

New York Wine Policy Institute

DISCUSSION NOTE

NEW YORK STATE EXTENDED PRODUCER RESPONSIBILITY

Introduction

In response to clear evidence of the environmental problems caused by inadequate packaging waste management, manifested most dramatically in recent years by stark images of oceanic plastic pollution, and the growing cost and logistical challenges of processing such waste, governments and environmental experts around the world have sought to develop effective solutions, including measures to incentivize the use of recyclable materials while disincentivizing the use of non- or difficult-to-recycle packaging. Extended Producer Responsibility or EPR, which shifts financial and/or operational obligations for recycling to the private sector, is becoming a preferred tool.

Europe and Germany in particular were early proponents of EPR policies, and many states have them legislated for specific product groups such as electronics and paint. But pressure to adopt policies covering a wider range of packaging have continued to grow in recent years. This year, two states – Maine and Oregon – passed EPR laws that cover a broad range of materials. New York is considering its own EPR legislation with two bills proposed during the recent session.

While recognizing the need for policies to address the growing challenges posed by packaging waste, members of the New York Wine Policy Institute expressed concerns about the proposed EPR bills during the session and proposed that the state take more time to develop legislation that reflected input from various stakeholders, including the New York wine industry. We called for and continue to urge that the state convene a working group this year for such a purpose.

This paper is intended as a contribution to what we hope will be a more open and deliberate approach to developing a New York Extended Producer Responsibility Law.

Wine Industry Issues and Concerns about the proposed New York EPR legislation

(Section references to New York Senate Bill S1185C)

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. 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 industries a cooperative effort to develop an EPR law that will

achieve the state's recycling and ecological goals without creating unnecessary burdens for small agricultural businesses.

Clarity:

One of the major concerns about the proposed legislation was its sheer complexity, with ambiguous definitions, technical jargon, 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 procedures that meet the state's expectations. But the small agricultural businesses 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. Is it simply a matter of paying a Producer Responsibility Organization whatever fee might be set for glass bottles? Case packaging would seem to be an obvious material on the covered list, but are other packaging materials such as corks, screwcaps and wire enclosures included, and if so, how will the fees for each material be set? Additionally, 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?

Cost:

Among the most important questions to resolve during an extended EPR law development period are the costs involved for the businesses concerned. Similar to 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 as part of the legislation. It was interesting to see that the proposed law provided 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.

Section Analysis: Concerns, Questions and/or Recommendations

§ 27-3301. Definitions.

Covered Materials and Products:

Our uncertainty about the proposed legislation begins with the definitions themselves. For example, **"covered materials and products"** would logically include glass bottles and other containers commonly used by wineries to package their wine. But as stated above, what about other materials such as corks, screwcaps and other closures, etc.? 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 need to assess fees for each material used?

We also notice that, at least for wine, there may be conflicting requirements. On the one hand, covered materials including packaging that "is intended at point of sale to contain, protect, wrap, present or deliver products...." But then the legislation excludes "packaging that is used for the long-term protection or storage of a product or with a life of not less than five years." Does that mean that any wine product that is purchased by a consumer or collector for cellar aging and later enjoyment is exempt?

Producer:

New York State wineries would appear to fall under the definition's first category (A), i.e., "the person or company who uses the covered material under such person's own name or brand and who sells or offers the product that uses the covered material in the state." But then, under § 27-3305 (Producer Responsibilities," Paragraph 7 exempts small businesses with less than one million dollars in annual revenues, generates less than one ton of covered materials, or "operates as single point of retail sale and is not supplied or operated as part of a franchise."

Our first concern is 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 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.¹ No licensed wineries in New York are supplied or operated as part of a franchise. Does this provision mean that New York wineries are exempt?

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. Producer Responsibility Advisory Board

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

¹ 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..."

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.

§ 27-3305. Producer Responsibilities.

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.”

§ 27-3307. 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. And of course the penultimate paragraph in this section is particularly onerous and ensures that different or unjustifiably high 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.

§ 27-3309. Producer Responsibility Plan and Needs Assessment.

This section details the information that should be included in a producer responsibility plan which is to be provided and approved by the Advisory Board and DEC every five years with progress audits annually. The plan contains no less than 20 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 reports, but also requires them to pay for the Department’s and Advisory Board’s administrative costs of implementation. 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.

Finally, we note that the law also mandates the plan to include “a description of how a Producer Responsibility Organization will strategically invest in existing and future reuse and recycling infrastructure and market development in the state, including but not limited to, installing or upgrading equipment to improve sorting of covered materials and products...and capital equipment for new technology, equipment and facilities.” 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. Collection and Convenience.

We would again note that in mandating producers or their PROs to provide widespread, convenient and equitable recycling collection to residents across the state could be a complicated and costly undertaking in certain parts of the state compared to others, and that the design and implementation of a new system "that is convenient as the collection of municipal waste" for wine packaging supplies may be daunting for small producers and their prospective PRO.

§ 27-3315. 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 currently encouraged to recycle winery materials. Wineries will continue to use their frequent interaction with the public and at events for educational purposes.

However, with respect to Section E, any new labeling scheme involving wineries would require prior approval by the TTB.

§ 27-3321. 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 outline 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 propose in both the Senate and Assembly this past session.

As stated at the very beginning, 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 and, in particular, accept private sector input so that the final legislation will be practical, effective and supported by those charged with its implementation.

We therefore strongly urge that a special commission be set up as soon as possible to develop EPR legislation with participation from government officials, people who are professionally involved in existing, successful EPR programs, and stakeholders.