

DATE: November 22, 2021

TO: Caroline Gordon, Rural Vermont
John Brabant, Vermonters for Clean Energy
Marcie Gallagher, VPRIG
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CC: Elena Mihaly, Conservation Law Foundation

FROM: Peter Blair, Conservation Law Foundation

RE: Summary of Public Records Request Findings

INTRODUCTION

This memorandum intends to outline the key findings associated with our Vermont Public Records Act request regarding the Agency of Natural Resources' (hereinafter "ANR" or the "Agency") implementation of the organic recycling requirements of the Universal Recycling Law.

The document I reviewed indicate that originally, the Agency developed an internal policy that confirmed with the requirements of the law. Specifically, the source separation requirement¹ which mandates that producers of food waste separate the food waste from all non-compostable material at the point of generation before transferring it to a facility that can manage it according to Vermont's Organic Management Hierarchy.² However, the agency gradually began eroding the requirement that source separation occur at the point of generation. This paved the way for the use of depackagers. In time, the agency would completely change course and develop a policy that explicitly authorized, if not encouraged, the use of depackaging. This is despite the fact that the practice does not confirm with the requirements of Vermont law. I provide a timeline of the Agency's evolving position below.

JULY 2019 POLICY

In July 2019, ANR circulated an internal policy entitled "Draft Food Residual and Packaged Organics Management Policy." This appears to be the first iteration of a formal internal policy addressing how the Agency will interpret the source separation requirements of the URL. The Agency determined that "it is necessary to maintain the purity of source separated organic material to keep the door open for diversion to the identified higher uses [of the food residuals management hierarchy]." To support this statement, "it is the Agency's policy that food residuals shall be managed separately from packaged organics at the point of generation." This policy was supported by the "plain language of the statute" which states that "food residuals, by definition, must be source separated from non-compostable materials at the point of generation and managed in a manner consistent with the priorities listed in the food residuals management hierarchy." To that end, the combining of source separated food residuals with packaged

¹ 10 V.S.A. §6602 (32).

² 10 V.S.A. 6605k.

organics “conflicts with the established URL requirements.” However, the policy allows for “certified facilities to process source separated food residuals into a slurry along with packaged organics provided that there are no higher priority use facilities willing to accept the source separated facilities.” This policy was to be further outlined in the approved facility management plan.

AUG. 2019 POLICY

In August 2019, ANR circulated a revised Draft Food Residual and Packaged Organics Management Policy. The language of this revised policy echoed the prohibition on comingling source separate food residuals with packaged organics. The document stated that “mixing food residuals with packaged organics does not satisfy the source separation requirement and can preclude the material from being utilized by any of the higher priority options on the hierarchy, such as food for people or food for animals.” Therefore, “it is the generator’s responsibility to source separate all non-compostable materials from food residuals at the point of generation.” In fact, the Agency explicitly found that “the growing practice of combining source separate food residuals with packaged organics by the generator conflicts with the established URL requirements.” However, the Agency clarified that there are minimal exceptions. ANR recognized that “in some cases a generator may not be able to source separate large volumes of packaged food residuals that they generate (i.e. separating yogurt from individually packaged expired yogurt cups).” To address this, ANR allows for generators to “contract with certified treatment facilities to separate packaged food residuals on their behalf.” This allowance is “limited to significant volumes of packaged organics only.” Essentially, this policy created a system where generators of food residuals will have “a source separated organic material stream, and some generators may elect to have a source separated organics material stream AND a distinct packaged organics stream.” These two streams “shall be kept separate and shall not be comingled.”

FALL 2019 INTERNAL DISCUSSION

In Fall (September – early November) 2019, email chains show internal agency discussion about the future direction of the Food Residual and Packaged Organics Management Policy. Several agency officials lead by Cathy Jamieson were pushing for revisions to the August 2019 Draft Policy. Specifically, to allow for the comingling of packaged organics with source separated food residuals. Ben Gauthier challenged this effort. In an email to Cathy and other Agency officials, Ben wrote that he does “not think our approach of allowing comingling of packaged organics with source separated food residuals at the point of generations conforms with the letter of the law. Ben “felt it appropriate to submit that opinion formally.”

In response, Barbara Schwendtner argued that the source separation requirements should not be read “too closely because if we do they become a little circular and nonsensical.” Barbara argues that when read literally, the landfill ban only applies to source separated material and therefore the ban would not ban any packaged food from disposal. She notes that “the intent of [of the law] was to ban food and recyclables from trash, not given an ‘out’ to food and recyclables that are not already separated.” Therefore, she concludes that “for the law and implementation to make sense, we have to resist taking the source separated part of the definitions too literally. Based on this argument she doesn’t “see an issue with compliance via the de-packaging route by a 3rd party.”

Cathy Jamieson agreed with Barb. Cathy added that “the law does allow for de minimis amount [of food residuals] to be disposed if the generator has a plan and has informed and educated employees on how to separate food residuals”

NOV. 2019 POLICY

Following this round of feedback, the Agency circulated another internal Draft Food Residual and Packaged Organics Management Policy in November 2019. This draft was a significant departure from the previous policy. For the first time, this policy included data about the amount of food residuals that are packaged. The Agency stated that “roughly 80,000 tons of food residuals are disposed of annually, with roughly 30,000 tons of that in packaging (38%).” This data was calculated using the 2018 Vermont Waste Composition Study. Also included in this draft was the first mention of the Agency’s lack of authority to strictly enforce the food residual management hierarchy. The policy stated that the Agency “does not have the authority to require the use of one hierarchy option over another.” Instead, the Agency only “recommends reducing food waste or donating edible food as preferred hierarchy options.”

Additionally, now the Agency only required generators to “keep food residuals (including food residuals that packaging and those that are unpackaged) separate from other solid waste.” In fact, the Agency now required “generators who have large volumes of food residuals in packaging must separate food residuals from the packaging, either at the site of generation or transfer them to a facility for processing, prior to the food residuals being managed at a facility in accordance with the hierarchy.” Furthermore, this policy even allows generators transferring food residuals in packaging to a facility for processing to “combine all food residuals generated at that location and transfer the total amount of food residuals for processing.”

NOV. – DEC. 2019: INTERNAL DISCUSSION

Ben Gauthier again pushed back on this policy shift. Ben noted that the draft policy “routinely conflates the landfill ban requirement with the source separation requirement.” Ben argues that they are “two different requirements that are not interchangeable. The landfill ban prohibits disposing specific material with solid waste and source separation speaks to what the landfill banned material streams may or may not contain and who is responsible for doing the separation/removal.” Ben also notes that “regulatory considerations aside, undermining the source separation requirements will have cascading implications that will ultimately impair the strength and diversity of the organics management system, likely resulting in lower quality finished products and increased environmental contamination.” He argued that “source separation at the point of generation provides the highest quality resource and fosters healthy competition and diversity within the organics management system.

Cathy Jamieson acknowledged the “difference in opinion” but did not provide any substantive response.

In a December 12, 2019, URL stakeholder meeting, ANR confirmed that it will not “prohibit generators from co-mingling packaged food with unpackaged food when that packaging can be separated by depackaging equipment.” Moreover, ANR stated that the “provides ANR with the

ability to recommend the priority uses of food residuals but does not give ANR the authority to require a generator to use a higher priority."

JAN. 2020: FINALIZED POLICY

Between December 16, 2019, and January 2021, ANR finalized the Policy for Managing Food Residuals, Including Packaged Food Residuals. This policy is a culmination of the Agency's gradual erosion of the source separation requirement over the previous four months. The final policy explicitly holds that "the use of depackaging equipment is needed in order to divert some packaged food residuals from disposal, prior to management by one of the hierarchy options."

Additionally, the policy claims "the existence of depackaging equipment does not necessarily preclude other uses for food residuals, such as agricultural uses, composting, or anaerobic digestion. For example, depackaging equipment is currently in use in other New England states to remove packaging from some off-spec food to create animal feed." The policy also holds that "the existence of depackaging equipment does not preclude a generator from donating a food item for human consumption."

SEPT. 2020: INCINERATION OF VERMONT PACKAGING WASTE IN MAINE

In September of 2020, the Agency learned from Casella that the decision to allow Hannaford's to begin shipping commingled packaged and unpackaged food waste from Vermont to a depackaging and anaerobic digestion facility in Maine was resulting in incineration. The food waste generated in Vermont was sent to Agricycle, where it was first put through a depackaging machine to separate the organic material from the non-compostable packaging. Agricycle then sent the packaging to an incinerator.