

# TAKE HOME MATERIALS 2: EXTENDED PRODUCER RESPONSIBILITY

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1. The basic legal principle in Western law is that when the buyer acquires an object from the seller, it becomes the property of the buyer and the object is his (or hers) to dispose of as he (or she) sees fit. Unless it can be shown in a court of law that the seller has been duplicitous or knowingly concealed some defects in the sold object, the buyer is stuck with what he has acquired, and when he ends his use of the object, is required by law to dispose of the object in such a way as not to 1) create a nuisance, or 2) make trash, rubbish or garbage with the object, UNLESS the buyer has committed the object to a secure and appropriate manner of disposal, which could be resale to another desirous buyer, discarding into a facility approved for disposal (like a landfill or a transfer station), or into a container heading towards such a facility (like a garbage bin, box, cart, etc.).
2. All of the recycling in the early modern era (roughly 1970-1980) was completed because a system was in place, paid for usually by the sale of objects or materials at the end of the containment-collection-sorting-aggregation-reprocessing network that put enough money into the system to pay for itself. For instance, if the maker of lead-acid batteries wanted the lead back from the batteries he had sold in the past, he would pay enough for the used lead coming back to his factory so that himself and others would create this portion of the loop so that the original buyer of the product would be attracted to the containment portion of the loop with cash being made available to the original buyer, now a seller of materials for scrap.
3. In some early cases the original seller put a deposit on the sold objects so that the buyer would be rewarded for returning the object to the original seller; this was how bottle deposit systems worked from early manufacturing into the present. The government was not in any way involved in this system; these programs provided reduced costs to the seller and a recycling incentive to the buyer. This practice is not uncommon today in the sale of industrial supplies where the buyer pays a fee to the seller for the container of the liquids, powders, packages, etc. and gets a credit for returning the empty container to the first seller or the one charging the fee.
4. When the Resource Conservation and Recovery Act (RCRA) determined that some products were inherently composed in notable amounts of hazardous materials, and as the disposal of hazardous materials would routinely cost ten times what it cost to dispose of these materials if they were non-hazardous, the stage was set to develop alternative systems that would put additional cash into programs that would manage unwanted, hazardous materials at the end of their effective use by the buyers. (I have carefully avoided the use of the term “end-of -life” here; there has been confusion over the use of this term and the issue of proper disposal arises because the original owner wishes to undertake an appropriate disposal; whether the product has exhausted its utility to its user is not the issue; the issue is that, absent other forces, the owner, original or second-hand, wants to get rid of the product and it won’t be cheap or allowed as garbage. The person taking over the object or material doesn’t care if the product or material is “end-of-use” or “end-of-life,” all that the newly-acquiring person knows is that this person must now “manage” the material.)
5. As recycling programs developed in the years after 1970 with the first Earth Day and the roll-out of increased recycling activities, all of these recovery management programs were either within market constraints or were subsidized by some type of governmental intervention. The typical drop-off programs of the 1970s and 1980s (there were 4,000 such programs in the USA by the mid-1980s) were market driven with the program operators paying

## INTRODUCTION TO RECYCLING

their bills (labor, land, equipment, etc.) from the sale of the donated materials. The other major programs of the 1970s and 1980s were buyback programs; although buying materials from the public was (with only a few exceptions where local governments provided operating subsidies, free land, etc.) subject to the same constraints as donation programs, i.e., relying on the free market sale prices to pay for previously purchased materials plus operating costs. (There were exceptions to the rule that buybacks covered all their costs from material sales; in the California bottle bill where convenience zone recycling programs were eligible for extra state funds, the buyback was intentionally subsidized.)

6. In the 1980s the idea that government would assign charges to newly-purchased products to cover their end-of-use needs became widely established; these charges were known as “advanced disposal fees.” A new tire would be assigned a 25-cent fee to be paid to the state to clean up old tire piles and help old tires find useful markets. [Other examples needed.]

7. In the period after 1986, as rate-and-date laws (requiring specified recycling rates by a specified goal date) became common throughout the USA, it was common for local governments to create curbside programs to provide easy-to-access recyclable materials collection programs. (In 1986 there were 200 curbside programs nationwide; by 1996 there were 3200 programs.) These programs did then and continue now to occupy much of local governments' attention in the waste reduction and recycling field. It's important to notice that the final destination of all materials collected under convenient and subsidized curbside programs end up in the hands of private parties, the firms that reprocess metals, paper, glass and plastics to be a substitute for virgin materials, but it's the local government that makes up any revenue shortfall in the successful operation of a curbside program. (I believe Wisconsin and Pennsylvania have programs where funds raised at the state level (most often surcharges on disposed materials at landfills or incinerators) can be used to underwrite costs assumed at the local level; in California, there are no substantial funds flowing from the state to the local governments which initiate the curbside collection programs.)

8. EPR CONCEPT ARTICULATED: In 1990 a new concept was established which called for the persons creating the troublesome products (some use the term “hard-to-manage” here and distinguish this group of troublesome products from the hazardous materials mentioned above) to collect a fee at point-of-sale to recover the costs of end-of-use management. The idea had been floating around for some time but was given its first coherent expression in the 1990 report, “Models for Extended Producer Responsibility” by the Swedish economist Thomas Lindhqvist. The concept was referred to as “extended producer responsibility” and known mostly by its letters, EPR. The idea was that a government (local, state, or federal) would require the original manufacturers [OMs] to create systems to collect products and materials, process these materials, and thus provide end uses for their reprocessed products and materials that are now no longer desired by their first or subsequent owners. Under the law, these OMs acting together would be called “stewards” and would be exempt by law from various anti-trust laws.

9. On the one hand, this EPR idea made a lot of sense: the OMs had profited by the creation and sale of these objects in the first place and no one would know better than the OMs the qualities of the substances and materials involved in the product. An OM might have uses for the used materials or, having previously disposed of unsold, returned, out-of-model products himself, might know of someone who would. Local governments, which by now were investing heavily in containment-collection-sorting-aggregation systems (see para. 7 above), have little understanding of the technical specifications of the materials and it would be the OMs and their suppliers who would know best what to do with the now-used, but available-as-scrap, products and materials still outside the loop.

## NORTHERN CALIFORNIA RECYCLING ASSOCIATION

10. On the other hand, the EPR concept could meet with a lot of resistance. The OMs were being asked to assume a responsibility which they had never had under law before; and, commonly, they resisted this new duty. The idea that the OMs should be responsible, like any idea that involved further expense and duty, caught on slowly and was generally resisted by the OMs and their partners. When you realize that 30 or more of the 100 largest corporations in the USA are OMs of consumer products, and, for most of the last fifty years, have had their way in public forums, it's reasonable to expect major resistance to this concept.

11. However, starting about 1995, some local but mostly state laws were enacted that laid on the OMs the duty to collect and manage the materials and products which they had first placed in the marketplace and from which they had made their profits. As these laws developed (there were 40 such laws in place around the USA by 2000; now there are over 80), several policies within the EPR concept were clarified: 1) The OMs could charge a separate fee attached to the point-of-sale price to cover the end-of-use costs; the legislators did not expect the OMs to cover these new costs out of their profits. 2) The OMs were not required to operate the collection or reprocessing programs themselves but could subcontract with others to do so, and 3) The OMs were not required to reuse the materials in the re-acquired objects but were required to find other buyers for those materials. Regrettably, EPR laws as enacted were not always carefully drafted and the exact obligation of the OMs varies from law to law.

12. CRADLE-TO-CRADLE: One part of the EPR movement which involves product redesign to make recycling and reuse easier got a boost in 2002 with the publication of William McDonough and Michael Braungart's book, "Cradle-to-Cradle: Remaking the Way We Make Things" which pushed the concept that products should be planned at the design stage to be reprocessable efficiently. Recent testimony indicates that has not happened among product stewards drawn into EPR programs; stewards are not considering end-of-life/end-of-use concerns in the original design of the product.

13. FRAMEWORK LAW: Each EPR law enacted by a local legislature came about only after considerable discussion. OMs never became fond of the laws and commonly resisted them with the considerable powers at their command. By about 2005 the idea that each covered product being assigned to an OM group would require a separate legislative action became onerous, and the idea that each product to be put under EPR legislation would require a separate legislative action led to the concept of a framework EPR law wherein the duty to create and oversee EPR systems would be entrusted to an administrative agency not requiring specific legislative action but simply oversight (not dissimilar to how in labor law a state agency can recognize a union rather than requiring the legislature to attend to each little detail). The idea of a framework law attracted great interest from the pro-EPR forces but has been enacted in the USA only in Maine in 2010. (In Canada, the legislatures of Quebec, Ontario and British Columbia (where 76% of Canada's population lives) have enacted framework laws; in the USA, Maine has less than one-half of one percent of the nation's population. Oregon has considered Bill 3060, a framework bill, but it has, so far (late 2013), failed passage.

14. When EPR first became popular as a strategy to pay for and manage materials, it was thought that EPR would be applied first to hazardous materials. There was a strong sense that HHW management programs, even in progressive communities, were only reaching a small portion of the materials that should be collected and processed and that a major change in emphasis (such as EPR might stimulate) should develop. Many, if not most, of the early EPR laws were focused on HHW-type materials (mercury thermometers, mercury switches, fluorescent light bulbs, cathode ray tubes [CRTs], etc.) but after 2012 an increasing number of hard-to-manage materials were brought under EPR laws even though the materials were not hazardous; in 2013 Connecticut, Rhode Island, and California each enacted a bedding recycling program in each state with a product stewards group in charge. Landfills don't like inner-spring mattresses because the springs get stuck in bulldozer treads and they are unsightly when left

## INTRODUCTION TO RECYCLING

alongside a street or office building. At this point it's not clear how much EPR legislation will be devoted to hard-to-manage (rather than HHW-type) materials.

15. The current supporters of additional EPR legislation are 1) local governments who observe that they have neither the funds nor the expertise to manage complex or toxic products, 2) environmental groups that see local government programs as poorly operated, stretched to the limit, or inadequate to deal with the complexities of complex, multi-material products at end-of-use, and 3) businesses that sense new marketing opportunities by moving or processing materials separately and with more attention. E.g., a waste hauling firm that now puts all household batteries in the trash and onto the landfill could collect these materials separately from multiple, locally-based, aggregation points (like small batteries returned to retail stores) and charge the OMs for this service.

16. The institutional support for EPR has resided in, first, the Product Policy Institute [PPI] of Athens, Georgia [renamed UPSTREAM in early 2014] which has called for state and federal mandates that stewards be assigned post-consumer materials management, and second, the Product Stewardship Institute [PSI] of Boston, Massachusetts which was founded in 2000 and supported the concept of groups of OMs working together voluntarily to deal with the materials. In 2012 PPI and PSI agreed to a joint statement of principles that downplayed any differences they had with each other and Upstream [PPI] especially has been involved in state and regional groups that support EPR principles. In California, this is the California Product Stewardship Council [CPSC] and in the northwest [WA and OR] the Northwest Product Stewardship Council [NWPSC]. PSI is not a big player in California.

17. The opponents of current EPR practice and future additional legislation generally find fault with the details of specific programs, although never to be forgotten is a populist streak in many opponents of corporate America who distrust large corporations in general and would prefer that all targeted products and materials be managed by small and independent businesses that are subject to local pressures and authorities. The specific objections to current EPR practices include: 1) stewards ignore current program operators and establish competing systems that hurt small businesses (not dissimilar to how the advent of curbside programs proved the death-knell for most drop-off and many buyback programs), 2) stewards place onerous requirements on their local program operators, reducing them to a company-owned store rather than to an arms-length contractor, 3) stewards make arrangements for the disposition of the collected used materials that cuts out local buyers (and reprocessing firms), 4) stewards avoid considering reuse of products that can be rebuilt, reprocessed, renovated, etc., or, 5) in some cases, stewards arrange for the disposal of the collected materials in a waste incinerator which is generally considered an unsustainable solution to materials management (owners and users of such facilities of course argue that there is no other alternative method of management for the materials as they are, almost always refusing to consider what proper upstream management of the materials or products would do to their end-of-use viability). Opponents of EPR refer to it as a "faith-based initiative" that sounds better than it is.

18. The role of waste incineration [WTE] in EPR programs is a very hot-button issue at this time. Most of the authorizing laws for EPR programs are silent on WTE as an acceptable system to dispose of targeted products, and, in the absence of local prohibitions, many program operators have relied on incineration as a simple way to solve the problem of what to do with consumerReturned items. (Under current federal rules, incineration is the only acceptable disposal option for unwanted pharmaceuticals; in the early days of decontaminating petroleum contaminated soils [PCS], it was thought that "thermal roasting" [putting the PCS in an oven and burning off the hydrocarbons] was the way to get the job done. Early on, the ability of microbes to oxidize the hydrocarbons became clear and the out-of-pocket costs and environmental degradation costs were much lower.) Incineration is still a part of the integrated waste management hierarchy and, although some parts of the USEPA support "sustainable materials management," WTE is still a legally-accepted disposal practice for non-toxic products in the USA.

19. About 2010, as the various OMs began to recognize that the noose created by EPR was tightening around their neck, the concept that all persons originally profiting from the sale of the items should be expected to contribute to the end-of-use management of the products and materials and the costs and inconveniences attached thereto. In America, the retailer's share of the retail sales price can be anywhere from 5 to 50% of the wholesale cost, depending on the industry and the goods sold, but to release others in the supply chain from an obligation for end-of-use management seemed unjust, so various OMs and their associations have worked to make sure that the Targets and the Costcos of the country would bear at least some of the burden and costs of the programs.

20. In 2012 a book was published entitled RECYCLING REINVENTED [RR]. Melissa Innis, the author, is a former Maine state legislator who calls recycling a broken system and thinks that only EPR with major powers given to private firms will accomplish recycling's high and lofty goals. Reviewers have, if not refuted, argued extensively with the premises and conclusions, and the reader is referred to the RR website to review the pros and cons of this issue.

21. EPR got a big boost when the Alameda County, California ordinance (June 12, 2012) to charge pharmaceutical manufacturers the full costs of collecting the county-run used pharmaceuticals collection and disposal program received court approval, first in federal district court, then the Ninth Circuit Court of Appeals and then the refusal of the US Supreme Court to review that decision (May 26, 2015). Cost is 0.1% of total pharma sales in the county.

22. In September, 2015, the California Product Stewardship Council] spun off the National Stewardship Action Council [NSAC] to promote its policies and practices on a national level. The idea is to place California's experience in drafting EPR laws at the service of the other states. NSAC will be a (c)(4) organization (lobbying work) rather than (c)(3) that CPSC is.

23. Where are we now? The EPR proponents continue to be supportive of their systems and believe that EPR is the solution to the problems of unmarketable products and materials at the end-of-use. Their opponents call attention to the inordinate power given to stewards and the modest results achieved so far in the marketplace. That is, products are not being redesigned to be easier to recycle, no new markets are being found for scrap materials not wanted by the stewards, stewards are suppressing the market for used products that could have been reconditioned or renovated and offered for sale (in the same way Japanese auto manufacturers convinced their legislature to ban trucks over ten years old from the highway, an unheard of prospect in the USA), and local economic development is impeded because the stewards have created a fast track that gets those scrap materials out of the country or into an incinerator, etc. No one envisions an early resolution of the differences.

24. Thrown Away Dirty: One of the problems that EPR has skirted so far is the fact that lots of things that are thrown away are done so in a "dirty" condition. We've all had the experience of walking around a rental car with an agent when we take it out of their shop to look for dings, damage which gets noted; we're expected to bring it back in the same condition as it goes out and we expect to be charged a fee if the car comes back in worse condition than when it goes out. Particularly when there are a string of people handling something when it enters the stream for reprocessing, doing all these inspections and assigning blame and obligations gets complicated, tedious, etc. It's particularly a problem because waste haulers are often the first player in the chain-of-custody and they have very little experience (and even less interest) in reviewing items for cleanliness as they come under their control.

Arthur R. Boone, October 2013

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