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Melanie Loyzim  
Commissioner of the Maine Department of Environmental Protection  
17 State House Station  
32 Blossom Lane  
Augusta, Maine 04333-0017

### **Re: Comments on Producer Exemptions Specific to Maine's Packaging Stewardship Law (38 M.R.S. § 2146)**

My name is Christine Cummings and I am the Executive Director of the Maine Grocers & Food Producers Association (MGFPA). The Maine Grocers & Food Producers Association (MGFPA) is a business trade association representing main street businesses: independently owned and operated grocery stores, supermarkets, food and beverage producers and processors, wholesalers and distributors and allied service companies.

#### **Perishable Food:**

The DEP is soliciting feedback specific to the description of perishable food under subsection 2 (38 M.R.S. § 2146(2)). We are providing comments for consideration to help expand upon the clarity and definition of perishable foods.

"As used in this paragraph, "perishable food" means any food that may spoil or otherwise become unfit for human consumption because of its nature, type or physical conditions, including, but not limited to, fresh and processed meats, poultry, seafood, dairy products, bakery products, eggs in the shells and fresh fruits and vegetables. "Perishable food" does not include any such food that is sold, offered for sale or distributed for sale frozen except for frozen wild blueberries."

The USDA defines perishable food as follows, "Perishable food means food that is not heat-treated; not frozen; and not otherwise preserved in a manner so as to prevent the quality of the food from being adversely affected if held longer than 7 calendar days under normal shipping and storage conditions."<sup>1</sup>

"Perishable foods are those likely to spoil, decay or become unsafe to consume if not kept refrigerated at 40°F or below, or frozen at 0°F or below. Examples of foods that must be kept refrigerated for safety include meat, poultry, fish, dairy products, and all cooked leftovers."<sup>2</sup>

"Food" is also defined in "section 201(f) of the Federal Food, Drug, and Cosmetic Act and includes raw materials and ingredients." Is the intent to only exempt raw agricultural commodities or is the intent to also include food that has been manufacturer and processed but has limited shelf life? If the intent is to also include manufactured/processed foods, or raw ag. commodities that have added ingredients, what is the threshold for spoilage or becoming unfit for human consumption? Is further detail necessary specific to storage in relation to food safety?

It is challenging to 'categorize' perishable foods as attempted to be done within the EPR law's description. For example, the term 'dairy products' is used to encapsulate dairy product-like items. So does this mean the USDA's definition of 'the Dairy group' which "includes milk, yogurt, cheese, lactose-free milk and fortified soy milk and yogurt" but "does not

<sup>1</sup> <https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=1.377>

<sup>2</sup> <https://ask.usda.gov/s/article/What-foods-are-perishable>

include foods *made from milk* that have little calcium and a high fat content, such as cream cheese, sour cream, cream, and butter.”<sup>3</sup>

We also question how and what is categorized specifically as ‘bakery products’ without a federal definition or further detail.

Additional criteria are necessary to hone in on what is perishable so producers can clearly determine whether or not they are exempt.

#### *Other questions:*

Specific to the frozen blueberry exemption, is the exemption for packaging that is solely frozen blueberries or does it also include frozen blueberries as a component of a frozen fruit mix? Does the exemption include plants such as seedlings with grown fruit or vegetables?

#### **Producer Exemption D.:**

2. Producer Exemption. D. 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.

We find this particular exemption of interest because it explicitly states “to retailers”. We also look forward to clarity on the B2B and consumer definitions as raised during the discussion on 12/22. Of interest, is why the small, perishable food producer would have their B2B packaging included if the rest of the program does not?

#### **Food Safety Requirements:**

We want to reiterate that food packaging must meet food safety requirements, ensure quality and consistency, safeguard the goods during distribution, resist tampering, and guarantee shelf life. The reality is that some products, especially food items, have some limited packaging material options (for example: ice cream or milk).

As defined by the Food and Drug Administration (FDA), a tamper-evident label or seal "is one having one or more indicators or barriers to entry which, if breached or missing, can reasonably be expected to provide visible evidence to consumers that tampering has occurred." The FDA also clarifies that it must be "distinctive by design" (meaning that it cannot be readily available to the public and not duplicated). To demonstrate that some federally required food packaging components do not have always have a more sustainable solution, Ben & Jerry’s specifically speaks to the challenges of one of their packaging components, “Our biggest priority is finding an alternative to the remaining plastic in our ice cream containers, including the protective tamperband around the lid. Finding a solution that is recyclable and/or compostable throws up a number of challenges. Recycling standards and regulations vary widely between countries and even between towns. Composting isn’t an ideal solution yet either, because it’s not widely available...We’re working to find solutions and break down these and other barriers surrounding the global waste system...”

#### **Response to Comments To-Date:**

Comments have noted that it is “appropriate to acknowledge any packaging-related design limitations through reduced fees.” And acknowledged that there may be instances where the packaging’s role may limit the ability of the producer to reduce the material or use a material that is more recyclable. It’s been suggested that these instances can be addressed in

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<sup>3</sup> <https://ask.usda.gov/s/article/What-foods-are-in-the-Dairy-Group-formerly-called-the-Milk-Group>

the fee determination process, additionally suggested as reduced fees given the limitations. However, we feel this is contradictory to the statute's fees language which states that payments and fees should incentivize sustainability innovation *opposed to reduce fees when reduction cannot be achieved*, "(c) For producers other than low-volume producers, the payment schedule adopted under this subparagraph must delineate criteria to be used to adjust producer payments in a manner that incentivizes: the use of recycled content in and increased recyclability of packaging material, lower toxicity in packaging material, a reduction of the amount of packaging material used, a reduction of litter from packaging material, increased reuse of packaging material and labeling of packaging material to reduce consumer confusion and creates other incentives consistent with generally accepted industry standards."

Comments have suggested that the Department consider criteria to determine whether an exemption is appropriate under the EPR law as part of the routine technical rule making process. We would agree that parameters to determining exemptions would be helpful. Specific to food packaging, it would be beneficial to determine if a more sustainable alternative is readily available in sufficient quantity, at a comparable cost, and that the alternative option performs as well as or better than the packaging component specific to material and function. Market factors may preclude or significantly diminish the producer's ability to increase the recyclability.

At times there are perishable food items that are packaged in a particular way to ensure a longer shelf life and so that items can endure distribution. For example, cucumbers have a thin skin and the plastic wrap can protect the delicate items while also ensuring the produce does not dehydrate, prolonging shelf life (in turn, preventing increased food waste). When considering fee structures or exemptions, it will be imperative to give consideration to purpose and carbon footprint as well as the packaging material.

We believe the 'perishable food' exemption's intent is to exempt Maine farmers and perishable food producers. There may be instances in which farmers (or producers) who sell perishable food may also sell by-products or other items as a part of their business model (recognizing for this exemption, it's all within the 15 tons or less of packaging threshold). For example, a Maine dairy farmer who sells 'dairy group products' but also sells hay. What about a farmer who sells perishable-produce at their farm stand but also sells sleeved flowers or jugs of fresh apple cider (which is not part of the bottle bill)? Is the special consideration specific to small farmers that exclusively sell perishable food items or those who sell perishable food items within their overall business model? Clarity is necessary with retaining the integrity to protect Maine's local farmers and perishable food producers. We are continuing to work to gather feedback specific to what 15-tons of packaging looks like in real-world examples and will share as more information becomes available.

Many companies, both in-state and nationally, have sustainability goals as pillars of their companies. Our members and the food industry support Maine's EPR program's evolution in providing the necessary clarity to comply and increase recycling. Thank you for the opportunity to provide comments and we look forward to continuing to be a part of the process.

*Christine Cummings*

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Executive Director