



June 30, 2023

Department of Ecology
Attn: Shannon Jones
PO Box 47600
Olympia, WA 98504

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

Dear Ms. Jones

On behalf of the membership of the Association of Washington Business (AWB), thank you for the opportunity to provide comment on the proposed rulemaking for the post-consumer recycled content (PCRC) rule, WAC 173-925. AWB is the state's oldest and largest business trade association representing around 7,000 large, medium, and small employers across the state.

AWB appreciates the stakeholder outreach and opportunities to participate in conversations around this policy. We have many members who support this policy and are engaged in this rulemaking. AWB supports robust PCRPs and while we were neutral on the enacting legislation, SB 5022, we did support those policies in the final bill. Key to that support, however, was the carefully negotiated definition of producer, which provided a clear hierarchy for responsibility for our members and their exposure under this proposed program. It also uses the same definition which Oregon uses for a similar program and the continuity across state jurisdictions makes compliance with the law much easier for our members.

We are therefore deeply concerned that the producer definition in the proposed WAC has been significantly changed from the definition passed by the Legislature. We do not believe that the Department of Ecology has the authority to change statutory law in this fashion and we strongly oppose the adoption of this rule based on this new definition. Ecology has stated in webinars that the original language creates challenges with enforcement and made it difficult to ascertain the responsible party in certain circumstances.

The original definition of "producer" was adopted after significant and wide-reaching stakeholder conversations during the 2021 Legislative session. Groups representing the agency, environmental NGOs, brand managers, packing producers, waste management, and retailers were all present during these discussions and worked together to craft this final language. After the language was finalized, there was further opportunity for public testimony on the bill, which included the new definition. At no time were concerns about enforcement challenges or unresolved questions of responsibility brought up by Ecology staff either during these conversations or in public testimony.

In addition, Oregon continues to utilize this exact same definition for the management of their EPR program and has reported no challenges with ongoing implementation or enforcement that AWB or its members have been made aware of. It is unclear why Oregon Department of Environment Quality continues to move forward with this definition while Washington's Department of Ecology has expressed concerns about workability and enforcement.

AWB supports agency efforts to provide clarity to legislative language, however in this instance the agency has moved beyond interpretation to re-drafting existing law. Furthermore, the extent of the discussions around this definition make the need for additional clarity unnecessary. The case *Association of Washington Spirits & Wine Distributors v. Liquor Control Bd. 2013* established that state agencies may not change existing law via rule. Any changes that are needed would need to go back to the Legislature, and AWB contends that the significant changes in the producer definition and how it completely re-writes the responsibilities of covered parties go far beyond the authority of the agency.

AWB continues to be supportive of the concept of PCRCP and this policy. We would like to see this policy implemented and appreciate all the work that has been accomplished towards that goal. However, the original definition of producer is key towards successful implementation of the policy, especially as it relates to alignment with Oregon's existing program. The employer community is deeply concerned at actions of Ecology to change of existing law via the rulemaking process. AWB believes that the fastest and smoothest path towards implementation would be to restore the statutory definition of producer as passed by the Legislature.

Thank you,

A handwritten signature in blue ink that reads "Peter Godlewski". The signature is written in a cursive, flowing style.

Peter Godlewski
Government Affairs Director Energy Environment and Water
Association of Washington Business