

**Minimum Post-consumer Recycled Plastic Content Requirements for the
Sale of Trash and Carry-Out Bags and Food, Beverage, and Household Product Containers
*Draft Model Legislation***

Thank you for taking the time to review the draft model legislation and offering your suggestions. Please use this form, in track change if you're editing the text itself, and return it to lynn@nerc.org and tgoldberg@newmoa.org by Friday, February 11, 2022. Your comments will be considered by the committee.

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COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: Post-consumer recycled material use cannot be applied ubiquitously to all plastic packaging products. Use of post-consumer recycled plastic can be problematic in some packaging and is not technologically feasible in others. This model legislation should clearly define and exclude any packaging that does not possess a viable solution for use of recycled plastic.

I. Statement of purpose of bill as introduced

This bill proposes to require producers of certain plastics products to use a specified minimum amount of post-consumer recycled plastic in the production of new future products, phased in over time. The plastic products include trash bags, carry out bags, and non-durable containers used for food, beverages, household cleaning, and personal care products.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: While the potential benefits to the environment that come with increased percentages of post-consumer recycled materials are real and attainable, it is important that this model legislation not compromise the integrity of any currently existing infrastructures that protect the production of safe and effective packaging products.

The benefits of mandating a minimum post-consumer recycled content in plastic products include conservation of resources, reduction in greenhouse gas emissions and other environmental impacts of producing plastics products from virgin petroleum, and improvements to domestic markets for plastic recycled materials while providing stability to the markets for recycled plastics. This proposed bill can be used concurrently and augment other programs, such as beverage container redemption program and/or extended producer responsibility for packaging.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: We recommend the following be added to the Definitions section:

“Food” means articles used for food or drink for consumption by humans or other animals and articles used for components of any such article.

II. Definitions

“Beverage” means beverages intended for human consumption including:

- Water and flavored water;
- Beer, wine, distilled spirits, and all other alcoholic beverages;
- Mineral water, soda water, and all carbonated and non-carbonated soft drinks;
- Milk and non-dairy milks; and
- Any other beverage except for infant, medical food, fortified oral nutritional supplements used for persons who require supplemental or sole source nutritional needs due to special dietary needs directly related to cancer, chronic kidney disease, diabetes, or other medical conditions as determined by the Department.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

“Carry-out bag” means a film plastic bag of any thickness provided or made available by a retail establishment to a customer at the point of sale for the purpose of transporting groceries or retail goods.

“Carry-out bag” does not include: a bag provided to contain meat, seafood, loose produce or other unwrapped food items; a newspaper bag; or a laundry or garment cleaning bag.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

“Covered product” means an item in one of the following categories subject to minimum post-consumer recycled content requirements:

- Plastic trash bags;
- Plastic carry-out bags;
- Plastic non-durable containers, including food and beverage containers, and household cleaning and personal care product packaging.

“Covered product” does not include any type of container or bag for which the State is preempted from regulating content of the container material or bag material under federal law.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

“Medical Beverage” means any beverage as defined in 21 U.S.C. Sec. 17321(z) or 21 U.S.C. Sec. 360ee(b)(3).

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

“Plastic” means a manufactured or synthetic material made from fossil fuels that link monomers through a chemical reaction to create a hydrocarbon polymer chain that can be molded or extruded at high heat into various solid forms.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

“Plastic beverage container” means an individual, sealable, separate bottle, can, jar, carton, or other container made of plastic that is intended to contain a beverage up to two gallons in capacity.

“Plastic beverage container” does *not* include:

- a) Refillable beverage containers, such as containers that are sufficiently durable for multiple rotations of their original or similar purpose and are intended to function in a system of reuse;
- b) Rigid plastic containers or plastic bottles that are or are used for medical devices, medical products that are required to be sterile, nonprescription and prescription drugs, or dietary supplements;
- c) Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container; and
- d) Containers certified by the Biodegradable Products Institute (BPI) as compostable.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: Excluding pre-consumer and/or post- industrial secondary materials from recycled content is concerningly limiting. Certain applications, such as food-contact, require pre-consumer or post-industrial secondary materials as a necessary source because they eliminate the potential for contamination. Limiting the language to include only post-consumer recycled content would leave gaps in the supply of necessary materials, particularly for food-contact applications. Additionally, this definition needs to address the inclusion of advanced recycling or chemical recycling. Advanced recycling should be incorporated in this model as a viable source of recycled material and should be defined as such expressly, particularly as it relates to post-consumer material content.

“Post-consumer recycled content” means a material or product that has completed its intended end use and product life cycle, from households or by commercial, industrial, and institutional facilities and which has been separated from the solid waste stream for the purposes of collection and recycling. “Recycled content” shall not include pre-consumer or post-industrial secondary waste material or materials and by-products generated from, and commonly used within, an original manufacturing and fabrication process.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: The definition of producer mistakenly points to the packaging manufacturer, who does not have control over what packaging is purchased by a brand owner or distributor, nor has the capacity to track where or how their packaging is used by a brand owner. FPA developed the following definition of producer through extensive dialogue with the Product Stewardship Institute, which should instead be used in this model legislation to accurately track the use of PCR content in products and packaging. While manufacturers of packaging can help certify specified use of PCR, they do not have the ability to report on packaging use within specific geography; track consumer sales in a jurisdiction; control how products are packaged; and educate the consumer through the package label.

“Responsible Party” means a party that has legal ownership of the brand of a product for sale, use, or distribution in the state, including online retailers who sell into the state, that utilizes covered material.

(1) For packaging, responsible parties shall be determined based on the following criteria:

(A) A person who manufactures a product under the manufacturer’s own brand that uses covered material;

(B) If subparagraph (A) does not apply, a person who is not the manufacturer of a product under the manufacturer’s own brand that uses covered material, but is the owner or licensee of a trademark under which a covered material is used in a commercial enterprise, sold, offered for sale or distributed in the state, whether or not the trademark is registered; or

(C) If subparagraphs (A) and (B) do not apply, a person who imports the product that uses the covered material into the state for use in a commercial enterprise, sale, offer for sale or distribution in the state.

"Producer" means the following person responsible, including a manufacturer, for compliance with minimum post-consumer recycled content requirements for a covered product sold, offered for sale, or distributed in or into this State:

- If the covered product is sold under the producer’s own brand or lacks identification of a brand, the producer is the person who manufactures the covered product;
- 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
- If there is no person described in 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.

"Producer" does not include:

- Government agencies, municipalities, or other political subdivisions of the State;
- Registered 501(c)(3) charitable organizations and 501(c)(4) social welfare organizations; or

- De Minimis producers that annually sell, offer for sale, distribute, or import into the country for sale in the State:
 - Less than 1,000 units of a single category of covered products; or
 - A single category of a covered product that in aggregate generates less than \$1,000,000 each year in revenue in the State.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: We recommend “Recycled Content” be defined as:

Plastics certified under an approved certification system and produced (i) from mechanical recycling using pre-consumer recovered materials, and post-consumer materials, or (ii) from advanced recycling feedstocks or advanced recycling products via mass balance attribution.

“Recycled content” means the portion of a covered product’s total weight that is composed of post-consumer recycled material, as determined by a material balance approach that calculates total post-consumer recycled material in the package as a percentage of the total weight of the covered product.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

"Retail establishment" means any person, corporation, partnership, business, facility, vendor, organization, or individual that sells or provides merchandise, goods, or materials directly to a customer. “Retail establishment” includes, but is not limited to, food service businesses, grocery stores, department stores, hardware stores, home delivery services, pharmacies, liquor stores, restaurants, catering trucks, convenience stores, or other retail stores or vendors, including temporary stores or vendors at farmers markets, street fairs, and festivals.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: Food should be expressly exempt from this model legislation because of the strict and comprehensive requirements of food grade materials. Food contact packaging must meet strict U.S. Food and Drug Administration (FDA) requirements for quality and sanitization. In many applications it is nearly impossible to use post-consumer recycled content materials and meet these FDA requirements. Further, food grade recycled resins exist in a limited supply. Sourcing the levels of food grade recycled resin the model legislation requires would be increasingly challenging.

More generally speaking, there should always be an exemption for containers for which existing state or federal regulations do not enable or permit the use of post-consumer recycled content, or for which there is not a commercially available packaging alternative that allows for use of recycled content.

“Rigid plastic container” means any non-durable plastic container used for food, beverages, household cleaning or personal care products.

- "Household cleaning and personal care products" means a bottle, jug, or other rigid container with a neck or mouth narrower than the base, and:
 - That is capable of maintaining its shape when empty;
 - Comprised solely of one or multiple plastic resins; and
 - Contains a household cleaning or personal care product.
- "Household cleaning and personal care product container" does not include:
 - Refillable household cleaning and personal care product containers, such as containers that are sufficiently durable for multiple rotations of their original or similar purpose and are intended to function in a system of reuse; and
 - Rigid plastic containers or plastic bottles that are medical devices, medical products that are required to be sterile, nonprescription and prescription drugs, and dietary supplements.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

“Trash bags” means a bag that is made of plastic and is designed and manufactured for use as a container to hold, store, or transport materials to be discarded or recycled, and includes, but is not limited to, a garbage bag, recycling bag, lawn or leaf bag, can liner bag, kitchen bag, or compactor bag. "Trash bag" does not include any bags certified by the Biodegradable Products Institute (BPI) as compostable.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: Requiring carry-out bags to contain at least 40% post-consumer recycled content 5 years after enactment is potentially too aggressive considering the vast array of unknown variables in the supply and demand chain for post-consumer recycled material. This is particularly true because the model does not define or discuss the inclusion of advanced recycling processes. Clarification regarding advanced recycling may provide better insight with regard to the supply of post-consumer recycled material, and thus as to whether the 40% rate is feasible.

III. Post-consumer recycled plastic content requirement

Carry-out bags:

- Beginning two years from the date of enactment, all carry-out bags offered, sold, offered for sale or distributed in the State must contain at least 20% post-consumer recycled content.
- Beginning five years from the date of enactment, all carry-out bags offered, sold, offered for sale or distributed in the State must contain at least 40% post-consumer recycled content.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Plastic beverage containers:

- Beginning two years from the date of enactment, all plastic beverage containers sold, offered for sale or distributed for sale in the State must contain at least 15% post-consumer recycled content.
- Beginning five years from the date of enactment, all plastic beverage containers sold, offered for sale or distributed for sale in the State must contain at least 25% post-consumer recycled content.
- Beginning 10 years from the date of enactment, all plastic beverage containers sold, offered for sale or distributed for sale in the State must contain at least 50% post-consumer recycled content.

Rigid plastic containers:

- Beginning two years from the date of enactment, all rigid plastic containers sold, offered for sale or distributed for sale in the State must contain at least 25% post-consumer recycled content.
- Beginning every three years from the date of enactment, all rigid plastic containers sold, offered for sale or distributed for sale in the State must contain must increase the post-consumer recycled content by 5% until 50% post-consumer recycled content is reached (no later than 18 years from enactment).

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: As discussed above, clarification regarding the inclusion of advanced recycling practices would help to unveil the potential for difficulties complying with this model based on supply chain limitations.

Trash bags:

- Beginning two years from the date of enactment, all trash bags sold, offered for sale or distributed for sale in the State must contain at least 10% post-consumer recycled content.
- Beginning five years from the date of enactment, all trash bags sold, offered for sale or distributed for sale in the State must contain at least 30% post-consumer recycled content.
 - Producers have the option of meeting the minimum post-consumer recycled content requirement by averaging the total amount of post-consumer recycled content from all trash bags sold into the State rather than per product.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

IV. Determination of compliance with post-consumer recycled plastic requirement

For the purposes of determining a producer's compliance with the post-consumer recycled requirement, the producer may rely on state-specific data regarding covered product sales and material use, if available, or if approved by the Department, may alternatively rely on the same type of regional or national data.

If a producer elects to rely on data derived from applicable data that is regional or national rather than state-specific, they shall:

- (1) Prorate the regional or national data to determine the state-specific figures based on market share or population in a manner that ensures that the percentage of post-consumer recycled plastic calculated for covered products sold in the State is the same percentage as calculated for that larger region or territory; and
- (2) Document the methodology used to determine those state-specific figures calculated under subparagraph (1) in the annual report.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

V. Registration, Third-Party Certification, Waivers, State Reporting, & Interstate Coordination

Registration

On or before _____, and annually thereafter, a producer that offers for sale, sells, or distributes covered products in or into the State shall register with the Department individually or through a third-party representative registering on behalf of a group of producers, in a form and manner as prescribed by the Department, and pay an annual registration fee of \$1,000. The Department may modify the amount of the registration fee as necessary to reflect the Department's costs to implement, administer, monitor, and enforce the provisions of this act.

The registration information submitted to the Department under this section must include:

- A list of the producers of covered products and the brand names of the covered products represented in the registration submittal;
- The number of items of each product category sold into the State in the previous 12 months;

- The average percentage of post-consumer recycled content for each product category sold into the State in the previous 12 months; and

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

FPA: The requirement for third-party certification has the potential to create several complications within this model legislation. At the forefront rests the absence of guarantee that a sustainable field of third-party certifiers will exist at the time of enactment; currently this field does not exist at such a capacity. Further, the model needs to address the accreditation of third-party certifiers. Compliance via third party certification on a state-by-state level would be severely challenging and potentially impossible. National third-party certification would be significantly less burdensome.

Compliance via third-party certification will be measurably costly and time consuming as it will require application fees, time and costs to communicate and validate data, and time to prepare and submit information to the state. No existing post-consumer recycled content legislation (in Washington, California, or New Jersey) contains any requirement for third-party certification. It is unnecessary to the model legislation at hand and should likely be removed as it is a substantial burden that lacks precedential support.

- Proof of third-party certification of compliance of post-consumer content requirements for covered products, as described below.

Third-Party Certification

Beginning thirty-six (36) months after the effective date of this act, and annually thereafter, each producer shall provide third-party certification of the minimum postconsumer recycled content of all covered products offered for sale in the State in writing to the Department. The certification must be specific to items sold into the State. Acceptable certifications will be determined by the Department and published on its website.

The certification shall be signed by an authorized representative of the producer. A producer shall submit the certification, in the form and manner determined by the Department, under penalty of perjury. The certification shall include the amount, in pounds, of virgin plastic, and the amount, in pounds, of postconsumer recycled material used by the producer for any products subject to the requirements of this act, and any other information as the Department deems necessary.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Waivers

A producer may seek a waiver from the requirements of this act, in which case the producer shall set forth the specific basis upon which the waiver is claimed and submit such proof as the Department determines necessary.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

State Reporting

By ____ of the first year of implementation, the Department must prepare an analysis that identifies the annual costs it expects to incur to implement, administer, and enforce this section, and including any rule making.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Authorization to Participate in an Interstate Coordination Clearinghouse

The Department is authorized to participate in the establishment and implementation of a multi-state clearinghouse to assist in carrying out the requirements of this act, in particular to help coordinate reviews of the producers' registrations, waiver requests, and certifications; implement education and outreach activities; and implement state reporting activities and any other related functions. Authorization shall include the ability to register on a centralized portal rather than a state-specific portal.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

VI. Confidentiality/Proprietary Information - Needs to be customized for each state

Should be customized for each state as a function of existing laws that apply to confidential business information.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

VII. Enforcement - Needs to be customized for each state

States might have rule making procedures they need to integrate into this law, or include reference to existing statutory authority, as appropriate.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

VIII. Penalties For Postconsumer Recycled Content Requirements - Needs to be customized for each state

The law should include a requirement that if a regulated party does not meet PCR goals there is a fine that is in excess of the cost of compliance. An example is included in [Appendix 1](#).

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

IX. Pre-emption

This law shall pre-empt any conflicting state, county, or local laws. The act would also supersede and preempt any municipal or county rule, regulation, code, or ordinance regulating the recycled content of those items.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:
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X. Severability - Needs to be customized for each state

Each state should add its appropriate language.

**Appendix 1 – Sample Penalty Language
Based on Washington State**

(1)(a) A producer that does not meet the minimum postconsumer recycled content requirements pursuant to section x of this act is subject to a penalty pursuant to this section. Beginning June 1st of the year following the first year that minimum postconsumer recycled product content requirements apply to a category of covered product, the penalty must be calculated consistent with subsection x of this section.

(b) A producer that is assessed a penalty pursuant to this section may pay the penalty to the department in one payment, in quarterly installments, or arrange an alternative payment schedule subject to the approval of the department, not to exceed a 12-month payment schedule unless the department determines an extension is needed due to unforeseen circumstances, such as a public health emergency, state of emergency, or natural disaster.

(2) Beginning June 1st of the year following the first year that minimum postconsumer recycled product content requirements apply to a category of covered product, and annually thereafter, the department shall determine the penalty for the previous calendar year based on the postconsumer recycled content requirement of the previous calendar year. The department shall calculate the amount of the penalty based upon the amounts in pounds in the aggregate of virgin plastic, postconsumer recycled content plastic, and any other plastic per category used by the producer to produce covered products sold or offered for sale in or into the state, in accordance with the following:

(a)(i) The annual penalty amount assessed to a producer must equal the product of both of the following: The total pounds of plastic used per category multiplied by the relevant minimum postconsumer recycled plastic target percentage, less the pounds of total plastic multiplied by the percent of postconsumer recycled plastic used; multiplied by 20 cents.

(ii) Example: $[(\text{Total pounds of plastic used} \times \text{minimum postconsumer recycled plastic target percentage}) - (\text{Total pounds of plastic used} \times \text{postconsumer recycled plastic percentage used})] \times 20 \text{ cents}$.

(b) For the purposes of (a) of this subsection, both of the following apply:

(i) The total pounds of plastic used must equal the sum of the amount of virgin plastic, postconsumer recycled content plastic, and any other plastic used by the producer, as reported pursuant to section x of this act.

(ii) If the product calculated pursuant to (a) of this subsection is equal to or less than zero, the department may not assess a penalty.

(3)(a)(i) The department shall consider granting a reduction of penalties assessed pursuant to this section for the purpose of meeting the minimum postconsumer recycled content requirements required pursuant to section x of this act.

(ii) In determining whether to grant the reduction pursuant to xx of this subsection, the department shall consider, at a minimum, all of the following factors:

(A) Anomalous market conditions;

(B) Disruption in, or lack of supply of, recycled plastics; and

(C) Other factors that have prevented a producer from meeting the requirements.

(b) In lieu of or in addition to assessing a penalty under this section, the department may require a producer to submit a corrective action plan detailing how the producer plans to come into compliance with section x of this act.

(4) For the purposes of determining compliance with the postconsumer recycled content requirements of this chapter, the department may consider the date of manufacture of a covered product.

(5) A producer shall pay the penalty assessed pursuant to this section, as applicable, based on the information reported to the department as required under section x of this act in the form and manner prescribed by the department.

(6) A producer may appeal the penalty assessed under this section within 30 days of assessment.