

August 26, 2024

Attn: Mr. Brian Boneski
Maine Department of Environmental Protection
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: rulecomments.dep@maine.gov

RE: Comments on Revised Draft Rules Chapter 428: Stewardship Program for Packaging

Dear Mr. Boneski,

Circular Action Alliance (CAA) is pleased to submit comments on Maine's revised draft rules for Chapter 428: Stewardship program for packaging.

Circular Action Alliance (CAA) is a U.S. Producer Responsibility Organization (PRO) dedicated to implementing effective Extended Producer Responsibility (EPR) laws for paper and packaging. As a nonprofit, producer-led organization, CAA is committed to delivering harmonized, best-in-class compliance services to all producers to advance an efficient and effective circular economy.

CAA is the only organization approved to implement U.S. EPR laws for paper and packaging and is operating as the single PRO in California and Colorado. CAA has submitted an initial program plan to operate as the PRO in Oregon and has also been selected to represent producer interests as the PRO on the State Producer Responsibility Advisory Council in Maryland. The attached submission outlines our detailed comments, including key recommendations pertaining to:

- Definition of producer;
- Producer reporting requirements; and
- Timing of producer reporting, invoicing, and payments to municipalities.

We appreciate the opportunity to provide feedback and would be happy to answer any questions you might have.

Sincerely,



Susan Bush
Maine Program Manager
Circular Action Alliance (CAA)

Circular Action Alliance Comments on Maine Revised Draft Rules (“Reposting Draft”)

Section 2: Definitions

- 1) The word “Plan” is mentioned frequently throughout the rules but is never defined. We request that the phrase “Program Plan” be defined and that the Stewardship Organization (SO) update the Program Plan every five years. This approach would add clarity and reduce confusion with other types of plans such as the investment savings plan. We request simplifying the request for proposals (RFP) process and contract to the greatest extent possible by focusing on meeting statutory requirements and providing DEP with adequate information to make an informed decision. The SO’s Program Plan would include more detail on the SO’s approach.
- 2) We request that the perishable food exemption in statute be clarified in the rules to indicate that the exemption only applies to the packaging associated with the perishable food, not to other products the producer may sell or supply into the state. The current wording appears to make a producer exemption, not a product exemption. Therefore, this should be clarified in the definitions section of the rules.
- 3) The definition of “Manage,” as presented in the revised draft rules, includes “to educate consumers about packaging material, or to pick-up litter.” This definition is unclear because these activities are not described as reimbursable activities in Section 13 and do not seem to be part of what is described elsewhere in the draft rules (e.g., Section 17); therefore, that portion of the definition of “manage” should be removed, and those activities could be outlined where appropriate.
- 4) “Producer” is defined in statute and in rules. We encourage DEP to clarify the definition of producer to ensure that there is a tiered structure, such that it is clear who has obligation to report and pay fees. Under the current wording, a tiered structure is alluded to, in that subsection (2) states “and has no physical presence in the United States”; implying tier (1) would require a physical presence in the U.S. We also request that the importer described in (2) be required to be located in Maine. The current definition is as follows:

V. 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 Section 2(VW)(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.

Producer includes a low-volume producer, as defined in 38 M.R.S. §2146(1)(G), and a franchisor of a franchise located in the State but does not include the franchisee operating that franchise.

Producer does not include a nonprofit organization exempt from taxation under the United States Internal Revenue Code of 1986, Section 501(c)(3).

We suggest broadening responsible entity to the first tier as including an entity licensed to sell the brand and including that the entity has a physical presence in the U.S.” in (1) and having (2) be restricted to an importer located in Maine. We also suggest removing “sole importer,” as there may be several entities importing a product into the State.

Additionally, the description of added packaging to another producer’s product and low-volume producer elements are not part of the tiered approach but belong at the end of the definition as clarification

language, as is the franchisee language. We present preferred revised language below. It is important that the definition clarifies who is the obligated party. If there are several possible obligated parties, identifying the obligated producer in the packaging supply chain will be more difficult and time-consuming. Additionally, there is the potential that no entity will step forward as the obligated producer. We also believe it is unlikely that there will be one sole importer into the state in many cases; therefore, the definition should not say “is the sole importer.” It is also important that the definition of producer be as harmonized as possible among states to reduce confusion and enhance compliance.

5) Toxics – In Section 2 DD “Toxics” is defined to mean chemicals of concern, chemicals of high concern, or priority chemicals listed by the Department in accordance with *Toxic chemicals in children’s products*, 38 M.R.S. §1694; PFAS and phthalates as defined in *Reduction of toxics in packaging*, 32 M.R.S. §1732; and food contact chemicals of high concern or priority food contact chemicals listed by the Department in accordance with *Toxics chemicals in food packaging*, 32 M.R.S. §1743.

We believe the DEP has expanded the scope of the laws addressing children’s products and food packaging by applying these limitations to all packaging, instead of the children’s products and food packaging the laws were intended to address. We suggest the chemicals in the children’s products law be removed, and the food contact chemicals of concern only apply to food contact packaging.

Further, we request that DEP publish a list of chemicals that cannot be included in packaging on their website, as this definition relies on Maine laws, and therefore is unique relative to toxics addressed in other states.

CAA Comments Pertaining to Section 2 of Chapter 428 Revised Draft Rules

Section 2	Add a definition to clarify what a Program Plan is and broadly, when it is due/updated.	Add a definition for the Program Plan to the definitions section to clarify that there is a Program Plan (and is not being used interchangeably with RFP or confused with other types of plans), and that it is to be updated every five years. We also suggest DEP simplify the RFP as is practicable and instead obtain details in the Plan.
Section 2	Add a definition to clarify the producer of perishable food exemption in statute	Statute – §2146 (2) (D) Producer Exemptions The producer sold, offered for sale or distributed for sale in or into the State during the prior calendar year to retailers or direct to consumers products that were perishable food and that were contained, protected, delivered, presented or distributed in or using less than 15 tons of packaging material in total. Perishable food exemption – If a producer sells, offers for sale, or distributes for sale in or into the State during the prior calendar year to retailers or direct to consumers products that were perishable food and that were contained, protected, delivered, presented or distributed in or using less than 15 tons of packaging material in total. The exemption applies only to the less than 15 tons of packaging associated with the perishable food, not other products the producer may sell or distribute into the State.
Section 2	Define import	It appears that in this Chapter import includes interstate trade. A definition should be developed to clarify this.
Section 2 (P)	Amend the definition of Manage	“Manage” means to collect, transport, process, or otherwise prepare a packaging stream for recycling, reuse, composting, or disposal; to educate consumers about packaging material, or to pick-up litter.
Section 2 (V)	Amend the Definition of Producer	V. Producer. “Producer” means a person that: (1) Has legal ownership the rights to market the product either as the legal owner or licensee 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 and

		<p>has a physical presence in the United States; or, if no such entity exists;</p> <p>(2) Is an-the sole entity with a physical presence in Maine that imports into the State for sale, offers 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 Section 2(V)(1) and has no physical presence in the United States.</p> <p>Producer includes a low-volume producer as defined in 38 M.R.S. §2146(I)(G)</p> <p>(3) is a Producer includes a A-franchisor of a franchise located in the State but does not include the franchisee operating that franchisee.</p> <p>A non-exempt entity that adds packaging material to another producer's product for distribution directly to a consumer is also a producer This person is only the producer for the packaging material it adds. Producer includes a low-volume producer, as defined in 38 M.R.S. § 2146(1)(G). Producer does not include a nonprofit organization exempt from taxation under the United States Internal Revenue Code of 1986, Section 501(c)(3).</p>
Section 2 (DD)	Amend the definition of Toxics	<p>"Toxics" means chemicals of concern, chemicals of high concern, or priority chemicals listed by the Department in accordance with Toxic chemicals in children's products, 38 M.R.S. §1694; PFAS and phthalates as defined in <i>Reduction of toxics in packaging</i>, 32 M.R.S. §1732; and for food contact packaging, food contact chemicals of high concern or priority food contact chemicals listed by the Department in accordance with <i>Toxics chemicals in food packaging</i>, 32 M.R.S. §1743.</p> <p>We request the Department publish a list of toxics that should not be in packaging or food-contact packaging on their website.</p>

Section 3: Assessment

- 1) Program Goals –Targets should be, measurable, achievable and based on robust data. Ideally, goals would be established after the Needs Assessment is complete, and there is more data available. We suggest DEP consider establishing goals through the Program Plan process, after data is available.
- 2) Program Goals – There should be a method to update the goals over time as more data is obtained through program reporting and Needs Assessments.
- 3) Litter goal – If DEP continues to include specific goals in the rules, the ramification of not achieving the litter goal should be revisited. If the litter goal is unmet, current draft rules indicate that the SO is to report on the feasibility of a deposit program for the five packaging material types that are most littered. Food and beverage containers are generally the most littered items. Many beverage containers are in the Maine deposit-return system, so those are exempt from the program. Food packaging, however, is generally not suitable for a deposit program, as it is not practical, cost-effective, or sanitary. We suggest DEP remove that requirement.
- 4) Annual SO Reporting (B)(6) requires the SO to provide an update list of toxics in an appendix. We suggest the DEP provide and update the list of toxics on their website, as they are based on Maine laws.
- 5) Disposal Audits (D)(3) – We suggest relaxing the statistical standard for disposal audits from 90% confidence +/- 5% to either 85% +/- 5% or 90% +/- 10% to enhance the cost effectiveness of the studies.
- 6) Litter audits (E) -- We request that litter audits involve sorting covered packaging by packaging material type only, and not by brand. Sorting by brand is time consuming and will make such studies costly, without benefit to the expense. Brand owners have no control over consumer behavior or other actions (i.e., haulers

allowing materials to blow away, municipalities and other service providers using uncovered recycling containers, etc.).

CAA Comments Pertaining to Section 3 of Chapter 428 Revised Draft Rules

Section 3 Assessment (A) Program Goals	Ensure goals are based on data and are achievable but drive improvement.	Develop targets after the Needs Assessment is complete and more data is available through the Program Plan.
(A) Program Goals	Introduce a method to adjust goals over time.	Develop a process for goals to be adjusted over time as more data becomes available.
(A)(10) Litter goal	Program Goals – Litter. (If DEP includes goals in rules)	If a litter goal is unmet, the SO must identify the five packaging material types that are most littered, evaluate the feasibility of a deposit system for those packaging material types , evaluate any location patterns with respect to littering of packaging material, and include this information and any suggested education approaches or mitigation methods in the following year's annual report, unless it did so for one of the past three annual reports.
(B)(6) Annual SO Reporting – Toxics	Eliminate the SO requirement to provide an updated list of toxics as part of its annual report.	An updated list of toxics provided in an appendix: DEP should develop and update this list as needed, as it is based on Maine laws, and provide it on their website.
(D) Disposal Audits (3)	Relax the statistical standard associated with disposal audits.	For each audit the SO must collect and analyze samples until results estimate the relative weight of packaging material, by packaging material type, with 90% confidence +/- 610% for the 15 most prevalent packaging material types. [Alternatively with 85% confidence +/- 5%]
(E) Litter Audits	Adjust the litter audit methodology.	The SO must conduct litter audits to identify the percent of litter that is comprised of packaging material, and the percent of litter belonging to each packaging material type, and the percent of packaging material that can be attributed to a brand.

Section 5: Process for Defining Material Type List

- 1) The criteria for defining packaging material types should take into consideration the criteria in other EPR states to the extent possible in order to reduce producer reporting burden. The list of readily recyclable material should be determined outside of the rulemaking, such as in the development of the Program Plan.

CAA Comments on Section 5 of Chapter 428 Revised Draft Rules

(A) Defining Packaging Material Types	Revisit methodology and criteria for developing Appendix A	The criteria for defining packaging material types should take into consideration the criteria in other EPR states to the extent possible to reduce producer reporting burden. Develop the readily recyclable list outside of the rulemaking process, e.g., in the Program Plan development.
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Section 7: Calculation of the Per Ton Cost by Commodity

- 1) The title and description in this section should clarify that the section describes the calculation of the net cost per ton.
- 2) The Contractor Cost Per Ton should be net cost per ton. This is described in the equation, but not in the description.

CAA Comments Pertaining to Section 7 of Chapter 428 Revised Draft Rules

Section 7 Calculation of the Per ton Cost by Commodity	Clarify in the title and the description that this is to calculate the net cost per ton.	7. Calculation of the Net Per ton Cost by Commodity Section 7(A) through (F) below should be calculated with respect to a participating municipality's costs and revenues , as defined in Section 6.
Section 7 (D) Contractor Cost Per Ton	Clarify this is to calculate net cost.	D. Contractor Net Cost The contractor net cost is the net cost of a service agreement, as allocated to a commodity. (1) When a service agreement is for the management of one commodity stream, the contractor net cost per ton is the contractor net cost divided by the tons managed, in accordance with Section 17. The contractor net cost must be reported annually to the SO. (2) When a service agreement is for a mixed packaging stream, more than one packaging stream, or includes additional services beyond the management of packaging streams, the contractor must participate in a cost study, and Section 7(A) through (F) must be calculated for the contractor or subcontractor in order to assign the contractor net cost/ton to a commodity. ... Subcontractor net cost per ton is figured in the same way as contractor net cost per ton.

Section 8: Start-Up Registration with the SO

- 1) According to the current rules, if the producer does not know and cannot estimate the total tons produced, in order to estimate the start-up registration fees, the producer may report the total tons of packaging material distributed nationally. The SO will then estimate the total tons of packaging material produced by multiplying the national tons by Maine's share of the population of the United States. This method of estimating is only acceptable for start-up registration. We suggest the producer be the entity responsible for estimating the tons of packaging sold and distributed into Maine, not the SO. Producers will be responsible for reporting their supplied packaging in pounds to CAA in EPR states where we are operating as a PRO. We also suggest that this method of estimating the quantity of packaging sold or distributed into Maine be acceptable for annual reporting, and we suggest some clarification language.

CAA Comments on Section 8 of Chapter 428 Revised Draft Rules

Section 9 (A) Start-Up Registration with the SO	Have the producer, not the SO, determine the amount of packaging sold into state. Allow methodology to be used for annual reporting.	...This registration must include the information in Section 9(A) and an estimate of the total tons of packaging material produced during a timeframe identified in the SO's contract with the Department. If the producer does not know and cannot estimate the total tons produced in accordance with Section 9(D), the producer may report the total tons of packaging material used to contain, protect, deliver, present, or distribute a product that is sold, offered for sale, or distributed for sale nationally. In such cases the SO-producer will estimate the total tons of packaging material produced supplied into Maine by multiplying the national tons by Maine's share of the population of the United States. This method of reporting and estimation is only acceptable for start-up registration.
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Section 9: Ongoing Producer Registration and Payment

- 1) Producers are to report data to the SO by May 31 annually. This is in alignment with reporting in other states: therefore, we support this date. If the producer were reporting in 2025, the producer would be reporting 2024 supply data, which would be used to establish fees for the 2026 program year.
- 2) The introduction to producer reporting indicates that producers must assume packaging material is received by the consumer of the product unless the producer can verify that the packaging material is not received by the consumer of the product, in which case that material is not packaging material, as defined by 38 M.R.S. §2146, and should not be reported. We suggest the rules clarify that this does not pertain to transport packaging, which routinely does not go with the consumer.
- 3) Reporting obligations (as described in (B)(2) and (3) should be simplified to reduce unnecessary complexity, which could introduce inaccuracies given producer data may be organized in different ways. The Draft Rules present reporting requirements that are more stringent than statute requires. We suggest the reporting requirements be simplified, such that packaging material data does not have to be reported by UPC or brick code, which can change frequently. We request reporting requirements minimize the administrative burden on producers. Listing packaging materials by UPC will be onerous and is a unique requirement to Maine that would take significant effort and time for producers to meet. Also, we request the removal of the language requiring that “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 the addition of packaging material.” It is administratively burdensome and unusual for producers to have to describe their sales pathway.
- 4) The revised draft rules indicate that producers are to report the total weight of the packaging material type [(9(B)(4) and (5)], as well as the base material, or, “if routinely separated and recycled according to Appendix A,” and that weighs at least 0.1 gram.” We suggest that the draft rules stipulate that additional reporting requirements are to be provided in the SO’s Program Plan or guidance documentation, and will, to the extent possible, harmonize reporting among the states to minimize administrative burden, while still providing data required to support the intent of the statute. These details would be developed in collaboration with DEP. We suggest that the producer not be required to provide a short description of the methodology used to determine the measurement in (4) and (5). This, again, is administratively burdensome to producers and is not required in other states. We would be happy to discuss examples and their complexity with DEP.
- 5) Producers should not report on the weight of the package that is “targeted for recycling.” They should simply be required to report weights of the package and/or components. What is targeted for recycling can vary in different regions and can change over time with market conditions and innovation.
- 6) Producers should not be required to report about refill and reuse options the producer is aware of beyond their own packaging [(9)(B)(8) and 9(B)(9)]. This is of marginal benefit and a reporting request unique to Maine.
- 7) We request that in Section (9)(B)(10), the producer reporting packaging “in a way that suggests” it is recyclable, reusable, or compostable, be rephrased to state “in a way that indicates it is,” which is less ambiguous and subjective.
- 8) The methodology for estimating units produced in Maine is overly complex. Producers should be able to estimate based on allocation of national sales estimated by percent of U.S. population in Maine. Distribution networks are rarely based on state lines, with products shipped to distribution centers being solid in state or shipped across state borders. As a result, many producers will rely on estimates through this method, as well as the method suggested.

CAA Comments on Section 9 of Chapter 428 Revised Draft Rules

9(B) Annual Reporting for Producers	No suggestion.	We support the May 31 date for producer reporting.
	Clarify that transport / tertiary packaging is not	Producers or reporters must assume packaging material is received by the consumer of the product unless the producer can verify that the packaging material is not received by the consumer of the product, in

Other than Low-Volume Producers	included in this requirement.	which case that material is not packaging material, as defined by 38 M.R.S. §2146, and should not be reported. This requirement does not pertain to transportation/tertiary packaging which is assumed to not go with the consumer.
	Reduce reporting burden on producers.	We request that reporting details beyond overall packaging weight and packaging material type be developed with DEP input and provided in the Program Plan or guidance documentation. We suggest adding this text before (1) Producers are to annually report brands they sell into the state, and list UPC codes of the products they sell.
9(B)(1)		(2) Brand or brands of products sold with this packaging material, 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 materials. (2) The quantity of packaging material sold into the state by packaging material type. (3) The UPCs of products sold with this packaging material. Brick codes may be provided instead of UPCs in cases where all products with a given brick code are associated with the same packaging material type;
9(B)(4)	Simplify reporting requirements described in draft rules.	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 measurement. Any material present that is neither the base material nor another material that is routinely separated and recycled according to Appendix A, and that weighs at least 0.1 gram, should not be included in this weight, only in Section 9(B)(5). and other packaging components, in a manner to be described in the Program Plan or guidance documentation, to be decided upon with DEP input, to harmonize, to the extent possible, with reporting requirements of other states.
9(B)(5)	Simplify reporting requirements.	Total weight of the packaging material type. and a short description of the methodology used to determine this measurement.
9(B)(8) and 9(B)(9)	Remove reporting requirements that provide little benefit.	(8) Whether the producer provides, or is aware of, refill options for the product sold with for the packaging material in State, either in the State or elsewhere; (9) Whether the producer provides, or is aware of, reuse systems for the packaging material in the State or elsewhere; and
9(B)(10)	Delete the phrase "in a way that suggests it is" to reduce ambiguity	(10) Whether the packaging material is labeled in a way that suggests it is as being: a. recyclable; b. reusable; or c. compostable, and for a packaging material type that is labeled in a way that suggests it is as reusable, the counties in which it is produced.
(9)(D)(2)	Provide a simpler way for producers to estimate the quantity of	Estimating units produced. If a producer cannot obtain information on the number of units produced, as used by the producer to quantify sales to distribution networks, it must may estimate the number of units produced as follows:

	products they sell in Maine	<p>(a) A producer mustmay estimate the number of units produced for each distribution network that may sell, offer for sale, or distribute for sale in or into the State;</p> <p>(b) Estimates must assume equal per capita sales throughout the distribution area, and distribution areas must be defined along state lines; and</p> <p>(c) A producer mustmay report for each distribution network, the distributor, the distribution area, and the total number of units distributed through that network.</p> <p>Alternatively, a producer may estimate the units produced by allocating national sales data to the portion of the U.S. population that Maine comprises.</p>
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Section 10: Producer Fees

- 1) According to the current revised draft rules, the SO must invoice the producer by July 1 of each year, and the producer must pay fees by September 1 of each year. CAA is working toward the harmonization of reporting and fee-setting timelines across states to support producer compliance. Our objective is to have a May 31 deadline for reporting, and then to publish the fee schedules on Oct. 1, so producers can make fee payments in the following year. There needs to be more time to calculate fee rates, develop invoices, and have producers pay, if it is to be for the same data reported in May. The SO will need several months to review data, ensure accuracy, and determine fees, with fee rates being determined by Oct. 1 and producers being invoiced by January 1. We suggest the DEP work out the exact schedule with the SO and that this schedule be included in the SO's Program Plan.
- 2) The manner in which producer fee rates (and in particular packaging material type fees) are estimated is problematic. It introduces financial volatility, as the per-ton cost of material managed in the prior year is applied to a current year's quantity being supplied – not to the quantity being managed and reimbursed to municipalities under the program. This could produce surpluses in revenues over costs (particularly in a state where not all municipalities are expected to be participating, initially). However, it can also result in shortfalls. The examples below show how a surplus or shortfall could occur in the material base fee portion of producer fees given this methodology.

Typical PRO Approach		Maine's Approach
<ul style="list-style-type: none"> Supply = 200k tons Collected/recovered = 125k tons Cost to manage materials = \$25M (\$200 x 125k - actual cost x tons managed) Fee rate = \$25M/200k ton = \$125/ton (Total cost to manage/tons supplied) Total Fees Levied = \$25M (\$125/ton x 200k tons) 	<p>Same</p> <p>Different</p>	<ul style="list-style-type: none"> Supply = 200k tons Collected/recovered = 125k tons Cost to manage materials = \$25M (\$200 x 125k - actual cost x tons managed) Fee rate = \$200/ton (i.e., cost per ton to manage = fee rate) Total Fees Levied = \$40M (\$200/ton x 200k tons) Fee surplus = \$15M

The mathematical example above shows the unintended outcome of a fee surplus under Maine's approach, as the fee rate applied to supplied tons is the actual cost to manage collected tons. This results in greater revenues than needed to manage the tons collected.

A fee shortfall may occur, however. If reported supply declines from year to year or is low compared to the tons of material collected/ recovered. Another scenario that could cause a shortfall is if other revenue sources into the system, like revenue shares for commodities, decline. The example below shows a circumstance where reported supply into the market is reduced, and how applying the actual cost to manage materials as a fee to all materials

supplied can result in a fee shortfall. This scenario may occur in programs where there is underreporting of supply tons.

Typical PRO Approach		Maine's Approach
<ul style="list-style-type: none"> Supply = 200k tons Collected/recovered = 125k tons Cost to manage materials = \$25M (\$200 x 125k - actual cost x tons managed) Fee rate = \$25M/200k ton = \$125/ton (Total cost to manage/tons supplied) Total Fees Levied = \$25M (\$125/ton x 200k tons) 	Same	<ul style="list-style-type: none"> Supply = 100k tons Collected/recovered = 125k tons Cost to manage materials = \$25M (\$200 x 125k - actual cost x tons managed) Fee rate = \$200/ton (i.e., cost per ton to manage = fee rate) Total Fees Levied = \$20M (\$200/ton x 100k tons) Fee shortfall = \$5M
	Different	

Allowing flexibility in the setting of fee rates to be based on the required budget, not solely on quantity supplied, would alleviate volatility. Taking this approach would align with other states and CAA's plans to help harmonize services for producers. It would also allow to plan better to accumulate funds for investments (as is also mentioned in Section 18). The stewardship reserve funds will help manage volatility, but more stable fees help producers budget with greater accuracy.

- 3) The fee structure should allow for the charging of producers for investments as part of their packaging material type fees. Ideally investments are paid for by the material types that that will benefit from them.
- 4) We suggest introducing the structure of incentive fees in the Program Plan, rather than in the rules, so that there can be flexibility to harmonize with other states, such that producers can have clarity on which packaging attributes are desirable, without conflicting messaging among states. They should also be phased in over time, so that producers can understand their obligations and budget for them. The rules could broadly describe the attributes to be addressed using incentive fees.
- 5) CAA does not support the implementation of a litter reduction fee, as producers cannot control behaviors that result in littering. Penalizing producers for behaviors undertaken by consumers and others is not equitable. We request eliminating this goal and fee. Instead, as part of the investment in education, efforts can be made to educate consumers and others on ways to prevent litter, and on the importance of not littering. Additionally, if packaging litter is found to be an identified issue in a certain location, a community could apply for an investment to be made in litter cleanup. These would be more direct approaches to address litter.
- 6) If eco-modulation remains in Rules, we suggest the following changes:
 - Include a mix of incentive and malus fees - not just maluses. We suggest the toxicity fee be changed to be an incentive fee (reward producers for seeking attestation of no toxics).
 - We suggest relaxing standards for the "labeling fee" - currently 100% of state must have access to management pathway (recycling, composting, reuse) or the producer faces fee for mislabeling. This is not realistic, especially as reuse and composting systems and other alternative collection programs are developed - they will likely not be available statewide immediately. We suggest this percentage be 60% of the counties.
 - As was mentioned in Section 3, we request removing the "in a way that suggests it is" language regarding labeling, as this is subjective language that introduces ambiguity. Instead, the language should read "is labeled as recyclable," "is labeled as compostable," and "is labeled as reusable."

CAA Comments on Section 10 of Chapter 428 Revised Draft Rules

Section 10 (A)(2) Packaging Material Type Fees	Delay when producers must pay fees.	Producer fees should be paid by January 1 of the next calendar year.
	Reconsider how fees are calculated.	We suggest allowing fees to be based on the budget, not solely on quantity of packaging material supplied, would reduce revenue volatility. Fees would still be based on the cost of recycling each material type. This would also allow for more certainty in the budgeting of investments.
Section 10 (A)(2)	Adjust packaging material type fees to allow for the inclusion of investment funds as needed.	Packaging material type fees should include/have the ability to include funds that will go toward investments. This should be added as (A)(2)(c).
Section 10 (A)(3) Incentive Fees	Change the approach for implementing malus fees such that there is harmonization among states.	Have the SO provide details regarding eco-modulation fees in the Program Plan instead of rules to allow the SO flexibility to harmonize among states to the extent possible, so that producers are clear on which packaging attributes are most desired. Phase in implementation of all eco modulation criteria over time so producers have a clear understanding of potential financial impacts of malus fees and are able to budget for them.
Section 10 (A)(3) Incentive Fees	Eliminate the litter reduction incentive fee.	Eliminate the litter reduction fee and brand-level goal as producers have little to no ability to influence behaviors that result in litter.
Section 10 (A)(3) Incentive Fees	Make certain changes if incentive fees remain in rules.	Implement a mix of incentive and malus fees. The toxicity fee could be an incentive fee, rewarding producers that provide a certificate of compliance that there are no added toxics in their packaging. Relax the requirement that programs be available throughout the entire state. We suggest a threshold of 60% of the counties. Remove the "in a way that suggest it is" language for (d) (i)(ii) and (iii), replacing it with "labeled to be" to reduce ambiguity.

Section 11: Alternative Collection Programs

- As is currently structured, there is little incentive for a producer or group of producers to operate an alternative management program, as producers have to pay in on all covered packaging material produced and report to the SO, and also have to develop a proposal, pay a proposal fee, pay for the operation of the program itself, and report to DEP annually, as well as pay an annual fee to DEP. The DEP then reviews annual reports and confirms or adjusts tons to be credited to the producers for covered packaging material that is managed through the program. These requirements place a higher burden on producers that operate an alternative collection program, even if that system is more robust and more effective and efficient than the common collection system. This results in little to no incentive for a producer or group of producers to develop an alternative collection program. We suggest the DEP consider ways to incentivize alternative collection programs for materials that should not or cannot safely be managed in municipal curbside and drop-off recycling programs.
- We suggest that for hard-to-manage materials that are already being managed, at least in part, through an established alternative collection program, be exempt from the program. Examples include the Agricultural Container Recycling Council (ACRC) packaging, automotive fluid containers, and pressurized cylinders. Such packaging:
 - Is generally, not managed through municipal curbside and drop-off recycling programs, which are the primary means of collecting most consumer packaging;

- Is costly to manage, often having unique handling needs;
 - Can introduce safety risks at municipal or other facilities; and
 - Many of these material types are federally regulated, and are therefore unable to meet many of the packaging attributes desired, or are unable to do so without risking safety.
- 3) In Section A (4), replace “The Department may wave...” with “The Department may waive...”
 - 4) In Section B, Approval Conditions, clarify that the program is at no cost to generators (producers will be covering the costs).
 - 5) We suggest that the draft rules clearly state that that alternative collection programs are approved for a five-year period, which would help producers and groups of producers budget and more cost effectively manage their programs. This is consistent with Section 8(A) of the statute, which states, “The department may approve an alternative collection program for a term of 5 years.”
 - 6) In Section (B)(1)(d), Credit for regional programs, we suggest there be other defensible means for allowing regional programs beyond county-level sales data. Such data can be costly to obtain and may not reflect where the material is generated. Examples might include employment data for specific business sectors, land use data, business location data, etc.
 - 7) We suggest that deficiencies that require a change to collection or processing operations have more than 90 days to correct the deficiency, or that there be a process for requesting more time to correct the deficiency. It can be time-consuming, for example, to spec and purchase needed equipment, make collection site changes, etc.
 - 8) In Section (E). Timeframes for Correcting deficiencies, we suggest there be a process whereby the producer or group of producers can apply for a deficiency that will require a change to collection or processing operations (2), upon approval by the Department.

CAA Comments on Section 11 of Chapter 428 Revised Draft Rules

Section 11 Alternative Collection Program	Make it less burdensome for producers to introduce and operate an alternative collection program.	Consider ways of making it more enticing for an entity to develop an alternative collection program where there is a need for one – such as when there is a need to manage materials separately from other packaging. Because there is duplicative reporting and program payment, and producers pay in on all produced to the SO, the current rules do not encourage the formation of alternative collection programs and are punitive to producers that are participating in effective programs.
Section 11	Exempt programs managing difficult-to-manage materials from the SO Program.	Exempt existing well-established alternative collection programs that collect hard-to-manage materials and/or materials not managed through traditional municipal curbside and drop-off recycling programs from reporting into and paying fees to the SO.
Section 11 (A) Proposal Fee (4)	Replace “wave” with “waive.”	The Department may wave -waive or reduce the proposal fee for a proposal modification to an alternative collection program if its review does not require significant staff resources.
Section 11 (B) Approval Conditions	Clarify free is at no charge to generators.	In order for an alternative collection program to be eligible for approval by the Department, it must provide collection that is free -free at no cost to generators , available year-round, and convenient.
Section 11 (B) Approval Conditions	Clearly state that programs are approved for five years.	Alternative collection programs should be approved for five years, not “up to five years.” This would help producers and groups of producers be better able to budget for and cost effectively manage the program.

Section 11 (B)	Allow for revocation of alternative collection program under certain conditions.	We suggest the DEP be able to revoke an alternative collection program if they are underperforming in consecutive years.
Section 11 (B)(1)(d)	Allow for additional ways to defend regional programs beyond sales data by county.	If the producer or group of producers can provide defensible data other than sales data to justify a regional program, this should be allowed, as sales data by county can be costly to obtain.
Section 11 (E)(2)	Allow producers or groups of producers to request additional time to correct a deficiency.	If the Department identifies a deficiency that will require a change to collection or processing operations the Department will allow 90 days to correct the deficiency. If the Department identifies a deficiency that will require a change to collection or processing operations the Department will allow 90 days to approve a plan to address the deficiency in a timely manner." If the Department identifies a deficiency that will require a change to collection or processing operations that will take 90 days to correct, the Department will request that the producer or group of producers submit a plan within 90 days describing how the deficiency will be corrected in a timely manner.

Section 13: Defining Municipal Reimbursement

- 1) Under the current draft rules, the SO must reimburse participating municipalities by October 1 of each calendar year and prior to dispensing funds for investments. We suggest this time frame be adjusted to harmonize with the schedule in other states. Fees will be developed in September or October, with invoices being issued in January. The municipalities would be reimbursed by March 1.
- 2) Throughout the section, clarify that it is the net cost of recycling being determined, not the cost.
- 3) In managing packaging that is not readily recyclable, we suggest that in (2), a participating municipality managing its solid waste through alternative management be reimbursed at ½ the median per ton net cost of recycling

CAA Comments on Section 13 of Chapter 428 Revised Draft Rules

Section 13 Defining Municipal Reimburse- ment	Extend the time that municipalities must be reimbursed.	The SO must reimburse participating municipalities by October March 1st of each calendar year, for costs they incurred the prior year, and prior to dispersing funds for investments.
Section 13 (A) (D)(1) (D)(2)	Clarify that for recycling the net costs are being determined. Change the cost of reimbursing for alternative management to ½ the median net cost of recycling from 2/3.	The SO must determine the tons of each packaging material type recycled, reused, or composted in accordance with Section 17 and the median per ton net costs of recycling in accordance with Section 16. (A) For a packaging material type.... At the median per ton net cost of recycling this packaging.... (D)(1) For a packaging material type that is not readily recyclable: This reimbursement is at one-third of the median per ton net cost of recycling readily recyclable packaging.... (D)(2) A participating municipality managing its municipal solid waste through alternative management must be reimbursed for managing its per capita share of packaging material that is not readily recyclable and is not recycled at two-thirds one-half the median per ton net cost of recycling readily recyclable packaging

		<p>(D)(3) For a packaging material type that is not readily recyclable, a at the median per ton net cost of recycling</p> <p>The median per ton net cost of recycling readily recyclable packaging material is the median of the reimbursements to be paid for each ton of readily recyclable packaging material being reimbursed to participating municipalities.</p>
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Section 14: Obtaining Information for Municipal Reimbursement

- 1) Section (B)(2)(c) – Describes accuracy. We suggest this statistical standard be relaxed, in order to make the audits more cost effective.
- 2) Section (B)(3) describes site-specific audits. To be able to budget/allocate resources effectively, we suggest that there be an upper limit on the total number of site-specific audits that the SO is required to conduct in a year. We suggest this be 10 per year.

CAA Comments on Section 14 of Chapter 428 Revised Draft Rules

Section 14 (B) (2)(c)(i)	Relax the statistical standard required for audits.	For audits conducted in accordance with Section 14 (B)(1)(a), samples only need to be collected and analyzed until results estimate the value of the most prevalent packaging material type with 90 85 % confidence +/- 5%. [Alternatively, 90% confidence +/- 10%]
Section 14 Obtaining Information for Municipal Reimbursement (B)(3)(a)	Limit the total number of site – specific audits to be conducted annually.	Process. A request for a site-specific audit must be submitted to the Department in writing, and must describe....If the Department determines that the participating municipality should have a site-specific audit, the Department will approve the request and direct the SO to conduct a site-specific audit for the participating municipality within one year of the approval of the request, up to 10 per year . If the SO's auditing schedule does not allow for the completion of a site-specific audit within one year, or if the SO has already agreed to conduct 10 site-specific audits in the year , the Department may delay approval of the request for up to 12 months.

Section 16: Determining the Median Per Ton Cost of Recycling, Reusing, and Composting Each Packaging Material Type

- 1) This section should make it clear that for recycling, it is the median net cost per ton of recycling that is being identified. For composting and reusing, it should be the median cost.
- 2) Clarification is needed in the description of 16(A)

CAA Comments on Section 16 of Chapter 428 Revised Draft Rules

Section 16 Determining the Median Per Ton Costs	<p>Clarify that for recycling it is the median net cost.</p> <p>Clarify what is meant by "as the per-ton cost of the commodity with which it was sold as it pertains to compost and reuse, or describe differently for those pathways.</p>	<p>As data allows, the SO must determine a median per-ton net cost of recycling and median per-ton cost of reusing and composting each packaging material type for each group of similar municipalities. Only costs from participating municipalities that have a current complete cost study are used to determine the median per-ton cost.</p> <p>(A) For each participating municipality that has a current complete cost study, the SO must determine the per-ton net cost of recycling, and the per-ton cost of reusing, or composting each packaging material type as the per-ton cost of the commodity with which it was sold.</p> <p>The last part of this statement requires clarification, and it does not seem to apply to composting and reuse.</p> <p>The per-ton <u>net</u> costs for <u>recycling</u> need be clarified in (B), (B)(1), (B)(2), and (B)(3), also.</p>
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Section 18: Investments

- 1) Investment proposal criteria should include that the proposal should expand capacity (if required) and /or result in cost efficiency of managing packaging material.
- 2) We suggest that proposal for new infrastructure not be required to designate ownership of the infrastructure to the entity types listed (municipalities, schools, nonprofits, and businesses that realized less than \$5,000,000 in total gross revenue during the prior calendar year. Instead, investments should be considered based on the merits of the proposal, including the ability to support the state's waste management hierarchy, expand capacity for recycling, composting, and/or reuse, and/or drive cost efficiency through the system.
- 3) We suggest that in (A)(5) the wording be changed such that "...operation of the proposed infrastructure drive value, as shown by projected revenues and/or savings in excess of the initial funding including cost of securing such funding."
- 4) We suggest that the wording regarding (A)(6)(c) be revised to indicate that the cost threshold pertains to total material collection and processing costs, not the investment cost.
- 5) We suggest deleting the requirement that major investments that will designate new infrastructure as property of the entities listed above be preferred. Infrastructure investments should be based on what is needed, the ability to expand capacity and/or improve the cost efficiency and effectiveness of the management of packaging material, as well as other merits of the proposal.
- 6) Preference for funding must be prioritized based on the value the proposal will generate balanced with other preferences (vs just other preferences)

CAA Comments on Section 18 of Chapter 428 Revised Draft Rules

Section 18 Investments (1) (a)	Make the criteria for investments less ambiguous.	A proven solution for improving expanding the capacity (if needed) and/or cost efficiency of the management of packaging material.
Section 18 Investments (A)(2)	Delete the requirement of new infrastructure ownership.	1(2) In the case of a proposal for new infrastructure, the proposal must designate the infrastructure as the property of a municipality, a group of municipalities, tribe, school administrative unit, career and technical region set forth in 20-A M.R.S. §8451, nonprofit organization exempt from taxation under the United States Internal Revenue Code of 1986, Section 501(c)(3), 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, improvements to existing infrastructure, or major investment needs.
Section 18 Investments (A)(5)	Clarify the investments should drive overall value.	In the case of proposals for infrastructure, operation of the proposed infrastructure must drive value must be sustainable , as shown by projected revenues or other ongoing funding and/or savings, equal to, or in excess of, the initial funding including cost of securing such funding. funding required for the operation. This criterion does not apply to pilot projects as described in Section 18(A)(1)(b). In addition, the primary determinant of value creation should reside with the body providing the funding.
Section 18 Investments (A)(6)(c)	Clarify that cost threshold pertains to total material collection and processing costs.	For proposals for infrastructure that facilitate recycling, an analysis of throughput demonstrating that the investment will not result in a total collection and processing cost of more than for every \$2,000 of investment, expressed in January 2021 dollars and per ton, in 2021 dollars adjusted according to the U.S. Bureau of Labor Statistics' Consumer Price Index. there will be at least one ton of material recycled.

Section 18 Investments (D)(2)	Allow for producer fees to include funding for investments, as described in the savings plan.	It will be necessary to add an investment component to producer fees to better budget for investments, as producer fees may not necessarily result in adequate surpluses to the stewardship fund to fund investments according to plan – see comments in Section 10. Investments should be funded by packaging material types that will be benefit from the investment.
Section 18 Investments (D)(4)	Remove the requirement that investment proposals designating new infrastructure as owned by specified types of entities be preferred.	...Proposals to fulfill a major investment need must follow the process described in Section 18(C). and investment proposals that will designate new infrastructure as the property of a municipality, group of municipalities, tribe, school, administrative unit, or career and technical region set forth in 20-A M.R.S. §8451 must be preferred.

Section 19 – Packaging Stewardship Fund Cap

The Packaging Stewardship Fund Cap is excessive. In California, for example, the fund is to be capped at six months of operating expenses.

1) We suggest that excess funding in (A) be defined as follows:

- There is no excess funding during the first five years.
- After five years, the packaging stewardship fund has excess funding if after setting aside funding for municipal reimbursement for the prior calendar year and the amount being saved for major investment needs according to the savings plan, as well as the amount needed for other planned investments (including education), there is more than enough funding to cover one year of expenditures based on the highest of the prior three years.
- After 10 years, the packaging stewardship fund has excess funding if after setting aside funding for municipal reimbursement for the prior calendar year and the amount being saved for major investment needs according to the savings plan, as well as the amount needed for other planned investments (including education), there is more than enough funding to cover six months of expenditures based on the highest of the prior three years.

CAA Comments on Section 19 of Chapter 428 Revised Draft Rules

Section 19 Stewardship Fund Cap (A)	<p>(1) There is no excess funding during the first five years.</p> <p>(2) After five years, the packaging stewardship fund has excess funding if, after setting aside funding for municipal reimbursement for the prior calendar year, there is more than enough funding to cover:</p> <p>(a) The sum of expenditures realized over one year, based on the highest year of the prior three; the past five years, other than expenditures on major investment needs</p> <p>(b) The amount being saved for major investment needs according to the savings plan; and</p> <p>(c) Any additional anticipated expenditures for other investments and education beyond what would be included in (2)(a).</p> <p>(3) After 10 years, the packaging stewardship fund has excess funding if, after setting aside funding for municipal reimbursement for the prior calendar year, there is more than enough funding to cover:</p>
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		<p>(a) The sum of expenditures realized over six months, based on the highest year of the prior three; the past three years, other than the expenditures on major investment needs; and</p> <p>(b) The amount being saved for major investment needs according to the savings plan; and:</p> <p>(c) Any additional anticipated expenditures for other investments and education beyond what would be included in (3)(a).</p>
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Section 21: Requests for Exemption from the Post-Consumer Recycled Material Incentive Fee

- 1) We suggest that exemptions from having to achieve certain packaging attributes be called a waiver, not an exemption, to reduce confusion. Typically, an exemption means a producer or a packaging material type is exempt from having to report and pay into a program.
- 2) We suggest producers have the ability to apply for a waiver from all packaging attributes that they might not be able to achieve and that they could result in an incentive fee, not just recycled content.
- 3) We suggest that the ability to apply for a waiver should be expanded to include state-regulated products at a minimum and, ideally, non-regulated products as well, as there are many reasons that a producer might not be able to achieve a packaging attribute goal. For example, there may not be a letter of no objection from FDA to use a certain type of food contact material, there may not be enough recycled material available in the marketplace, etc.
- 4) When producers are granted waivers for achieving specific goals/attributes, the packaging weight needs to be deducted from the denominator of the assessment calculation. This should be stipulated in the rules.
- 5) When a waiver is granted, we request it be for a period of five years, not “of up to five years” as currently stated in the rules. This allows producers to plan and budget better.

CAA Comments on Section 21 of Chapter 428 Revised Draft Rules

Section 21 Requests for Exemption from the Post- Consumer Recycled Material Incentive Fee	Change the term to waiver vs. exemption, as exemption generally refers to not being covered by the program.	We suggest referring to granting the ability of a producer to not have to achieve a packaging goal or attribute to be called a “waiver,” not an “exemption,” to enhance clarity.
Section 21	Expand the scope of waivers to different attributes/goals.	Allow producers apply for a waiver from all packaging attributes/goals that they might not be able to achieve and that could result in an incentive fee.
Section 21	Expand the scope of reasons that producers can apply for waivers.	Allow state-regulated and non-regulated packaging to apply for waivers from achieving specific packaging goals and attributes that could result in incentive fees.
Section 21	Clarify that packaging that receives waivers should be excluded in that goal's assessment calculation	Stipulate in the rules that packaging granted waivers is to be excluded from the “denominator” of the calculation pertaining to applicable goals.

Section 21(2)(a)	Grant waivers for five years, not "up to five years."	The Commissioner shall exempt the packaging material for a period of up to five years, beginning with the packaging material produced during the calendar year of approval and reported during the following calendar year.
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