

Divert (Holly Yanai)

Please find Divert's comments attached for the Organic Materials Management Rulemaking, Chapter 173-350 WAC.

We appreciate the opportunity and would be happy to chat through any of our comments further.

Cheers,
Holly Yanai

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

August 13, 2026

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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. We appreciate the opportunity to comment on the latest draft of the organics management rulemaking. We offer a variety of comments below.

We also want to express our concern about alternative proposals from landfill owners, waste haulers, composters, and purported environmental advocates. At least one of these stakeholder proposals has already been accepted by Ecology, which rolled back initial incoming feedstock progress made in the previous rulemaking draft. We are concerned that this rollback fails to meet HB 2301’s statutory obligation to reduce incoming feedstock contamination for organic materials management facilities.

These stakeholders have already sought further rollbacks in this latest comment period. Divert is troubled by these efforts to loosen incoming feedstock and finished product standards and implement anti-competitive “Vermont style regulations”. Outcome-based standards work because they force facilities to update their infrastructure and innovate. These rollbacks would negate proven pre-processing innovations that increase recoverable food volumes while removing contamination. These rollbacks also appear to be designed to meet the limitations of a few local jurisdictions and their incumbent composting company. Unfortunately, it would simply ensure that publicly owned and publicly contracted legacy systems do not have to evolve to manage the complexity of today’s food system. Protecting existing operations and market share does not serve the state’s interest in advancing environmental outcomes. This would further erode the public’s trust about whether finished compost and soil amendment products are safe for fields, agricultural crops, and backyard gardens. Lastly, these alternative proposals would also have adverse social outcomes through higher food prices.

Divert asks Ecology to resist the lobbying from these companies and consider the following recommendations that would strengthen contamination protections:

Set a Lower Incoming Contamination Limit

Divert is concerned that Ecology is not addressing its statutory requirement to address contamination associated with incoming food waste feedstocks. The RCW 70A.205.540 amendment in 2024 from HB 2301 directs Ecology to address contamination in finished organics products by improving both incoming feedstock and finished products: *“The department must adopt new rules or amend existing rules adopted under this chapter establishing permit requirements for organic materials management facilities requiring a solid waste handling permit addressing contamination associated with incoming food waste feedstocks and finished products, for environmental benefit.”* The statute directs Ecology to make contamination improvements for incoming feedstocks. Divert believes that Ecology’s initial reduction from 5% to 2% was not only warranted but specifically required by statute.

Page 17 of Ecology’s “Preliminary Analyses” document notes that *“Amendments to RCW 70A.205.540 in 2024 direct Ecology to address contamination in incoming organic feedstocks at organic materials management facilities. This limit is meant to protect organics management facilities from the expense of feedstocks that are too contaminated to effectively transform into finished products without initial pre-processing. Together with the pre-processor standards, the proposed rule amendment is meant to reduce the cost of removing contamination at organic materials management facilities, to reduce the number of loads rejected due to contamination, and help maintain the high quality of finished products.”* Page 70

notes that *"We considered setting a lower incoming physical contamination limit between 2% and 4% by volume. However, based on public comments we decided that a 5% by volume incoming physical contamination limit would be less burdensome to covered parties."* Page 71 notes that *"We considered having no incoming contamination limit for organics management facilities, however, this would not meet the statutory mandate of requiring further reduction of incoming feedstock contamination."*

Divert is concerned that Ecology has not met this statutory mandate to require further reduction in incoming contamination, because the current and proposed incoming feedstock limit for organic materials management facilities (composters) remains 5%. While Ecology's initial proposal met the statutory requirement by lowering the threshold to 2%, the latest iteration moved it back to 5%. This negates the steps it took to meet this statutory requirement, given that the vast majority of organic material management facilities already had a 5% limit. Ecology acknowledges this in its "Preliminary Analyses", noting *"We do not anticipate any impact on existing facility operations due to the proposed five percent contamination limit. The baseline already limits compost facilities to accept feedstock that is five percent contamination by volume or lower unless they have a plan to decontaminate it prior to composting."* If there was a widely known contamination problem that led to this statutory change, and if the latest draft will not have "any impact on existing facility operations", then one could reasonably assume that the statutory obligation is not being met.

Comment letters written by the City of Seattle, King County, Cedar Grove, and others in the composting industry expressed concern about Ecology's initial 2% proposal and asked for a reversal of this change. Divert is also aware of lobbying from the leaders of these organizations to the highest levels of state government. Existing facility limitations should not be a reason to resist improved incoming feedstock requirements that are clearly required by statute.

The problem that the statute and Ecology's initial rulemaking proposal was trying to solve is well documented. Page 21 of Ecology's "Preliminary Analyses" document notes that *"Ecology's 2022-2023 organics characterization study found that 2.2% of hauler-collected residential organic material by weight was physical contamination. In a similar waste characterization study for 2022, King County identified 7% of residential organic waste, and 10% of non-residential organic waste, by weight as contaminants."* Ecology acknowledges that incoming contamination remains high even in mature programs like King County, where residents and businesses have been familiar with organics diversion programs for years. It also acknowledges that as incoming material increases, contamination is likely to increase too. Page 21 notes that *"Most residents of King County have had access to organics collections for years, making it a plausible model for how much contamination there may be in areas of the state where organics collection will become required over the next several years. The baseline for analyzing the impacts of the proposed rule is not static. We assume that there will likely be an increase in organic waste managed by Washington facilities and that waste will likely become more contaminated with material that cannot be processed by organic management facilities."* Despite the documented problem, page 28 states *"Pre-processing operations for feedstocks with less than five percent physical contaminants by volume is exempt from all requirements under this section."*

The latest rulemaking draft appears to be a direct response to significant lobbying efforts asking Ecology to forego statutory amendments to RCW 70A.205.540. These amendments require Ecology to address the statutory mandate on incoming food waste feedstocks because the legislation that prompted it recognized this was a critical environmental problem (and Ecology reiterated this on page 71 of its "Preliminary Analyses" document). The data demonstrates that consumer behavior has not improved incoming contamination outcomes. The statute requires Ecology to address this by tightening the incoming feedstock threshold by which pre-processing should be required, and if that threshold doesn't change then facilities will continue to produce subpar contamination outcomes.

Page 26 of Ecology's "Preliminary Analyses" document notes that *"Many organic materials management facilities, such as compost facilities and anaerobic digester facilities, pre-process their incoming feedstocks to remove physical contaminants prior to organic materials management. These operations are common and are permitted in the baseline as part of each facility's solid waste permit under the existing rule. In addition to numerous other organic materials pre-processing operations, two depackaging*

operations have been permitted subject to the recycling and material recovery facility standards detailed in WAC 173-350-210.” Ecology acknowledges that successful pre-processing is possible and is successfully removing contaminants. It notes that “Changes in prevailing technologies and practices since then have created opportunities for Ecology to amend the rule to better meet the environmental, safety, and economic goals of chapter 70A.205 RCW.”

Privately funded facilities in Washington state have invested in pre-processing to reduce incoming feedstock contamination below 2% and meet the incoming feedstock improvement thresholds the statute envisioned. Why should Ecology allow publicly funded facilities managed by the City of Seattle, King County, and their designated composting entity, Cedar Grove, to continue receiving contaminated feedstock without having sufficient pre-processing in place? Divert asks Ecology to resist the continued lobbying pressure from these city, county, and industry leaders and restore the improved incoming contamination limits. This will ensure contaminant levels are reduced before organic materials management can begin.

Avoid calls to set an incoming physical contamination limit for pre-processors

Divert applauds Ecology for recognizing that many organics management facilities already deploy pre-processing operations and for adding a pre-processing section in rulemaking. Page 16 of Ecology’s “Preliminary Analyses” document states that *“The proposed rule amendment is intended to recognize that organic materials pre-processing is a necessary step in the organics management process for some feedstocks. Organic materials pre-processing has existed in Washington for years, either at an organics management facility or at a material recovery facility, and will likely grow if feedstock contamination increases together with expansions to residential and commercial organic materials management. By creating a distinct permit section that sets requirements for these activities, Ecology intends to achieve contamination reduction standards for incoming feedstocks prior to processing at an organic materials management facility and to reduce start-up costs by increasing regulatory certainty for these operations.”*

Divert also applauds Ecology for resisting efforts to set an upward incoming physical contamination limit for pre-processors. Page 70 notes *“We considered setting a physical contamination limit on feedstocks received by organic materials pre-processing. Since these facilities’ primary function is to remove contamination to meet contamination limits prior to processing at recyclers, it does not meet goals to limit how much contamination an organic materials pre-processor may receive and remove. To help address stakeholder feedback, we did specify that such facilities cannot accept municipal solid waste.”*

Ecology correctly recognized that commercially generated wasted food has many incidental contaminants, regardless of whether it remains heavily packaged. For this reason, many organic materials management facilities in the state do not accept commercially generated wasted food. By permitting pre-processing facilities, Ecology recognizes that food products not previously processed can now be redirected away from the landfill and into these facilities. Pre-processing facilities enable feedstock to reach a low enough contamination level to be processed by organic materials management facilities. Divert accepts packaged food products where non-recyclable packaging is in direct contact with organic material. This material is never accepted by curbside recycling programs and usually not accepted by legacy curbside composting programs – but it still needs to be redirected away from the landfill. For food retail customers, Divert does not accept municipal solid waste or outer packaging that is not in direct contact with food. For food manufacturers, Divert often receives heavily packaged food products that have recyclable outer food packaging, and this material is recovered for recycling at Divert facilities. Placing an upward limit on the amount of food packaging that can be accepted by a pre-processing facility would only prevent this type of food material from being recovered. It would result in the unnecessary landfilling of food products and would run counter to the statutory requirement to redirect food away from landfills.

Resist calls to deflect waste processing responsibility onto food companies

Implementation of “Vermont style” regulations:

Landfill owners, waste haulers, and composters have continued to publicly pressure Ecology to roll back these draft rules by abdicating their responsibility to process this wasted food material and placing it on the backs of food company workers. These stakeholders' comments, direct lobbying, and recent media placements suggest that food companies and depackaging operations – not organic management and waste processing companies – have been contributing to contamination in compost and soil amendment products! The absurd insinuation made by these stakeholders is a dereliction of their duty as environmental stewards. It also suggests that these companies are resigned to the fact that they cannot reduce contamination on their own without shifting responsibility to food companies.

If Ecology were to adopt "Vermont style" regulations in the name of "source separation" improvements, it would shift the job of removing all incidental contaminants and the packaging that directly encompasses wasted food products onto food businesses themselves. It would also force food companies to hand depackage food products at each location instead of at regulated depackaging facilities like Divert. This is something the vast majority of food companies have never done before. Divert is only aware of one food retailer that attempts to remove packaging by hand. Onsite observations indicate that this practice results in a significant amount of incidental contaminants and food packaging being placed directly into the organics bin. Human error is something the marketplace continues to grapple with even in jurisdictions like the City of Seattle and King County, which have mature organics diversion programs. When organics materials management facilities are not equipped with pre-processing, the inorganic material in these bins is destined to end up in finished compost and soil amendment products, an environmental outcome we assume this retailer would not support.

Onsite observations at this food retailer also suggest that a tremendous amount of packaged food products continue to be landfilled. Ecology's draft rules recognize that many composters do not accept commercially generated wasted food or packaged food products, and in the absence of pre-processing operations, these food products are being landfilled. Food retailers have also become more acutely aware of this as they seek depackaging services from companies like Divert. 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 retail stores switch from an unpackaged food recovery program to Divert's unpackaged and packaged food product program, they see 2-4 times the amount of food products being recovered than before, confirming that these food products were previously landfilled. These food products would simply be landfilled under Vermont's proposed system.

To be clear, the inorganic material that the "Vermont style" regulations envision being recovered directly by food companies is not the often-recyclable outer packaging such as cardboard. This is the non-recyclable portion of packaging that comes into direct contact with food material – packaging that's intrinsic in transporting and preserving food. If food retailers were forced to take on the waste processing responsibility associated with "Vermont style" source separation regulations, it would result in:

1. De-sleeving cucumbers one at a time
2. Opening individual fruit cups
3. Removing lettuce from individual salad bags
4. Peeling stickers from individual pieces of produce
5. Emptying ice cream and yogurt containers
6. Adding staff and training associates to do this work while meeting stockroom food safety standards

Grocery retail operates on margins of roughly 1 to 3 percent, according to FMI. A new manual processing function at that margin does not get absorbed quietly. Retailers will pass the cost to shoppers, cut it elsewhere, or in some cases send unsold food back to the landfill, packaging included, rather than build a hand-sorting operation in every store.

A more important question to ask is: Why are composters, waste haulers, and landfill owners teaming up to shift the burden to food companies when non-recyclable material is ultimately landfilled anyway? This is because compost facilities that should already be equipped for contamination removal (but are not investing in it) would get to deflect that responsibility to food companies; and waste haulers and landfill

owners would get the waste hauling and landfill “tip fees” associated with disposing non-recyclable material at each individual location. These stakeholders are asking for a massive policy change simply to avoid processing responsibility and to recover hauling fees for a small amount of incidental material.

Recovery of recyclable inorganic materials

Ecology appears to have also recognized this challenge when it resisted calls to have rigid requirements in place about how or where inorganic materials should be recovered. Page 71 of Ecology’s “Preliminary Analyses” document indicates that Ecology “*considered requiring organic materials pre-processors to recover inorganic recyclable materials.*” and it ultimately did “*add a section in the operating plan at such facilities to include a description of any plan to recover inorganic recyclables.*”

At the retail food company level, the stores Divert services have direct access to curbside recycling programs and make regular use of their “blue bins” for recycling inorganic material. It is simply not in their best financial interest to place recyclable inorganic material in Divert bins. Divert also works with food manufacturers, where damaged, off-spec, or spoiled food product pallets that cannot be sold or donated are redirected away from the landfill. For these products, Divert recovers inorganic material that meets recycling recovery guidelines and sends it to local recycling companies.

Source separation policy must reflect real inbound material – pre-processing is a prerequisite

Wasted food diversion goals cannot be met if food waste is only defined as clean, unpackaged scraps suitable for composting, something the “Vermont style” regulations attempt to force onto the marketplace. The food material actually entering the system at scale is often contaminated with incidental plastics (stickers, ties, rubber bands, etc.), regardless of whether it is encompassed in packaging. It is often commingled with packaged food and incompatible with composting without pre-processing separation. Policy must reflect real inbound material flows, not an idealized subset. The dominant volumes of wasted food are not kitchen scraps. They are industrial scale and retail scale packaged food losses that only exist in a form that requires processing. Examples from real operations include 500lbs of yogurt, dairy blends, sauces, and prepared foods with mixed packaging arriving each day from individual retail stores; 1,500 tons of food manufacturer mozzarella arriving each day in fully packaged plastic film, corrugate, and pallets; and 3 million cases of wine arriving bi-weekly that is bottled, labeled, boxed, and shrink wrapped. None of this material can go to compost directly. There is no manual or upstream solution that makes this material compost-compatible at scale. Pre-processing through mechanical separation or other means is not optional – it is a prerequisite.

Avoid calls to add a recovery rate to organic materials pre-processors

In February 2024, waste hauling and composting companies attempted to add an initial amendment to HB 2301. That amendment failed to advance and was replaced by the statutory amendment that directed Ecology to advance this rulemaking process. The initial amendment called for a flat recovery rate on anaerobic digestion facilities. That amendment failed because it lacked meaningful context for how organic material processing pathways incorporate various inputs and outputs into their process. Adding a flat recovery rate to all organics processing pathways would be impractical and would likely harm composting more than anaerobic digestion operations. This is because composting consumes water and energy, whereas high recovery depackaging and anaerobic digestion actually creates energy. It also recovers water from food, recirculating it through the depackaging process, and pretreating it before returning it back into local water treatment systems for reuse.

Page 71 of Ecology’s “Preliminary Analyses” document notes “*We considered adding a recovery rate to organic materials pre-processors. However, we lack data available nationally to set an informed organic materials pre-processing recovery rate. Additionally, measuring recovery is imperfect given the water weight of incoming feedstocks, which easily evaporates and/or is separated from organic material. This alternative may have resulted in a standard that was not equitable and more burdensome for organic materials pre-processors.*” Divert applauds Ecology for once again recognizing how challenging and impractical it would be to incorporate a recovery rate into pre-processing. Outcome-based standards

continue to be the best way to ensure environmental results are achieved. Placing artificial recovery rates on facilities simply picks winners and losers and disincentivizes innovation.

Strengthen enforcement of testing standards.

Ecology has taken a critical step forward in revising testing requirements for finished organic materials. The latest *"proposed rule amendments revise the existing testing frequency and reporting requirements for finished organic products to make test reporting more consistent, to demonstrate the consistent quality of organic products, and to be more protective of human and environmental health."* While increasing testing frequency is a positive step forward, outcomes will only be as good as the self-selected samples chosen by organics processors for third party testing and self-reporting. Divert urges Ecology to recognize that under the current process, contamination problems have persisted, all while organics material management facilities conveniently report testing data that passes Ecology standards. Outcomes will only improve when testing is randomly performed by Ecology, and organics processing companies are held to stronger enforcement standards.

Strengthen contamination limits in finished organic products and refuse calls from those seeking to loosen currently proposed requirements.

Divert applauds Ecology for strengthening contamination limits in finished organic products to align with other states like California. The movement from 1% physical contamination and 0.25% film plastic by weight to limit to 0.5% physical contamination and 0.1% film plastic by weight is a critical step in meeting HB 2301's statutory requirement. Page 18 of Ecology's "Preliminary Analyses" document notes now *"Amendments to RCW 70A.205.540 in 2024 directed Ecology to address physical contamination in finished organic products. The proposed rule amendments are meant to address the statute and to respond to consumer demand for less contaminated finished products. It is meant to benefit both consumers and producers of finished organic materials by maintaining consumer confidence in product quality despite anticipated increases in finished product volume. The proposal rule amendments are also more protective of the environment and public health."*

Divert is also very supportive of Ecology removing labeling tolerances for compost products that have physical contamination that "exceeds .1 percent film plastic by weight but does not exceed .25 percent film plastic by weight" along with the requirement that compost exceeding those tolerances should not be used near sensitive environments (wetlands, streams, lakes, etc.). In doing this, Ecology has recognized that any compost material exceeding these thresholds should not be land applied anywhere.

A strengthened contamination limit in finished organic products is a critical step in improving environmental quality. It also helps rebuild public trust that the compost and soil amendment products purchased in wholesale and retail locations across Washington state will not be harmful to fields, agricultural crops, and backyard gardens. However, Divert believes that public trust would be restored further if a stronger limit was in place. Even at Ecology's currently proposed 0.5% finished physical contamination and 0.1% film plastic contamination standards, a 40-pound bag of compost could still legally contain the equivalent of up to 7.7 square feet of thin plastic film. Expressed differently, this would amount to a quantity of 1,103 one-inch (1") plastic film squares allowed to be inside each bag of compost sold in Washington state¹. At an allowable 0.5% physical contamination limit, a 100-pound bag of

¹ Calculation methodology: 0.7 Mil plastic sheeting weighs 13.4 pounds for a 4,000 square foot roll. That's .00335 pounds per square foot or 1.52 grams per square foot. A 40-pound bag of compost (1 cubic foot) has an estimated dry weight of 25 lbs. At the proposed 0.1% acceptable plastic film standard (by weight), that amounts to $0.001 \times 25 \text{ pounds} = .025 \text{ pounds}$ or 11.34 grams per each 40-pound bag of compost. 11.34 grams of acceptable plastic film divided by 1.52 grams of 0.7 mil per square foot equals 7.66. That's 7.66 square feet of 0.7 mil plastic allowed inside each 40lb bag of compost. Expressed differently,

compost is also allowed to have one half pound of plastic material. Continued calls by waste haulers and composters to loosen the finished product standard should send alarm bells to Ecology that these organic processors lack confidence in whether their facilities and processes can protect public health.



These photos demonstrate what a 7.66 square feet sheet of 0.7 mil plastic film would look like if plastic film were unable to be removed by a pre-processing operation or by an organic materials management facility's contamination removal process. At Ecology's proposed 0.1% (by weight) plastic film standard, up to 11.34 grams of plastic film would be allowed in each 40-pound bag of compost (25-pounds by dry weight). This sheet of 7.66 square feet 0.7 mil plastic film is also cut into 1,103 1" plastic squares to illustrate how much plastic film contamination would be permissible in every 40-pound bag of finished compost produced and sold in Washington state.

Set incoming physical contamination standard based on weight

Divert understands the challenges associated with sampling and testing material that might be burdened by water weight and result in inaccurate results. Ecology noted on page 70 of its "Preliminary Analyses" document that it "*considered setting an incoming physical contamination standard based on weight. However, because organic material weight varies greatly by type of feedstock and climate (moisture), a weight comparing organic materials to relatively light-weight physical contaminants would lead to inconsistent measurements. Moreover, best practices indicate this should be measured on a dry-weight basis in a laboratory, which is impractical for organics management material facilities deciding to accept or reject an incoming load in real time. This alternative would be more burdensome for covered parties to comply with.*" Divert appreciates Ecology's concern about how challenging testing methodology can be. From our own experience in California, we were forced to implement testing procedures for material required to be sampled midstream when water is being used to depackage material. This measure was an attempt by the state to determine residual quantity. The moisture levels at this sampling point leads to inaccurate results, suggesting that residual quantities are higher than what was actually being disposed of once processing was complete and water had been recovered. It can be challenging to properly align a testing program with a particular processing pathway.

Even though dry weight testing can pose challenges, a volume-based assessment remains a very subjective and challenging way to measure incoming contamination. Organic materials management facilities that may try to avoid making pre-processing investments could easily avoid pre-processor permitting by subjectively assuming their incoming contamination remains below 5%. This rulemaking process was prompted by statutory amendments to RCW 70A.205.540 that directed Ecology to address incoming food waste feedstocks because there was a recognition that this was a critical environmental problem. Currently, organic materials management facilities require a visual assessment to determine if contamination by volume exceeds 5%. If the incoming feedstock standard continues to require a visual

this would amount to a quantity of 1,103 (one thousand one hundred and three) 1" plastic squares per bag of compost.

volume-based determination and the limit remains 5%, this suggests that the statutory requirement to address contamination is not being addressed.

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. We ask Ecology to strongly consider our recommendations as it nears completion of this important rulemaking task.

A handwritten signature in black ink, appearing to read "Chris M. Thomas". The signature is fluid and cursive, with the first name "Chris" and last name "Thomas" clearly legible, and "M." in the middle.

Chris Thomas
Vice President of Public Affairs
Divert Inc.