

WEBINAR SERIES: PREPARING PRODUCERS FOR OREGON PACKAGING EPR

Food Serviceware Webinar - June 11, 2024

Q&A Extended Response



1. Are compostables considered contamination? How will they work in this system?

See the Recycling Modernization Act's definition of "contamination" at ORS 459A.863(5). Compostables are contamination in the context of both the Uniform Statewide Collection List and the PRO Recycling Acceptance List, as these are lists of materials intended for recycling and as such no compostables are included on these lists. Compostables that make their way into the commingled recycling stream need to be sorted out of the stream by commingled recycling processing facilities, or else they count against proposed outbound bale standards for those facilities, which will be applied to those facilities as part of a new permitting program. PRO collection points, meanwhile, are held to performance standards for contamination removal and management under OAR 340-090-0650(1)(e).

2. Are compostable foodware manufacturers obligated as producers?

Obligated producers (first sellers in or into the state) of compostable food serviceware are, unless they qualify as a small producer, obligated to join a PRO, report data on their supply of covered products in the state to the PRO, and pay fees to the PRO. Depending on how product is sold in or into the state, that could be the manufacturer of food serviceware, or may be another entity in the supply chain, such as a distributor.

While much of the producer funding generated through the Act goes toward improvement of the state's recycling system, non-recyclable, including compostable, products are also covered products because 1) they impose costs on the state's recycling system as contaminants, 2) not including them in the program would result in a perverse incentive to produce non-recyclable products, and 3) the law does include a waste prevention and reuse component (it is not limited to recycling alone).

3. What qualifies a "large producer"?

Per ORS 459A.863(8), "large producer" means a producer that is among the 25 largest producers of covered products based on market share. The approach for calculating a producer's market share is mandated by OAR 340-090-0700(1)(b). It is the weight of all covered product that a producer reports to the PRO/is obligated for divided by the weight of all covered product reported by all producers.

4. Is there any "Truth in Labeling" language for compostables?

The Truth In Labeling report to the Oregon state legislature mandated under Sec. 36, chapter 681, Oregon Laws 2021 focused on recycling labeling alone and did not focus on labeling of compostables. See that report here: <https://www.oregon.gov/deq/recycling/Documents/TIL-Report.pdf>

5. Will 2025 fees collected be based off of 2024 packaging?

DEQ understands that it is a norm in North American packaging EPR programs to set fees in a given program year on the basis of data from two years prior, and as such has proposed revisions to the market share rules (OAR 340-090-0700) in the current rulemaking that would enable such alignment among data and program years with the exception of the first year of the program (2025), when year from one year prior (2024) would be used to set fees. This allows producers to potentially, under advisement from our prospective PRO CAA through engagement in the CAA producer working group, make adaptations to their data gathering practices for a year that is still underway in order to enable seamless reporting to CAA (rather than needing to reformat data for a year that has already closed, 2023).

Note: in the realm of assessing fees, it is not unusual to charge fees for a given year on the basis of data from prior years.

6. If I sell to a distributor, would I be a producer?

As the obligated producer for food serviceware per ORS 459A.866(3) is the first seller of the food serviceware into the state, it depends on whether or not the sale to the distributor is the first sale in or into the state. If so, then yes.

7. Can you show scenario 5 again?

Please refer to the slide deck and recording and we welcome any further questions that you may have on Scenario 5.

8. Once a covered material is sold into the distribution or warehouse system, it is challenging for "producers" to know the application for which it is used. In some instances, the same covered material could be food serviceware, packaging or service packaging depending on how it is used by the party that purchases the item utilizes it in their unique business. How would DEQ recommend distinguishing between the obligated parties?

It is a common challenge in EPR programs for obligated producers to follow their product down the supply chain. It is true that a covered product could be food serviceware, packaging, or service packaging (a specific subset of packaging) depending on how it is used, and an obligated producer may currently lack adequate downstream visibility to distinguish accurately.

Slides 31-33 in the presentation provided some principles for distinguishing among packaging and food serviceware--namely, that one must first pose the question of whether or not a product meets the definition of food serviceware at ORS 459A.863(7) and further clarified in proposed rule at OAR 340-090-0840(1)(d). And if the answer is "no," then subsequently one should pose the question of whether or not the product is packaging pursuant to the definition at ORS 459A.863(18). If the product is determined to be packaging, and it is furthermore packaging that is filled at point of sale for the

purpose of providing goods to consumers, then per proposed rule OAR 340-090-0840(1)(b) it is service packaging.

Producers preparing to comply with the law can expect guidance on distinguishing between these different types of covered product in CAA's forthcoming producer guidebook. Rule OAR 340-090-0700(1)(d) allows producers to use reasonable estimates of supply as long as they are accompanied by reasonable methodological justifications and updated if better data are generated indicating that the prior submitted data was not accurate. Companies that partner together in a supply chain may also make arrangements, per ORS 459A.869(3), to divvy up obligations amongst themselves in a fashion that is mutually agreeable (as long as all covered products have an obligated producer, that is allowable).

9. In scenario 2, for the out of state manufacturer to be the producer, is the distributor then understood to be a "retailer"?

To determine whether or not a company is obligated for food serviceware, one needs to first ask, "is it food serviceware?" And then ask, "who is the first seller in or into the state?"

The word "retailer" is used in the definition of "food serviceware" at ORS 459A.863(7) and as such is of consequence for the first question, but it does not appear in the definition of obligated producer for food serviceware at ORS 459.866(3) and is as such inconsequential for the second question.

The Recycling Modernization Act does not have a specific definition for "retailer," so one should apply a plain language definition.

10. What if a manufacturer sells into the state and the covered material is then exported outside of Oregon?

The exemption ORS 459A.863(6)(b)(J) from "covered product" for material ultimately disposed of outside of Oregon would be applicable to the material that leaves the state.

11. Another proposed concept in the second rulemaking is the "service packaging" and we would ask the DEQ provide a clarification between the producers for food serviceware vs service packaging? That is to say, how will the differentiation be made between "sells" and "distributes".

Recycling Modernization Act does not have specific definitions for "sell" and "distribute," and as such, plain language definitions are to be applied in making interpretations. Proposed rule OAR 340-090-0840(4) places obligation for service packaging on the first distributor in or into the state. Public comment is currently being solicited for this rule and we welcome feedback.

12. In the food serviceware definition, in (7)(b) food serviceware is sold to a retailer or a dine-in food establishment or take-out food establishment. Based on that, wouldn't the distributor in a scenario like scenario 2 be the producer since the manufacturer sold to a distributor, not a retailer, dine-in, or take-out establishment as specified in the definition of food serviceware?

See the response to question #9 above regarding sequencing of the questions, "is it food serviceware?" and "who is the first seller in or into the state?" one after the other rather than posing the two questions simultaneously. Downstream of the distributor, the food serviceware was sold to restaurants who used it for prepackaging food or filling food on site--as such, the product is food serviceware. Subsequently, you look at who the obligated producer is, and it's the manufacturer who was the first seller in or into the state.

13. Why are aluminum containers (pie pans or turkey roasters not collected curbside with bev cans? If it's cleaning? Concerned citizens should clean if they are concerned about recyclability. Certainly the small amount of alum containers can not contaminate the large quantity of beverage cans (since they are diff alloys)

If collected commingled, aluminum foil must be separated from other aluminum products at a commingled recycling processing facility and marketed separately to a smelter in order for the foil to not be burned off but rather recovered. Producer investments in unders systems and manual sorters at Oregon processing facilities could enable this as part of a PRO "on-ramp" proposal (PROs may add materials to the uniform statewide collection list through their program plan, subject to DEQ review and approval, pursuant to ORS 459A.914(4)(b). If producers do not wish to make such investments and the PRO does not propose the material for on-ramping (the material was not proposed for on-ramping in CAA's first draft plan), it will remain on the PRO depot list.

14. How do you get an item off the SIM list onto the USCL? I dont really understand what a SIM is

Specifically identified materials (SIM), per ORS 459A.917, are materials that DEQ considers to require extra attention in order to enable their successful collection, processing and/or responsible recycling. See more information on SIMs and the current SIM listings here: <https://www.oregon.gov/deq/recycling/Documents/rmaSIMdesignations.pdf>. PROs in their program plans must lay out their plans to address the issues that have resulted in SIM designation, and must also ensure, to the extent practicable, that SIMs collected for recovery in Oregon go to responsible end markets. This is one area where the Recycling Modernization Act could intersect with composting -- if cups, currently designated as a SIM, are being marketed by companies, event organizers, or other entities toward composting markets in Oregon, the PRO should approach these entities to partner, if practicable, in order to ensure that these products are reaching a market that meets Oregon's "responsible" standard. These organizations may choose to decline to partner, and as such, the statute would allow the PRO to claim that practicable action was not possible.

A material can be cross-listed on the Uniform Statewide Collection List and on the SIMs list; they are not mutually exclusive.

15. Are emerging concerns about microplastics considered part of 'toxicity' or potentially reflected in other environmental categories as well?

It is presumed that this question pertains to slides 47-49 in the slides regarding ecomodulation and proposed rules that would mandate that two bonuses for voluntary evaluation and disclosure of life cycle impacts of covered products be made available by PROs to their member producers.

The standards and methods proposed for these producer evaluations are included in the current rulemaking at OAR 340-090-0900-0940. DEQ welcomes public comment on these rules. The impact categories proposed for inclusion in impact assessment pursuant to OAR 340-090-0930(3) that would determine whether or not a producer would qualify for the substantial impact reduction bonus include the category of "Plastic Impacts -- Other," which encompasses toxic impacts of plastic. Because there is no peer-reviewed life cycle assessment methodology for assessing the impacts of plastic that are covered within this category, producers will use the estimated amounts of plastic leakage from their product's life cycle, i.e., the raw data, as proxies for the impacts of this leakage, and will feed that into the assessment of overall impact across the categories, determining whether or not a 10% impact reduction occurred through a design or other change that the producer implemented.

Additives and other hazardous substances pursuant to production of plastic are also relevant to the proposed toxics disclosures covered on slide 49 and laid out in proposed rule OAR 340-090-0940.

16. Can you share a snap shot of the fee schedule?

Per ORS 459A.875(2)(i), Circular Action Alliance (CAA) was required to include in its March 31, 2024 Program Plan a proposed fee schedule for producers. Given data uncertainties, CAA's initial proposed fee schedule only included 8 fee categories, which can be viewed on page 104 of CAA's Program Plan. Given the preliminary nature of these fee estimates, CAA strongly advises against relying on these estimated fees to budget producers' compliance costs in Oregon. With the completion of the Oregon Recycling System Optimization Project, CAA will be in an improved position to refine the fee range and likely expand the base fee schedule to reflect the proposed 62 fee reporting categories in the second Program Plan submission. A final fee schedule will be released once the Program Plan is approved and more accurate cost and supply data are captured to replace estimates.

17. Will producers be able to register after July 1st? How long will the registration period be open for?

Producers will be able to register with CAA after the July 1, 2024 registration deadline, and registration will remain open on a rolling basis. However, CAA's educational spaces - including CAA's Producer Working Group and Oregon Reporting Training in the fall of 2024 will only be open to registered producers. Producers who believe they may have obligations under the RMA should register with CAA. If a producer later determines that they will not have obligations under the RMA, the producer's registration status changes without a penalty.

18. If a convertor makes a pint sized container with lid that is empty and sold (distributed) to a distributor in Oregon, with ownership and legal responsibility for the packaging per the Universal Commercial Code has changed ownership, buyer and seller obligations met. That packaging / foodservice packaging could be used to contain ice cream in a freezer for resale (covered product packaging) or it could be used by a deli to sell soup or salad (foodservice ware). What legal support has Oregon taken to mandate reporting of end use the distributor has resold the product to the original convertor?

See response to question #8 above, also relevant to this question.

19. So we are not incentivized to switch to compostable?

The Recycling Modernization Act takes a neutral stance toward compostables in that they are not incentivized or disincentivized merely on the basis of the attribute of being compostable. Compostable packaging and food serviceware are covered products like other non-recyclables (and like recyclables as well), and as such producers must join a PRO, report data and pay fees. Producers of compostable covered products, just like producers of other covered products, may qualify for the ecomodulation bonuses proposed as part of the current rulemaking and referenced above in response #15 if they choose to voluntarily evaluate and disclose the impacts of their products using the standards and methods set in rule.

20. Are conventional plastics termed as a contaminate to the composting industry?

The Recycling Modernization Act defines "contamination" at ORS 459A.863(5). The definition focuses on contamination in a recycling collection or commodity stream rather than contamination in a composting collection or commodity stream, as the Act focuses predominantly on improvement to the state's recycling system.

21. Since service packaging is not designated service packaging until "used to" and it has multiple applications how will the state mandate the retailer to report the use back to the distributor and then back to the entity that first distributed into the state?

See response to question #8 above, also relevant to this question.

22. As a 'producer' how are you going handle companies, the use all of the scenarios you had proposed. It is not as simple and one way of supply- the same product can come into the state different ways that go to the same end user (restaurant operator, or retail store)

How will the state know what has been taxes/ assed, and what has not ?

PROs must report producer supply data to DEQ on an annual basis pursuant to ORS 459A.887(3), enabling DEQ visibility into the quantities of covered product reported per producer. Because obligation can be traded among companies in a supply chain pursuant to ORS 459A.869(3), DEQ would not be looking on a granular basis, was obligation always borne by the producer that matches the obligated producer definition? DEQ would rather be looking for producers that did not join a PRO and report data, or for categories of covered product that appear substantially under-reported. The PRO will also take measures to ensure compliance -- see 124-126 in CAA's first draft program plan here:

<https://www.oregon.gov/deq/recycling/Documents/CAAProposedRMAplan.pdf>

23. Where can the latest information be found on the development and implementation of the LCA components of the EPR system?

The proposed life cycle evaluation rules can be viewed in the rulemaking public notice here on pg 198-216:

<https://ormswd2.synergydcs.com/HPRMWebDrawer/Record/6734994/File/document>.

24. Can we be sent the 12 criteria for USCL? It is hard to find on the DEQ website

These criteria appear at ORS 459A.914(3).