

## **H.695. An Act Relating to Establishing a Product Stewardship Program for Primary Batteries: Overview, Section by Section Summary, and Senate Proposal**

### **Overview**

Approximately 10 million batteries are sold in Vermont each year. Batteries contain heavy metals such as mercury, lead, cadmium, and nickel. Most of these batteries are disposed of in landfills, where the heavy metals can be exposed to the environment. Batteries can be recycled, but, currently, most solid waste districts in Vermont do not recycle batteries because of costs.

H.695 requires producers of primary batteries—i.e. non-rechargeable alkaline, carbon-zinc, or lithium batteries—to develop, operate, and finance a plan for the collection and recycling of primary batteries. H.695 requires primary battery producers to submit plans—known as primary battery stewardship plans—individually or as part of a stewardship organization. Any stewardship plan must provide for convenient collection at no cost to a consumer. A plan also must provide for environmentally sound recycling or approved disposition.

ANR will oversee approval and implementation of primary battery stewardship plans. ANR shall post all proposed plans for public review and comment. A primary battery producer shall pay ANR a fee of \$15,000.00 per year per plan. There are approximately 156 primary battery producers. Because the producers most likely will participate as part of a stewardship organization, only 2 to 3 primary battery stewardship plans are expected to be submitted.

A primary battery producer shall be prohibited from selling batteries in the State if it fails to submit a plan or register as part of a stewardship organization. Retailers would be prohibited from selling a producer's battery if the producer is not operating an approved primary battery stewardship plan. Retailers may review an ANR website to see a list of approved primary battery producers.

H.695 authorizes primary battery producers to seek reimbursement from other primary battery producers and from rechargeable battery producers for costs of collecting batteries that are not listed under the plan of the collecting producer. H.695 also authorizes a private cause of action for reimbursement when the collecting producer does not receive reimbursement.

Over the past several years, Vermont has developed a strong product stewardship ethic with the establishment of stewardship programs for electronic waste, compact fluorescent light bulbs, and paint. H.695 is the next step for product stewardship in Vermont. H.695 creates a first-in-the-nation program that will remove potentially harmful batteries from the State's landfills at no cost to Vermont consumer or solid waste districts.

## Section by Section Summary

### **Sec. 1. 10 V.S.A. Ch. 168: New Chapter on Product Stewardship for Primary Batteries & Rechargeable Batteries.**

**10 V.S.A. § 7581.** Definitions Section. The key definitions are:

- **§ 7581(10):** “Primary battery” means a non-rechargeable battery weighing two kilograms or less, including alkaline, carbon-zinc, and lithium metal batteries.
  - “Primary battery” is not batteries intended for industrial, business-to-business, warranty or maintenance services, or non-personal use.

**SENATE PROPOSAL OF AMENDMENT: SNRE’s First proposal of amendment amends 10 V.S.A. § 7581 to clarify that “primary batteries” are not:**

- **Batteries sold in a computer, computer monitor, computer peripheral, or cathode ray tube;**
  - **Batteries that are not easily removable or not intended to be removed; and**
  - **A battery sold as part of a medical device**
- **§ 7581(11):** “Primary battery producer” or “producer” means one of the following for a primary battery sold, offered for sale, or distributed in the State:

**SENATE PROPOSAL OF AMENDMENT: SNRE’s First proposal of amendment amended 10 V.S.A. § 7581(11) to clarify that the bill applies to batteries sold or offered for sale by a producer, but not to batteries “distributed” in the State.**

- **This helps clarify that products sold containing batteries are not subject to the bill.**
  - A. A person who manufactures a primary battery and who sells, offers for sale, or distributes that primary battery in the State under the person’s own name or brand;
  - B. If 7581(11)(A) doesn’t apply, a person who owns or licenses a trademark or brand under which a primary battery is sold or distributed in the State; or
  - C. If 7581(11)(A) and (B) don’t apply, an importer of a primary battery for sale or distribution.
- **§ 7581(12):** “Primary battery stewardship organization” means an organization acting on behalf of a primary battery producer or producers to implement a primary battery stewardship plan.
  - **§ 7581(13):** “Primary battery stewardship plan” means a plan submitted to ANR by a producer or a primary battery stewardship organization for collection and recycling of primary batteries.

- § 7581(16): “Rechargeable battery steward” means a person who:
  - A. Manufactures a rechargeable battery or a rechargeable product sold, offered for sale, or distributed in the State under its own brand name;
  - B. Owns or licenses a trademark or brand under which a rechargeable battery or rechargeable product is sold or distributed in the State, whether or not the trademark is registered; or
  - C. If subdivisions (A) and (B) do not apply, imports a rechargeable battery or rechargeable product into the State for sale or distribution.
- § 7581(17): “Rechargeable battery stewardship organization” means an entity registered by ANR that is either a single rechargeable battery steward operating on its own behalf; an organization operating for one or more rechargeable battery stewards; or a retailer or franchisor of retailers operating a plan on behalf of itself or its franchisees.

- **10 V.S.A. § 7582. Sale of Primary Batteries**

**SENATE PROPOSAL OF AMENDMENT: SNRE’s Second proposal of amendment redrafted 10 V.S.A. § 7582 to eliminate unnecessary language—combining subsections (a) and (b) as proposed by the House**

- § 7582(a): Sale prohibition. Beginning Jan. 1, 2016, a producer shall be prohibited from selling primary batteries unless:
  - The producer or stewardship organization is implementing an approved primary battery stewardship plan;
  - The producer or stewardship organization paid the required fee; and
  - The producer and the producer’s brands are listed on ANR’s website as approved.
- § 7582(b): New producers—those who haven’t sold batteries in the State before Jan. 1, 2016—must notify ANR before selling and have 90 days to have a plan approved or join an approved stewardship organization.
- § 7582(c): A producer who sells less than \$2,000 of batteries in total retail value per year is exempt from the requirements of the chapter.
- **10 V.S.A. § 7583: Primary Battery Stewardship Organization Registration**
  - § 7583(a): Producers can comply with the requirements of the chapter by participating in a stewardship organization.

- § 7583(b): To qualify as a primary battery stewardship organization, the organization must: commit to the participating producers' duties, not create barriers to participation by other producers, and maintain a website of covered producers and brands.
- § 7583(c): Beginning March 1, 2015, and annually thereafter, a stewardship organization must register with ANR. The registration form shall:
  - List the manufacturer participating in the stewardship organization;
  - List a contact name for a manufacturer's compliance;
  - Describe of how the organization meets the stewardship organization qualifications; and
  - List contact information for a person that a non-member manufacturer can contact regarding membership in the organization.

- **10 V.S.A. § 7584. Primary Battery Stewardship Plans**

- § 7584(a): By June 1, 2015, a producer, individually or as a participant in a stewardship organization, shall submit a primary battery stewardship plan to ANR for review.
- § 7584(b): The collection plan shall:
  - List all participating producers and brands, and contact information for each.
  - Provide free collection of primary batteries from consumers at no cost to the consumer.
  - Accept all primary batteries and shall not refuse collection based on brand or producer.
  - Allow all qualifying retailers, and all certified solid waste management facilities to opt to be a collection facility.
  - Provide, at a minimum, no fewer than 2 year-round collection facilities in each county.
  - Provide for the acceptance from a consumer of up to 100 batteries per visit (or more at the discretion of the collection facility).
  - Describe how the collected batteries will be responsibly managed to ensure recycling.
  - List all participants of the battery collection chain, including collection facilities, transporters, and recycling facilities.
  - Include an education and outreach program that, at a minimum, notifies the public that there is a free collection program for primary batteries and lists the collection locations.
  - Include a reimbursement procedure consistent with the statutory requirements.
  - Include a collection rate performance goal for batteries under the plan.

**SENATE PROPOSAL OF AMENDMENT: SNRE's Third proposal of amendment amends 10 V.S.A. § 7584(b)(8) to clarify that the collection rate performance goal under a battery stewardship plan includes the estimated total weight of primary batteries that will be sold or offered for sale in the State by producers participating in the plan.**

- § 7584(c): A producer or stewardship organization shall provide retailers, municipalities, and certified solid waste management facilities acting as collection facilities equipment for setting up a collection point and for providing for the pickup of collected primary batteries, including arranging for the management of those primary batteries.

- **10 V.S.A. § 7585. Annual Report; Audit**

- § 7585(a): By March 1, 2017, and annually thereafter, a producer or stewardship organization shall report to ANR. The report shall:
  - document the weight of primary batteries collected in the prior calendar year;
  - specify the collection rate achieved in the prior calendar year;
  - identify the locations for all collection points under the primary battery stewardship plan and contact information for each location;
  - provide examples and description of educational materials used to increase collection;
  - describe the manner in which the collected primary batteries were managed;
  - report any material change to the primary battery stewardship plan; and
  - report the cost of implementation of the primary battery stewardship plan, including the costs of collection, recycling, education, and outreach.

**SENATE PROPOSAL OF AMENDMENT: SNRE's Fourth proposal of amendment amends 10 V.S.A. § 7585 to require additional information to be submitted in a producer's annual report, including:**

- **The estimated percentage of rechargeable batteries collected by a primary stewardship organization; and**
  - **The percentage of primary batteries collected in the previous calendar year from producers not participating in an approved stewardship plan.**
- § 7585(b): After five years of implementation of an approved primary battery stewardship plan, a primary battery producer or stewardship organization shall complete an independent third party audit of the effectiveness primary battery stewardship plan.

- **10 V.S.A. § 7586. ANR Responsibilities**

- § 7586(a): Within 90 days of receipt of a proposed stewardship plan, ANR shall determine whether it complies with the requirements of 10 VSA § 7584.
  - If ANR fails to Act within 90 days the plan is deemed approved.
  - If ANR rejects the plan, the producer or stewardship organization has 45 days to resubmit.
- § 7586(b): ANR must approve changes to stewardship plans. ANR may require plan amendments.
- § 7586(c): ANR shall post all proposed stewardship plans and all proposed amendments on its website for 30 days from the day of the application is administratively complete.
- § 7586(d): ANR shall establish a process under which a stewardship plan is, prior to plan approval or amendment, available for public review and comment for 30 days.
- § 7586(e): ANR shall accept, review, and approve or deny registrations required by this chapter.
- § 7586(f): ANR shall post on its website all producers and brands under an approved plan.

**SENATE PROPOSAL OF AMENDMENT: SNRE Fifth Proposal of amendment amends 10 V.S.A. § 7586 to correct a cross reference to conform with change made by SNRE second proposal of amendment.**

- § 7586(g): The term of a stewardship plan shall not exceed 5 years.

- **10 V.S.A. § 7587. Retailer Obligations**

- § 7587(a): Sale prohibited. Beginning January 1, 2016, no retailer shall sell or offer for sale a primary batter unless the producer is implementing an approved stewardship plan or is part of an approved stewardship organization listed as approved on ANR's website.
- § 7587(b): A retailer shall not be responsible for an unlawful sale of a primary battery if:
  - the retailer purchased the battery before Jan. 1, 2016 and sells it before Jan. 1, 2017; or
  - the producer's stewardship plan expired or was revoked; and the retailer took possession of the primary battery prior to the expiration or revocation.

- **10 V.S.A. § 7588. Registration of Rechargeable Battery Stewardship Organization**

- § 7588(a): Rechargeable battery manufacturers, known as rechargeable battery stewards, or stewardship organizations representing rechargeable battery stewards shall register with ANR.
  - Rechargeable battery stewards run a voluntary recycling program for rechargeable batteries.

- Registration of rechargeable battery steward is required to allow stewards to seek reimbursement of costs they incur in collecting primary batteries.
- § 7588(b): ANR will register a rechargeable battery steward or stewardship organization—and thus allow them to seek reimbursement—if they:
  - Provide all of the manufacturers and brands covered and contact information; and
  - ANR determines that the steward or stewardship organization offers a year round collection and recycling program.

- **10 V.S.A. § 7589. Reimbursement; Authorization**

- § 7589(a): Authorizes a primary battery producer or a primary battery stewardship organization implementing an approved primary battery stewardship plan to seek reimbursement of costs they incur in collecting the batteries of other producers, including rechargeable battery manufacturers.
- § 7589(b): Registered rechargeable battery stewards or stewardship organizations may also seek reimbursement of costs of collecting the batteries of other producers or organizations.
- § 7589(c): Reimbursement can only be sought for **direct costs (See SNRE PROPOSAL OF AMENDMENT)** of collection—i.e. costs of collection, transport, and recycling, plus an additional amount of no more than 10% for administrative costs.

**SENATE PROPOSAL OF AMENDMENT: SNRE Sixth Proposal of amendment amends 10 V.S.A. § 7589(c) to provide that producers can seek reimbursement of costs of collection, transport, recycling and reasonable, educational, promotional, or administrative costs.**

- **The House only allowed reimbursement of direct costs, and capped reimbursement for educational, promotion or administrative costs at 10% of direct costs.**

- **10 V.S.A. § 7590. Reimbursement Process**

- § 7590(a): Reimbursement must follow a specific process. The producer or stewardship organization must submit a request for reimbursement.
  - The producer that receives a reimbursement request can elect to have the request audited by a third party to determine the reasonableness of the request.
  - If the request is verified, the producer who requested the audit pays the reimbursement amount and the audit cost. If the auditor disputes the reimbursement request, the producer who submitted the request pays the audit cost and the reimbursement amount.

**SENATE PROPOSAL OF AMENDMENT: SNRE Seventh Proposal of Amendment amends 10 V.S.A. § 7590 to strike reference to “direct” costs for conformity with Sixth Proposal of Amendment.**

- § 7590(b): ANR shall have no role in the reimbursement process.

- **10 V.S.A. § 7591. Private Right of Action**

- § 7591(a)-(d): A producer or stewardship organization is authorized to bring a private cause of action against another producer when reimbursement is not provided
- § 7591(e): Before a private cause of action may be brought:
  - Reimbursement must be requested under 10 V.S.A. 7590;
  - If no audit is conducted of the reimbursement request, the cause of action cannot be filed for 90 days from the date of the reimbursement request; and
  - If an audit is conducted, a cause of action can brought 60 days after audit completion.

**SENATE PROPOSAL OF AMENDMENT: SNRE Eight Proposal of amendment amends 10 V.S.A. § 7591(a)-(e) to clarify the private cause of action language by consolidating separate authority for a rechargeable battery steward to bring a cause of action with the authority for primary battery producers to bring a cause of action. And struck reference to direct costs.**

- § 7591(f): An action may be brought against an individual producer or steward only if that producer is implementing their own, solo plan. Otherwise, a cause of action shall be brought against the stewardship organization in which the producer or steward is participating.
- § 7591(g): ANR shall have no role in the cause of action, unless subpoenaed.
- § 7591(h): Damages that may be sought in a cause of action of actual direct costs of the collecting, handling, recycling or disposal of batteries.

- **10 V.S.A. § 7592. Confidentiality of Submitted Data**

- § 7592(a): Reports and other information submitted to ANR by producers or stewardship organizations is public, except that information protected by the uniform trade secret law or the trade secret exemption to the Public Records Act shall be exempt.
- § 7592(b): ANR can require any required report to omit any trade secret information.
- § 7592(c): The total weight of batteries collected is not exempt, trade secret information.



- **10 V.S.A. § 7593. Antitrust Conduct Authorized**

- § 7593(a): Producers, stewardship organization, and retailers implementing or participating in an approved stewardship plan are immune from antitrust liability under State law for conduct necessary to comply with the requirements of the chapter.
  - Because stewardship organizations can meet the obligations of multiple producers, their collaboration might be construed as collusion, which violates anti-trust law.
  - Similar antitrust immunity is included for other product stewardship programs in the State.
- § 7593(b): Any exemption from antitrust liability shall not apply to producer or stewardship organization agreements related to battery price or geographic area where batteries are sold.

- **10 V.S.A. § 7594. Fees**

- § 7594(a): A producer or stewardship organization shall pay \$15,000.00 annually.
- § 7594(b): The fees are deposited in the environmental permit fund under 3 V.S.A. § 2805.

- **10 V.S.A. § 7595. Rulemaking**

- ANR may adopt rules to implement the chapter.

**Sec. 2. ANR Report on Implementation of Primary Battery Stewardship Program**

- By Jan. 15, 2019, ANR shall report to the Legislature regarding implementation of the primary battery stewardship program. The report shall include:
  - The amount by weight of primary batteries and rechargeable batteries collected under an approved primary battery stewardship plan;
  - The percentage of collected batteries not covered by an approved producer or organization;
  - Recommendations for any amendments to the program, including whether additional manufacturers should be required to implement stewardship plans.

**Sec. 3. 10 V.S.A. § 8003. ANR Enforcement Authority**

- Adds collection and disposal of primary batteries to ANR's enforcement chapter.

**Sec. 4. 10 V.S.A. § 503. Appeal of ANR Decisions**

- Adds collection and disposal of primary batteries to the chapter governing ANR appeals.

**Sec. 5. Effective Date:**

- The act takes effect on passage. Most of the trigger dates for the primary battery stewardship requirements are established by the text of the bill.