



## COMMENTS ON TITLE 33 EXTENDED PRODUCER RESPONSIBILITY ACT

### Introduction

The New York Wine Policy Institute is pleased to provide these comments on Governor Hochul's proposed Extended Producer Responsibility Act included as Title 33 in the Executive Budget.

Last year the New York Wine Policy Institute expressed concerns about EPR bills proposed during the 2021 legislative session. Our comments reflected the deep uncertainty and financial risks associated with the proposals from the perspective of New York's wineries and other small agricultural businesses that might be swept up in the new program. Governor Hochul's bill does nothing to allay those concerns, but it does at least begin with a needs assessment that may offer more clarity and predictability on how the new program will impact small businesses.

Given the sheer scale of this new recycling policy, we continue to believe that any new legislation should be based on a sound understanding of the status and recycling needs of different packaging, and of the experience with existing EPR programs in Europe that have evolved over decades to address those needs. We also urge that state take time to seek input from various stakeholders, especially small businesses, so that the negative impacts on our sector and others might be mitigated.

We offer the following general comments:

### **Process:**

A policy reform of this magnitude and complexity, with its considerable cost implications for businesses and consumers, and its significant impact on the state's economy, should be subject to expert review and input, stakeholder feedback, and a careful cost-benefit analysis of its provisions. We were pleased to see that the Governor recognized the importance of analysis by calling for a comprehensive needs assessment first in her proposal. However, her proposal for 2022 should stop there rather than outlining a rigid timeline for the establishment and implementation of EPR programs. Indeed, we noticed that the proposed timeline was so hastily constructed that PRO plans must be submitted to the Department by April 1, 2025. But to be acceptable they must show adherence to Department regulations that are not expected to be adopted until October 1, 2025, six months later.

Similar to the proposals last session, many of the rules and procedures following the Governor's call for a needs assessment appear to have been developed and written by proponents without any understanding or acknowledgment of the likely effects on small businesses, particularly New York's small wineries. Rather than rushing a confusing and impractical proposal into law, spending the extra

time to develop an effective and workable approach the first time will not only mitigate the effort and resources needed for subsequent amendments, but will elicit greater acceptance and compliance from the start by the sectors involved. Although it accounts for a relatively small percentage of the “covered material” packaging by itself (estimated at only 1/3 of one percent of the waste stream), the New York wine industry stands ready to engage with its colleagues from other affected small businesses in a cooperative effort to develop an EPR law that will achieve the state’s recycling and ecological goals without creating unnecessary burdens.

### **Clarity:**

One of the major concerns about the proposed legislation is its sheer complexity, with ambiguous definitions and layers of rules and requirements. It may be relatively easy for large consumer product companies to assign teams of specialists to wade through the language and translate it into routines and procedures that meet the state’s expectations. But small wineries that have tried to understand the practical implications of the law are for the most part confused and concerned about what needs to be done to comply. Will there be one Producer Responsibility Organization (PRO) for glass that will set the fees for glass bottles? Or will there be multiple glass PROs representing different sectors setting different fees depending on the number of participating companies? The same questions apply to case packaging. Nearly all consumer product companies use some kind of cardboard packaging. At what level will those fees be set – generally or sector by sector? And what about other packaging materials commonly used in the wine industry such as corks, screwcaps and wire enclosures? Are they included, and if so, how and by whom will the fees for each material be set?

We would also point out that, while many producer responsibilities were delineated, including a requirement to pay for education and outreach, there was no indication of any expectations of consumers in helping to improve packaging recycling rates. Do consumers bear any responsibility, or will small businesses be penalized for insufficient public participation resulting in a failure to meet recycling rates?

All this uncertainty could be addressed in a needs assessment that includes an analysis of existing systems that have dealt with many of the same issues over time. For example, in France the wine and spirits industry began with its own PRO (Adelphe), which has since fallen under the umbrella of a main PRO for all packaging (CITEO). Belgium has also continued with just one PRO for all sectors. Why? Is having one PRO for all sectors more efficient or easier to implement? Maine has taken that approach in its new law. Contrast that tactic with Germany which began with one PRO but now has several, competing, privately-operated PROs. Is that a better system? Perhaps, but it may be worth noting that the German government eventually had to re-centralize the registration of participating companies so that manufacturer- and brand-related data can be collected and cross-checked to prevent program evasion.

In each of the European systems mentioned above, consumer responsibility is a key feature and a primary reason for the programs’ effectiveness. In Germany, consumers must use six different bins for their waste: black for general waste, blue for paper, yellow for plastic, white for clear glass, green for colored glass and brown for composting. Will New York’s consumers be similarly expected to sort their recyclables to help meet the state’s EPR objectives?

**Cost:**

Among the most important questions to resolve during an extended EPR law development period are the costs involved for the businesses concerned. As with the costs of compliance, it may be quite feasible and even easy for large companies to factor in the expenses associated with the EPR legislation, but for small wineries and agricultural businesses that are operating at tight margins it is essential to determine some fee pricing parameters during the needs assessment phase, i.e., before the law is finalized and passed.

It is interesting to see that, similar to earlier bills, the Governor's proposed law provides a list of items that should be covered by the PRO fees, including the cost of collection and processing of packaging materials, education and outreach, administration, market development and infrastructure improvements. Although no attempt was made to elaborate what the fees might be, the proposed law was very clear about the amounts that could be assessed as penalties for noncompliance.

Once again, we believe that New York's eventual law would benefit from the experience with existing EPR programs, including an analysis of the fee structures used and their impact on small businesses. For example, for the wine industry, it would be helpful for New York to look at the rates charged for bottles and other wine-related packaging in France to determine how that country's fees were determined and set and whether they had any impact on small winery viability.

***Section Analysis: Concerns, Questions and/or Recommendations*****§ 27-3301. Definitions.*****5. "Packaging and paper products"***

Our uncertainty about the Title 33 legislation begins with the definitions themselves. For example, **"packaging and paper products covered by this title"** would logically include glass bottles and other containers commonly used by wineries to package and transport their wine. But as stated above, other materials such as corks, screwcaps and other closures used "for containment, protection, handling, delivery and presentation" would also appear to be covered. Is every part of the wine or sparkling wine packaging included, and if so, does each material require its own PRO or would a wine sector PRO assess fees for each material used?

***8. "Producer"***

Unlike others who have commented on this definition, including a coalition of large industry interests, we support the Governor's proposed hierarchy of responsible parties that prioritizes "the person that manufactures the covered material or product under such person's own name or brand and who sells or offers for sale the covered material or product in the state."

Some suggest that EPR laws should focus first on brand-owners that use the packaging furnished by manufacturers for their products. They maintain that manufacturers lack the incentive to reduce or change packaging without brand-owners' demand for improved supplies, and that obliging brand-owners first will make compliance and enforcement more effective because they are better at tracking their products in the market.

As a group, New York's 475 wineries depend on glass packaging for their businesses. Given that they have different bottle size, color and shape requirements and that many are relying on different suppliers, it is questionable whether they would have the market power to motivate significant changes by their suppliers. We also question the contention that bottle manufacturers are somehow less competent at tracking their orders and sales in a given jurisdiction.

We would note that later in the bill, in Section § 27-3307, paragraph 3, the discussion of eco-modulation provides that the funding mechanism should provide producers with "financial incentives that reward waste and source reduction and recycling compatibility innovations and practices, reward producers of packaging and paper products that can be easily reused, and that disincentivize designs or practices that increase costs of managing the packaging and paper products." In our view, manufacturers of packaging are much better placed to innovate and improve packaging for reuse and recycling than small businesses that buy from them.

Although it may be true that many European EPR programs focus first on brand-owners, we tend to agree with countries like Japan that believe it is important for manufacturers to be included and, as a result, invested in the success of the program. Indeed, Title 33 also seems to recognize the primary role of packaging manufacturers when it includes them as voting members of the proposed Advisory Committee while adding producers that use the packaging simply as non-voting members.

New York wineries would appear to fall under the definition's third category, i.e., "the person or company that offers for sale, sells, or distributes the packaging or paper product in the state." But then, subparagraph b exempts small businesses that "(i) generate less than one million dollars in annual gross revenue; (ii) generate less than one ton of packaging and paper products supplied to New York state consumers per year; or "(iii) operate as single point of retail sale and are not supplied or operated as part of a franchise."

First, we are concerned about the arbitrary exemption benchmarks set for revenues and weight of material used. For annual revenues, one million is far too low and gross revenue fails to take into account the narrow margins New York's small wineries experience after factoring in production and land costs. But even if the exemption rule continues to use gross revenue as the threshold, we would note that recent legislation in Maine and Oregon set more realistic thresholds of \$5 million (in Maine that figure is limited to the first 3 years after the law comes into force, after which it decreases to \$2 million).

We would also note that Maine's law provides for a "low-volume producer," a company "that sold, offered for sale or distributed for sale in or into the State during the prior calendar year more than one ton but less than 15 tons of packaging material in total." It may be useful for New York to consider establishing such a tier for small businesses, which qualify for lower, flat rate fees.

Finally, we also have questions about the third criteria noted above. New York wineries generally operate as single points of retail for their brands with production and tasting room sales occurring in the same premises. A few wineries may have "branch offices" allowed under New York ABC laws, but these "satellite" locations are still considered part of a single licensee's business operation.<sup>1</sup> No licensed

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<sup>1</sup> NY State Alcohol Beverage Control Law, Article 6, Paragraph 7: "The holder of a license issued under this section may operate up to five branch offices located away from the licensed farm winery. Such locations, although not required to be on a farm, shall be considered part of the licensed premises and all activities allowed at and limited to the farm winery may be conducted at the branch offices..."

wineries in New York are supplied or operated as part of a franchise. Does this provision mean that New York wineries are exempt?

It is interesting to note that Oregon's EPR law exempts "Items sold on a farm...or used on a farm,..., or for processing on a farm, provided that the item used on farm is not subsequently sold at an off-farm retail establishment." We would certainly support a similar provision to exclude products that New York's wineries and other small farm operations sell from their locations

### **9. "Producer Responsibility Organization"**

Presumably a Producer Responsibility Organization defined in this section is envisaged to represent an industry sector. But is it realistic to have one PRO that represents the wine industry with its relatively small waste contribution setting fees that apply state-wide in different regions with varying recycling needs and cost structures? And how will the fees for wine bottle glass, for example, compare with those of other sectors' PROs that use far more (or less) glass. Will the fees be determined and set so that each sector contributes a proportional amount of the municipal recycling costs it is trying to help to cover? And if every sector PRO is required to have material trade associations represented on its board, has the availability of representatives for say, the beverage glass trade, been assured and if so, who will cover the cost of such board participation across the state?

### **§ 27-3303. Needs assessment and establishment of a packaging and paper products program.**

#### ***Needs Assessment:***

As stated in our general comments above, we applaud Governor Hochul for recognizing that a law of this economic impact and complexity requires that a comprehensive needs assessment be conducted first. We believe that mandating and outlining the contents of such an analysis would be a significant achievement for this legislative session by laying the foundation for a landmark EPR program that could be fully supported and implemented by all stakeholders and serve as a paragon for other states and countries considering their own EPR programs or improvements to existing laws.

To provide the necessary basis for such important legislation, however, we would urge that the study broaden its scope to include research and analysis of successful packaging EPR programs around the world, many of which have made significant changes over decades to improve participation and increase recycling rates or to correct serious flaws in their initial laws that turned out to be impediments to better recycling. New York should take full advantage of this experience to avoid some of the same pitfalls and instead create a program that incorporates the very best practices.

We also urge that state take the time during the needs assessment process to seek input from various stakeholders, especially small businesses, at various stages of the study so that potential negative impacts on our sector and others will be understood and addressed in the eventual legislation. We have certainly appreciated that access – and the resulting legislation - when the state has embarked on other critical law reforms or development.

#### ***Producer Responsibility Plan Submission Date:***

As mentioned in our general comments above, we question the mandated deadline for delivery of a producer responsibility plan (April 1, 2025), which is 6 months earlier than the date stipulated for

adoption of Department regulations (October 1, 2025) which will be used as a basis for approving the plan (§ 27-3307 Paragraph 4(b)(iv)).

***Producer Price Controls:***

We consider the final paragraph (9) of this section particularly onerous as it ensures that different or higher fees in some regions will create competitive disadvantages. By denying businesses the opportunity to adjust retail pricing to try to recoup some of the costs of this law, the state is penalizing businesses for compliance. Neither Maine nor Oregon have provisions like this that interfere with business pricing decisions in their laws.

**§ 27-3305. Advisory committee.**

We question why the producer or producer responsibility organization members of this Advisory Board should be non-voting. Is there a reason why entities that are actually charged with implementing the law are excluded from oversight and decision making?

We would note that Maine does not stipulate the need for such an oversight board, leaving program management to its Department of Environmental Protection, and under Oregon's new law four of the seventeen representatives of the "Oregon Recycling System Advisory Council" must be producers of covered products or producer trade associations or suppliers with voting rights intact.

**§ 27-3307. Producer responsibility program plan.**

***General Comment:***

This section details the information that should be included in a producer responsibility plan which is to be provided to and approved by the DEC every five years with progress audits annually. The initial plan contains no less than 16 components of varying degrees of technical complexity. Large companies or PROs representing sectors with large companies may have the expertise and staffing to collect and synthesize the information required, but it will be both difficult and expensive for small wineries or their sector PRO to generate many of the data points without assistance. However, this provision not only mandates that producers or their PROs create the plans and complete annual audit, but also requires them to pay for the Department's administrative costs. The funding mechanism is thus not only expected to cover the recycling cost for the covered materials across the state, but also the administrative costs associated with the program whether borne by themselves, their PRO, or by the bodies and agencies overseeing the program.

***Funding Mechanism:***

Looking at this provision from a sector-specific perspective, and especially from one that accounts for such a small part of the unrecycled waste generated in the state, it is difficult to understand how a wine industry PRO would be able to come up with a single fee for wineries across the state without creating competitive disadvantages for those in one or another region. Recycling facility availability and costs vary greatly in different parts of the state so that setting a high fee generally for the sector to cover the expenses in a high-cost region will penalize those in low-cost areas. If the PRO sets a varied fee taking into account population density and related recycling costs as the law allows, some regions will be assessed higher fees than others. (See also ***Producer Price Controls*** comment above.)

***Outreach and Education:***

Although we are concerned that the cost of marketing the program may add significantly to the fees charged by PROs, especially in one of the most expensive media markets in the world, we would note that some of this provision's requirements are already being carried out by many New York wineries as part of their commitment to sustainable business practices. Consumers are generally encouraged to recycle winery goods and materials so it will not be a burden for wineries to use their frequent interaction with the public and events for educational purposes.

With respect to subparagraph (g)(ii), we would point out that any new labeling scheme involving wineries would very likely require prior approval by the TTB.

***Collection and Convenience:***

Following from the comment above, we believe that mandating producers or their PROs to "provide for widespread, convenient and equitable consumer access to collection opportunities" to residents across the state could be a complicated and costly undertaking in certain parts of the state compared to others, and that it may present significant challenges in some rural parts of the state for small producers or their PROs to comply with the requirement to provide collection facilities "within 15 miles of at least 95% of the population of the jurisdiction's population."

**§ 27-3309. Reporting requirements and audits.**

The list of information required of producers in this section would be onerous for any size company but is especially burdensome for small winery businesses, especially if, as provided for in the legislation, they choose to comply as an individual business rather than through a PRO. But even if a sector PRO prepares the information on progress towards recovery, recycling and post-consumer recycled content rates by material type, and whether they are on target to meet approved rates, they will still rely on their members to collect and report the data. As mentioned above, we believe the small business threshold for exemption from this responsibility should be far higher or provided for small wineries as "single points of retail."

We note that the law also mandates the report to include "a description of investments made in infrastructure and market development in New York State as related to the needs identified, including the amount spent expressed as a percentage of the program's total annual expenditures." Presumably, in the case of a PRO representing small wineries, members will be expected to balance their own business investment needs with the PRO's obligation to generate capital to pay for such investments.

**§ 27-3313. Penalties.**

As written, the proposed law provides numerous pitfalls that could make small businesses unwitting targets of enforcement and penalty assessment. The challenge of complying with the enormous data gathering and reporting requirements alone could cause time delays and inaccuracies that would risk violations. There is then the question of whether producers fall short of achieving proposed recycling rates or of providing "widespread, convenient, and equitable access to collection opportunities...at no additional cost to residents" despite their best efforts. If these should constitute violations "of any provision" or failure "to perform any duty imposed" by the law, will small businesses be liable for a

\$500 penalty with an additional \$500 per day assessed while the deficiency continues? And because “all producers participating in a producer responsibility organization shall be jointly and severally liable for any penalties assessed against the producer responsibility organization,” will small businesses really share in PRO penalties of up to \$20,000 and \$6,000 per day even if they themselves are complying with the law?

Neither Maine nor Oregon envisages such draconian penalties in their EPR laws. In fact, from their provisions for stakeholder engagement ensuring the participation of producers to enforcement, it was interesting to see the difference in tone among the three states. Maine and Oregon seemed to view their producers, including small businesses, as partners in an effort to improve packaging material recycling rates, while New York’s proposed law, in stark contrast, seems to treat producers as miscreants that need strict rules, onerous reporting requirements and a looming threat of stiff punishments to guarantee participation.

### **Missing: Consumer Responsibilities**

For certain products which have been subject to earlier versions of producer responsibility laws (e.g., lead-acid batteries, oil-based paints, electronics), consumers have been given guidance or even mandated to dispose of them differently. For example, the NYS Rechargeable Battery Recycling Act was signed in 2010 making it illegal to throw away rechargeable batteries. In 2015 New York made it illegal to throw away most household electronic devices. Will there be similar state-legislated obligations or expectations for consumers regarding packaging material recycling? The proposed law expects producers or their PROs to pay for education and outreach, but should the business community, including small businesses, bear the only responsibility and liability for penalties if recycling rates fall short of anticipated rates?

### **Conclusion**

This discussion note has attempted to pose questions and raise concerns that the New York wine industry has with the draft legislation proposed by Governor Hochul in Title 33 this year.

Members of the New York Wine Policy Institute understand the need for policy measures to address the growing challenges posed by packaging waste around the world. And despite our industry’s small size, we certainly agree that we can and should play a role in developing solutions. To do that, however, elected officials must recognize the importance of involving all stakeholders on this issue, especially small businesses that could be disproportionately affected by a new EPR policy, so that the final legislation will be practical, effective, and supported by those charged with its implementation.

We therefore strongly urge that the needs assessment be conducted before any implementing legislation is passed, and that the assessment process include input from government officials from the DEC and Agriculture and Markets, EPR experts and ALL stakeholders.