

March 18, 2024

Via Electronic Submission

MainePackagingEPR@maine.gov

Re: Draft Proposed Rules for Maine’s Stewardship Program for Packaging

The Personal Care Products Council (“PCPC”)¹ is pleased to submit the following comments on the Maine Department of Environmental Protection’s (“Department”) draft proposed rules for Maine’s Stewardship Program for Packaging, released February 5, 2024 (the “Proposed Rules”).² Our member companies are involved in the distribution and sale of over-the-counter nonprescription drug products, cosmetics, toiletries, fragrances, and ingredients in Maine, and therefore have a strong interest in the scope and applicability of the Conceptual Draft Rules.

Our Position

The Draft Rules address in detail the importance of implementing LD 1541 (“EPR Law”) for the reduction of volume and toxicity in packaging material, and for the increased recycling of packaging material. While PCPC supports the Department’s role to establish a stewardship program for producers of covered products, and appreciate the revisions made after receiving feedback for the Conceptual Draft Rules, we do believe that the draft rules could be further revised to create a more efficient program as the current language is still onerous and will be costly to implement. We kindly request the Department to consider our feedback on the Conceptual Draft Rules concerning the below. Note that the comments below are a collection of feedback from various member companies and do not necessarily represent the feedback of every member company.

Definitions

It is unclear in the definition of “compost stream” as to if it includes all compost materials or specific types of compost material. The definition of “compost stream” should specify whether it includes industrial compost, at home compost, or both. Additionally, the definition of “composting” should align with definition in other states to prevent confusion as producers navigate compliance with several states. For the definition of “consumer”, we request for clarification on the definition, specifically on (i) whether the definition intentionally excludes

¹ Based in Washington, D.C., PCPC is the leading national trade association representing the cosmetic and personal care products industry. Founded in 1894, PCPC’s more than 600-member companies manufacture, distribute, and supply the vast majority of finished personal care products marketed in the United States. As the makers of a diverse range of products that millions of consumers rely on every day, from sunscreens, toothpaste, and shampoo to moisturizer, lipstick, and fragrance, member companies are global leaders committed to product safety, quality, and innovation.

² See Maine Department of Environmental Protection, Conceptual Draft Rules, available at <https://www.maine.gov/dep/waste/recycle/epr.html>.

entities such as hotels and schools and (ii) whether it includes an end use consumer, and if so, this should be specified or otherwise specifically excluded.

Consultations

Although the reduction of cost studies from 20 to 12 is an improvement, 12 cost studies would still prove to be very costly. It is unclear why it is necessary to have specifically 12 cost studies as it appears to be an arbitrary number. If it is at all possible to reach the goals of the EPR Law with one annual cost study, we would favor that approach with the understanding that this would decrease the burden on the SO to find resources to conduct such studies and decrease the cost for producers which could be allocated elsewhere for the benefit of the EPR Law. Additionally, we request the Department to provide the methodology that the SO will use for the compost cost study. Lastly, we recommend the Department consider that consistency and alignment with the other EPR states could deliver favorable results, such as efficiency, better data, and more compliance.

Readily Recyclable

We appreciate the Department's response in simplifying the annual review process for packaging material types list and readily recyclable list. We further request the Department to consider harmonizing the lists across states and consistency with federal guidance.

During the transitional period from not readily recyclable to readily recyclable, producer payments are based on the "highest management cost." We request for the Department to clarify how to determine "highest management cost" and how producers will have access to this information.

Since the Readily Recyclable list is subject to change or update annually, the Department should consider how such updates will affect a producer's ability to meet the target dates. Additionally, the deadlines and penalties for producers with packaging material that is not readily recyclable seem arbitrary and extremely severe. There should be a sound basis for additional fees, such as additional cost to handle not readily recyclable materials or investments needs to improve recycling. Additionally, we request the Department to reconsider the 100% target, as there could be small traces of material that could slightly lower this percentage. Certain products will require longer lead times and infrastructure investment to recycle (i.e. plastic small formats), and this should be considered in review of the program goals for readily recyclable.

Representative Audits

We request clarification on why "weight" is used in certain provisions, while "volume" is used in others. This provision also includes language regarding the accuracy of the audits. The Department should consider clarifying who and how accuracy will be determined. Additionally, the purpose of site-specific audits is unclear (i.e., do they result in higher reimbursement rates for that specific jurisdiction?). If the purpose is for higher reimbursements, the Department could be

constantly subjected to requests for site-specific audits so it could be beneficial to add a cap either in terms of numbers per year or no more than a certain percentage of the SO's administrative costs.

We request the Department to consider the efficiency of any audits and how to reduce costs. The infrastructure will need to support successful audits. Further, we request the Department to specify the use of the litter data as litter audits appear to be unnecessary to achieve the overall goal.

Reduction

So as not to create a barrier to future business growth, the reduction goal should be only a weight-based goal and needs to be normalized by the number of packaging units shipped. In addition, so as not to penalize companies that have already taken significant steps to optimize their packaging, a mechanism should be added to allow producers to receive credit for historical reductions nationally. California's SB54 has incorporated similar credits for reference. Furthermore, we recommend that, in addition to the credits for historical reductions, the baseline for reductions be aligned with other states with EPR laws so that producers are working against one baseline for reductions nationally. As some reductions will require shifts between materials, we request the addition of the following language: "Producers who make reductions in plastic materials by replacement with alternate packaging materials will not be required to meet reductions on the replacement materials."

More specifically, there are physical limitations to how much packaging can be reduced to still practically and safely transport products. For example, if companies reduced packaging by 25%, further reducing by another 50% would mean a total reduction of 75%. We request for the Department to consider that certain products (i.e. mascara) would not be functional if more packaging is removed. As such, we further request the Department to consider alternative routes in the event these percentages are too aggressive for certain products or industries. The rules should be revised accordingly in consideration of such products. Producers should be credited for already taking steps to address these goals due to their own initiative or required by other jurisdictions, such as California. Additionally, not all of the program goals are appropriate for all of the base materials, i.e., glass, metal, paper, plastic. We request clarification on how these reductions will be calculated (e.g. at a high level like plastic, paper, metal or more granularly).

It is also important to note that materials that are typically widely recyclable (i.e. glass, metal, and paper) typically are heavier in weight than plastics. With the transition to more packaging becoming recyclable, it should therefore be accounted for that weight is likely to increase as a result of designing for recyclability. It should, as such, be clarified if this reduction pertains to total packaging, or if it is specific to waste/nonrecyclable materials only.

Reusable/Refillable/Reuse Systems

The Proposed Rules are written with more emphasis on “reuseable” or “reuse” compared to the references to “refill” or “refillable”. We request for the language in the reuse program goals section to be modified to incorporate reuse in the home by a consumer from a package purchased to refill the reusable package as this is not captured by “managed for reuse by municipalities or through alternative collection programs”. Further, the Department should consider defining the “reusable systems” with the inclusion of a refill at home option. We also request the Department to expand the definition of “reusable packaging material” to include a refill at home option as well. The following is suggested revised definition.

"Reusable packaging material" means packaging material that is designed to be reused several times for the same purpose and without a change in format after initial use, to include allowing the business or the consumer to put the same type of purchased product back into the original packaging, and the return and reuse of which is made possible by adequate logistics and infrastructure as part of a reuse system.

Many reuse/refill definitions are geared toward mass-market models. This does not always work for products such as cosmetics, as the refill outer packages may stay with the consumer and do not get returned to the producer to be sanitized. This is due to hygiene reasons so as to protect the product quality and safety for the consumer. If the refill/reuse definition does not become more encompassing of other refill models, it should remain limited to sectors in which the deposit return system has proved efficient and should not be applicable to all industries. Lastly, packaging designed with child-resistant closures may not be reused under federal law and thus should be exempt from this goal.

Postconsumer Recycled Material (PCR)

Packaging materials that are restricted from using PCR due to federal law (e.g., transportation regulations) should be clearly out of scope of these requirements and not included in the total weight of packaging material used to calculate the percentage that is postconsumer recycled material. Additionally, due to an insufficient supply of high-quality PCR and the potential for migration of chemical contaminants to the product being protected, we recommend exempting PCR mandates for the packaging of certain products such as drugs, medical devices, and hygiene products (e.g. diapers, menstrual products, toilet paper, baby wipes) and products intended for contact with food (e.g. paper towels).

Litter

We appreciate the Department’s revisions to the litter program goals and removal of the investment project requirement. In addition to these revisions, we recommend that given that all other aspects

of the regulation are based on packaging weight, the litter goals should also be expressed in weight (vs units).

Toxics in Packaging

The definition for toxics is broad with some references to specific product categories that are not relevant to all covered products under the EPR law. One such reference is Reduction of Toxics in Packaging, 32 M.R.S. §§ 1731-1738 (2019), which regulates PFAS in food packaging, but not in all packaging. The Proposed Rules now penalizes all packaging and as a result regulates PFAS in all packaging in a way that was not intended or proposed under the referenced law. We request the Department to revise this definition to only have the toxics list apply to the specific product category in which it was intended in the referenced regulation.

Further, we find the use of the priority chemicals list under the "Toxic Chemicals in Children's Products" to be overly expansive, especially given that a producer must certify no intentional addition of toxics to avoid an increased packaging material fee. Certification to a list of over 1000 banned chemicals, which otherwise would not have been applicable, is burdensome and unnecessary as it yields a patchwork of compliance. We would also like the Department to consider that there could be traces of toxic chemicals in PCR as the material is reprocessed. The Department should consider whether the elimination of every trace of toxics will be feasible for producers.

Reporting Requirements & Payment Penalties

Additional time must be allowed between producers reporting to the stewardship organization (May 31) and the payment of fees (August 1). Two months is a short time period for the stewardship organization to analyze data from all producers and calculate and invoice fees. The statute does not appear to dictate this short time frame nor a requirement to impose a penalty if producers are delinquent. Fortunately, the language is more flexible than originally proposed in that the SO "may apply late fees in accordance with its approved plan to the Department". Nonetheless, we request a more realistic time frame to be built into the Proposed Rules.

We recommend the Department to reduce the reporting requirements in the Proposed Rules as it goes well beyond the EPR law as well as what the SO may need for its annual report. The EPR law states that a "producer shall annually report to the stewardship organization the total amount, whether by weight or volume, of each type of packaging material sold, offered for sale or distributed for sale in or into the state by the producer in the prior calendar year." The Proposed Rules goes beyond by requiring producers to additionally provide information on product labeling, certification for absence of intentionally added toxics, whether the producer is "aware of reuse systems for the packaging material in the state or elsewhere". This is overly broad and outside the resources and information readily available to the producer. Producers do not typically have visibility into where the goods they produce are distributed, therefore having producers "report, for each distribution network, the distributor, the distribution area, and the number of total units distributed throughout the network" would be difficult, if not impossible, to obtain. We request the

Department to consider requiring only the information necessary for the purpose of the annual report, as to not burden producers and cause compliance to be complicated.

Reporting obligations should be simplified to allow calculation of fees against statutory obligations without additional complexity that is unnecessary and could introduce inaccuracies given producer data may be organized in different ways. To this end, the following should be considered:

- Given that SKU UPCs do not always change when a package changes, other codes that represent the various SKU versions sold during the reporting year should be the basis of reporting rather than UPCs.
- Reporting for multi-material components should be by individual material type and not by heaviest material type.
- Reporting should not require brick code as not all companies use brick codes.

Many of the program goals are based on a percentage of the total packaging material weight across brands, so it is unclear how reporting at the brand level against a multi-brand measure would work. Lastly, references to reporting packaging material type “produced” in the section for Annual Reporting for Producers Other Than Low-Volume Producers and throughout the Proposed Rules should be revised to be consistent with the language in the statute that refers to “packaging material sold, offered for sale or distributed for sale in or into the State.”

Estimates

Please clarify that reporting based on actual shipments at the national level and normalized for Maine’s population are not subject to malus fees associated with estimated data.

Incentive Fees and Payment Penalties

The Proposed Rules require a litter fee for producers who are associated with a packaging material type that consistently represents one of the top 5 packaging material types collected during a litter audit. It is possible for packaging that causes the majority of litter to be of the same packaging material type as packaging that is not causes the majority of litter. We request the Department to clarify the Proposed Rules as to penalize such producers who are not significantly contributing to litter.

We recommend the Proposed Rules to reflect that there are more ways to encourage consumer adoption of reuse, including refill at home options, which may also include labeling that instructs the consumer on how to refill the container. The Proposed Rules seem to be restrictive in terms of labeling for reusable packaging with higher fees attached if a producer is unable to comply with the following: "a material management pathway is available if there are alternative collection programs managing the packaging material type in every county in which it is sold". We request revisions for in home refill or other reuse options that may be developed in the future.

Exemption

Packaging materials that are prohibited from using postconsumer recycled material due to federal law (e.g. transportation regulations) should be clearly out of scope of these requirements and not included in the total weight of packaging material used to calculate the percentage that is postconsumer recycled material. There should be a clear exemption for such packaging in the regulations rather than a process to request exemption.

Thank you for the opportunity to submit comments on the Proposed Rules, and we look forward to continued engagement on this important issue.

Best regards,
Kenisha Cromity
Staff Counsel
Personal Care Products Council