



January 24, 2024

Senator Brenner, Chair  
Representative Gramlich, Chair  
Joint Committee on Environment and Natural Resources  
Maine Legislature  
100 State House Station  
Augusta, Maine 04333

**RE: Testimony in Support of LD 295 – An Act to Ensure Accurate Recyclability Labeling of Plastic Containers and Plastic Packaging Material.**

Dear Senator Brenner, Representative Gramlich, and Members of the Joint Committee on Environment and Natural Resources:

Thank you for the opportunity to provide testimony in support of LD 295, An Act to Ensure Accurate Recyclability Labeling of Plastic Containers and Plastic Packaging Material. This testimony is submitted on behalf of Just Zero. Just Zero is a national environmental non-profit advocacy organization that works to implement just and equitable solutions to climate-damaging and toxic production, consumption, and waste disposal practices.

The truth is most plastic is not recyclable. In fact, the U.S. plastic recycling rate is a dismal 5%.<sup>1</sup> This shouldn't be surprising. Most plastics were never designed or intended to be recycled.<sup>2</sup> However, you wouldn't know that from looking at the labels on the plastic products and packaging that line the shelves of stores across the state. A lack of regulation and enforcement has enabled companies to make false, misleading, and deceptive claims about the recyclability of their plastic products and packaging. As a result, consumers are extremely confused about what is and is not recyclable. This confusion not only masks the environmental impacts of single-use plastics, but also undermines recycling by increasing contamination as unrecyclable products are wishfully placed into recycling bins where time, labor, and energy are needed to remove them.

LD 295 is a commonsense and necessary measure that will help reign in claims about plastic recycling. Under the bill, only plastic products and packaging that are truly recyclable will be able to be labeled as such. If enacted, this bill will help Mainers make informed decisions about the environmental impacts of the products they purchase, reduce contamination in the recycling stream, and compliment Maine's first-in-the-nation Extended Producer Responsibility ("EPR") for Packaging Law.

<sup>1</sup> Greenpeace USA, [Circular Claims Fall Flat Again](#). (Oct. 24, 2022).

<sup>2</sup> Laura Sullivan, [How Big Oil Misled the Public into Believing Plastic Would be Recycled](#), NPR. (Sept. 11, 2020).



## I. Deceptive and False Recyclability Labels Are Confusing Consumers and Undermining Recycling Efforts.

Despite the clear lack of plastic recycling in the U.S., many companies are continuing to falsely label and market their plastic products and packaging as recyclable. These labels – including the use of resin identification codes - have a significant impact on how consumers choose to dispose of and manage these materials. A national survey conducted in 2020 found that 67% of consumers polled look at the recycling label before making a decision about whether to recycle a product or not.<sup>3</sup> Thus these labels have a significant impact on recycling systems.

In 2021, Oregon created the Truth in Labeling Task Force to study and evaluate misleading and confusing claims regarding the recyclability of consumer products and packaging.<sup>4</sup> After extensively surveying consumers and studying the issue the Task Force found that the existing patchwork of labels and lack of standards has created confusion that is leading to significant contamination in the recycling system which impacts the viability of recycling programs and how expensive they are.<sup>5</sup> According to the survey data, 89% of Oregonians were confident that frozen food containers could be recycled, and 62% were confident that single-use plastic coffee cups could be recycled.<sup>6</sup> Both items, however, are not recyclable but contained markings and labels that indicated they were.<sup>7</sup> Likewise, a majority of the people surveyed were confident that plastic tubs, plastic berry containers, lids, and plastic takeout containers were recyclable.<sup>8</sup> Again, these items are not recyclable but contained markings and labels that implied they are.<sup>9</sup> These items are common forms of contamination that must be removed from the system.<sup>10</sup>

False and misleading recycling labels cause consumers to place unrecyclable items into recycling bins which creates contamination.<sup>11</sup> These unrecyclable materials need to be sorted out and removed from the system which takes time, effort, and money. According to the U.S. Environmental Protection Agency, as much as 25% of all recycling is contaminated.<sup>12</sup> This contamination harms the ability of Material Recovery Facilities (“MRFs”) to cost-effectively collect and sort other materials that are actually recyclable. Removing contamination makes the processing of recyclable more expensive, sometimes so expensive that communities choose to

<sup>3</sup> Shelton Group, [Engaging Middle America in Recycling Solutions](#), August 27, 2020.

<sup>4</sup> 2021 Oregon Laws Ch. 681 (S.B. 582)

<sup>5</sup> Oregon Truth in Labeling Task Force Report, [Truth In Labeling Final Report and Recommendations](#), p.8. (June 1, 2022.)

<sup>6</sup> *Id.* at p.9.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Environmental Protection Agency, [National Overview: Facts and Figures on Materials, Wastes and Recycling](#). (December 3, 2022).



drop materials from their recycling collection services or abandon their recycling programs altogether.<sup>13</sup> In fact, since 2019, 113 community recycling programs have been terminated with most of them citing cost and contamination as the primary reason.<sup>14</sup>

MRFs, however, are not the only ones impacted by contamination. Companies that purchase and use recycled materials to manufacture new products are negatively impacted by increased contamination. For example, a paper mill in Longview, Washington, is a major end market for mixed paper collected from Oregon’s recycling programs.<sup>15</sup> Representatives from the mill have announced that they are spending millions of dollars annually on overly contaminated feedstocks and then spending millions more removing and disposing of those contaminants – which is overwhelmingly plastic.<sup>16</sup> These added expenses are making the use of recycled feedstock increasingly unfavorable from an economic perspective.<sup>17</sup> This experience is not an isolated incident. Rather, it is a common experience across the country.

LD 295 will help reduce contamination by forcing companies to be truthful when labeling their plastic products and packaging. Mainers will now have an easier time determining which materials should be recycled, which will help lower recycling costs and ensure that actually recyclable materials are actually being recycled.

## **II. LD 295 is a Complimentary Policy That Will Help Advance the Goals and Objectives of Maine’s EPR for Packaging Law.**

Additionally, LD 295 will compliment Maine’s EPR for Packaging Law. In July 2021, the legislature enacted a EPR for Packaging Law to reduce the volume and toxicity of single-use packaging waste, while also increasing recycling.<sup>18</sup> The law requires large companies to pay fees to help support packaging reduction and recycling based on the amount and types of packaging material they use to sell, contain, and market their products.

While the law does require companies to pay higher fees for using unrecyclable materials – such as most plastic packaging – it does not require that they accurately label those products to ensure that consumers understand whether the product or packaging is recyclable. As a result, without LD 295 it is very likely that even with the added benefits provided by the EPR for Packaging Program, Mainers will still be confused about what materials are actually recyclable and will still

<sup>13</sup> Oregon Truth in Labeling Task Force Report, [Truth In Labeling Final Report and Recommendations](#). (June 1, 2022).

<sup>14</sup> Waste Dive, “[Where Curbside Recycling Programs Have Stopped and Started in the US](#),” (Jan. 9, 2023).

<sup>15</sup> Oregon Truth in Labeling Task Force Report, [Truth In Labeling Final Report and Recommendations](#), p. 9. (June 1, 2022).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 38 M.R.S.A. §2146.



be placing unrecyclable items into their recycling bins. As a result, recycling in Maine will remain expensive and ineffective.

By enacting LD 295, the legislature can support the policy objectives of the EPR for Packaging Law by ensuring that companies are not only working to increase the recyclability of their products and packaging, but also accurately communicating how these products and packaging materials should be managed. This will make it quick and easy to determine whether you should recycle or dispose of a product or its packaging.

### **III. Several States and the Federal Government Are Considering Similar Measures to Crack Down on False and Misleading Claims About Recyclability.**

Maine is not alone in considering ways to crack down on false and deceptive recycling claims. In 2021, California passed a sweeping labeling reform law.<sup>19</sup> The law was a direct response to the prevalence of false and misleading claims about the recyclability of products and the impacts these false claims were having on the state’s recycling system.<sup>20</sup> The law creates a clear and objective basis for holding companies responsible for their claims about the recyclability of their products and packaging that are based on whether the product is actually capable of being recycled, as opposed to just recyclable in theory.<sup>21</sup> Similar proposals are being considered in several other states, including New York<sup>22</sup>, New Jersey<sup>23</sup>, and Maryland.<sup>24</sup>

Additionally, the Federal Trade Commission (“FTC”) is currently evaluating whether to update the Green Guides for the Use of Environmental Marketing Claims (“Green Guides”).<sup>25</sup> The Green Guides are a federal policy document that helps companies avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act.<sup>26</sup> This includes guidance on what products can and cannot be labeled as recyclable.<sup>27</sup> In fact, the FTC is particularly interested in updating the requirements of the Green Guides that relate to claims about recyclability. As part of the review of the Green Guides, the FTC hosted a workshop that exclusively focused on prospective changes to guidance surrounding recycling claims.<sup>28</sup> Therefore, it appears that the FTC is poised to make significant changes to the Green Guides that

<sup>19</sup> [California Accurate Recycling Labels Act](#) (Senate Bill 343, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> New York, [Senate Bill 1400](#) (2024).

<sup>23</sup> New Jersey Recycling Market Development Council, [2022 Recycling Market Development Council Report to the Governor and Legislature](#), p. 15. (April 2022).

<sup>24</sup> National Caucus of Environmental Legislators – [Policy Update: Maryland Pursues Truth in Labeling Bill](#). (Feb. 17, 2022).

<sup>25</sup> Federal Trade Commission, [Guides for the Use of Environmental Marketing Claims - FTC-2022-0077](#).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Federal Trade Commission, [Public Workshop: Recyclable Claims and the Green Guides – FTC-2023-0025](#).



will include stronger standards similar to those outlined in LD 295. However, Maine should not wait for federal leadership and instead should enact LD 295. Enacting LD 295 would provide Maine with a state-specific system for evaluating recycling claims that is based on the actual recycling conditions in Maine. This is especially important given that the EPR for Packaging Program may result in the development of specialized recycling programs for certain plastics that don't exist elsewhere in the country.

#### **IV. Maine Has the Legal Authority to Enact LD 295.**

It is likely that opponents to LD 295 will argue that Maine does not have the legal authority to enact LD 295. More specifically, they will argue that Maine is preempted<sup>29</sup> from passing laws that regulate claimed about recyclability of plastic products and packaging. This is incorrect. Maine is not preempted from passing laws that impose conditions on when companies can and cannot label their products as recyclable. While the federal government does regulate environmental marketing claims – including claims about recyclability – under the FTC Act and the Green Guides, those federal laws and regulations do not preempt state action.

The Supreme Court has identified two general forms of preemption. The first, is express preemption – where a federal statute or regulation contains explicit language preempting state regulation.<sup>30</sup> The second, is implied preemption – where the structure and purpose of a federal law or regulation is viewed to have shown Congress's intent to bar state level regulation.<sup>31</sup> Moreover, the Supreme Court has also further distinguished implied preemption by dividing it into two subcategories: field preemption and conflict preemption. Field preemption results when a federal law or regulation is intended to occupy the entire regulatory field in a manner that precludes supplementary state regulation.<sup>32</sup> Conflict preemption occurs either when compliance with both federal and state regulation is physically impossible, or where the state regulation creates an obstacle which prohibits compliance with the purposes of objectives of the federal regulation.<sup>33</sup> When attempting to discern whether a federal regulation preempts state regulation, the Supreme Court has repeatedly held that Congress's intent when enacting the federal regulation is the “ultimate touchstone.”<sup>34</sup>

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<sup>29</sup> The Supremacy Clause of the United States' Constitution provides that federal law is “the supreme law of the land” notwithstanding any state law to the contrary. This language has provided the foundation for the doctrine of federal preemption, through which federal law supersedes, and in some cases may invalidate, conflicting state laws. U.S. CONST. art. VI, cl. 2.

<sup>30</sup> *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>34</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).



The FTC Act and the Green Guides do not contain any explicit language illustrating Congress’s intent to preempt state regulation over environmental marketing claims and claims about recyclability. Therefore, there is no express preemption. Additionally, there is no implied preemption. First, the FTC Act and the Green Guides are not drafted in a way that precludes supplementary state regulation. Rather, the requirements of the Green Guides set a floor not the ceiling and states are empowered to pass legislation that add additional and more rigorous requirements. This is how California was able to pass its Truth in Labeling Law which has not been challenged in court despite being enacted over two years ago. Second, the language of LD 295 does not conflict with the requirements of the FTC Act or the Green Guides in a way that would make compliance with both federal and state regulation impossible. Instead, LD 295 supplements the requirements of the federal regulations by adding additional requirements which only apply to plastic packaging and products sold and distributed in Maine. Companies will be able to comply with both the federal and state requirements without any conflict.

## V. Conclusion

In order to meaningfully address plastic pollution, consumers need to know what types of plastics are actually recyclable, and which are not. The most obvious and effective way to accomplish this is by prohibiting companies from labeling their products or packaging as recyclable, unless it actually is being recycled in Maine.

Consumers should not have to track down additional information and perform research to understand how to responsibly manage plastic waste. Instead, companies should be required to be truthful and upfront about the recyclability of their products and packaging. LD 295 is an important policy that will help Mainers make informed and correct decisions about plastic recycling. This will also help reduce the cost of recycling, ensure actual recyclable materials are being properly sorted and managed, and illustrate just how unrecyclable and wasteful most plastics truly are.

Thank you for your time and consideration of this testimony.

Respectfully submitted,

Peter Blair, Esq.  
Policy and Advocacy Director  
Just Zero.