

October 31, 2023

*Submitted via email: [MainePackagingEPR@maine.gov](mailto:MainePackagingEPR@maine.gov)*

The Honorable Melanie Loyzim, Commissioner  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, Maine 04333-0017

**RE: Packaging Stewardship Law; Comments – EPR Conceptual Draft Rules, Parts 1, 2, and 3**

Dear Maine Department of Environmental Protection,

AMERIPEN – the American Institute for Packaging and the Environment – appreciates the opportunity provided by the Maine Department of Environmental Protection (“DEP” or the “Department”) to submit written comments on Parts 1, 2, and 3 of the proposed conceptual draft rules for the **Stewardship Program for Packaging** (38 MRSA § 2146). AMERIPEN respectfully submits these written comments, and the attached redline documents on the draft rules, for consideration and requested modifications to the draft rules.

AMERIPEN is a coalition of stakeholders dedicated to improving packaging and the environment. We are the only material inclusive packaging association in the United States representing the entire packaging supply chain, including materials suppliers, packaging producers, consumer packaged goods companies and end-of-life materials managers. We focus on science and data to define and support our public policy positions, and our advocacy is based on this rigorous research rooted in our commitment to achieve sustainable packaging, and effective and efficient recycling policies. We have several member companies with a presence in Maine, and many more who import packaging materials and products into the state.

AMERIPEN supports policy solutions, including packaging producer responsibility, that are:

- **Results Based:** Designed to achieve the recycling and recovery results needed to create a circular economy.
- **Effective and Efficient:** Focused on best practices and solutions that spur positive behaviors, increase packaging recovery, recapture material values and limit administrative costs.
- **Equitable and Fair:** Focused on all material types and funded by shared cost allocations that are scaled to make the system work and perceived as fair among all contributors and stakeholders.

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The below written comments from AMERIPEN speak to the contents of the conceptual draft rules Parts 1-3 recently released by the Department. Given the complexity of the interaction between the three concepts, AMERIPEN and its members are still working to understand all their provisions. As such, AMERIPEN requests the opportunity to present further comments and questions to the Department on conceptual draft rules as we continue to consider them, even beyond the initial presentation of the conceptual draft rules to the Maine Board of Environmental Protection (BEP) in December 2023.

### **CONCEPTUAL DRAFT RULE PART #1**

Part 1 raises issues for AMERIPEN, including that it allows municipal disposal costs to be reimbursed using producer funds and utilizes a “per capita” basis for municipal reimbursement. AMERIPEN also seeks changes to some of the cost calculation provisions. Finally, AMERIPEN has concerns with some definitions and the details of portions of the Stewardship Organization’s duties.

#### **SECTION 1. Definitions**

Paragraph (1)(A) establishes conditions for four different types of materials to meet the definition of “commodity.” These conditions run the risk of being so specific as to processing technologies that they could exclude current or future recycling uses. For example, glass may be incorporated into items other than those listed and not all paper is recycled in a pulping operation. AMERIPEN recommends that this definition be revised to provide more flexibility for allowable treatments of recycled commodities, as they become feedstocks, regardless of what technology might be used for a material.

Paragraph (1)(G) defines “manage” as *“to collect, transport, process, and otherwise prepare a packaging stream for recycling or disposal.”* While the definition captures activities associated with packaging materials, the inclusion of “and otherwise prepare” makes it more abstract and complicates the understanding of the definition. The use of “and” also requires an entity to always “otherwise prepare” a packaging stream, in addition to the other listed actions, to meet the definition. AMERIPEN suggests modifying the definition to instead read *“to collect, transport, process, ~~and or~~ otherwise prepare...”* That way, the definition applies whenever any of the three discrete actions occurs, as well as if an entity “otherwise prepares” a packaging stream. AMERIPEN also asserts, and will address later in the comments, that disposal activities should not be included in the definition of “manage” under the Packaging Stewardship Law.

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Paragraphs 1(E) and (F) define “disposal” and “disposal stream” respectively. However, AMERIPEN firmly believes that reimbursement for disposal costs of packaging material not readily recyclable should not be allowed under this regulation. As AMERIPEN has asserted, this runs counter to the law and legislative intent, through clear amendments taken during the legislative process. In contrast, AMERIPEN does support funding for alternative management of packaging materials that are diverted from disposal at landfill and moved up the state’s solid waste hierarchy, as stipulated in 38 MRSa §2101. Even if specific landfill tipping fees were excluded, which is not clear from the current draft rule text, reimbursement for activities that support disposal should not be funded under this regulation, as it will have the effect of making landfilling less expensive to a municipality. AMERIPEN therefore asserts that all relevant references to “disposal” in the draft rule be changed to “alternative management.” Our attached redlines to the draft rule reflect these requested changes to the definitions.

**SECTION 2. Requirements for participating municipalities**

In any year in which a municipality seeks to begin participating in the Stewardship Program for Packaging (“Program”), paragraph 2(a) requires the municipality to notify the Stewardship Organization (“S.O.”) of its intent to participate before March 31.

There is a lack of certainty about whether the municipality would be able to participate and be eligible for reimbursement for activities that occur between January 1 and the date of notification in that situation. Should a municipality attempt to claim reimbursement for activities during that timeframe, this will lead to a lack of coordination between the municipality and S.O. and a lapse in oversight.

AMERIPEN recommends that the rule be clarified to state that a municipality is not eligible for reimbursement for activities that occur prior to its notification to the S.O. of the intent to participate. Our attached redlines to the draft rule reflect this recommendation.

**SECTION 3. Defining municipal reimbursement**

The materials category in paragraph 3(B) is reimbursed on a per capita share basis, while the other two categories are reimbursed simply on a per ton basis. It is not apparent from the rule concept what necessitates the unique treatment of materials that are not readily recyclable and that are not managed for recycling. This is especially unclear since such materials that are not readily recyclable but that are managed for recycling are not reimbursed on a per capita basis, nor does statute qualify that reimbursement be based on a “per capita” share basis. AMERIPEN

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does not support the use in 3(b) of per capita measure and our attached redlines to the draft rule reflect this.

## **SECTION 4. Determining municipal reimbursement**

### **Obtaining information**

Per 38 MRSA § 2146(13)(A), the method for calculating reimbursements under these rules “*must include the median per-ton cost of managing packaging material that is readily recyclable and the median per-ton cost of managing packaging material that is not readily recyclable.*” As a general comment when approaching reimbursement, disposal costs of packaging material not readily recyclable should not be considered a reimbursable cost. As AMERIPEN has asserted, this runs counter to the law and legislative intent. There is clear legislative intent with the H-714 amendment of L.D. 1541, offered by Representative Tucker, replacing the word “disposal” with “other management” and specifically removing language that would have required reimbursement to participating municipalities for costs incurred in the disposal of packaging material not readily recyclable.

AMERIPEN believes reimbursing the disposal of materials could also potentially lead to an increase of municipal program participation yet result in activities that only simply collect the minimal recyclable materials and then seek as much reimbursement as possible for the disposal of significant volumes of packaging materials to receive funds under the program. AMERIPEN asserts that providing disposal costs for packaging materials undermines the overall goal of moving materials up the solid waste management hierarchy.

Finally, AMERIPEN raises a concern that limiting the inputs for the mechanism to measure municipal reimbursement to just geography and population will leave out differences between program types. This will create a disincentive for municipalities to adopt curbside collection and other enhanced or value-added programs that are not captured in the current cost identification proposal.

### **Complete consultation**

Paragraph 4(A)(1)(a) states that “[a] *complete consultation is not current if it was nullified because of a significant change to operations or if it is 10 or more years old.*” “Significant change” is not defined, nor is there any indication of who would determine one occurred or of how that would be determined. Notably, “relevant changes,” as used in paragraph 4(A)(1)(b) are specifically enumerated in the next subsection of the rule concept. AMERIPEN requests that the rule specify what entity (presumably the S.O.) would determine when a significant change occurs,

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as well as provide guidance as to how that determination would be made. Our attached redlines to the draft rule reflect this request.

### **Follow-up consultation**

The rule concept requires the S.O. to conduct a follow-up consultation with a municipality whenever any one of six types of “relevant changes” are made to the management of a packaging stream. Among those changes are actions that are outside of the control of producers and the S.O., such as “energy use changes affecting total metered energy” and “changes to transportation routes.”

In effect, subparagraph 4(A)(1)(b) forces the S.O. to conduct a new consultation (or consultations) any time a municipality revises its operations in marginal ways like altering a collection route. This will create new, unnecessary costs for producers. It also subjects municipalities to more administrative compliance burdens, which may discourage them from making “relevant changes” even if merited.

AMERIPEN recommends that follow-up consultations only be triggered in situations that necessitate the involvement of the S.O. or producers, and not in cases where the change would have an insignificant or de minimis impact on the cost of management. Our attached redlines to the draft rule reflect this recommendation.

### **Representative audits**

Paragraph 4(A)(3) of the rule concept pertains to representative audits, which are to be used to help *“determine the per ton cost of managing each packaging material type for recycling, the total tons of each packaging material type managed for recycling by each participating municipality, and the per ton cost of managing packaging material for disposal.”*

However, the language never states what specifically is being audited; there are references to “samples,” but it is unclear if that is a sample of a quantity (of unknown size) of material entering a municipal facility. There is also a lack of clarity as to the metric(s) that the samples are being audited against. It should be noted that 38 MRSA § 2146(13)(A)(6) provides more specificity about the representative audits that the S.O. must conduct.

AMERIPEN requests a greater level of detail about auditing procedures, including what the targets of the audits are and what is being measured. This detail should reflect what is laid out in the enabling statute.

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Additionally, paragraph 4(A)(3)(b)(iv) requires audit results from two municipalities that “are not significantly different” to be averaged and represent all municipalities managing the same commodity or accepted materials. If the first two are significantly different, but a third is similar to one of the other two, the two similar municipalities would be averaged and become representative for applicable municipalities.

This methodology relies on very small sample sizes and appears to risk biasing the average in favor of results that agree by chance. AMERIPEN seeks justification as to why this approach was chosen and how it will produce truly representative values.

#### **Labor costs**

The rule concept breaks out various reimbursable costs for managing packaging streams. Paragraph 4(B)(1) includes a category for “labor cost” that broadly covers “*the employee’s time spent managing a packaging stream.*” In two other categories, “equipment cost” (4(B)(2)) and “structure cost” (4(B)(3)), there is a subset of costs for “maintenance cost.” That maintenance cost includes “*the amount spent on...labor*” for servicing or operating equipment or for servicing a structure.

In short, this approach risks labor costs being double counted, once for the “labor cost” category and then again within the “equipment cost” and “structure cost” categories. This would introduce duplicative and unjustified expenses for producers. AMERIPEN calls for clarification that the labor costs in the “equipment” and “structure” categories do not duplicate any of the costs under the “labor” category. This is reflected in our attached redline.

Additionally, there is no constraint on what types of loans municipalities may receive reimbursement for under paragraph 4(B)(2)(c)(i) and paragraph 4(B)(3)(a)[sic](i). This can lead to unfortunate situations where high-interest loans would be guaranteed reimbursement, raising program costs further. AMERIPEN requests that a condition be added requiring loans for capital investments be limit interest to five percent annually, as reflected in our attached redline.

#### **Profit and overhead paid**

Paragraph 4(B)(5) limits the calculation of reimbursable profit and overhead paid to cases “*when a contract is for the management of more than one packaging stream and does not include additional services.*” Profit and overhead can be accrued even in single-stream operations. Therefore, AMERIPEN is seeking clarity as to why the calculation is limited to multi-stream management.

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## **CONCEPTUAL DRAFT RULE PART #2**

Part 2 introduces significant new topics and concerns, with many surrounding the broad program goals and overly-punitive fee levels. There are additional issues related to producer reporting, including about “toxics,” and about the criteria used to define “readily recyclable” materials. Other topics of concern range from the design of auditing to the nature of the definitions.

### **SECTION: Scope Definitions**

This conceptual draft rule proposes to make additions and clarifications to statutory definitions. However, any additions (or substantive changes) to definitions should be made through legislation. Additionally, attempting to impart regulatory definitions that do not align with statutory definitions runs the risk of conflict language and inconsistent implementation and enforcement. AMERIPEN requests that any definitions in the rules that affect terms defined in statute be limited to those that clarify or make specific those terms.

For example, the definition of “perishable food” is narrower than what is provided in statute. Unlike the definition in the draft, the statutory definition contains the phrase “including but not limited to” and includes “fresh and processed meats.” AMERIPEN requests that this definition should be aligned with the statutory one to ensure it follows the explicit language of the law. Additionally, the definition limits baked goods to those baked at the point of retail sale, which is not provided in the statute. This would unnecessarily preclude this exemption from applying to certain bakery arrangements, such as where a central bakery site distributes products to retailers. AMERIPEN requests this definition be aligned with the statutory definition accordingly:

*C. Perishable food. “Perishable food” means **any food that may spoil or otherwise become unfit for human consumption because of its nature, type or physical conditions, including, but not limited to, fresh, processed, or refrigerated meats, poultry, seafood, and dairy products; bakery products—baked at the point of retail sale; eggs in their shells; fresh fruits and vegetables; and frozen wild blueberries.** Perishable food does not include any such food that is sold, offered for sale or distributed for sale frozen except for frozen wild blueberries.*

Separately, the definition of “consumer” would also capture commercial and business-to-business consumers rather than being limited to consumer packaging destined for the residential, end-user sector. This will vastly expand the scope of the law and result in far more regulatory and financial burdens across the state. Additionally, in contrast to residential recycling systems, commercial packaging materials already have an industrial payer for those materials and there

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should not be any burden to municipal governments for that packaging material. In addition to a corresponding clarification in the definition of “product,” AMERIPEN recommends limiting the definition as follows:

**A. Consumer. “Consumer” means the entity that uses a product in a residential location, including an entity that uses a product to create a new product.**

The definition of “durable product” uses an “average lifespan of at least 5 years.” AMERIPEN requests to know how the average will be measured. Additional flexibility in applying the “durable products” is also merited, given the wide range of products that are regulated under the law. Therefore, AMERIPEN recommends allowing a process for the S.O. or producers to petition the Department to treat products as “durable” even if they do not meet the five-year lifespan standard. This could be implemented with the following language:

**B. Durable product. “Durable product” means a product that wears out over an average lifespan of at least 5 years. A durable product is not depleted through use. The Department may also designate a product as a “durable product” even if the product does otherwise not meet this definition, upon the petition and provision of justification from the S.O. or a producer.**

## **SECTION: Readily Recyclable**

### **Process for creating the initial packaging material types list and initial readily recyclable list**

This subsection requires the Department to circulate a proposed packaging material types list and a proposed readily recyclable list. It also requires the Department to accept comments on those lists before “finalizing” them but does not explicitly authorize the Department to make changes to the proposals. AMERIPEN requests clarification that DEQ has the authority to update the two lists after taking comments, such as the addition of the following:

**E. The Department will modify the proposed initial packaging material types and the proposed list initial readily recyclable list, as appropriate and based on the input received, and then publish finalized lists.**

### **Process for annual review of the packaging material types list and readily recyclable list**

Paragraph (3)(B) requires the S.O.’s annual report to the Department to include an appendix of suggested changes to the lists. AMERIPEN asks that it be clarified which entity is making these suggestions, whether it is the S.O. or any party.



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According to paragraph (3)(G)(1)(a), newly readily recyclable materials must be reimbursed at the highest rate of other readily recyclable materials for three years. This broad approach may be too long and could easily lead to excessive costs that do not reflect reality. It also may disincentivize producers from adopting readily recyclable materials. AMERIPEN believes the S.O. should be allowed to estimate the reimbursement rate until reliable data is available instead, as follows:

*a. Producer payments made during the calendar year in which the change occurs will reflect the packaging materials type's status as not readily recyclable during the prior calendar year. ~~For 3 calendar years following that in which the change occurs, a producer's payment must reflect the per ton cost of managing the readily recyclable packaging material type with the highest management cost. Beginning the fourth calendar year following that in which the change occurs, a producer's payment must reflect actual per ton cost of managing the packaging material type.~~ **For subsequent years, the S.O. shall determine the schedule and rate of producer payments based on the cost of managing the material, or estimates thereof if sufficient data is not available.***

AMERIPEN also seeks clarity about what is meant by “municipal reimbursement and participation requirements” in paragraph (b). If this is to give municipalities a three-year grace period to actually recycle the materials newly added to the readily recyclable list, there is a risk that it will compound the excessive payment issue in (a) if the rate is too high, but little is actually recycled.

For paragraph (3)(G)(2), there is a three-year window for reimbursement at the highest rate necessary for products that are added to or removed from the readily recyclable list. AMERIPEN requests that the S.O. be given authority to calculate the post-transition costs, consistent with the request for subparagraph (3)(G)(1)(a). This is reflected in our attached redlines to the draft rule.

**Representative Audits**

Paragraph (4)(A)(1) requires the S.O. to conduct waste stream audits at least every 10 years. AMERIPEN appreciates that this frequency will not be overly taxing on the S.O.'s resources.

Paragraph (4)(B) allows municipalities to suggest litter audit locations, from which the S.O. will randomly select a location to audit. This approach will not yield “representative audits,” despite its intent: municipalities are unlikely to select locations *randomly*, as would be necessary, but instead will choose sites where litter is common. Furthermore, municipalities are not required to participate. Altogether, this approach will not deliver an unbiased examination, which is

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problematic given that the audits will also inform the “reduction of litter” incentive fee. AMERIPEN asks that the S.O. instead be allowed to design the nature of the litter audits in an unbiased, representative fashion. This can be done by rewriting subparagraph (2) as follows:

*(2) ~~During annual reporting, participating municipalities may suggest one location of up to 2 acres or up to 5 roadside miles for a litter audit. The SO must randomly select a location to audit from those suggested and may audit at any time of year that the area is free of snow and ice. The S.O. must design and implement a process to randomly select a representative sample of site or sites in the state for a litter audit. The SO must collect and sort all litter from the audit sites into non-packaging material and packaging material, and further sort the packaging material by packaging material type. The SO must then sort packaging material by producer, to the extent possible. The SO must measure the percent of litter grouped by packaging material type and the percent of litter grouped by producer in weight and number of items.~~*

AMERIPEN requests that the S.O.’s required analysis of the litter audit results, found in subparagraph (4)(B)(3), include a duty to differentiate litter between packaging and non-packaging materials. This is reflected in the attached redline document.

### Program Goals

As a general comment, the various program goals identified in paragraph (5) would be financially punitive for producers and are overly prescriptive for use of these punitive non-attainment funds. The investment consequences laid out for each goal are not explicitly defined in statute. As such, AMERIPEN prefers to defer to the S.O. to set any programmatic goals in a manner that effectively balances costs, feasibility, and effectiveness.

Paragraph (5)(A) imposes a packaging weight reduction goal of escalating percentages that ultimately reaches 50% by 2050. It applies to the total weight for all packaging material. This exceeds the ambitious single-use plastic source reduction policy California has adopted, in terms of materials covered, amount to be reduced, and pace of reduction. It is unrealistic and should be readjusted to at least align with California, including using the same benchmarking year of 2013. Further, AMERIPEN requests that the reduction goal be normalized by the number of packaging units shipped, to avoid creating a barrier to future business growth, and requests that producers be able to receive credit for historical reductions, to avoid penalizing companies that have already significantly optimized their packaging. Finally, AMERIPEN requests that the percentage of investment dedicated under this paragraph include projects that support

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“reduction,” since that is the goal in question. These recommendations are reflected in our attached redlines to the draft rule.

Paragraph (5)(B) establishes reuse goals, but it is unclear how feasible they are. AMERIPEN recommends collaboration among the S.O., producers, and other interested parties before specifying discrete reuse targets. These recommendations are reflected in our attached redlines to the draft rule. Additionally, this goal focuses exclusively on reuse, which leaves out opportunities to encourage refill. AMERIPEN requests that this concept be revisited to ensure that the refilling of packages by the original consumer, whether inside their home or outside, be incorporated into the goal.

In paragraph (5)(C), every base material must achieve the same proportion of post-consumer recycled material content. It is not realistic to expect this would ever be the case, given each material’s unique physical properties. AMERIPEN requests that the rates be delineated and proposed by the S.O. and adjusted by base material and the S.O. submit those goals to the Department for approval. Furthermore, the post-consumer recycled material content market and its use is complicated by U.S. Food and Drug Administration (FDA) requirements and supply constraints; these may make it impossible to comply with the goals, but there are no offramps provided. AMERIPEN requests that, at a minimum, packaging materials that are restricted from post-consumer recycled material due to other laws and regulations not be considered when calculating the total weight under this goal. A waiver or exemption process via the S.O. with Department approval that reflects extrinsic limits should be included in the rule. These recommendations are reflected in our attached redlines to the draft rule.

Regarding the “readily recyclable” goal in paragraph (5)(D), it is important that the Department address the reimbursement issues AMERIPEN has identified in paragraph (3)(G) of the Readily Recyclable section. If the Department is going to establish such ambitious goals (up to 100% by 2050), it should ensure that any costs tied to reimbursement of readily recyclable materials are reasonable and justified. Otherwise, it will create a compounded problem of undue expenses across a high volume of materials. Additionally, there must be some off-ramps for critical packaging materials that serve vital functions that cannot be readily recyclable given the products that they contain or their use by consumers. These recommendations are reflected in our attached redlines to the draft rule.

Meeting the “litter” goals in paragraph (5)(E) is ultimately contingent upon consumer behavior and must first be fully informed by the pending litter audits. Given that, AMERIPEN cautions the Department in setting such steep expectations here. Additionally, the expression of percent of

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litter that is not packaging seems to indicate that there could be the perverse effect of sanctioning of litter of other non-packaging items. This approach is not supported by the statute and is flawed in its approach that discouraging litter across the state will only impact packaging materials. In this case, the efforts under this law have broad application and such a goal and measurement is not justified and should be removed. These recommendations are reflected in our attached redlines to the draft rule. Additionally, in this paragraph and elsewhere throughout the concept, the term “unit” is not defined. AMERIPEN requests that it be defined or clarified for each use, or that weight be used instead for the purpose of this goal.

Paragraph (5)(F) establishes local government “participation” as a goal. However, this is not an appropriate goal or use of funding. Producers, the S.O., and consumers all lack control over whether a municipality participates. “Participation” is not called for under the statute. While municipal “recycling access” goals are required by law, they are not found in these rules. “Participation” is not a proxy for “access,” as it does not measure consumers’ ability to use recycling systems. Finally, program funds should not be diverted from recycling to “raising awareness” for municipalities that should already be aware of this law. AMERIPEN recommends that paragraph (5)(F) be stricken and that DEQ instead work with municipalities to encourage participation using existing resources.

In paragraphs (5)(G) through (I), the goals of “Collection,” “Base material-specific recycling,” and “Overall recycling rate” have no funding adjustments for missed goals. AMERIPEN seeks to confirm that this arrangement means there is no consequence to a municipality for failures to meet these three goals, particularly if a municipality fails to meet recycling expectations. If so, AMERIPEN asks for the Department’s justification for this potentially unfortunate dynamic.

Under paragraph (5)(H), every base material is required to achieve the same recycling rate. Like the post-consumer recycled material content goal, it is not realistic to expect this would ever be the case, given each material’s unique physical properties. Furthermore, the goals are overly ambitious considering the recycling yields presently attained for various materials. Finally, there is absolutely no current data that suggests that any material is achieving these recycling rates. Therefore, AMERIPEN requests that the rates, as well as the recycling rate in (5)(I), be developed by the S.O. following the needs assessment and adjusted appropriately by base material. These recommendations are reflected in our attached redlines to the draft rule.

**SECTION: Producer Reporting and Payments**

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## Definitions

The terms “base material” and “remanufacturing facility” are defined in the Readily Recyclable section, but not in this section. AMERIPEN seeks to clarify whether the definition in the prior section carries over to the Producer Reporting and Payments section.

**Additionally, AMERIPEN requests that the Department produce and regularly update a discrete list of all chemicals that would qualify as “toxics” under the definition in this concept. These chemicals are not compiled anywhere, and that will make it challenging for producers to ensure they are checking for the right chemicals to remain compliant.**

## Defining Packaging Material

Subparagraph (2)(A)(4) states that packaging material can be distinguished due to “the use of packaging material to contain products that are hazardous...” As the statute in question is focused on packaging, not products within the packaging, this is an unnecessary distinction. AMERIPEN suggests removal of this clause, or else justification as to its inclusion.

For defining a base material, as laid out in paragraph (2)(B), AMERIPEN notes this may be an opportunity to coordinate with other states’ efforts. In particular, the Department could align with California’s approach to define the base material using the “predominant” material, rather than an arbitrary 60% standard.

In paragraph (2)(C)(1), for a material to be considered “readily recyclable,” there must at least three remanufacturing facilities that recycle the material. AMERIPEN seeks justification as to why the threshold was set at three facilities. AMERIPEN also seeks clarity as to whether those facilities must be in Maine or whether they can be elsewhere (e.g., another state or Canada), and as to how a facility’s eligibility will be determined. This recommendation is reflected in our attached redlines to the draft rule.

Paragraph (2)(C)(1)(c) also prohibits “recycling processes...that are known to result in the release of material into the environment.” Given that all recycling activities will release some amount of material unavoidably, this language is far too restrictive. AMERIPEN requests that this condition instead be tied to an objective environmental standard or metric. This recommendation is reflected in our attached redlines to the draft rule.

Paragraph (2)(C)(2) establishes “throughput” requirements for the definition of “readily recyclable.” The restrictiveness of these requirements could result in many materials being excluded. For example, the arbitrary 1% threshold, the use of term “commodity” (which appears

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to exclude mixed material bales), and the phrase “already used” all impose subjective limits on what is readily recyclable. AMERIPEN recommends instead that the S.O., in consultation with the Department, be empowered to determine what materials are present enough to provide significant “throughput.” This recommendation is reflected in our attached redlines to the draft rule.

Paragraph (2)(C)(3) requires “recycling yields” by type of at least 60% upon the effective date to be considered “readily recyclable,” but paragraph (5)(H) of the Readily Recyclable section only expects recycling rates of 40% to meet the program goals from 2030 through 2039. A “recycling yield” and “recycling rate” presumably are different measurements, but there is no definition or guidance as to what a “yield” is. AMERIPEN requests that “recycling yield” be defined to clarify the meaning of this provision and to ensure it can be harmonized with the recycling rate goal.

**Producer Reporting**

Given the scope of requirements for reporting and invoicing, AMERIPEN members are concerned that the deadlines in the concept are unrealistic and will result in late fees that cannot be avoided. As such, AMERIPEN requests that the S.O. be authorized to grant extensions of deadlines to producers where merited and where the producers are working in good faith.

Paragraph (4)(A) requires a producer to register with the S.O. “when it begins producing packaging material,” but it may have begun that production years in the past. AMERIPEN seeks clarity that the registration requirement should go into effect only when the rule goes into effect, as is provided in paragraph (3)(A), as follows:

- A. *Registration. **Beginning after this rule goes into effect, a** producer must provide the following information to the SO when it begins producing packaging material **sold or distributed in the State** and must update the SO whenever this information changes.*

Regarding the reporting obligations listed in paragraph (4)(B), these should be simplified to allow calculation of fees against statutory obligations without additional complexity that is unnecessary and could introduce inaccuracies, given that producer data may be organized in different ways. To this end, AMERIPEN requests consideration of the following, as reflected in our attached redline:

- Reporting should be by category and then packaging components as defined in the producer specification system, rather than defined by separability for recycling.
- Reporting for multi-material components should be by individual material type and not by heaviest material type.

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Item (4)(B)(9) requires producers to disclose whether they can certify the absence of toxics. However, it is virtually impossible to guarantee the absence of any chemical when testing. Instead, testing is conducted based on detection limits. Furthermore, two other references to toxics in this concept address it in the context of “intentional addition of toxics.” AMERIPEN requests that these provisions be rewritten to reflect this reality and harmonized with the other sections, along the lines of the following:

*9. Whether the producer can certify the absence of **intentionally added** toxics **above a de minimis amount**;*

*[...]*

*b. Toxicity fee. For components for which a producer indicates it is unable to certify no intentional addition of toxics, it must pay a per ton fee ~~equal to 10 percent~~ **recommended by the SO and approved by the Department of for** the packaging material type fee.*

Subparagraph (4)(D)(1)(d) subjects a producer that estimates weight from unit to various eco-modulation fees. Some producers may be unable to calculate the exact amount of packaging that enters the state because it is a low volume. However, they may still be able to certify that their packaging does not contain toxics and does comply with post-consumer recycled material requirements. AMERIPEN recommends that any of the five listed assumptions in this subparagraph be inapplicable if the producer can provide certification that they are not appropriate. This recommendation is reflected in our attached redlines to the draft rule.

Under paragraph (4)(D)(1), producers that estimate weight produced based on units are subjected to eco-modulation fees. AMERIPEN requests that the concept be clarified to explicitly state that reporting based on actual shipments at the national level and normalized for Maine’s population, as authorized in paragraph (4)(D)(2) is not subject to those same fees. This recommendation is reflected in our attached redlines to the draft rule.

In paragraph (4)(E)(3) the S.O. is required to “provide a mechanism to anonymously report suspected irregularities in producer reporting,” and audit “substantiated irregularities” reported via the mechanism. AMERIPEN seeks clarity as to what entity is responsible for determining whether reports are substantiated, and how it is to determine a report is substantiated.

## Producer Fees

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As a general comment, and like the program goals, the incentive fees and late fee would be financially punitive for producers and introduce steep costs. AMERIPEN prefers to defer to the S.O. to set any incentive fees or credits in a manner that effectively balances costs, feasibility, and effectiveness. This recommendation is reflected in our attached redlines to the draft rule. AMERIPEN also cautions against allowing collected revenues from exceeding actual management costs and a limited reserve; doing otherwise will inflate costs statewide.

Based on the annual May 31 reporting deadline for producers and the annual July 1 payment deadline, the concept leaves the S.O. with one month to calculate each producer's fees and bill them. This is an extremely tight turnaround, especially for a novel program. AMERIPEN recommends providing additional time between the reporting and payment deadlines, at least in the early years of the program until a routine is established.

AMERIPEN seeks justification as to why low-volume producers do not face any late fees. AMERIPEN also seeks further specification as to how the late fee waiver process works, including whether further rules for that are forthcoming.

Paragraph (5)(A)(1)(b) sets the aggregate annual registration fee at the full \$300,000 (as authorized in the statute). AMERIPEN seeks the Department's justification as to why that value was determined appropriate, rather than a lesser amount. This is reflected in our attached redlines to the draft rule.

Paragraph (5)(A)(2)(b) requires producers to pay triple the costs for non-readily recyclable materials, based on the cost of the most expensive readily recyclable material rate. These two requirements will lead to steep costs. AMERIPEN seeks the Department's justification as to how the requirements were determined to be appropriate and recommends the S.O. instead determine the factor. This recommendation is reflected in our attached redlines to the draft rule. AMERIPEN also asks the Department whether any cost impact analysis was performed.

Paragraph (5)(A)(3)(a) references post-consumer goals for "components," but there are no component-specific post-consumer recycled material goals. There are only goals for base materials. AMERIPEN requests clarity about how this paragraph is supposed to work.

Paragraph (5)(A)(3)(b) establishes a "toxicity fee." AMERIPEN asks the Department to confirm whether a producer's self-certification in reporting is sufficient to not be subject to this fee. Furthermore, AMERIPEN recommends that this fee rate be recommended by the S.O. and approved by the Department. This recommendation is reflected in our attached redlines to the draft rule.



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Paragraph (5)(A)(3)(c) bases a “reduction of litter” incentive fee on whether a component uses one of the top five materials found in litter audits. This fee on only five packaging components is not specifically called for by statute. It is also an arbitrarily designed, unsupportable approach that ignores the possibility that litter goals will have been met and/or that litter is de minimis. In such cases, this would add unnecessary costs without justification. Litter reduction can instead be incentivized through increased waste collection opportunities and education efforts. AMERIPEN seeks revision of this incentive fee and our attached redlines to the draft rule include a recommendation.

Paragraph (5)(A)(3)(d) establishes a “labeling” incentive fee that penalizes labeling for material management pathways that are “unavailable or improper in the State.” This approach is not defined and not supported by any reasonable standard. AMERIPEN requests that this incentive be tied to national labeling best practices and be set by the S.O. Undefined and arbitrary fees such as this are not justified. This recommendation is reflected in our attached redlines to the draft rule.

**Packaging Stewardship Fund Cap**

Paragraph (6)(B) is not a justified mandate for the use of additional funds that a S.O. collects. This entire concept does not seem justified in statute and is overly prescriptive for regulation. If additional support is needed for infrastructure investment projects, that should be managed in other areas of the S.O. plan approval. AMERIPEN asserts that this section must be wholly removed as it does not stand the test of reasonable interpretation of the law. This recommendation is reflected in our attached redlines to the draft rule.

**Transparency and Benchmarking for Producers**

Many of the program goals referenced are based on the percentage of total packaging material weight across brands, but this subsection requires the S.O. to conduct reporting by brand. It is unclear why this brand-level reporting is warranted or if it is even feasible, and it may involve confidential business information. AMERIPEN seeks clarity as to why this provision is focused on brands, if the Department determined it would be workable with the reported data, and what the Department is attempting to achieve with this data – or the Department should remove this subsection. AMERIPEN also recommends tying the labeling provision to a national labeling standard.

**Alternative Collection Programs**

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Paragraph (8)(D) establishes the annual fees for alternative collection programs. AMERIPEN seeks the Department’s justification for these fee levels and asks whether the Department has considered whether lower levels would be more appropriate given the reduced complexity of a single-producer program. In the interim, see our attached redlines to the draft rule for an alternative annual fee structure for alternative collection programs.

### **CONCEPTUAL DRAFT RULE PART #3**

Part #3 creates concerns for AMERIPEN about the design of the investment process and the Department’s role in it. Additionally, AMERIPEN has comments relating to the needs assessment components.

As a general comment, this conceptual draft rule for investment proposals and consideration of them is unnecessarily restrictive and does not afford enough latitude to the S.O. to implement investments successfully. AMERIPEN is deeply concerned that this concept places too much responsibility on the Department, at times where it is not required or even allowed by the statute, and will limit the effectiveness of producers’ funding for the whole state.

#### **SECTION: Investment Criteria**

This section states that *“Proposals that improve the management of material other than packaging material must be supported with a commensurate source of outside funding.”* However, 38 MRSA §2146(11) provides only that *“the stewardship organization shall make investments in education and infrastructure **that support the recycling of packaging material** in the State”* (emphasis added). AMERIPEN requests this section of the rules be clarified to ensure that any program funds from producers are not used to fund management of materials that are outside its scope. This can be accomplished as follows:

*Proposals that improve the management of material other than packaging material must be supported **in full** with ~~a commensurate source of~~ outside funding.*

This section also limits eligibility for infrastructure investments to municipalities, school administrative units, or career and technical regions, and 501(c)(3) organizations for reuse-enabling investments. However, the law does not place any restrictions on who may receive investment funding. AMERIPEN believes that full flexibility for eligibility is warranted to ensure that every option that can support packaging recycling in Maine. The S.O. and Department will still be responsible for evaluating the merit of each proposal, so there will be no loss in stringency

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for funding use. As such, AMERIPEN recommends striking specific references to entity eligibility and this recommendation is reflected in our attached redlines to the draft rule.

Paragraph (2)(a) requires infrastructure investment proposals to designate infrastructure as the property of the recipient. AMERIPEN is concerned that giving full ownership to these entities creates a risk of mismanagement of the property. As such, AMERIPEN requests that the entities agree to notify the S.O. when it intends to sell or discard the infrastructure, and to reimburse the S.O. if the infrastructure is sold before it is fully depreciated.

Paragraphs (2)(b) and (2)(c), as well as the **Submittal of investment proposals** and the **Annual evaluation of investment proposals** sections, contradict the statute by allowing entities other than the S.O. to submit investment proposals. Paragraph (A) of 38 MRSA § 2146(11) states, “The stewardship organization shall submit any proposed investment in education or infrastructure to the department...” No other submittal methods are allowed or contemplated. This is an area where the proposal places more duties on the Department than allowed or merited. Thus, AMERIPEN requests that Sections 2, 4, and 5 be revised to reflect that only the S.O. may submit proposals, and that outside proposals instead may be submitted to the S.O. This recommendation is reflected in our attached redlines to the draft rule.

AMERIPEN appreciates the financial sustainability and cost-effectiveness requirements in paragraph (2)(d) and (2)(e). These will help ensure producer funds are used prudently and effectively, though they may result in the disqualification of some projects. To that point, paragraph 2(f)(ii) allows for pilot projects, but those may not be compatible with the financial restrictions in place. AMERIPEN requests consideration of flexibility for smaller projects and pilot projects, such as through a waiver process.

Subparagraph (2)(e)(ii) establishes a \$2,000/ton recycled cost effectiveness requirement for infrastructure proposals. AMERIPEN requests to know how the Department established this figure.

### **SECTION: Needs Assessment**

The minimum required components of the S.O.’s statewide recycling needs assessment are specified in 38 MRSA § 2146(3)(A)(7). AMERIPEN notes that the components in the conceptual draft rule do not fully align with what the enabling statute requires. For example, the draft rule makes no mention of transportation, market conditions, and consumer education needs, even though those elements are all required in the statute. AMERIPEN recommends that the

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Department revise the elements to reflect at a minimum what is specified in the law. This recommendation is reflected in our attached redlines to the draft rule.

AMERIPEN seeks the Department’s rationale as to why the needs assessment specifically looks specifically at “one or two” mixed packaging streams (as used in (3)(a)(ii)(1) and (3)(a)(iv)).

### **SECTION: Funding Availability**

This section of the conceptual draft rule is another area where the proposed language imposes prescriptive requirements on the Department that are generally are not mandated by the enabling statute. For example, paragraph (6)(a)(iii) requires the Department to conduct a request for proposals for major investment needs. This will add complexity to the process and increase workload for the Department, thereby increasing program costs. AMERIPEN recommends that this section concept be reconsidered with the goals of reducing its prescriptive nature and deferring some of the workload to the S.O. where allowable. This recommendation is reflected in our attached redlines to the draft rule.

# # #

AMERIPEN strives to offer a good-faith and proactive approach that integrates elements from other established packaging producer responsibility programs with hopes of developing a plan that will incentivize recycling growth and the beneficial impacts that come along with that in California. AMERIPEN continues to focus on strategies that develop and/or strengthen policies to progress the “reduce, reuse, recycle” strategies, while at the same time, enhancing the value of packaging. Our members are driving innovation, designing better environmental performance to evolve the recycling infrastructure and to create a more circular economy for all packaging. In our efforts to reduce environmental impact by increasing the circularity of packaging, our members continue to recognize the value of collaboration and the importance of working across the packaging value chain.

AMERIPEN looks forward to the continued open dialogue with the Department and interested stakeholders while collectively balancing between the myriad of needs for packaging, recycling, and sound solutions to grow a more sustainable future, an effective circular economy, and systems that achieve positive environmental outcomes for everyone, which in the end, ultimately assists in the success of this program. We remain committed to supporting progressive, proactive, and evidence-based strategies for a sustainable packaging program.

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As always, AMERIPEN thanks the Department for this opportunity to provide written comments regarding the above proposed conceptual draft rules and appreciates the Department staff's time and assistance during the rulemaking process. Please feel free to contact me or Andy Hackman with Serlin Haley, LLP (AHackman@serlinhaley.com) with any questions on AMERIPEN's positions.

Sincerely,



Dan Felton  
Executive Director