

March 18, 2024

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

via electronic submission

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

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

Background

HCPA represents approximately 230 member companies engaged in the manufacture, formulation, packaging, distribution, and sale of products for household, commercial, institutional, and industrial use. HCPA members are continuously working to improve products and packaging in line with the principles of a circular economy to decrease waste and enable economic growth without greater resource use. Companies utilize several different materials for packing and shipping their products to ensure that products arrive undamaged, uncontaminated, safe for use, meet user expectations, have a lower environmental footprint, and generally enhance the quality of life of the consumers and workers who depend on these products daily. We have many members who sell products into Maine or otherwise have a presence in the state and are committed to ensuring that all residents have access to high-quality products with reduced environmental impacts.

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

² Public Law 2021, Chapter 455.

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

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

2. Definitions

HCPA thanks the Department for updating the definition of "commodity" and removing the term "remanufacturing facility" to avoid unintentionally excluding current or future recycling uses. We also credit the Department for updating the definition of "producer" to clarify when different entities are considered the producer and directing how potential double-counting would be handled. HCPA remains concerned about some of the definitions in the proposed rule, as described below:

L. Consumer

As discussed in our prior comments on the conceptual draft rules, the definition of "consumer" is inordinately broad and may be interpreted to include business-to-business and commercial transactions. Combined with the expansive definition of "product," we believe this could result in numerous raw materials and items, used exclusively in industrial and institutional settings to produce new products for later sale getting pulled into the scope of Maine's stewardship program. HCPA does not believe this is consistent with the legislative intent in passing LD 1541, the bill that established Maine's stewardship program for packaging. Packaging for products used exclusively in industrial and institutional settings often have established take-back, reclamation, or recycling systems in place and do not typically end up in curbside recycling and disposal systems. HCPA recommends that DEP revise the definition of "consumer" and/or the definition of "product" to clarify that only products which are intended to be used by entities for personal, family, or household purposes and/or are sold via retail including e-commerce are within the scope of the law.

AA. Reuseable Packaging Material

HCPA appreciates the Department adding definitions for reuse and refill but we are concerned that the separate reuse definition does not account for a consumer reusing a package in a refill operation. HCPA suggests that the Department combine “refill” and “reuseable packaging material” into a single definition that encompasses both return-and-reuse systems and refill-at-home systems. This is exemplified in other states with Extended Producer Responsibility (EPR) programs, such as California,³ that have structured their definitions of reuse/refill accordingly to prevent a policy conflict between these concepts. Such an approach provides clear guardrails without unintentionally excluding important reuse/refill pathways from either definition or from provisions of the stewardship program that reference reuse or refill.

FF. Toxics

HCPA recognizes that the definition of “toxics” comes from the underlying statute but cautions the Department about broadly applying all referenced lists of toxic chemicals to all types of packaging. Requiring producers to certify all packaging according to a list of chemicals based on stringent food contact and children’s product requirements would create a significant time and cost burden for companies without adding meaningful human health and environmental protection. For example, food contact packaging is manufactured according to U.S. Food & Drug Administration (FDA) regulations, whereas packaging used to contain or transport a household product such as a floor polish or cleaner is primarily designed for the rigors of commerce and product protection. Maine itself has recognized this distinction and existing Maine law sets requirements for food packaging that go beyond those for other types of packaging. Similarly, the presence of certain chemicals can pose a risk to children that is notably greater than the risk to an adult, and existing Maine law also recognizes this by setting additional requirements for children’s products. These lists were developed for use in particular contexts to proactively address identified risks and should not be taken out of context and generically applied to all types of packaging sold into Maine. HCPA recommends that the Department apply the relevant lists to the types of packaging they were developed to refer to (*e.g.*, apply the “toxic chemicals in food packaging” list to food contact packaging), rather than a blanket application of all lists to all packaging.

3. Assessment

A. Program Goals

HCPA thanks the Department for restructuring several of the goals recognizing that they may be unmet and the stewardship organization (SO) must study the reasons why and make a recommendation for further action. We believe this is reasonable approach in comparison to setting a rigid penalty in regulation without any understanding of the root cause of a missed goal.

³ Cal. PRC § 42041(af)

HCPA credits the Department for revising the calculation of recycling rate to remove references to recycling yield, which would otherwise have resulted in impossible targets. HCPA remains concerned about some provisions of the program goals, as detailed below:

(3) Reduction

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

Source reduction activities have been underway for years and HCPA remains concerned that, if the reduction goal does not account for historical reductions, companies which have already taken significant steps to optimize their packaging will be penalized. For example, California requires its Producer Responsibility Organization (PRO) to give producers credit for source reduction achieved from the 2013 calendar year to the 2022 calendar year.⁴ HCPA recommends that the Department add a similar mechanism for companies to receive credit for historical source reduction.

HCPA respectfully requests that the Department clarify how the reductions will be calculated and to what level of granularity. For example, will the reductions be calculated by packaging material type? If so, and a producer makes a reduction in one type of material which necessitates switching to an alternate material, can the Department clarify that the producer will not also be required to make a reduction on the replacement material?

(4) Reuse

As discussed above in the section of our comments on the definition of “reusable packaging material,” HCPA is concerned that the program goal for reuse and related definition of reusable packaging does not take into account refill-at-home systems, which are not managed by municipalities or alternative collection programs. Reusable packaging can be owned and refilled by consumers or be part of a system where the consumer returns the package for reuse.⁵ Both refillable and returnable packaging are important reuse pathways. HCPA recommends that

⁴ Cal. PRC § 42057(f)

⁵ The Sustainable Packaging Coalition has developed guidance on successful reusable packaging programs, including a description of the different types of reusable packaging: <https://sustainablepackaging.org/wp-content/uploads/2023/07/Guidance-for-Reusable-Packaging.pdf>

the Department revise the “reuse” goal to clearly account for consumer refill systems, as defined in 2(Y) of the proposed rule, along with reuse through return systems.

Packaging that is not allowed to be reused due to federal regulatory requirements should be clearly exempt from this goal. For example, the Poison Prevention Packaging Act requires some household substances, such as furniture polish and mouthwash to be packaged in “special packaging” that meets stringent child-resistant standards, one of which is that the special packaging must not be reused.⁶ HCPA recommends that the Department clarify that packaging which cannot be reused according to federal regulations is exempt from this goal and not included in the total weight of packaging used to calculate the percentage that is reusable.

(8) Post-Consumer Recycled Material

Packaging that is not allowed to contain post-consumer recycled (PCR) material due to federal regulatory requirements should be clearly exempt from this goal. For example, the Pipeline and Hazardous Materials Safety Administration (PHMSA) sets specifications for plastic aerosol containers that do not allow for any PCR content to be used in the containers.⁷ As described further below in our comments on requests for exemption from the PCR fee, HCPA recommends that the Department clarify that packaging which cannot contain PCR material according to federal regulations is exempt from this goal and not included in the total weight of packaging used to calculate the percentage that is PCR material.

(9) Litter

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

B. Annual SO Reporting

HCPA thanks the Department for removing the producer benchmarking provision that would have required the SO to produce a report on price per unit for packaging material and components, information which had no clear relation to the program goals.

HCPA questions the utility of producer benchmarking by brand as described in 3(B)(2). The program goals are generally based on the percentage of total packaging weight, either across all packaging, by packaging material type, or by base material. In no case is a goal based on

⁶ 16 CFR § 1700.15(c)

⁷ 49 CFR § 178.33b-6(a)

brand-specific performance. If the Department’s intent is to encourage producer benchmarking, HCPA suggests that the reporting described in section 3(B)(2) be broken out by *producer*, not by brand.

4. Defining Packaging Material

C. Identifying the Primary Management Pathway

(1) Readily Recyclable Criteria

HCPA is grateful to the Department for updating and adding more clarity to the criteria used to define packaging material types and categorize them as readily recyclable.

HCPA is concerned about the requirement in 4(C)(1)(c) for ratio of weight targeted for recycling to total weight. While HCPA appreciates the Department’s removal of the recycling yield requirement, which would have led to impossible targets, HCPA is concerned that the updated wording does not provide sufficient clarity on what endpoint should be calculated and is not aligned with the program goals. The phrase “routinely separated and recycled by a recycling market” is unclear – at what point in the process is it determined that the material has been recycled? Given that producer fees and program requirements are directly tied to what is or is not considered readily recyclable, it is important to have a clear understanding of what the readily recyclable criteria are. HCPA suggests aligning 4(C)(1)(c) with the language in section 3(A)(2), the program goal for collection (“collected and sent for recycling by participating municipalities”), as this is a clear and measurable data point that relates to the program goals.

9. Ongoing Producer Registration

B. Annual Reporting for Producers Other Than Low-Volume Producers

HCPA thanks the Department for making several updates to simplify obligations and relate reporting obligations to program goals. HCPA remains concerns about some of the updated provisions, as described below:

HCPA strongly recommends that the Department align the language for reporting “packaging material type produced” with the statutory language on the scope of the stewardship program: “packaging material sold, offered for sale or distributed for sale in or into the State.”⁸ HCPA recommends that the Department make this change throughout the proposed rule to align with the statute (*i.e.*, replace packaging material type “produced” with “sold, offered for sale or distributed for sale in or into the state”).

⁸ 38 MRS § 2146(7)

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

HCPA remains concerned by the requirement in 9(B)(8) for producers to report on whether they can certify the absence of toxics. The lists of toxic chemicals in the proposed rule are broad and not applicable to all packaging types, making it nearly impossible for any producer to appropriately certify using all of those lists as a basis. As discussed above in the “Definitions” section of our comments, HCPA recommends applying the relevant lists only to the types of packaging they were developed to refer to rather than taking them out of context. HCPA additionally recommends updating this requirement so that producers report on whether they can certify “no intentional addition” of toxics, in line with the language on incentive fees in 10(A)(3)(b).

D. Estimates

HCPA thanks the Department for providing a process for producers to estimate weight from units in cases where they are not able to obtain sufficient information on the weight of their packaging material. Given the complexity of today’s supply chains and distribution channels, producers may also be unable to obtain sufficient information on which products are specifically sold into Maine. HCPA strongly recommends that the Department include clear language to allow for producer reporting using national data prorated for Maine’s population.

10. Producer Fees

HCPA is concerned that the requirement for producers to pay fees by August 1 each year, when producer reporting is not due until May 31 and the SO will not invoice until after producer reporting is complete, will be extremely difficult if not impossible for companies to meet. This timeline would mean that companies have less than two months to complete the invoice, possibly substantially less if the SO does not issue an invoice until well after producer reporting is complete, which is extremely short for corporate payment systems. HCPA recommends that the fee payment due date be updated to two months after the invoice is received from the SO.

A. Fees for Producers Other Than Low-Volume Producers

HCPA is deeply concerned that the proposed fees for reusable packaging, as laid out in 10(A)(2)(a), do not take into account consumer refill systems that may not require any additional infrastructure or for municipalities to play a role in managing the reuse/refill of the packaging. Relatedly, HCPA is deeply concerned that the proposed labeling requirements for packaging that is labeled as reusable to avoid a fee, as laid out in 10(A)(3)(d)(iii), do not consider consumer refill systems. Reusable packaging will not necessarily require alternative collection programs to manage the packaging material type in every county that it is sold if the packaging is intended to be used in a consumer refill system rather than a return-to-producer system. As discussed above in the “Definitions” section of our comments, HCPA requests that the Department revise all sections of the proposed rule dealing with reusable packaging, including the two mentioned here, to incorporate and incentivize consumer refill along with return-to-producer systems.

HCPA recommends that the Department revise the reduction of litter fee in 10(a)(3)(c) to be based, to the extent possible, on product type as well as packaging material type. Certain products may be more likely to be littered than others and thus targeted incentive fees, education campaigns, and other anti-litter strategies may be more effective if applied to highly littered product types rather than the packaging material type more generally.

13. Defining Municipal Reimbursement

HCPA thanks the Department for limiting municipal reimbursement to packaging material that is reused, recycled, composted, or managed through an alternative management pathway and removing reimbursement for disposal.

20. Requests for Exemptions from the Post-Consumer Recycled Material Incentive Fee

Packaging that is not allowed to contain PCR material due to federal regulatory requirements should be clearly exempt from the PCR material incentive fee without needing to go through a process to request an exemption. For example, the Pipeline and Hazardous Materials Safety Administration (PHMSA) sets specifications for plastic aerosol containers that do not allow for any PCR content to be used in the containers.⁹ HCPA recommends that the Department clarify that packaging which cannot contain PCR material according to federal regulations is exempt from the PCR material incentive fee without needing to go through the process described in this section. The request for exemption process should be reserved for circumstances where federal regulations include content or construction standards that may make use of PCR content difficult or impossible, *not* for circumstances where federal regulations clearly state that use of PCR content is not allowed.

⁹ 49 CFR § 178.33b-6(a)

Conclusion

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

Sincerely,

A handwritten signature in black ink, appearing to read "Molly R. Blessing". The signature is written in a cursive, flowing style.

Molly R. Blessing
Vice President, Sustainability & Product Stewardship