



March 18, 2024

ME DEP
Attn: Brian Boneski
Supervisor, Recycling Programs
Division of Materials Management
Bureau of Remediation and Waste Management
17 State House Station
32 Blossom Lane
Augusta, Maine 04333-0017

Sent via email: MainePackagingEPR@maine.gov

RE: Feedback on Chapter 428 Draft Rules for Extended Producer Responsibility Program for Packaging

To whom it may concern:

Circular Action Alliance (CAA) appreciates the opportunity to provide feedback on the conceptual draft rules for Maine's Extended Producer Responsibility Program for Packaging.

CAA is a U.S., non-profit producer responsibility organization (PRO) established to support the implementation of extended producer responsibility (EPR) laws for paper and packaging. CAA's Founding Members include Keurig Dr Pepper; General Mills; Niagara Bottling; The Coca-Cola Company; Danone North America; Ferrero; L'Oréal; Nestlé; Procter & Gamble; PepsiCo; Unilever; Colgate-Palmolive; The Clorox Company; Mars, Incorporated; Mondelez International; SC Johnson; Kraft-Heinz; Walmart; and Target. CAA has been selected as the PRO responsible for administering paper and packaging EPR programs in Colorado and California and was selected to represent producer interests and serve as the single PRO on the State Producer Responsibility Advisory Council in Maryland. The organization is also preparing to submit a program plan to Oregon Department of Environmental Quality by March 31, 2024.



CAA applauds Maine's Department of Environmental Protection (DEP) for the progress it has made implementing the EPR program for packaging. CAA team members have significant experience in EPR implementation and program operation, playing integral roles in the creation, operation, and improvement of producer responsibility organizations. Following our team's review of the draft rules, we have prepared some recommendations and identified clarification questions in this submission that we believe will help producers and the selected SO implement the program while encouraging municipal participation in the program. We wish to see Maine's EPR program succeed and submit these comments in the spirit of collaboration towards that mutual goal. Our comments are presented by Draft Rule Section.

1. DEFINITIONS

A. **Alternative Management.** "Alternative management" means methods of managing solid waste that are prioritized above land disposal of waste and below composting of biodegradable waste according to the State's Solid Waste Management Hierarchy pursuant to 38 M.R.S. §2101.

1) CAA supports the creation of a circular economy and, to that end, suggests that producer funding should cover only activities to incent advancements in this area. We are also seeking clarification on which activities are meant to be included as alternative management.

C. **Base Material.** "Base material" means, with regard to packaging material, the primary material or the primary material that is targeted for recycling, as designated by the Department in accordance with Section 4(B). Base materials are glass, metal, paper, plastic by resin type, and composite.

1) CAA suggests that the DEP define base material uniformly by material types in a consistent fashion by removing "by resin type" from the definition. This would greatly simplify program inception for both the SO and producers, contributing to its success in the first few years. Once the program has stabilized, the DEP may wish to introduce a more granular approach, subdividing plastics by either rigid or flexible formats. As the program builds its data and understanding of the recycling system in Maine, the DEP could progressively introduce additional granularity such as resin type.

2) CAA notes the term composite is included in the draft rules but it is not defined. CAA assumes this means materials composed of more than one base material, such as a package made of fiber and plastic. CAA suggests the DEP define this term to reduce the potential for misreporting.



L. **Consumer.** “Consumer” means the entity that uses a product, including an entity that uses a product to create a new product. A consumer does not include an entity that only distributes, installs, sells a product at retail, or undertakes any combination thereof.

- 1) As drafted, the definition of consumer includes both residential and industrial, commercial and institutional (IC&I) packaging. However, if a producer can show the material is recycled outside of the municipal system (i.e., IC&I), they can claim an exemption for this material. In most cases, such programs are not producer-driven, and the producer would not have access to such data. Haulers have contracts with individual factories, businesses and government buildings that have no producer involvement. Intervention in these commercial relationships would be disruptive. As a result, while this packaging is likely being recycled, producers and the SO will have no concrete data to measure the impact. This represents a significant concern, as many of the goals and targets set forth in the draft rules measure the quantity of materials supplied into the markets as compared to the goal (i.e., quantity collected, recycled, etc.). We suggest limiting the obligation at this time by defining consumers solely as consumers of residential packaging to ensure the denominator is aligned to the numerator in reporting progress toward achieving goals. This is important for the following reasons:
- Most municipal programs do not handle large quantities of IC&I, if any at all.
 - The municipal reimbursement program outlined in the draft rules focuses on residential collection, yet all materials are obligated, and goals are measured assuming all material is managed by municipalities.

Q. **Manage.** “Manage” means to collect, transport, process, and otherwise prepare a packaging stream for reuse, recycling, composting, or disposal. Manage includes educational initiatives to facilitate collection and litter pick-up.

- 1) CAA is seeking clarification of the DEP’s intent in stating: “educational initiatives to facilitate collection and litter pick-up.” CAA suggests this section would be clearer by stating educational initiatives to facilitate participation in recycling programs and anti-litter campaigns. We suggest “disposal” be removed from this definition.

R. **Mixed Packaging Stream.** “Mixed packaging stream” means packaging material and other material that is managed together prior to being separated into disposal streams or commodity streams.



T. **Packaging Stream.** “Packaging stream” means packaging material and other material that is managed together. Commodity streams, disposal streams, reuse streams, compost streams, mixed packaging streams, and alternative management streams are types of packaging streams.

- 1) The definitions of “mixed packaging stream” and “packaging stream” require clarification. It might be clearer to define streams according to streams that are collected (incoming stream) and sorted/processed (outgoing processed stream).

W. **Producer.** “Producer” means a person that:

(1) Has legal ownership of the brand of a product sold, offered for sale or distributed for sale in or into the State contained, protected, delivered, presented or distributed in or using packaging material;

(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 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

(3) Adds packaging material to another producer’s product for distribution directly to a consumer. This person is only the producer for the packaging material it adds. ...

- 1) CAA suggests that part (1) include that the entity has a physical presence in the U.S. This seems to be implied, based on the “and has no physical presence in the U.S.” portion of (2), but should be explicitly stated.

X. **Product.** “Product” means an economic good that is marketed or sold.

Material sold for use in containing, protecting, delivering, or presenting items at a later time is a product and, therefore, does not constitute packaging material. Material bought at the point of sale for use containing, protecting, delivering, or presenting other purchases is not a product, it is a packaging material.

- 1) The current definition creates confusion between packaging sold to producers to be filled and packaging sold to residential consumers. CAA supports a separate definition for “unfilled packaging” and defining product as “meaning an economic good that is marketed or sold.” We would be pleased to meet to discuss a potential solution.



EE. Target Material. “Target material” means a packaging material type that is used by a receiving facility to make:

- (1) Filtration media for use in a manner that does not constitute disposal, abrasive materials, glass fiber insulation, or construction materials for use in a manner that does not constitute disposal;
- (2) Smelter or furnace-ready metal;
- (3) Pulp;
- (4) Recycled plastic pellets ready for use in an extrusion or molding operation or recycled plastic flakes that do not require further processing before use in a final product; or
- (5) A commodity for sale to a market with a set of accepted materials that share the same base material.

- 1) We suggest removing items 1–4 and rewording item 5 to say: “A commodity for sale or supply to an end market or for a use that does not constitute disposal.” The current definition is limiting and does not consider evolving and alternative markets (as an example, whole cartons markets that use the entire beverage carton in manufacturing building products). Also, due to price fluctuations in commodity markets, adding “or supply” to item 5 (i.e., a commodity for sale or supply...) would allow for materials to access markets where the material might have a negative value, or no value, but can still be used as a feedstock or in place of a purchased product.

Other suggested comments regarding definitions:

- 1) Covered packaging material is not defined. Many explanations throughout the rules could be made in a simpler fashion if that term were defined and used. We suggest the DEP explore the definition in Colorado.
- 2) CAA recommends that producers not be obligated to report number of units supplied into the state. However, if producers must include units in their reporting, “unit” should be defined. The term “unit” is not self-explanatory. For example, without a definition, it is unclear if a six-pack of beverages with an overwrap would be a single unit or six units. If a six-pack is not a unit, then how is the overwrap or can carrier captured? If a six-pack is a single unit, then this seems to reduce the importance of using units as a metric. Due to the near limitless number of packaging quantities, formats and sizes, unit-based reporting and goals toward reducing the number of units lose their meaning as they defy comparison. Given the complexity, unit reporting should not be used.



- 3) CAA suggests the DEP clarify whether food-service packaging (such as to-go wraps and containers) is included, confirm that single use-bags provided at retail are included in the program, and clarify whether this also includes produce bags supplied by retailers.

3. ASSESSMENT

A. Program Goals

General Comments:

- 1) Many of the goals presented in the Assessment section are likely not attainable in the defined time frame. CAA suggests the DEP institute rules that promote a clear understanding of the performance required to meet goals and targets. To that end, the DEP should institute goals that follow the SMART approach (i.e., goals that are specific, measurable, achievable, relevant, time-bound).
- 2) Ideally, DEP and the SO would set goals for the program following the needs assessment to ensure goals have a solid foundation and follow the SMART approach.
- 3) Because achievement is measured by allocating all materials to municipalities by population, diversion of some materials to commercial recycling programs will affect the SO's ability to achieve goals such as recycling rate, collection rate, and base material recycling rate.
- 4) The SO will require more time to conduct an analysis when specific goals are not met and chart a path to meeting them. We recommend extending the SO reporting deadline from January 30 to July to allow the SO sufficient time to officially close the year-end with assurance audits conducted on both its financial and operational results before publishing its annual report.
- 5) As mentioned previously in our comments on the definition of "consumer," we are concerned that data will not be available for much of the recycling that takes place with packaging material between businesses. This material is often backhauled and recycled through more direct programs, not through material recovery facilities (MRFs) or through municipal programs. Producers cannot be expected to have knowledge about these recycling activities, and such programs may not be suitable for or wish to apply to be an alternative collection program with DEP. Phasing in the IC&I stream would give time to explore solutions for this issue.



Comments on Specific goals:

§ 3 A (1) Participation.

- 1) The level of granularity the draft rules propose for municipal reporting may significantly impede onboarding new municipalities and thus the ability for the participation goals to be achieved. We suggest setting goals following program inception, once the SO has had the opportunity to engage with municipalities to better understand barriers to their participation and what is required to overcome them.

§3(A)(2) Collection:

- 1) The most recent State of Recycling study by The Recycling Partnership indicates a participation rate of only 45% where recycling access exists in Maine (compared to 59% nationally). As such, the collection goals are likely not attainable, and CAA recommends revising them following the SO-mandated, formal needs assessment.
- 2) A key concern for achieving these targets is the assumption that all materials placed in the market are/will be managed by municipal recycling. The aforementioned diversion by IC&I, as well as other commercial entities (e.g., multi-family dwellings with private contracts) will potentially significantly impact the numerator in the calculation of these goals, resulting in a lower collection rate. CAA suggests focusing on residential packaging, at least until the program stabilizes and data can be accumulated.
- 3) Likewise, CAA notes that Maine's mature bottle deposit program's return rate was reportedly 78% in 2022, despite being in place since 1978.

§3(A)(3) Reduction:

- 1) Packaging manufacturers have been lightweighting their packaging for years to achieve both economic and environmental benefits. In many cases, achieving further significant decreases will affect the integrity of the packaging and its ability to protect the product.
- 2) As a result, producers would need to rely heavily on the implementation of reusable packaging to meet these goals, which is not suitable for many products, limiting the potential impact. Reusable collection programs also take time to implement and to engage consumers to achieve participation.
- 3) The first year of reporting typically sees a higher percentage of reporting errors and producers who have not joined the SO. This will result in incomplete data and likely a misestimation (downward) of the total packaging in the state. We suggest



reduction goals be introduced only after the program has stabilized (3–4 years), and that they be based on weight, not units, to truly measure impact.

- 4) Finally, we believe a per capita goal is appropriate; however, the percentages presented are exceptionally difficult, if not impossible, to achieve.

§3A(4) Reuse:

- 1) Not all products and packaging applications are suitable for reuse. As a result, the EU has proposed goals for specific types of packaging only (e.g., 20% for take-away cups by 2030 and specific goals for packaging used to deliver online purchases).
- 2) It will take time for reusable packaging systems to be developed in a cost- and resource-effective way. We support goals that are SMART.
- 3) We would like greater clarity on how DEP sees reuse as impacting the reduction goal, as well as other goals. We believe use of reusable packaging should be captured under packaging reduction. We also suggest further clarity be provided on how reuse data will be collected and reported against goals.

§3(A)(5) Readily recyclable, reusable or compostable:

- 1) This section should also state that if a goal is unmet, producer fees for packaging material that is not readily recyclable, reusable, or compostable increases over time, and in consideration of progress made toward the goal, as is described in Section 10.

§3(A)(6) Base material-specific recycling:

- 1) Base materials (glass, metal, paper, plastic by resin type, and composite) have different recycling rates based on their formulation, use, consumer behavior, and how they are managed post-collection. Therefore, specific goals should be set for each base material.
- 2) Typically, material-specific goals are based on broad categories of materials (e.g., plastic, fiber, glass, metal), and do not include resin types.
- 3) CAA recommends adopting base material-specific goals along broad categories at program inception. More specific categories could be considered after data has stabilized. Goals should incent progress while being achievable.
- 4) Typically, waste-to-energy (WTE) facilities recover metal for recycling after processing. If this is the case in Maine, this material should be included in the packaging recycling data. The rules should specify how this data will be collected and reported.



§ 3 A (7) Overall recycling rate:

- 1) The most recent State of Recycling in the U.S. report by the Recycling Partnership indicates that with the ideal system in place, recycling rates are in the 63%–67% range.
- 2) This report further states that the most significant factor in recyclable packaging not being recycled is in consumer decision making.
- 3) Again, metals recovered from WTE processing should be allowed to count toward participating municipalities' recycling data.
- 4) While education and awareness will be core components of the program, producers cannot control the actions of consumers.
- 5) In addition, as previously stated, some materials will be recycled through commercial recycling programs, making this goal even more challenging to achieve. We need to ensure alignment between the numerator and the denominator.
- 6) Therefore, CAA suggests that these goals be established once more data is known.

§3(A)(8) Post-consumer recycled material:

- 1) Much like the goals associated with reuse, base materials, and the overall recycling rate, not all packaging types lend themselves equally to recycled content. For example, it is more challenging from a technical standpoint to achieve higher levels of postconsumer content in flexible plastic packaging than in rigid plastic packaging. We suggest these goals be revised to be achievable for each base material type.
- 2) There are materials/packaging types for which these rates cannot be met for technical reasons, FDA food contact limitations, and postconsumer material supply limitations. Therefore, we suggest producers beyond those associated with a federally regulated product be able to apply for an exemption to the post-consumer recycled material incentive fee.
- 3) This section should state that producers of packaging material types that do not achieve these goals are subject to the incentive fees described in Section 10(3).

B. Annual SO Reporting

- 1) The draft rules set January 30, annually, as the deadline to submit the SO report. To enable reporting using prior year data, we suggest the deadline be July 1 at the earliest. It takes producers time to compile and submit their reports and then the SO will require time to assess and verify the data and conduct analyses ahead of reporting.



(b) Producer benchmarking

- 1) Producer benchmarking will have to be based on data two years prior. In other words, the 2027 report would show producer benchmarking relative to packaging data supplied in 2025.
- 2) CAA suggests reporting relative to progress made toward goals should be done at the producer level, not the brand level. Some producers have dozens of brands, which significantly complicates reporting for both the producer and the SO. The reporting could still list the brands associated with each producer, while not breaking down the detailed information by each brand.

(c) Municipal benchmarking

- 1) The draft rules outline that municipal benchmarking must be done for all participating municipalities; however, only municipalities with complete cost studies report costs. Therefore, we suggest benchmarking elements that include costs only apply to municipalities with complete cost studies/data.
- 2) The SO is to report tons of packaging material collected and tons recycled statewide and by municipality. We presume the recycling data will have to be derived from MRF sales data allocated by community served, plus collection and recycling data obtained from DEP on alternative collection programs. We recommend that DEP clarify this reporting process.

6. Defining Reimbursable Cost by Packaging Stream

This section “defines the reimbursable costs for management of each packaging stream and the methods for their determination.”

- 1) The methodology described in Section 6 to identify municipal costs are very complex and are likely to be an impediment to municipal participation. For example, municipalities and private entities are required to allocate labor costs, energy costs, equipment costs, and structure costs as well as overhead costs and profits to packaging streams. This will be a significant level of effort, and our experience is that private service providers and publicly traded service providers will be reluctant to or constrained from providing this data. CAA is concerned, also, that municipalities will be deterred from participating. It will not be possible for the SO or its contracted entity to verify every allocation – such as labor hours. CAA would recommend simplifying the methodology to reduce the burden of reporting on municipalities and service providers. CAA recommends that DEP consider consulting with the SO and municipalities to allow for bypassing the estimation of costs by packaging stream, and instead estimating costs directly per ton of covered packaging material managed through the recycling system or alternative management.



- 2) This section would benefit from an introduction describing the context, and what is done with the resulting annual costs developed in this section. It might be helpful to broadly describe some example scenarios.
- 3) It is unclear why “contractor costs” are described in Section 7, but not in Section 6.
- 4) This section should be renamed “Defining Packaging Stream Costs,” as the costs that result from the calculations in this section are not all reimbursable. The title and current introductory language are misleading. Also, it appears that these calculations result in annual costs of packaging streams that include covered packaging material. If so, that should be clarified.

7. Calculation of the Per Ton Cost by Alternative Management Stream or Commodity

This section provides methods for estimating the per-ton cost of alternative management streams and commodities.

- 1) Again, Section 7 is complex and may be an impediment to municipal participation. For example, the concepts of specific costs and non-specific costs are unclear. CAA would recommend simplifying the methodology to reduce the burden of reporting on municipalities and service providers. Providing broad descriptions of “specific costs” and “nonspecific costs” might be helpful. Similarly, because the packaging stream and mixed packaging stream definitions are unclear, the resultant description of costs is unclear.
- 2) Audit requirements of 90% accuracy +/- 5% need to be achieved. This is not practical or achievable at each site and each season for all packaging material types. This statistical standard should apply only to the most prevalent packaging material types.
- 3) Guidance is needed regarding where disposal of MRF residue fits into costs.
- 4) CAA recommends an approach whereby the principles of the approach would be described, but not the actual methodology. This exact methodology could be developed by the SO and approved by the DEP after selection.
- 5) It needs to be made clear throughout that producer fees are to cover the reimbursable costs of covered packaging only.

8. Start-Up Registration and Payment

B. Start-Up Registration Fee

- 1) CAA requests clarification regarding whether the start-up registration fee is to satisfy the requirement set forth in the rules that producers must make first



payments within 180 days of the SO being under contract. It should be noted that it could take the SO more than a year to develop full producer fees, given the methodology outlined in the draft rules, and the schedule should be set accordingly.

- 2) CAA requests DEP provide additional clarity about why the draft rules state that “The SO must not charge a producer more than the producer’s estimated annual registration fee for the first calendar year for which participating municipalities are reimbursed.” Full data will likely not be available, and the SO may inadvertently overcharge. Because it deducts this fee from the full producer payment, we suggest this be removed.
- 3) CAA agrees that start-up registration fees are required in advance of obtaining full producer data. We suggest the exact formula for this start-up registration fee be determined by the SO and DEP jointly.

C. First Calendar Year Invoice

- 1) CAA requests clarification regarding when the DEP envisions that producers would be issued their first calendar year invoice.

9. Ongoing Producer Registration

B. Annual Reporting for Producers Other Than Low-Volume Producers.

Producers...must report the following packaging material details to the SO by May 31 of each calendar year. Packaging material details must be reported for each packaging material type by brand, as follows: ... (1) Brand, or in cases where one producer adds packaging material to another producer’s product for distribution directly to a consumer, a description of the sales pathway resulting in the addition of packaging material;

(2) The UPCs; or the brick codes in cases where all products with a given brick code are associated with the same packaging material type;

(3) Units produced and a short description of the methodology used to determine this number....

(5) The total weight of the base material or, in cases where separation and recycling of more than one material is determined to be routine as designated in Appendix A, the sum of the weights of the materials that are routinely separated and recycled, and a short description of the methodology used to determine this number;

- 1) Typically, producer reporting is at the conglomerate (producer) level, to facilitate reporting and compliance.
- 2) Reporting by brand increases complexity both for producers and the SO with no specific benefit.



- 3) Likewise, granular data such the number of units, UPC or brick code, and the typical weight of packaging significantly increases the challenges to compliance while providing no additional benefits.
- 4) CAA recommends reporting at the producer level and reporting by material type and weight only, not by units.
- 5) Producers are to report on “The sum of the weights of materials that are routinely separated and recycled.” Producers may not be aware of what is routinely separated and recycled, and technologies and innovation are constantly impacting both recycling and manufacturing technologies. We suggest this reporting requirement be removed. If it is not, a reporting threshold needs to be established, as there are many elements of a package that may not be targeted for recycling, including coatings, can liners, labels, caps, etc. We suggest that Maine adopt the 10% by weight threshold, as is adopted in Ontario. We would be happy to provide more information on this.
- 6) We suggest this section be called Ongoing Producer Registration and Reporting.

10. Producer Fees

A. Fees for Producers Other Than Low-Volume Producers

(1) Annual registration fee.

A producer other than a low-volume producer must pay an annual registration fee. Annual registration fees must cover the \$300,000 fee for Department administration and the SO’s annual budget. A producer owes a share of this cost for every 15 tons of packaging material produced. A share is equal to the sum of \$300,000 and the SO’s annual budget divided by the total number of shares owed, as determined from the reports of producers other than low-volume producers and that are received prior to the reporting deadline.

- 1) The method of allocating overhead costs to producers by weight of packaging implies that such costs are proportional to the weight of packaging distributed. In other words, non-operational costs have different cost drivers than material management costs (i.e., packaging material type fees) and are often common to all covered materials. As a result, these costs are allocated to materials using a different approach than material management costs. Therefore, CAA suggests the SO and DEP jointly develop an alternative approach to more equitably allocate overhead costs among producers.

(2) Packaging material type fees.

(c) For a packaging material type that is readily recyclable, the producer must pay, per ton produced, the average per ton cost for recycling that packaging material type during the prior calendar year. The average per ton cost is the total amount to



be reimbursed to municipalities for recycling the packaging material type during the prior calendar year divided by the tons of the packaging material type recycled by participating municipalities.”

- 1) The actual cost per ton managed for each packaging material cannot be directly used as the fee for each packaging material. Doing so will result in unpredictable fee revenue imbalances (i.e., overpayments and underpayments) for each material type and for the program overall, relative to actual costs required to be reimbursed to the municipalities in the prior year. These swings will occur in response to year-over-year fluctuations in the quantity and types of packaging managed supplied and managed. While we think, in general, Maine is likely to see overpayments due to initial low participation rates, underpayments are also a strong possibility if fees are calculated in the manner suggested. CAA recommends identifying total costs for the year, as well as total quantities of packaging, by type, and developing packaging material type fees that will closely equate to the reimbursable costs in the prior year to ensure fee revenues and municipal costs balance. Material-specific fees will reflect the cost of managing each material type.
- 2) The process of allocating material fees is complex, with potential unintended consequences. CAA would be happy to discuss this further with the DEP at their convenience to ensure the allocation methodology is well principled and equitable to all producers.
- 3) It is unclear whether DEP envisions whether packaging material type fees also need to cover the costs of approved investments, or if investments are to be included in overhead costs. CAA suggests that an additional sub section of fees be identified, (i.e., #3, and incentive fees become #4) to fund approved investments, as not all investments will be material specific.

(d) Fees for packaging material types that are not readily recyclable, reusable, or compostable are “2 times the average per ton cost of the most expensive readily recyclable material during the prior calendar year. ... If goals for the percent of readily recyclable packaging material are unmet, producers must pay 3, 4, or 5 times the average per ton cost ... of the most expensive readily recyclable material.” (10. Producer Fees. (2) Packaging material type fees. (d)).

- 1) We suggest these multipliers be determined by the SO in a Plan Amendment for approval by DEP rather than rule. This would allow the SO to amass data, develop a clearer understanding, and set appropriate targets, for approval by DEP. It would also allow both the SO and DEP to revise them as needed.

(3) Incentive Fees



- 1) We suggest the SO determine what incentive fees (due in the third calendar year in which producers report) will be through a Program Plan amendment. As is described above, this allows time for data to be amassed and decisions regarding fees to be better informed.
- 2) (b) Toxicity Fee – Instead of an additional per-ton fee being charged to producers for packaging material types for which the producer is unable to certify that there was no intentional addition of toxics to their packaging, we suggest a fee reduction if the producer can certify that there is no intentional addition of toxics to the packaging material. DEP should provide clarity on what it envisions as certification.
- 3) (b) Toxicity Fee – DEP should develop a clear list of toxics that must not be intentionally added, as a reference, for producers to be able to certify no intentionally added toxics have been added to their packaging. The toxics related to children’s products and food packaging should not be taken out of context and applied to all packaging.
- 4) (c) Weight not recycled – A producer knows the portion of packaging that is base material, but in some cases additional portions of the package are also recycled. A producer would not have this information. . For example, although the base material of fiber cartons is fiber, there are whole cartons markets that recycle cartons in their entirety, transforming them into building products. A producer should not be penalized for something that is not known.

13. Defining Municipal Reimbursement

A participating municipality must be reimbursed for the cost of managing packaging material that is reused, recycled, or composted and for the cost of managing packaging material that is not readily recyclable through alternative management. The SO must determine the tons managed in accordance with Section 16 and the per ton cost realized by similar municipalities in accordance with Section 15.

- 1) This section should state that municipalities should be reimbursed for median NET costs (i.e., net of any material revenues earned) of all covered packaging material. This should be made clear throughout the draft rules. Municipalities are to be reimbursed for costs less revenues, and only for the costs of managing covered packaging material. In other words, it needs to be made clear throughout the draft rules that producers are not reimbursing municipalities for the costs of managing materials other than covered packaging material.

14. Obtaining Information for Municipal Reimbursement

A. Cost Studies



- 1) There are situations, such as follow-up cost studies, where cost studies and their representative audits (as well as additional audits, such as site-specific audits) will be required on an “ad hoc” basis – i.e., in response to program changes or input from a municipality, etc. This makes it challenging for the SO to budget appropriately. Timing can also be an issue, as audits are to be 2-season, and subcontractors that conduct this type of work may not have availability.
- 2) CAA requests clarity on (2) (a) and (b), and how DEP envisions and SO would be able to conduct such studies in a timely manner given changes can take place at any time during the year, and audits required to be 2-season.
- 3) Municipalities are to indicate if they expect the cost of managing one or more packaging material types is to change by at least 10%. We suggest this threshold be revisited and raised to at least 20%, and question whether a municipality would be able to predict this.

B. Representative Audits

(2) Requirements

(c) For each site and season, samples shall be collected and analyzed until the sample results achieve statistical representativeness of 90% +/-5%.

- 1) The level of accuracy required is not cost effective for all material types. We suggest that the draft rules require the SO to conduct the audits in line with industry standards.

Investment

A. Investment Criteria

(1) In the case of a proposal for new infrastructure, the proposal must designate the infrastructure as the property of a municipality, group of municipalities, tribe, school administrative unit, career and technical region ...nonprofit organization or a business that realized less than \$5,000,000 in total gross revenue during the prior calendar year.

These conditions do not apply to proposals for investments in education or improvements to existing infrastructure.

- 1) In many cases, recycling programs rely on medium and large sized waste management companies to ensure efficient and effective management of materials.
- 2) These entities have the scale, technology, and resources required to advance the circular economy.
- 3) While CAA agrees that municipalities/tribes, non-profits, and smaller businesses should be eligible to benefit from investments, we suggest the rules allow for



investment wherever the SO sees it can have the greatest environmental and performance impact. Thus, we recommend larger businesses also be eligible.

18. Packaging Stewardship Fund Cap

A. Excess Funding.

The packaging stewardship fund has excess funding if there is more than enough funding to cover:

- (1) The sum of expenditures realized over the past 5 years, other than expenditures on major investment needs; and
- (2) The amount being saved for major investment needs according to the savings plan.

B. Reducing Amount Owed. If producer reporting shows that full payment will result in excess funding, the SO must calculate the expected excess funding, divide that amount by the number of tons produced during the prior program year, and reduce the amount owed for each ton of packaging material produced accordingly. If a producer's per ton cost is such that this reduction is more than the amount owed, the excess must be used to lower or eliminate the producer's annual registration fee but must not be refunded to the producer.

- 1) Typically, a non-profit entity would maintain reserves of approximately 6 months of operating expenses (the standard in packaging EPR in North America).
- 2) In some circumstances, a non-profit might maintain reserves of 1-2 years of operating expenses.
- 3) In California, SB 54 states that:

A PRO shall not maintain total program reserves exceeding **60 percent of its annual operating expenses**, consistent with the requirements of the Financial Accounting Standards Board's Accounting Standards Update 2016-14, Not-for-Profit Entities (Topic 958), and any future updates to that standard. (B) The department, in approving the annual PRO budget, **may authorize the total reserves to be increased to up to 75 percent of the PRO's annual operating expenses if the department determines the increase is necessary to implement the requirements of this chapter.**

- 4) As such, CAA recommends reducing the Packaging Stewardship Fund cap to 2 years of operating expenses (excluding any one-time costs and capital-related expenditures).



20. Petitions for Exemption from the Post-consumer Recycled Material Incentive Fee

A producer of packaging material that, because of its association with a federally regulated product, is required to meet specific content or construction standards that may preclude or significantly diminish the producer's ability to meet the post-consumer recycled material content goals in Section 3(A)(8) may apply for an exemption from the post-consumer recycled material incentive fee in Section 10(A)(3)(a) on a form provided by the Department.

- 1) CAA suggests producers be allowed to petition for and obtain an exemption from the post-consumer recycled material incentive fee even if it is not associated with a federally regulated product, as there are many potential valid exemption reasons – technical, market, regulatory (e.g., lack of FDA food contact LNO material).

General Questions

- 1) Throughout the draft rules, dates are provided for when certain activities must take place, such as when producers must report and pay, the SO must report, municipalities report, etc. Can DEP clarify which year DEP envisioned these timelines would occur.

Conclusion

CAA looks forward to continuing the discussion with the DEP and other key stakeholders through the consultation process on initial rule concepts. These are our high-level comments on the rule concepts, and we would welcome additional conversations with the DEP to provide potential solutions to the challenges we have outlined, and work collaboratively to ensure the success of the program.

Sincerely,



Susan Bush
Circular Action Alliance
Maine Program Manager

