

June 12, 2023

VIA EMAIL: MainePackagingEPR@maine.gov

The Honorable Melanie Loyzim, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: Packaging Stewardship Law; Collective Comments – Readily Recyclable, Audits and Program Goals; and Education and Investment

Dear Commissioner Loyzim,

The American Institute for Packaging and the Environment (“AMERIPEN”) appreciates the opportunities afforded by the Maine Department of Environmental Protection (“DEP” or the “Department”) to submit public comments and dialog with other stakeholders on the establishment and implementation of Maine’s Packaging Stewardship Program pursuant to 38 MRS § 2146. Additional time was provided for the previous rulemaking topic of *program goals* that was revisited during the May stakeholder meetings, along with *education* and *investment*, in addition to the originally scheduled rulemaking topic discussion for the May stakeholder meetings. Therefore, as the past few stakeholder meetings have involved combined rulemaking topic discussions, AMERIPEN would like to provide comments on the collective rulemaking topics recently discussed.

AMERIPEN is a coalition of stakeholders dedicated to improving packaging and the environment. We are the only material neutral packaging association in the United States representing the entire packaging supply chain, including materials suppliers, packaging producers, consumer packaged goods companies and end-of-life materials managers. We focus on science and data to define and support our public policy positions, and our advocacy is based on this rigorous research rooted in our commitment to achieve sustainable packaging, and effective and efficient recycling policies. We have several member companies with a presence in Maine, and many more who import packaging materials and products into the state.

AMERIPEN supports policy solutions, including packaging producer/stewardship responsibility, that are:

- **Results Based:** Designed to achieve the recycling and recovery results needed to create a circular economy.

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- **Effective and Efficient:** Focused on best practices and solutions that spur positive behaviors, increase packaging recovery, recapture material values and limit administrative costs.
- **Equitable and Fair:** Focused on all material types and funded by shared cost allocations that are scaled to make the system work and perceived as fair among all contributors and stakeholders.

Following below are comments on the several issues with the collective rulemaking topics recently discussed.

1. **Readily-Recyclable** – The DEP requested comments speaking to sections 13(A)(2), 13(A)(5), and 13(A)(6) of 38 MRS § 2146 Stewardship Program for Packaging, which addresses the following [*bolded*]:

A process for determining on an annual basis those types of packaging material that are readily recyclable, [...] [13(A)(2)] which must involve consultation with the stewardship organization and recycling establishments and must include a transitional period between the time that a type of packaging material is determined to be readily recyclable or to not be readily recyclable and the time that such determinations will be effective for the purposes of calculating producer payments and municipal reimbursements.

We agree with the Department that the distinction between what is and what is not considered “readily recyclable” is significant. Such determination can have major implications on municipality participation and reimbursements, material recovery facilities’ (MRFs) equipment, staffing and operations, as well as processing plants, producer payments, and multi-state regulatory compliance issues. AMERIPEN asserts that the readily recyclable designation system that the Department creates must be both predictable for municipalities and MRFs and capable of adaption to move materials toward recyclability in Maine and up the solid waste hierarchy.

Material targets are constantly adjusting throughout the year, which can create difficulty in characterizing materials as “readily recyclable” on a frequent basis. Such characterization may possibly not hold true the following year, resulting in increased expenses, needed education, and more confusion. Recycled material bale markets for cardboard, glass, mixed paper, mixed plastics, and plastic films also frequently shift within the calendar year. This is why AMERIPEN strongly prefers a widely accepted collaborative approach where producers, the stewardship organization, municipalities, and MRFs initially determine and annually update a reasonable list of materials to be considered “readily recyclable” and include an appropriate transitional period

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between the time that a type of packaging material is determined to be “readily recyclable” or not, as determined for the purposes of calculating producer payments and municipal reimbursements.

When determining if a material should be listed as “readily recyclable”, the following should be taken into consideration:

1. The material must be included in a relevant collection system in Maine.
2. The material must be effectively and efficiently sorted with sufficient infrastructure in place in the majority of recovery facilities in Maine or regionally.
3. The material must have a dependable end market for the final bale of material.

In addition to the above, as the determination of “readily recyclable” is key to the calculation of producer payments and municipal reimbursements, we encourage DEP to ensure those formulas and calculation methods for payments and reimbursements are remain simple, easy-to-comprehend and reportable for all stakeholders involved.

Finally, AMERIPEN believes that there should be an in-between designation for “Candidate Readily Recyclable Packaging Materials” that might not be capable of being considered “readily recyclable” one year, but might be considered in the reasonably near future, and for which the stewardship organization could provide incentive reimbursement funding for those municipalities that are able to collect and recycle them in their communities. This designation would create a clearer on-ramp for readily recyclable packaging materials, provide incentives for municipalities to collect the materials, and provide greater predictability to where the “readily recyclable” list might be headed in the future.

2. **Performance Goals** – Section 13(A)(5) of 38 MRS § 2146 Stewardship Program for Packaging addresses performance goals for producers and the stewardship organization and performance goals have been a topic during the May meetings and requires the following through rulemaking:

Requirements for the assessment of program performance, including the setting of program goals used to inform the producer payment schedule determined pursuant to subparagraph (1) and the investments in infrastructure and education made pursuant to subsection 11, [...] [13(A)(5)] which must include, but are not limited to, program goals supporting an overall reduction by producers in the amount of packaging material used, an increased reuse by producers of packaging material and an increased amount of post-consumer

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recycled content in packaging material used by producers; packaging material litter reduction goals; recycling access and collection rate goals for municipalities; and overall program and material-specific recycling rate goals.

To the maximum extent practicable, material-specific recycling rate goals adopted pursuant to this subparagraph must reflect the following recycling standards:

- (a) Sorted glass is considered recycled if it does not require further processing before entering a glass furnace or before use in the production of filtration media, abrasive materials, glass fiber insulation or construction materials;***
- (b) Sorted metal is considered recycled if it does not require further processing before entering a smelter or furnace;***
- (c) Sorted paper is considered recycled if it does not require further processing before entering a pulping operation; and***
- (d) Plastic separated by polymer is considered recycled if it does not require further processing before entering a pelletization, extrusion or molding operation or, in the case of plastic flakes, does not require further processing before use in a final product; [13(A)(5)]***

AMERIPEN appreciates that the above performance goals will be utilized to inform producer payment schedules and investments in education and infrastructure rather than as enforceable compliance measures. AMERIPEN holds the position that a stewardship organization must involve the program's producers when developing, implementing, and managing the program to have true responsibility and impact on the recycling system. Therefore, the assessment of program performance that includes the setting of program goals used to inform producer payment schedule and investments in infrastructure and education must allow for flexibility and require consultation with the producers of the stewardship organization, as well as other appropriate industry stakeholders. All materials are not created equal and therefore not collected, sorted, processed, or analyzed the same, nor have the same markets as each other. Therefore, not all factors can or will be the same for the different types of packaging materials. This fact should be represented when discussions regarding program goals take place to ensure all areas of the packaging supply chain are heard and understood.

Recycling rates are dynamic and fluctuate. Industry should not be held solely responsible for consumer behavior and the rate at which its packaging is recycled, reused, or composted, and a packaging stewardship mandate will not *completely* change that. However, industry does play an essential role in driving increased recycled content, reuse, and recycling. Goals should be

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attainable, motivating, and provide producers with confidence in the ability to improve the recyclability, reusability, and compostability of packaging. Infeasible aggressive goals will set the program and its producers up for failure from the very beginning.

An important role for the Department in this part of the process, perhaps in coordination with the stewardship organization's work for the needs assessment, is the development of key material data through an independent statewide waste characterization study to evaluate the recycling rate of all materials. As we know, program goals will be used to inform producer schedules, as well as infrastructure and education investments, which must include, *but are not limited to*: an overall reduction in packaging material used by producers, an increased reuse by producers of packaging material and an increased post-consumer recycled content in packaging material used by producers; reduction of packaging material litter; municipality recycling access and collection rate goals; and overall program and material-specific recycling rate goals. Data needed to determine these goals is either all or partially not currently known, accessible, and/or retrievable. These missing pieces of data are critical pieces of the puzzle, necessary to the planning and implementation of the stewardship organization's program. For certain aspects of this process to move forward, additional key data is needed. The Department is best positioned to manage the request and collection of this data on a statewide level and provide the structure needed to achieve the purpose and objectives of a waste characterization study.

Therefore, AMERIPEN puts forth that producer rates and requirements for the assessment of program performance should be proposed by the stewardship organization in its program plan *rather than in rule*, after the completion of a statewide material characterization study, approved by DEP, with the flexibility to adjust as needed to reflect real-world changes in the marketplace. Within the stewardship organization's program, it shall also set forth the manner in which the organization will solicit and incorporate input in the development of proposed investments from producers, recycling establishments and participating municipalities.

3. **Audits** – Section 13(A)(6) of 38 MRS § 2146 Stewardship Program for Packaging addresses audits by the stewardship organization and has been a topic of the May meetings and requires the following through rulemaking:

Requirements for the stewardship organization to conduct representative audits of recyclable material processed and sold by facilities that process recyclable material generated in the State, of municipal solid waste disposed of in the State and of waste littered in the State, [...] [13(A)(6)], which must include, but are not limited to:

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- (a) Provisions regarding the sampling techniques to be used in those audits, which must include random sampling;***
- (b) For audits of recyclable material, provisions regarding:***
- i. How those audits must be designed to collect information regarding the extent to which recyclable material processed and sold by those facilities reflects the tons of each type of packaging material collected in the State for recycling and the tons of each type of packaging material recycled in the State, as well as the ultimate destination of and intended use for that recycled material;***
 - ii. How those audits must be designed so that information collected through the audit of one facility will not be used to infer information about a different facility that uses different processing equipment, different sorting processes or different staffing levels to conduct processing; and***
 - iii. The process by which a facility will be allowed to request and receive an audit if it can credibly demonstrate that an audit result being applied to its material output is not representative of its current operations;***
- (c) For audits of municipal solid waste, provisions regarding how the audits will be designed to collect information regarding the types and amount, whether by weight or volume, of packaging material in the waste stream and the percentage by weight and volume of the waste stream that is composed of packaging material; and***
- (d) For audits of waste littered in the State, provisions regarding how the audits will be designed to collect information regarding the packaging material type by amount, whether by weight or volume, in sampled litter, identification of the producer or producers of the packaging material in sampled litter, if identifiable, and an evaluation based on those audits regarding the areas of the State in which litter accumulation is greatest;***
[13(A)(6)]

As stated above, AMERIPEN feels the packaging stewardship program has the best chance at succeeding when the applicable stakeholders are involved with the planning. Audit requirements and specifics are no different. Requirements, and necessary provisions required by rule, for the stewardship organization to conduct representative audits of recyclable material processed and sold by facilities that process recyclable material generated in the State, of municipal solid waste

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disposed of in the State, and of waste littered in the State should be proposed by the stewardship organization in the program for approval by DEP.

4. **Infrastructure and Education Investments** – Section 13(A)(8) of 38 MRS § 2146 Stewardship Program for Packaging has been one of the central topics for the May meetings and requires the following through rulemaking:

A process by which the stewardship organization will develop and submit for department review and a process by which the department shall review and approve or deny a proposed investment in education and infrastructure pursuant to subsection 11. The process must set forth the manner in which the stewardship organization is required to solicit and incorporate input in the development of proposed investments from producers, recycling establishments and participating municipalities.

AMERIPEN asserts that an overly prescriptive and public comment type process for approving infrastructure and education investments by the stewardship organization is not required by the law. Additionally, putting specific percentages or dollar figures into regulatory code is not supported by the law and not an appropriate or flexible way to address changing recycling needs in the State. Instead, the process should flow from the annual stewardship plan submitted to the Department for review, with proposed investments in education and infrastructure, and be informed by data that is available after the completion of a statewide material characterization study. Additionally, as previously mentioned, targets, the markets, and economy are always changing. The frequency therefore needs to be on a continual basis, versus once a year.

AMERIPEN agrees with other stakeholders that there is the potential need for differentiating investment categories, such as 1) augmenting infrastructure, when expanding currently in-place infrastructure, and 2) wholly new infrastructure, when developing an entirely new infrastructure. This could potentially include a dollar (\$) amount qualifying threshold for this second investment category. Due to the level of detail and specific data for these two (2) different types of investments, it may be more appropriate to have different evaluation processes as well.

AMERIPEN supports rule language stating that preference for funding is given to proposals that support the State's solid waste management hierarchy, promote a circular economy for packaging material types for which producers 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

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recycling and education efforts in participating municipalities - particularly in those participating municipalities that have received minimal or no prior funding.

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AMERIPEN strives to offer a good-faith and proactive approach that integrates elements from other packaging producer responsibility programs with hopes of fostering a program, in Maine, that will incentivize recycling growth and build recycling infrastructure to move packaging materials to greater circularity. AMERIPEN continues to focus on strategies that develop and/or strengthen policies to progress “reduce, reuse, recycle” while at the same time enhancing the value of packaging. Our members are driving innovation, designing better environmental performance to evolve the recycling infrastructure and to create a more circular economy for all packaging. In our efforts to reduce environmental impact by increasing the circularity of packaging, our members continue to recognize the value of collaboration and the importance of working across the packaging value chain. AMERIPEN looks forward to the continued open dialogue with the DEP and interested stakeholders while collectively balancing between the myriad of needs for packaging, recycling, and sound solutions to grow a more sustainable future, an effective circular economy, and systems that achieve positive environmental outcomes for everyone, which in the end, ultimately assists in the success of this program. We remain committed to supporting progressive, proactive, and evidence-based strategies for a sustainable packaging program.

As always, AMERIPEN thanks the DEP for the continued opportunities to provide written comments regarding the establishment of the stewardship program for packaging in Maine and appreciates its staff’s time and assistance during the rulemaking process. Please feel free to contact me or Andy Hackman, with Serlin Haley, LLP (ahackman@serlinhaley.com) with any questions on AMERIPEN’s position.

Sincerely,



Dan Felton
Executive Director