

March 18, 2024

*Submitted via email: MainePackagingEPR@maine.gov*

Brian Beneski  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, Maine 04333-0017

**RE: Chapter 428 Stewardship Program for Packaging rules; Comments – Posting Draft**

Dear Mr. Beneski,

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 the posting draft of the proposed rules for the **Stewardship Program for Packaging** (“program”) (38 MRSA § 2146). AMERIPEN respectfully submits these written comments for consideration and with requested modifications to the draft rules.

AMERIPEN is a trade association 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. This includes materials suppliers, packaging producers, consumer packaged goods companies, retailers, and end-of-life materials managers. Our membership also includes a robust array of industry, material, and product-specific trade associations who are essential to the AMERIPEN fabric. We focus on science and data to define and support our public policy positions, and our advocacy and policy engagement is based on rigorous research rooted in our commitment to achieve sustainable packaging 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 and clarifying questions from AMERIPEN, ordered by section, speak to the contents of the rules in the posting draft released by the Department on February 5, 2024.

## **Section 2. Definition**

AMERIPEN greatly appreciates the Department’s inclusion of the terms “alternative management” and “alternative management stream” in the draft rules, as well as the distinction between “alternative management” and “disposal.” AMERIPEN firmly believes that reimbursement for disposal costs of packaging material not readily recyclable should **not** be allowed under the program. This is evidenced in 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.

AMERIPEN remains concerned that definition of “consumer” will capture industrial, commercial, and other business-to-business entities rather than being limited to consumer packaging destined for municipal recycling systems that makes up the majority of packaging material that is recycled. The expansion of “consumer” in the draft regulations greatly broadens the scope of the law and will result in capturing many packaging materials that will already have a business entity paying for those materials. Additionally, in contrast to residential recycling systems, commercial and industrial packaging materials already have a payer for those materials and in most cases should not be any burden to municipal governments. 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.~~ A consumer does not include an entity that only distributes, delivers, installs, sells a product at retail, or undertakes any combination thereof.*

The definition of “durable product” uses an “*an expected lifespan of at least 5 years.*” AMERIPEN requests to know how the average will be measured. Additional flexibility in applying the “durable product” definition is also merited, given the wide range of products that are regulated under the law. Therefore, AMERIPEN recommends allowing a process for the Stewardship Organization (S.O.) or producers to petition the Department to treat products as “durable” even

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if they do not meet the five-year lifespan standard. This could be implemented with the following language:

***“Durable product” means a product that wears out over an expected 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 otherwise does not meet this definition, upon the petition and provision of justification from the S.O. or a producer.***

“Manage” is defined to mean “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 uncertain 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 doing all 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.

For the definition of “reusable packaging material,” what is meant by “several” in the phrase “reused several times?” For example, would two reuses constitute “several?” Additionally, AMERIPEN seeks more clarity about what constitutes a “change of format.” Finally, AMERIPEN recommends that home reuse and refill be incorporated into the definition to maximize the opportunities to adopt them. These systems currently have the greatest potential for reuse functionality and packaging source reduction.

Regarding the definition of “toxics,” AMERIPEN requests that DEP review the application of the chemicals from the two statutes referenced for their applicability to packaging materials and if they are even relevant. Those laws deal with children’s products and food packaging, and therefore should not be applied indiscriminately to all forms of packaging. Additionally, AMERIPEN requests that the Department produce and update as necessary a discrete list of all chemicals that would qualify as “toxics” under this definition. 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.

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### **Section 3. Assessment**

In general, AMERIPEN appreciates many of the revisions made to the Program Goals compared to what was proposed in the concept phase, including specification that the “goals are not used to measure compliance” and the removal of various spending directives. However, AMERIPEN strongly recommends that the S.O., in collaboration with the Department and after the statewide recycling needs assessment has been completed, be able to propose programmatic goals in a manner that effectively balances costs, feasibility, and effectiveness. The S.O. is in a suitable position for this role because it will be informed by the needs assessment and its experience working with all recycling system stakeholders.

Pertaining to the Participation goal in paragraph (A)(1), producers, the S.O., and consumers all lack control over whether a municipality participates in the Program. “Participation” is not required as an element for performance goals under 38 M.R.S. §2146(13)(A)(5). 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. AMERIPEN recommends that this goal be stricken and that DEQ instead work with municipalities to encourage participation using existing resources, and the goal should be reframed for recycling access. Should this goal remain, AMERIPEN also seeks to know why the Participation goals have increased substantially from what was proposed in the rule concepts previously shared in 2023, especially for the 2030-2034 period.

The Reduction goal in paragraph (A)(3) for packaging weight entails escalating percentages that ultimately reaches 50% by 2050. It applies to the total weight for all packaging material. This goal significantly exceeds the ambitious single-use plastic source reduction policy California has adopted within their packaging extended producer responsibility law, in terms of materials covered, amount to be reduced, and pace of reduction. DEP’s proposed Reduction goal is unrealistic and should be readjusted to at least align with California, including using the same benchmarking year of 2013 to account for producers’ historical progress on source reduction that has taken years and millions of dollars to achieve. Further, AMERIPEN requests that: (1) the reduction goal be normalized by the number of packaging units shipped, to avoid creating a barrier to future business growth; (2) producers be able to receive credit for historical reductions, to avoid penalizing companies that have already significantly optimized their packaging; and (3) producers who make reductions in plastic materials through replacement with other materials not be subject to reduction requirements for those replacement materials. Finally, AMERIPEN seeks a specific enumeration for how these reductions will be calculated.

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For the Reuse goal in paragraph (A)(4), AMERIPEN recommends collaboration among the S.O., producers, and other interested parties before specifying discrete reuse targets. Additionally, this goal focuses exclusively on reuse, which leaves out opportunities to encourage refill. AMERIPEN requests that this provision be revised to ensure that the refilling of packages by the original consumer, whether inside their home or outside, be incorporated into the goal, in alignment with the suggested revision to the “reusable packaging material” definition above. Furthermore, federal law restricts the reuse of packaging designed with child-resistant closures, so AMERIPEN requests that packaging restricted for reuse by law or regulation should be exempt from this goal.

Regarding the Readily recyclable, reusable, or compostable goal in paragraph (A)(5), it is important that the Department address the reimbursement issues AMERIPEN has identified in Section 5. 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, AMERIPEN requests that there 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. Finally, the number of the most common packaging material types that are not readily recyclable that the S.O. must identify is unspecified, so AMERIPEN requests that it be clarified that the S.O. will determine this number.

The base material-specific recycling rate goal in paragraph (A)(6) requires each base material 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 rates in the Overall recycling rate goal, be initially proposed by the S.O. following the needs assessment and adjusted appropriately by base material.

The post-consumer recycled material content goal in paragraph (A)(8) requires packaging in each base material to use the same proportion of post-consumer recycled material. Like the base material-specific recycling rate goal, 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 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 for packaging for many types of products (i.e., food). This fact may make it impossible to comply with



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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 federal safety requirements not be considered when calculating the total weight under this goal and be discounted from the overall denominator. A waiver or exemption process via the S.O. with Department approval that reflects extrinsic limits should also be included in the rule.

Meeting the litter goal in paragraph (A)(9) is ultimately contingent upon consumer behavior and must first be fully informed by the pending litter audits. Not all litter has an equal impact on the environment, and it should not be assumed that packaging litter is the most troublesome form of litter. Given that, AMERIPEN cautions the Department in setting such steep expectations here. This approach also is flawed in its assumption 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. 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 as the measurement for the purpose of this goal.

Many of the program goals referenced above are based on the percentage of total packaging material weight across brands, but under the “Annual SO Reporting” subsection, the S.O. must 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. Such granular reporting may prove particularly difficult for smaller producers. AMERIPEN recommends that the Department remove this brand-level reporting, or else requests that it clarify why it seeks to include it, if it would be workable with the reported data, and what the Department is attempting to achieve with this data. AMERIPEN also requests the labeling eco-modulation factor be tied specifically toward achieving compliance with existing third-party national labeling standards until such time a clearer picture of what materials are uniformly recycled across the State of Maine.

AMERIPEN is supportive of the inclusion in subparagraph (B)(5) of the requirement for the S.O. to report “[j]ustification for any increase in realized program operating cost,” as it will provide transparency for the public and all program participants.

The “Litter Audits” subsection in paragraph (E) allows municipalities to suggest litter audit locations, from which the S.O. will randomly select a location to audit. AMERIPEN is concerned that 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

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approach will deliver a biased examination, which is 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 replacing subparagraph (2) with the following:

**“(2) 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.”**

#### **Section 4. Defining Packaging Material**

Subparagraph (A)(4) states that “packaging material used to contain products that, regardless of the consumer’s generator status, are hazardous in accordance with Chapter 850, *Identification of Hazardous Wastes*, can be classified as a distinct packaging material type.” As the statute in question is focused on packaging, not products within the packaging, this is an unnecessary distinction and AMERIPEN therefore requests removal of this provision.

In subparagraph (C), AMERIPEN makes a technical recommendation that the Department also be able to designate a packaging material type as “none” if it is not readily recyclable, reusable, or compostable.

While the provisions of paragraph (C)(1)(a)(i) have improved since the initial rule concept was published, AMERIPEN recommends deletion of “and conventions” in this paragraph, since “conventions” is undefined, and the intent of the applicable provision is covered by reference to “laws.”

Paragraph (C)(1)(b) establishes “throughput” requirements for the definition of “readily recyclable.” These requirements are supportably less restrictive than the rule concept, but AMERIPEN recommends that the S.O., in consultation with the Department, be empowered explicitly to determine when materials satisfy the proposed criteria.

#### **Section 5. Process for Defining the Packaging Material Types List.**

Subparagraph (B)(2) requires the S.O.’s annual report to the Department to include an appendix of suggested changes to the lists. AMERIPEN requests clarification as to which entity is making these suggestions, whether it is just the S.O. or any party.

According to subparagraph (C)(1)(a), newly readily recyclable materials must be reimbursed at the highest rate of other readily recyclable materials for two years. This blunt approach may be too long and will lead to excessive costs that do not reflect reality. That, in turn, may

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disincentivize producers from adopting readily recyclable materials. AMERIPEN believes the S.O. should be allowed to estimate the reimbursement rate as a transition period until reliable data is available. This can be achieved with the following language (as well as a parallel change in subparagraph (C)(2)(a)):

*(a) Producer payments made during the calendar year in which the change occurs must reflect the packaging materials type's designation as not readily recyclable during the prior calendar year. ~~For 2 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 third 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 estimate the schedule and rate of producer payments for the costs to manage the material and, when sufficient data is available, shall set the schedule and rate based on the actual cost to manage the material;** and*

AMERIPEN also seeks clarity about what is meant by “municipal reimbursement and participation requirements” in subparagraph (C)(1)(b). If this is meant to give municipalities a two-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 subparagraph (a) if the rate is too high, but little or no newly added material is actually recycled. To that point, it is fundamentally inequitable that there is a phase-in period with subparagraph (C)(1)(b), but no phase-out period in subparagraph (C)(2)(b).

### **Section 6. Defining Reimbursable Cost by Packaging Stream.**

The proposed rules break out various reimbursable costs for managing packaging streams. Paragraph (A) includes a category for “labor cost” that broadly covers “*the employee's time spent managing a packaging stream.*” In two other categories, (B) for “equipment cost” and (C) for “structure cost,” 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.

AMERIPEN is very concerned that, this formula 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



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requests clarification or a clear removal of the labor costs in the “equipment” and “structure” categories to not duplicate any of the costs under the “labor” category.

### **Section 8. Start-Up Registration and Payment.**

Since the initial concept draft proposal was published, AMERIPEN appreciates that the Department has provided increased time for producers to register with the S.O. when the rules take effect, by modifying this requirement from 30 days to 90 days. This is a more appropriate timeframe.

### **Section 9. Ongoing Producer Registration.**

Paragraph (A) requires a producer to register with the S.O. “when it begins producing packaging material,” but the producer may have begun that production years in the past. AMERIPEN seeks to clarify this provision to account for existing producers, as follows:

- A. ***Registration.*** *A producer must provide the following information to the SO when it begins producing packaging material, **or when this rule goes into effect if it already produces packaging material,** and must update the SO within 60 days of this information changing.*

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

- Reporting should be by category and then packaging components as defined in the producer specification system, rather than defined by separability for recycling.
- Reporting should not require a brick code if the producer does not utilize one.
- Given that SKU UPCs do not always change when a package changes, this level of reporting is not needed and would not create a distinction between packaging types and materials. AMERIPEN asserts that, while the statute references UPC code reporting, the Department should only require reporting of packaging materials by weight and units and could require UPC code reporting upon request if compliance with the law for all materials sold is in question for a particular producer.

AMERIPEN appreciates the addition of “intentionally added” in subparagraph (B)(8), which requires producers to disclose whether they can certify the absence of intentionally added toxics.

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However, AMERIPEN also requests that this provision be revised to reflect situations where a negligible amount of a chemical may be present, as follows:

*(8) Whether the producer can certify the absence of intentionally added toxics **above a de minimis amount**;*

Paragraph (D) governs how producers may use estimates when reporting data. AMERIPEN is grateful for the removal of the rule concept provision that would have subjected a producer that estimates weight from units to various eco-modulation fees.

AMERIPEN requests that the rules be clarified to explicitly state that producers be allowed to report based on national data prorated/normalized for Maine’s population.

### **Section 10. Producer Fees.**

As a general comment, and like the program goals referenced above, the type fees and incentive fees proposed in the draft regulations will be financially punitive for producers and introduce steep costs. AMERIPEN recommends instead to defer to the S.O. to set any type fees and incentive fees or credits in a manner that effectively balances costs, feasibility, and effectiveness, as well as the overall budgetary needs for an approved S.O. plan in the state. AMERIPEN also cautions against allowing collected revenues from exceeding actual management costs and a limited reserve; doing otherwise will inflate costs statewide.

Compared to the rule concept proposal, AMERIPEN appreciates the annual August 1 fee deadline and the provision of authority to the S.O. regarding late fees in the first paragraph of this section.

Paragraph (A)(1) sets the aggregate annual registration fee at the full \$300,000 – the maximum amount authorized in the statute. AMERIPEN seeks the Department’s analysis or justification as to why that value was determined appropriate, rather than a lesser amount.

Under subparagraphs (A)(2)(a)(i) and (A)(2)(b)(i), the type fee for reusable and compostable material types with less than 85% of the units produced managed for reuse or compost, respectively, are set at the type fee for the “most similar” type. AMERIPEN notes that it is unclear how the “most similar” type will be determined and requests more specificity. Additionally, 85% seems like a high threshold, and AMERIPEN therefore suggests consideration of a blended approach, whereby the actual management cost is applied in proportion to the amount of material reported as reused or composted. For example, if 75% of a given reusable material is reported as reused, then its type fee would be composed of 75% of the actual cost to reuse it plus 25% of the type fee of the most similar packaging material type. This may help mitigate situations

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that create perverse incentives if the type fee for the most similar type is lower than the actual cost of reuse or compost for the material.

AMERIPEN seeks to know whether the Department performed cost impact analysis regarding the fee provisions, as many appear to be pure speculation for cost factors. Specifically, subparagraph (A)(2)(d) requires producers to pay (at least) twice the costs for materials that are not readily recyclable, reusable, or compostable, based on the cost of the most expensive readily recyclable material rate. These two requirements will lead to unjustified costs. AMERIPEN recommends the S.O. instead determine the factor and propose that for approval by the Department in the stewardship plan.

Subparagraph (A)(2)(d)(iii) lacks a bifurcated fee approach for varying levels of recyclability/reusability/compostability, unlike subparagraph (A)(2)(d)(ii). Such bifurcation provides an incentive for producers to incrementally increase the recyclability/reusability/compostability of their material. AMERIPEN recommends bifurcating this subparagraph so that materials achieving a rate between at least 75% and 100% after 2050 would pay four times the cost.

Subparagraph (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.

Subparagraph (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. While this provision has been somewhat improved since the concept, AMERIPEN recommends letting the S.O. design any potential litter-related fee.

Subparagraph (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 supported by any reasonable standard. AMERIPEN requests that this incentive be tied to national labeling best practices and standards and be set by the S.O.

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### **Section 11. Alternative Collection Programs.**

Paragraph (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/industry collection program.

### **Section 13. Defining Municipal Reimbursement.**

When calculating municipal reimbursement, Section 13 requires the S.O. to determine the “per ton cost realized by similar municipalities in accordance with Section 15.” AMERIPEN raises a concern that limiting the inputs for the mechanism to measure municipal reimbursement to just geography and population (which determine “similar municipalities”) will leave out other 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.

Paragraph (E) requires municipal reimbursement at two “times the median per ton cost realized by similar municipalities for managing material through alternative management” for “packaging materials managed for recycling, and where a packaging material type is either not readily recyclable or is reusable or compostable but where the most similar packaging material type is not readily recyclable.” Doubling the costs of such materials creates unnecessary costs, and this approach will not be workable if no alternative management exists in similar municipalities. AMERIPEN recommends instead that in this situation the S.O. submit to the Department proposed costs for management and, upon approval by the Department, the S.O. compensate municipalities according to this approved rate.

### **Section 14. Obtaining Information for Municipal Reimbursement.**

Subparagraph (A)(1) states that “[a] complete cost study is not current if it was nullified because of a relevant change to operations or if it is 15 or more years old.” “Relevant change to operations” is not defined, nor is there any indication of who would determine if this occurred or of how that would be determined. Notably, “relevant changes to the management of a packaging stream” is used in paragraph 4(A)(2) and is specifically enumerated, but it is unclear if the meaning also applies to “relevant changes to operations.” AMERIPEN requests that the rule clarify if the definition applies to both subparagraphs, or that the rule specify what entity (presumably the S.O.) would determine when a “relevant change to operations” occurs, as well as provide guidance as to how that determination would be made.

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Subparagraph (A)(2) requires that if “a participating municipality or any affiliated contractor makes a relevant change to the management of a packaging stream, it must contact the S.O. to provide that information within 30 days.” AMERIPEN urges the Department to give thought to how it can be ensured that municipalities report changes in a timely manner – particularly those that will result in lower reimbursement. This may entail robust auditing and enforcement efforts.

Related, the second paragraph of subparagraph (A)(2) details what qualifies as “relevant changes to the management of a packaging stream.” The last example is “additional uses of energy affecting total metered energy.” While additional uses of energy will increase the need for energy and resultant costs, the opposite is also true: reduced uses of energy will lead to lower demand and costs that similarly affect management costs. AMERIPEN therefore requests replacing the word “additional” with “changes to” to capture all alterations made to energy usage.

Subparagraph (B)(2)(d) 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. This methodology relies on very small sample sizes and appears to risk biasing the average in favor of just two results that agree by chance. AMERIPEN seeks justification as to why this approach was chosen and how it will produce truly representative values. It may be preferable instead to let the S.O. set the nature of this applicability determination.

### **Section 16. Calculating the Tons Managed.**

Subparagraph (B)(2)(a) requires municipalities to report to the Department “total tons of the set of accepted materials received by the receiving facility,” which presumably is not a figure to which municipalities already have access. AMERIPEN suggests including an explicit requirement for receiving facilities to share this information with municipalities, including any appropriate confidentiality measures.

Subparagraphs (B)(3)(a) and (B)(3)(b) lack the language stating, “unless a specific case is brought to the attention of the Department and determined to be an exception,” which was included in corresponding language in the rule concept. AMERIPEN seeks the Department’s explanation for the reason for this omission.

As a technical note, the latest draft of the rules introduced a typo: subparagraphs (C)(1)(c) and (C)(1)(d) should instead be lettered as (C)(1)(a) and (C)(1)(b).



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### **Section 17. Investment.**

Paragraph (A) states that *“Proposals that improve the management of material other than packaging material must be supported with a commensurate source of outside funding that reflects the extent to which the investment will be used to manage material other than packaging material.”* In 38 M.R.S. §2146(11), it is provided that only *“the stewardship organization shall make investments in education and infrastructure **that support the recycling of packaging material** in the State”* (emphasis added). AMERIPEN appreciates the Department’s clarification to this provision to further ensure that investments beyond packaging material management are funded entirely by non-program revenue.

Subparagraph (A)(1) limits eligibility for infrastructure investments to municipalities, tribes, school administrative units, career, and technical regions, 501(c)(3) organizations, or businesses with less than \$5 million in total gross annual revenue. 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 for funding use. As such, AMERIPEN recommends striking specific references to eligible entities.

AMERIPEN appreciates the financial sustainability and cost-effectiveness requirements in subparagraphs (A)(4) and (A)(5). These will help ensure producer funds are used prudently and effectively, though that may result in the disqualification of some projects. To that point, subparagraph (A)(6)(b) allows for pilot projects, but those may not be compatible with the financial restrictions in place. AMERIPEN therefore requests consideration of flexibility for smaller projects and pilot projects, such as through a waiver process.

Subparagraph (A)(5)(b) establishes a \$2,000/ton recycled cost effectiveness requirement for infrastructure proposals. AMERIPEN requests to know how the Department established this figure.

AMERIPEN requests a technical change to subparagraph (E)(d) to achieve its intent, as follows:

(d) After allocating funding to previously identified major investment needs, the Department may approve, and, **if approved**, the SO must disperse or allocate to the savings plan, funding for new investment proposals

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AMERIPEN appreciates the addition of language in paragraph (F) requiring a contract between the S.O. and an investment recipient, including the requirement to refund misused funds.

The earlier published rule concept included a requirement for the S.O., in its annual report, to “include the amount of investment funding approved during the prior calendar year and a description of the approved investment proposals.” AMERIPEN supports the reporting of this information to give insight into investment performance and requests it be added back into the draft rules.

#### **Section 18. Packaging Stewardship Fund Cap.**

AMERIPEN supports the addition of this section governing the treatment of “excess funding,” particularly for the reduction of producer costs. AMERIPEN does seek the Department’s rationale for requiring the packaging stewardship fund to have at least enough funding to cover the amount of expenditures from the past five years, as provided in subparagraph (A)(1). That threshold may be too high to even facilitate this section or provide a realistic amount of reserve funding.

#### **Section 20. Requests for Exemption from the Post-Consumer Recycled Material Incentive Fee.**

AMERIPEN appreciates the addition of this section and acknowledgement of the limits of incorporating post-consumer recycled material. However, AMERIPEN seeks to clarify in the rule that, if a request is approved, the amount of the applicable fee would be entirely eliminated and not reapportioned to any other producers.

Additionally, the draft of these rules posted on February 5, 2024, removed an appeals process involving the Maine Board of Environmental Protection (BEP). AMERIPEN seeks to know why this appeal option was eliminated and requests some form of appeal be made available in the final rule.

AMERIPEN requests that packaging material that is precluded by law or regulation from using any post-consumer recycled material be excluded upfront from post-consumer recycled material goals and fees, rather than requiring a waiver request. This will save the Department resources from considering cases that are clearly constrained by existing prohibitions.

Finally, AMERIPEN appreciates DEP’s announcement on March 15, 2024, that producers may submit a packaging material exemption request if there are federal content or construction standards that preclude or significantly diminish their ability to increase the recyclability or

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reduce the volume of certain packaging material. This will help AMERIPEN members overcome compliance challenges presented by other requirements. AMERIPEN requests DEP to make this pathway permanent so that producers can adapt to any requirements that may be adopted in the future.

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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 Maine. 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 sustainable packaging policies and programs.

As always, AMERIPEN thanks the Department for this opportunity to provide written comments regarding the above proposed 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