



Oregon Department of Environmental Quality

Rule Concept: Clarifications and Exemptions to the Definition of a Covered Product

Plastic Pollution and Recycling Modernization Act (SB 582, 2021)
Rulemaking Advisory Committee Meeting 4, Rulemaking 2

Jan. 17, 2024

Background

This memo provides background information regarding the definition of a covered product. It clarifies the scope of covered products and indicates materials recommended for exclusion from that scope. Per ORS 459A.869, obligated producers of covered products must join a Producer Responsibility Organization, report data to the PRO on the amount of product they sell into the state, and pay membership fees.

ORS 459A.863(6)(a) defines covered product as (A) packaging; (B) printing and writing paper; and (C) food serveware. Each of these items are in turn defined at ORS 459A.863(18), (20), and (7) respectively.

ORS 459A.863(6)(b) provides an itemized list of packaging, paper, and food serveware products that are specifically exempt from the definition of a covered product. The statute also provides a placeholder for the Environmental Quality Commission to approve additional product-specific exemptions in rule. DEQ conducted an exemption request period between April-December 2023 to allow interested parties to request an exemption. The Oregon Recycling System Advisory Council was invited to review materials submitted and to advise DEQ on potential exemptions. For more information, please see:

- DEQ's exemption request [criteria](#),
- DEQ's [analysis of all 27 exemption requests received](#), and
- The document "[Oregon Recycling Council: Covered Product Exemptions poll results](#)," which summarizes the Council's recommendations to the department on the five exemptions recommended by DEQ.

Rule concepts for discussion at Jan. 31, 2024 RAC meeting

The following ten rule concepts clarify the scope of a covered product. The first three propose defining three sub-classes of packaging, specifying that these products are included within the scope of the law. A fourth clarifies the difference between food serveware and packaging for types of products that could fall under either definition. Five additional proposals exempt items from the definition of covered product in rule, addressing ORS 459.863(6)(a)(R). The final proposal clarifies the statutory exemption at ORS 459A.869(13).

- I. [Clarifying definition of storage items as packaging](#)
- II. [Clarifying definition of service packaging](#)
- III. [Clarifying definition of consumer wraps as packaging](#)

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- IV. [Further differentiating “food serveware” from “packaging”](#)
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I. Clarifying definition of storage items as packaging

The definition of packaging in statute (ORS 459A.863(18)(a)) encompasses “materials used for the containment or protection of products.” Three such items used for storage—moving boxes, file boxes, and file folders—are specifically included in the definition of packaging in ORS 459A.863(18)(a)(C). They are collectively referred to in statute as “nondurable materials used in storage, shipping, or moving.” While this citation refers particularly to nondurable materials, the Act’s definition of packaging does not explicitly exclude durable items. Certain durable items, such as rigid pallets, are included within the list of specific exemptions from the definition of covered product in ORS 459A.863(6)(a)(B).

Because these three storage items meet the definition of packaging (and are specifically referenced within the definition), DEQ proposes the following rule concept for consideration of the RAC:

A storage item is an item purchased empty and used for storage of other materials. The following storage items are packaging:

- File boxes and folders,
- Moving boxes,
- Plastic storage bags, including garbage bags,
- Food containers for perishable or non-perishable foods, and
- Plastic storage containers for durable items including large bins with and without lids.

Identifying the storage items listed above as packaging helps to provide regulatory clarity for producers of other storage items that might be used for “the containment or protection of products.” Including a specific definition of a storage item in rule will also allow for a rule clarifying how producers for these items are to be identified, as they are sold empty and therefore cannot be assigned to a producer on the basis of the contents contained within.

II. Clarifying definition of service packaging

Service packaging is a type of packaging that is filled at the point of sale. Single-use shopping bags are specifically included in the definition of packaging in ORS 459A.863(18)(a)(B). Other types of service packaging are not listed in the Act, although they meet the statutory definition of packaging. As with storage items, defining service packaging in rule and specifying products that are in scope will allow for a rule clarifying how producers for these items will be identified.

DEQ proposes the following rule concept for consideration of the RAC:

Service packaging is packaging that is filled at the point of sale for the purpose of transferring goods to a consumer. The following items are service packaging:

- Single-use shopping bags, including checkout, produce, and bulk food bags;
- Bags, wraps, single-use trays and associated items such as paper used to separate slices of cheese, and used by a retailer for packaging cheese, tofu, produce, meat, and fish;
- Trays provided to a consumer for containing multiple plants purchased at a nursery; and
- Bags or envelopes used to contain screws, nails and other bulk fasteners at a hardware store.

III. Clarifying definition of consumer wraps as packaging

Wraps such as aluminum foil, parchment paper, gift paper and plastic film wrap that are sold to consumers who then use them to enclose and protect food products also meet the definition of packaging. DEQ proposes the following rule language for consideration of the RAC:

Wraps sold directly to consumers are packaging, including:

- Aluminum foil,
- Film wrap,
- Wax paper,
- Parchment paper, and
- Gift wrap.¹

IV. Further differentiating of food serviceware from packaging

The definition of food serviceware includes several types of products that could also be packaging—wraps, plates, cups, etc.—depending on the context in which they are used. As the two types of products have different producer definitions at ORS 459A.866, it is important to be able to distinguish between them.

Per ORS 459A.863(18)(b)(A), packaging does not encompass any items that meet the definition of food serviceware. To meet the definition of food serviceware, per ORS 459A.863(7), items must be:

- (a) generally intended for single use, and
- (b) sold to a retailer or a dine-in food establishment or a take-out food establishment, regardless of whether the item is used to prepackage food for resale, is filled on site for food ordered by a customer or is resold as is.

DEQ proposes the following rule language for consideration of the RAC:

¹ The inclusion of gift wrap on the PRO Recycling Acceptance list in rulemaking 1 aligns with this rule concept.

- Food serviceware is sold *empty or unused* to a retailer, a dine-in food establishment or a take-out food establishment, regardless of whether the item is used to prepackage food for resale, is filled on site for food ordered by a customer or is resold as is.
- Food serviceware is used to contain or consume food or drink that is ready to eat.

V. Covered product exemption for durable packaging for durable goods

Per ORS 459A.863(6)(b)(R) and in response to exemption requests, DEQ proposes to exempt packaging that is used for the long-term (i.e., five or more years) storage of a durable good (i.e., a product with a lifespan of three or more years) from the definition of covered product.² Because this packaging is long-lasting and only used to store durable goods, it does not contribute significant volumes to the commingled recycling system, and will create minimum free ridership in terms of producers of other products having to pay for those that are financially benefitting from the exemption.³

Examples of packaging that would be exempt under the proposed rule are:

- Ornament packaging,
- Board game boxes, and
- Durable storage totes.

Because many storage containers would no longer be covered products due to this exemption, DEQ proposes to remove storage containers from the PRO Recycling Acceptance List in OAR 340-090-0630(3)(e) as a part of this rulemaking.

The Recycling Council indicated general support for this exemption in responses to a November 2023 poll.

VI. Limited covered product exemption medical device packaging

Per ORS 459A.863(6)(b)(R) and in response to an exemption request received from AdvaMed, the Consumer Healthcare Products Association, the Healthcare Distribution Alliance, the Medical Device Manufacturers Association, and the Oregon Bioscience Association, DEQ proposes to exempt one of the following three groups of medical devices from covered product:

- 1) Durable Medical Equipment as defined under [OAR 410-122-0010](#) and used in healthcare facilities as defined under [ORS 442.015\(12\)](#). Examples of DME include wheelchairs, crutches, glucose monitors, and ventilators, i.e., durable devices;
- 2) Class I, II and/or III medical devices as defined in [360c of Title 21 of the United States Code](#). These classifications are commonly used and well-understood by the

² DEQ is proposing here to use the definition of durable good used by the EPA and by the Department of Commerce, i.e., a product with a lifespan of three or more years.

³ Through application of its criteria for consideration of exemption requests, DEQ prioritized those requests that had strong rationales (particularly, materials that 1. bypass the commingled system, 2. are disposed of outside of the state, or are covered by other EPR programs) and for which the exemptions would have low economic and environmental impacts (including free rider impacts on other producers).

medical device industry and represent risk, invasiveness, and potential impact of the device on the user.

- a. Class I medical devices represent minimal potential for harm to the user. Examples include bandages and toothbrushes.
 - b. Class II medical devices generally come into more sustained contact with users and therefore represent a greater risk of harm than Class I. Examples include syringes, pregnancy test kits, and contact lenses.
 - c. Class III medical devices pose some risk to the patient if not used correctly and generally require Premarket Approval before they can be sold in the United States. Examples include pacemakers, dialysis machines, and breast implants; or
- 3) Medical devices sold to and accepted for recycling by Oregon hospitals that process materials collected for recycling in their own, privately-operated material recovery facilities.⁴

Discussion prompts:

- Which of the three items does the Rulemaking Advisory Committee recommend for exemption?
- If item #2 is recommended, which Class(es) of medical devices does the Committee prefer to exempt?

When polled, the Recycling Council indicated support for a limited exemption, expressing concerns about implementing an exemption that is too broad or infeasible to implement. The Council also questioned whether this industry merits an exemption considering the lack of large-scale producer take-back programs that target medical packaging.

VII. Covered product exemption for packaging used to manage infectious waste

Per ORS 459A.863(6)(b)(R) and in response to an exemption request received from Healthcare Waste Institute, DEQ proposes to exempt packaging used in healthcare facilities, as defined in ORS 442.015, from covered product for the management of infectious waste as defined in ORS 459.386.

Examples of products that would be exempt under this rule are red bags for infectious wastes and red boxes for sharps (one of four types of infectious waste, along with pathological wastes, biological wastes, and cultures and stocks).

Due to the proscribed pathways for the disposal of these materials, they are unlikely to come into the commingled system in a significant quantity, even as contamination. Infectious wastes are [managed separately from other wastes](#) and are unlikely to end up in the commingled system. For example, pathological wastes must be incinerated unless DEQ determines that an incinerator is not reasonably available within a watershed. If landfilled, sharps must go to segregated landfills.

⁴ These products could already qualify for the exemption described in ORS 459A.869(13), but if such an exemption was promulgated in rule, it would apply a blanket exemption to the products sold to the facilities, rather than requiring the producer to work with the facility to determine how much of the material bypassed the commingled system and went to a responsible end market in a given year.

The Recycling Council indicated general support for this exemption in its poll responses.

VIII. Limited covered product exemptions for professional use agricultural chemical packaging

Per ORS 459A.863(6)(b)(R) and in response to exemption requests received from Oregonians for Food and Shelter, DEQ proposes to exempt packaging of pesticide products as defined under ORS 634.006(8) and fertilizer and agricultural amendment products as defined under ORS 633.311 intended for commercial use and belonging to the following categories:

- 1) Packaging of pesticides classified as restricted-use under the provisions of section 3 (d) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and 40 CFR part 152, subpart I and sold to licensed commercial applicators;
- 2) Returnable/refillable intermediate bulk containers (IBCs); and
- 3) Returnable/refillable asset totes, drums, and kegs.

Additionally, DEQ is evaluating whether to recommend a fourth item for exemption:

- 4) Rigid HDPE packaging of commercial-use pesticides, fertilizers and agricultural amendments produced by members of the Ag Container Recycling Council (ACRC).

Discussion prompt: Does the Rulemaking Advisory Committee support exempting all four items, or limiting the exemption to the first three items?

Many of these products (in categories 1-4) are already exempt through the statutory exemptions for items used on farms and for items used in by a nursery for commercial purposes (ORS 459A.863(6)(b)(K)-(L)). Products not already exempt that would achieve exemption through this rule would be those used in agriculture-adjacent industries such as timber and public land management and commercial landscaping.

The rationale for exempting items 1-3 lies with limited contributions to the commingled system. Restricted-use pesticides comprise approximately 500 of the 15,000 pesticides sold in Oregon and by limiting the exemption to licensed commercial applicators, it can be ensured that no residential-use products likely to come into the commingled system as contamination would be exempt. Items 2 and 3, meanwhile, are generally too bulky to end up in the commingled system.

As for the possible inclusion of item 4, the ACRC contracts with Agri-Plas Inc. to collect commercial-use agricultural chemical containers in Oregon. ACRC estimates that the program captures 80% of the rigid HDPE agricultural chemical packaging produced and sold into Oregon by its members. DEQ is working to verify this estimate. While the proportion of its containers captured by ACRC could be claimed by member producers for the existing statutory exemption ORS 459A.869(13), the exemption proposed in rule would apply as a blanket to the supply of these products, and producers would not need to corroborate the successful collection and processing of the materials.

The Recycling Council indicated general support for an exemption for agricultural chemical containers. Recycling Council members wanted to ensure that the exemption scope is

limited to commercial use products and did not include products used in residential settings that would be more likely to enter the commingled system as contamination, and should pay their share of system costs. The Council also encouraged DEQ to evaluate the performance of the ACRC take-back program.

IX. Covered product exemption for particular reusable and refillable pressurized cylinders

Per ORS 459A.863(6)(a)(R) and in response to exemption requests received from Circular Action Alliance and the Pressurized Cylinder Industry Association, DEQ proposes exempting from the definition of “covered product” the following types of reusable and refillable pressurized cylinders:

- 1) Pure hydrogen or oxygen, all sizes;
- 2) Acetylene, 10 cubic feet and larger in size; and
- 3) Carbon dioxide, 5 lbs. and larger in size.

Based on consultation with local cylinder vendors, DEQ considers that these three types of cylinders have a) functioning exchange systems, and b) economic value in the local context, and therefore are unlikely to appear in the commingled system.

The Recycling Council indicated support for exemptions for pressurized cylinders that meet these two criteria.

X. Clarifications on Statutory Exemption ORS 459A.869(13)

The statutory exemption at ORS 459A.869(13)(a), cross-referenced by ORS 459A.863(b)(G), allows producers to claim an exemption for the proportion of their material that:

- Is collected through a recycling collection service not provided under the opportunity to recycle;
- Does not undergo separation from other materials at a commingled recycling processing facility; and
- Is recycled at a responsible end market.

Clarifying rules are needed to specify what is considered “a recycling collection service not provided under the opportunity to recycle,” and how producers are to confirm that their materials are recycled at a responsible end market when claiming this exemption. A clarifying rule is also needed to specify that producers cannot claim this exemption for materials collected at PRO depots and collection points, as this would contravene statutory intent.

DEQ proposes to clarify in rule that, for the purposes of applying this exemption:

- 1) For the purposes of ORS 459A.869(13)(a)(A), a collection service not provided under the opportunity to recycle is:
 - a. Any collection that is not part of a DEQ-approved commercial recycling program per OAR 340-090-0030 – 0040, including

- i. commercial generators collecting and sending materials directly to end markets, either independently or through a service provider that is not franchised, contracted, or otherwise permitted or authorized⁵ by the local government⁶ where the services if provided; and
 - ii. collection points and special recycling services that accept materials from consumers and send them directly to end markets; and
 - b. any collection that goes beyond the minimum requirements of a DEQ-approved commercial recycling program per OAR 340-090-0030(7)(a) and OAR 340-090-0040(3)(f)), including
 - i. commercial generators collecting an individual material separately from others (for example, by using a cardboard compactor) and in a condition that would allow it to be received directly by a responsible end market without additional processing,
- 2) In order to claim the exemption under ORS 459A.869(13), all end markets that recycle the material must either be verified “responsible” by a PRO per OAR 340-090-0670(3)(f) or certified “responsible” through third-party certification from an Environmental Quality Commission-approved program. The certification, verification, or an annual audit (of either the certification or verification) must either have occurred within a calendar year for the exemption to be granted.
- 3) ORS 459A.869(13)(a) does not apply to materials collected through a recycling collection service provided under ORS 459A.896(1), i.e., a collection service counted by a PRO toward meeting its convenience standards under OAR 340-090-0640.

Non-discrimination statement

DEQ does not discriminate on the basis of race, color, national origin, disability, age or sex in administration of its programs or activities. Visit DEQ’s [Civil Rights and Environmental Justice page](#).

⁵ “otherwise permitted or authorized” is limited to specific permission granted to collect recyclables; it does not apply to general business licensing requirements.

⁶ “local government” means the city where the collection is provided, or if collection occurs in an unincorporated area, the county.