



Please accept the following as the Association of Washington Cities formal comments on the proposed Chapter 173-905 WAC, Battery Stewardship Program. Our key concerns, elaborated on below, are the repetition of statute in rules, the definition of “demonstratable costs,” the conflict with rewording the statute in the section on non-program site collection, and the omission in the education and outreach sections which creates ambiguity where none existed before.

Including unnecessary language as rules

RCW 70A.555.100 directs the agency to “adopt rules *as necessary* for the purpose of implementing, administering, and enforcing this chapter.”

AWC is requesting that the agency limit rulemaking only to the limited circumstances to resolve ambiguity or “fill in the blanks”, or where expressly directed to in statute (as in the definition of “demonstratable costs”). That is the limited scope and purpose of rulemaking according to the Administrative Procedures Act (APA) and related caselaw.

Much of the proposed rule language is either verbatim statute or restating unambiguous statutory language. We are requesting that the agency remove all these instances. Under the APA, a petitioner requesting amendment or repeal of an agency rule is “encouraged to address, among other concerns....(b) Whether the rule is needed...and (c) Whether the rule conflicts with or duplicates...state law. See RCW 34.05.330. The proposed rules fail both tests.

Instead of assisting in implementation, adopting rules that duplicate statute—or even restate unambiguous statutory language—is disfavored by the APA and is cause for petition because it works against good governance. It adds to the length of laws that must be drafted by the agency at the outset of rulemaking and amended any time the underlying statute is amended by the Legislature—an inefficient use of state resources. Once adopted, excessive and unnecessary rule language burdens those it regulates because jurisdictions must reference the rules and statute (and cross-reference due to all the duplication in rules) to ensure compliance. This compounds the work of local government,

exacerbating the inefficient use of public dollars—for no gain. Rules should be additive, not duplicative.

More concerning, it also creates the possibility of conflict between the statute and the rule. The following are three examples where the proposed rules do not aid in resolving ambiguity but, instead, create it by conflicting with statute or by sole omission:

1. Definition of “demonstrable cost” includes a negotiation requirement that does not exist in statute, conflicts with the legal duty of the BSO, and undermines the statutory right of local governments to be reimbursed all demonstrated costs.
2. Sites at local government facilities (proposed WAC 173-905-500 (7)) rewords verbatim statute to require a non-participating government site to follow *all* procedures in the BSO plan rather than just the identified statutory list, according to the procedures in the plan.
3. Although the proposed rules concerning the education and outreach components of the law duplicate much of what is in statute, the draft omits the requirement for the BSO to address diverse language users, in consultation with impacted communities.

Definition of “demonstrable cost”

RCW 70A.555.060 states, in part:

...

*(3)(a) Except for costs incurred by a local government or local government facility exercising the authority specified in RCW [70A.555.070](#)(4)(c), **each battery stewardship organization is responsible for all costs** of participating covered battery collection, transportation, processing, education, administration, agency reimbursement, recycling, and end-of-life management in accordance with the battery management hierarchy and environmentally sound management practices.*

*(4)(a) Except for costs incurred by a local government or local government facility exercising the authority granted by RCW [70A.555.070](#)(4)(c), a battery stewardship organization **must reimburse local governments for demonstrable costs**, as defined by rules adopted by the department, **incurred as a result of a local government** facility or solid waste handling facility **serving as a collection site** for a program including, but not limited to, associated labor costs and other costs associated with accessibility and collection site standards such as storage.*

The definition of “demonstrable costs” must not be narrower than the statutory responsibility assigned to battery stewardship organizations for “all costs” of collection, transportation, processing, education, administration, recycling and end-of life management. By proposing rule language that requires any reimbursed costs to be “negotiated between local government and a BSO,” the agency has narrowed the eligibility standard from all costs incurred to those that a BSO agrees to through negotiation. This is not what the statute directs.

The Legislature was clear that the BSO “is responsible for all costs” to provide end-of-life management. The language chosen—*all costs*—is not conditional. The term “negotiate” is not found in Chapter 70A.555 RCW because the legislative intent was to place full responsibility of the costs on the BSO rather than to create a power imbalance between private companies and a local jurisdiction—learning from past implementation on previous EPR laws. Although each participating local government may *demonstrate* different costs associated with its participation, the statutory responsibility of the battery stewardship organization cannot be negotiated away.

The Legislature directed the agency to initiate rulemaking to define “demonstrable costs.” The agency has focused its efforts on the latter half on that phrase (costs) rather than what needs to be clarified—demonstrable. What does it mean to *demonstrate* costs to be eligible for reimbursement under the law? Because the statute expressly contains language about eligible costs and clarified areas that could be in question—“all costs” (see above), “labor costs,” “other costs associated with accessibility”, and “collection site standards such as storage”—there is no need to itemize eligible costs in rules. In doing so, the agency risks creating a conflict in interpretation. What the definition should do is clearly provide what it means to demonstrate a cost.

Alternative proposed definition:

“Demonstrable costs” are costs that a local government incurs, and can demonstrate through standard accounting practices and procedures, to provide covered battery collection activities pursuant to Chapter 70A.555 RCW.

Sites at local government facilities (non-program activities)

RCW 70A.555.070 states, in part:

...

*(c)(i) A local government facility may collect batteries at its own expense through a collection site or temporary collection event that is not a collection site or event under the program implemented by a battery stewardship organization. **A local government facility that collects covered batteries under this subsection must**, in accordance with procedures set forth in battery stewardship organization plans approved by the department:*

***(A)** Notify battery stewardship organizations of the local government facility's decision to operate a collection site that is not a collection site under a program established under this chapter;*

***(B)** Collect each chemistry and brand of covered battery at its collection site or sites;*

***(C)** Collect, sort, and package collected materials in a manner that meets the standards established in a battery stewardship organization plan approved by the department;*

***(D)** Either provide the collected batteries to the battery stewardship organization in lawful transportation containers for it to transfer the collected batteries at a processing facility the battery stewardship organization has approved, or transport to, or arrange for the transportation of collected batteries for processing at a facility that a battery stewardship organization has approved under a plan approved by the department.*

Proposed rule language by the agency:

- (a) A local government facility may collect batteries at its own expense through a collection site or collection event that is not a collection site or event under the program. A local government facility that collects covered batteries under this subsection **shall follow procedures included in approved plans and:**

[verbatim statute]

This rule section mostly duplicates statute and is, thus, unnecessary. The one departure from statute (in bold) results in a conflict with the statute, providing uncertainty rather than clarity.

By changing the statutory language to the bolded language, the agency has expanded the requirement of local governments from following the procedures in the plan to address the statutory list of tasks (A-D) to following *all* procedures in the plan *and* the following list (A-D). The bolded statutory language identifies what action the Legislature intended for jurisdictions to follow if they chose to collect outside of the program. The clause that follows the bolded clause (*in accordance with procedures set forth in battery stewardship*

organization plans approved by the department) is modifying the following list – it is not adding additional requirements. The Legislature could have placed this clause at the beginning of the sentence, which would have resulted in the same grammatical (and thus, legal) effect:

*In accordance with procedures set forth in battery stewardship organization plans approved by the department, **a local government facility that collects covered batteries under this subsection must: (A-D)***

We request that this entire section is struck from the proposed rules.

Education and outreach

The proposed rules repeat, in multiple sections, what already appears in statute. The notable exception is part of RCW 70A.555.080(f) (in italics):

And implementation of outreach and educational resources targeted to overburdened communities and vulnerable populations identified by the department under chapter [70A.02](#) RCW that are conceptually, linguistically, and culturally accurate for the communities served and reach the state's diverse ethnic populations, including through meaningful consultation with communities that bear disproportionately higher levels of adverse environmental and social justice impacts.

The agency appears to use “that are accessible for the communities where the outreach takes place” as a substitute for this provision. It is not. To be clear, we are not requesting that this provision is added to the rules; rather, we are asking that the rules get paired down to *only* include anything that is not already in statute. By picking and choosing which statutory provisions to repeat in rules and which to leave out, the agency creates confusion on what is required and increases the difficulty in determining compliance, both by the regulated and the agency.

Respectfully,



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