



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 containers.

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 model 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: [(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.

Disclaimer

The views expressed in this model do not necessarily reflect those of each of the NEWMOA-member states and NERC's 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 adaptation 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/>.