

October 30, 2023

Susanne Miller
Bureau of Remediation and Waste Management Director
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

RE: Extended Producer Responsibility (EPR) Draft Rules

Dear Ms. Miller:

I am writing on behalf of the Municipal Review Committee (MRC) to provide feedback on the draft Extended Producer Responsibility (EPR) rules proposed by the Maine Department of Environmental Protection (DEP). Ideally these rules would support a long-term plan to have a forward-thinking approach beyond a municipal transfer station to recycling and solid waste management. While we appreciate the effort to address EPR, we have some concerns that we believe need to be addressed to ensure that the rules are effective and fair for all stakeholders who are responding to the solid waste and recycling processing needs in Maine.

Part 1: Conceptual Draft Rules

1. Definitions

There are a few definitions that we are concerned about either due to lack of clarity or believe that they need to be included in the rules.

Disposal and Disposal Stream: We are concerned that the definitions of "disposal" and "disposal stream" in the draft rules may inadvertently exclude facilities like ours. The contradiction between Section 1.F. (Disposal Stream) and 1.H. (Mixed Packaging Stream) regarding material removed from the mixed packaging stream needs clarification.

2. Lack of Specific Guidance for Facilities Like Ours

The biggest concern for the MRC is that the draft rules do not specify or adequately address facilities like Municipal Waste Solutions (MWS). We see potential areas in the draft concept plan where facilities like ours can fit such as in the Needs Assessment but the rules should include definitions so there is no question about how current and future technology fit within the EPR rules. We operate as a quasi-municipal organization and play a crucial role in Maine's waste management hierarchy. We compound recycling efforts for municipalities by removing and recycling more from municipal solid waste. We can be an example of how reusable packaging material is being managed in other jurisdictions.

We believe the rules should lay out specific allowances for aggregating facilities like ours, as the current document does not seem to fully support the hub and spoke model the Maine DEP has discussed to achieve efficiencies in recycling. With the scope and magnitude of services MWS provides, it is obvious that we will play an important role in the success of the EPR program. We need clarity on whether or where our programs

fit into the envisioned EPR process; we want to be a DEP resource for fully implementing EPR in all areas of concern including processing, accounting, outreach, and communication.

3. Use of Median vs. Mean Costs

The draft rules use both a “median” and “mean” calculation. This is both confusing and inconsistent for calculating costs and reimbursements. We suggest that costs and reimbursements should be calculated using the mean (average) instead of the median (the number in the middle of the dataset).

4. Complexity and Record-Keeping Burden

The proposed structure for calculating the costs of managing packaging streams is highly complicated and onerous. Many municipalities may struggle to hire the necessary staff for record-keeping because there is no evidence that municipal costs incurred from record-keeping will be recovered from annual fees producers are expected to pay and the Stewardship Organization (SO) is expected to distribute.

We believe that the DEP should consider whether municipalities can afford to recycle all the listed material on the EPR list at today's recycle tip rates and transportation costs. There could be the unintended consequence that if a municipality does not comply with everything in this program, then they will not participate in the program at all.

MRC can be a resource to the SO and the DEP as we are already doing recordkeeping, outreach and communication for MRC members.

5. Capital Costs and Repurposing

The draft does not adequately address capital investments, particularly in relation to loan and lease financing. Borrowing costs are used as a surrogate for capital investments, which we believe is inappropriate. Hour meters for vehicle and equipment usage should be considered. Additionally, the draft lacks recognition of the value-added processing of packaging materials through repurposing technologies, which should be reimbursable under the EPR rules.

6. Full Disclosure Requirement for Packaging Manufacturers

We recommend a requirement for packaging manufacturers to fully disclose their packaging materials. This would enhance transparency, assist in determining manageable materials, and discourage the creation of blended packaging that is less environmentally friendly.

7. Stewardship Organization

The draft does not specify how the annual fees paid by packaging producers to the SO will be calculated or whether they will be paid in advance or in arrears. The SO charges annual fees to packaging producers in order to cover the SO operating costs and, presumably, capital investments, if any, not to mention reimburse municipalities for costs incurred to process packaging materials. As part of reporting and auditing, the SO should be required to meet with facilities like ours and vice versa. Stakeholders, processing & recovery facilities, and participating municipalities should be allowed to attend meetings for roundtable discussions.

We request that the rules clarify the funding mechanism for the SO and the submission of an operating budget to ensure transparency. We encourage the DEP to address questions like the following in the rules:

- To whom does the SO have recourse if fees charged to and collected from packaging manufacturers are insufficient to cover SO operating costs and/or to reimburse municipalities for the costs they incur?
- Is the State liable?
- Will the legislature have to allocate funding to support the EPR program if it is not self-sustaining?

8. Inclusion of Larger Facilities in the EPR Framework

As noted earlier, MRC can help successfully implement the EPR rules. Larger facilities like MWS in Hampden, of which MRC owns a stake, should be utilized to benefit the EPR program. Streamlining the process by having the SO work directly with MRC, rather than individual municipalities, could simplify the administration of the program. Should that be the case, given the additional work, we propose being recognized should there be a fund surplus.

We also believe that if there is a fund surplus, facilities like ours should fall in second place in the funding waterfall and be eligible for distributions due to the added expense acquired for additional reporting, education, and outreach. SO will be paid, and MRC and facilities like ours will be doing much of the work.

We also support the inclusion in the Investment Criteria section, that if MWS is included, MWS and its owners could receive funds for community outreach and education. If we were eligible for appropriate funding, we see opportunities for the MRC to provide transportation for collection of some recyclable materials that our members cannot collect, due to cost or volume issues. MRC could collect everything and consolidate it at the MWS facility, reinforcing the hub and spoke concept.

Part 2: Conceptual Draft Rules

1. Scope Definitions

There are a few definitions that we are concerned about either due to lack of clarity or believe that they need to be included in the rules.

Durable Product

Durable Product is defined in a counter-intuitive way. Contrary to what the definition says, durable products do depreciate and are replaced. They have finite useful lives. It's understood that the definition wants to convey something about durable products and recycling. Suggested definition: "Durable Product" means a product that wears out over an average life span of at least five years. A durable product's disposal or recycling values are not necessarily depleted through use."

Perishable Foods

We also believe that these rules should be consistent and not play favorites when it comes to perishable foods. Frozen foods are also ultimately perishable and both refrigerated and frozen foods are typically packaged for distribution and sale.

Producer

The definition of Producer is complicated. We suggest the following language (edits in bold italics):

Producer. "Producer" means a legal person that:

- (1) Has ***trademarked ownership of a branded*** product ***that is*** sold, offered for sale or distributed for sale in or into the State ***and*** that is contained, protected, delivered, presented or distributed in or using packaging material; or
- (2) Is the sole entity that imports into the State for sale, offer for sale or distribution for sale in or into the State a product ***that is*** contained, protected, delivered, presented or distributed in or using packaging material branded by a person that meets the requirements of subsection (1) and has no physical presence in the United States; ***or***

Product

"Product includes material sold in bulk for use in containing, protecting, delivering, or presenting items at a later time." Does "product" include shrink film, dunnage, inflatable dunnage? Equating "Product" with "delivery of an economic good" makes no sense. The act of delivering a product is, in essence, a "service" not a good. There is no apparent rationale for linking the definition of an economic good to the delivery of that good.

Include a definition of "economic good."

2. Readily Recyclable

Definitions

We encourage the DEP to leave an opening with a general description for future readily recyclable material that is not yet developed. With the speed of innovation these rules need to be adaptable to technological inventions.

Base Material

Definition of "Base Material" leaves the idea of "mixed" dangling. Is the intent to discuss the mixing of types of plastic or the mixing of the four basic material types (glass, paper, metal and plastics)—or both? Perhaps the definition could read as noted below (edits in bold italics), along with modified definitions for "Refill" and "Remanufacturing Facility":

- A. **Base material.** "Base materials" are glass, metal, paper, **and** plastic. ***Plastic may be mixed or classified*** by resin type.
- B. **Refill.** "Refill" means an operation by which an end-user ***has purchased and used the contents of a container and subsequently refills the same container with the same product, usually purchased from a bulk distributor or retailer.***
- C. **Remanufacturing facility.** "Remanufacturing facility" means the facility responsible for the final processing ***and packaging*** of a ***product to make it available as*** a new product ***for direct sale or distribution.***

We are seeking clarification of base materials because the current definition leaves questions: Colored and/or colored glass?, All metals?, Paper, meaning office, newsprint, magazines? Resin type, meaning #1, #2, #3, etc. plastics? Does mixed mean mixed plastics or co-mingled base materials?

The term "remanufacturing" does not adequately describe the process of "repurposing" waste materials that are diverted from landfills, which can either be sold as "new" versions of a recycled product or as products made from waste that has been "repurposed" as opposed to "remanufactured". "Repurposing Facility" would be a more descriptive and accurate term than "remanufacturing facility". The definition of "Remanufacturing Facility" should therefore be replaced as follows:

Repurposing facility

"Repurposing facility" means a facility responsible for the final processing and packaging of a material or materials diverted from a landfill to make a new or reconstituted product for direct sale or distribution.

Recycling Establishments

The EPR process envisions the participation of "recycling establishments" but does not identify either specifically or generally what those establishments might be. Recycling Establishment should be a defined term in order to identify the nature of entities targeted for participation. An attachment listing "Current Maine Recycling Establishments" would help clarify what the term means.

Entity

There should be a definition for Entity. An attachment listing the current Municipal Reporting Entities and Producer Reporting Entities required to communicate changes in Material types would be helpful. Single entities that currently represent many municipalities or process the solid waste of many municipalities should be listed in an attachment to clarify that municipal waste processing facilities that take the waste of multiple municipalities are expected to participate in the EPR effort.

Process for creating the initial packaging material types list

Department will make a "reasonable effort" to ensure recycling establishments and potential SO's are present. Would benefit from clarification regarding what efforts will take place.

Representative Audits

We believe the Representative Audits section requires language to specifically define and include MWS and facilities like ours. For example, if municipalities who do not source separate were audited, all the data would have to come from a facility like MWS, who separates materials for the municipality, in order to complete the audit.

What is the basis for the $\pm 3\%$ as an acceptable range of variance for relative weight packaging material results?

Litter Audits

MRC may be able to work with larger members who already do roadside cleaning. Containers could be placed in their public works departments and dedicated to litter audit collection. Those containers could be weighed to assist the SO. The draft does not recognize that many municipalities conduct spring cleanups to eliminate litter from their roads. The SO audit might obtain more accurate information, and be more representative, by using the results of community litter pick-up efforts for the audit process. The random selection of a 2-acre or 5-roadside-mile area could skew the data and be less reliable than comparing the annual results of annual spring litter removal efforts in randomly selected communities that conduct such efforts.

MWS collection volumes would be much greater than a transfer station and we may be able to remove materials from the waste stream that would be difficult for separation at a transfer station. This volume may qualify these items in our waste stream to be readily recyclable, where it may not be at other facilities.

Program Goals

We contend that 2030 is too soon to meet a 10% reduction in total packaging material goal.

We contend that having 50% of all packaging be classified as readily recyclable starting in 2030 is too soon.

We would like the DEP to clarify the basis for charging producers four times, five times or six times the per ton cost to manage the most expensive readily recyclable material for each ton of not readily recyclable material they produce.

Postconsumer Recycled Material

This is noted in the Program Goals section of the draft EPR but it is vague and requires a definition.

Clarification of Goals

The program goals appear arbitrary and unrelated to actual results achieved. Our suggestion is to establish program goals after EPR has been in effect for at least two years in order to have a basis against which to set goals and to measure actual progress.

Also, the program goals mention “reuse” but do not address “repurposing.” For example, using anaerobic digestion to repurpose organics and fiber into renewable natural gas or using glass grit as an additive to asphalt for building roads or to aid in the construction of drainage. Both of those processes which repurpose packaging materials should be reimbursable under EPR.

We want to make sure that gas from digestion counts as reuse for the fiber. We agree that if we are putting fiber in the ground to extract gas at a landfill, it should not count.

In the case of unmet goals, “Department will dedicate a percentage of investments to projects supporting reuse and refill.” Should there be a clarification of what these “investments” are? Are these “investments” the fees producers are going to be required to pay? Are part of these funds going to be invested and will the funds need to be invested in certain types of companies, for example companies with high ESG scores? Are they “investing” in individual towns? This seems unclear.

This section also shows why a facility like MWS would be a huge boost to the success of this program. Facilities like MWS could extract a much higher percentage of the recyclables from a waste stream to increase the total quantity recycled. Contaminated recyclable fiber and glass in a regular recycling processing facility would get rejected and sent to landfill or incineration. MWS will digest the fiber for gas and turn the glass into construction material. This is the absolute definition of reuse and will help Maine to meet stated recycling goals. EPR rules need to look beyond the traditional transfer station and baled commodity.

3. Producer Reporting and Payments

Definitions

The draft refers to Brick Code and to Global Product Classification. Please consider consistently referencing UPC as opposed to GPC.

The MRC would like to see an example(s) of component.

Defining Packaging Material

The discussion of “Throughput” fails to recognize the act of repurposing packaging materials to make other products, for example, using anaerobic digestion to produce renewable natural gas from fibrous packaging materials or repurposing glass as an ingredient in asphalt paving and/or drainage construction.

There is reference to “operational remanufacturing facilities” and to “recycling” packaging material. This reference ignores the process of repurposing repackaging materials. An example is the use of organics and fibrous packaging materials in anaerobic digestion to produce renewable natural gas. Repurposing organics and packaging materials as renewable natural gas is very different from “recycling” such materials.

What is the basis for the determination that three operational remanufacturing facilities must be available?

The fact that there are three operational remanufacturing facilities is a criterion for marketability. Does this take into account that the carbon cost to get “marketable” material halfway around the world to a facility may be much greater than the value received from recycling?

Producer Reporting/Initial Registration and Payment

There is no means of notification of businesses noted. How will all businesses know that a registration mechanism has been created? We also believe that 30 days is a short period of time.

There are going to be challenges to the registration fee assessed. The rules would benefit from a specific method of handling challenges/appeals from producers.

Producers should be responsible for providing a comprehensive list of their UPC codes to SO.

We request that the rules clarify what the program year will follow i.e., the calendar year or the State fiscal year.

Annual Reporting for Low-Volume Producers

The MRC would like to see the basis used to make the decision to use 15 tons as the amount that separates low volume producers from high volume producers.

Please clarify whether film falls under plastic. Almost everything today comes wrapped in a stretch film or in a bag within the packaging. The rules should clearly cover film.

How is the determination made that defines whether a material is “prone to be littered?” We request that the DEP clarifies that it is based on the litter audit, subjective assessment, etc.

Producer Fees

We believe that the producer fees may have the unintended consequence of making the producers push back from the state. Clarification on how these producer and incentive fees were arrived at may help.

The 5% litter fee per ton is based on litter audits that are only done in one community per year. We believe that this assessment of fees without adequate data will result in this legislation getting tied up in court. We are also concerned about what happens if a producer does not pay or whether they can appeal SO estimates or data. This will tie up program enforcement and revenue.

When MRC and members have expenses to comply with the program, we would like to know what guarantees reimbursements will be available when the time comes to distribute.

Alternative Collection Programs

Under this section, we believe that the MWS facility could fit in with some language revised and added.

Part 3: Conceptual Draft Rules

The use of EPR funds to finance capital investments is both inappropriate and potentially inefficient. It undercuts the intent of EPR to reimburse communities for costs they incur to deal with packaging materials.

1. Definitions

Investment Criteria

We have questions on whether the SO and the Department have roles to play in education and in helping to determine needs. We believe the answer is an unqualified “yes”. Should the SO and the Department “save” EPR funds for capital projects? The answer to that question is an unqualified “no”.

If EPR funds are going to be used to invest, rules should include a cost-share or matching funds component to ensure municipality has vested interest in success of investment.

Investment criteria language should be changed to reflect the fact that a group of municipalities may be represented as owners in the new infrastructure.

Once again, a clarification of the definition of “entity” would be helpful in determining who can submit proposals for investment.

We propose language for “a proven solution for improving the management of packaging material” be clarified to include proven solutions outside the State of Maine.

Proposal

MWS, and similar facilities, can serve as proving grounds for pilot projects to improve the management of packaging material.

2. Needs Assessment

We suggest that 18 months to conduct a recycling needs assessment for the entire state is not enough time.

Most municipalities belonging to the MRC will be identified as “not providing for collection” due to the fact that they are recycling at MWS, not at the user or municipality level. This will unnecessarily exclude municipalities that are recycling packaging materials using our method. It may be helpful to include the MWS model in the definition of collection.

Facilities like MWS need to be specifically included as regional options to efficiently manage packaging material.

3. Submittal of Investment Proposals

The MRC would like to know whether the public/stakeholders have any input on the investment proposals submitted.

4. Annual Evaluation of Investment Proposals

Establishing and gearing up to implement procedures to evaluate, prioritize and fund projects that do not benefit all EPR participants is inherently unfair. The proposed investments allocation structure introduces favoritism and preferences and in doing so it compromises the integrity of the EPR program. Moreover, administering the program introduces costs and reduces amounts available for distribution to EPR participants, many of whom would never benefit from the capital investments the SO and the Department decide upon.

A preferred alternative approach is for the SO and the Department to encourage cooperation among communities that do not work together but could. Capital investments are always more efficient and optimize returns when they serve the largest number of communities possible. The SO and the Department would encourage communities to pool their EPR funds to support mutually beneficial projects. This “bottom up” approach keeps EPR reimbursements where they belong, in the hands of the communities that deserve them.

5. Funding Availability

This section talks about investing in projects and only leaving one year of costs as a reserve to keep the program funded. Is one year of costs an appropriately conservative reserve?

With MMBB SRF loan funding administered by the DEP, the loan contains funds that are paid to the DEP by the borrower used to finance their, DEP, budget. Are any of the penalties, fees or any direct payments going to go to the DEP from the savings plan for a similar reason?

6. Department Approval of Investment Proposals

We have a number of questions regarding this. Will the proposals be presented to the SO or DEP? Which has final say on awards and denials; will they be sent to the SO who will review and rank them then go to the DEP with a recommendation?

Will there be an appeal process if a proposal is denied? Can the 90 days be broken down into a specific number of days per part of the review process?

In Closing

We appreciate the opportunity to provide these comments and request that the DEP carefully consider these concerns and suggestions during the rulemaking process. Our goal is to ensure that the EPR rules are clear, comprehensive, fair, and effective in achieving their intended environmental and waste management objectives.

Thank you for your attention to these important matters. We look forward to continued collaboration and dialogue as we work towards a sustainable and efficient waste management system in Maine.

Sincerely,



Michael Carroll
Executive Director
Municipal Review Committee