



Minimum Postconsumer Recycled Content Requirements for Plastic Products and Packaging Model Legislation

Introduction

A committee made of up state agency representatives and jointly facilitated by the Northeast Recycling Council (NERC) and the Northeast Waste Management Officials' Association (NEWMOA) drafted this model legislation. Its publication does not constitute an endorsement by NERC, NEWMOA, nor any of its members. Rather, it reflects a best effort based on current circumstances to provide a potential basis for state legislative action to further the use of postconsumer resin in plastic products and packaging.

Statement of Purpose of Bill As Introduced

This model bill proposes to require producers of covered plastic products and packaging to use a specified amount of minimum postconsumer recycled content in products or packaging that are used or offered for sale, phased in over time. The covered plastic packaging and products include film bags, single-use containers used for food, beverages, household cleaning, and personal care products, and rigid plastic products.

This bill does not address all types of plastic products and packaging. These include flexible packaging, liners, bladders, caps, lids, labels, corks, and other packaging components.

The proposed legislative strategy encourages a circular economy in plastics. The other benefits of mandating minimum postconsumer recycled content in plastic products and packaging include conservation of resources, reduction in greenhouse gas emissions and other environmental impacts of producing plastics products from petroleum and gas, strengthened domestic markets for products made with post-consumer plastics, and increased stability in the plastic scrap markets

Yet, mandates alone are not sufficient to achieve these benefits if plastic is not collected in sufficient quantity and quality to supply the mandated amount of material. This proposed bill is likely to be most effective when accompanied by well-designed policies and programs that promote and fund improved collection.

I. Definitions

“Beverage” means any potable liquid for human consumption, unless used, designed, or otherwise intended for use as infant formula, medical food, medical beverage, food for special dietary use, or as fortified oral nutritional supplements, wherein “food for special dietary use” means the same as the term is defined in 21 U.S.C. Sec. 105.3; and “medical food” and “infant formula” mean the same as those terms are defined in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 21 Sec. 301 et seq.”

“Covered product” means a plastic item in one of the following categories that is sold, offered for sale, or distributed within the State:

- Durable products, including but not limited to, recycling/compost/garbage bins and totes, storage bins, storage shelves, drainage tile, and corrugated pipes.
- Film bags, including but not limited to, trash, carry-out, laundry and garment cleaning, and newspaper bags.
- Single-use containers, including but not limited to, food and beverage containers, and household cleaning and personal care product packaging.

A single-use food container shall be exempt from the postconsumer recycled content requirements of this act for a period of five years beginning on the effective date of this Act, except that the exemption provided in this paragraph shall *not* apply to plastic beverage containers.

"Covered product" does *not* include any type of:

- Container, bag, or packaging for which the State is preempted from regulating the content that is covered by the "Federal Insecticide, Fungicide, and Rodenticide Act," 7 U.S.C. 19 s.136 et seq.
- Container, bag, or package associated with a product produced in or brought into the State that is destined for shipment to a destination outside the State, and that remains with the product upon shipment, or is manufactured for use in the shipment of hazardous materials and is (a) prohibited from being manufactured with material that is covered by federal packaging material specifications set forth in 49 C.F.R.s.178.609, or (b) is subject to the recommendations of the United Nations on the transport of dangerous goods.
- Secondary or tertiary packaging that may accompany the container or bag for the purposes of selling or distributing the container or bag into the State.
- Container or product certified as compostable to ASTM D6400 or D6868 standards.

"Department" means the State regulatory agency charged with implementation of this law.

"Durable product" means a product that has an expected lifetime greater than three years.

"Film bags" means a plastic bag designed to contain or transport goods.

"Food" refers to articles used for consumption by humans or other animals, and articles used for components of any such article.

"Hot fill" means a process to sterilize either a beverage or food product and its container during the packaging process, in which the food product is heated to a temperature between 194- and 203-degrees Fahrenheit and then injected into the container.

"Plastic" means a manufactured or synthetic material made from linking monomers through a chemical reaction to create a polymer chain that can be molded or extruded at high heat into various solid forms.

"Plastic beverage container" means an individual, sealable, separate bottle, can, jar, carton, or other container that is intended to contain a beverage up to two gallons in capacity. "Plastic beverage container" does *not* include 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.

"Postconsumer recycled content" means a plastic material generated by households or by commercial, industrial, and institutional facilities in their role as end-users of the product, which can no longer be used for its intended purpose. This includes returns of material from the distribution chain.

Recycled content does *not* include pre-consumer or postindustrial secondary waste material or materials and by-products generated from, and commonly used within, an original manufacturing and fabrication process.

"Producer" means the person responsible for compliance with minimum postconsumer recycled content requirements for a covered product.

- The owner or licensee of a brand or trademark for covered product that is sold under such person's owned or licensed brand or trademark (whether or not the trademark is registered in this State).
- The person is a manufacturer of covered product that lacks identification of a brand at the point of sale; or the producer is the person who manufactures the covered product.
- 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.

"Manufacturer" means a person that produces or generates covered product.

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

"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.

"Single-use container" means any plastic container used for food, beverages, household cleaning, or personal care products.

- "Household cleaning and personal care product packaging" means a bottle, jug, tube, or other rigid container:
 - That is capable of maintaining its shape when empty; and
 - Comprised solely of one or multiple plastic resins; and
 - Contains a household cleaning or personal care product.
- "Household cleaning and personal care product containers" do 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.

“Trash bag” 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.

II. Postconsumer Recycled Content Requirements

Durable Products:

- Beginning six months from the date of enactment, all durable products offered for sale or distributed in the State, must contain at least 25% postconsumer recycled content.
- Beginning five years from the date of enactment, all durable products offered for sale or distributed in the State, must contain at least 50% postconsumer recycled content.
- Beginning ten years from the date of enactment, all durable products offered for sale or distributed in the State, must contain at least 75% postconsumer recycled content.

Film Bags:

- Beginning six months from the date of enactment, all plastic film bags offered for sale or distributed in the State, must contain at least 20% postconsumer recycled content.
- Beginning one year from the date of enactment, all plastic film bags offered for sale or distributed in the State, must contain at least 40% postconsumer recycled content.

Single-Use Containers:

A single-use container shall be exempt from these requirements if it:

- (1) Contains drugs, dietary supplements, and medical devices as defined in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. s.301 et seq.
- (2) Contains toxic or hazardous products regulated under the "Federal Insecticide, Fungicide, and Rodenticide Act," 7 U.S.C. s.136 et seq.;
- (3) Is manufactured for use in the shipment of hazardous materials and is: (a) prohibited from being manufactured with used material by federal packaging material specifications set forth in 49 C.F.R. s.178.509 and 49 C.F.R. s.178.522, (b) is subject to the testing standards set forth in 49 C.F.R. s.178.600 through 49 C.F.R. s.178.609, or (c) is subject to the recommendations of the United Nations on the transport of dangerous goods.
- (4) Is a refillable container or a reusable container. For the purposes of this paragraph, "refillable container" means a rigid plastic container that is routinely returned to and refilled by the manufacturer with the same product packaged by the container; and "reusable container" means a rigid plastic container that is routinely reused by consumers to store the original product packaged by the container.

A package or container that contains food shall be exempt from the postconsumer recycled content requirements of this act for a period of five years beginning on the effective date of this act, except that the exemption provided in this paragraph shall not apply to a plastic beverage container.

- Beginning two years from the date of enactment, all single-use containers must contain at least 15% postconsumer recycled content.
- Beginning five years from the date of enactment, all single-use containers must contain at least 25% postconsumer recycled content.

- Beginning ten years from the date of enactment, all single-use containers must contain at least 50% postconsumer recycled content.

Department review and recommendations – Ten years from the date of enactment, the Department shall review the minimum recycled content requirements of this act and consider, at least:

- Are the requirements achievable?
- Should the percentages be adjusted?
- Are there are additional packaging or product categories that should be added, and if so what percentage of recycled content should be required?

Based upon this review, the Department shall send a report to the legislature containing the results of its analysis and any recommendations for changes to the law.

III. Determination of Compliance with Postconsumer Recycled Plastic Requirements

A producer shall achieve compliance with the postconsumer recycled requirements based upon the portion, by weight for each covered product category: bags, durable products, and single-use containers.

The calculation of averages may be based on a producer's entire covered product category, or separated into product sub-lines, provided that all of the producer's products are accounted for in the calculation, and that all individual products with postconsumer content used in the calculation are sold in the State.

The producer may include the weight and material content of liners, bladders, caps, lids, labels, corks, and any other packaging components, but if included it must be reflected in the annual report.

IV. 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 in an amount to be determined by the Department. The fee shall be adequate to cover the Department's costs to implement, administer, monitor, and enforce the provisions of this act, and shall be used exclusively for that purpose. The Department may modify the amount of the registration fee as necessary to reflect current implementation costs.

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 average percentage of postconsumer recycled content for each of the following covered product categories sold into the State in the previous 12 months:
 - Film bags
 - Single-use containers
 - Durable products.
- Proof of third-party certification of compliance of postconsumer 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 approved by the Department and published on its website.

An authorized representative of the producer shall sign the certification. 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 plastic, and the amount, in pounds, of postconsumer recycled plastic used by the producer for any products subject to the requirements of this act, and any other information, as the Department deems necessary.

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.

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.

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; recommendation of acceptable third-party certifications; 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.

V. 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.

VI. 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.

VII. 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](#).

VIII. 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.

IX. 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.

Disclaimer

The views expressed in this model do not necessarily reflect those of each of the NEWMOA-member states and NERC's members. Mention of any process or product name should not be considered an endorsement by NEWMOA, NERC, or the NEWMOA and NERC members.

About NEWMOA

The Northeast Waste Management Officials' Association (NEWMOA) is a non-profit, non-partisan, interstate association whose membership is composed of the state environment agency programs that address pollution prevention, toxics use reduction, sustainability, materials management, hazardous waste, solid waste, emergency response, waste site cleanup, underground storage tanks, and related environmental challenges in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. NEWMOA's mission is to provide a strategic forum for effectively solving environmental problems through collaborative regional initiatives that:

- Advance pollution prevention and sustainability
- Promote safer alternatives to toxic materials in products
- Identify and assess emerging contaminants
- Facilitate adaption to climate change and mitigate greenhouse gas sources
- Promote reuse and recycling of wastes and diversion of organics
- Support proper management of hazardous and solid wastes
- Facilitate clean-up of contaminant releases to the environment

For more information, visit www.newmoa.org.

About NERC

The Northeast Recycling Council (NERC) is a multi-state non-profit organization whose programs emphasize source reduction, reuse, recycling, composting, environmentally preferable purchasing (EPP), and decreasing the toxicity of the solid waste stream in the 11-state region comprised of Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Maryland, Pennsylvania, Rhode Island, and Vermont. Its *mission* is to minimize waste, conserve natural resources, and advance a sustainable economy through facilitated collaboration and action. For more information, visit <https://nerc.org/>.

February 11, 2022

Dear NERC and NEWMOA,

Thank you for the opportunity to provide comments for the proposed model legislation for recycled content. The [Alliance for Mission-Based Recyclers](#) (AMBR) represents pioneers of mission-driven, community-based nonprofit recycling and zero waste programs operating in the U.S. Our comments reflect more than four decades of experience in recycling collection, processing and education programs to manage post-consumer products and packaging.

AMBR strongly supports recycled content mandates and is grateful for the leadership of NERC and NEWMOA to develop this policy. AMBR would like to offer the following recommended revisions to the policy:

Scale penalty with market conditions rather than fixed value. The fixed price per pound penalty for non-compliance may not be sufficient to drive brands to purchase more recycled content, as we have learned from past PCR policies and in dialogues with consumer goods companies. Depending on the price of virgin plastic, it may simply be cheaper for companies to pay the penalty. AMBR suggests building in a periodic review of the effectiveness of the penalty and including language in the legislation that gives the oversight agency the ability to establish an adjustable penalty rate to account for the cost difference between virgin and recycled content plastics. This sliding scale rate, rather than a static amount, reduces the risk that it will be cheaper for producers to pay the penalty and will push more companies to invest in using PCR content.

Include flexible packaging in product scope. Flexible packaging is a fast growing share of consumer packaging and exempting these products from PCR standards gives them an unfair market advantage over other material types that have to use PCR and demonstrate compliance. Recycled content pouches with up to 40% recycled content are already available on the market. AMBR urges NERC to expand the product categories to set standards for flexible packaging either at the onset or in a phased approach. In addition, AMBR would like to see newspaper bags and laundry or garment cleaning bags should be included in the film category, and to include tubes in the definition of rigid plastic container used for personal care products.

Include durable goods in product scope. AMBR supports greater use of recycled content plastic in both durable and single-use products and packaging. There has been strong work done by NERC, EPA, and others to promote procurement standards for recycled content in durable goods, specifically drainage pipes and recycling/trash receptacles. AMBR recommends expanding the product scope to include these products as well to further drive recycled content demand.

Require reporting on both post-consumer and post-industrial recycled content. AMBR fully supports the focus on post-consumer recycled content over post-industrial recycled content. However, we would like to see a requirement for producers to report separately on post-industrial or pre-consumer versus post-consumer recycled content levels in products as well to better track the full extent of recycled content in the products.

Support regional entity rather than state level. AMBR sees strong benefits to a regional rather than state-by-state approach to recycled content mandates to reduce the compliance burden on producers and the oversight burden on state governments. Rather than provide the option to join a regional clearinghouse, we would prefer to see a regional approach to establishing a program similar to the Regional Greenhouse Gas Initiative among Northeast states. That said, AMBR is supportive of state level recycled content policies as well.

Registration fees should cover administrative and enforcement costs. This policy places a substantial burden on the state government(s) to manage enforcement and regulations. These costs should be paid by the producers and covered fully by the registration fees or other funding mechanism. AMBR suggests clarifying the registration fees to cover the full system costs.

Scale registration fees with company size. The webinar did not provide a sufficient explanation of the methodology used to establish a registration fee of \$1000 per producer. We suggest scaling the reporting costs based on revenue size.

Support recycled content rates. AMBR supports the rates and timelines for recycled content established in the bill.

Review of recycled content goals at regular intervals. To adjust for changing market conditions, the bill should authorize the regional clearinghouse to conduct a review of the recycled content at five years intervals with funding authorized from the fees paid by producers.

Publish data on website. We would like to see public reporting of the data on state or regional websites.

Eliminate preemption language. AMBR does not support the blanket ban on pre-emption. In particular, pre-emption should not apply to procurement standards established by local governments that help drive innovation and greater demand for recycled content.

Pair with design requirements. The availability of recycled content to meet these targets depends directly upon the design of plastic products and specifically the compliance with industry specifications to increase recycling such as the APR Design Guides. AMBR supports a requirement for producers to report on their compliance with APR Design Guidelines.

Support certification but caution on state-specific data. AMBR strongly supports the transparency and accountability provided by third-party certification for recycled content. However, we have concerns about the requirement for producers to certify recycled content based on the products sold in the state. While we support the intent of this language to ensure the products sold in the Northeast have the required recycled content, we feel this places undue burden on producers and is not aligned with the reporting requirements that allows for national data extrapolation. We support allowing for national or regional certification until if/when state-specific data becomes more widely available.

Additional work needed to address toxic substances. Toxic substances used in plastic packaging pose serious risks to public health both during the initial product use and in the secondary use of this plastic as recycled content. Further, such chemicals may restrict the ability of plastics to be used in food-contact applications. More work needs to be done to design these chemicals of concern out of plastic packaging. AMBR recommends the state or regional authority review these regulations every two years to consider how these standards or the use of recycled content should be limited to products free from the most problematic chemicals in order to avoid recycling the public health risks. Further, AMBR supports BPI as the certifying body for compostable products because their criteria exclude PFAS.

Phase in requirements on ancillary materials. AMBR suggests a provision to extend recycled content requirements to liners, bladders, caps, labels, corks, and any other packaging components. This can be done through a phased in approach with rates and dates determined through future data. However, we feel strongly that the bill should set the stage for these future requirements even if rates are not currently set.

Labeling needs to be considered. Consumers are commonly confused by recycling labels and can misinterpret recycled content to mean a product is recyclable. AMBR recommends adding language to address labeling guidelines around the use of recycled content. Given the emerging nature of these programs, we recommend addressing labels in the same fashion as the third party certification programs and creating a pathway to require the use of these programs as they emerge.

Exclude plastic credit trading. AMBR does not support the use of plastics credit trading to meet the producer obligations under this policy. We do not think the bill as written would allow for this use but wanted to share our concerns and consideration for a clarifying statement to clearly exclude these programs.

Thank you to NERC and NEWMOA for the extensive work to develop this policy and the opportunity to provide content. Please reach out to us at any time if we can provide further clarification or information on our comments.

Sincerely yours for a more just and sustainable future,



Kate Bailey, National Policy Coordinator
Alliance of Mission-Based Recyclers (AMBR)

On behalf of AMBR Founding Members



**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.

NAME: Michael Hodges

ORGANIZATION: Amcor

EMAIL ADDRESS: Michael.hodges@amcor.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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.

Commented [MH1]: Two comments:

- 1) Will there be mandate requirements for other types of packaging (e.g., aluminum cans, glass bottles, Multi-layer cartons for beverages?
- 2) Certain plastics? Should the types of plastics be spelled out here? PET, HDPE, PP, all 1-7's?

Commented [MH2]: Demand is outpacing supply. Mandates should follow supply chain initiatives, as you point out here.

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:

Commented [MH3]: “Non-durable containers” need clarity. Does this include only rigid bottles? Thermoforms?

Commented [MH4]: Good inclusion. May want to provide example, such as “Tetra-cartons.”

- 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:

"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:

"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.

Commented [MH5]: Consideration of PCR + PIR being included as "recycled content" would be valuable. It is important to keep PIR out of the waste stream.

Commented [MH6]: Maryland recently released an EPR bill (HB 307) that contains a good definition of Producer: "Producer" means a person that meets one of the following classifications in descending order of responsibility:

- (1) A person that uses packaging materials for the sale or distribution of a product under the person's own name or brand;
- (2) A person that is a licensee of a trademark under which a packaging material is sold, offered for sale, distributed, or otherwise used in a commercial enterprise in the State, regardless of whether the trademark is registered; or
- (3) A person that imports a product that includes a packaging material and that is sold, offered for sale, distributed, or otherwise used in a commercial enterprise in the State.

A producer does not include:

- (1) A local government; or
- (2) A nonprofit charitable organization.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Recommend replacing definition of “Producer” with the language found in the recently introduced Maryland HB 307 (see comment box.) Due to the ability to track sales within a given state, producers definition needs to remain with the brand, brand owner or importer.

“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:

“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.

Commented [MH7]: Since beverage is mentioned beforehand and separately, it should be removed here to avoid confusion.

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:

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:

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.

Commented [MH8]: It is important that this contains the wording "on average" to allow flexibility to the brands in procuring and using PCR. "...all plastic beverage containers, on average, sold, offered for sale or distributed for sale in the State ..."

Commented [MH9]: As per above.

Commented [MH10]: As per above

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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).

Commented [MH11]: Please align with recent legislation on the rates of PCR (not necessarily the dates) including NJ, CA and WA. Producers will need to provide similar rates across the country.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

**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.

NAME: Adam S. Peer, Senior Director, Product Packaging & Consumer Products Markets

ORGANIZATION: American Chemistry Council

EMAIL ADDRESS: Adam_Peer@AmericanChemistry.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: For our full positions, also please see the report below:

Plastic Division. (2021). 5 Actions for Sustainable Change [Industry report]. American Chemistry Council. <https://perma.cc/ST3R-J2KW>

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 [may] 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: Each jurisdiction should determine scope based on local capacity and availability.

The benefits of mandating a minimum post-consumer recycled content in plastic products [may] 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: Environmental claims highly depend on specific circumstances. Incenting recycled content will help a jurisdiction to a more circular economy.

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: See exemptions below.

“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 [packaging relating to toxic or hazardous products, any therapeutic good and related packaging for use in humans or animals, medical food, during a period of emergency, a product deemed essential to public safety, essential to the daily living of an elderly individual, differently abled person, or a person in need of services].

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Certain items and packaging is designed to keep us safe and sanitary by improving our health and safety. Those items should be excluded from proposed minimums.

“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:

"~~[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.]~~ [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 using mass balance attribution. Recycled plastics shall not be considered solid waste.]

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: This suggestion better recognizes all recycling technology required to increase recycled content use. It also promotes transparency through third party certification. Lastly, it ensures that recycled content is not considered waste.

"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:

~~["**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: See suggestion above.

"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:

"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 [or reusable] 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: Exclude reusable containers.

“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:

III. Post-consumer recycled plastic content requirement

Carry-out bags:

- Beginning [~~two years from the date of enactment~~][in 2030], all carry-out bags offered, sold, offered for sale or distributed in the State must contain at least [20%][30%] [~~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: To drive a consistent national approach to recycling and encourage the development of efficient recycling systems, ACC supports a national standard, requiring 30% recycled plastic in plastic packaging by 2030.

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Rigid plastic containers:

- Beginning [~~two years from the date of enactment~~][in 2030], all rigid plastic containers offered, sold, offered for sale or distributed in the State must contain at least [~~20%~~][30%] [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: To drive a consistent national approach to recycling and encourage the development of efficient recycling systems, ACC supports a national standard, requiring 30% recycled plastic in plastic packaging by 2030.

Trash bags:

- Beginning [~~two years from the date of enactment~~][in 2030], all trash bags offered, sold, offered for sale or distributed in the State must contain at least [~~20%~~][30%] [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: To drive a consistent national approach to recycling and encourage the development of efficient recycling systems, ACC supports a national standard, requiring 30% recycled plastic in plastic packaging by 2030.

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: See our prior suggestions.

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

<p>COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Registration should include a exemption for a de minimums or small producer.</p>
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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: See prior suggestion on federal preemption.

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.

**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.

NAME: Brennan Georgianni

ORGANIZATION: American Cleaning Institute

EMAIL ADDRESS: BGeorgianni@cleaninginstitute.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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:

"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:

"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:

"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:

"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:

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

- Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container should not be considered part of the rigid plastic container.
- Other exemptions should include containers that:
 - Are associated with a product produced in or brought into the State that is destined for shipment to a destination outside the State, and that remains with the product upon shipment;
 - contain toxic or hazardous products regulated under the "Federal Insecticide, Fungicide, and Rodenticide Act," 7 U.S.C. s.136 et seq.; or
 - are manufactured for use in the shipment of hazardous materials
- The definition of "Household cleaning and personal care products" should be expanded to match existing California law which reads: "a soap, detergent, or other chemically formulated consumer product labeled to indicate that the purpose of the product is to clean, disinfect, or otherwise care for fabric, dishes, or other wares; surfaces including, but not limited to, floors, furniture, countertops, showers, and baths; or other hard surfaces, such as stovetops, microwaves, and other appliances."

- 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.

"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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

- An availability study should be conducted to establish reasonable PCR rates for the initial dates
- The state shall reevaluate on a regular basis the established PCR rates along with the performance of state, regional and national recycling markets.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

- The requirement for third-party certification of recycled content would be costly and it is unclear if entities exist that are able to adequately certify this type of data. The state should be the entity responsible for this type of verification to ensure information is protected. This requirement should be removed from the model legislation.

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.

**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.

NAME: Dan Felton
ORGANIZATION: AMERIPEN – American Institute for Packaging and the Environment
EMAIL ADDRESS: danf@ameripen.org

NOTE: AMERIPEN comments are provided in the comment box above the section of the model bill to which they apply, and suggested changes are in track change mode in the body of each section.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

AMERIPEN: Use of post-consumer recycled plastic can pose issues in some packaging and is not technologically feasible in others. The scope of non-durable containers should therefore be clearly defined and exclude packaging where there is not a feasible or safe solution for use of recycled plastic. Any minimum amount of recycled plastic should also accurately reflect the feasibility of capturing consumer recycled plastic in the infrastructure and using it to manufacture alternative packaging. Alternatively, use of pre-consumer or post-industrial secondary materials should be allowed to meet minimum recycled content requirements.

AMERIPEN: Food contact packaging must meet strict U.S. Food and Drug Administration (FDA) requirements for quality and sanitization, and manufacturers must achieve compliance for all types of products and containers, depending on various factors such as food acidity, fat content and moisture levels. In many applications it is nearly impossible to use post-consumer recycled content materials and meet these FDA requirements. Furthermore, the FDA's ability to review and approve "letters of no objection" (LNOs) from manufacturers desiring to use post-consumer recycled content materials for food-grade packaging applications has historically been hindered by limited staff dedicated to this process. We therefore recommend a full exemption for non-durable containers used for food in this model legislation as a reasonable starting point and redlines throughout reflect that recommendation. If food is not fully exempted from this model legislation, then language should be included to give exemptions – not waivers – when products are unable to get an LNO from the FDA for food contact and proper on-ramps that recognize actual availability of recycled content.

AMERIPEN: We note that while packaging producers design based upon format, recyclers sort by material/resin. The type of plastic resin used to fabricate a beverage cup or food container, for example, will impact access to recycled content and perhaps should be considered within this model legislation. Doing so would also help reframe a focus around the infrastructure needed to advance recycling opportunities. Washington State took this approach with their recent Plastics Stakeholder Advisory Committee (SAC) and legislative recommendations for additional materials to require recycled content. They noted both the product and resin. Another option, also seen in Washington State, is to apply goals across a packaging portfolio rather than requiring it in all packaging formats. For example, if a beverage cup producer makes cups from PET, PP and PS plastic resins, they could apply a 20% recycling rate across all three but put a higher content in PET where they have greater access to recycled content. But there is some risk to this approach in that it doesn't help develop new markets and will put economic strain on existing ones as producers fight for limited material. Having resin flexibility will be important for plastics materials that are only developing end market processing technologies (i.e., PP) and some of our redlines below reflect this approach.

I. Statement of purpose of bill as introduced

This bill proposes to require producers of certain plastics packaging and container 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 packaging and container 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:

AMERIPEN: Recycling of plastic has an environmental benefit, but where and what technologies produce the greatest results have yet to be qualified. For the environmental benefits of required recycled content use in manufacturing, there needs to be effective infrastructure in place for recycling and assurances that recycled content can be used safely in new packaging materials without altering the packaging's safety or quality. The bill should therefore ensure requirements are based on legitimate and attainable environmental benefits, and not just a generalized assumption of benefits from the idea of recycling.

The benefits of mandating a minimum ~~post-consumer~~ recycled content in plastic packaging and container 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:

AMERIPEN: 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:

AMERIPEN: We believe it is clearer to refer to covered products as those “sold, offered for sale, or distributed within the State” rather than defining producers relative to the disposition of covered products (see edits to “Producer” definition further below). This way, the bill will not need to clarify the nexus between producer activity and sale of covered product within the State. Furthermore, we believe it’s not necessary to define covered products as those subject to the minimum recycled content requirements since those requirements are expressed clearly in later sections of the model bill. We seek clarification that any minimum recycled content requirements do not apply to secondary and tertiary packaging that may accompany the covered product. Finally, we suggest the a single exemption under the “covered product” definition suffices for all instances in which such as certified as compostable. Redlines below reflect these recommendations.

“Covered product” means an item in one of the following categories ~~subject to minimum post-consumer recycled content requirements~~ that is sold, offered for sale, or distributed into the State:

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

"Covered product" does not include:

- ~~any~~Any type of container, ~~or~~ bag or packaging for which the State is preempted from regulating content of the container material or bag material under federal law;
- Any type of secondary or tertiary packaging that may accompany the container or bag for the purposes of selling or distributing the container or bag into the State; or
- Any type of container or bag certified as compostable by a third-party certifier.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

AMERIPEN: We note that while “Medical Beverage” is defined below, it does not appear anywhere else in this proposed model legislation. We have added its use in the “Plastic Beverage Container” definition further below. As well, we note the term “medical food” is listed as an exception to the “Beverage” definition above but does not appear anywhere else in this proposed model legislation.

“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 solely of plastic and 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 beverages, 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:

AMERIPEN: Exclusion of pre-consumer or post-industrial secondary materials for recycled content is problematic because it’s a necessary source for certain applications, including food-contact, because it hasn’t yet been potentially contaminated by a product. We note that the paper industry, in favor of recognizing the value of recycling at large, has moved away from qualifying pre- and post-consumer content in several of their certification programs. And as noted in our 2021 study “US Company Recycled Plastic Content Goals Analysis: Supply & Demand”, we lack sufficient supply and capacity to process sufficient plastic resins to meet the currently articulated voluntary goals. Some of the content requirements in this model legislation would apply to materials and containers (i.e., PP tubs) that are not currently accepted in many municipal curbside recycling programs. Better alignment is needed between recycled content requirements and existing and future curbside collection infrastructure, rather than requiring a producer to meet a requirement that is not possible through curbside collection but then also not allowing them to work towards meeting that requirement, including through use of pre-consumer or post-industrial secondary materials. Further restricting access to post-consumer only content will only further exacerbate this challenge. Finally, we encourage a definition that more closely aligns with ISO 14021’s definition that incorporates product that was removed from the value chain before being used or sold. It likewise anticipates technological advances in the chemical recycling arena. Redlines below reflect these issues.

AMERIPEN: While we do not have a formal policy on advanced recycling, we do believe that it can be a complementary approach to mechanical recycling and that both may help advanced a truly circular economy. However, advanced recycling should only include material-to-material technologies. Waste-to-fuel or waste-to-energy processes are considered recovery and not recycling. Mass balance is an accepted and certified method to measure and track recycled inputs and outputs for advanced recycling and should be allowed.

"Post-consumer recycled content" means a material or product that has completed or can no longer be used for its intended purpose, end use, or 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 includes material made from non-mechanical material-to-material processes, including but not limited to pyrolysis or gasification. Recycled content is determined to be the portion of a covered product's total weight that is composed of recycled material and can be determined through various chain of custody models, including a material balance approach that calculates total recycled material in the covered product as a percentage of the total weight of the covered product. "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:

AMERIPEN: The phrase "including a manufacturer" is not necessary within the "producer" definition since "manufacturer" is used later in the definition, although we do recommend that a definition for "manufacturer" relative to covered products be included in the model legislation. Defining a producer relative to where covered product is sold, offered for sale, or distributed conflates the entity or person subject to the law and the product covered by it and is not necessary. We believe the "sale/offer for sale/distribution" qualifier is best located in the definition of "covered product" as indicated earlier. Furthermore, if a "producer" is someone who manufactures a product, then whether that product is sold under the manufacturers' brand or is a generic product (lacking brand identity) is a distinction without a practical difference. Ideally, this model legislation should not be based on whether products are branded or not, but rather on whether the products are sold, offered for sale, or distributed in the State. The minimum recycled content requirements will then rest on any entity that sells or distributes covered products to end markets in the State – whether branded (licensed or not) or generic (not branded). It is common for packaging manufacturers to have no idea whether or how their customers market products or where they are sold, and it is common for a brand owner or licensee to purchase packaging or products from a manufacturer, place their own brand on it, and sell or distribute those products nationwide, unbeknownst to the packaging manufacturer. For this, compliance with any minimum recycled content obligation should rest with the entity in the position of knowing whether and where the covered product is being sold or distributed – the brand owner, distributor, or licensee. When a packaging manufacturer sells non-branded product within the state, only then should they be directly subject to the law. To obligate a packaging manufacturer to comply prospectively with an obligation it won't know exists will be difficult to enforce and is arguably unfair. Redline below reflect these recommendations.

AMERIPEN: As the standard practice for existing state minimum recycled content laws for plastics, the exemption for de minimis producers should be based on weight of covered products for sale in the state rather than number of units for sale in the state. Redlines below reflect this.

"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 person is an owner or licensee of a brand or trademark for covered product that is sold under the producer's such person's owned or licensed brand or trademark (whether or not the trademark is registered in this State);
- The person is a manufacturer of covered product that lacks identification of a brand at the point of sale; or, 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.

“Manufacturer” means a person that produces or generates covered product.

"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~~one ton 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:

~~**“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 direct-to-consumer via remote sales or distribution and temporary stores or vendors at farmers markets, street fairs, and festivals.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

AMERIPEN: The "Rigid Plastic Container" definition below seems to include plastic beverage containers and yet the "Plastic Beverage Container" definition earlier above exempts some rigid plastic containers. Without some clarification here, it could then be argued that plastic beverage containers could be required to incorporate 25% recycled content within two years from the date of enactment of the act. Redlines below suggest a way to address this issue.

AMERIPEN: As mentioned earlier, food should be expressly exempt from this model legislation. Containers and packaging for products regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) should also be expressly exempt. Redlines below reflect this recommendation. 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 that is not otherwise defined as a plastic beverage container.

- "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.
 - Rigid plastic containers or plastic bottles used for the containment, protection, delivery, presentation or distribution of a product regulated under the Federal Insecticide, Fungicide and Rodenticide Act.
- Rigid plastic container does not include liners, caps, corks, closures, labels, and other items added externally or internally but otherwise separate from the structure of the container.
- Non-durable containers used for food are not a rigid plastic container for the purposes of this act.

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:

III. ~~Post-consumer-r~~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:

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.
- Producers have the option of meeting the minimum recycled content requirement by averaging the total amount of recycled content from all plastic beverage containers within their portfolio sold into the State, rather than per product.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

AMERIPEN: Requiring rigid plastic containers to contain at least 25% post-consumer recycled content two years after enactment is far too aggressive and not feasible, including as compared with new related laws enacted in New Jersey and Washington State that are not even consistent with each other (one starts at 10% and one starts at 15%). The feedstock existing (and every aggressive projection) for recycled content will not support such a goal. Furthermore, there is no obvious justification for rigid plastic containers to have more aggressive initial levels of post-consumer recycled content material than plastic beverage containers that arguably have a clearer path forward because of resin types used that already have higher recycling rates (i.e., PET and HDPE versus PP). Redlines below reflect a more realistic and reasonable approach.

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~~10% ~~post-consumer~~ recycled content.
- Beginning ~~every three~~five years from the date of enactment and every three years thereafter, all rigid plastic containers sold, offered for sale or distributed for sale in the State must contain must increase the ~~post-consumer~~ recycled content, from an initial 10% minimum, by 5% until 50% ~~post-consumer~~ recycled content is reached ~~(no later than 18 years from enactment)~~.
- Producers have the option of meeting the minimum recycled content requirement by averaging the total amount of recycled content from all rigid plastic containers within their portfolio sold into the State, rather than per product.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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 content plastic requirement

For the purposes of determining a producer's compliance with the ~~post-consumer~~ recycled content 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 available.

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.

A producer shall achieve compliance with the recycled content requirements of this act based on the average amount of recycled content across their portfolio for the covered product, by weight or another metric as determined by the producer and reviewed by the Department.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

AMERIPEN: As the standard practice for existing state minimum recycled content laws, annual producer reports should be based on weight of covered products for sale in the state rather than number of units for sale in the state. Redlines below reflect this.

**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 that~~ reflects the Department's costs to implement, administer, monitor, and enforce the provisions of this act, but not to exceed \$1,000.

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 amount in pounds of virgin plastic and the amount in pounds of recycled content by resin type used for each category of covered products that are sold, offered for sale, or distributed in or into the state in the previous 12 months;

- The total recycled content resins as a percentage of total weight; and
- ~~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~~
- Proof of third-party certification of compliance of ~~post-consumer-recycled~~ content requirements for covered products, as described below.

A producer may submit national data allocated on a per capita basis for the State to approximate the information required in this subsection if the producer or third-party representative demonstrates to the Department that State level data are not available or feasible to generate.

A producer that demonstrates to the Department that the producer's gross revenue is below \$5,000,000 shall not be required to pay the registration fee established pursuant to this section.

A producer that produces or generates only products that are exempt from the provisions of this act shall be required to register with the Department only once and shall be exempt from the registration fee.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

AMERIPEN: We are concerned that access to third-party certification of recycled content, particularly for plastics, is still an emerging area and a mandate on producers to provide third-party certification of the minimum postconsumer recycled content of all their covered products will be cost prohibitive at a state level at least, if not nationally. To the best of our knowledge, no existing state law for minimum recycled content includes such a requirement. Furthermore, this approach seems to remove the state from any burden for validating and confirming producer data, instead shifting that burden back to the producer. We encourage consideration of the approach taken in the New Jersey recycled content law where the state agency may work with producers to study whether there exist independent, third-party verification organizations that can verify producers' compliance with the requirements of the act and appropriate accreditation standards for such organizations. Alternatively, but less desirable, we would encourage consideration of a process whereby a subset of producers is randomly selected and audited or evaluated by a third-party certification body, when such exists, for use of recycled content and recycling processes. Limitations would of course need to be set on costs and frequency of such audits or evaluations. A model for this approach could be drawn from the processes defined within third party forestry certification programs. We have not made related redlines below, but appreciate consideration of our concerns and potential solutions.

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 or another metric, as determined by the producer and reviewed by the Department, 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:

AMERIPEN: The New Jersey minimum recycled content law contains more precise/robust waiver language that we find generally acceptable. Redlines below reflect that language.

Waivers

A producer may seek apply for a waiver from the recycled content 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.~~ The Department may grant a waiver, without penalty, pursuant to this section if the producer demonstrates, and the Department finds, in writing, that:

(1) The producer cannot achieve the recycled content requirements and remain in compliance with applicable rules and regulations adopted by the United States Food and Drug Administration, or any other State or federal law, rule, or regulation.;

(2) It is not technologically feasible for the producer to achieve the recycled content requirements.;

(3) The producer cannot comply with the recycled content requirements due to inadequate availability of recycled material or a substantial disruption in the supply of recycled material.; or

(4) The producer cannot comply for another reason as determined by the Department pursuant to rule, regulation, or guidance.

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~~recycled content 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. A municipality, county, or other local government entity shall not adopt or enact any rule, regulation, code, or ordinance regulating the recycled content of covered products after the effective date of this act.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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 or another metric, as determined by the producer and reviewed by the Department, 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 of total~~ plastic multiplied by the percent of ~~postconsumer~~-recycled plastic used; multiplied by 20 cents.

(ii) Example: [(Total pounds of plastic used x minimum postconsumer recycled plastic target percentage) – (Total pounds of plastic used x ~~postconsumer~~-recycled plastic percentage used)] x 20 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) Availability of recycled plastics suitable for manufacturers to meet the recycled content requirements, including the availability of high-quality food-grade recycled plastic; and

(D) 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~~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.

**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.

NAME: Jonathan Levy

ORGANIZATION: AMP Robotics

EMAIL ADDRESS: Jonathan.Levy@amprobotics.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:
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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.

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

<p>COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: We do not believe this legislation will accomplish its goal of driving demand for recycled resin unless the ability for MRFs and reclaimers to capture and process that material is addressed. As such, we believe this legislation should include a component that supports MRFs and reclaimers by providing incentives for this community to upgrade their facilities. Such incentives could be realized through programs provided by either public or private entities. Regardless of the form of the incentive, it is critical that the MRFs and reclaimers have access to capital that allow them to upgrade their facility to take advantage of the advances in capture and sortation technology. Without such upgrades, the industry will be unable to supply manufacturers with the amounts of PCR this bill hopes to stimulate. This will lead manufacturers to use scarcity of supply as the reason to seek waivers and exemptions from meeting the thresholds contained in the bill. As a result, the industry will be stuck in a cycle where supply will be limited and manufacturers will continually seek exemptions based on the scarcity of supply.</p>

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:

The purpose of minimum recycled content legislation is to develop demand for PCR and have that demand encourage the recycling of higher and higher amounts of plastic found in the recycling stream. Accordingly, the aim of this legislation should be to support the recycling industry by creating and spurring demand for PCR. The legislation should include an onramp for the Department to continuously add items to a list after it conducts a market study to see if appropriate supply is available. This includes not only consumer level items such as those used in a household but commercial or industrial items such as plastic pallets, furniture, outdoor products, drainage pipe, etc. It is important to note however, that the bill should cover non-food grade items only due to a variety of complications that are associated with food grade items.

“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:

“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:

“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:

"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:

"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:

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:

While we have seen the approach the model legislation is taking in several states, we are concerned that applying hard percentage limits to specific products may actually hinder the growth of the use of post-consumer plastic resins. By calling out specific percentages, manufacturers have no incentive to stretch their capabilities further than what is required in the law. Additionally, we have seen and heard multiple accounts of manufacturers claim that due to current market conditions, there is not enough PCR available to increase the amount they are using now. This provides the manufacturer with an “out” to either not use PCR and continue their reliance on virgin plastic or to limit their reliance on PCR by claiming recycled resin markets are “unstable”.

Rather than set hard percentages for certain products, this legislation should encourage manufacturers to use the *maximum achievable levels available* across all covered products. In other words, producers should be given flexibility to meet PCR goals by matching the amount used in their products to the amount currently available in the marketplace. We recommend that regulatory authorities make regular, systematic predeterminations on the supply and demand of PCR material. Using that information, the department can then set realistic goals for manufacturers to meet.

We believe manufacturers should be given the flexibility to transition their supply infeds to incorporate recycled content while at the same time applying pressure to have them use the maximum amount the market can supply at any given point in time. We understand that although manufacturers will need lead time to make this transition, we also believe they can utilize a certain percentage at the current time and as a result should be required to do so.

Once such a transition is made, we are concerned that as currently written, manufacturers will not stretch beyond the maximum that is set out in the legislation. Ultimately, we should encourage manufacturers to use 100% recycled content if possible. Eliminating a hard percentage and replacing it with language that encourages the use of the maximum amount available will put continuous pressure on manufacturers to stretch the boundaries of the amount that can be incorporated.

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

III. 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:

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

This section uses state specific information regarding covered product sales as a method to determine compliance with the legislation. Reliance on such information is approximate and may only describe how much of a covered product is being sold in the state, not how much is being recycled, how much is available, or how much post-consumer resin is being utilized in covered products. When determining the amount of recycled material that is available to be used as post-consumer resin, it may be more useful to know the amount and types of products that are flowing through the recycling stream. Providing accurate MRF level information is important to help ensure manufacturers are not using supply capacity shortages as an excuse for not meeting stated goals.

Traditional methods of collecting this type of information would require manual bale audits that take time and are not always accurate. These manual waste audits are useful but only evaluate small samples of the overall waste stream. Audits can be biased by many factors and expensive to undertake frequently enough to be statistically relevant. Constant sampling requires MRFs to dedicate space, time, labor, equipment and other resources which drive up operational costs. Additionally, increased sampling exposes workers to safety risks, is cumbersome and time consuming, and quickly becomes outdated compared to the pace of market changes.

Automated, anonymous, and consistent real time monitoring of material flowing through the MRF can give an exact and accurate picture of the types of materials that are being recycled while providing the data needed to ensure the program is working as designed. This eliminates the need for MRFs to dedicate resources to successfully conduct a manual audit thereby reducing the MRFs overall operational costs as well as cost to administer the program.

Fortunately, advanced systems powered by artificial intelligence that can provide real-time data collection have been developed and are currently being deployed throughout the recycling industry. Such data can be analyzed by stakeholders to see if manufacturers are meeting publicly stated goals laid out in the legislation. We believe that harnessing this technology will give stakeholders a powerful tool to make adjustments in the legislation as needed. Accordingly, we believe language such as listed below should be incorporated in the draft:

For the purposes of determining a producer's compliance with the post-consumer recycled requirement, the Department shall implement data collection technologies that can assess the amount and types of covered products that are being processed by material recovery facilities. Such technology should be able to differentiate between types of covered products and product specific information regarding the amounts of materials being collected and recycled. Such data will be utilized by the Department to prepare compliance reports to help ensure producers are meeting the state's policy goals as laid out in Section xx

We believe that by harnessing such technology, state regulatory authorities can gain access to tools that will allow them to fulfill their obligations without adding additional burdens on staff or increasing administrative costs.

- (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.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Due to the broad nature and vagueness of the section, we believe it should be fleshed out further to reflect the importance a waiver will have on the ability of the state to meet its minimum recycled content goals. As a suggestion, manufacturers should be required to submit comprehensive supply and demand information that compares the amount of virgin resin to the amount of PCR they have used in their process. It should also supply the Department a technical report based on independent 3rd party testing that can demonstrate how much PCR can be incorporated into a product before performance suffers.

necessary.

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:

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.

**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.

NAME: Ginny Siller

ORGANIZATION: Animal Health Institute (AHI)

EMAIL ADDRESS: gsiller@ahi.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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: AHI appreciates the definition of “Covered product” as it does not include animal health products. We request this definition stay in place.

“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:

"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:

"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:

“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:

“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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

**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.

NAME: Steve Alexander

ORGANIZATION: Association of Plastic Recyclers

EMAIL ADDRESS: Steve@plasticsrecycling.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: Any content requirement must include a ladder approach for compliance that differs for resins as well as time frames for compliance. Saying all packaging must meet a certain percentage by a certain date ignores the fact that resins such as PET and HDPE have had some form of government mandated collection infrastructure in place for almost 40 years. It is irrational to require pp to meet the same levels as those resins in the same time frame, particularly when communities are not collecting the resin.

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: While content requirements address the demand side of the equation, that is only part of the equation. Design for recyclability is the necessary first step, and increased consumer participation in recycling programs to increase the supply of recyclables is a more pressing issue. Recycling plastic containers is one of the most cost effective way to reduce ghg and is an activity that consumers can physically participate in to contribute to global climate change. We must encourage putting more in the bin.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: it will be difficult to get content requirements for milk and dairy products.

determined by the Department.

“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: There is an entire industry that provides bags with content that should be encouraged. How to collect those bags is the issue.

“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:

“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: This is the critical issue. The issue of plastic waste is about plastic containers that the consumer has used, touched, and either discarded or placed in a recycling program. The issue we are faced with is not PIR or pre-consumer material. Without this safeguard, companies will continue to use PIR and continue to confuse the consumer by calling it recycled content. Surveys are clear the consumer believes any package with the term recycled content on it that the content comes from post consumer material that they have placed in the bin. Critical.

“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:

"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: agree

"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:

"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:

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: This is doable given the industry today.

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Again must be based on the supply chain, but generally this level of requirement makes sense

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: see supply comments above

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: fine

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: Compliance should include use of pcr certified by a 3rd party. Those certifications exist, ie APR PCR Certification program.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: see above
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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: See above-this is a critical step. Without this, we will never solve the issue of plastics packaging sustainability. There needs to be a lever to enforce.

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: strongly agree.

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:

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.

**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.

NAME: Kyle Rudolph

ORGANIZATION: Berry Global Group, Inc.

EMAIL ADDRESS: kylrudolph@berryglobal.com

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:

"...This bill proposes to require producers of certain plastics packaging and container products to use a specified minimum"

Is it worthwhile to add a clearer distinction between "products" and "packaging/containing products" covered by the model legislation, if only to establish consistent delineation between the scope of PCR-content mandate laws and EPR bills?

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:

No changes suggested.

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:

“Beverage” means any potable liquid ~~beverages~~ intended for human consumption unless 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~~ used, designed, or otherwise indented for use as infant formula, medical food, medical beverage, food for special dietary use, or as fortified oral nutritional supplements ..., wherein “food for special dietary use” means the same as the term is defined in 21 U.S.C. Sec. 105.3; and “medical food” and “infant formula” mean the same as those terms are defined in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 21 Sec. 301 et seq.”

If we avoid a serial list, then we minimize the risk of interpretation issues based on categories that aren’t included. As well, should we think about a clearer statutory tie-in to regulated medical/health-related beverage products, similar to how the latest NJ PCR Mandate (PL 2021, c.391) is drafted?

Note, as well, the term “medical beverage,” while defined below, is not used anywhere else. We think the bill could be improved by adding that defined term here within the exceptions to the definition of “beverage,” generally.

Finally, it is relevant to point out that the regulations define “special dietary use” to include the use of artificial sweetener when used to achieve characteristics of sugar that cannot be achieved with sugar or other nutritive sweetener, when used to regulate the intake of calories and available carbohydrates, or for use in the diets of diabetics (i.e., water enhancer products like Mio® and Sweet Leaf®). Is there a reason these kinds of product should be excluded?

“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:

No changes suggested.

“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:

"Covered product" means an item in one of the following categories that is sold, offered for sale, or distributed into the State ~~subject to minimum post-consumer recycled content requirements~~: ...

We think it is clearer to refer to covered products as those "sold, offered for sale, or distributed within the State" rather than defining producers relative to the disposition of covered product. *See edits to "producer" definition, below.* This way, the bill will not need to clarify the nexus between producer activity and sales of covered product within the State.

As well, we think it is better to avoid defining covered products as those subject to the minimum PCR consumer recycled content requirements, given the fact those requirements are expressed clearly in later sections of the model bill.

"Covered product" does not include any type of container, ~~or~~ bag, or packaging which (a) is prohibited from being sold, offered for sale, or distributed within the State; (b) is regulated by federal law; or (c) is a type of container or bag which the State is otherwise preempted from regulating under federal law.

In some states, single-use bags are outright prohibited from being sold. Is it worth acknowledging as much to ensure the requirements legislation doesn't conflict with a single-use bag ban law already in place?

Similarly, the term "packaging" is not referenced. It might be good to add that term when describing the "preemption exception" so that we don't risk a court inferring intent that an exception for implied preemption should apply to bags and containers but not household cleaning and personal care product packaging.

Finally, we think there is a chance to broaden the intended exemption for both direct and implied preemption, giving an interpreting court the opportunity to justify broader exceptions intended under the model bill and avoid uncertainty in a situation where the federal government passes a nation-wide PCR mandate.

"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:

This term isn't used anywhere else. Was it intended to be used above as an exception to "covered products"? Or perhaps in the negative definition of "plastic beverage container" below?

"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:

No changes suggested.

"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:

“...Rigid plastic containers or plastic bottles that are or are used for medical devices, medical products that are required to be sterile, medical beverages, nonprescription and prescription drugs, or dietary supplements;...”

We suggest using the defined term “medical beverages” here.

"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:

"Post-consumer recycled content" means a material or product that has completed or can no longer be used for its intended purpose, end use, or 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. For clarity, post-consumer recycled content includes material made from non-mechanical processes, including but not limited to pyrolysis or gasification.

This definition more closely aligns with ISO 14021’s definition of post-consumer recycled content, which incorporates product that was removed from the value chain before being used or sold. It likewise anticipates technological advances in the area of advanced recycling which we believe is a crucial component to further efforts towards higher recycling rates and increased waste stream circularity.

Definition: Post-consumer recycled content

Proportion, by mass, of post-consumer (1) recycled material in a product or packaging.

Note

1. ISO14021’s usage of the term clarifies post-consumer material as material generated by households or by commercial, industrial and institutional facilities in their role as end users of the product which can no longer be used for its intended purpose. This includes returns of material from the distribution chain

Source: ISO 14021:2016 modified, *Environmental labels and declarations — Self-declared environmental claims (Type II environmental labelling)*, Usage of terms, modified (focus on post-consumer recycled material)

"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:

See comments on next page.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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

- ~~The person is an owner or licensee of a brand or trademark for~~ if the covered product that is sold under such person's ~~the producer's owned or licensed brand or trademark (whether or not the trademark is registered in this State);~~
- ~~The person is a manufacturer of covered product or that~~ lacks identification of a brand at the point of sale; ~~the producer is the person who manufactures the covered product; or~~
- ~~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 with no physical presence in the United States who imports or distributes ~~the~~ covered product in or into the State.

"Manufacturer" means a person that produces or generates covered product.

First, the phrase "including a manufacturer" implies that manufacturers aren't producers, subject to the requirements of the law even though the definition includes a "person who manufactures covered product." It is not a necessary clarifier. Second, defining a producer relative to where covered product is sold, offered for sale, or distributed conflates the entity or person subject to the law and the product covered by it. We think the "sale/offer for sale/distribution" qualifier is best located in the definition of "covered product." Third, using the term "producer" to define a "producer" is not consistent with prevailing legislative drafting principles. Fourth, we believe the term "manufacturer," if used, should be defined relative to covered products. Fifth, if we say a "producer" is someone who manufactures a product, then whether or not that product is sold under the manufacturers' brand or is a generic product (lacking brand identity) is a distinction without a practical difference.

In general, we do not think the legislation should apply based whether products are branded or not. Instead, it should apply based on whether the products are sold, offered for sale, or distributed in the State. These edits clarify the notion that a functional PCR mandate will rest on the shoulders of any entity that sells or distributes covered products to end markets in the State – whether branded (licensed or not) or generic (not branded). Entities with no ability to control whether products manufactured and sold to brand owners or licensees should similarly not be covered directly, though they will be covered indirectly. If an entity manufactures covered products and sells them without brand identification, then such manufacturer should be responsible.

For these reasons, we proposed edits to the first and second bullets, which we found confusing as drafted. The second bullet as drafted states that if a branded product is sold via a license, then the licensee will be considered a producer "unless the manufacturer or brand owner of the covered product has agreed to accept responsibility." Responsibility for compliance should be tied to covered products and not private contracts. If left unedited, we see courts struggling with determining who is responsible, resulting in due process issues.

Plus, packaging manufacturers like Berry sometimes have no idea whether or how their customers market products or where they are sold. It is not an atypical occurrence for a brand owner or licensee to purchase packaging or products from a manufacturer, place their own brand on it, and sell or distribute those products nationwide, unbeknownst to the manufacturer. In this way, **compliance with any PCR content obligation should rest with the entity in the position of knowing whether and where the covered product is being sold or distributed – the brand owner, distributor, or licensee. When a manufacturer sells non-branded product within the state, only then should it be directly subject to the law.**

This is perhaps Berry's most important ask: To consider re-thinking a cleaner approach to the definition of "producer" which recognizes the reality that the sale or distribution in a particular state is and should be the driver of compliance. We suggest the obligation be first and foremost for (1) brand owners and licensees (on equal footing – both know where the products are sold); and (2) secondarily, on distributors for covered products that lack brand identification, whether those distributors are manufacturers or not. We expect covered entities will seek commitments and warranties from manufacturers to ensure compliance. **However, to obligate a manufacturer to comply prospectively with an obligation it won't know exists is clunky, will be difficult to enforce, and is arguably unfair.**

“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:

No changes suggested.

"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:

No changes suggested.

“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:

“Rigid plastic container” means any non-durable plastic container used for food, beverages, household cleaning or personal care products that is not otherwise defined as a plastic beverage container.

This proposal is based on the fact the term “rigid plastic container” seems to include “plastic beverage containers” and the definition of plastic beverage containers above describes those containers in the negative, with reference to the fact that they are “rigid plastic containers.”

“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:

No changes suggested.

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:

No changes suggested.

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

No changes suggested.

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:

See below...

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

~~Starting on the sixth year from the date of enactment and continuing~~ ~~Beginning~~ every three years ~~thereafter 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 ~~from an initial 10% minimum~~ by 5% until ~~35~~50% post-consumer recycled content is reached (no later than 18 years from enactment).

These edits are both substantive and clarifying. First, from a substantive standpoint, we believe the notion of 25% PCR in rigid plastic containers across the board, given the sheer scope and breadth of products represented by that category, is not realistic. The feedstock existing (and aggressively projected) for PCR content will not support such a goal. We suggest a more realistic starting point of 10%, with incremental 5% increases from there.

Secondarily, the phrasing of the 3-year moves is ambiguous because it doesn't reference a starting point. Consider, whether if on the date of enactment, a particular producer sold rigid plastic containers with 15% PCR? Should we clarify the progressive 5% per ever 3-year period as one that starts with an identified baseline?

Third, and just as important, we question whether if on year 3, for instance, the 5% incremental increase is required to occur (e.g., if the starting point is 25%, then this would be 30% PCR). Based on this concept, 50% will be reached by year 15 and not year 18 (As drafted, Year 2-25%, 3-30%, 6-35%, 9-40%, 12-45%, 15-50%). Edits above clarify that the progressive 5% increases begin after year 6. That way, if the PCR percentages remained, Year 2-25%, 6-30%, 9-35%, 12-40%, 15-45%, and 18-50%.

Our suggestion, however, is that the PCR percentages for rigid plastic containers reflect the following minimum content progression: Year 2-10%, 6-15%, 9-20%, 12-25%, 15-30%, 18-35%.

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:

No changes suggested.

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:

No changes suggested.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

No changes suggested.

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:

No changes suggested.

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:

No changes suggested.

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:

No changes suggested.

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:

No changes suggested.

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:

No changes suggested.

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:

No changes suggested.

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:

No changes suggested.

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:

A municipality, county, or other local government entity shall not adopt any rule, regulation, code, or ordinance regulating the post-consumer recycled content of covered products after the effective date of this law. 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.

Consistent with language adopted in NJ via PL 2021, c. 391.

X. Severability - Needs to be customized for each state

Each state should add its appropriate language.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

No changes suggested.

**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.

**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.

NAME: Elena Bertocci

ORGANIZATION: I work for the Maine Department of Environmental Protection however these comments are my own and do not reflect any official stance or policy of the department

EMAIL ADDRESS: elena.bertocci@maine.gov

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

determined by the Department.

“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: I think you need a definition for non-durable. I don't want to suggest one because I'm not sure of your intent.

“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: Why provide an exemption for the non-recyclable beverage container types?

"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:

"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:

“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:

“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: Why is the definition for a rigid plastic container? Covered products are non-durable containers, which would seem to include pouches. As written there are no recycled content requirements for pouches/flexibles. So if I put my product in a non-recyclable pouch instead of a highly-recyclable HDPE bottle, I'm exempt from this regulation? I would absolutely include flexibles, but if the intent is to exclude flexibles, you might adjust your definition of covered product.

"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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:
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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: The purpose of minimum content legislation as I understand it is to send a market signal and trigger investment. That signal is muted/confused by the waiver option. It certainly eliminates/precludes innovation to find solutions allowing for recycled content if there is not one readily available. In addition, waivers are very work intensive to implement and very difficult to implement fairly. I've seen some bills that just charge if the requirement is not met. Is the group opposed to putting a fee on single-use plastics that cannot accept PCR? Isn't the ability for the department to lessen penalties under certain circumstances (appendix) sufficient? Why have a waiver provision as well?

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: See addition below. In deciding whether to lessen a penalty, the department should also consider whether the producer's competitors managed to meet the requirements.

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:

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; and

(D) Whether or the degree to which producers of similar products met 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.

**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.

NAME: Rhodes Yepsen

ORGANIZATION: BPI

EMAIL ADDRESS: exec.dir@bpiworld.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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: Amended to exempt certified compostable items as a category, rather than by product types.

“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, [or products certified as compostable to ASTM D6400 or D6868](#).

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: Removed exemption for BPI certified compostables, instead listing them at the category level as not “covered”.

“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:

"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:

"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:

"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:

"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: Removed exemption for BPI certified compostables, instead listing them at the category level as not "covered".

"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: Added clarification that it's PCR requirements for covered products, linking back to the exemption for certified compostables.

III. Post-consumer recycled plastic content requirement for covered products

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

**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.

NAME: Bree Dietly

ORGANIZATION: Breezeway Consulting for the American Beverage Association

EMAIL ADDRESS: bree@breezewayc.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

The benefits of ~~mandating a minimum~~increasing the use of 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. Yet, mandates alone are not sufficient to achieve these benefits if plastic is not collected in sufficient quantity and quality to supply the mandated amount of material. This proposed bill is more effective when accompanied by well-designed policies and programs that promote and fund improved collection, ~~can be used concurrently and augment other programs,~~ such as beverage container redemption program and/or extended producer responsibility for packaging and paper.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Given that recycled content for PET beverage bottles, for example, is in very short supply (both as a consequence of recovered PET flowing to lower value uses such as fiber and inadequate collection rates), it is important to note that using MRC legislation is not sufficient to address issues with recycling and will not, by itself, achieve these listed benefits.

II. Definitions

"Beverage" means any ready to drink liquid for human consumption. ~~Beverage does not include 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 [formula](#), 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: [Listing out categories will lead to disputes – may be simpler to use a categorical definition with exclusions.](#)

“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: [It is confusing for beverage containers to be individually defined and then included with other containers; clearer to simply call out beverage as one category. Also recommend labeling the non-beverage containers as noted below to avoid confusion.](#)

“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 beverage containers](#)
- ~~Plastic non-durable containers~~[Rigid plastic 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: [Recommend a more rigorous compostable definition. Also, CA recently included the TUV Austria OK Home certification in their state for a home compostable standard.](#)

“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 [as industrial compostable pursuant to ASTM D6400 or D6868](#)~~by the Biodegradable Products Institute (BPI) as compostable.~~

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: [this definition and the recycled content definition significantly overlap and create ambiguity. The intent of the edit is to focus this definition on the material itself and the other on the content/standard](#)

“Post-consumer ~~recycled content~~ material” 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~~**Post-consumer**” 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: [The *de minimis* language implies a producer with one category generating less than \\$1 million in sales is exempt, even if other categories have higher sales. The intent isn’t clear.](#)

“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: [To align with post-consumer definition](#)

"[Post-consumer 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 [covered product 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: [We proposed a separate definition for beverage containers above, and we recommend a RPC definition consistent with NJ to avoid inconsistency. We also have concerns with including certain rigids in the requirements at this time – see discussion below in Section III](#)

"Rigid plastic container" ~~means any non-durable plastic container used for food, beverages, household cleaning or personal care products.~~ [means a container made of plastic that has a relatively inflexible finite shape or form, has a minimum capacity of eight fluid ounces or its equivalent volume and a maximum capacity of five fluid gallons or its equivalent volume, and is capable of maintaining its shape while empty or while holding other 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:

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 on average and in aggregate, 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 on average and in aggregate, at least 40% post-consumer recycled content.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: The language in the requirements is vague and could be interpreted to require each container sold to meet the standards. Since averaging is a critical component of the legislation, we believe it should be reflected in the standards language as well (inserted throughout).

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 on average and in aggregate, 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 on average and in aggregate, 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 on average and in aggregate, at least 50% post-consumer recycled content.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: We have opposed requirements on PET rigids (i.e., thermoforms) unless and until there are collection programs for them or unless the requirement is truly circular (thermoform rPET in thermoforms). With bottle-grade PET in short supply and intense competition from fiber markets for downcycling, a mandate on thermoforms would simply divert bottles from potential use in new bottles as is occurring in California and elsewhere. [Also note that the starting level for these rigids in NJ (the only state to enact standards in recent years) is 10%, not 25%.] While not a primary package for our industry, we also question recycled content standards for non-PET food and beverage contact containers at this time; it would be useful to conduct a coordinated, multi-state study to assess technical feasibility and market viability for food contact recycled plastics other than PET before setting such standards. Lastly, the second bullet needs to apply five years after enactment, if it is to remain.

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 on average and in aggregate, at least 25% post-consumer recycled content.
- Beginning ~~five years~~every three years from the date of enactment and every three years thereafter, 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:

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 on average and in aggregate, 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 on average and in aggregate, 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: The definitions and requirements could be read to require compliance with each item sold, rather than allowing averaging across the entire portfolios of plastic bags or beverage containers sold. The first edit is intended to clarify that.

The second edit removes the uncertainty associated with department approval of regional averages. State specific data will be the exception, not the rule; the presumption should be that nearly all demonstrations will use pro-rated data of some sort and requiring approval is unnecessarily burdensome for producers and regulators.

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

For the purposes of determining a producer's compliance with the post-consumer recycled content requirement, the producer may:

- Determine compliance for the total quantity of each category of covered materials, by weight, that are sold in the state. Compliance shall be determined for each category on average and in aggregate across the category and shall not be construed as requiring compliance with the requirements for each individual covered product sold.
- 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: It isn't clear if the intent is to have an initial registration that differs from annual reporting. In any event, the number of units sold is not relevant to compliance. These edits assume reporting begins the first April two years after the effective date. The signature requirement is moved up from the Third Party Certification section. If the intent is to have an initial registration before reporting and standards begin, that would require additional language.

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

Registration

On ~~or before~~ April 1, following two years after the effective date_____, 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 amount by weight in pounds of post-consumer recycled plastic, of plastic that is not post-consumer recycled plastic, and the percentage of post-consumer recycled plastic in the total weight of each covered product category sold in the state in the previous calendar year; and 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~~
- ~~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.~~ Proof of third-party certification of compliance of post-consumer content requirements for covered products, as described below.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: We are concerned with the required third-party certification when such services are still in flux, and no one is currently offering any kind of services that meet a recognized standard. Our suggestion is for the department to first identify qualified certification entities. Then, following the language in the Maine bill, permit the department to request third party review periodically and to allow certifications from other jurisdictions where the same data are used to show compliance.

Third-Party Certification

The department shall assess the availability of independent entities offering third-party certification of post-consumer recycled content and the establishment of standards for defining, measuring, and certifying its use. The department shall identify acceptable entities and publish a list of at least three such entities on its website and may update it as necessary.

~~Beginning thirty six (36) months after the publication of this list, and not more than once every five years, the department may require a producer to fund a third-party verification the information submitted under this act. A producer may satisfy this requirement by submitting to the department third-party verification of substantially similar information reported to another state with a post-consumer recycled plastic content requirement that is substantially similar to the requirements of this section as long as that other state is included in the region for which the producer is claiming compliance. 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: The conditions for waivers from requirements are consistent across the laws in WA, CA, and NJ as well as the bill in ME. We suggest the model bill incorporate the same language and used WA as the template in our comments.

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.~~

Beginning two years after the effective date, the department may, on an annual basis, review and determine for the following year whether to reduce the post-consumer recycled content percentage required for some or all covered product categories. The review may be initiated by the department or at the petition of a producer or a covered product manufacturing industry not more than once annually. When submitting a petition, producers or a producer manufacturing industry must provide necessary information that will allow the department to make a determination considering

(i) Changes in market conditions, including supply and demand for post-consumer recycled plastics, collection rates, and bale availability both domestically and globally;

(ii) Recycling rates;

(iii) The availability of recycled plastic suitable to meet the post-consumer recycled content requirements including the availability of high-quality recycled plastic, and food-grade recycled plastic from recycling programs;

(iv) The capacity of recycling or processing infrastructure;

(v) The technical feasibility of achieving the post-consumer recycled content requirements in covered products that are regulated under federal law; and

(vi) The progress made by producers in achieving the goals of this section.

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:

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.

**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.

NAME: Mark Smith

ORGANIZATION: The Clorox Company

EMAIL ADDRESS: mark.t.smith@clorox.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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: align exemptions with NJ legislation

“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 including vitamins and supplements. Covered product does not include packaging/containers that (4) contain toxic or hazardous products regulated under the 18 “Federal Insecticide, Fungicide, and Rodenticide Act,” 7 U.S.C. 19 s.136 et seq.;

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:

"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:

"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:

“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:

“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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: Align with NJ language to ensure alignment with waste hierarchy and ensure producers do not use more plastic.

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.~~

~~o 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.~~

- 8. a. All plastic trash bags sold or offered for sale in the State by a manufacturer shall:
- beginning two years after the effective date of this act, contain, on average, the following percentage of postconsumer recycled content
- (a) plastic trash bags greater than 0.70 mils thick but less than 0.80 mils thick shall contain at least 5 percent postconsumer recycled content; and
- (b) plastic trash bags greater than 0.80 mils thick but less than 1.00 mils thick shall contain at least 10 percent postconsumer recycled content; and
- (c) plastic trash bags equal to or greater than 1.00 mils thick shall contain at least 20 percent postconsumer recycled content; and
- (2) beginning five years after the effective date of this act, contain, on average, the following percentage of postconsumer recycled content:
- (a) plastic trash bags greater than 0.70 mils thick but less than 0.80 mils thick shall contain at least 10 percent postconsumer recycled content; and
- (b) plastic trash bags greater than 0.80 mils thick but less than 1.00 mils thick shall contain at least 20 percent postconsumer recycled content; and
- (c) plastic trash bags equal to or greater than 1.00 mils thick shall contain at least 40 percent postconsumer recycled content.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:
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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:

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.

**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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ORGANIZATION: Consumer Brands Association

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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.

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: Plastic beverage containers and the respective PCR requirements should not include: Liners, caps, corks, closures, labels, and other items added externally or internally but otherwise separate from the structure of the bottle or container. This is consistent with Washington State.

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.

“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.

“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.
- **Consumer Brands suggests providing clarity on the inclusion or exclusion of flexible plastics**

"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. **E.g., FIFRA covered products. Federally designated or regulated hazardous products should not be covered.**

“Hot-Fill Process” means a process to sterilize both a food product and its container during the food packaging process, in which the food product is heated to a temperature between 194 and 203 degrees Fahrenheit and then injected into the container

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

“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: **Consumer Brands recommends policy alignment across states. The model should be consistent with Washington and New Jersey’s requirements, please allow producers to provide national portfolio data on recycled content use and allow it to be prorated for specific states.**

“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.
- e) **Containers certified as industrial compostable pursuant to ASTM D6400 or D6868 or home compostable pursuant to TUV Austria OK Home certification.**

“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. **PCR requirements**

should not include: Liners, caps, corks, closures, labels, and other items added externally or internally but otherwise separate from the structure of the bottle or container.

"Postconsumer recycled content" means the content of a covered product made of recycled materials derived specifically from recycled material generated by households or by commercial, industrial, and institutional facilities in their role as end users of a product that can no longer be used for its intended purpose. "Postconsumer recycled content" includes returns of material from the distribution chain. Definition from WA SB 5022.

"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.

SUGGESTED LANGUAGE: Consumer Brands recommends the definition from WA SB 5022 to ensure e-commerce/ sales are included.

(a) "Producer" means the following person responsible for compliance with minimum postconsumer recycled content requirements under this chapter for a covered product sold, offered for sale, or distributed in or into this state:

- (i) If the covered product is sold under the manufacturer's own brand or lacks identification of a brand, the producer is the person who manufactures the covered product;
- (ii) 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
- (iii) If there is no person described in (a)(i) and (ii) of 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.

(b) "Producer" does not include:

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

(iii) De minimis producers that annually sell, offer for sale, distribute, or import in or into the country for sale in Washington:

(A) Less than one ton of a single category of plastic beverage containers, plastic household cleaning and personal care containers, or plastic trash bags each year; or

(B) A single category of a covered product that in aggregate generates less than \$1,000,000 each year in revenue.

“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. **Recycled material shall include material recycled through mechanical and / or advanced recycling processes. Consistent with WA SB 5022.**

“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.

“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:
 - **has a minimum capacity of eight fluid ounces or its equivalent volume and maximum capacity of five fluid gallons or its equivalent volume.**
 - 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.

“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.

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: Consumer Brands supports policy alignment across states and recommends that PCR rates and compliance dates not exceed current law in other states. Moreover, we are concerned that achieving 25% recycled content in two years from enactment for all rigid plastic containers. As such, assessment data will be an important component in establishing commercial and technical feasibility.

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 a national portfolio average of 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 a national portfolio average of 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 a national portfolio average of 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 a national portfolio average 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, based on a national portfolio average, by 5% until 50% post-consumer recycled content is reached (no later than 18 years from enactment).

SUGGESTED LANGUAGE:

(1) beginning two years after the effective date of this act, contain, on average, the following percentage of [at least 10 percent] postconsumer recycled content [; and]

- (a) plastic trash bags greater than 0.70 mils thick but less than 0.80 mils thick shall contain at least 5 percent postconsumer recycled content; and
- (b) plastic trash bags greater than 0.80 mils thick but less than 1.00 mils thick shall contain at least 10 percent postconsumer recycled content; and
- (c) plastic trash bags equal to or greater than 1.00 mils thick shall contain at least 20 percent postconsumer recycled content; and⁵

(2) beginning five years after the effective date of this act, contain, on average, the following percentage of [at least 20 percent] postconsumer recycled content [.]

- (a) plastic trash bags greater than 0.70 mils thick but less than 0.80 mils thick shall contain at least 10 percent postconsumer recycled content; and
- (b) plastic trash bags greater than 0.80 mils thick but less than 1.00 mils thick shall contain at least 20 percent postconsumer recycled content; and

(c) plastic trash bags equal to or greater than 1.00 mils thick shall contain at least 40 percent postconsumer recycled content.

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.

COMMENTS: Consumer Brands recommends that state post consumer content goals/requirements should be determined after completion of the statewide recycling needs assessments. We recommend that state regulators should make decisions on an annual basis, review and determine for the following year whether to adjust the minimum postconsumer recycled content percentage required for covered products. State requirements should be measured on a product portfolio average which reflects current law in California, Washington, and New Jersey. If state-specific data is unavailable, compliance should be expressly allowed using regional or national data without requiring permission from the state regulatory agency.

Additionally, we recommend that in making content determinations, the appropriate state regulatory agency should consider the following factors:

Changes in market conditions, including supply and demand for postconsumer recycled content plastics, collection rates, and bale availability both domestically and globally;

Recycling rates;

The availability of recycled plastic suitable to meet the minimum postconsumer recycled content requirements pursuant to subsection (-) of this section, including the availability of high quality recycled plastic, and food-grade recycled plastic from recycling programs;

Food contact packaging that must meets strict FDA requirements for quality and sanitization. Hot-filled food products, for which certain PCR levels may not be applicable *[Accordingly certain applications make it impossible to use PCR materials and meet FDA requirements while preventing spoilage or contamination of foods. Food contact and preservation packaging should be exempted from the requirements to have PCR content in packaging necessary to provide tamper-resistant seals for public health purposes, used for perishable food protection and delivery.]*

The capacity of recycling or processing infrastructure.

The technical feasibility of achieving the minimum postconsumer recycled content requirements in covered products that are federally regulated under: 21 C.F.R., chapter I, subchapter G, 21 C.F.R. Sec. 175-179, 7 U.S.C. Sec. 136, 40 C.F.R. Sec. 152.10, and other federal laws.

1. 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: Consumer Brands recommends striking the following section. This would be a precedent setting provision requiring manufacturers to pay third-parties to certify compliance. Moreover, the reporting requirements under this section would be burdensome and, in the case of “numbers of items of each product category sold into the State”, such figures would likely be estimates, as product inventories can vary based on the needs of retailers and distribution networks that cross state lines.

2. 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
- 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: Containers for substances regulated under the Federal Insecticide, Fungicide, and Rodenticide Act, U.S.C. 19 s.136 et seq. should be exempted from PCR requirements. FIFRA has numerous requirements for packaging and many states have recycling programs specially designed for FIFRA products.

Additionally, we recommend waiver language align with New Jersey S.2515.

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.

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.

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.

3. 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.

4. 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.

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

COMMENT: Consumer Brands suggests including a provision that provides enforcement exemption for alternative measure to reduce the use of virgin plastics, including sustainable materials management protocols, light weighting, lifecycle analysis, and other such measures as determined by state regulators.

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](#).

6. 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.

7. 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 subsections, 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.

**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.

NAME: Jeff Stoutenburg

ORGANIZATION: Dow, Inc.

EMAIL ADDRESS: jastoutenburg@dow.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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 rigid containers used for food, beverages, household cleaning, and personal care products.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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;
- Rigid 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, lids, 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:

"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:

"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:

"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.~~ 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.

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:

"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:

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~~10% 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~~25% 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:

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.
- 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:

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~~10% 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 increase the post-consumer recycled content by 5% until 50% post-consumer recycled content is reached (no later than 18 years from enactment).
- 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:

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

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

**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.

NAME: Maranda Demuth, Government Affairs Manager

ORGANIZATION: Eastman

EMAIL ADDRESS: mdemuth@eastman.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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:

"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:

"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:

As written, the definition of recycled content is limited to mechanical recycling.

Mechanical and advanced recycling are complementary approaches that have different inputs and outputs. They are both needed to advance a circular economy and meaningfully improve our environment. Each technology plays a vital role: mechanical recycling is already widely used by many consumers as a proven model. Advanced recycling creates value from additional types of waste plastics, allowing them to be reprocessed an infinite number of times. Please note, only material-to-material advanced recycling technologies should be included in the definition. Waste-to-fuel or waste-to-energy processes are considered recovery and not recycling.

Mass balance is an accepted and certified method to measure and track recycled inputs and outputs. Its principles are used in a number of industries like renewable energy and the cocoa industry.

In advanced recycling, mass balance traces, measures, and reports the amount of recycled materials used to create a product. This method, certified by the International Sustainability and Carbon Certification (ISCC), measures recycled inputs and outputs and allows brands to report the percentage of recycled content allocated to manufactured products.

Leading voices, like the Ellen MacArthur Foundation, recognize that mass balance enables the circular economy today. It allows recycled plastics and conventional fossil raw materials to be processed together in existing, world-scale manufacturing systems.

The alternative to mass balance is building a separate and redundant infrastructure. To duplicate the many reactors, purification columns, storage tanks, polymerization lines, and packaging and distribution systems would result in tremendous environmental impact and take decades.

“Recycled content” includes materials that have been recycled using traditional or mechanical recycling or material-to-material advanced recycling process. Recycled content can be attributed through various chain of custody models including a mass balance credit system.~~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:

“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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

A producer shall achieve compliance with the recycled content requirements of this act based on the average amount of recycled content, by weight or another metric, as determined by the Department.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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 or another metric, as determined by the department, 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~~recycled content 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:

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 or another metric, as determined by the department 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.

**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.

NAME: Eadaoin Quinn

ORGANIZATION: EFS-plastics Inc.

EMAIL ADDRESS: Eadaoin.quinn@efs-plastics.ca

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COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: I would prefer to see legislative focus on PCR be on applications that can easily uptake PCR. Brands are already very focused on trying to get PCR into their consumer-facing packaging. However, this is driving a demand for clear, food-grade resin; it is not driving demand for colored, non-food grade plastic, which is the vast majority of what is collected through curbside programs. I would like to see very specific applications require the use of post-consumer resin, which we know could accept material from residential programs. Items like: recycling/compost/garbage bins and totes, storage bins, storage shelves, drainage tile, corrugated pipes (in addition to trash bags/carryout bags already proposed). I worry that a focus on packaging will slow progress and create a need for exemptions, compared to choosing items that could uptake higher levels of PCR almost immediately.

PP (#5) – 20% PCR Min.

Recycling, garbage, compost bins & totes

Storage shelving & bins

Until the recent decline in virgin resin pricing, these products were made using up to 100% PCR content for the last 10 years. A 20% minimum would be easily achievable in a very short timeline.

HDPE (#2) – 25% PCR Min.

Corrugated pipes

Drainage tile

ASTM has recently approved the use of up to 100% HDPE in corrugated piping. Until the recent decline in virgin resin pricing, piping and drainage tile were made using up to 70% PCR content for the last 10 years. We propose a minimum of 25% PCR in these applications.

LDPE (#4) – 10% PCR Min.

Garbage bags

Grocery bags

More than 40 organizations have joined the Recycle More Bags Coalition, advocating for legislative require the use of PCR in garbage bags and grocery bags. California legislation (SB270) currently require 40% PCR in all grocery bags sold in state. A 10% minimum is a very conservative place to start.

Below, I specifically removed the word “food” because there is very little PCR resin available for food packaging today. Brands are willing to pay a premium for it already, it is just not available in large enough volumes. Certain color additives used in packaging really should never be used in food-grade PCR, and it is important to create a demand for recyclable colored material that is left behind once the clear, food-grade feedstock has been skimmed off. We should not assume that availability of food-grade material will drastically increase, there are real limitations based on what is generated on the marketplace.

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:

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: Especially hard to source PCR for use in milk packaging. Containers filled while warm and that hold items high in fat have the strictest requirements in terms of receiving a letter of non-objection (LNO) from the FDA.

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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: I would be concerned that brands might switch to compostable packaging. Potentially, could be a good move in the long-run, but right now, with very limited infrastructure for collecting and processing compostable packaging, it would be potentially pushing brands from using a recyclable package to one that ends up being disposed of (or creating contamination in the recycling stream).

Also, the most common compostable "plastic" is PLA, which is derived from plants, so it wouldn't fall under the definition of "plastic" in this document. I don't know of any truly biodegradable plastics that are derived from fossil fuels, so an exemption for "d" below might not really apply any existing packaging formats.

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"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: I'd like to see this definition line up with ISO 14021:2016, which is also referenced in APR's post-consumer recycled content certification program. The more we can all align on a definition, the less confusion and fewer opportunities for being misled. I certainly agree that PCR must always be distinguished from pre-consumer/PIR.

"Recycled content
Proportion, by mass, of recycled material in a product or packaging. Only pre-consumer and postconsumer materials shall be considered as recycled content, consistent with the following usage of terms.

1) Pre-consumer material

Material diverted from the waste stream during a manufacturing process. Excluded is reutilization of materials such as rework, regrind or scrap generated in a process and capable of being reclaimed within the same process that generated it.

2) Post-consumer material

Material generated by households or by commercial, industrial and institutional facilities in their role as end-users of the product which can no longer be used for its intended purpose. This includes returns of material from the distribution chain."

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"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:

"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: Yes. Any claim on package should be the minimum amount that they can guarantee is in the package. The package could potentially have more PCR in the package, but it should never be less. The on-pack label should not be reflective of what the brand uses across the packaging line.

That said, I don't believe legislation should focus on consumer-facing packaging at this time. Every large brand has publicly committed to increasing their use of PCR (yet to be seen who will follow through of course, but the pressure is on). I really would like to see legislation focus on applications where there are absolutely not technical hurdles to increasing the levels of PCR used. There are so many applications that don't get as much attention as packaging that could create strong end-markets for plastic materials collected from residential sources. These applications are able to use PCR, but their use of PCR today is mostly based on spot market pricing. The moment the price of virgin plastic drops, the interest in using PCR drops with it.

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"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: Again, I'd like to see a shift away from packaging. But if this is the direction forward, I'd at least like to see food removed. The other applications (household cleaning and personal care) are very ambitious, and very far away from where the market is today.

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"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: Looks good. Glad/Clorox will want this to apply to only higher gauge bags. There is some merit in this, but the thickness gauge shouldn't be pushed too high. Brie Welzer from Green Seal is working on a standard that lines up well with what I think is attainable. I think they are using 0.5 mil as the minimum thickness that should require PCR. I would recommend aligning with her proposal – Bwelzer@greenseal.org.

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"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.

III. Post-consumer recycled plastic content requirement

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: California already requires 40%. This could be a very fast change for anyone one state. Local suppliers are not crucial, the vast majority of carryout bag manufacturers have national supply chains. For example, EFS produces PCR resin in Ontario and Pennsylvania. Our end markets who are buying PCR for carryout bags are almost entirely supplying customers in California. When California increased their PCR levels from 20% to 40%, we only saw an increase in PCR resin sales to this market in the weeks leading up to the Jan. 1st transition deadline. A 6 month start up time would be more than enough time. All bag manufacturers are preparing to have to comply with this type of legislation.

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This is an application that is such a “no brainer.” Good riddance to plastic carryout bags... Should they persist, they better have high levels of PCR in them! And of course, a colored, non-food grade application like this creates an important end market for colored film packaging that is becoming a larger fraction of waste generated by households.

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Carry-out bags:

- Beginning ~~two~~ 6 months ~~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~~ 1 ~~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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: I don't think the legislation should focus on packaging at this time. If it does, these % should be lowered significantly. I think it should start at 5% and go up to 25%. Brands are already incentivized to advertise on packages. I would much prefer to see producers have to use 100% PCR shipping pallets or 100% PCR shipping crates, for example. So easy to scale very quickly. It is crazy to think applications like that are used in large volumes and still made of almost all virgin plastic.

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: This is already being done at scale in California. Canada should be releasing PCR requirements in trash bags shortly (not confirmed but stay tuned this month!) There is no reason to wait so long. Each bag, above a minimum thickness (again, please refer to Green Seal's proposal – I think it is 0.5 mil) should have to hit these 10 and 30% targets. They are truly a baseline requirement; much higher levels of PCR are already achieved.

Trash bags:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: APR does not issue 3rd party certifications; they simply provide guidelines that 3rd party certifiers must align with. There are 3rd party certifiers that do a thorough job, there are ones that just issues certifications as soon as they get paid. APR does some of the leg work of vetting who is legitimate. <https://plasticsrecycling.org/apr-pcr-certification>

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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. All plastic resin used to produce the post-consumer recycled content must be approved by a 3rd party certifier in compliance with Association of Plastic Recycler's Post-Consumer Recycled Content Certification Program.

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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:

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.

September 20, 2022

Ms. Lynn Rubinstein
Executive Director
Northeast Recycling Council
139 Main St, Ste 401
Brattleboro, VT 05301
(Submitted Electronically)

**NERC/NEWMOA - Model Minimum Postconsumer Recycled Content Requirements
for Plastic Products and Packaging Legislation**

Dear Ms. Rubinstein,

The Flexible Packaging Association (FPA) applauds and supports your efforts in taking steps to proactively address the issue of minimum post-consumer recycled (PCR) content requirements. We believe that a suite of options is necessary to address plastics circularity and that well-crafted public policy is a major piece of that puzzle. Unfortunately, as currently drafted, FPA finds the NERC/NEWMOA proposed Model Minimum Postconsumer Recycled Content Requirements for Plastic Products and Packaging Legislation's definition of "Producer" is problematic and erroneously targets packaging manufacturers (converters) of plastic packaging, instead of the product manufacturers; specifically the second bullet point.

For over a year, FPA worked with the Product Stewardship Institute (PSI) and jointly drafted a set of principles to guide extended producer responsibility (EPR) for flexible packaging (<https://www.flexpack.org/publication/RG93bmxvYWQ6NDUx/download>). While the principles were technically drafted with EPR in mind, they remain applicable as the definition of "Producer" is critical to both EPR and PCR legislation for the same reasons. The PSI/FPA principles suggest the following in order to ensure the responsible party is correctly identified:

"Producer – 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 plastic packaging.

(1) For plastic packaging, a producer shall be determined based on the following criteria:

(A) A person who manufactures a product under the manufacturer's own brand that uses plastic packaging;

(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 plastic packaging, but is the owner or licensee of a trademark under which plastic packaging 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 plastic packaging into the state for use in a commercial enterprise, sale, offer for sale or distribution in the state.”

The primary responsibility for ensuring that packaging meets state and local requirements for PCR content must be on the consumer packaged goods companies (CPGs), which encompasses food manufacturers and retailers in their role as brand owners. They, and not the producers of the packaging (converters), have the ability to track consumer sales in a given jurisdiction and control how products are made. Packaging producers (converters) would have no way to determine where the packaging is sold and even in some cases to what brand – packaging producers sell packaging to CPGs, which may then use it for multiple brands within their portfolio and sell throughout the country. Even when packaging is sold directly to a brand in a given state, packaging producers have no way of knowing whether the final product will be sold in or out of the state. This makes it impossible for packaging manufacturers (converters) to know which state’s standards (some of which contradict one another) they need to comply with. As PCR content laws vary considerably from one state to another, this would force packaging manufacturers (converters) to conform to whichever standards are harshest and most restrictive, to avoid facing penalties. This would also effectively allow one state to set public policy for others, particularly within the same region, by passing the most aggressive and restrictive standards. Even if this was a viable option, packaging manufacturers do not specify products for their CPG customers – CPGs (product manufacturers) specify this; converters cannot dictate what products CPGs offer or sell.

Similarly, to date, four states (ME, OR, CO, CA) have now passed laws establishing EPR programs for packaging, each with a distinctively different approach to EPR and some with PCR content mandates. All four states, however, share a common definition of “Producer” that correctly points to product manufacturers or CPGs, consistent with the PSI/FPA principles. Again, this is because it is simply infeasible, if not impossible, for a packaging manufacturer (converter) to predict or track where their product will end up and therefore have no way of determining which states’ standards to comply with, and even if they could, they are not specifying the product, they are merely making it under contracts with the product manufacturers.

For these reasons, FPA would strongly encourage you to amend the model legislation’s current definition of “Producer” so that it comports with the PSI/FPA elements, creating sound policy to address plastics circularity through a scientifically based, common sense approach. FPA stands ready to assist you in any way possible and if we can provide further information or answer any questions, please do not hesitate to contact us via phone at 410-694-0800 or via email at Akeane@Flexpack.org or SSchlaich@Flexpack.org.

Very Respectfully,

Sam Schlaich

Sam Schlaich
Counsel, Government Affairs
Flexible Packaging Association

**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.

NAME: Abigail Trumpy

ORGANIZATION: Flexible Packaging Association (FPA)

EMAIL ADDRESS: Atrumpy@flexpack.org

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.

**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.

NAME: Carol Patterson

ORGANIZATION: Foodservice Packaging Institute (FPI)

EMAIL ADDRESS: Cpatterson@fpi.org

(NOTE: Comments are provided above the section they apply to.)

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Overall Comments:

With respect to this *draft model legislation*, FPI's comments are focused on foodservice packaging.

There are a number of considerations that need to be taken into account when adding PCR resins to foodservice packaging products, including U.S. Food & Drug Administration (FDA) requirements, supply of PCR resins, and product specifications and constraints. Our comments below will reflect these challenges.

Further, it was based on these challenges that New Jersey's S2515, contains the following exemption:

A package or container that contains food shall be exempt from the postconsumer recycled content requirements of this act for a period of five years beginning on the effective date of this act, except that the exemption provided in this paragraph shall not apply to a plastic beverage container or a glass container filled with a beverage.

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:

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:

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:

As stated in the overall comments at the beginning of this document, consideration of the FDA requirements for PCR in food-contact packaging is needed.

According to the FDA, PCR resins must meet the same specifications as virgin plastic resin. In this regard, all foodservice packaging manufacturers have to follow strict FDA guidelines for all manufacturing processes and materials used in the making of foodservice packaging as per the [Guidance for Industry: Use of Recycled Plastics in Food Packaging \(Chemistry Considerations\)](#). Of particular note, food contact materials used in the manufacture of foodservice packaging are required to obtain a letter of no objection (LNO) from the FDA, this extends to PCR resins.

For this reason, it may be preferable to have food-contact packaging as a separate bullet, as noted below in track changes.

Further, there is some inconsistency in the language between the title (Sale of Trash and Carry-Out Bags and Food, Beverage, and Household Product Containers), how covered products are described below, and then the definition of "rigid plastic containers". Need to ensure consistency.

"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.
- Plastic non-durable food-contact 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.
- compostable plastic packaging or products certified as compostable by a third-party certifier.

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:

“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:

“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:

"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:

As previously suggested, it may be preferable to have food-contact packaging as a separate bullet, as noted below in track changes.

Also noted earlier, recommend either selecting "rigid plastic container" OR "plastic non-durable container".

"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.
- [Food-contact packaging](#)

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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

As previously noted, FPI suggests an exemption for food-contact packaging for the first five years.

There are a number of considerations that need to be taken into account when adding PCR resins to foodservice packaging products, including U.S. Food & Drug Administration (FDA) requirements, supply of PCR resins, and product specifications and constraints.

According to the FDA, PCR resins must meet the same specifications as virgin plastic resin. In this regard, all foodservice packaging manufacturers have to follow strict FDA guidelines for all manufacturing processes and materials used in the making of foodservice packaging as per the Guidance for Industry: Use of Recycled Plastics in Food Packaging (Chemistry Considerations). Of particular note, food contact materials used in the manufacture of foodservice packaging are required to obtain a letter of no objection (LNO) from the FDA, this extends to PCR resins.

Further, as various food and beverage companies make commitments to use PCR at higher rates, for an increasing number of products, the supply of available material dwindles. There is currently not enough PCR resin in the marketplace to meet the voluntary demand driven by retailers. In fact, a recent study by AMERIPEN which analyzed U.S. company recycled content goals against available supply, states that *“domestic supply and reprocessing capacity for plastic resin concludes that based upon demand stated through public commitments for plastic PCR, the U.S. currently lacks the available supply and, in some cases, domestic reclamation capacity to meet those goals”*.

It is also important to note that, although PCR resins and virgin resins must adhere to the same FDA requirements, the use of PCR impacts packaging containers to differing extents. As PCR resins are increased, factors like rigidity can be affected. It is our understanding, currently PCR for foodservice packaging items is blended with virgin resin at a rate that render differences undetectable, ensuring product quality and performance. Certain packaging container shapes are more easily manufactured using PCR resins at higher percentages, while others cannot as easily utilize the same percentage, making it difficult to uniformly assign minimum content requirements.

Based on these factors, we would suggest that any future PCR goals for food-contact packaging may need to consider both the resin and the product, and that exemptions will be needed in the event of lack of supply and/or FDA LNOs (as noted under waivers).

Additionally, producers of all packaging should have the option of meeting the minimum post-consumer recycled content requirement by averaging the total amount of post-consumer recycled content from covered products sold into the State rather than per product, as is suggested for trash bags.

Rigid plastic containers:

- Beginning two years from the date of enactment, all rigid plastic containers sold, with the exception of food-contact packaging, offered for sale or distributed for sale in the State must contain at least 2510% post-consumer recycled content.
 - A package or container that contains food shall be exempt from the postconsumer recycled content requirements of this act for a period of five years beginning on the effective date of this act, except

that the exemption provided in this paragraph shall not apply to a plastic beverage container or a glass container filled with a beverage.

- Beginning every ~~three-five~~ 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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

Suggested waiver language from New Jersey S2515:

A manufacturer may apply for a waiver from the postconsumer recycled content requirements established pursuant to this act. The department may grant a waiver pursuant to this section if the manufacturer demonstrates, and the department finds, in writing, that:

(1) the manufacturer cannot achieve the postconsumer recycled content requirements and remain in compliance with applicable rules and regulations adopted by the United States Food and Drug Administration, or any other State or federal law, rule, or regulation;

(2) it is not technologically feasible for the manufacturer to achieve the postconsumer recycled content requirements;

(3) the manufacturer cannot comply with the postconsumer recycled content requirements due to inadequate availability of recycled material or a substantial disruption in the supply of recycled material; or

(4) the manufacturer cannot comply for another reason as determined by the department pursuant to rule, regulation, or guidance.

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:

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.

February 11, 2022

Lynn Rubinstein, Executive Director, NERC
Terri Goldberg, Executive Director, NEWMOA

GreenBlue Comments on NERC Draft Minimum Postconsumer Recycled Content Legislation for Plastics

Dear Lynn and Terri:

GreenBlue thanks NERC and NEWMOA for the opportunity to comment on the draft Minimum Postconsumer Recycled Content Model Legislation for Plastics. GreenBlue is an environmental nonprofit dedicated to the sustainable use of materials in society. Our comments reflect our years of experience working with industry and other stakeholders, including the members of the Sustainable Packaging Coalition (SPC), as well as our experience developing the Recycled Material Standard (RMS).

During the development of the RMS Framework and Plastics Module, we sought input from a broad range of stakeholders, including environmental NGOs, developers of related standards, brands, retailers, plastic material manufacturers, trade associations, academia, governmental agencies, and others, both informally, through a formal public comment period, and through a multi-stakeholder Advisory Committee. We took the views of all interested parties into consideration, seeking to reconcile conflicting arguments and achieve consensus. Ultimately, the RMS was approved by vote of the Advisory Committee.

Third-Party Certification

We support NERC's inclusion of third-party certification for recycled materials. Standards for third-party certification of recycled materials, including the RMS, exist today and are available for companies seeking certification. We suggest that any standard to be used in support of the minimum recycled content requirements should be developed through a multi-stakeholder voluntary consensus process, as described in the FTC Guides for the Use of Environmental Marketing Claims ("Green Guides"). Additionally, approved standards should cover the full chain of custody for recycled plastics, ensuring that recycled material claims on the final product are accurate. The RMS, among other standards, meets these criteria.

Calculation of Recycled Content

We believe it is important to provide clarity regarding the methods used to calculate recycled content. We suggest that the phrase "material balance approach" used in the model legislation may lead to confusion, given that many certification programs use "mass balance allocations". We suggest the inclusion of a simple formula, showing that recycled content is calculated as a percentage of the weight of the product. We also suggest the addition of clarifying language

allowing the average recycled content to be measured over a specific period of time, either as the average over a defined time period (e.g., monthly or quarterly), or a rolling average.

We also suggest allowing for mass balance allocation claims. This type of claim is allowed by the EU Directive on single-use plastics for beverage containers, and consistency with international legislation will help major brands. Mass balance claims can also help enable the use of recycled materials in challenging applications, like food contact, and will be an important enabler of new recycling technologies, such as chemical recycling (also referred to as advanced recycling or molecular recycling). Standards vary in the rules applied to mass balance allocation claims. For example, RMS *excludes any mass converted to fuels* from allocation to finished products, while ISCC+ allows this.

The model legislation as written is ambiguous as to whether recycled content is to be calculated for each individual covered product separately, or as an average across all items in each covered category. We suggest clarification whether the intent is to require minimum recycled content in each individual product sold or averaged across all products in a category.

Complete Accounting of Recycled Materials

As written, the draft model legislation includes minimum content requirements for only post-consumer recycled materials. To support a complete accounting system for the use of virgin and recycled plastics, we encourage the inclusion of a definition of post-industrial recycled materials in the model legislation. The definition of post-industrial plastic included in the RMS Plastics Material Module was developed with extensive stakeholder input and consideration of the specifics of plastics reprocessing and manufacturing operations, with the intent of allowing accurate tracking of the use of post-industrial recycled plastic while excluding materials that can be reused directly in the process that generates them.

While we recognize the hierarchy of recycled status claims, with post-consumer recycled materials considered the highest recycled status claim, we believe there is a role for the use of post-industrial recycled materials, which also have environmental benefits. Particularly in cases where an adequate supply of post-consumer recycled plastic may not be available, or may not meet the necessary requirements (e.g., a Letter of Non-Objection for food contact materials), the use of post-industrial recycled materials can displace the use of virgin plastics and reduce the amount of plastics sent to landfill. Even if post-industrial materials are not counted toward the recycled content minimums specified in the model legislation, for the sake of a complete accounting of materials used, post-industrial materials should be included in annual reports along with virgin and post-consumer materials. Additionally, the use of post-industrial materials may be an important part of alternative compliance options to be considered for companies seeking waivers.

The Inclusion of Waivers

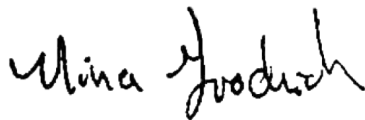
We appreciate the inclusion of the section on waivers as it is likely that some companies may struggle to meet some of the targets set forth in the legislation. It may be helpful to suggest

alternatives for compliance, such as the use of post-industrial material, mass balance allocation, or plastic credits that support investments in domestic recycling infrastructure.

Finally, we would like to make sure that NERC is aware of the existence of the multiple programs offering tradeable plastic credits, including GreenBlue's ARCs and Verra's Plastic Credits. These credits are environmental commodities that represent recycling of materials of a specific resin type. These proposed opportunities for waivers create alternative solutions for helping to advance the use of recycled materials and lessen the dependence on virgin plastics. In lieu of such alternatives, industry may find itself competing for a limited pool of post-consumer resin suitable for challenging applications.

Again, GreenBlue appreciates the opportunity to comment on this draft model legislation. We are happy to provide further detail on our comments, or further discuss how third-party certifications for recycled materials, including RMS, can align with the requirements of the model legislation.

Sincerely,



Nina Goodrich
Executive Director, GreenBlue



Laura M. Thompson
Director, RMS Program at GreenBlue

**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.

NAME: Laura Thompson

ORGANIZATION: GreenBlue

EMAIL ADDRESS: laura.thompson@greenblue.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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:

"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:

Consider adding a definition for post-industrial recycled material to enable full and accurate accounting of recycled materials. We suggest that this definition mirror the definition for post-industrial plastic in the GreenBlue Recycled Material Standard: "plastic diverted from the waste stream during a manufacturing process that cannot be reclaimed within the same process producing the same product that generated it without reformulation of the input stream. Plastic which undergoes size reduction only (e.g. cutting, shredding, or regrinding) is not considered recycled material. May also be referred to as pre-consumer plastic." This definition was developed with extensive stakeholder input to allow for the accurate tracking of the use of post-industrial recycled plastic, while excluding materials that can be reused directly in the process that generates them.

"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:

“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:

Consider revision to the phrase “material balance approach”. Many certification standards are defining “mass balance allocations” and this phrase may lead to some confusion. Suggest including a simple formula that shows that it is a portion of the total weight, e.g., $\% RC = 100 \times W_r / (W_r + W_v)$, where W=weight, r=recycled, and v=virgin.

Consider adding clarifying language that allows average content to be measured over a specific period of time, for example, a rolling average or an actual average over a defined period of time (e.g., monthly or quarterly).

Consider allowing for mass balance allocation claims – this type of claim is being allowed by the EU Directive on single-use plastics for beverage containers. Consistency with international legislation will help major brands. Mass balance claims can also help enable use of recycled materials in challenging applications, like food contact.

This section seems to convey that the calculation is done at the product level, whereas section IV implies that averages can be made across product lines within a given jurisdiction. Suggest clarifying whether the intent is to have minimum content in each product sold or averaged across all products in a category.

"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:

“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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

GreenBlue applauds the requirement for third-party certification. We welcome the opportunity to weigh in on establishing criteria for acceptable certifications. We note that certifications for recycled materials are currently available, including GreenBlue's Recycled Material Standard.

We suggest clarifying the language that producers should "submit an authorized report that conveys the amount of third-party certified materials."

Even if post-industrial materials are not counted toward the recycled content minimums specified in the model legislation, for the sake of a complete accounting of materials used, post-industrial materials should be included in annual reports along with virgin and post-consumer materials.

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:

Consider including post-industrial material to help meet requirements as both sources help reduce reliance on virgin plastic. There is precedent for this approach in recycled content guidelines for other material types. See, for example, the federal Comprehensive Procurement Guidelines (CPGs), which set guidelines for the use of both post-consumer and post-industrial fiber in paper products.

Consider including an option for purchasing "plastic credits" or "environmental commodities" that represent recycling of recycled materials of the same resin type (e.g., GreenBlue's ARCs or Verra's Plastic Credits) as part of an alternative compliance plan for companies seeking a waiver from the requirements of the act.

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:
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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:

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.

**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.

NAME: Brian Heindl

ORGANIZATION: Henkel of America Inc.

EMAIL ADDRESS: Brian.Heindl@henkel.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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. Add additional exemptions from NJ’s law for consistency - *is associated with a product produced in or brought into the state that is destined for shipment to a destination outside the state, and that remains with the product upon shipment - *contains toxic or hazardous products regulated under the “Federal Insecticide, Fungicide, and Rodenticide Act” 7 U.S.C.s.136 et seq. - *is manufactured for use in the shipment of hazardous materials and is (a) prohibited from being manufactured with used material by federal packaging material specifications set forth in 49 C.F.R.s.178.609, or (c) is subject to the recommendations of the United Nations on the transport of dangerous goods; -

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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:

"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.

"Postconsumer recycled content" means the content of a covered product made of recycled materials derived specifically from recycled material generated by households or by commercial, industrial, and institutional facilities in their role as end users of a product that can no longer be used for its intended purpose. "Postconsumer recycled content" includes returns of material from the distribution chain. Definition from WA SB 5022

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Consistency in definitions is critically important as products are manufactured for use in all the states.

"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:

"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. Recycled material shall include material recycled through mechanical and / or advanced recycling processes. Consistent with WA SB 5022.

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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:

"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 (important to define household cleaning or personal care product so that manufacturers know which products are in scope).
- Add “Has a minimum capacity of eight fluid ounces or its equivalent volume and a maximum capacity of five fluid gallons or is equivalent volume”, which is included in WA/NJ laws.
- "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.
- Add: “Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container;” as listed in beverage container definition
-

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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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~~shall contain at least 10 25% post-consumer recycled content (to align with NJ law).
- ~~Beginning every three five~~ years from the date of enactment, and every three years thereafter, the percentage of postconsumer recycled content required for all rigid plastic containers pursuant to this section shall sold, offered for sale or distributed for sale in the State must contain must increase the post-consumer recycled content by 105% until 50% post-consumer recycled content is reached (to align with NJ law) ~~(no later than 18 years from enactment)~~.

The department may review and adjust any of the postconsumer recycled content requirements In making an adjustment the department shall consider:

- (1) Changes in market conditions, including supply and demand for postconsumer recycled content, collection rates, and bale availability both domestically and globally;
- (2) Recycling rates, as may be determined by the department;
- (3) The availability of recycled material suitable for manufacturers to meet the postconsumer recycled content requirements, including the availability of high-quality recycled plastic or glass, and food-grade recycled plastic or glass;
- (4) The capacity of recycling or processing infrastructure;
- (5) The progress made by manufacturers in meeting the postconsumer recycled content requirements; and
- (6) Any other factors as determined by the department pursuant to rule, regulation, or guidance.

Any adjustment to the postconsumer recycled content requirements made pursuant to this section shall be only for a time-period, and only under such conditions, as the department may be rule or regulation establish.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:Add language from NJ law allowing for departmental review of rates – see language above. Further, state requirements should be measured on a product portfolio average which reflects current law in CA, WA, & NJ.

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:

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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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Requiring state agencies to approve use of regional or national data creates a significant and unnecessary burden on state agencies, as well as manufacturers and retailers who would have to track which SKUs coming from a regional warehouse are being sold in a specific state. Further, this language is not aligned with WA/NJ which does not require specific approval.

subparagraph (1) in the annual report.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Requiring third party certification is not aligned with WA State or NJ. Further, to our knowledge there are not any third party certifiers with a proven track record that could perform this service. This would be a tremendous and costly undertaking to certify compliance through a third party on an annual basis.

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 manufacturer shall certify in writing. A producer shall submit the certification,~~ in the form and manner determined by the Department, under penalty of perjury, ~~whether or not the rigid plastic containers, plastic beverage bottles, plastic carryout bags or plastic trash bags, as applicable, sold, offered for sale, or used in association with the sale or offer for sale of a product in the State, are in compliance with the postconsumer recycled content requirements of this act~~ 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: Given costs, burdens, and lack of track record with third party certifications, an annual third party certification should be eliminated. Alternative is WA law, which only requires annual reporting, or NJ, which requires a manufacturer to certify in writing compliance with the recycled content requirements.

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: Inclusion of a waiver provision is important given the need to address unforeseen circumstances, whether due to weather, pandemic, or other incidents that result in supply chain constraints or inability to source recycled content, as well as technological issues that may arise with certain packaging and increased recycled content requirements.

**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: Having a central portal to register and report is important from an efficiency and cost perspective rather than having to register and report for each state.

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:If Congress establishes national recycled content standards, then it would be beneficial to include language allowing for reverse preemption where the state requirements would be voided if national requirements were in alignment.

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.

**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.

NAME:

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COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: Highlights that states that would prefer not to ban or otherwise restrict the use of products can instead pursue recycled content requirements.

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. Minimum recycled content standards can also be pursued as an alternative to restrictions on plastic products, such as carry-out bags, food service ware, and single-use plastic products.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Milk provides a particular issue regarding supply of recycled content and should not be included in proposal.

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 milk and non dairy milks, 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:

Plastic non-durable container would likely benefit from its own definition, similar to other covered products. ISRI suggests adding language similar to that used in New Jersey to delay application to food grade. Alternately, such a delay could be applied as its own exemption provision and/or in the certification requirements.

Also, ISRI suggests that the current exemption points b, c, and d from the plastic beverage containers definition be applied to all non-durable containers, not just beverage containers.

Additionally, NERC and NEWMOA could consider including or refocusing the recycled content requirement on other, less consumer facing products that can easily incorporate high amounts of PCRC but do not typically do so. While packaging and other consumer-facing products often have manufacturer pledges to increase recycled content, products such as the following could greatly benefit from PCRC requirements:

- Recycling and trash collection bins.
- Drainage pipe.
- Sewage pipes.

“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. A container that contains food shall be exempt from the post-consumer recycled content requirements of this act for a period of five years beginning on the effective date of this act, except that the exemption provided in this paragraph shall not apply to a plastic beverage container.

"Plastic non-durable container" does not include"

- a) 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;
- b) Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container; and
- c) Containers certified by the Biodegradable Products Institute (BPI) as compostable.

"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: Per the changes to covered product / non-durable container above, ISRI suggests moving exemptions b, c, and d to instead apply to a definition for all plastic non-durable containers, which includes plastic beverage containers.

"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)b) Containers certified by the Biodegradable Products Institute (BPI) as compostable.~~

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Redefining as "post-consumer material", along with the suggested change from "recycled content" to "post-consumer recycled content" and the suggested new definition for "recycled material", will address some confusion in terms in the original draft while maintaining focus on the use of post-consumer recycled content and referencing ISO standards, which include a distinction between post- and pre-consumer material. If NERC / NEWMOA does not wish to reference ISO, ISRI suggests either utilizing the Washington state definition or removing references to waste and waste stream.

~~"Post-consumer recycled content material" 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., as defined by ISO 14021:2016, means material generated by households or by commercial, industrial and institutional facilities in their role as end-users of the product which can no longer be used for its intended purpose. This includes returns of material from the distribution chain.~~

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

"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: Rename to post-consumer recycled content, along with changing current post-consumer recycled content definition to post-consumer material and adding a new definition for recycled material, will address some confusion between the terms.

For the "material balance approach", this should specify mass balance or a different approach to avoid confusion. The model should also specify (either here or in a later section) whether the consideration will be across all of a producer's covered products taken as a whole, across individual product lines, or by specific product. How to properly account for the inclusion of chemical recycling content which may not be reflected within a mass balance approach should also be considered.

For Recycled Material, ISRI suggests the use of the definition approved by ISRI's Board of Directors.

"Post-consumer Recycled content" means the portion of a covered product's total weight that is composed of recycled materials derived specifically from 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.

"Recycled Material" means material that was initially obsolete, previously used, off-specification, surplus, or incidentally produced and that has been processed into a specification-grade commodity for use in materials manufacturing.

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:

"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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: Separate percentages based on the thickness of the trash bag could be considered as were incorporated into the enacted language of NJ S2515

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: ISRI members felt it was proper for each state to assess the per-producer cost based on their own requirements, and for any such fee to reflect participation in any coordinating body to prevent additional financial burdens upon producers.

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~~ adopt a registration fee as necessary to reflect the Department's costs to implement, administer, monitor, and enforce the provisions of this act. Any producer registration fees should reflect the state's participation in any interstate coordination clearinghouse.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: ISRI would like to ensure that the 3rd party certification reflect existing certification standards.

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 shall follow the Association of Plastic Recyclers Postconsumer Resin (PCR) Certification Program or an equivalent program to endorse third party companies to conduct certifications, as 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:
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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:

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.

**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**

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.

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. Minimum recycled content standards can also be pursued as an alternative to restrictions on plastic products, such as carry-out bags, food service ware, and single-use plastic products.

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.

“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.

“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. A container that contains food shall be exempt from the post-consumer recycled content requirements of this act for a period of five years beginning on the effective date of this act, except that the exemption provided in this paragraph shall not apply to a plastic beverage container.

“Plastic non-durable container” does not include

- a) Rigid plastic containers or plastic bottles that are or are used for medical devices, medical products

Commented [JS1]: Milk provides a particular issue regarding supply of recycled content and should not be included in proposal.

Commented [JS2]: NERC and NEWMOA could consider including or refocusing the recycled content requirement on other, less consumer facing products that can easily incorporate high amounts of PCRC but do not typically do so. While packaging and other consumer-facing products often have manufacturer pledges to increase recycled content, products such as the following could greatly benefit from PCRC requirements:

- Recycling and trash collection bins.
- Drainage pipe.
- Sewage pipes.

Commented [JS3]: Language used in NJ to delay application to food grade. Alternately, could be applied as its own exemption provision and/or in the certification requirements.

Commented [JS4]: Points b, c, and d of the original applied to all plastic non-durable containers, not just beverage containers.

It would be best to create a separate definition for a "plastic non-durable container" rather than referencing solely in the definition for a covered product.

that are required to be sterile, nonprescription and prescription drugs, or dietary supplements;
b) Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container; and
c) Containers certified by the Biodegradable Products Institute (BPI) as compostable.

"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.

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

"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.

"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-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)a) ~~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)a) ~~Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container; and~~
- d)a) ~~Containers certified by the Biodegradable Products Institute (BPI) as compostable.~~

"Post-consumer recycled content material" ~~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, as defined by ISO 14021:2016, means material generated by households or by commercial, industrial and institutional facilities in their role as end-users of the product which can no longer be used for its intended purpose. This includes returns of material from the distribution chain.~~

"Post-consumer Recycled content" means the portion of a covered product's total weight that is composed of recycled materials derived specifically from 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.

"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;

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Commented [JS5]: Renaming as post-consumer material and post-consumer recycled content addresses some confusion between terms in the original draft.

Commented [JS6]: In our Comments submission, we will reference that we prefer the approach in this redline (ISO), but if NERC / NEWMOA do not wish to follow that, then they could either:

- Use Washington state definition; or
- Remove references to waste and waste stream.

Commented [JS7]: Utilizing ISO standard ensures consistency; also allows reference to ISO definition of pre-consumer material without necessitating direct reference to an undefined / unutilized term within the model.

Commented [JS8]: Renaming as post-consumer material and post-consumer recycled content addresses some confusion between terms in the original draft.

Commented [JS9]: This should specify mass balance or a different approach to avoid confusion. The model should also specify (either here or in a later section) whether the consideration will be across all of a producer's covered products taken as a whole, across individual product lines, or by specific product. How to properly account for the inclusion of chemical recycling content which may not be reflected within a mass balance approach should also be considered.

- 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.

~~"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.~~

"Recycled Material" means material that was initially obsolete, previously used, off-specification, surplus, or incidentally produced and that has been processed into a specification-grade commodity for use in materials manufacturing.

Commented [JS10]: If a definition for recycled material is desired to clarify usage in the amended "Post-consumer recycled content" definition, ISRI suggests the use of this definition as approved by the ISRI Board.

"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.

"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.

“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.

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.

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).

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.

Commented [JS11]: Separate percentages based on the thickness of the trash bag could be considered as were incorporated into the enacted language of NJ S2515

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.

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~~ adopt a registration fee as necessary to reflect the Department's costs to implement, administer, monitor, and enforce the provisions of this act. Any producer registration fees should reflect the state's participation in any interstate coordination clearinghouse.

Commented [JS12]: ISRI members felt it was proper for each state to assess the per-producer cost based on their own requirements, and for any such fee to reflect participation in any coordinating body to prevent additional financial burdens upon producers.

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
- 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 shall follow the Association of Plastic Recyclers Postconsumer Resin (PCR) Certification Program or an equivalent program to endorse third party companies to conduct certifications, ~~as 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.

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.

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.

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.

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.

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.

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](#).

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.

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.

**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.

NAME: Alasdair Carmichael

ORGANIZATION: NAPCOR

EMAIL ADDRESS: acarmichael@napcor.com

COMMENT/: NAPCOR represents the PET container industry of North America; therefore our comments are limited to the clauses relevant to PET containers. Our comments are relevant to PET, and not necessarily relevant to other plastics.

1-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/: The first sentence states "producers of certain plastics products." What exactly are those certain plastics products? PET, HDPE, PP, all 1-7's?
If PCR is mandated, is it collected for recycling within the states? Are other types of packaging materials (aluminum cans, glass bottles, cartons) proposed to have recycled content. If not, Why?

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/: NAPCOR supports well designed recycled content legislation, but it is critical that any content legislation is accompanied by legislation addressing supply of recycled materials. There is no point in mandating recycled content if there is insufficient recycled content available to meet the targets set. Unlike many plastics the availability of recycled PET is very tight and the major challenge for the industry is not demand, but is supply. NAPCOR research shows that states with deposit schemes (such as some in New England) yield significantly higher return rates than those with curbside systems. Nationally, the USA typically collects between 28 – 30% of its PET bottles. With normal yield/contamination rates the RPET generation rate is typically between 20 - 22%. Even if 100% of RPET was suitable for use in Food Grade applications we would be unable to reach a national 25% RPET content in PET bottles. The only way this could be achieved is to improve the national collection rate and experience indicates that deposit schemes allow this to happen.

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Commented [AC1]: Does this exclude products from bio sources, eg Coca Cola "Plant Bottle" How would you tell the difference between virgin petroleum and bio based?

2-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: OK

“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:

- 1- Plastic trash bags;
- 2- Plastic carry-out bags;
- 3- 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/: We do not comment on trash bags or carry out bags.
It is not clear what is covered by the term “Plastic non-durable containers.” Does it include thermoforms for food and non food use as well as food and beverage bottles?

“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:

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“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/: The 2nd para of section 1 states “plastic products from virgin petroleum”, but in this section a different definition for plastics is used. There should be consistency within the document.

“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:

- (1)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;
- (2)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;
- (3)c Liners, bladders, caps, corks, closures, labels, and other items added but otherwise separate from the structure of the bottle or container; and
- (4)d Containers certified by the Biodegradable Products Institute (BPI) as compostable.

COMMENT/: What happens to refillables at the end of their life?

“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 material 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/: We suggest that post-industrial recycled material, excluding regrind, should be considered recycled content as it can still help with the stated goals of displacing the need for virgin material and lowering associated environmental impacts.

“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:

- 1. 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;
- 2. 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

Commented [AC2]: Does this exclude products from bio sources, eg Coca Cola “Plant Bottle” How would you tell the difference between fossil fuels and bio based?

Commented [AC3]: Need to define carton. Are multilayer containers which include plastic included, such as Tetrapak. Also paper board /plastic cartons such as juice boxes?

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Commented [AC4]: BPI certifies products as compostable even if they need industrial composting facilities which are not available in most municipalities. This exclusion needs to be removed

Commented [AC5]: Recycled content” is defined below; this section is describing the type of material that can qualify as postconsumer, not content levels in new packaging. Suggest that the word “content” be removed from this paragraph.

Commented [AC6]: Maryland recently released an EPR bill (HB 307) that contains a good definition of Producer: “Producer” means a person that meets one of the following classifications in descending order of responsibility:
(1) A person that uses packaging materials for the sale or distribution of a product under the person’s own name or brand;
(2) A person that is a licensee of a trademark under which a packaging material is sold, offered for sale, distributed, or otherwise used in a commercial enterprise in the State, regardless of whether the trademark is registered; or
(3) A person that imports a product that includes a packaging material and that is sold, offered for sale, distributed, or otherwise used in a commercial enterprise in the State.

A producer does not include:
(1) A local government; or
A nonprofit charitable organization

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Commented [AC7]: Does this mean that the company that made the bottle, not the beverage, could be responsible under this clause. I do not think this is the intention but it should be clarified and reworded

~~1.~~ 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:

- ~~1.~~ Government agencies, municipalities, or other political subdivisions of the State;
- ~~2.~~ Registered 501(c)(3) charitable organizations and 501(c)(4) social welfare organizations; or
- ~~3.~~ De Minimis producers that annually sell, offer for sale, distribute, or import into the country for sale in the State:
 - ~~1.~~ Less than 1,000 units of a single category of covered products; or
 - ~~2.~~ 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:

"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/: Provision should be included in the document to allow recycled content produced from advanced/chemical recycling processes to qualify as post-consumer content.

"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:

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

~~1.~~ "Household cleaning and personal care products" means a bottle, jug, or other rigid container with a neck or mouth narrower than the base, and:

- ~~1.~~ That is capable of maintaining its shape when empty;
- ~~2.~~ Comprised solely of one or multiple plastic resins; and
- ~~3.~~ Contains a household cleaning or personal care product.

~~2.~~ "Household cleaning and personal care product container" does not include:

- ~~1.~~ 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

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Commented [AC8]: Including cap, label, etc.? Clarity required on whether it is the just the weight of the primary container or total weight including all components.

Commented [I9]: It is problematic to include beverages under "rigid plastic container" as well as "plastic beverage container" definitions, as the two categories are subjected to different content mandates later in the document.

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Commented [I10]: Why are sub-bullets regarding shape, single resin, and reusability applied only to household cleaning and personal care products, and not bottles for food contact or other purposes? E.g. as written sub-bullets do not apply to a ketchup bottle.

~~2.0~~ 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/: Is “rigid plastic container” meant to be equivalent to “plastic non-durable containers” listed under covered products, or is the former a subcategory? In general, categories of containers need clear boundaries without overlap, or explicit indication that they fall under a common umbrella category. As written “rigid plastic container” seems to include thermoformed packages (except for household cleaning and personal care products which must be a bottle/jug with a neck).

“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:

~~3-III~~ Post-consumer recycled plastic content requirement

Carry-out bags:

~~1-•~~ 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.

~~2-•~~ 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.

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COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Plastic beverage containers:

~~3-•~~ 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.

~~4-•~~ 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.

~~5-•~~ 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.

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COMMENT/: The inclusion of wording “all plastic beverage containers... must contain XX% recycled content” would not be acceptable. A more typical wording would be “all plastic beverage containers should have ON AVERAGE XX% recycled content” with the average being determined on a national or portfolio basis for each producer.

Rigid plastic containers:

~~6.~~ 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.

~~7.~~ 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/SUGGEST: Green highlighted text needs rewording

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.

~~9.~~ 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.

~~10.~~ 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:

Trash bags:

~~8.~~ Beginning two years from the date

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Commented [AC11]: Why do rigid plastic containers have to meet 25% recycled content in 2 years, whereas beverage containers have 5 years. 2 years is not achievable. These rates and dates are different to what has been passed in NJ 2515. Shouldn't NERC try to align with NJ or vice versa?

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~~10-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: The above clause fits much better with our request for containers "ON AVERAGE" meeting the recycled content level on page 5.

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~~11-V.~~ R

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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:

- 1. A list of the producers of covered products and the brand names of the covered products represented in the registration submittal;
- 2. The number of items of each product category sold into the State in the previous 12 months;
- 3. The average percentage of post-consumer recycled content for each product category sold into the State in the previous 12 months; and
- 4. Proof of third-party certification of compliance of post-consumer content requirements for covered products, as described below.

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COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: The above clause fits much better with our request for containers “ON AVERAGE” meeting the recycled content level on page 5.

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:

5.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:

6.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:

7.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:

8.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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~~9.X.~~ Severability - Needs to be customized for each state
Each state should add its appropriate language.

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**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.

**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.

NAME: Anne Germain

ORGANIZATION: National Waste & Recycling Association

EMAIL ADDRESS: agermain@wasterecycling.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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:

Why would newspaper, laundry or garment bags be exempt?

"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:

What about other single use products such as plastic utensils, non-bag film plastic, pouches and the like?

"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:

Why exempt caps, corks, closures & labels? While not recyclable, it seems that they should be able to include recycled content creating demand for those products. I didn't edit it as track changes in case there was a reason that I wasn't aware of

"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:

"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:

The \$1M exclusion as de minimis seems high --- what constitutes a "single category"?

"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:

"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:

Why would household cleaning & personal care product containers be limited to narrow neck? Also, why "comprised solely of one or multiple plastic resins"? If it has more than 50% plastic content, we suggest not exempting it.

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"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, jar, 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:

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:

Why the inconsistency between this and rigid plastic containers? This one starts slower (15 vs. 25%), but finishes faster (10 vs. 18 years)...

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Suggest exempting beverage containers from this to avoid confusion. Or establish this as “Food, household and personal care product rigid plastic containers.”

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:

Why is averaging allowed here but not in the other categories?

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

**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.

NAME: Sustainable Food Policy Alliance

ORGANIZATION: Nestlé USA, Unilever, Mars, Danone

EMAIL ADDRESS: hope.hurley@fgh.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

- In addition to plastic is a similar standard for other substrates being considered?

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.

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:

- Need clarification that it is intended for primary packaging only, not secondary or tertiary

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:

- No Comment

“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:

- Instead of “covered product,” suggest reframing slightly to ensure that text includes explicit definitions for “packaging” and “product.”

“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:

- No Comment

“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:

- No Comment

“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:

- No Comment

“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:

- **"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 via technologies that produce feedstock/raw material for new products or packaging OR for the purposes of collection and recycling (mechanical and advanced recycling technologies). "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.

"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:

- Unit of measurement should be in tons not units in the "De Minimis" provision.

"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:

- Definition should be based on volume instead of weight.
- **“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 volume of all covered products in the market.

“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:

- Definition should include specific mention of e-commerce establishments
 - **“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 e-commerce stores, temporary stores or vendors at farmers markets, street fairs, and festivals.

“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:

- No Comment

“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:

- No Comment

"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:

III. Post-consumer recycled plastic content requirement

a. Recycled content mandates must have market assessments before going into effect. The Department of Environmental Protection (or similar state agency) must evaluate the mandate for 10% increases (and above) for market conditions before the increases automatically go into effect and to determine whether these standards are 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:

- No Comment

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

- For rigid plastic containers (HDPE and PP) have only 1 or 2 sources with FDA letters of no objection issued for direct food contact recycled plastic aside from chemically recycled resin. Our recommendation is for longer compliance timing for polyolefin bottles so technology can be commercially scaled and more financially viable. And/or national/portfolio level reporting as offered elsewhere in comments.

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:

- No Comment

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:

- No Comment

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:

- SFPA has concerns that enforcement of PCR rates and the date of achievement for all plastics packaging does not work without additional recycling infrastructure paired with a EPR system enacted in parallel or already in existence. In the case of an EPR program it should be harmonized alongside the PCR requirements.
- Recommend adding language to ensure future alignment between this reporting and a PRO in the event that the state adopts an EPR system.
- Include more details on third-party reps, harmonized with EPR representative
 - 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 **single, nonprofit** 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 **based on an assessment carried out by the Department on the actual projected cost to administer this program and adjust fees as necessary.**
- Reporting number of items or even volume of item of each product category sold in the State in the previous 12 months isn't feasible – this data is not easy to obtain since products move through distributors and other channels and the option to pro-rate/allocate national PCR numbers to the state would have to be taken into consideration.
 - 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
 - Producers may submit national data allocated on a per capita basis for the state to approximate the information required if the producer or third-party representative demonstrates that state level data are not available or feasible to generate.
 - Proof of third-party certification of compliance of post-consumer

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

- Need assurance that a viable set of third-party certifiers exists by the time of enactment before writing into law – especially as this is currently nascent field.

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:

- Food safety waivers need to be specifically addressed in the language
- Add in language detailing criteria needed to apply for a waiver based on food safety concerns
 - o A producer may seek a waiver from the requirements of this act, in which case the producer shall set forth the specific basis **based on the below criteria** upon which the waiver is claimed and submit such proof as the Department determines necessary.
 - o A producer may apply for a waiver demonstrating that:
 - the producer cannot achieve the postconsumer recycled content requirements and remain in compliance with applicable rules and regulations adopted by the United States Food and Drug Administration, or any other State or federal law, rule, or regulation;
 - it is not technologically feasible for the producer to achieve the postconsumer recycled content requirements; or
 - the producer cannot comply with the postconsumer recycled content requirements due to inadequate availability of recycled material or a substantial disruption in the supply of recycled material; or
 - the producer cannot comply for another reason as determined by the department pursuant to rule, regulation, or guidance.

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:

- No Comment

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:

- No Comment

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:

- No Comment

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:

- SFPA has concerns that enforcement of PCR rates and the date of achievement for all plastics packaging does not work without additional recycling infrastructure paired with a EPR system enacted in parallel or already in existence.

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:

- No Comment

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:

- No Comment

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.

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.

**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.

NAME: Brian Carmody

ORGANIZATION: NYSDOT

EMAIL ADDRESS: Brian.Carmody@dot.ny.gov

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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.

Commented [CB(2)]: Consider using the word “Plastic” in front of Carry.

“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.

Commented [CB(3)]: Why?

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).

Commented [CB(4)]: This definition should be directly under the Beverage section

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.

Commented [CB(5)]: This definition should come prior to the use of the word “Plastic”

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:

"**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.

Commented [CB(6)]: No mention of medical waste?

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

"**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:

"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:

"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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

Commented [CB(7)]: Has the minimum % PCR been quantified for the intended contents or use to these minimum requirements?

How are these %'s determined?

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.

Commented [CB(8): "Department" is not defined.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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.

Commented [CB(9)]: Acceptable reasons for a waiver?

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.

Commented [CB(10)]: Suggest tying this section, to section V in the area of the language about the annual registration fee.

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:

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.

Commented [CB(11)]: What is the basis for this determination? How was this formula developed?

Commented [CB(12)]: Typo?

From: [Peter Pettit](#)
To: [Northeast Recycling Council](#); [Terri Goldberg](#)
Subject: Re: Minimum Post-Consumer Recycled Content Model Legislation for Plastics - Call for Comments
Date: Sunday, February 6, 2022 4:24:32 PM

Terri and Lynn, I was not able to download the comment form so I thought I would just send these suggestions to you directly if that's ok.

1. I believe that there should be something within the proposed language to address adding additional products if desired by the state provided of course that there is some form of public input and review.

2. Under the penalties I didn't see an option for the state to direct that the products may no longer be sold in the state. I would think that some states would rather just prohibit such sales than go through that entire penalty process. Maybe it could just be mentioned as an option.

If the comments need to be on a more official form could you send it to me?

Peter Pettit

PS. I hope you are both doing well and staying warm. Please tell the group that prepared this nice job!!!!

On Jan 25, 2022, at 1:56 PM, Northeast Recycling Council <lynn@nerc.org> wrote:

Trouble viewing this email? [Read it online](#)

**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.

NAME: Danielle Fortunato

ORGANIZATION: Plastics Industry Association

EMAIL ADDRESS: dfortunato@plasticsindustry.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:
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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:
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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: To avoid market disruption, any minimum recycled plastic requirements should be set with both economic and environmental feasibility in mind as well as the performance characteristics, quality of the available supply, and suitability for health and human safety. A scientific analysis should be conducted by the proposed regulating entity to determine whether requiring recycled content will yield positive environmental outcomes across important impact areas.

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: Consideration for performance and safety must be included in any proposal. For instance, a covered beverage using a “hot-fill” process should be exempt from onerous requirements.

“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: Certified compostable products should be exempt from any recycled plastic requirements provided they are designed to be composted in a municipal or industrial composting facility and are certified by a recognized third-party independent verification body. Any product that is subject to and has met the recycled content requirements should be authorized for use in the entire jurisdiction of regulation and not be eligible for additional restrictions or bans. Lastly, food packaging should be completely exempt from these requirements.

“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: This definition does not consider other components of a container such as closures and labels regarding how that affects the overall weight. There should be clarification to ensure that weight is considered solely the bottle itself, and that the intention is not to require closures or labels to have recycled 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: “Recycled content” should include pre-consumer and post-industrial materials. The recognized ISO standard is defined as: “Proportion, by mass, of recycled material in a product or packaging. Only pre-consumer and post-consumer materials shall be considered as recycled content. (Source: ISO 14021:1999)”

“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: A manufacturer who does not sell a product in a state under its own name should not be considered a "producer." Manufacturers who produce packaging or goods for other companies who then sell or distribute their products under their brand do not have access to the necessary location information for that final sale or distribution. Any law should clearly state that the responsibility for payment of the fee lies with the owner of the brand on the covered product.

"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: Determination of recycled content should be calculated using a mass balance approach.

"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:

"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:

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: Before any requirement is set, research must be done to quantify if there is an appropriate and adequate supply of recycled plastic for all products impacted. Balance between supply and the required minimum amount should be regularly evaluated and adjusted according to supply constraints. Any recycled plastic requirements should be calculated on an aggregated weight basis of the regulated entity's portfolio of affected products, not on a per unit basis. Future increases in content standards should only be made upon a finding by the appropriate state entity that the targets are reasonably achievable. There should be a minimum 18-month window of time for compliance based upon the minimum amount of recycled content required. Mandated percentages should be an average as opposed to a fixed number, i.e., 15%, as it may prove to be an impossibility to achieve a set 15% due to lack of post recycled content being available for use.

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: Before any requirement is set, research must be done to quantify if there is an appropriate and adequate supply of recycled plastic for all products impacted. Balance between supply and the required minimum amount should be regularly evaluated and adjusted according to supply constraints. Any recycled plastic requirements should be calculated on an aggregated weight basis of the regulated entity's portfolio of affected products, not on a per unit basis. Future increases in content standards should only be made upon a finding by the appropriate state entity that the targets are reasonably achievable. There should be a minimum 18-month window of time for compliance based upon the minimum amount of recycled content required. Lastly, the 25% post-consumer recycled content mandate is far too high a number when other states' enacted legislation is taken into consideration. For example, New Jersey's law requires 10% and Washington's law requires 15%. Harmonization with already enacted state legislation would provide for a more successful initiative overall.

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

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: Demonstration of compliance should be done through self-reporting or third-party verification.

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: There must to be a process by which the recycled content percentage can be adjusted based upon factors, therefore preventing producers from complying with an onerous waiver process that could have been avoided by a simple adjustment of said percentages. Such factors should include:

- Changes in market conditions, including supply and demand for postconsumer recycled plastics, collection rates, and bale availability both domestically and globally;
- Recycling rates;
- The availability of recycled plastic suitable to meet the minimum recycled content requirements, including the availability of high-quality recycled plastic, and food-grade recycled plastic from the state's and other beverage container recycling programs; and
- The capacity of recycling or processing infrastructure.

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:
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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:

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.

**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.

NAME: Cherish Miller

ORGANIZATION: Revolution

EMAIL ADDRESS: cmiller@revolutioncompany.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Request that we also note that is legislation is an impactful alternative to all out bans and encourages the circular economy in plastics.

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:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

determined by the Department.

“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:

"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: [Suggest we reference ISO 14021:2016 Section 7.8.1.1. APR uses it in their PCR certification document and overall it creates consistency](#)

"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:

"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: Based on not giving a thickness, the understanding is a foodservice establishment could use their regular thinner bags with PCR. That way if a restaurant cannot use a reusable bag to put food in, they could be making positive change with the PCR in the current bags. Just confirming that is the intent.

Formatted: Don't adjust space between Latin and Asian text, Don't adjust space between Asian text and numbers

"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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE: Determine automated ways to send this info. Please confirm also if something is sold into another state and shipped into state in question, how will that be handled?

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: Based on another section, the understanding is the company could give an estimate of what is sold in this state as part of the review given it could be challenging if it is sold to one DC for instance that covers more than one state. Also, please confirm if a company sold let's say 20 different brands of trash can liners, just the overall trash can liners for the company sold have to be listed not the individual brands.

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: How will the waivers be decided?

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:

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.

**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.

NAME: Kenneth Jenke

ORGANIZATION: Reynolds Consumer Products

EMAIL ADDRESS: ken.jenke@reynoldsbrands.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: Does the "new future products" reference mean that any product that are currently existing in commerce would not need to meet this regulation?

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

determined by the Department.

“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:

"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:

"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:

“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: In reading this section, does it include ecommerce? The inability to geofence would require all products from a manufacturer to meet these regulations, not just the ones sold in the NE states.

“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: There needs to be a better definition of a non-durable plastic container used for food, beverages. Some examples of what is included should be added.

“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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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: For rigid plastic containers used for food and beverages, the recycled material must be FDA compliant in order to be used. Having 25% PCR for these applications is not feasible.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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.

**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.

NAME: Renee Sharp

EMAIL ADDRESS: renee@saferstates.org

ORGANIZATION: Safer States + additional signatory organizations listed below

Thank you for the opportunity to comment on this model legislation. Safer States is submitting the following comments on behalf of the following organizations from across the country:

- 5 Gyres Institute
- Alaska Community Action on Toxics
- Beyond Plastics
- Center for Biological Diversity
- Center for Environmental Health
- Clean and Healthy New York
- Defend Our Health
- Ecology Center
- Environmental Justice Ministry Cedar Lane
Unitarian Universalist Church
- Informed Green Solutions
- Locust Point Community Garden
- Moms for a Nontoxic New York
- Natural Resources Defense Council
- Plastic Pollution Coalition
- Safer States
- The Last Beach Cleanup
- Upstream
- Vermont Public Interest Research Group
- Women's Voices for the Earth

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

As organizations concerned with the health, climate, justice and environmental impacts of plastics and plastic pollution we appreciate the opportunity to submit comments on this model legislation. We urge you to consider the following overall comments as well as the section-specific comments provided in this document:

1. The entire lifecycle of plastic creates negative health, justice and climate impacts. Recycling plastic will not solve these issues. Therefore, we ask that model bills mandating recycled content also include provisions mandating plastic reduction and incentives to move to real solutions such as non-toxic reuse.
2. Many toxic additives are present in plastic packaging, and the recycling process itself can sometimes create additional toxic chemicals (PVC labels can create benzene in recycled PET plastic, for example). For this reason, it is important that recycled content mandates also include provisions that ban toxic chemicals and problematic materials from virgin packaging to reduce these health hazards in both virgin and recycled material.
3. The use of recycled plastic for food packaging poses particular health concerns. We therefore urge NERC/NEWMOA to require any recycled plastic content used for food or beverage packaging be sourced from closed loop deposit/return systems that rigorously accept only food grade plastic.
4. Only mechanically recycled post-consumer content should be allowed given the significant questions surrounding so-called “chemical recycling” technologies which have been shown to be polluting, energy intensive, and with a track record of technical failure.
5. The current language allowing exemptions for BPI compostable products should be retained, and no other certification body should be accepted to address PFAS contamination concerns.
6. The clause allowing state and local pre-emption should be eliminated. Given the severity of the plastic waste and environmental issues facing our society and nation, model bills should always allow for stronger action to be taken by other entities. Many organizations will oppose any legislation that takes away the right of municipalities to improve their environment through pre-emption. We have seen laws pre-empting stronger action on [climate change, fracking, and living wages](#), among many other issues. We strongly urge you to strike this section in its entirety.

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:

In the webinar that NERC/NEWMOA hosted to present the model legislation, Safer States asked the following question: “Almost all plastics contain toxic chemicals that are not removed during recycling but are carried over to the new products. In addition, plastics also absorb chemicals that they come into contact with, and sorting of plastic containers into those that have been used for food and those who have been used for household cleaners, for example, is never going to be perfect, leading to additional health concerns. One study of recycled HDPE pellets also found that almost all of them contained BPA [bisphenol A] and brominated flame retardants, indicating that recycled HDPE contained polycarbonate plastic and plastic from electronics. How does your model policy propose to address these toxic chemical issues that are particular to recycled plastic?”

NERC/NEWMOA staff answered this question by stating that there were “other laws and programs” designed to address these issues. Unfortunately, however, this is not really the case. Thousands of chemicals were grandfathered in and presumed safe by the Toxic Substances Control Act of 1976. Those chemicals are supposed to be reviewed for safety, but at the current rate it will take the Environmental Protection Agency [7,000 years](#) to review the 40,000 chemicals currently in use.

At the same time, scientific [research](#) recently published by the EPA pointed to the issue of contamination within recycled content:

- “Products made from recycled materials contained greater numbers of fragrances, flame retardants, solvents, biocides, and dyes.”
- “The circular nature of the recycling economy may have the potential to introduce additional chemicals into products.”

The issues of toxic chemicals in recycled products cannot be ignored and our current regulatory system is not addressing them. We urge NERC/NEWMOA to consider these issues seriously and address them in their recycled content model policies as described above. Recycled materials can only be as clean as the materials creating them. If we ban a toxic chemical from a product category today, it will continue to circulate in recycled content for years to come. For this reason, it is imperative that we eliminate toxic chemicals from our products to begin with, and ensure that problematic materials that can create additional toxins in the recycling process (such as PVC labels on PET bottles) are also promptly phased out.

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:

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:

There are significant concerns about the safety of recycled plastic content, particularly with respect to food and beverage packaging.

There are several issues of concern: (1) recycling toxic additives contained in the plastics themselves into new products; (2) comingling of food grade plastic containers with non-food grade plastic containers with similar appearance, resulting in contaminants in the recycled plastic (household pesticides are sometimes sold in PET containers and are labelled with a recycling symbol, for example); (3) contamination by toxic materials mistakenly put in curbside recycling bins.

The US Food and Drug Administration has [raised concerns](#) with the use of recycled plastics for food and beverage containers, stating that: “The possibility that chemical contaminants in plastic materials intended for recycling may remain in the recycled material and could migrate into the food the material contacts is one of the major considerations for the safe use of recycled plastics for food-contact applications.”

A report commissioned by the Canadian government titled “[Assessing the State of Food Grade Recycled Resin in Canada and the United States](#)” found that:

- “In Canada and the United States, the vast majority of plastic products and packaging produced each year and placed on the market is not suitable for processing into food grade PCR [Post-Consumer Resin].”
- “Most consumer film and bags packages also look and feel very similar, making it nearly impossible to create a sorting pathway for consumers to segregate food-contact from non-food contact film packages in a consistent way.”
- “Segregated collection of post-consumer plastics, such as deposit return systems, improve the overall quality of that specific material, making it easier and less costly to process to higher quality PCR.”

To begin to address these issues, we ask that NERC/NEWMOA require any recycled plastic content used for food or beverage packaging be sourced from closed loop deposit/return systems that rigorously accept only food grade plastic. Alternatively, we ask that NERC/NEWMOA drop all food and beverage products from the “covered product” definition.

“**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:
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“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:

During the public webinar on this model bill a participant suggested changing subclause (d) above such that third party certifications other than BPI could be used to certify that a product was compostable. We strongly object to this suggestion and urge you to retain the requirement to only have containers certified by the Biodegradable Products Institute (BPI) as compostable be eligible for the following important reason: [BPI does not allow products containing PFAS to be certified as compostable](#). PFAS are a class of toxic chemicals that never break down in the environment.

The Environmental Protection Agency highlighted the importance of BPI's restrictions on PFAS in an August, 2021 [report](#) which found that:

1. Food waste streams are a source of PFAS contamination in compost.
2. An analysis of U.S. composts demonstrated that composts containing compostable food packaging had higher levels of PFAS than composts not containing compostable food packaging.
3. The fact that "compostable food contact materials certified by the Biodegradable Products Institute may no longer contain intentionally added fluorinated chemicals," in combination with recent regulations adopted by cities and states banning PFAS in food packaging, "should lead to decreased PFAS levels in food waste streams."

The issue of PFAS contamination of compost materials is garnering national attention. For example, [U.S. Rep Debbie Dingell](#) pointed to the PFAS found in Ann Arbor's municipal compost as a reason that Congress must pass a federal bill to ban PFAS in food packaging.

For all of these reasons, it is imperative that only BPI certified compostable products be eligible for an exemption from the definition of "plastic beverage container" in this model bill.

"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:

As noted earlier in this document, there are significant concerns about the safety of recycled plastic content, particularly with respect to food and beverage packaging. To begin to address these issues, we ask that NERC/NEWMOA require any post-consumer recycled plastic content used for food or beverage packaging be sourced from closed loop deposit/return systems that rigorously accept only food grade plastic. Alternatively, we ask that NERC/NEWMOA drop all food contact materials from the "covered product" definition. In addition, it is important that the definition of "post-consumer recycled content" be updated to clarify that only mechanically recycled post-consumer content is eligible given the significant questions surrounding so-called "chemical recycling" technologies which have been shown to be [polluting, energy intensive, and with a track record of technical failure](#).

"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:

"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:

“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:

As noted earlier in this document, there are significant concerns about the safety of recycled plastic content, particularly with respect to food and beverage packaging. To begin to address these issues, we ask that NERC/NEWMOA require any post-consumer recycled plastic content used for food or beverage packaging be sourced from closed loop deposit/return systems that rigorously accept only food grade plastic. Alternatively, we ask that NERC/NEWMOA drop all food contact materials from the “covered product” definition.

“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:

As discussed earlier in this document, it is imperative that only BPI certified compostable products be eligible for an exemption from the definition of “trash bag” in the model bill. [Scientific research](#) has documented landfill leachate as a source of PFAS in municipal wastewater. Recognizing only BPI certified compostable products can help prevent any compostable trashbags that contain PFAS from entering the waste stream.

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

As noted earlier in this document, there are significant concerns about the safety of recycled plastic content, particularly with respect to food and beverage packaging. To begin to address these issues, we ask that NERC/NEWMOA require any post-consumer recycled plastic content used for food or beverage packaging be sourced from closed loop deposit/return systems that rigorously accept only food grade plastic. Alternatively, we ask that NERC/NEWMOA drop all food contact materials from the “covered product” definition.

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:

As noted earlier in this document, there are significant concerns about the safety of recycled plastic content, particularly with respect to food and beverage packaging. To begin to address these issues, we ask that NERC/NEWMOA require any post-consumer recycled plastic content used for food or beverage packaging be sourced from closed loop deposit/return systems that rigorously accept only food grade plastic. Alternatively, we ask that NERC/NEWMOA drop all food contact materials from the “covered product” definition.

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Registration fees should cover administrative and enforcement costs. The proposed policies will require significant government resources to implement and enforce these regulations. These costs should be paid by the producers and covered fully by the registration fees. We recommend modifying the registration fees to cover the full system costs and scaling registration fees by company size. It would be inequitable for a company that has revenues of \$100K per year to be paying the same as a company that has revenues of \$100M per year.

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:

We ask that all data collected be publicly reported on the state website.

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:

It is a grave mistake to allow this bill to pre-empt any stronger state, county or local laws. Given the severity of the plastic waste and environmental issues facing our society and nation, model bills should always allow for stronger action to be taken by other entities. Many environmental organizations will oppose any legislation that takes away the right of municipalities to improve their environment through pre-emption. We have seen laws pre-empting stronger action on [climate change, fracking, and living wages](#), among many other issues. We strongly urge you to strike this section in its entirety.

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.

**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**

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.

Commented [mhw1]: Redundant with 'new'

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.

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.

"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.

"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.

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

"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.

Commented [mhw2]: 'fossil fuels' is too limiting as many plastics may be made from sugar cane or vegetable starches.

Commented [mhw3]: 'hydrocarbon' may be inappropriately limiting. Are polyesters (e.g., PET) or PVC 'hydrocarbons'?

Formatted: Strikethrough

"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.

"Post consumer recycled content material" 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.

Commented [mhw4]: To make consistent with "Recycled content" as defined below.

"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.

Commented [mhw5]: The number of units and the dollar sales are inconsistent unless each unit is valued at \$1,000. Consider increasing the number of units to 10,000 and reducing aggregate sales to \$100,000

"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.

"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.

"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 container**" 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.

Commented [mhw6]: This is a description of the container, not the product.

"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.

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.

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).

Commented [mhw7]: Orphan phrase

Commented [mhw8]: This is far too long a time frame. Make consistent with Plastic Beverage Containers and require 50% PCR in 10 years

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.

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.

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

- 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.

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.

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.

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.

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.

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.

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](#).

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.

X. Severability Needs to be customized for each state

Each state should add its appropriate language.

DRAFT

**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.

**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.

NAME: Sarah Bloomquist

ORGANIZATION: TOMRA

EMAIL ADDRESS: sarah.bloomquist@tomra.com

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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 their ir-production-of-new-future products/packaging, 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:

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 to stimulate demand for high quality recycle and augment other programs that generally address the supply side of recycling, such as beverage container redemption program and/or extended producer responsibility for packaging.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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

Commented [SB1]: Recommend including targets for all packaging materials, not just plastics, in order to avoid substitution.

Commented [SB2]: Recommend removing 'new future' b/c the targets should apply to all packaging, existing and new. The current language sounds like the targets only will apply to new items.

Commented [SB3]: Definition needed for "non-durable." Perhaps "single use containers" makes the most sense here. There could also be targets for reusables, but generally they would be lower since reuse is already higher on the waste hierarchy.

Commented [SB4]: Perhaps add here some of the other main beverage categories such as juice, teas, coffee, energy drinks, to explicitly call out current main bev categories, but also keeping the definition open to accommodate future developments in beverages.

- 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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

determined by the Department.

“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.

Commented [SB5]: As commented earlier, need to define 'non-durable.' Was "single-use" intentionally avoided for some reason?

"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.

Commented [SB6]: Recommend clarifying if this means any amount of plastic at all.

Commented [SB7]: Recommend removing caps here b/c caps on beverage containers should also have PCR reqts; they're an oft-littered component

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

"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.

Commented [SB8]: Recommend revising this definition. "Recyclate" is the material that results from products/packaging being recycled into new feedstock material. "post-consumer recycled content" refers to the amount of recycled material in a product/packaging, e.g. relative to virgin material. Perhaps APR has standard definitions for this.

Commented [SB9R8]: And yes, completely agree this needs to specify post-consumer.

Commented [SB10]: There's a separate definition below for "recycled content" so what does this mean here? Also, recommend introducing and using "PCR" for post-consumer recycled content, throughout.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

"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.

Commented [SB11]: Why "1,000 units"? If this is to avoid disproportionate weight issues across material types, then this should be further quantified/limited for weight also E.g. <1k units AND weighing less than 'x' tons.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

"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.

Commented [SB12]: See comment above on definition of "post consumer recycled content." The definitions are a bit conflicting/misaligned.

Commented [SB13]: What is a 'material balance approach'? Do you mean mass balance? This is a good resource for measuring PCR - https://ecostandard.org/wp-content/uploads/2021/02/2021_zwe_joint-paper_recycling_content_mass_balance_approach.pdf

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:

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

Commented [SB14]: As commented previously, definition needed for 'non-durable'

- "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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

Commented [SB15]: Overall support the targets with comments noted below.

Commented [SB16]: Recommend following the same schedule for all materials, to simplify the program, tracking, monitoring, reporting, etc....so 5 years here instead of 3. Also, it would be very helpful to include a table schedule showing how these targets and dates line up (then folks can just plug in the actual years that apply).

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;

Commented [SB17]: Recommend clarifying the conditions for the Dept approving the use of regional/national data in place of state data, so as to restrict the exception.

Commented [SB18]: Recommend adding that the producer also has to clearly outline why they are not able to use state data and what steps they're taking to be able to use state data. And there should be a sunset to this provision. So, e.g., in 5 years, producers must all use state data, unless they have an additional exceptional approval not to.

- The average percentage of post-consumer recycled content for each product category sold into the State in the previous 12 months; and
- Proof of third-party certification of compliance of post-consumer content requirements for covered products, as described below.

Commented [SB19]: As well as the quantities sold and the quantity of recycled content, not just average percents.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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.

Commented [SB20]: In addition to certification, there should be additional annual reporting requirements for the producers to, at a minimum, describe any challenges they've encountered in achieving the targets, any lessons learned they can share publicly, etc. This information should be public and can be used by industry to determine investment opportunities.

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:

Commented [SB21]: Recommend having more outline and clear model direction and language on enforcement, even if generic, e.g. potential penalties, bans on selling goods, etc. Emphasizing that enforcement may be critical in achieving targets.

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:

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.



Minimum Postconsumer Recycled Content Requirements for Plastic Products and Packaging Model Legislation

Introduction

A committee made of up state agency representatives and jointly facilitated by the Northeast Recycling Council (NERC) and the Northeast Waste Management Officials' Association (NEWMOA) drafted this model legislation. Its publication does not constitute an endorsement by NERC, NEWMOA, nor any of its members. Rather, it reflects a best effort based on current circumstances to provide a potential basis for state legislative action to further the use of postconsumer resin in plastic products and packaging.

Statement of Purpose of Bill As Introduced

This model bill proposes to require producers of covered plastic products and packaging to use a specified amount of minimum postconsumer recycled content in products or packaging that are used or offered for sale, phased in over time. The covered plastic packaging and products include film bags, single-use containers used for food, beverages, household cleaning, and personal care products, and rigid plastic products.

This bill does not address all types of plastic products and packaging. These include flexible packaging, liners, bladders, caps, lids, labels, corks, and other packaging components.

The proposed legislative strategy encourages a circular economy in plastics. The other benefits of mandating minimum postconsumer recycled content in plastic products and packaging include conservation of resources, reduction in greenhouse gas emissions and other environmental impacts of producing plastics products from petroleum and gas, strengthened domestic markets for products made with post-consumer plastics, and increased stability in the plastic scrap markets

Yet, mandates alone are not sufficient to achieve these benefits if plastic is not collected in sufficient quantity and quality to supply the mandated amount of material. This proposed bill is likely to be most effective when accompanied by well-designed policies and programs that promote and fund improved collection.

I. Definitions

"Beverage" means any potable liquid for human consumption, unless used, designed, or otherwise intended for use as infant formula, medical food, medical beverage, food for special dietary use, or as fortified oral nutritional supplements, wherein "food for special dietary use" means the same as the term is defined in 21 U.S.C. Sec. 105.3; and "medical food" and "infant formula" mean the same as those terms are defined in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 21 Sec. 301 et seq."

"Covered product" means a plastic item in one of the following categories that is sold, offered for sale, or distributed within the State:

Commented [JS(1)]: NOTE: Some of my comments below are draft language from our rulemaking process. They may not be approved or included in our final adopted rule and may change as we continue through our draft, economic analysis, and public comment periods. The suggested changes are our current draft attempts to clarify some of the language in the RCW that has created the most difficulty in implementation.

Commented [JS(2)]: One issue that came up is whether a "beverage" needs to meet the dictionary definition of beverage and whether or not it needs to be "ready-to-drink". "Intended for human consumption" has turned out to be confusing for products like non-dairy creamers, liquid concentrates, and flavored syrups that otherwise meet the size and packaging specifications for a covered product, but are not necessarily designed for immediate consumption.

Our language also states "for human or animal consumption". This might apply to things like hummingbird food, for which there isn't a practical reason not to include PCRC in the packaging.

- Durable products, including but not limited to, recycling/compost/garbage bins and totes, storage bins, storage shelves, drainage tile, and corrugated pipes.
- Film bags, including but not limited to, trash, carry-out, laundry and garment cleaning, and newspaper bags.
- Single-use containers, including but not limited to, food and beverage containers, and household cleaning and personal care product packaging.

A single-use food container shall be exempt from the postconsumer recycled content requirements of this act for a period of five years beginning on the effective date of this Act, except that the exemption provided in this paragraph shall *not* apply to plastic beverage containers.

"Covered product" does *not* include any type of:

- Container, bag, or packaging for which the State is preempted from regulating the content that is covered by the "Federal Insecticide, Fungicide, and Rodenticide Act," 7 U.S.C. 19 s.136 et seq.
- Container, bag, or package associated with a product produced in or brought into the State that is destined for shipment to a destination outside the State, and that remains with the product upon shipment, or is manufactured for use in the shipment of hazardous materials and is (a) prohibited from being manufactured with material that is covered by federal packaging material specifications set forth in 49 C.F.R.s.178.609, or (b) is subject to the recommendations of the United Nations on the transport of dangerous goods.
- Secondary or tertiary packaging that may accompany the container or bag for the purposes of selling or distributing the container or bag into the State.
- Container or product certified as compostable to ASTM D6400 or D6868 standards.

(b) Covered products does not include:

- (i) Rigid plastic containers or bottles that are federally regulated for the containment, protection, delivery, presentation, or distribution of;*
- (ii) A prescription or non-prescription drug;*
- (iii) Dietary supplements as defined in this section*
- (iv) Medical devices or a biological product required to be sterile, as regulated by the United States Food and Drug Administration under 21 Code of Federal Regulations, Parts 200, 300 and 800.*
- (v) Refillable containers sufficiently durable for multiple rotations of their original or similar purpose, and are intended to function in a system of reuse; or*
- (vi) Liners, caps, corks, closures, labels, and other items added externally or internally, but otherwise separate from the structure of the bottle or container.*

"Department" means the State regulatory agency charged with implementation of this law.

"Durable product" means a product that has an expected lifetime greater than three years.

"Film bags" means a plastic bag designed to contain or transport goods.

"Food" refers to articles used for consumption by humans or other animals, and articles used for components of any such article.

"Hot fill" means a process to sterilize either a beverage or food product and its container during the packaging

Commented [JS(3): We are in favor of moving towards the inclusion of all rigid plastic packaging containers (WA law does not do this) regardless of product category. This would eliminate a lot of other issues that come up in the definitions. Your "not limited to" language might leave some room for that, but naming the categories may also box you in.

Commented [JS(4): This language may require further discussion to explain some of the context we have faced as it relates to covered product exclusions. For our rule, we actually have drafted a separate definition for "PCRC products" as a subset of "covered products."

"Covered products" includes all of those products under this law that are subject to each of the requirements, regardless of the timeline for meeting their PCRC minimums. The only products automatically excluded from all of those requirements are those that I added in track changes.

"PCRC products" include those which, at a given moment in time according to the phased-in requirements, are subject to PCRC minimums and reporting. This means "PCRC products" are "covered products", but "covered products" are not necessarily "PCRC products."

This distinction is particularly relevant when outlining exclusions from specific requirements of the law. There is no reason to exclude most federally regulated products from registration, reporting and (if relevant to the policy in question) fee payment. Exclusions from "covered products" are automatically excluded from all aspects of the law, and are not required to register, report, or pay fees on the weight of those products. Exclusions from "PCRC products" must still register, report, and pay fees on those products, but can be granted temporary exclusions from meeting their PCRC minimum on an annual basis. Those exclusions are granted based upon a producer's annual documentation that the PCRC minimum percentage cannot be achieved because it is in conflict with a federal law (like FIFRA) *only as it relates to the material composition of the packaging* (so ...

Commented [JS(5):

Here is our language for products excluded ONLY from PCRC requirements:

- (1) (a)** The department must grant a temporary exclusion from the minimum PCRC requirements when the inclusion of PCRC for the following year is technically infeasible due to federal health and safety standards for the containment, protection, delivery, presentation, or distribution of products under 21 C.F.R., chapter I, subchapter G, 7 U.S.C. Sec. 136, 15 U.S.C. Sec. 1471-1477, 49 C.F.R. Sec. 178.33b, 49 C.F.R. Sec. 173, 40 C.F.R. Sec. 152.10, 15 U.S.C. Sec. 1261-1278, 49 U.S.C. 5101 et seq., 49 C.F.R. Sec. 178.509, 49 C.F.R. Sec. 179.522, 49 C.F.R. Sec. 178.600-609, or other federal laws.
- (b)** In order for the department to consider and grant temporary exclusions from PCRC requirements, producers must annually submit documentation that identifies the health and safety standards cited in (1)(a) of this section that render the inclusion of PCRC infeasible for a type of PCRC product packaging.
- (i)** Producers must submit documentation of excluded

process, in which the food product is heated to a temperature between 194- and 203-degrees Fahrenheit and then injected into the container.

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

“Plastic beverage container” means an individual, sealable, separate bottle, can, jar, carton, or other container that is intended to contain a beverage up to two gallons in capacity. “Plastic beverage container” does *not* include 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.

"Postconsumer recycled content" means a plastic material generated by households or by commercial, industrial, and institutional facilities in their role as end-users of the product, which can no longer be used for its intended purpose. This includes returns of material from the distribution chain.

Post-consumer recycled content does *not* include pre-consumer or postindustrial secondary waste material or materials and by-products generated from, and commonly used within, an original manufacturing and fabrication process.

"Producer" means the person responsible for compliance with minimum postconsumer recycled content requirements for a covered product.

- The owner or licensee of a brand or trademark for covered product that is sold under such person's owned or licensed brand or trademark (whether or not the trademark is registered in this State).
- The person is a manufacturer of covered product that lacks identification of a brand at the point of sale; or the producer is the person who manufactures the covered product.
- 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.

(23) "Producer" means the entity responsible for compliance with the requirements of this chapter for covered products sold, offered for sale, or distributed in or into Washington.

(a) The producer of a covered product is the entity that affixes its brand, or specifies that its brand be affixed, to the covered product container or retail packaging, unless one of the following is true:

- (i) If an entity is a "brand licensor," meaning it has licensed its brand to be used on a covered product that is to be sold by the licensee, then the licensee is the producer.
- (ii) If the covered product lacks identification of a brand, the entity that specified the material composition of the covered product is the producer.
- (iii) If there is no person described above, the entity who imports or distributes the covered product in or into the state, including through online sales, is the producer.

(b) Producer does not include:

- (i) Government agencies, municipalities, or other political subdivisions of the state;
- (ii) Registered 501(c)(3) charitable organizations and 501(c)(4) social welfare organizations; or
- (iii) De minimis producers as defined in (10) of this sub-section.

(3) "Brand" means a name, symbol, word, or mark that identifies a product and attributes the product and its components, including packaging, to the brand owner of the product as the producer.

"Manufacturer" 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.
- De Minimis producers that annually sell, offer for sale, distribute, or import into the country for sale in the State:
 - Less than one ton of a single category of each covered product category each year; and
 - Has a gross revenue of less than \$5 million for the organization's most recent fiscal year; .

(6) (a) "De minimis producer" means an entity that annually sells, offers for sale, distributes, or imports in or into the country for sale in Washington:

- (i) Less than one ton of a single category of plastic beverage containers, plastic household cleaning and personal care containers, or plastic trash bags each year; or
- (ii) A single category of a covered product that in aggregate generates less than \$1,000,000 each year in

Commented [JS(6): I will post our current producer definition and supplementary definitions in track changes below.

We have found it important to avoid the term "manufacturer," as this entity has many different interpretations, and almost all are impossible to track for the purpose of compliance monitoring and determination of responsibility (due to the many varied supply-chain arrangements between those who make and sell products). Focusing your attention wherever possible on the brand owner simplifies this.

Commented [KA(7): We have had producers use different definitions of licensee. This includes use by a manufacturer who produces products for a brand owner. This causes confusion in determining who is responsible. Recommendation – define licensee.

Commented [JS(8): Strongly suggest avoiding this term or assigning producer responsibility to the "manufacturer". See comment above.

Commented [JS(9): I second Alli's comment. We have been stuck with the de minimis language as it is written in our RCW, but it is seemingly arbitrary and allows MANY larger scale producers to avoid responsibility. Additionally, it is critical to craft your definition of "producer" and of "de minimis" carefully to avoid the possibility of brand owners simply subdividing their brand into all of their subsidiary brands, and then claiming each of those brands as de minimis even though they are all owned by the same large parent company. We crafted a supplementary definition of "entity" to try and address this to some extent.

Commented [KA(10): We have found this language extremely problematic. More than half of the producers registered in our program are classified as de minimis.

- De Minimis producers are not required to register with the Ecology, which creates compliance monitoring challenges.

- Some brands use the producer definition in the law to break out their production among more than one "producer" so each falls below the compliance thresholds,

We recommend alignment with similar laws in other states, setting the de minimis threshold at 5 Million dollars of global gross sales AND the sale of less than one ton of plastic in a single category each year

We also recommend adding a requirement that all producers – including de minimis producers, to have to register and verify their status or exemption annually.

Commented [JS(11R10): Strongly agree that you should include a requirement for all de minimis producers to still annually register without paying fees. Not only does this give states a more accurate idea of plastic sold in-state, but also helps producers who want to monitor the registration of other producers to ensure that everyone is paying their fair share of the fees. Unless a producer has identified themselves through registration as de minimis, others (including both other producers and the regulatory agency

gross revenue from sales into Washington.

(b) These thresholds are to be calculated at the level of the "entity" as defined in (9) of this subsection.

(c) De minimis does not apply to entities who have agreed to accept responsibility on the behalf of a producer.

(d) De minimis producers are not required to meet annual registration, reporting, PCRC, or fee requirements of covered products, but must annually notify the department in writing to demonstrate that they meet the de minimis threshold.

(e) The department may request additional information to verify the de minimis status of a producer, including:

(i) Annual gross revenue dollar amount less than or equal to one million dollars;

(ii) Annual total resin weight less than or equal to one ton; and

(iii) Any additional information requested by the Department

(9) "Entity" means an individual and any form of business enterprise. For purposes of calculating the de minimis producer thresholds in subsection (6), a producer entity includes all legal entities that are affiliated by common ownership of fifty percent or greater, including parents, subsidiaries, and commonly owned affiliates.

"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.

Commented [JS(12): Online retailers?

"Single-use container" means any plastic container used for food, beverages, household cleaning, or personal care products.

- "Household cleaning and personal care product packaging" means a bottle, jug, tube, or other rigid container:
 - That is capable of maintaining its shape when empty; and
 - Comprised solely of one or multiple plastic resins; and
 - Contains a household cleaning or personal care product.
- "Household cleaning and personal care product containers" do 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

Commented [KA(13): Do not limit to household cleaning and personal care products. (HHC/PCP) It is confusing to have the contents of containers dictate their inclusion in the program. If only HHC/PCP you leave out yard and garden products, air fresheners, etc. Focus on the type or shape of container or it's use as "single-use." Do not make resin focused or risk driving to other less recyclable resins. Better to use New Jersey's 'all rigid plastic packaging'

Commented [JS(14R13): Strongly second Alli's comment! Will happily elaborate on the ongoing challenges we have had defining both of these categories of products. They seem arbitrary as well since many rigid plastic containers do not fit these categories but have no practical reason not to include PCRC.

Commented [KA(15): If you do use household cleaning or personal care product you must define them carefully. Ask us for follow-up details.

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.

“Trash bag” 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.

II. Postconsumer Recycled Content Requirements

Durable Products:

- Beginning six months from the date of enactment, all durable products offered for sale or distributed in the State, must contain at least 25% postconsumer recycled content.
- Beginning five years from the date of enactment, all durable products offered for sale or distributed in the State, must contain at least 50% postconsumer recycled content.
- Beginning ten years from the date of enactment, all durable products offered for sale or distributed in the State, must contain at least 75% postconsumer recycled content.

Film Bags:

- Beginning six months from the date of enactment, all plastic film bags offered for sale or distributed in the State, must contain at least 20% postconsumer recycled content.
- Beginning one year from the date of enactment, all plastic film bags offered for sale or distributed in the State, must contain at least 40% postconsumer recycled content.

Single-Use Containers:

A single-use container shall be exempt from these requirements if it:

(1) Contains drugs, dietary supplements, and medical devices as defined in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. s.301 et seq.

(2) Contains toxic or hazardous products registered under the "Federal Insecticide, Fungicide, and Rodenticide Act," 7 U.S.C. s.136 et seq.;

(3) Is manufactured for use in the shipment of hazardous materials and is: (a) prohibited from being manufactured with used material by federal packaging material specifications set forth in 49 C.F.R. s.178.509 and 49 C.F.R. s.178.522, (b) is subject to the testing standards set forth in 49 C.F.R. s.178.600 through 49 C.F.R. s.178.609, or (c) is subject to the recommendations of the United Nations on the transport of dangerous goods.

(4) Is a refillable container or a reusable container. For the purposes of this paragraph, "refillable container" means a rigid plastic container that is routinely returned to and refilled by the manufacturer with the same product packaged by the container; and "reusable container" means a rigid plastic container that is routinely reused by consumers to store the original product packaged by the container.

A package or container that contains food shall be exempt from the postconsumer recycled content requirements of this act for a period of five years beginning on the effective date of this act, except that the exemption provided in this paragraph shall not apply to a plastic beverage container.

- Beginning two years from the date of enactment, all single-use containers must contain at least 15% postconsumer recycled content.
- Beginning five years from the date of enactment, all single-use containers must contain at least 25% postconsumer recycled content.

Commented [KA(16): Clarify that this does **not** exempt nonprescription drugs. In general a drug is “anything used to cure, treat, or prevent disease, or to affect the structure or any function of the human body.” So sunscreens, antiperspirants, antidandruff shampoo, anti-cavity toothpaste, and anti-gingivitis mouthwash are all “drugs”

Commented [JS(17): This is a very important point.

- A suntan product is a cosmetic, but a sunscreen product is a drug.
- A deodorant is a cosmetic, but an antiperspirant is a drug.
- A shampoo is a cosmetic, but an antidandruff shampoo is a drug.
- A toothpaste is a cosmetic, but an anti-cavity toothpaste is a drug.
- A skin exfoliant is a cosmetic, but a skin peel is a drug.
- A mouthwash is a cosmetic, but an anti-gingivitis mouthwash is a drug.
- A hair bulking product is a cosmetic, but a hair growth product is a drug.
- A skin product to hide acne is a cosmetic, but an anti-acne product is a drug.
- An antibacterial deodorant soap is a cosmetic, but an antibacterial anti-infective soap is a drug.
- A skin moisturizer is a cosmetic, but a wrinkle remover is a drug.
- A lip softener is a cosmetic, but a product for chapped lips is a drug.

Commented [JS(18): See comment above. Also if you do want to create a blanket exemption for these products, make sure you change it to products “registered” under FIFRA instead of “regulated”. Tons of harmless every day products (including shower curtains, wet wipes, etc) are technically regulated under FIFRA. Only the ones that MIGHT be of any concern from a PCRC packaging standpoint are “registered” under FIFRA. Small but important distinction.

- Beginning ten years from the date of enactment, all single-use containers must contain at least 50% postconsumer recycled content.

Department review and recommendations – Ten years from the date of enactment, the Department shall review the minimum recycled content requirements of this act and consider, at least:

- Are the requirements achievable?
- Should the percentages be adjusted?
- Are there are additional packaging or product categories that should be added, and if so what percentage of recycled content should be required?

Based upon this review, the Department shall send a report to the legislature containing the results of its analysis and any recommendations for changes to the law.

III. Determination of Compliance with Postconsumer Recycled Plastic Requirements

A producer shall achieve compliance with the postconsumer recycled requirements based upon the portion, by weight for each covered product category: bags, durable products, and single-use containers.

The calculation of averages may be based on a producer's entire covered product category, or separated into product sub-lines, provided that all of the producer's products are accounted for in the calculation, and that all individual products with postconsumer content used in the calculation are sold in the State.

The producer may include the weight and material content of liners, bladders, caps, lids, labels, corks, and any other packaging components, but if included it must be reflected in the annual report.

IV. 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 in an amount to be determined by the Department. The fee shall be adequate to cover the Department's costs to implement, administer, monitor, and enforce the provisions of this act, and shall be used exclusively for that purpose. The Department may modify the amount of the registration fee as necessary to reflect current implementation costs.

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 average percentage of postconsumer recycled content for each of the following covered product categories sold into the State in the previous 12 months:
 - Film bags
 - Single-use containers
 - Durable products.
- Proof of third-party certification of compliance of postconsumer content requirements for covered products, as described below.

Commented [JS(19): Consider defining mass balance. Most producers will likely need to use some sort of mass balance calculation (to report how much PCR resin and how much virgin resin they purchase for state or regional production of a certain package type). This is a mass balance calculation, but is different from a mass balance calculation used to track PCR coming from an advanced recycling process. We haven't landed on an answer (and it is out of scope of our rule), as to whether or not advanced recycling should be allowed in this calculation.

Could require certification of the PCR resin that producers report – whether PET, HP, PP or PE-to cover any PCR production method – mechanical or chemical – rather than requiring individual product certifications.

Commented [KA(20): This also needs defined. We have had a producer just have someone else register for them – not a PRO.

Commented [JS(21R20): Agree—if you are going to create this allowance, be sure to indicate that a third-party representative is an organization functioning more like a PRO, not just a manufacturer who is claiming a subset of products in order to subdivide themselves into de minimis status.

Commented [KA(22): This is really difficult to determine.

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 approved by the Department and published on its website.

An authorized representative of the producer shall sign the certification. 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 plastic, and the amount, in pounds, of postconsumer recycled plastic used by the producer for any products subject to the requirements of this act, and any other information, as the Department deems necessary.

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.

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.

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; recommendation of acceptable third-party certifications; 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.

V. 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.

VI. 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.

VII. 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](#).

VIII. 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.

IX. Severability - Needs to be customized for each state

Each state should add its appropriate language.

Commented [KA(23)]: Provide a list of traits that should be included in a third party certification. Some certifications allow plastic-to-fuels and you need to be aware if this is was is intended.

Commented [JS(24)]: From a state gov perspective, we would not be allowed to publish certifying organizations by name due to concerns about showing favoritism to some accrediting bodies over others. We would instead establish a list of criteria by which we would consider a certification (ISO accredited certifications might be a good simple standard to adhere to when setting criteria). Most cert systems are about PCRC resin itself, not packaging containing PCRC. It seems like a typical certification process can take 6 weeks to 3 months depending on the scope.

**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: [(Total pounds of plastic used x minimum postconsumer recycled plastic target percentage) – (Total pounds of plastic used x postconsumer recycled plastic percentage used)] x 20 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.

Commented [JS(25): We also added language to our draft rule enforcement section regarding the department's authority to perform audits of submitted information:

(2) The department may conduct audits and investigations for the purpose of ensuring producer compliance.

(a) In the event of an audit, producers must provide documents upon request to the department.

(b) Audit materials the department requests from producers may include documents and records that:

(i) Verify reported PCRC percentage data;

(ii) Confirm reported pounds of plastic resin sold in or into Washington state;

(iii) Demonstrate producer de minimis status;

(iv) Verify the national or regional data used to determine reported plastic resin;

(v) Verify federal regulations that exclude a product from requirements of this chapter; and

(vi) Additional information requested by the department.

Disclaimer

The views expressed in this model do not necessarily reflect those of each of the NEWMOA-member states and NERC's members. Mention of any process or product name should not be considered an endorsement by NEWMOA, NERC, or the NEWMOA and NERC members.

About NEWMOA

The Northeast Waste Management Officials' Association (NEWMOA) is a non-profit, non-partisan, interstate association whose membership is composed of the state environment agency programs that address pollution prevention, toxics use reduction, sustainability, materials management, hazardous waste, solid waste, emergency response, waste site cleanup, underground storage tanks, and related environmental challenges in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. NEWMOA's mission is to provide a strategic forum for effectively solving environmental problems through collaborative regional initiatives that:

- Advance pollution prevention and sustainability
- Promote safer alternatives to toxic materials in products
- Identify and assess emerging contaminants
- Facilitate adaption to climate change and mitigate greenhouse gas sources
- Promote reuse and recycling of wastes and diversion of organics
- Support proper management of hazardous and solid wastes
- Facilitate clean-up of contaminant releases to the environment

For more information, visit www.newmoa.org.

About NERC

The Northeast Recycling Council (NERC) is a multi-state non-profit organization whose programs emphasize source reduction, reuse, recycling, composting, environmentally preferable purchasing (EPP), and decreasing the toxicity of the solid waste stream in the 11-state region comprised of Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Maryland, Pennsylvania, Rhode Island, and Vermont. Its *mission* is to minimize waste, conserve natural resources, and advance a sustainable economy through facilitated collaboration and action. For more information, visit <https://nerc.org/>.

**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.

NAME: Anthony Tusino

ORGANIZATION: WWF-US

EMAIL ADDRESS: anthony.tusino@wwfus.org

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

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:

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:

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:

The word “Department” will need to be defined to fit each state.

“**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:

Why are these excluded? WWF believes that even these should include recycled content.

“**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:

We encourage the use of the ASTM standards for composability. NGO definitions could change at any time, and if the codified reference here stands, the legislation would have to be amended.

"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:

"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:

“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:

“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:

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:

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.

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

We suggest changing to the below timeline.

5 years = 30%

10 years = 60%

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:

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

COMMENT/SUGGESTED CHANGE IN TRACK CHANGE:

Instead of accounting by item, account for content by weight, and include weight of product or packaging sold in the state, weight of PCR and number of units sold in annual report.

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:

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.