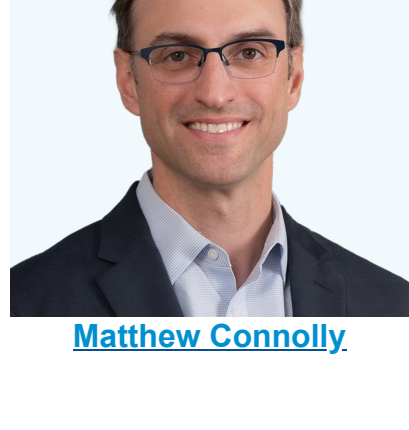


ENVIRONMENT & ENERGY INSIGHTS



October 2024 Edition



[Matthew Connolly](#)



[Matthew Snell](#)

Welcome to the October edition of Nutter's *Environment & Energy Insights*, a monthly update of current trends in environment and energy law. This month we cover:

- EPR laws, including how they can shift the cost of single-use products, updates on the states drafting their implementation regulations, and what to do if your company is subject to EPR regulations.

Get Ready for State Extended Producer Responsibility Recycling Laws

For this month's *Insights*, we are taking another single-issue deep dive, this time focusing on state extended producer responsibility ("EPR") laws. Earlier this year, Minnesota became the fifth state to enact an EPR law aimed at curbing single-use products and assigning the costs of recycling those products on producers. In doing so, it joins California, Colorado, Maine, and Oregon in enacting EPR laws. Below we summarize what EPR laws are, what materials are covered, who are considered producers of those products, and what a producer's obligations will be.

What are EPR laws?

EPR laws shift the cost of handling certain single-use product's end-of-life from municipalities to the producer of those products. EPR laws establish producer responsibility organizations ("PRO") to work with producers and the state in collecting fees and reducing the use of single-use products and packaging materials.

While the regulatory frameworks vary, each of the five states has embraced two threshold questions: (1) does a company create, distribute, and/or sell a product that contains a "covered material"; and (2) if so, is that company a "producer" of that product. Even if these criteria are met, certain exemptions may apply.

What are covered materials?

This first threshold question hinges on the component materials used in a product's packaging and how that packaging is intended to be used. Each state will publish a separate list that contains categories based on the recyclability of the packaging's component materials. These categories will help each state and its PRO establish fees for producers, calculate exemptions, and report progress on recyclability goals. California and Colorado are further along in identifying these categories, while other states like Maine will wait to finalize their list until after their implementing regulations have been adopted. Single-use plastic containers are the most common example of the type of covered material EPR laws aim to regulate.

Each state has certain exemptions, for example, for products like baby formula and medical products. Products regulated under other state recycling regulations are also typically exempt.

Who is a producer?

If a product uses covered materials, the regulations will then determine who the "producers" of those products/materials are.

In some states, like California, Oregon, and Minnesota, a producer will generally be either: (a) the brand owner of the product if the brand owner is located in state; or (b) if not, the in state-based distributor of that product. In other states, like Maine, a producer is either: (y) the brand owner of the product, even if not located in Maine; or (z) the sole importer of a product branded by another company not physically located in the United States.

California, Maine, and Minnesota are also incorporating third-party transporters or e-commerce suppliers into the definition of producer. For instance, a company that adds covered materials to another producer's product will generally be the producer of the added covered material but not the rest of the product.

There are certain producer exemptions mostly aimed at small businesses. For instance, a company may be exempt if it has gross revenues below a set threshold or if products use less than a set amount of covered materials.

Note that all five states will require products sold and distributed in the state to reach certain recyclability goals over the course of the next 10 years. For instance, California will require all covered materials to generally be recyclable or compostable by 2032. So, even if a company does not need to register as a producer in a specific state, its products will nonetheless need to meet these goals to do business in those states.

When will regulations be implemented?

All five states are currently drafting their implementing regulations and have anticipated timelines for adoption. Oregon and California anticipate that their regulations will become effective in 2025 while Colorado, Maine, and Minnesota estimate that their regulations will be adopted in 2026.

What will it mean if I am subject to EPR regulation? And what should I be doing now?

If a company is regulated under the above criteria (without an exemption), it will need to register with the state's PRO and pay a series of annual fees to comply with the state's recyclability goals.

When registering with the state's PRO, a covered company will need to provide information that will help determine the fees it will need to pay and allow the state and the PRO track the state's recyclability goals.

In Maine, each producer will need to provide information on items like the brand associated with each regulated product, whether the regulated products are part of a reuse or refill program in the state, the total tonnage of covered materials produced, Universal Product Codes for each regulated product, whether its regulated products contain no intentionally added toxics, and other similar information. This information will need to be updated annually and will be subject to random audits from the PRO.

The fees in Maine can include a "covered material type" fee, which will be based on the types of covered materials used in the regulated products, to "incentive" fees, which seek to encourage producers to switch to recyclable covered materials and/or create private alternative waste collection programs. For instance, if a regulated product does not contain post-consumer recycled covered materials, then the producer will pay a fee for those products. And if a regulated product does not contain any recyclable materials, then the producer will also pay a fee for those products.

While the five states have not yet finalized their EPR regulations, there are general steps a potential producer can take now to prepare. For instance, most of the fees a state will seek to collect are geared towards incentivizing producers to use recyclable, reusable, or compostable covered materials in their products and to ensure that the products are either recycled through local municipalities with a fee being paid to the PRO or collected through a private alternative waste collection program the producer or group of producers organize and fund. Potential producers can begin determining whether any of their products can be manufactured using recyclable, reusable, or post-consumer recycled covered materials. This will help potential producers lower their overall fees in each state and allow it to continue to sell products in states like California or Minnesota that, as mentioned above, will require all covered materials to be recyclable or compostable by 2032.

Potential producers can also begin building internal systems to allow them to compile the necessary data and information that will be provided to the PRO. This may involve requiring their partner manufacturers to cooperate with the producer and provide information on a product's component materials.



This advisory was prepared by [Matthew Connolly](#), [Matthew Snell](#), and [Daniel Johnston](#) in Nutter's [Environmental](#) and [Energy](#) practice group. If you would like additional information, please contact any member of our practice group or your Nutter attorney at 617.439.2000.

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