October 16, 2024

Safer Products for Washington
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

By Website Submission

Re: Outdoor Industry Association Comments on Cycle 1.5 Preliminary Draft Rule

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 Preliminary Draft Rule.

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 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 repellant 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 is 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 Draft Rule with Other States

In the absence of federal regulation, states have taken the leading role in addressing PFAS in consumer products. Several states have adopted prohibitions and reporting requirements for intentionally added PFAS in outdoor gear and apparel, and outdoor brands have already begin adjusting their product lines to comply with existing state regulatory regimes. We request that Ecology evaluate other states' restrictions on PFAS in outdoor gear and apparel and align the Cycle 1.5 regulation with preexisting bans and reporting requirements wherever possible.

A. Standardize Product Definitions and Operative Language

PFAS prohibitions and reporting requirements adopted by several states feature similar definitions for product categories, helping brands identify priority product lines for PFAS management and eventual phaseout. For example, PFAS restrictions in several states, including California,[1] Connecticut,[2] and New York[3] define "apparel" in part as "clothing items intended for regular wear or formal occasions," and include detailed lists in the definition of the various covered products. In contrast, Washington's draft prohibition of PFAS in apparel does not include a detailed definition, indicating only that the ban on PFAS in apparel applies to "apparel and includes accessories (such as hats, gloves, and scarves) made from natural textiles, synthetic textiles, technical textiles, and leather."[4] Outdoor brands will be better able to identify which products are covered by PFAS bans and reporting requirements if product categories are defined through detailed exhaustive lists that align with definitions provided by other states.

We also request that Ecology employ preexisting terms of art used by other states when describing product categories that are critical to the outdoor industry. The Preliminary Draft Rule's prohibition on intentionally added PFAS in apparel includes a reporting carveout for "apparel intended for extreme and extended use."[5] What qualifies as "apparel intended for extreme and extended use" is not clearly defined, however, despite the provision requiring reporting for such products beginning in 2028.[6] This category appears to be drawn in contrast to the generally-accepted category of "outdoor apparel for severe wet conditions" adopted in many other states.[7] Terms of art currently used across state PFAS laws like "outdoor apparel for severe wet conditions" have already been analyzed by outdoor brands and allow brands to coordinate PFAS phaseouts nationwide. Using such terms wherever possible will better allow brands and retailers to understand and comply with Ecology's regulations, especially those that address products that are central to outdoor product consumers.

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[1] Cal. Health & Saf. Code § 108970(a)(1).
[2] 2024 Conn. Pub. Act No. 24-59 (S.B. 292) § (1)(a)(3).
[3] N.Y. Envtl. Conserv. Law § 37-0121(4)(a).
[4] WAC 173-337-110 (5)(a)(i).
[5] WAC 173-337-110 (5)(a)(ii).
[6] WAC 173-337-110 (6).
[7] Cal. Health & Saf. Code § 108970(d); N.Y. Envtl. Conserv. Law § 37-0121(4)(d).

B. Adopt Achievable Reporting Requirements

The preliminary Draft Rule's reporting standard requires the reporting by name and CAS RN of any priority chemical included in a priority consumer product that has a set notification requirement. The list of products that would require a reporting requirement include apparel intended for extreme and extended use, footwear, gear for recreation and travel, and ski waxes. In the absence of achievable reporting requirements, these reporting requirements will have the impact of a ban. 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. Further, in complex global supply chains, suppliers do not want to disclose information regarding chemical inputs due to their proprietary nature. As a result, any reporting requirement would impose an unknown set of requirements on outdoor brands—what test methods should they employ in the absence of information?

There are generally accepted test methods for Total Fluorine in consumer products.[8] 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 necessarily indicate the level of PFAS in a product, and they may capture fluorine that is unconnected to PFAS content. In fact, Ecology has adopted these standards for their own screening purposes in the preliminary Draft Rule.[9]

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

[8] EN 14582:2016 or ASTM D7359:2018
[9] WAC 173-337-110 (1)(c)(ii), et seq.

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. Otherwise, the reporting requirements will simply act as prohibitions by another name.

C. Adopt Safe Harbor Limits for Sales Prohibitions and Reporting

The preliminary Draft Rule's prohibitions and reporting requirements for intentionally added PFAS in products are predicated on a "detection of total fluorine."[10]Any detection of Total Fluorine creates the presumption that a product contains intentionally added PFAS and is subject to a prohibition or reporting requirement. While Ecology's Draft Rule allows manufacturers to submit statements rebutting the presumption that a detection of Total Fluorine indicates the presence of intentionally added PFAS, the current strict standard will likely force brands to rebut low level detections of total fluorine caused by cross-contamination. OIA members have routinely found low-level fluorine under 100ppm in samples, including for well-characterized materials that are known to contain no intentionally added PFAS.

To avoid placing the unnecessary burden on brands to submit statements defending products with no intentionally added PFAS, we ask that Ecology develop a numerical maximum for Total Fluorine or Total Organic Fluorine detection. Any products with a Total Fluorine or Total Organic Fluorine detection below the maximum number would not be deemed as containing intentionally added PFAS, while those with detections above the maximum would be subject to the presumption that PFAS had been added as part of the manufacturing process. We recommend, for example, a level of 100ppm to mirror California's own safe harbor level.[11]

II. Harmonize and Further Define Rule Contents

A. Extend Treatment of Legacy Inventory to Reporting Requirement

Our members are grateful for the accommodations that Ecology has made for the phase out of products containing PFAS. These provisions, including the sell-through of legacy inventory subject to bans,[12] will be an asset for retailers that are still struggling with inventory issues from the COVID-19 pandemic, as well as the brands working to update

[10] WAC 173-337-110 (1)(c)(ii), et seq.
[11] Cal. Health & Saf. Code § 108970(g)(2)(A).
[12] WAC 173-337-110 (5)(c)(i).

chemistry in their existing product lines in the face of key material shortages. We ask that the same treatment of legacy inventory also extend to reporting requirements. Unless Ecology extends this treatment, brands will have to backtrack through past product years and attempt to evaluate which products may be on shelves in Washington that contained PFAS and work to comply with the notification requirements, no matter the quantity of remaining inventory. Older products may sit on shelves for years—and those shelves may belong to a retailer several links away from the original manufacturer.

To that end, we propose that Ecology adopt the following language in each of its reporting requirements:

(c) Reporting. The manufacturer must provide notice that the priority consumer product described in (a) of this subsection, contains intentionally added PFAS. The manufacturer must provide notice to ecology in accordance with WAC 173-337-060. **This does not apply to a priority consumer product described in (a) of this subsection manufactured before [Effective Date of Reporting Requirement]**.

Adding such a reporting exemption for legacy products will streamline reporting obligations and allow brands to focus on accurately reporting any PFAS in new products. Without the exemption, retailers and manufacturers may become bogged down in their attempts to report for past product lines, an outcome that would not advance Ecology's goal of capturing information on current and future uses of PFAS in the Washington consumer products market.

B. Clarify Outdoor Gear Definition:

Ecology's preliminary Draft Rule provides that "gear for recreation and travel" includes "non-clothing items that are used for a particular purpose such as backpacks, sleeping bags, umbrellas, camping furniture, and climbing rope."[13] Our brand members appreciate that this definition elaborates beyond the earlier proposed definition.[14] However, the open-ended definition provided also potentially covers a broad set of outdoor gear products that may not fit within the current definition of "gear for recreation and travel," especially those that fall outside of the general categories of bags/luggage and camping furniture. Outdoor brands produce and sell a wide range of products, from mountain bikes to camping stoves and reusable water bottles, and the current definition of gear only lists a small subset of those products. As Ecology continues to draft its Cycle 1.5 regulations, we ask that it provide a detailed and specific definition that clearly delineates what falls inside the scope of restrictions on "gear for recreation and travel." Such a specific definition would provide greater certainty for brands as they seek to comply, and providing more expansive list of specific products or product types would better allow brand leaders to meet their

[13] WAC 173-337-110 (8)(a)(i)..

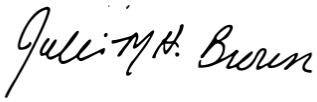
[14] Wash. State Dep't of Ecology, *Draft Regulatory Determinations Report to the Legislature: Safer Products for Washington Cycle 1.5 Implementation Phase 3* at 10, Publication 23-04-062 (Dec. 2023).

regulatory requirements. Ecology may want to consider the use of Harmonized Tariff Schedule (HTS) codes to define which goods are in scope.

III. Conclusion

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

Best,



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