



August 26, 2024

Mr. Brian Beneske
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Re: Comments of the American Chemistry Council on Proposed New Rule:
Revised Chapter 428, Stewardship Program for Packaging

Submitted via email: rulecomments.dep@maine.gov

Dear Mr. Beneski:

The American Chemistry Council is pleased to comment on the Department of Environmental Protection's (DEP) revised proposed regulations to implement its statewide Extended Producer Responsibility (EPR) program for packaging. ACC represents over 190 companies engaged in the business of chemistry—an innovative, \$639 billion enterprise that is helping solve the biggest challenges facing our nation and the world. In Maine alone, our industry helps generate more than \$22 million in state and local taxes. The business of chemistry drives innovations that enable a more sustainable future, creates approximately 555,000 manufacturing and high-tech jobs—plus over four million related jobs—that support families and communities, and enhances safety through the products of chemistry and investment in research. For Mainers, this is more than 500 direct jobs and 600 related jobs.

ACC and our members are working hard to create a more circular economy for plastics. That is why ACC and its Plastics Division members were among the first to establish ambitious, forward-thinking goals that all plastic packaging in the United States is reused, recycled, or recovered by 2040 and that all U.S. plastic packaging is recyclable or recoverable by 2030. Achieving these goals will require industry, manufacturers, brands, and retailers; recyclers and waste haulers; as well as citizens, communities, non-profits, and academics; and federal, state, and local governments to come together to support policies and programs to increase the supply of and the demand for recycled materials, to create the circular economy we all want.

ACC offers the following comments to help inform the development of the Maine implementing regulations. Addressing these issues will be critical to advancing an effective Stewardship Program for Packaging in Maine.

I. Utilization of the Full Range of Circularity Criteria to Guide Overall Draft Regulations

As Maine seeks to implement the regulations for this program, it must take a holistic approach to advance the most effective EPR program. Failure to take a holistic, life-cycle approach to packaging that does not consider impacts on packaging design and performance, overall product safety, and availability and safety of potential alternatives will undermine the effectiveness and viability of the program. The authorizing statute outlines criteria used to incentivize circularity improvements that should be fully considered, including: use of recycled content; increased recyclability; reduction in amount of packaging material used; reduction of litter; increased reuse of packaging material; labeling of packaging material; and other incentives.

II. Proposals Related to Priority Chemicals

We have concerns with the proposed regulation's approach to identifying priority chemicals for certification. The July 9, 2024, reporting of the draft rule for Chapter 428 seems to be taking a rather broad approach for the blanket inclusion of all the approximately 1400 compounds from Maine's three statutory chemicals lists – and lists under which potential “priority chemicals” require additional regulatory review. The proposed regulations should establish a science-based process with clear criteria for identifying, assessing, and prioritizing substances for certification that consider the actual use of chemicals in packaging and the overall program circularity criteria. This process should include a notice and comment period for interested parties to provide input that can inform DEP's evaluation and the overall program. As noted above, the evaluation and any determinations of chemicals for certification should take a holistic approach and explicitly consider the overall program circularity criteria. Failure to do so will undermine packaging design and performance and the success of the overall program.

III. Exemption of FDA Regulated Packaging

Given the U.S. Food and Drug Administration (FDA) regulates the safety of food packaging, as well as medical devices, we recommend DEP exempt FDA-regulated food packaging and medical packaging from the “lower toxicity” criterion in its packaging EPR program. FDA's regulatory process has determined safe levels of chemicals in food packaging (FDA uses a stringent reasonable certainly of no harm safety standard), so a “lower toxicity” measure would be duplicative.

IV. Definitions of “Toxicity and “Toxics”

As noted above, the authorizing statute already provides a definition of toxicity to mean the presence in packaging material or the use in the manufacturing, recycling or disposal of packaging material of intentionally introduced metals or chemicals regulated under three sections of Maine statutes. The law requires rules to be promulgated that outline criteria to be used to incentivize circularity improvements in seven areas:

- use of recycled content
- increased recyclability
- reduction in amount of packaging material used

- reduction of litter
- increased reuse of packaging material
- labeling of packaging material
- other incentives.

An eighth category is also noted - “lower toxicity” - in packaging material. Contextually, the category of “lower toxicity” immediately follows the category of “increased recyclability of packaging material.” Further, DEP’s annual report to the legislature must subsequently address whether packaging “exhibits” toxicity, particularly if that toxicity is demonstrated to have a disproportionate impact on any community in the State.”

ACC recommends DEP consider its goal of “lower toxicity” in packaging material in tandem with the overall circularity criteria of packaging material and not as a stand-alone category. This will require careful review of opportunities to improve circularity, including whether a concentration of a particular substance impedes recycling, reuse, or other circular technology suitable for packaging.

Accordingly, we recommend DEP strike its proposed definition of “toxics” and focus on implementing its EPR program to achieve circularity objectives – evaluating specifically where chemical substances in food packaging may be impeding recycling.

V. Certification of “No Intentionally Added” Toxics

DEP’s proposed producer benchmarking provision would require that the packaging “is able to be certified as containing no intentionally added toxics.” As noted above, we recommend that DEP not add a new term to the regulations (“toxics”). Further, since the statutory term “toxicity” refers to three different statutory lists, adopting this approach (to certify to “no intentionally added toxics” that would require certifications for all the chemicals on all three lists is likely unworkable. At a minimum, DEP would need to align its definition of “intentionally added” with the certifying body.

DEP should clarify that “intentionally added” does not mean used in a manufacturing facility, equipment, intermediate processes, as a monomer or otherwise in manufacturing or processing of the base material. Styrene, for example, is a monomer polymerized to make polystyrene, and styrene is certainly intentionally used to make polystyrene. Styrene is not, however, subsequently added to the polymerized polystyrene.

We recommend that DEP either use “intentionally added” or “intentionally introduced” as the relevant term of art in the regulations or clarify that the two terms mean the same thing. DEP should also clarify that the mere presence of an impurity or byproduct in the base material does not meet the definition of “intentionally added” or “intentionally introduced.” The specific evaluation of whether a trace amount of a chemical substance in packaging should be targeted to the packaging at issue and its use/application and should take into consideration whether the trace is relevant to DEP’s circularity objectives (e.g., does it impede or disincentive recycling or other technologies).

VI. Incentive Fees - Proposed Toxicity Fee

DEP has not yet analyzed which chemicals, if any, in which packaging types, in what concentrations, impede or disincentivize recycling or other circularity measures. Accordingly, it is premature to propose criteria to charge a “toxicity fee” and we recommend that DEP strike this section. We recommend that DEP first determine, by regulation, which packaging materials are readily recyclable and which are not in accordance with the Producer Payments section of the statute as a prerequisite to understanding where and how incentives to achieving lower toxicity in packaging material are warranted to improving recyclability. After this review, DEP can more readily move to establishing targeted incentives. As we noted above, food contact packaging (as well as medical devices) regulated by FDA should be exempted from any incentive provisions related to a toxicity criterion.

VII. Updated List of Toxics Provided in an Appendix

DEP proposes including an updated list of “toxics” in an Appendix. As noted above, the statute already defines “toxicity” by reference to three statutory lists, so it is unnecessary for the implementing regulations to do anything further. More importantly, we recommend that DEP use the statutory lists as reference lists only, since the use of specific chemicals in each type of packaging will likely vary. DEP should not aggregate the chemicals on the three statutory lists and present them in an appendix, which could be misunderstood as a “no presence” list rather than the “lower toxicity” goal set out by statute.

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Thank you for the opportunity to comment. ACC welcomes the opportunity to meet with DEP to discuss our comments in greater detail.



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