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Recommended Citation

Marina Mozak () "It's Time to Trash Consumer Responsibility for Plastics: An Analysis of Extended Producer Responsibility Laws' Success in Maine," *Sustainable Development Law & Policy*. Vol. 23: Iss. 1, Article 4.

Available at: <https://digitalcommons.wcl.american.edu/sdlp/vol23/iss1/4>

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IT'S TIME TO TRASH CONSUMER RESPONSIBILITY FOR PLASTICS: AN ANALYSIS OF EXTENDED PRODUCER RESPONSIBILITY LAWS' SUCCESS IN MAINE

Marina Mozak*

Consumer responsibility for waste is a historic relic, dating back to a time when nearly all of a consumer's waste was compostable, reusable, or marketable.¹ Today, with the rise of plastics and complex goods like electronics, consumers lack the expertise, time, and ability to personally break down the products they consume for reuse.² Much of our household waste goes to the curb and into a single stream of municipal solid waste ("MSW"). This includes a variety of wastes which each require specialized processing.³ Recycling this complex waste falls to municipalities which are woefully underfunded and underqualified to process such complex and dangerous waste.⁴ Solutions beyond consumer responsibility, like Extended Producer Responsibility ("EPR"), are needed to mitigate the costs and environmental impacts associated with modern MSW.⁵

MSW is an externality of product production and consumption.⁶ Though there is a known cost associated with MSW,⁷ it is not taken into account in the producer to consumer transaction, with costs to manage waste falling to the consumer and subsequently to municipalities.⁸ These costs can prove prohibitive in the volatile recyclables market, which has changed dramatically since China stopped buying most U.S. recycling in 2017.⁹ EPR is a waste cost management system, which reassigns responsibility for waste from consumers to the product producers.¹⁰ In this way, it takes the economic externality of post-consumer waste, and internalizes it to the producing company.¹¹ By internalizing the externality in production, EPR can save municipalities money, encourage recycling, and discourage companies from producing waste.¹²

The EPR system's effectiveness has been proven in the U.S. by the success in twenty-five states (and the District of Columbia) of EPR laws for electronic waste ("E-Waste").¹³ One of the first states to implement EPR was Maine with passage of its E-Waste law in 2005, which has served as a test for the potential efficacy of EPR in more states.¹⁴ These E-Waste laws apply to a significant portion of MSW (including everything from televisions to 3D printers), requiring producers to take financial responsibility for the hard to recycle waste that they produce.¹⁵ Under the Maine law, producers of products which become E-Waste are required to pay municipalities based on the costs associated with recycling and their market share of their products.¹⁶ This system has proven effective, with the program facilitating the recycling of thirty-seven million pounds of E-Waste in the first six years of operation.¹⁷ This saved Maine municipalities a total of \$11

million over that same period of time, alleviating some of the pressure on municipal budgets and the local taxpayers.¹⁸

EPR has proven an effective means for reducing E-Waste going into landfills. Based on this success, it follows that EPR for plastic packaging would also be effective in reducing plastic waste. *A Stewardship Program for Packaging*, passed in Maine in 2021, established an EPR system similar to the existing program for E-Waste.¹⁹ This new law will apply to all products "used for the containment, protection, delivery, presentation or distribution of a product."²⁰ These categories are not narrowed to plastic waste but instead are broadly inclusive. Packaging materials of all sorts comprises twenty-eight percent of all MSW, including much of the most difficult to recycle plastic waste.²¹

A Stewardship Program for Packaging creates a fee hierarchy, charging producers a varying amount depending on the volume, toxicity, and recyclability of the materials.²² In this way, the new system accounts for environmental and public health needs, analogizing cost with adverse impacts, which more accurately internalizes the externalities of waste.²³ These cost increases will incentivize the use of less packaging, or at least less toxic packaging materials by businesses selling products in Maine.²⁴

Other states are taking notice of this law's widespread support.²⁵ In 2021 and 2022 Oregon, California, and Colorado passed EPR for packaging waste, and fifteen additional states have also proposed similar legislation.²⁶ However, many of these EPR bills fall into common traps of poor legislative drafting, such as: copywriting errors, inconsistencies within the legislation, and conflict with existing law.²⁷ The most egregious failures are the bills' numerous exemptions and lack of attention to detail on the part of legislators.²⁸ These flaws are illustrated by the major exemption carved out for blueberry producers in the Illinois bill.²⁹ Directly copied from the Maine law, where blueberries are a major industry,³⁰ Illinois legislators failed to tailor the program to their state's specific needs,³¹ allowing once significant exemptions to become meaningless loopholes and reducing public confidence in the program before it passes.³² It is this kind of careless legislating that results in unsuccessful programs.³³

Existing E-Waste EPR programs prove EPR as a successful means of simultaneously limiting production of hard-to-recycle waste and further funding the recycling of what is produced.³⁴ Application of this system is an effective step toward managing

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the massive problem of consumer waste. However, thoughtful legislation, tailored to the needs of individual states, is imperative for these programs to succeed.³⁵ Finally resolving the issue of plastic waste is critical, as are programs designed to do so.

EPR is an effective method to solve the waste crisis and more states must implement well-drafted legislation inspired by *A Stewardship Program for Packaging* to effect change in our waste systems.³⁶



ENDNOTES

¹ SUSAN STRASSER, WASTE AND WANT: A SOCIAL HISTORY OF TRASH 69–109 (1999) (highlighting the pre-plastic role of peddlers in trading new and repaired goods to agrarian families in return for their waste goods, such as damaged pots and rags, which they would subsequently repair or repurpose and resell).

² *Id.*; Marc Fawcett-Atkinson, *The insidious side effects of recycling plastic*, CANADA'S NATIONAL OBSERVER (Dec. 14, 2021), <https://www.nationalobserver.com/2021/12/14/news/insidious-side-effects-recycling-plastic>; Anthony Austin, *Article: Where Will All The Waste Go?: Utilizing Extended Producer Responsibility Framework Laws To Achieve Zero Waste*, 6 Golden Gate U. ENV'T L.J. 221 (2013).

³ See Fawcett-Atkinson, *supra* note 2 (explaining that complex waste often takes the form of plastics, which based on their composition must be broken down differently; moreover, the level of expertise required to break down this waste and the toxins created during the process constitutes a significant barrier to their recycling).

⁴ See Fawcett-Atkinson, *supra* note 2; see also Austin, *supra* note 2.

⁵ Louis Dawson, *Steering Extended Producer Responsibility for Electric Vehicle Batteries*, 23 ENV'T L. REV. 128 (2021); Hannah Elisha, *Addressing the E-Waste Crisis: The Need for Comprehensive Federal E-Waste Regulation Within the United States*, 14 CHAP. L. REV. 195 (2010); Fawcett-Atkinson, *supra* note 2; Austin, *supra* note 2; Strasser, *supra* note 1.

⁶ Winston Choi-Schagrin, *Maine Law Could Revive Recycling*, N.Y. TIMES (Jul. 23, 2021), <https://www.nytimes.com/2021/07/21/climate/maine-recycling-law-EPR.html>; see also Austin, *supra* note 2; Thomas Helbling, *Externalities: Prices Do Not Capture All Costs International Monetary Fund* (Feb. 24, 2020), <https://www.imf.org/external/pubs/ft/fandd/basics/external.htm> (defining an externality as “the indirect effects [which] have an impact on the consumption and production opportunities of others, but the price of the product does not take those [costs] into account”).

⁷ See CITY OF PORTLAND MUNICIPAL BUDGET, July 1, 2009 – June 30, 2010 at 77 <https://content.civicplus.com/api/assets/a423e042-64e6-4716-94a5-2c4c9293a7c8?cache=1800> (showing, in Portland, Maine in 2010 \$6.7 million was appropriated toward MSW management).

⁸ See Choi-Schagrin, *supra* note 6; NATURAL RESOURCE COUNCIL OF MAINE [hereinafter “NRCM”], *Extended Producer Responsibility (EPR) for Packaging*, <https://www.nrcm.org/programs/sustainability/extended-producer-responsibility-packaging/> (last visited Oct. 18, 2022).

⁹ See Choi-Schagrin, *supra* note 6.

¹⁰ See Austin, *supra* note 2.

¹¹ *Id.*

¹² *Id.*; See NRCM, *supra* note 8.

¹³ ENV'T PROT. AGENCY, *Regulations, Initiatives and Research on Electronics Stewardship*, <https://www.epa.gov/smm-electronics/regulations-initiatives-and-research-electronics-stewardship> <https://www.maine.gov/dep/waste/ewaste/comply.html> (last visited Oct. 8, 2022) (E-Waste, short for electronic waste, is a category of products that end up in the MSW stream. It includes: “televisions, portable DVD players, game consoles, computer monitors, laptops, tablets, e-readers, 3D printers, desktop and portable printers, digital picture frames, and other visual display devices with screens of at least four inches, measured diagonally, and one or more circuit boards”).

¹⁴ Electronic Waste, Me. Rev. Stat. Ann., tit. 38, § 1610 (2021); NRCM, *Product Stewardship: A Success for Maine*, https://www.nrcm.org/wp-content/uploads/2014/03/ewaste_case_study_sm.pdf (last visited Oct. 8, 2022).

¹⁵ See EPA, *supra* note 13.

¹⁶ Electronic Waste, Me. Rev. Stat. Ann., tit. 38, § 1610 (2021); ME. DEP'T OF ENV'T PROT., *Manufacturer Recycling Share Responsibilities in Maine's Extended Producer Responsibility Program for E-Waste Recycling* (2022)

<https://www.maine.gov/dep/waste/ewaste/documents/2022%20recycling%20shares%206%20for%20Feb%20billing%20.pdf> (last visited 8 Oct. 2022).

¹⁷ See NRCM, *supra* note 14.

¹⁸ *Id.*

¹⁹ A Stewardship Program for Packaging, Me. Rev. Stat. Ann., tit. 38 § 2146 (2021).

²⁰ *Id.* at (1)(I).

²¹ See Austin, *supra* note 2; ENV'T PROT. AGENCY, *Containers and Packaging: Product-Specific Data*, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/containers-and-packaging-product-specific> (last visited Oct. 8, 2022).

²² See Austin, *supra* note 2; ME. DEP'T OF ENV'T PROT., *Extended Producer Responsibility Program for Packaging*, <https://www.maine.gov/dep/waste/recycle/epr.html> (last visited Oct. 18, 2022).

²³ *Id.*; See Choi-Schagrin, *supra* note 6.

²⁴ See ME. DEP'T OF ENV'T PROT., *supra* note 22.

²⁵ Patrick Gleason, *2021 Saw Two States Enact A New Plastic Packaging Fee Program, A Proposal That Will Be Debated In More State Capitals In 2022*, FORBES (Dec. 31, 2021, 8:12 PM), <https://www.forbes.com/sites/patrickgleason/2021/12/31/how-a-maine-centric-exemption-wound-up-in-illinois-legislation-that-would-further-inflate-food-prices/?sh=32a4706764b8>.

²⁶ SUSTAINABLE PACKAGING COALITION, *Guide to EPR Proposals*, <https://epr.sustainablepackaging.org/policies> (last visited 8 Oct. 2022).

Passed laws: S.B. 54, Reg. Sess. (Cal. 2022); H.B. 1355, 73rd Gen. Assemb., 2nd Sess. (Colo. 2022); S.B. 582, 81st Leg. Assemb., Reg. Sess. (Ore. 2021). Proposed legislation: S.B. 115, Feb. Sess. (Conn. 2022); H.B. 2399, 31st Leg., Reg. Sess. (Haw. 2022); H.B. 4258, 102nd Gen. Assemb. (Ill. 2022); H.B. 108, Reg. Sess. (Ky. 2022); H.D. 1553, 192nd Gen. Ct. (Mass. 2021); H.B. 307, 444th Gen. Assemb. (Md. 2022); H.F. 4132, 92nd Sess. (Minn. 2022); S.B. 426, 220th Leg., 1st Ann. Sess. (N.J. 2022); A.B. 10,185, Reg. Sess. (N.Y. 2022); H.B. 1113, Reg. Sess. (N.C. 2022); H.B. 1873, 225 Gen. Assemb. (Pa. 2021); H.B. 7279, Jan. Sess. (R.I. 2022); S.B. 236, Reg. Sess. (Vt. 2022); H.B. 918, Reg. Sess. (Va. 2022); S.B. 5697, 67th Leg., Reg. Sess. (Wash. 2022).

²⁷ See Gleason, *supra* note 25. Arthur Rynearson, *Legislative Drafting Step-by-Step* 125 (2013).

²⁸ See Gleason, *supra* note 25; Carole Excell, *127 Countries Now Regulate Plastic Bags. Why Aren't We Seeing Less Pollution?*, WORLD RESOURCES INSTITUTE (Mar. 11, 2019), <https://www.wri.org/insights/127-countries-now-regulate-plastic-bags-why-arent-we-seeing-less-pollution> (analyzing why, despite best intentions in banning plastic bags, there has been little to no success in seeing less of them due to poor draftsmanship).

²⁹ See Gleason, *supra* note 25; H.B. 4258, 102nd Gen. Assemb. (Ill. 2022).

³⁰ Margaret Lawrence, *Wild Blueberries—The Maine Event*, USDA NAT'L INST. OF FOOD AND AGRIC. (July 14, 2022), <https://www.nifa.usda.gov/about-nifa/blogs/wild-blueberries-maine-event> (highlighting the significance of the blueberry industry in Maine).

³¹ Joe McFarland, *Illinois' Blueberry Hills*, Ill. Dep't of Nat. Res., <https://www2.illinois.gov/dnr/O1/Pages/BAIllinois%E2%80%99BlueberryHills.aspx> (illustrating how uncommon blueberries are in Illinois) (last visited Oct. 26, 2022).

³² See Gleason, *supra* note 25; H.B. 4258, 102nd Gen. Assemb. (Ill. 2022).

³³ See Excell, *supra* note 28.

³⁴ See NRCM, *supra* note 14.

³⁵ See Excell, *supra* note 28. Megan Quinn, *2021 Could be Year for Packaging EPR, Nearly A Dozen State Bills in Play*, WasteDive (Feb. 11, 2021), <https://www.wastedive.com/news/2021-state-extended-producer-responsibility-recycling/594873/>.

³⁶ A Stewardship Program for Packaging, Me. Rev. Stat. Ann., tit. 38, § 2146 (2021).