

August 26, 2024

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via electronic submission

Subject: HCPA Comments on Maine Proposed Rule for the Stewardship Program for Packaging

The Household & Commercial Products Association (HCPA)¹ appreciates the opportunity to provide input on the implementation of Maine's Stewardship Program for Packaging.² We look forward to continuing to work with the Maine Department of Environmental Protection (DEP) on establishing and implementing rules and regulations to carry out the requirements of the Stewardship Program for Packaging.

Background

HCPA represents approximately 240 member companies engaged in the manufacture, formulation, packaging, distribution, and sale of products for household, commercial, institutional, and industrial use. HCPA members are continuously working to improve products and packaging in line with the principles of a circular economy to decrease waste and enable economic growth without greater resource use. Companies utilize several different materials for packing and shipping their products to ensure that products arrive undamaged, uncontaminated, safe for use, meet user expectations, have a lower environmental footprint, and generally enhance the quality of life of the consumers and workers who depend on these products daily. We have many members who sell products into Maine or otherwise have a presence in the state and are committed to ensuring that all residents have access to high-quality products with reduced environmental impacts.

¹ The HCPA is the premier trade association representing companies that manufacture and sell \$180 billion annually of trusted and familiar products used for cleaning, protecting, maintaining, and disinfecting homes and commercial environments. HCPA member companies employ 200,000 people in the U.S. whose work helps consumers and workers to create cleaner, healthier and more productive lives.

² Public Law 2021, Chapter 455.

In addition to representing various categories of household and commercial products (regardless of packaging), HCPA represents products packaged in the aerosol delivery form. The aerosol delivery form is used to dispense a wide range of products, including but not limited to adhesives, air fresheners, antiperspirant, asthma inhalers, body spray, cleaners, degreasers, deodorant, disinfectants, dry shampoo, hair spray, insect repellent, insecticides, lubricants, paints, pan sprays, sealant, shaving creams and gels, sunscreen, and whipped cream. HCPA has represented the U.S. aerosol products industry since 1950 through its Aerosol Products Division, which includes companies that manufacture, formulate, supply, market, and recycle a variety of products packaged in an aerosol form.

HCPA's comments below address both areas of Maine's draft rules that are generally applicable to household and commercial products and items specific to aerosol products.

More Stakeholder Input Needed

HCPA is broadly concerned that, by developing detailed rules and associated goals and fee structures without first conducting a needs assessment or selecting a stewardship organization (SO), Maine has designed an EPR program that will be impossible to implement in practice. It is HCPA's view that, like programs in other packaging EPR states such as Colorado and Oregon, the goals and fee structure should be *developed by the SO* based on an in-depth exploration of the current state of waste management in Maine and subject to *review and approval by the department*.

Maine's packaging EPR program is of considerable size and is expected to have a substantial impact. A program of this level of complexity should be developed based on detailed research and input from interested parties, including on-the-ground knowledge of Maine's municipal recycling systems. Further, the SO responsible for working through the practicalities of interpreting fee structures and collecting and paying the appropriate amounts should be engaged from the beginning to design a fee system that is effective and equitable.

Despite the inclusion of numerous criteria, there is a considerable lack of clarity in the current draft rules on the specifics of what materials are and are not "readily recyclable" or what fees will need to be paid by the SO on behalf of producers, how much they will amount to, and on what timelines. That is, the practicalities that producers will need to understand in order to prepare for compliance with this program are not specified and the proposed process for specifying them is complex.

HCPA encourages the Department to consider delaying finalization of the draft rules until after an SO has been selected and a needs assessment conducted. If this is not possible, HCPA strongly recommends that the Department update the draft rules so as to remove many of the details in the current draft and leave as much as possible, particularly regarding fee structure, to be updated and finalized with the SO once an SO is in place and a needs assessment has been conducted.

Overly Broad Definition of “Consumer”

HCPA is concerned that the definition of “consumer” is inordinately broad, particularly as the definition has been broadened from previous drafts. Combined with the expansive definition of “product,” we are concerned that this could result in many products used exclusively by businesses, as well as raw materials and items used exclusively in industrial and institutional settings to produce new products for later sale, getting pulled into the scope of Maine’s EPR program.

HCPA does not believe this is consistent with legislative intent in passing LD 1541, the bill that established Maine’s stewardship program for packaging. Packaging for products used exclusively by businesses often have established take-back, reclamation, or recycling systems in place and do not typically end up in curbside recycling and disposal systems. The law reflects this understanding by specifying that reimbursable costs associated with the collection, transportation, and processing of covered packaging material incurred by municipalities “may include costs associated with the management of covered packaging material collected in public spaces and schools.”³ There is no mention of costs associated with the management of covered packaging material collected in other non-residential spaces such as workplaces. If a product is not typically managed through municipal systems, those products should not be included in determining which producers are obligated to pay to support municipal systems.

HCPA recommends that DEP revise the definition of “consumer” and/or the definition of “product” to clarify that only products which are intended to be used by entities for personal, family, or household purposes and/or are sold via retail including e-commerce are within the scope of the law.

Overly Broad Definition of “Toxics”

HCPA remains concerned that the lists of toxic chemicals included in the draft rules are broad and not applicable to all packaging types, making it effectively impossible for any producer to appropriately certify using all of these lists as a basis. HCPA cautions the Department about broadly applying all lists of toxic chemicals referenced in the statute to all types of packaging.

For example, food contact packaging is manufactured according to U.S. Food & Drug Administration (FDA) regulations, which are designed to account for and protect consumers from the specific, often higher, types of exposures to a chemical they may experience from food contact materials. In contrast, packaging used to contain or transport a household product such as a floor polish or cleaner is primarily designed for the rigors of commerce and product protection, taking into account the differing exposures that consumers may have (*e.g.*, consumers do not typically drink their cleaner and are thus unlikely to have oral exposure to chemicals that

³ 38 MRS § 2146(10)(A)(1)

may leach from the packaging). Maine itself recognized this distinction in 2022 when Public Law c. 277 was signed into law, which put in place requirements for food packaging that go far beyond Maine's requirements for other types of packaging. Similarly, the presence of certain chemicals can pose a risk to children that is notably greater than the risk to an adult, and existing Maine law also recognizes this by setting additional requirements for children's products.

These lists were developed for use in particular contexts to proactively address identified risks and should not be taken out of context and generally applied to all types of packaging sold into Maine. Requiring producers to certify, or to ask their suppliers to certify, all packaging according to a list of thousands of chemicals based on stringent food contact and children's product requirements would create a significant time and cost burden for companies without adding meaningful human health and environmental protection.

HCPA recommends that the Department apply the relevant lists to the types of packaging they were developed to refer to (*e.g.*, apply the "toxic chemicals in food packaging" list to food contact packaging), rather than a blanket application of all lists to all packaging. HCPA additionally recommends that DEP remove the penalty fee provision in 10(A)(3)(b) that would apply to manufacturers unable to present supplier certifications of no intentional addition of toxics.

Federally Regulated Products Should Be Exempt from Goals Which Conflict

Packaging that is not allowed to contain post-consumer recycled (PCR) material due to federal regulatory requirements should be clearly exempt from the PCR content goal in 3(A)(9) and, similarly, packaging that is not allowed to be reused due to federal regulatory requirements should be clearly exempt from the reuse goal in 3(A)(5). For example, the Pipeline and Hazardous Materials Safety Administration (PHMSA) sets specifications for plastic aerosol containers that do not allow for any PCR content to be used in the containers.⁴ As another example, the Poison Prevention Packaging Act requires some household substances, such as furniture polish and mouthwash to be packaged in "special packaging" that meets stringent child-resistant standards, one of which is that the special packaging must not be reused.⁵

HCPA recommends that the Department clarify that:

- Packaging which cannot contain PCR material according to federal regulations is exempt from the goal in 3(A)(9) and not included in the total weight of packaging used to calculate the percentage that is PCR material, and
- Packaging which cannot be reused according to federal regulations is exempt from the goal in 3(A)(5) and not included in the total weight of packaging used to calculate the percentage that is reusable

⁴ 49 CFR § 178.33b-6(a)

⁵ 16 CFR § 1700.15(c)

Additionally, packaging that is not allowed to contain PCR material due to federal regulatory requirements should be clearly exempt from the PCR material incentive fee without needing to go through a process to request an exemption. As mentioned above, PHMSA sets specifications for plastic aerosol containers that do not allow for any PCR content to be used in the containers.⁶ HCPA recommends that the Department clarify that packaging which cannot contain PCR material according to federal regulations is exempt from the PCR material incentive fee without needing to go through the process described in this section. The request for exemption process should be reserved for circumstances where federal regulations include content or construction standards that may make use of PCR content difficult or impossible, *not* for circumstances where federal regulations clearly state that use of PCR content is not allowed.

PCR Material Verification Process

HCPA is concerned about Maine's addition to producer reporting in 9(B)(6) of a requirement to verify PCR material through a third-party audit. Third-party certification of PCR content is standard practice for material recyclers and processors of recycled material, but not typically done at the end product/brand level. Certification at the brand level would be duplicative of work done by material suppliers and packaging manufacturers earlier in the supply chain. HCPA recommends that the Department allow producers to certify by submitting one or both of an independent third-party certification and self-certification. Manufacturers would be relying on the third-party certification of their suppliers to develop the self-certification, so allowing for self-certification would not mean lessening the role of third-party evaluation in the recycled content supply chain, but rather avoiding duplicative payment of third parties and additional burdensome reporting requirements.

More and Clearer Incentivizes for Refill and Reuse Needed

In general, HCPA's view is that refillable and reusable packaging should have *at least* the same level of incentives as recyclable packaging and refillable packaging should have *the same* level of incentives as reusable packaging.

HCPA remains concerned that "refill" and "reuse" are separated into two distinct definitions instead of combined into a single definition. As described by the Ellen MacArthur Foundation, an international charity whose mission is to accelerate the transition to a circular economy, there are four broad models of reuse/refill systems: return from home, return on the go, refill at home, and refill on the go.⁷ All of these models are important to incentivize in order to move Maine forward on the path to a circular economy. To prevent a policy conflict between the various concepts of reuse and refill, other states with EPR programs, such as California, have combined reuse and refill into the structure of a single definition.⁸ Such an approach provides

⁶ 49 CFR § 178.33b-6(a)

⁷ https://emf.thirdlight.com/file/24/_A-BkCs_aXeX02_Am1z_J7vzLt/Reuse%20%E2%80%93%20rethinking%20packaging.pdf

⁸ Cal. PRC § 42041(a)

clear guardrails without unintentionally excluding important reuse/refill pathways from either definition or from provisions of the stewardship program that reference reuse or refill. HCPA recommends that the Department take a similar approach to California and combine “refill” and “reuse” into a single definition that encompasses return from home, return on the go, refill at home, and refill on the go.

Relatedly, HCPA is concerned that the program goal for reuse does not take into account refill at home systems, which are not managed by municipalities or alternative collection programs. Reusable and refillable packaging can be owned and refilled by consumers or be part of a system where the consumer returns the package for reuse.⁹ HCPA recommends that the Department revise the “reuse” goal in 3(A)(5) to clearly account for consumer refill systems along with reuse through return systems. This could be done by, for example, adding language that includes the percent by weight of packaging material reported by producers that is “demonstrated to be refillable by the consumer” to the total percent considered in evaluating whether the goal is met, with the specifics of this later determined by the SO in consultation with and subject to approval by the Department. HCPA additionally recommends that the Department update the goal in 3(A)(6) to include the “percent of packaging material that is readily recyclable, reusable, refillable, or compostable.”

Based on the above, HCPA also recommends that the Department add in a reference to refillable packaging in the following places:

- Producer benchmarking in 3(B)(2)(a)
- Producer reporting of labeling in 9(B)(10)
- Incentive fees for labeling in 10(A)(3)(d)

HCPA is also concerned that packaging material fees detailed in 10(2)(a)-(b) are based only on whether the material is readily recyclable and do not include consideration of whether the material is reusable or refillable. Reusable and refillable packages need to be sufficiently durable to be used multiple times and thus may require being made from less readily recyclable materials but still have a lower environmental footprint overall and contribute more to waste reduction overall. To incentivize reuse and refill, reusable and refillable packages should be exempted from the fees in 10(2)(b).

Packaging designed to be refilled at home should be clearly exempt from municipal reimbursement for costs associated with managing reuse and refill systems.

Normalize Reduction Goal Against Sales Volume

HCPA thanks the Department for removing the reduction goal for packaging units, which would have incentivized producers to reduce sales of products into the state.

⁹ The Sustainable Packaging Coalition has developed guidance on successful reusable packaging programs, including a description of the different types of reusable packaging: <https://sustainablepackaging.org/wp-content/uploads/2023/07/Guidance-for-Reusable-Packaging.pdf>

HCPA remains concerned that, unless the reduction goal is normalized against sales volume, this will unintentionally limit new sales of products into the state as the population grows and penalize companies for market growth. HCPA recommends that the Department base the reduction goal solely on packaging weight and normalize the goal by number of packaging units reported. We recommend the following: “This goal measures the ~~total units and~~ total weight of packaging material reported by producers, collectively, per ~~capita packaging material~~ **unit**, relative to the first reporting year. The ~~total units and~~ total weight should be reduced by...”

Litter Goal and Fee Units

HCPA questions why the litter reduction goals are expressed as percentage measured in items rather than as percentage of total weight. It is likely that litter will degrade or break apart while in the environment prior to collection and assessment by the SO or contractor, making it difficult to sort litter into discrete units. Further, all other program goals are described as percentage of total weight, making the litter goal as written inconsistent with other goals. HCPA recommends that DEP base the litter goals on the percent of litter that is packaging by total weight.

HCPA thanks the Department for revising the reduction of litter fee in 10(A)(3)(c) to be based on brand instead of packaging material type but is concerned that it may be difficult to distinguish the particular brand any given piece of litter is associated with. Certain products may be more likely to be littered than others and thus targeted incentive fees, education campaigns, and other anti-litter strategies may be more effective if applied to highly littered product types rather than the packaging material type more generally. Specifically targeting brands, however, could result in companies with a more recognizable brand name or logo being penalized simply because it is easier to distinguish their brand on littered material than others. HCPA recommends that the Department base the reduction of litter fee on product type rather than specifically by brand or clarify how the Department will proceed if the brand is unable to be identified on a signification portion of the litter collected in an audit.

“Recycling Facilities” Clarification

HCPA is concerned that the draft rules reference “recycling facilities” multiple times when detailing criteria for determining if a packaging material will be considered readily recyclable without defining this term in either the draft rules or the underlying statute. For example, 4(B) states that for multi-material packaging, the Department will identify cases where the separation and recycling of more than one base material is routine at *recycling facilities* that accept the packaging material type. Additionally, 4(C)(3) refers to materials that are routinely separated and sorted at *recycling facilities* that accept the packaging material type as a way to determine the weight of material targeted for recycling to total weight.

Given that producer fees and program requirements are directly tied to what is or is not considered readily recyclable, it is important to have a clear understanding of what the readily recyclable criteria are. HCPA recommends removing references to recycling facilities and instead aligning 4(B) and 4(C)(3) with the language in section 5(A)(2), which states that packaging material types designated as readily recyclable must be “collected and sent for recycling by participating municipalities”, as this is a clear and measurable data point that relates to the program goals. If the Department chooses to retain the reference to recycling facilities, HCPA recommends that the Department clearly define this term.

Producer Reporting and Fees Clarifications

HCPA recommends that the Department align the language for reporting “packaging material type produced” in 9(B) with the statutory language on the scope of the stewardship program: “packaging material sold, offered for sale or distributed for sale in or into the State.”¹⁰ HCPA recommends that the Department make this change throughout the proposed rule to align with the statute (*i.e.*, replace packaging material type “produced” with “sold, offered for sale or distributed for sale in or into the state”).

HCPA remains concerned that the requirement in 9(B)(3) to report by UPCs or brick codes introduces additional complexity not required by the statute that may result in inaccuracies or inconsistencies in producer data. Producer data is organized in different ways. Not all producers use brick codes and it is not required to be included in reporting by the statute. Additionally, UPCs may not always change when a package changes. In order to simplify reporting obligations to focus on allowing for calculation of fees against statutory obligations, HCPA recommends that the Department remove the reference to brick code in 9(B)(2) and instead structure reporting by stock-keeping unit (SKU) and other codes that represent the various SKU versions sold during the reporting year as needed.

HCPA thanks the Department for providing a process for producers to estimate weight and number of units in cases where they are not able to obtain sufficient information on the weight or units of their packaging material sold into Maine. To improve the efficiency of this process, HCPA recommends that the Department include clear language to allow for producer reporting using national data prorated for Maine’s population.

HCPA thanks the Department for updating the payment due date for producer fees to be at least two months after the invoice is received from the SO.

¹⁰ 38 MRS § 2146(7)

Inclusion of Disposal Costs Disincentivizes Waste Reduction

HCPA remains concerned that the draft rules appear to require producers, through the proposed fee structure, to effectively reimburse municipalities for the costs of landfilling or otherwise disposing of packaging material. Requiring producers to reimburse for disposal costs, even if limited to not readily recyclable materials, does not give municipalities a clear incentive to work with other stakeholders on ways to recycle more materials instead of landfilling them, as municipalities receive funds either way. Other similar packaging Extended Producer Responsibility (EPR) programs incentivize producers to incorporate more circular packaging through eco-modulated fees and/or source reduction requirements and incentivize municipalities to recycle or recover said packaging through recycling reimbursement. HCPA recommends that the Department limit reimbursement to material managed for recycling, reuse/refill operations, or other pathways that reduce waste.

Conclusion

HCPA appreciates the opportunity to provide input on the Department's proposed rule for the implementation of Maine's Stewardship Program for Packaging and appreciates the care that the Department is taking to solicit and incorporate stakeholder input. HCPA looks forward to continuing to engage with the Department to support successful implementation of Maine's Stewardship Program for Packaging. We invite any questions about this submission and look forward to the Department's response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Molly R. Blessing'.

Molly R. Blessing
Vice President, Sustainability & Product Stewardship