

February 11, 2021

Honorable Kathy Hochul
Governor of New York State
State Capitol
Executive Chamber
Albany, NY 12224

Dear Governor Hochul:

We, the undersigned, are encouraged that you have made Extended Producer Responsibility (EPR) for packaging and printed paper (Part RR) and toxics in packaging (Part SS) priorities for the SFY 2022-23 budget. We look forward to working together to ensure that New York passes a strong EPR program for packaging and paper which adequately addresses the untenable solid waste and recycling crisis and puts New York on a successful path to implementing the waste sector recommendations of the State's Climate Action Council's Scoping Plan to combat the climate crisis.

We believe a strong EPR program needs to do the following: hold producers responsible for the life cycle management of their products; modernize and improve the recycling system; provide for minimum waste reduction and recycling mandates; include strong accountability and enforcement frameworks; and eliminate toxics in packaging. In order for New York's EPR program to be effective, it is critically important that the following changes are made to the budget bills.

Financial relief for municipalities and modernize recycling

From rural upstate communities to New York City, and throughout our suburbs, local recycling programs in every part of the state are struggling to survive. In 2020, it was estimated that local governments and recycling system ratepayers had to spend \$80 million to keep local recycling programs alive.

To ensure New York's recycling programs are expanded and improved, we recommend that Part RR incorporates the following changes:

- Clarify that every resident of the state will have access to recycling that is as convenient as their existing waste collection services, whether they live in an urban or rural community or a single-family or multi-unit dwelling.
- Allow producers to establish or contract for new programs where municipalities do not currently, or decide not to, provide recycling services. This is critical to ensuring convenient, consistent, statewide recycling services.
- Establish consistency among programs in New York, so that all materials that can be sorted and sold to market are collected and processed for recycling. This will facilitate consumer education and reduce confusion.
- Require producer responsibility organizations to coordinate their plans to ensure that consistent, convenient recycling programs are available statewide. This should not be a responsibility of the advisory board.
- Limit the preemption of local laws only to those that require producer funding of packaging and

paper products.

- Clearly define the rights and responsibilities of municipalities to continue providing services independent of the PRO and receive reimbursement, discontinue the right to provide service, or opt out of the program and continue to operate as they see fit.

Waste and plastic reduction requirements

Plastic pollution is one of the greatest environmental and health threats of our time. Plastic pollutes our air, water, soil, and bodies, threatens our wildlife and ecosystems, increases illness, widens inequality, and hastens the climate crisis. A report issued by the National Academies of Sciences, Engineering, and Medicine on December 1, 2021, concluded that “Without modifications to current practices in the United States and worldwide, plastics will continue to accumulate in the environment, particularly the ocean, with adverse consequences for ecosystems and society.” Forty percent of virgin plastic is used for single-use packaging, much of which is utilized for moments before it is discarded.

A significant contributor to our waste and plastic pollution crisis is the fact that consumer brand-owners are disconnected from the end-of-life management of their product packaging. They have no requirements or incentives to reduce packaging waste, create reusable products, make packaging easier to recycle, or boost market demand by using more recycled content. This is unacceptable and must change if we are to make meaningful strides in addressing our plastics and climate crises. Our waste management strategy for the state has lost sight of the waste hierarchy which starts with waste prevention, then reduction, reuse, and finally, recycling.

Part RR of the Executive Budget, as currently drafted, somewhat acknowledges packaging reduction as a goal, but is mostly voluntary. This will result in little to no reductions in packaging waste. By placing reduction goals in PRO plans, instead of legislation, it will be multiple years before we realize that the packaging industry has not reduced packaging—wasting precious time that we do not have. EPR systems that were passed nearly a decade ago in Europe have indeed improved recycling, but there has been no reduction in packaging waste. In the absence of specific reduction goals in these programs, packaging waste has grown over the past ten years and legislative bodies are now adding packaging reduction requirements to fix this initial oversight. Therefore, it is important to set packaging reduction requirements in law now.

To that end, we recommend the following waste and plastic reduction requirements be included in Part RR:

- Clear waste reduction requirements that are commensurate with the problem and increase over time. Brand owners can achieve these reductions by switching to reuse and refill systems and/or by eliminating packaging components entirely. These rates and dates must be included in the law, not set later.
- Incentives for reuse and refill systems, not just reusable packaging. Incentives for reusable packaging that are not contained within a reuse and refill system will likely result in a proliferation of single-use packaging that is more durable and resource intensive. This would not be a net environmental benefit.

Minimum recycling, and post-consumer content standards

Strong recycled content standards help drive up the value of recycled materials and recycling rates, which in turn helps lower demand for virgin feedstocks. This reduces the need to extract natural resources and will significantly lower greenhouse gas emissions, especially from plastics which are set to surpass the emissions from coal-fired power plants within the decade. In order to grow our circular economy, reduce demand for natural resources, and reduce greenhouse gas emissions, it is critical to set requirements for recycling rates and post-consumer recycled content for packaging in the legislation.

Part RR of the Executive Budget outlines a process by which the advisory board, based on a needs assessment, recommends to the Department minimum recovery rates, recycling rates, and post-consumer content rates to be established through a rulemaking process. The PROs are then directed to recommend changes to these rates in their annual report and the advisory committee can advise changes accordingly. Conflicts of interest will abound on the advisory committee, with many members having to recuse themselves on decisions related to their own companies or trade associations. This approach runs the risk of fostering a race to the bottom for recycling and post-consumer content rates. We support a mechanism for rates to be adjusted through rulemaking, but without minimum rates, goals and targets, the legislation will not achieve its intended goals.

To that end, we recommend that following standards be included within Part RR:

- Clear minimum rates for post-consumer recycled content and recycling that are commensurate with the problem and increase over time. These rates and dates must be included in the law, not set later.
- Financial incentives through eco-modulated fees that reward brand owners that design their products to go above and beyond the minimum requirements for recyclability and post-consumer recycled content.

Definition of producer

As drafted, Part RR of the Executive Budget defines the “producer,” who will be responsible for packaging and paper waste under the EPR system, primarily as the manufacturers of packaging or paper products. However, it is consumer brand owners who decide which materials to use to package consumer products, and who distribute packaged products into the market. Therefore, it is customary in EPR systems for packaging around the world to obligate brand owners as producers. Obligating consumer brands simplifies compliance, enforcement, data tracking, and accountability within the EPR system because consumer brands track where (and how many of) their packaged goods are sold. Furthermore, packaging manufacturers have less incentive to reduce packaging materials, and cannot make decisions to move consumer goods into reusable/refillable containers or to eliminate packaging altogether.

We recommend the following changes to the definition of “producer” in Part RR:

- In the first tier, obligate the person that manufactures a product *that uses covered materials* under the person’s own brand.
- In the second tier, obligate the person that is not the manufacturer of a product, but is the owner or licensee of a trademark under which the product is sold or distributed into the state *using*

covered materials.

- In the third tier, obligate the person that imports a product *that uses covered materials* into the state.
- In all cases, obligate the brand owner of the consumer product itself, rather than the manufacturer of the packaging in which the product is sold.

Definition of recycling

Since a primary goal of an EPR program is to support and strengthen existing recycling operations across the state, it is essential that the legislation set forth an unambiguous definition of the term “recycling.” We do not believe the definitional section of the legislation should be used as a vehicle for expanding the traditional meaning of the term to encompass technologies that produce fuel or fuel products, but as currently drafted it does just that.

The definition of recycling must:

- Prevent incineration, gasification, or pyrolysis, which are often put forward under the umbrella of chemical or advanced recycling, to be considered recycling.
- Explicitly prohibit thermal treatment of fuel or fuel products in all scenarios.
- Only include processes that produce marketable commodities and secondary materials and clearly exclude any processes that produce fuel or fuel products to any extent.

Role of the advisory committee

An important foundation of an effective EPR program is accountability, government oversight, and protecting against industry capture. Checks and balances are important to ensure the producers are preparing and executing responsibility plans that are in compliance with the legislation and that the Department of Environmental Conservation (DEC) has the administrative support to fully oversee the law’s implementation, with stakeholder input. An advisory committee is a mechanism to help address these concerns. The role of the advisory committee is voluntary and, as such, its role should be strategically applied and limited in scope. Part RR of the Executive Budget expands the role of the advisory committee that is far too burdensome for a non-compensated body to play.

We recommend the following changes to the role of the advisory committee in Part RR:

- Remove the requirement that the advisory committee be responsible for coordination amongst PROs. This role would be onerous and difficult and an aspect that the PROs should be responsible for and are in a position to achieve.
- Remove the insertion of the advisory committee in the rulemaking process. As discussed, we support having minimum recovery rates, recycling rates, and post-consumer content rates in the legislation as part of the responsibility plan requirements, not through a rulemaking process.
- Include more community, environmental and environmental justice interests to achieve a needed balance in membership. Specifically, we recommend increasing the number of environmental and environmental justice organization representatives on the advisory committee. There are different needs in different communities, and it is unreasonable to expect one organization to represent the needs of communities across the state.

Increased accountability and transparency

To enhance producer accountability and transparency we support creating and funding an EPR Inspector General to assure compliance with the EPR Statute and its implementing regulations. An EPR program like this will create multiple responsibilities for producers, government agencies and others to be implemented over long-periods of time. The legislation is not self-enforcing, and without timely and effective performance, the promised benefits of the EPR approach will not be achieved. Under these circumstances, we encourage the bill to include an added mechanism to ensure implementation and enforcement of the statutory and regulatory scheme.

We recommend the following change to increase accountability and transparency in Part RR:

- The bill should create an Extended Producer Responsibility Inspector General, operating out of the State Attorney General's Office, funded by the PRO, and tasked with ensuring compliance and implementation of the EPR law and rules. A similar structure was created as part of the 1997 Upstate-Downstate Watershed Agreement, with a Watershed Inspector General position created to ensure that the multiple duties and responsibilities of that program were effectively implemented. Other New York State programs for which an Inspector General office was created include Welfare, Workmen's Compensation Fraud and the Metropolitan Transportation Authority.

While we strongly recommend an Extended Producer Responsibility Inspector General, we note that not all organizations supporting this letter endorse the PRO model proposed in the legislation.

Elimination of toxics in packaging

There has long been a tension between what is framed as concern about solid waste generation and concern about toxic chemicals, because the presence of harmful chemicals in a material makes it inappropriate to be returned to the supply stream. Often, materials circulated through general recycling are turned into objects and uses never contemplated by the original producer. Only manufacturers have the power to change this. As we move further towards a circular economy, and rely on reused and recycled materials as feedstocks, chemical composition must face even greater scrutiny.

To achieve a circular economy, removing toxics from products and packaging must be inextricably linked to EPR legislation. As such, we support the expansion of the Toxics in Packaging Law and appreciate that such a revision was introduced in Part SS. Reducing toxicity in materials is inseparable from increased reuse and recycling as would occur under an EPR law. It has been far too many years since New York State established its first set of toxic chemicals in packaging. Over the intervening decades, scientific evidence has revealed many more concerns about chemicals used in packaging.

Therefore, we believe such an expansion must go beyond PFAS and phthalates. We recommend the following for Part SS:

- Adding the following chemicals and classes to the Toxic Substances listed in the bill: bisphenols; benzophenone and its derivatives; halogenated flame retardants; perchlorate; formaldehyde; toluene; polyvinyl chloride; polystyrene; or polycarbonate.

- Specifying the frequency and requirement for the state to update the list based on specific criteria. Such updates should take place no less frequently than once every three years.
- Prohibiting the presence of Toxic Substances to their practical quantitation limit, not an arbitrary threshold such as 100 parts per million.

The Bottle Deposit Law

New York's Bottle Deposit Law, approved in 1982, is the State's first EPR-based statute and has been highly successful. The Bottle Deposit Law is complementary to any EPR for paper and packaging legislation. It is particularly important that any EPR for paper and packaging law passed in New York does not undercut or threaten the existing bottle law or expansion thereof.

By expanding the Bottle Deposit Law, New York can lead the way on reducing waste, litter, and greenhouse gas emissions. Over its 40-year history, the Bottle Bill has proven to be an effective program in reducing litter and increasing recycling rates. In 2020, New York's redemption rate was at 64%. The Bottle Bill reduces roadside container litter by 70%, and in 2020, 5.5 billion containers were recycled in the state. Expanding the Bottle Deposit Law in parallel with EPR legislation will further enhance these successes and strongly support municipalities. The data supports that the best functioning EPR programs operate with an expanded container deposit system. It is critically important that moving forward with an EPR paper and packaging does not leave bottle bill expansion behind.

Specifically, we urge that:

- Nothing in Part RR should preclude or inhibit the expansion of the Bottle Deposit Law to cover a wider range of beverage containers in a deposit program. In particular, we strongly recommend that the New York's Bottle Deposit Law be amended in parallel with EPR legislation to include noncarbonated soft drinks, noncarbonated fruit or vegetable juices containing less than one hundred percent fruit or vegetable juice, coffee and tea beverages, carbonated fruit beverages, and wine, liquor, distilled spirit coolers, and cider and wine products as defined in section three of the alcoholic beverage control law and the deposit be increased to 10 cents from 5 cents.

Specifically in Part RR, we recommend the following:

- Section 27-3309(2)(o) of Part RR (page 192, lines 1-3), which directs the producer/PROs in their annual report to include "an evaluation of the feasibility and recommendation for adding beverages in beverage containers ..." should be deleted. Directing producers to annually analyze whether containers covered under the Bottle Deposit Law should instead be covered under EPR is extremely problematic and threatens to undercut it. This provision gives producers a path to re-litigate what we already know: Bottle Deposit Laws are the most effective way to recycle beverage containers.

Local governments, taxpayers, and our shared environment cannot wait any longer for the much-needed relief that this policy provides—we respectfully urge you include our recommendations in Part RR and SS of the Executive Budget. Thank you for your consideration.

Sincerely,

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