



June 30, 2023

VIA ELECTRONIC MAIL

State of Washington
Department of Ecology
Attn: Shannon Jones
Shannon.jones@ecy.wa.gov
300 Desmond Drive SE, Lacey, WA 98503

RE: Comments on Proposed Rule WAC 173—925, Post-Consumer Recycled Content

Dear Ms. Jones:

Thank you for the opportunity to comment on the Department of Ecology's (Ecology) proposed rule for post-consumer recycled content (PCRC) rule, WAC 173-925, on behalf of the Northwest Grocery Association (NWGA). NWGA represents several grocery private labels, general retailers, and manufacturers, and employ more than 80,000 workers at more than 860 locations throughout Washington state.

We appreciate the ongoing dialogue and work with Ecology around the issues of product stewardship and particularly efforts related to the current rule development for PCRC. Unfortunately, there are two key issues that need to be addressed before Ecology finalizes the rule:

- Producer definition
- Compliance target averaging

Specific to those two outstanding issues:

Producer definition:

In previous communication with Ecology related to the drafting of the PCRC rules, NWGA expressed concern with the interpretation being used to define "producer" in WAC 173-925. As you are aware, our organization and members were at the table during the negotiation of SB 5022 – which became the enacting legislation of Chapter 70A.245 RCW. Ecology representatives

also participated in the negotiated language in statute. However, the proposed definition for producer in WAC 173-925 does not follow the clear intent of the definitional compromise.

NWGA supported the definition of producer as written in statute, which provides certainty within the supply chain process for the manufacture, brand owner, and retailer.

RCW 70A.245.010(19) defines producer as:

(19)(a) "Producer" means the following person responsible for compliance with minimum postconsumer recycled content requirements under this chapter for a covered product sold, offered for sale, or distributed in or into this state:

(i) If the covered product is sold under the manufacturer's own brand or lacks identification of a brand, the producer is the person who manufactures the covered product;

(ii) If the covered product is manufactured by a person other than the brand owner, the producer is the person who is the licensee of a brand or trademark under which a covered product is sold, offered for sale, or distributed in or into this state, whether or not the trademark is registered in this state, unless the manufacturer or brand owner of the covered product has agreed to accept responsibility under this chapter; or

(iii) If there is no person described in (a)(i) and (ii) of this subsection over whom the state can constitutionally exercise jurisdiction, the producer is the person who imports or distributes the covered product in or into the state.

In the proposed rule definition, Ecology re-writes the definition of producer ignoring the carefully crafted and negotiated language in statute. Here are a few examples of issues with the proposed definition in proposed WAC 173-925 (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.”*
 - “entity” is only used in statute as part of the definition for Licensee, and the way Ecology uses entity strictly limits the overall proposed definition of producer.
 - Statute says a “... the follow person...” is responsible, and then proceeds to outline whom a “person” may be in relation to producer.
- *“(a) The producer of a covered product is the entity that affixes its brand, or specifies that its brand be affixed, the covered product container or retail packaging, except as follows:”*
 - The concept of affixing a label is not used in statute and appears to place burden on a label owner inconsistent with the statutory construct.
- *Ecology’s proposed definition lacks key language used in the statutory definition, found in (19)(a)(ii), “... unless the manufacturer or brand owner of the covered product has agreed to accept responsibility under this chapter...”.*

- This language allows for any producer to assign responsibility for a covered product and was essential to the compromise of the final producer definition in law.

In addition to these examples highlighting concerns with the proposed definition, NWGA is concerned with Ecology interpretation of producer given the 2023 legislative discussion dealing with the definition of producer. HB 1131 (Improving Washington’s solid waste management outcomes) and SB 5144 (Providing for responsible environmental management of batteries) both specifically dealt with the definition of producer. Ecology representative directly engaged in the negotiations, including signaling support for the language being used in both bills – which would have also modified the statutory language for the PCRC law.

Furthermore, SB 5144 was adopted in the 2023 Session and includes clarification for the definition of producer using the waterfall of responsibility for covered products. The producer definition in SB 5144 included the same key language found in RCW 70A.245.010(19) allowing producers to assign responsibility to other persons for participation in stewardship programs.

Given the ongoing policy debate around the definition of producer in the state Legislature and the clear intent from stakeholders to ensure consistency across stewardship programs, and that Ecology was part of the negotiation of current law and the continued policy discussion – it begs the question, “If Ecology is not using the strict, plain-English, interpretation of the definition of producer in current statute – then why not use the latest clarification provided by the Legislature in SB 5144?”

During the rulemaking process Ecology has suggested the changes to the definition of producer ensures easier enforcement. However, if Ecology believes there are enforcement challenges, then why not bring those to the Legislature? Ecology, as noted above, is in the room during the negotiations, but has failed to clearly articulate the concerns it has with using the statutorily required definition.

The definition of producer is very important to our retail groups because there is little to no control from the retailer over how product packaging is utilized. There is also little to no retailer control over what goes into the product. Certain situations do allow some modicum of control – generally based on contractual provisions. The rules should reflect this and we believe the limitations are properly expressed in current law.

Compliance target averaging:

Industry has tough challenges ahead meeting the requirements outlined in statute, yet Ecology’s proposed rule will make it more difficult to meet the compliance targets by limiting the averaging for all beverage containers. We believe this is inconsistent with the statute.

In the rule, Ecology splits out dairy milk and wine as separate categories from other beverages for reporting PCRC. Creating subcategories and not averaging across dairy, wine, and other

beverages to reach our compliance targets will narrow our flexibility in complying with the requirements. Yet the statute doesn't require this of Ecology. The law expressly states, "A producer of a beverage in a plastic beverage container must meet the following annual minimum postconsumer recycled content percentage on average for the total quantity..., by weight, that are sold, offered for sale or distributed..."

There is no limitation in statute on the averaging across products or subcategories. The language in statute does provide a delay in the requirement for certain products – but doesn't tell Ecology to limit the averaging for compliance. Industry will need all the flexibility contemplated by the statute to comply with these requirements. Moreover, the proposed approach unnecessarily disincentivizes early action by not allowing for total averaging across beverage containers as statute allows.

We appreciate the opportunity to comment, providing critical feedback on the proposed rules for WAC 173-925. As an industry we are committed to working with Ecology to ensure compliance with post-consumer recycling content and appropriate stewardship of products in Washington state. We hope Ecology will reconsider the part of the proposed rule dealing with the definition of producer and averaging of PCRC across beverage products. Given the ongoing work in the product stewardship space it will be important to work together and honor the compromise achieved in the process of developing the governing laws.

Please don't hesitate to follow up if you have any questions or concerns. We look forward to our continued work on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda Dalton", with a long, sweeping underline that extends to the right.

Amanda Dalton

President

Northwest Grocery Association

Cc: Brandon Houskeeper, Washington Legislative Counsel