



October 30, 2023

Commissioner Loyzim,

Thank you for the opportunity to comment on *the conceptual draft rules* ([part one](#), [part two](#), and [part three](#)) for Maine's Extended Producer Responsibility (EPR) for Packaging program established in [MRS Title 38 §2146](#). NRCM remains committed to working with the Department and stakeholders to ensure the success of this transformative program. We believe that the Department has provided an excellent starting point for feedback and discussions as we anticipate the formal rulemaking process to begin in December of this year. We appreciate the inclusion of stakeholder feedback in the Department's draft, since it was not required by law, but rather is a Department-led initiative for which we are grateful.

In addition to the comments that we submitted to the Department on each of the five sections: [Producer Exemptions](#), [Municipal Reimbursements](#), [Program Goals](#), [Recyclability of Packaging and Auditing](#); [Producer Fees](#), and Education and Investments, our comments below address the conceptual draft rules and highlight the areas that we strongly support (**which we have emphasized in bold in this document**). Please also find suggestions (underlined in this document) for how to further strengthen the language and best leverage this exciting opportunity to implement a robust EPR for Packaging program in Maine.

Exemptions

We are very pleased to see that the Department is not pursuing any additional exemptions under subparagraph (13) (D). We feel strongly that exemptions adversely impact the management and fairness of any EPR program. Any exempted producers would still be selling packaging materials into Maine's communities but leaving the responsibility of paying for management of this material to either the participating producers or municipal taxpayers. This is inequitable, and contrary to the fundamental rationale behind EPR. Further, we believe exemptions should be considered with caution and should be very limited in scope because:

- Exemptions add administrative complications for the stewardship organization; insofar as producers should only be accountable for obligated materials, significant auditing is required to account for exempted materials collected by municipalities.
- Exemptions benefit producers of exempted materials, creating an unlevel marketplace.
- Exemptions make performance measurement challenging (e.g., recovery rate/collection rate) as there is not full reporting of the material sold, and significant work is required to audit material collected.

If any special treatment is to be granted regarding federal regulations that limit the recyclability or use of recycled materials for a particular type of packaging, then that should be addressed by not making them subject to the malus fees, not total exemptions.

Program Goals

We believe that setting program goals is the most important aspect of the rulemaking process. And we have organized the bulk of our feedback on the draft rules such that our suggested changes are in pursuit of reaching the identified program goals. **We applaud the Department for setting nine program goals including: reduction; reuse; postconsumer recycled content; readily recyclable packaging; litter; participation; collection; base material-specific recycling; and overall recycling rate.** But we have some suggestions on how to rank them in order of importance, and ways to modify them to increase the value of these targets. We believe that ranking the program goals is important as the list relates to other program elements such as education and investments. Once clear goals are established, then all the other programmatic elements can be designed to achieve those goals. In general, NRCM maintains that there are *four overarching goals* of the EPR for Packaging program:

- 1) *Shifting costs from taxpayers and towns to producers of packaging*: Save taxpayers money and reduce the financial burden on local cities and towns by creating a more sustainable funding source to support the diversion of recycling of packaging materials.
 - a. We believe that equitable municipal participation should be the primary goal of the program. We suggest moving the municipal participation goal (F) to the top of the list and increasing the participation goal to 60% of all cities, towns, townships, villages, and plantations from 2030-2034, 75% from 2035-2039, and no less than 100% by 2040. We don't understand why 100% participation would not be the final goal. Further, we ask that the Department apply this goal to each of the groupings of similar municipalities to ensure participation throughout the state.
 - b. To help reach this important goal, we believe the Department should require the Stewardship Organization (SO) to conduct significant outreach to municipalities. Efforts should be made to assist them with understanding the benefits of the program, guidance for reporting, and technical assistance to help municipalities adopt best practices as part of its contract with the State. We further believe that the SO should be required to demonstrate active recruitment directly with municipal organizations such as the Municipal Review Committee, ecomaine, Maine Resource Recovery Association, and the Maine Municipal Association.
 - c. Further, we note that the "Collection" goal (G) is directly related to the municipal participation goal since it's the municipalities that will be doing the bulk of the collection. The Department may want to consider merging these two goals, as separate, but reinforcing primary goals of the program. The collection goal should also be applied to each group of similar municipalities so that there is an equitable focus on all communities throughout the state and not just the most populated areas.
 - i. We believe that *Alternative Collection Programs* can also help Maine achieve our collection goals, and the addition of this material should be explicitly added to this program goal.

2) *Safeguard the environment and enable environmental action:* Encourage large corporations, brands, and packaging manufacturers to reduce plastic pollution and design less wasteful packaging that can be more easily recycled or reused. And make it simpler for Maine people and businesses to reduce, reuse, and recycle packaging materials. *We mentioned above that participation and the resultant collection should be the most important targets to reach for this program.* The rest we would rank in this order:

- a. The “Reduction” goal should not be focused solely on reduction of weight of total packaging, but rather a goal of reducing the number of units of single-use packaging and their components specifically. And reduction credits should not be allowed if a producer switches from a readily recyclable or reusable packaging to a non-recyclable or reusable package. This is also consistent with California’s EPR for Packaging program reduction goals. Otherwise, we are concerned that a weight-focused-only goal would encourage a shift to lightweight not recyclable nor reusable plastics and discourage the use of heavier packaging materials that are designed for reuse. Ideally, we want to reduce unnecessary packaging, shift away from single-use, and ultimately dispose of less waste.

Additionally, we suggest that the Department modify the required investment in reuse needed for not meeting the goal such that “the percentage of the investment must be at least equal to the difference between the percent reduction goals and the realized percent reduction goal during the year in which the goal was not met.”

- b. The “Reuse” target is appreciated, but we also suggest that the Department consider adding a unit-based measurement onto the reuse targets because we will get a better understanding of the shift from single-use to reusable packaging as the EPR program matures. Like our suggestion for the reduction target, we suggest that the Department dedicate funds for missing the target based on the goal of the year that the target was not met, rather than the two years prior.

On a related note, we believe the Department should add an expanded definition of reuse and reusable packaging to the rules to make crystal clear that recycling is not a form of reuse for purposes of this program:

- i. Reuse. “Reuse” means the repeated use of a product, packaging type or component in a product or packaging for the same manner and purpose for which and in the same format in which it was originally produced.
- ii. Reusable packaging. “Reusable packaging” is packaging that is designed to be reused several times for the same purpose and without a change in format after initial use, and whose actual return and reuse is made possible by adequate logistics and infrastructure as part of a reuse system operated by or on behalf of producers.
- iii. **We also appreciate that the annual fee for alternative collection programs for reuse is half of the fee for recycling programs.**

- c. **We appreciate the Department’s draft “Readily Recyclable” goal and have no suggestions at this time.** The only way to make recycling work is if the materials are in fact designed to be recyclable in the first place. We do however have comments on the criteria for “readily recyclable” below.
- d. **We also appreciate the base-material specific recycling goal** so that each part of the packaging industry has an incentive to work together to achieve the goals rather than letting one base material carry the weight of the program.
- e. **The overall recycling rate goal is also very appreciated and important,** especially as it diverges from what is collected by the municipalities to what is in fact recycled into new products. Currently, our state measures collection rates but doesn’t have the additional step of estimating the yield. We need to have solid, auditable reporting on what is sold, collected, and recycled to make this a meaningful number.
- f. **We appreciate the setting of post-consumer recycled content goals,** since the use of recycled content is key to driving demand for the materials collected by Maine’s municipalities; however, *we are concerned about how verification of the use of this material in packaging will be done and if it applies to materials sold in Maine only or elsewhere by the producer. We also wonder if setting the same goal for each base material is the right approach.* We suggest that the setting of post-consumer recycled content goals is an area of the program where the SO could propose base-material-specific goals after they’ve identified some baseline data methods for verification, which would then require Department approval. All post-consumer content should be certified through a third party, and the content should be required to be supplied from North America.
- g. **We applaud the litter reduction goal,** especially how it is measured in units, and believe that the audits will provide invaluable data as the state works to reduce the prevalence of packaging litter. We believe that an added step of noting the brand of the littered material would be useful as well.

Additional feedback regarding setting goals for *safeguarding the environment and enabling environmental action* includes:

- We suggest the Department create a mechanism to evaluate and adjust the targets as needed based on data that becomes available overtime. For instance, this provision could be added to the annual report by the Stewardship Organization to make recommendations to the Department and be open for public feedback.
- Parallel reasoning to how we want the number of participating municipalities to increase over time throughout the state, we believe that the Department should slowly urge each obliged producer to achieve the goals individually as well as a collective group as is currently written. This will help level the playing field among producers such that the goals are met through a joint effort and across the diverse packaging formats and needs, and not just by a handful of large companies. We suggest starting with 20% of all producers having to contribute

toward meeting the program goals and increasing by 10% every 10 years. This requirement should only apply to producers who are not low-volume producers.

- We strongly support the Department’s use of malus fees to disincentivize undesirable packaging types since that has proven effective elsewhere in actually encouraging design change. But we believe there is room to add bonus incentives for the use of reusable packaging. To that end, we urge the Department to use a bonus payment for high-performing producer-run reusable packaging programs that achieve at least a 90% return rate that is verified through annual reporting by producers

3) *Fund infrastructure enhancement*: Invest targeted funding to expand reuse and recycling programs in cities and towns equitably throughout Maine, not just the population centers and cities.

- The investment criteria says that funds must “improve” the management of packaging material, which is too vague and open to interpretation. Instead, we suggest that investments be targeted at reaching program goals—with the primary goals being to increase municipal participation and collection followed by waste reduction, reuse, and an increase in readily recyclable packaging, and otherwise move materials up the solid waste hierarchy as defined in [38 MRSA §2101](#).

This is further supported by the EPR for Packaging statute, which states: *The department shall ensure that preference for funding is given to proposals that support the State's solid waste management hierarchy under section 2101, promote a circular economy for packaging material types for which producers were required to make payments under subsection 6, increase the recyclability of packaging material that is not readily recyclable, increase access to recycling infrastructure in the State, improve consumer education in the State regarding recycling and recyclability and equitably support recycling and education efforts in participating municipalities, particularly in those participating municipalities that have received minimal or no prior funding pursuant to this paragraph.*

- We ask that the Department remove the provision that states that certain proposals must be met with a commensurate source of outside funding, and just evaluate the proposals based on whether they are going to contribute to reaching the program goals. This feels like an unnecessary barrier for applicants.
- We ask the Department to also consider restructuring the nature of the investment section of the law, such that priorities are set and then the SO adjusts fees accordingly to raise sufficient funds to meet the priorities, rather than having a set amount of funds each year that need to be prioritized.
- We request that the Department allow grants for new infrastructure be made available to small businesses as well as nonprofits and municipalities. We don’t believe that wealthy corporations should have access to this funding, so putting a cap on the size of the business could be like the small-business exemption in the program, such that

any small businesses with less than \$5 million gross revenue are eligible to receive funding.

- We are glad that the Department is concerned with evaluating the impact of the funds on achieving higher rates of recycling, but we ask the Department to also evaluate the fundings' impact on facilitating reuse. Further, we believe that this assessment could be done by the SO as part of its annual report.
- We were **happy to see that the needs assessment required information from the SO about how the municipal system could facilitate more reuse in the state.**

4) *Gather and leverage data.* Expand availability and quality of data and use the information to continually improve the effectiveness and enforcement of recycling and reuse in Maine.

- a. For auditing of producers' reporting, we suggest that the Department instead require the SO to have a third party do the auditing and require more than two brands be audited each year, similar to how audits will be done for figures reported by initiators of deposit in [Maine's Bottle Bill](#) law. We suggest that the SO propose an auditing schedule to the Department for approval as part of its contract with the State, as well as a mechanism to report any underreporting to the State so that the Department may take enforcement action.
- b. We aren't going to be able to have reliable data to support this program unless there is required reporting by all Material Recovery Facilities (MRF) municipal contractors. **We like that the Department has required participation by contractors in the municipal requirements section of the draft rules.** Further, we think that the Department and the SO should help municipalities secure this data in municipal contracts with MRF and haulers. Requiring participation from contractors is typical in the United States:
 - i. For example, [California's EPR law](#) states: *For purposes of studying a representative sample of material types and forms in the state, within 90 calendar days of a department request, a transfer, processing, or recycling facility shall allow for periodic sampling conducted by a designated representative of the department on a mutually agreed upon date and time. The department shall not require a periodic sampling of a transfer, processing, or recycling facility if that facility was sampled during the previous 24 months.*
 - ii. [And Colorado's EPR law states:](#) *Reduce contamination of covered materials delivered to materials recovery facilities and compost facilities by: (A) Requiring each materials recovery facility and compost facility participating in the program to report annually to the organization of contamination levels at each facility.*
- c. The definition of "Packaging material type" should make clear that any reusable packaging is a separate category for the purposes of tracking and measuring the use of reusable packaging in Maine.

- d. Regarding municipal waste stream audits, it's unclear if the audits in the municipal reimbursement section are for both the recycling and disposal streams, but it should be both. We believe that the rules should allow for more than three municipalities to be audited for a larger sample size, and the audits could be part of a larger waste characterization study that is done, or the audits required under the producer reporting section.
- e. The definition of "Commodity" doesn't seem to reflect what Maine's MRFs sell, and we encourage the Department to consider defining commodity in such a way that makes reporting by municipalities and MRFs meaningful in the context of this law.
- f. **Regarding producer payments, assuming the highest eco-modulated fees if using estimations over actual data is a great way to encourage more and better data.**
- g. We are grateful that the Department is requiring data regarding the use of recycled content and lack of toxins in the producer reporting and fees section; however, we believe the Department should add clarity to how these figures will be verified.

Readily Recyclable

We firmly believe that the State of Maine should be extremely explicit in what constitutes recyclability such that we can encourage measurable gains in diversion and restore public trust in recycling. Determining what constitutes recycling, and therefore what "readily recyclable" means, is vital to this effort. Conversely, it's important to clearly identify what recycling is not. We have suggestions for how to improve the marketability and throughput, and yield criteria; but we also want the Department to add two more criteria to determine whether a material is "readily recyclable": 1) Existence of convenient collection in the state; and 2) Which problematic and unnecessary packaging components render a material unfit to be on the recyclable list.

We agree with the Department that, at a minimum, anything on the readily recyclable list each year should have an end market. The end market for the materials must be as an input into a new product or package that reduces the need for virgin materials. Under no circumstances should selling into a market for fuel or energy count. That is not "recycling" but rather destruction of resources. Further, anything placed in a landfill—even for engineering purposes—should not be classified as "recycling." It's more like forever storage.

- To that end, we suggest strengthening this section regarding end markets to make explicit that end markets cannot be for fuel and that anything placed in a landfill is not recycling.
- We also suggest that Materials Recovery Facilities in Maine and other recycling brokers should be required to report their markets so that there can be transparency as to where the materials collected in Maine are being sent.

We are also concerned that having three operational remanufacturing facilities anywhere in the world is too broad and that there should be consideration of the distance the materials are traveling from Maine to be remanufactured. Therefore, we suggest limiting the markets to North America for the purposes of determining marketability. For recycling to work, not only should

packaging be designed for recyclability but also collected for recycling by Maine towns. We suggest adding a criterion to qualify for “readily recyclable” that the material is collected through recycling programs such that 60% of Maine residents have free and convenient access that is just as convenient as disposal. (Note that #1 on The Recycling Partnership’s 5-point plan to fix the U.S. recycling system is ensuring that all households can recycle.) The Department could also consider that each group of similar municipalities should have a minimum number of towns that collect the materials as well. The addition of this criterion would further help the State reach the goal of maximum recruitment of municipalities by driving the producers to consider collection opportunity/convenience as a factor.

- The needs assessment should also annually identify which towns collect which materials as a baseline.

We believe that the Department should consider also generating an additional criterion for what qualities render a material not eligible to be on the “readily recyclable” list so that it’s clear to producers of packaging where they could make improvements. The US Plastics Pact provides a detailed list of problematic or unnecessary plastics that we believe provides an excellent basis for that list, or for what types of plastics are to be discouraged through the producer fee-setting process.

To that end, we suggest that the Department make clear that any materials that contain any of these items are not eligible for the “readily recyclable” designation in Maine. The Department should also create a pathway to add more to this list as more information becomes available over time:

- Intentionally added¹ Per- and Polyfluoroalkyl Substances (PFAS)²
- Non-Detectable Pigments such as Carbon Black
- Opaque or Pigmented PET – Polyethylene Terephthalate bottles (any color other than transparent blue or green)
- Oxo-Degradable Additives, including oxo-biodegradable additives
- PETG – Polyethylene Terephthalate Glycol in rigid packaging
- Problematic Label Constructions – This includes adhesives, inks, materials (e.g., PETG, PVC, PLA, paper). Avoid formats/materials/features that render a package detrimental or non-recyclable per the [APR Design® Guide](#). Labels should meet APR Preferred Guidance for coverage and compatibility and be tested in any areas where this is unclear.
- PS – Polystyrene, including EPS (Expanded Polystyrene)
- PVC – Polyvinyl Chloride, including PVDC (Polyvinylidene Chloride)
- And components such as stirrers, straws, and cutlery.

Adding this list of what makes something not readily recyclable will help add specificity to advance the Department’s marketability criteria that the recycling processes used safeguard the environment and human health, which we also applaud, but believe could use more descriptive language like what we’ve suggested above.

As for throughput, we appreciate that the Department is considering the volume of the material going through the system such that the material requires sortation and can be baled and sold as

its own commodity or at least not bring down the value of the other commodities with which it is sorted. It doesn't make sense for every single participating municipality to collect a small quantity of niche materials. However, we worry about this definition being flexible for the future of recycling that may be collected and sorted by MRFs, or secondarily sorted at another MRF. We are also wondering about how materials like aluminum, which are mostly collected through Maine's Bottle Bill, will be treated under the EPR law. Aluminum is highly recyclable and should be on the recyclable list even if it may measure less than 1% of the waste stream on any given year.

The recycling yield criteria is especially appreciated by NRCM as we work hard to expose the work of the plastics industry to classify certain forms of "chemical recycling" as recycling so that they can continue to profit from the proliferation of non-recyclable plastics in our society. Some forms of chemical recycling, like purification, can result in high yield rates and could be a keyway to keep materials in circulation, but others such as gasification and pyrolysis are extremely toxic, energy intensive, and have a very low yield rate. A yield rate of 60% should be an absolute minimum requirement, and we suggest the Department consider an increase to 70% yield rate and clarify that the yield rate is for processing yield vs. bale yield.

And finally, as for creating the initial "readily recyclable" list, the Department could put the initial proposed list of readily recyclable material together for the first year of the program as part of the contractual arrangement with the SO and make it publicly available on its website based on the rules adopted by the State. This way, when people are providing feedback to the Department 60 days after the effective date of the rule, they could react to something specific instead of theoretical and streamline the process. We believe it's important to give both producers and towns maximum lead time to prepare for the implementation and make any necessary adjustments to their programs or packaging based on this list.

Municipal Reimbursements

The statute very clearly states that determination of which costs associated with the management of packaging will be eligible for reimbursement will be made through Department rulemaking. NRCM believes that to be the most effective, Maine's municipalities should be reimbursed for all costs related to management of the covered packaging materials, which includes costs associated with collection, sorting, and processing of recycling, disposal, and litter costs, as well as education and outreach expenses. And it should be for all costs associated with packaging in homes, schools, and public areas as well as any costs incurred to participate in the EPR for Packaging program—basically anywhere that the taxpayer is ultimately footing the bill or investing in strategies that reduce packaging waste.

We are glad to see that the draft rules distribute funds to help cover the costs of packaging disposal because that is a significant expense for municipalities who have no control over whether a material is recyclable or disposable. And it's an added disincentive for producers to make disposal packaging. There will be no disposal costs if there is no disposable packaging. We suggest that the Department repeal this provision at a time when there is no longer disposable packaging sold in the state.

- However, it was concerning to see that the draft rules do not allow for reimbursement of municipal expenses for operating reuse and refill systems. Reuse is the future of packaging and ultimately the way we will reduce our waste and achieve a truly circular economy. We suggest that the rules be amended to explicitly add reuse as a packaging management pathway available to municipalities, just as it is for recycling.
- *Similar municipalities:* In addition to geography and population, similar municipalities grouping needs to be further refined to only group municipalities together that make recycling just as convenient or more than trash, and perhaps even further delineate between drop-off-only service and curbside-only service because of the large discrepancy in costs/convenience. Towns that offer recycling that is convenient for residents are offering a higher level of service that helps the State reach the goals of the program, and they should be compensated for that. The way the Department has grouped municipalities in the draft does not provide proper reimbursement for municipalities that offer a higher level of service that could raise the cost per ton because municipalities would not be compensated for doing that.
- We believe that the consultation process outlined in the draft seems unduly complicated and is not the only way to achieve a periodic cost study for purposes of creating a municipal reimbursement formula. Rather, we suggest that the Department outline parameters by which the cost-study should be done and allow for the SO to determine the methodology and formula for reimbursements, which would be subject to approval by the Department in order to leave some flexibility in the approach but still achieve the desired outcome. We provided more detailed suggestions for how this could be done in our prior comments regarding [municipal reimbursements](#).
- Municipalities should have to collect everything on the readily recyclable list to participate in the program, as directed by the statute. We are unsure why municipalities would only have to collect things that have been on the readily recyclable list for three years in these draft rules? We understand that a grace period may be needed once the list is updated, however three years seems excessive and counterproductive to the goals of this program. For the statewide education on recycling to be successful, we believe it's important for all participating municipalities to collect everything on the readily recyclable list within one year.

Producer Payments

The shift from an inequitable, inefficient taxpayer-funded system to a fairer and more systematic producer-funded approach is the backbone of this law. We want to make sure there is equity among producers who are funding the system such that we protect small and low-volume producers and reward producers for doing things that support the program goals.

- The criteria for alternative collection programs appear to be rather limiting in scope and cost-prohibitive for small but effective programs. We also don't believe that existence of collection sites per county is the most effective way to address convenience. We suggest that the Department consider reducing the registration fee for alternative collection programs, or at least make them tiered based on size of the producer, and consider evaluating program effectiveness if the program is able to collect back at least 80% of the

materials that were sold into the state. Convenience could be evaluated using service centers instead of counties. This change to align with the program goals will alleviate the burden of waste management on municipalities and ensure a high rate of collection.

- The definition of “consumer” is confusing as it relates to the producer payments, could the Department clarify what it means by an “entity that uses a product to create a new product”? What is the difference between a consumer and an end-user?
- **We applaud the added specificity that a producer that adds more packaging to a product is also a producer.**
- We don’t believe it’s fair for producers whose product moves from non-readily recyclable to readily recyclable to pay the highest fee for three years. We suggest the Department allow producers to pay for the materials they use according to the fee-schedule of the year the packaging material was sold in the state. We want to reward, not punish, producers who are doing the right thing.
- We are glad that low-volume producers are not legally subject to the reporting requirements of the larger companies with more resources, but we believe it should be explicit that low-volume producers may be able to do full reporting if they’d like. This is important for low-volume producers who might end up owing less of a payment than the minimum in the law.
 - We also believe that the Department should remove the \$400 per ton floor on low-volume producers. The statute has a \$500 ceiling so that these businesses may better predict costs without doing the more time-consuming reporting if they wish. We don’t see a reason why there should be a floor in the rules.
- We encourage the Department to exempt federally regulated packaging from malus fee payments if the regulation limits the recyclability or use of recycled materials for a particular type of package. We describe the rationale in our prior comments on [producer exemptions](#).

Thank you for the incredible amount of thoughtful work and the opportunity to provide comments on the conceptual draft rules for Maine’s EPR for Packaging program. We look forward to working with the Department and other stakeholders in the state to develop a strong set of rules to be adopted by the Board of Environmental Protection in 2024.

Sincerely,

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