. We may continue to experience material shortages as key suppliers increase the production of PFAS free materials.

We ask that Ecology consider adopting a safe harbor for goods manufactured before a certain prohibition date. Otherwise, disposal may become the only path forward for brands and retailers.¹⁰

Outdoor Gear Definition:

Ecology has provided that outdoor gear includes “non-clothing items that are used for a particular purpose such as backpacks, sleeping bags, umbrellas, camping furniture, and climbing rope.”¹¹ This ambiguous definition would potentially cover a broad swath of hard and soft good products. As Ecology drafts its regulations, we ask that it provide a definition that clearly delineates what falls inside the scope of the regulation. Such a specific definition would provide certainty for brands as they seek to comply. For example, would “camping furniture” include a tent? A hammock? A stove? Providing a limited list of specific products would better allow brand leaders to meet their regulatory requirements. Ecology may want to consider the use of Harmonized Tariff Schedule (HTS) codes to define which goods are in scope.

Conduct Further Research on Alternatives:

Ecology has conducted a limited amount of research on potential alternatives to PFAS in the marketplace. Several OIA members raised concerns with the research on safer, feasible, and available alternatives replacements, as well as Ecology’s market research.¹²

In the outdoor apparel and gear context, water repellency can play a lifesaving function. Recreators rely on the performance of their apparel and gear to protect them from harsh conditions. Ecology does not provide any chemical alternatives in its “safer alternatives” analysis, and instead relies entirely on altered weave alternatives as a safer alternative for water repellency.¹³ Although polypropylene and polyurethane knit textiles may be suited for certain applications, they may not present the protective equivalents of DWR treated, woven textiles for items like sleeping bags and tents. Considering the broad application of Ecology’s conclusions, we recommend that Ecology further study whether its conclusions

¹⁰ As Ecology is well aware, disposal implicates complicated questions regarding the environmental impact of disposed items. *See, e.g.*, Wash. State Dep’t of Ecology, *Aqueous Film-Forming Foam Collection and Disposal Program: Draft Programmatic Environmental Impact Statement* (Dec. 2023).

¹¹ Wash. State Dep’t of Ecology, *Draft Regulatory Determinations Report to the Legislature: Safer Products for Washington Cycle 1.5 Implementation Phase 3* at 10, Publication 23-04-062 (Dec. 2023).

¹² With regard to the market research, as Ecology itself notes, the use of third-party certification does not actually mean that Ecology studies products without PFAS. Rather than used a flawed study method, Ecology should examine the price of actual PFAS alternatives.

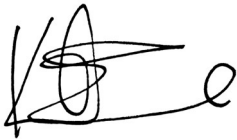
¹³ *Id.* at 34.

regarding only “some apparel”¹⁴ should be applied to an entire industry, and products that go far beyond that limited study.

V. Conclusion

We appreciate the opportunity to comment and welcome continued engagement. Please contact Julie Brown at jbrown@outdoorindustry.org if you have any questions or would like additional information.

Best,

A handwritten signature in black ink, appearing to read 'Kent Ebersole', with a stylized flourish at the end.

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¹⁴ *Id.*