

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

Model State Legislation

The Extended Producer Responsibility Act.

Section 1. Definitions.

For the purposes of this Act:

(a) “Baseline waste amount” means the amount of waste generated by a producer or producer responsibility organization in certain 12-month period as described under Section 2(c)(1) of this Act.

(b) “Board” means the Producer Responsibility Advisory Board.

(c) (1) “Covered material” means packaging, printed materials, or single-use plastics.

(2) “Covered material” includes any previously uncovered material for which a Department–approved recycling method is developed.

(3) “Covered material” does not mean any packaging, material, or product that:

(i) could become unsafe or unsanitary to return, reuse, or recycle by virtue of the anticipated use of the material or design of the material; or

(ii) includes labels, inks, or adhesives containing heavy metals or other hazardous materials that would contaminate the return, reuse, or recycling process, as defined or specified by the Secretary.¹

(4) “Covered material” does not include any packaging, printed materials, or single-use plastics that would otherwise be considered covered material that cannot be separated from uncovered material.

(d) “Department” means the Department of Environmental Quality.²

(e) “Large producer” means a producer that is one of the 25 largest producers of products containing covered (or uncovered) materials based on market share.³

(f) (1) “Packaging” means:

¹ This exclusion is based on language from the Vermont bill (H 142 2021)

² States should replace with appropriate state agency or department.

³ Based on language in Oregon bill (SB 582 of 2021 Regular Session)

- (i) Materials, regardless of recyclability, used for the containment or protection of products, including but not limited to paper, plastic, glass or metal or a mixture thereof;
 - (ii) Single-use bags, including but not limited to shopping bags; and
 - (iii) Nondurable materials used in storage, shipping or moving, including but not limited to packing materials, moving boxes, file boxes and folders.⁴
- (2) “Packaging” does not mean containers or materials:
 - (i) used for the long-term protection or storage of a product; and
 - (ii) with a life of not less than 5 years.
- (g) “Printed material” means paper of any description, including but not limited to:
 - (1) flyers;
 - (2) brochures;
 - (3) booklets;
 - (4) catalogs;
 - (5) telephone directories;
 - (6) paper fiber; and
 - (7) paper used for writing or any other purpose.⁵
- (h) “Producer” means a person or company who:
 - (1) Is the owner, licensor, or licensee of a brand or trademark used in connection with a product that is sold or offered for sale in the State and that uses covered or uncovered material in the State;
 - (2) Imports the product that uses covered or uncovered material as the owner or licensee of a trademark or brand under which the product is sold or distributed in the State; or
 - (3) Sells, offers for sale, or distributes the product that uses the covered or uncovered material in the State.⁶
- (i) “Producer responsibility organization” means a nonprofit organization established by a producer or group of producers to administer a producer responsibility program.

⁴ Oregon exempts food serviceware from this definition.

⁵ Taken from New York language re “paper” in s-1185-C of 2021 Session.

⁶ Modified based on New York bill’s definition. New York expressly exempts municipalities and local government planning units, as well as charitable and social welfare organizations, from the definition of producer. States may wish to do similar.

(j) “Producer responsibility program” means a statewide program for the responsible management of covered and uncovered materials that is administered by a producer or producer responsibility organization pursuant to approval by the Department of Environmental Quality.⁷

(k) “Recovery rate” means the amount of covered or uncovered material recovered over a program year divided by the amount of covered or uncovered material produced, expressed as a percentage.⁸

(l) “Responsible end market” means a materials market in which the return, reuse, recycling, or recovery of materials or the disposal of contaminants is conducted in a way that benefits the environment and minimizes risks to public health and worker health and safety, particularly in disadvantaged/Environmental Justice communities.⁹

(m) “Secretary” means the Secretary of the Department of Environmental Quality.

(n) “Single-use plastic” means plastic products that frequent the residential waste stream or that severely disrupt return, reuse, or recycling processes.¹⁰

(o) (1) “Uncovered material” means any packaging, material, or product that:

(i) could become unsafe or unsanitary to recycle by virtue of the anticipated use of the material or design of the material; or

(ii) includes labels, inks, or adhesives containing heavy metals or other hazardous materials that would contaminate the recycling process, as defined or specified by the Secretary.

(2) “Uncovered material” includes any covered material that cannot be separated from an uncovered material.¹¹

Section 2. Producer and Producer Responsibility Organization Obligations.¹²

(a) Beginning on January 1, 2025, a producer may not sell, offer for sale, or distribute for sale a product that uses or contains covered or uncovered material unless the producer or a producer responsibility organization acting as their designated agent has a producer responsibility program approved by the Board.

(b) A producer, or a producer responsibility organization, shall be responsible for the producer’s compliance with the requirements of this Act, including the preparation and

⁷ PRO and PRP definitions taken from Oregon bill.

⁸ Modified from New York bill language.

⁹ Language taken from Oregon bill.

¹⁰ Taken from New York bill.

¹¹ This provision is listed both inclusively under “uncovered material” and exclusively under “covered material”. States should choose the manner in which they prefer the provision to be drafted.

¹² Language in subsections (A) and (b) based on provisions in New York Bill. Other states (including Vermont) have similar provisions.

implementation of a producer responsibility program, and the submission of annual reports to the Department and the Board.

(c) (1) On or before (date), each producer or producer responsibility organization shall submit to the Department and the Board a detailed report prepared by an independent, third-party auditor establishing the baseline waste amount in volume, weight, and quantity generated by the producer or producer responsibility organization in the previous 12 months.

(2) Following the approval of an initial producer responsibility program, the producer or producer responsibility organization's producer responsibility program shall achieve an annual recovery rate of covered materials yielding:

(i) a 25% reduction from the baseline waste amount three years after initial program approval;

(ii) a 50% reduction from the baseline waste amount six years after initial program approval; and

(iii) a 100% reduction from the baseline waste amount ten years after initial program approval and each year thereafter.

(3) A producer or producer responsibility organization that cannot meet the obligations under subsection (2)(iii) of this section shall recycle two units of discarded covered material for every one unit of covered material generated by the producer or producer responsibility organization, until an independent, third-party auditor approved by the Department and the Board verifies that the producer or producer responsibility organization has achieved an annual recovery rate of covered materials yielding a 100% reduction from the baseline waste amount.

(4) Following the approval of an initial producer responsibility program, the producer or producer responsibility organization's producer responsibility program shall achieve an annual recovery rate of uncovered materials yielding:

(i) a 50% reduction from the baseline waste amount three years after initial program approval; and

(ii) a 100% reduction from the baseline waste amount six years after initial program approval and each year thereafter.

(5) A producer or producer responsibility organization that cannot meet the obligations under subsection (4)(ii) of this section shall recycle five units of discarded uncovered material for every one unit of uncovered material generated by the producer or producer responsibility organization, until an independent, third-party auditor approved by the Department and the Board verifies that the producer or producer responsibility organization has achieved an annual recovery rate of uncovered materials yielding a 100% reduction from the baseline waste amount.

(d) (1) Following the approval of a producer or producer responsibility organization's producer responsibility program by the Board, each producer or producer

responsibility organization responsible for the program shall submit to the Board annually a report detailing the producer or producer responsibility organization's progress regarding the producer responsibility program and any obligations under this Act.

(2) At the time the producer or producer responsibility organization submits its annual report to the Department and the Board, the producer or producer responsibility organization shall submit a reasonable annual fee established by the Department and the Board to cover the Department's costs for review of the annual report and the Department's costs in the prior fiscal year for its oversight, administration, and enforcement of the producer responsibility program, including any costs associated with management and operation of the Board.¹³

(e) (1) A producer responsibility organization shall, upon request, fund in advance or reimburse, as appropriate, the eligible expenses of a local government or the local government's service provider for eligible costs, in a manner and rate determined by the Department.

(2) The costs of any upgrades required to receive, consolidate, load and transport covered and uncovered material, as well the cost of hiring any additional staff and providing additional space and hardware, are eligible costs for funding or reimbursement by a producer or producer responsibility organization.

(3) (i) The Department shall conduct a statewide needs assessment in partnership with local governments and local governments' service providers to determine local interest in expanding collection options and recycling depots in areas not served with those collection opportunities, provided that funds are made available to the local programs for expansion.

(ii) The needs assessment shall include a process for local governments to request services and commit to providing additional services.

(iii) The Department shall periodically repeat the assessment and may conform the timing of the assessment to coincide with the schedule for producers or producer responsibility organizations to submit new producer responsibility programs for approval.

(4) A local government or the local government's service provider requesting reimbursement under this section shall submit an accounting of its costs to a producer or producer responsibility organization, if the reimbursement is not otherwise determined according to a formula.

(5) (i) A producer or producer responsibility organization shall remit payment for expenses under this section to a local government or the local government's service provider or other person authorized by the local government to receive payment within 60 days of receiving a request for payment.

(ii) A producer or producer responsibility organization shall provide written notification to the local government of any payments remitted to a person authorized by the local government to receive payment.

¹³ Similar to language in Maine EPR bill 38 MRS Sec. 2146.

- (6) (i) The Department may review or audit the cost accounting and reimbursement request records of a producer or producer responsibility organization, a local government or the local government's service provider that receives payment under this section.
- (ii) The Department shall require a local government or a local government's service provider that receives advance funding under this subsection and does not use the moneys for the purposes for which the funding was provided to return the funding to the producer or producer responsibility organization, according to standards established by the Department.
- (7) A local government shall identify to the Department the local government's service providers that are authorized to receive funding or reimbursement directly, as described in this section, from producers or producer responsibility organizations.
- (f) (1) A producer or producer responsibility organization that develops a recycling method approved by the Department for an uncovered material shall provide to the Department a comprehensive report of the technical specifications and methodologies used.
- (2) The Department shall make publicly available any report received under paragraph (1) of this subsection.

Section 3. Producer Responsibility Organization.

- (a) A producer may register with and be a member of a producer responsibility organization or organizations that administers a producer responsibility program.
- (b) A producer that is registered with a producer responsibility organization must:
- (1) Pay the membership fee calculated under the schedule established by the producer responsibility organization; and
- (2) Upon request, provide the producer responsibility organization with records or other information necessary for the organization to meet the organization's obligations under this Act.
- (c) (1) A producer responsibility organization that includes both producers and large producers as members must be created and administered in a manner equitable to all members, taking into account historic waste production, size and scale of current and future operations, and financial capacity.
- (2) Voting within a producer responsibility organization must be tabulated in an equitable manner that does not allow the producers responsible for generating the most waste to have the most votes.
- (d) Any cost-sharing arrangement established between members of a producer responsibility organization shall take into account historic waste production, size and scale of current and future operations, and financial capacity.

Section 4. Producer Responsibility Program.¹⁴

(a) On or before July 1, 2024, each producer of a covered or uncovered material, or a producer responsibility organization shall submit to the Producer Responsibility Advisory Board, in a form and manner prescribed by the Department, a proposed producer responsibility program.

(b) Using objective and measurable criteria whenever possible, a producer responsibility program must:

(1) Describe how the producer or producer responsibility organization will manage and administer a producer responsibility program to meet the producer or organization's obligations under this Act, including a description of how the producer or producer responsibility organization will:

(i) Support the collection, return, and reuse of uncovered materials and the collection, return, reuse, and recycling of covered materials;

(ii) Provide for the collection of covered and uncovered materials and meet convenience and performance standards for those materials;

(iii) Maximize the use of existing infrastructure;

(iv) Ensure the responsible management of covered and uncovered materials and other contaminants collected with those materials;

(v) Establish, calculate and charge membership fees, including incentives for achieving waste reduction goals in accordance with the requirements of this Act;

(vi) Encourage producers to make continual reductions in the environmental and human health impacts of covered and uncovered materials through a graduated fee structure;

¹⁴ Modified from language in Oregon Bill.

(vii) Ensure that covered materials, and contaminants collected with those materials, are managed and disposed of consistent with the goals, standards and practices required by this Act and other applicable laws and regulations;

(viii) Ensure that covered materials collected for reuse or recycling will be transferred to responsible end markets, including:

(A) The type and general locations of responsible end markets that may use, in the manufacture of new materials, covered materials collected for use or recycling;

(B) Whether any of those responsible end markets are certified for environmental and social sustainability by certification programs;

(C) How the producer or producer responsibility organization will ensure that responsible management is maintained through to final disposition of the covered material; and

(D) Arrangements the producer or producer responsibility organization has made with processors to ensure that covered materials are recycled at a responsible end market, including any investment intended to be made to support processors;

(ix) Ensure that any covered material that will be marketed for use through a method other than mechanical recycling will be transferred to a responsible end market, including:

(A) A description of how the proposed method will affect the ability of the covered material to be recycled into feedstock for the manufacture of new products;

(B) A description of how the proposed method will affect the types and amounts of plastic recycled for food and pharmaceutical-grade applications;

(C) A description of any applicable air, water and waste permitting compliance requirements; and

(D) An analysis of the environmental impacts for the proposed method compared to the environmental impacts of mechanical recycling, incineration and landfill disposal as solid waste; and

(x) Provide public outreach and education, including:

(A) A communications program for responding to public questions;

(B) Outreach to local governments to ensure information is accurate and consistent across this state; and

(C) Statewide promotional and educational campaigns;

(2) Identify and provide contact information for the producer responsibility organization and identify each producer registered with the proposed program;

(3) Describe the structure of the producer responsibility organization, including the management structure and roles and functions of committees;

(4) Describe:

(i) how the producer or producer responsibility organization will communicate and coordinate with the Department, the Board, local governments, local governments' service providers, processors and any other producer responsibility organizations;

(ii) how the producer or producer responsibility organization will communicate and coordinate with affected communities, particularly disadvantaged communities affected by:

Act; and (A) any changes made to waste management as a result of this

(B) siting of waste facilities and transportation of materials; and

(iii) the topics of communication or coordination between and among these various groups;

(5) Describe a process, including the process timeline, for how the producer or producer responsibility organization will resolve any disputes involving compensation of local governments and local governments' service providers and disputes involving commingled recycling processing facilities;

(6) Include projections on recycling rates;

(7) Describe any efforts the producer or producer responsibility organization will make to support collection, processing or responsible recycling of specifically identified materials, including:

(i) Any efforts to support or provide recycling depot or mobile collection of specifically identified materials;

(ii) Any efforts to use education and promotion to encourage proper participation in re cycling collection of specifically identified materials;

(iii) Any investments to support the successful processing of specifically identified materials;

(iv) Any efforts to develop or support responsible end markets for specifically identified materials; and

(v) Any other efforts to ensure successful and responsible returning, reusing, or recycling of specifically identified materials;

(8) Describe the membership fee structure of the producer responsibility organization, including a schedule of the membership fees actually charged to members;

(9) Demonstrate that the membership fees collected by the producer responsibility organization will provide adequate revenue to fund all costs associated with the producer responsibility program;

(10) Describe how the producer or producer responsibility organization will provide funding to allow local governments to protect ratepayers from increased costs associated with the processing and marketing of recyclables;

(11) Include a process for promptly notifying the Department and producers of potential noncompliance with the requirements of this Act by a producer or producer responsibility organization;

(12) Describe reserve funds or other contingency plans for responding to changes in markets or other circumstances that could affect the effectiveness of the program, including the amount of funds in reserve and a description of what contingencies those reserve funds will be sufficient to address;

(13) Include a closure plan to settle the affairs of the producer responsibility organization that ensures that producers will continue to meet their obligations in the event of dissolution of the organization and that describes a process for notifying the Department, the Board, and local governments of the dissolution;

(14) Include methods for advance funding, reimbursements and making payments to local governments or local governments' service providers;

(15) Describe how the producer or producer responsibility organization will implement the requirements of this Act by establishing:

(i) A schedule for implementing collection program expansions and improvements throughout this state;

(ii) A method for determining funding or reimbursement amounts; and

(iii) The total amount of funds that will be made available to local governments each year; and

(16) Include any other information required by the Department to determine that a producer or producer responsibility organization is capable of meeting its obligations and ensuring the outcomes required under this Act.

(c) Upon approval of the program or a program amendment by the Department, a producer responsibility organization must implement the approved program or program amendment.

(d) Each program shall have a term limit of 5 years, and the producer or producer responsibility organization shall review and update the program every 5 years.

(e) The Department may require a program to be reviewed or revised prior to the termination of the program if:

(1) the Department or Board has cause to believe the program factors are not being met or followed by the producer or producer responsibility organization; or

(2) the Department or Board determines a change in circumstances warrants revision of the program.

(f) The Board shall give an interested person the right to petition for the issuance, amendment, or repeal of a program's approval.

Section 5. Producer Responsibility Advisory Board.¹⁵

(a) The Department shall establish a Producer Responsibility Advisory Board within the Department.

(b) The Board shall review any producer responsibility programs required under this Act and shall approve or return to the producer or producer responsibility organization for amendment each program within 180 days.

(c) (1) The Board shall establish a process under which a producer responsibility program is available for public review and comment for 30 days prior to approval or return for amendment.

(2) In establishing such a process, the Board shall consult with interested persons, including but not limited to producers, environmental advocacy groups, Tribal communities, wholesalers, municipalities, and waste management entities.

(d) The Board consists of the following voting members, appointed by the Secretary:¹⁶

(1) One representative from each municipality association or municipal recycling program;

(2) One municipal representative from each city with a population of more than 500,000 residents;¹⁷

(3) One representative from a statewide environmental organization;

(4) At least one representative from an environmental justice community organization;

(5) One representative from a statewide waste disposal association;

(6) One representative from a materials recovery facility located in the State;

(7) One representative from a recycling collection provider;

¹⁵ This language is modelled on the New York bill.

¹⁶ New York's Board is required to consist of an odd number of members. There, the Commissioner is required to pick "at least" one member from each of the listed bodies.

¹⁷ This provision in the New York bill applied to cities with a population of 1,000,000 or more. Only 6 states have cities of such a population. States should edit this number as they see fit: 500,000 serves as a placeholder only (23 states have cities with a population larger than 500,000).

(8) One representative from a manufacturer of packaging materials utilizing post-consumer recycled content;

(9) One representative from a manufacturer of paper materials utilizing post-consumer recycled content;

(10) One representative from each Tribal community in the state affected by past, current, and future waste management operations;

(11) At least one public health specialist with relevant expertise.

(e) The Board includes one representative of each producer responsibility organization established under this Act as non-voting members.

(f) The Board shall meet at least once a year by the call of the chair or by request of a majority of the members or as allowed by the bylaws duly authorized by the Board.

Section 6. Penalties.

(a) Except as provided in subsection (b) of this section and subject to subsection (c) of this section, any producer or producer responsibility organization that violates any provision or fails to perform any duty imposed pursuant to this Act shall be liable for a civil penalty not to exceed \$10,000 for each violation and an additional penalty of not more than \$10,000 for each day during which such violation continues.

(b) Subject to subsection (c) of this section, any large producer or producer responsibility organization of which no less than half the members are large producers that violates any provision or fails to perform any duty imposed pursuant to this Act shall be liable for a civil penalty not to exceed \$100,000 for each violation and an additional penalty of not more than \$100,000 for each day during which such violation continues.

(c) Any producer or producer responsibility organization, including large producers, may apply to the Department for a reduced penalty rate based on low historic waste production relative to that producer or producer responsibility organization's industry, as determined by the Department.

(d) Civil penalties under this section shall be assessed by the Department after an opportunity to be heard pursuant to normal civil proceedings.

Section 7. Civil Action.

(a) A producer responsibility organization may bring a civil action against any member of the producer responsibility organization whose action or inaction prevents the producer responsibility organization from meeting the requirements of this Act.

(b) A producer in compliance with the requirements of this Act may bring a civil action against a producer not in compliance with the requirements of this Act.

(c) Any person may bring a civil action against a producer or producer responsibility organization not in compliance with the requirements of this Act.

(d) The Agency responsible for enforcement of this Act may bring a civil against any member of a producer responsibility organization or the producer responsibility organization not in compliance with the requirements of this Act. The Agency may hold producers within a producer responsibility organization joint and severally liable for the failure of any producer within that organization to comply with the requirements of this Act.

Section 8. Antitrust Exclusions.¹⁸

A producer or producer responsibility organization, including a producer's or producer responsibility organization's officers, members, employees and agents that organize a producer responsibility program, is immune from liability for the producer's or producer responsibility organization's conduct under state laws relating to antitrust, restraint of trade, unfair trade practices and other regulation of trade or commerce only to the extent necessary to plan and implement the producer's or producer responsibility organization's producer responsibility program consistent with the provisions of this section.

¹⁸ Taken from Maine 38 MRS Sec. 2146.