Washington Department of Ecology
Chapter 173-350 WAC – Organics Management Rulemaking
Divert, Inc. Response

December 12, 2025

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Divert thanks the Department of Ecology ("Ecology") for its continued efforts to ensure innovation plays an important part in addressing organics management in Washington state and for the opportunity to comment on the latest iteration of the organics management rulemaking. We offer a variety of comments below in response to Ecology's draft rules as well as a response to the composting industry's latest request to roll back this draft proposal to meet the limitations of certain companies in the industry and implement "Vermont style regulations".

Many of the comments submitted thus far suggest that Ecology should develop a solution to provide equal access to feedstocks for all organics processors, regardless of whether they rely on manual sorting or have invested in technology that actually improves environmental outcomes. These commenters suggest that the burden of contamination removal should shift entirely to food companies, rather than to the processing businesses that profit from claiming they can convert wasted organic material into clean, compliant byproducts. If a food company's source separation process can produce contaminant-free organics, then these materials should go to composting. But if certain products cannot be fully decontaminated through reasonable source separation, the food company should not be penalized or forced to seek special approval simply because they must use a processor capable of doing that work. It is the responsibility of the processor that earns revenue from producing these outputs (not the generator) to ensure feedstocks and byproducts meet contamination thresholds.

The comments provided run counter to Ecology's statutory mandate, which "is to protect, preserve, and enhance the environment of Washington state for current and future generations" involving "a coordinated program of pollution control, resource management, and environmental restoration." Ecology's responsibility in this rulemaking is to ensure stronger environmental performance. It is not tasked with intervening in the market in ways that dilute environmental standards or effectively select winners and losers, as many commenters have urged.

As our state continues to advance wasted food prevention and as landfill diversion increases, Ecology must ensure the organics processing industry is not given permission to pollute Washington's farms, backyards, playgrounds and public areas through contaminated finished organic products. When people procure compost and digestate to enhance their soil quality, they should see clean and earthy black soil, not diapers, plastic bags, and packaging material. Throughout this process, we've continued to hear from local jurisdictions and the policymakers involved in passing the HB 2301 legislative provision that created this rulemaking process. They've said time and again that the state's organics processing apparatus should not be limited to the capabilities of legacy incumbent organics processors, and the state's permitted solid waste facilities should do more to address contamination. These stakeholders have indicated that 1) existing processes and procedures for examining the contamination levels in organics processing facilities lack clarity, are incompatible with the latest organics management laws, and must be addressed, and 2) existing standards that address contamination in source separated material are incompatible with decades-old guidance. Prior regulations did not take into account new technologies that incorporate advanced depackaging and anaerobic digestion. *These technologies are enabling the food companies to access more capacity than ever and recover material that had previously been landfilled. Most importantly, their finished product contamination metrics exceed legacy composting industry performance (as demonstrated by third party testing). Now is not the time to roll back this critical progress!*

U.S. Composting Council (USCC) Comments

Throughout this rulemaking process, Divert has engaged in conversations with many Washington state composters, and two things have become clear.

1. The vast majority of composters do not accept commercially generated wasted food (Divert is aware of only one company in Washington state that does). Unfortunately, some advocates want loosened environmental regulation to help some composters get more commercial feedstock volume. However, the marketplace has long decided that commercially generated wasted food is not well-suited for composting unless it has robust pre-processing operations in place.
2. Composting champions, including some environmental lobbyists financially backed by a local composting company and associations such as the USCC, have already won significant composting subsidies in Washington state, such as compost procurement ordinances and compost purchase reimbursement programs. They've begun to recognize that member companies will not benefit from those subsidies if increased landfill diversion volume is not going to compost. As a result, they are asking Ecology to force food industry companies to choose composting over anaerobic digestion in order to ensure member company volume increases. It shouldn't be the state's responsibility to subsidize the operations of companies that the marketplace is not choosing.

<u>The USCC is asking Ecology to benefit an already subsidized industry by forcing food companies to work with certain member companies.</u>
If organics processors do not want to invest in the infrastructure that's needed to produce clean byproducts, then they should not be in the organics processing business. If food companies are not choosing a certain company's processing services because of this lack of infrastructure, then this rulemaking should not be forcing food companies to choose them either. Divert is troubled that an organization with a mission "to improve soil health, clean air/water, and create a stable climate" is suggesting that regulators limit the capabilities of organics processing companies to only what certain member companies can do. These companies are generating byproducts that result in better third-party contamination testing results. Customers are freely choosing these services, often while simultaneously paying for their franchised curbside collection service. If customers are choosing to do something different with their food products rather than discard them to a local jurisdiction's curbside collection service, this suggests that the marketplace is appropriately responding to innovation. Our entire organics processing industry should collectively focus on innovation and modernization instead of asking regulators to roll back hard-fought contamination reduction efforts or prevent food companies from benefitting from innovative solutions.

<u>The USCC is asking Ecology to roll back proposed incoming feedstock and finished product testing limits.</u>
The USCC suggests that the Department of Ecology is creating "restrictive burdens on compost facilities while failing to hold depackagers accountable to basic environmental outcomes." Divert is troubled that an industry already benefitting from guaranteed feedstock in the form of long-term curbside collection franchises, local jurisdiction compost procurement ordinances, and compost reimbursement programs for farmers, is arguing that the anaerobic digestion industry is unfairly benefiting from Ecology's latest rulemaking proposal. Companies like Divert are making privately-funded investments in technology with demonstrated success in processing food products that were previously landfilled (in addition to incentivizing volume reduction by addressing the root cause of waste). These companies do not have long-term curbside franchise agreements to guarantee a high-volume supply of feedstock or compost procurement ordinances or purchase programs to guarantee robust demand.

The department's latest draft rules hold depackagers to the same standard for finished organic products by proposing processes that ensure physical contaminants can be properly dealt with. The rules do not prevent composters from accepting certain types of material; they simply ensure that material with more than 2% visual contamination is pre-processed to remove contamination. The rules are simply acknowledging the practical reality that any organics processors without the manual or mechanical means to pre-process incoming material with more than 2% contamination should not accept that material until that contamination is reduced. Divert applauds Ecology for lowering this threshold from 5% and

recommends a more objective evaluation process instead of a subjective eyeball test. Divert also asks Ecology to consider whether 2% is restrictive enough for organics processors that are unwilling to invest in pre-processing infrastructure. The latest draft pre-processing limits leave room for contamination risk if organics processors are not taking any additional pre-processing steps. If a organics processor accepts feedstock with 1.99% physical contaminants without having pre-processing infrastructure in place, then the proposed policy could potentially tolerate up to 1.99% physical contaminants in finished organic products that are not tested. If current state legislative policy subsidizes composting in favor of other forms of organics processing like anaerobic digestion, then the administrative code should also ensure that composters and all types of organics processors don't have a free pass to accept contaminants that would be impossible to extract from their process.

In addition, The USCC appears to be complaining that Ecology is adding "new layers of testing, reporting, and compliance requirements that will drive up costs and slow down progress on composting — even as more organics are landfilled." The best way to ensure there are no physical contaminants in finished organic products is to conduct regular inspections and testing for finished organic products. Limiting finished material contamination to 0.5% or less physical contaminants by dry weight is a step in the right direction. Divert asks Ecology to reject lobbying from the USCC or other advocates that oppose new testing requirements because such requests conflict with the latest Organics Management Laws. The statutory requirement of this rulemaking process is to force accountability to ensure that material unsuitable for legacy collection and hauling operations is not landfilled, and to ensure the organics processing industry is not complicit in driving up finished product contamination.

Source Separation Comments

The USCC and other lobbyists representing legacy composting, collection, and hauling entities are asking Ecology to reconsider longstanding source separation policy to meet the performance limitations of certain member companies. They note that Ecology's new rules "undermine source separation, the foundation of Washington's solid waste system, by effectively exempting grocery stores from sorting their recyclables, food waste, and garbage." It's important to note that Divert's own data from routine audits conducted for customers shows that the amount of packaging in its bins is incidental. Divert recently shared with Ecology the results of an audit for a national retailer demonstrating that packaging in Divert bins amounted to 6.6% of the bin's products by weight. For the sake of comparison, Divert recently performed a simple test on recyclable cardboard found in typical household parcel shipments. It found that the weight of incidental tape and other items that hold recyclable cardboard packaging together amounts to roughly 5-10% of the weight of the overall amount of recyclable cardboard. This is unsurprising, since the collection and hauling industry tolerates a reasonable amount of incidental contamination in curbside recycling and does not ask those in businesses or individual homes to hand separate these incidental and non-recyclable contaminants. Policymakers know that if it required an extreme level of source separation, the amount of recyclable material collected would plummet.

Those asking for source separation reform are directing their attention to the wrong place. The roughly 5-10% levels of inorganic incidental packaging found in Divert bins pale in comparison to the 40-45% levels of contamination found in the source separated recycling programs championed by WRRA for its member companies. Those opposing Ecology's contamination reforms have created a false narrative that depackaging operations intentionally collect municipal solid waste and recyclable material in order to drive up volume. Divert's own experience contradicts this, considering that it employs individuals to sort through and remove obvious contaminants and penalizes companies for putting anything other than incidental packaging attached to food products directly in its bins.

More importantly, when depackaging systems are designed and permitted correctly, their finished product contamination results are far more effective than any program that has manual packaging separation of "clean" organics. Effective depackaging systems do not macerate or pulverize packaging into small pieces that can pass through screening, like some composting systems can potentially do. Divert uses equipment that gently pulls packaging off and uses hydraulic friction and a wet process that moves contaminants through primary, secondary, and tertiary screening. Divert's own testing results reinforce the benefits of an effective depackaging system. Divert has provided Ecology with the first digestate

testing completed for its new facility in Turlock, California. Third-party test results completed at Soiltest Consultants in Moses Lake, WA (Ecology's own third-party testing firm), demonstrated that this digestate is cleaner than any finished compost product available in Washington state.

Vermont Depackaging Moratorium Comments

As noted in our previous rulemaking comments, Divert was supportive of Vermont's temporary moratorium on new depackaging permitting. Occasionally, Divert encounters local jurisdictions and privately-operated companies haphazardly addressing physical contamination through ineffective off-the-shelf depackaging units. They believe this equipment will enable them to take on commercially generated wasted food and its higher rates of incidental contamination. Unfortunately, a simple $5-10M investment in depackaging equipment does not necessarily mean contamination standards will be met, especially when there is no wet process to screen out small pieces of packaging. The State of Vermont recognized this when it implemented a moratorium on depackaging until it could implement a process to ensure finished products are free of physical contaminants. The best way to ensure organics processors are taking responsible action is to 1) put stringent screening standards in place for those who do not have pre-processing equipment and 2) put stringent permitting standards in place for those that do have processing equipment capable of taking on hard-to-recycle organics. For both types of operations, rigorous finished product testing must be in place to ensure contamination thresholds are met.

Divert's own rigorous permitting experience in Washington state suggests that Ecology is already well out front of the challenges Vermont encountered.
Unlike Vermont, Ecology is proposing responsible incoming feedstock requirements to ensure pre-processing operations are utilized where applicable and finished products meet robust finished product contamination testing standards. Ecology already put that concept into practice when it reviewed and permitted Divert's depackaging and anaerobic digestion operation for a new facility that mirrors the one it recently opened in Turlock, CA. As noted, the digestate byproduct from that new facility underwent third-party testing and performed better than finished compost products widely sold across Washington state.

Vermont's proposed regulations do not include strict finished product testing requirements.
It's surprising to see a rulemaking proposal enacted to address excessive soil amendment contamination not include contamination testing for finished organic products. The fact that Vermont has not addressed finished product testing suggests that its moratorium and new proposed rules were also advanced to favor composting over anaerobic digestion. This presents a credible reason why the USCC and some composting lobbyists are advocating for "Vermont-style regulations".

Vermont's draft recommendations place unreasonably restrictive requirements on food companies.
It prevents organics processors that have the capability to accept packaged food products from also accepting any food products that are not packaged. As a result, some food companies will have to choose two separate organics processing operations to help the state further subsidize a composting industry that's unable to process packaged commercial food products. Regrettably, many food companies will simply be left with stranded products that have no suitable organic processing destination other than the landfill. Here are just a few examples:

3. Food manufacturers would not be able to send food manufacturing byproducts that are unsuitable for composting to industrial-level depackaging and anaerobic digestion operations, simply because they have not yet been packaged.
4. Food retailers that intend to maximize the amount of packaged food diverted from the landfill would be required to invest in two separate organics processing operations. They would need to implement costly and redundant pre-processing measures that current partners like Divert already have, including hiring dozens of workers at a store to physically remove incidental contaminants. This proposal would not only have a significant impact on the already strained cost of groceries, but it would also result in feedstock that remains unsuitable for composting. Like Divert, some composters direct employees to sort through and remove any material that would create problems in its processing operations, but none are able to completely remove packaging. Before Divert invested in depackaging equipment, it only accepted unpackaged food products. It's

unpackaged food products contained contamination that needed further refinement, and its data analysis demonstrated that retailers' packaged material was simply going to the landfill.

5. Non-profit food banks that have a mix of packaged and unpackaged food that's unfit for human consumption would be forced to make a costly choice. They will have to send unpackaged food products to local composting operations and decide whether they can afford to choose an additional service for their packaged food products or determine whether it's more cost effective to simply landfill it.
6. Local jurisdictions that have massive amounts of food scraps collected at transfer stations deemed too wet, too large, or too contaminated for composting operations will be unable to use industrial-level depackaging and anaerobic digestion operations that have enough capacity to process this material.

Vermont's moratorium resulted in the needless landfilling of food products.
During the time that Vermont's moratorium was in place, there was no measurable impact on increased composting volume. This article noted that "*A 2022 law placed a moratorium on the construction of new depackaging facilities in Vermont and compelled the state to convene a depackaging stakeholder group to come up with policy recommendations. Since then, the volume of food waste sent to compost has remained relatively steady even as the total amount of diverted food waste in the state has grown.*" Composting rates held steady because of what many food companies have known for years. Many states and localities have advanced organics diversion laws while making assumptions that this organic material will be acceptable for composting. What's often missed is that the tonnage thresholds of these laws often require commercial generators of wasted food to bear the burden of landfill diversion. The vast majority of experts in the hauling and composting industry acknowledge that anaerobic digestion is more appropriate for commercial food since the compost industry often lacks the type of infrastructure needed to process wet contaminated materials. More importantly, there is simply not enough yard waste volume in the state to make the additional wasted food products suitable for compost processing. A Vermont-style requirement would only result in increased volume for trash haulers.

Ecology's draft rules acknowledge that packaged food products will be at risk of being landfilled if pre-processing operations are not permitted.
Ecology's draft rules recognize that there are packaged food products that composters are not currently able to accept, and in the absence of pre-processing operations, these food products are being landfilled. Some articles suggest that the amount of food trapped inside food product packaging residuals is as high as 38%. Divert's own data shows that the amount of food being landfilled and in need of recovery is much higher. When stores add Divert's packaged product program, they see significant diversion gains, confirming that these food products were previously landfilled. These food products would continue to be landfilled under Vermont's proposed system. Here are some examples that validate this:

7. A large retailer with over 1,100 locations went from diverting 85lbs/store/day on a depackaged program to diverting 165lbs/store/day after launching a program that accepted packaged food products. The retailer saw no dip in donations.
8. Divert performed a waste characterization study for a national retailer on a depackaged program to demonstrate how much its service increased overall diversion. The study found that while these stores were diverting 200lbs/store/day through a depackaged program, an additional 250lbs/store/day was still ending up in the trash compactor. 155lbs of those 250lbs going to landfill was packaged food. Once this retailer launched a program that accepted both packaged and unpackaged food products, their diversion increased to over 500lbs/store/day.
9. Additional audits demonstrated that retailers with smaller food formats (a higher percentage of packaged food than unpackaged produce) had even larger gains.

Data demonstrates that this type of food was never being hand separated for composters. Forcing food companies to try hand separating all food to benefit composters instead of sending it through an additional layer of depackaging would run counter to the Organics Management Law rulemaking goals, which acknowledges that food companies need additional processing for their unique food products.

Recovery rate

Some commenters continue to recommend that Ecology implement a 10% recovery rate for pre-processors and anaerobic digesters. This would run counter to this rulemaking's legislative intent and result in non-compliance for many waste generators. The authors of HB 2301's legislative provision that initiated this Ecology rulemaking acknowledged that recovery rates prevent "an entire class of organic products from meeting the goals of HB 1799 and HB 2301". That's precisely why the Senate Ways & Means Committee removed an arbitrary 90% recovery rate provision placed on anaerobic digestion and replaced it with this rulemaking provision. A minimum recovery rate would impose a disincentive for organics processors to accept entire classes of industrial-scale difficult-to-process pre-consumer food from food manufacturers, food retailers, and food banks. These products include packaging material inherent to preservation and transportation through the food supply chain. They also contain significant amounts of water that is pretreated and recovered during pre-processing and would not be reflected in final recovery rates. Countless amounts of nutrient-rich off-specification/rejected, unsold, and inedible food products would be landfilled and waste generators would fail to meet rigid recovery rate standards.

If an overall organic material recovery rate were applied to an anaerobic digestion process, it would not result in a 90% recovery rate since the so much of the incoming organic material ends up as disparate byproducts such as water, biogas, and digestate soil amendment. Recovery rates would also be distorted by non-digestible/non-compostable organics (pits, husks, and other material) that lack nutrient value, are not processed into biogas or digestate, and are not wanted by composters. It's best to focus on measuring an organics processor's end products and effectiveness in removing contaminants of a certain size. This would be consistent with how other states are addressing physical contaminants, including California, which measures effectiveness through testing that's tailored to each type of process and does not pose restrictions on incoming feedstock.

Conclusion

Divert is encouraged by Ecology's efforts to develop organics diversion solutions and contamination standards that work at all points of the food supply chain. We applaud Ecology for recognizing the need to embrace alternative solutions, rather than limit waste generators to the limitations of certain legacy companies. We welcome the additional conversations that will unfold as the state pushes forward on this rulemaking initiative.

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