

Summary of Assessment of Public Comment 6 NYCRR Part 351, Plastic Bag Reduction, Reuse and Recycling

The Department of Environmental Conservation (Department) proposed plastic bag reduction, reuse and recycling regulations to implement Titles 27 and 28 of Article 27 of the Environmental Conservation Law (ECL) and published notice of this rulemaking on November 27, 2019. A public hearing was held on January 27, 2020. The Department received 816 separate individual comments, which came from 2,452 form letters and emails during the public comment period. The comment period was open between November 27, 2019 and February 3, 2020. Many comment submissions raised distinct individualized issues, while many of the form letters, emails and mass mailings repeated similar concerns. Because many of the submissions raised multiple comments on different aspects of the proposed rule, the Department broke down each submission into smaller segments and grouped related comments together. This summary provides an overview of the comments and the Department's response. The full Assessment of Public Comment provides a response to the comments raised during the public comment period. The Department made several non-substantive changes to address these comments and to clarify the proposed rule, as described below.

Proposed Part 351 included a requirement that reusable bags contain at least one separately attached strap or handle. Commenters raised concerns that a bag with separately attached handles would not be as strong as one with handles as an extension of the bag. Additionally, commenters were concerned with the increased cost of a bag with separately attached handles. After evaluation of the proposed requirement and the numerous comments received, this requirement has been removed.

Commenters also raised concerns regarding the requirement for low density polyethylene (LDPE) or high density polyethylene (HDPE) reusable bags to have a minimum thickness of 10 mils. Many comments indicated that this requirement would contribute to the plastic waste stream and plastic should be banned from all bag manufacturing. Other comments raised the concern that bags of this thickness would not be able to be manufactured, or that the cost of their production would burden stores and consumers. After evaluation, the Department firmly believes that the use of the industry-based definition for when a material is no longer a film plastic is an important element, among others, in defining reusable bags. However, the Department recognizes the presentation of the information within two definitions has caused confusion. Accordingly, the Department has used some of the suggested language provided through the public comment process to adjust the definition of a reusable bag to provide a more simplified approach to presenting the information and clarify that plastic carryout bags are prohibited and that no film plastic will be allowed to be used in allowable reusable bags.

Proposed Part 351 would regulate the durability requirements of reusable bags. Commenters raised several issues including that an 80 GSM requirement was too stringent, that a 2.25 mil bag is a durable bag, and that the Department should only approve a bag of equivalent material strength and durability following a public comment period. The Department's research has indicated that the 80 GSM standard is the typical requirement for reusable bags in similar laws across the country. Accordingly,

the Department retained that requirement as originally proposed. The final rule incorporates a clarified durability standard in the definition of reusable bag to streamline the reusable bag requirements into a single definition.

The proposed regulations detail exemptions to the plastic carryout bag ban. The Department received hundreds of comments related to the exemption applied to plastic carryout bags provided by a restaurant, tavern or other similar food service establishment, as defined in the New York state sanitary code, to carry out or deliver food. Many of the comments overlap with the food sliced or prepared to order exemption in 351-1.2(f)(3). Many commenters disagree with the exemption in the law and others sought clarification of the establishments included, especially convenience stores, gas stations, supermarkets, delis and bodegas. While the definition of food service establishment must be evaluated on a facility-specific basis, this exemption is intended to apply to carryout or delivery of prepared food from one of these establishments. In most instances, but not all, gas stations, bodegas, convenience stores, delis and supermarkets without seating would fall under the exemption in 351-1.2(f)(3), but only for the specific food sliced or prepared to order, and not any other items sold in the store, unless another specific exemption applies. The exemption language has been adjusted slightly to provide clarification.

Many commenters requested clarification regarding the exemptions. It has been determined that for consistency in implementation, it is best to identify these circumstances in the regulations. The uses identified in the comments are similar to

those identified in the proposal as clarifying examples and they will be added to the final rule as further examples.

Lastly, the proposed regulations would enable the Department to determine that a plastic bag is exempt in cases where there is no reasonable or practical alternative. The Department received hundreds of comments expressing concern that this provision is too open-ended and would create loopholes for film plastic bags to be distributed. The intent of the proposed exemption was to provide a means to address unique bag uses that were not considered when the legislation was drafted. After evaluating the proposed exemption, the hundreds of similar comments raising concerns with the wording, and the recommendations for amending the review process, the Department has eliminated this exemption. Instead, the Department has provided examples in some of the other exemptions to clarify the applicability of the rule based on the questions received from the public since the law was enacted.

There were approximately 75 comments related to reusable bags expressing concerns regarding potential cross-contamination of the reusable bags from meat and dairy products, potential contamination of stores from reusable bags brought to the stores by customers for use, potential theft concerns, the specifications of reusable bags, and the lack of a certification program proposed for reusable bags. One of the goals of the law is to help change behavioral habits of New Yorkers and move toward a more waste-free society by using reusable bags. These regulations implement the law.

Several comments requested clarification on individual use of plastic bags. There are no restrictions as to what types of plastic bags individuals can use in their homes.

Additionally, consumers can bring any bag to a store for reuse including a film plastic bag acquired prior to the March 1, 2020 effective date of the law. The law and the regulations ban the distribution of plastic carryout bags by a person required to collect tax after March 1, 2020.

The Department received dozens of comments related to the paper carryout bag reduction fee opt-in program for cities and counties identified in the law. The paper carryout bag reduction fee is beyond the scope of this rulemaking and is not addressed in the regulations. The law is the best guide with respect to these issues and questions can be directed to the New York State Department of Taxation and Finance.

The Department received dozens of comments on paper bags ranging from the challenges of using paper bags, to the impracticality or inconvenience of using paper instead of plastic bags, to comments questioning the true recyclability of paper bags, to the fact that there could be a significant production capacity and market shortfall if all formerly provided plastic carryout bags were replaced with paper bags. The requirements for paper bags are outside the scope of this rulemaking. While the available supply of paper carryout bags may be impacted, one of the goals of the legislation is to help change behavioral habits of New Yorkers and move toward a more waste-free society by using reusable bags.

The Department received approximately three dozen comments related to the fiscal impacts of the law. These included comments from citizens noting a potential increase in costs for shopping if the cost of bags is passed on to them by the retailer, retailers indicating the additional costs they have to absorb and the potential need to begin to charge a fee to customers for each bag, bag manufacturers and distributors indicating that there will be a paper bag shortage due to manufacturing capacity limitations if all current plastic carryout bags are replaced by paper bags, and from a manufacturer of plastic carryout bags in New York expressing they will be severely impacted by the implementation of the law. Fiscal impacts were considered as part of the rulemaking process and the fiscal realities identified by the commenters are understood. However, the regulations must also reflect and effectively implement the requirements set forth in the law. One of the goals of the law is to help change behavioral habits of New Yorkers and move toward a more waste-free society by using reusable bags. This move will have some associated fiscal impacts, although those impacts should be minimized by behavioral changes anticipated by the law.

The Department received dozens of similar comments suggesting or requesting there be a grace period for enforcement of the law and regulations to give time for retailers to order appropriate bags, use existing bag supplies, and educate customers about the change in law. There are potential fines outlined in the law and regulations for non-compliance that can be administered by the Department. However, as with most new laws the Department administers and enforces, the Department will continue with its outreach and education efforts, focusing on informing the public and regulated entities

about the law and its requirements. The Department will work with retailers during this transition period on the various logistical issues to address and achieve compliance.

Several commenters requested clarification as to whether the plastic carryout bag ban applies only to those entities that fall under the definition of store. The plastic carryout bag and film plastic recycling requirements in the regulations and Title 27 of Article 27 in the ECL apply to stores of a certain square footage and the plastic carryout bag ban applies to all persons that collect tax.

Approximately 50 commenters raised concerns about biodegradable or compostable plastic bags. While there were several comments that suggested these bags may be a good alternative to explore, the vast majority of the comments received sought clarification as to whether or not a compostable or biodegradable plastic bag was considered a plastic carryout bag subject to the law or spoke to concern for the recycling and composting streams if these bags are used. There are concerns with incorporating compostable or biodegradable plastic bags into the composting or recycling stream and is the reason the warning requirement in 351-2.4(c) is required of manufacturers. These bags are considered to be plastic carryout bags unless they meet the definition of a reusable bag or they are exempt bags, and are subject to the law and regulations accordingly.

The proposed Part 351 regulations also address the plastic carryout bag and film plastic recycling requirements outlined in Article 27, Title 27 of the ECL. The Department

received approximately two dozen comments related to the continued requirement for stores to maintain their plastic film recycling collection programs. The requirement for stores specified in Article 27, Title 27 were kept in place with language in Article 27, Title 28. The regulations clarify that requirement. The rationale is that there will still be exempt plastic film bags and the existing recycling infrastructure has been in place since 2009 and should remain in place to provide access for film plastic recycling to citizens. On a related topic, the Department received approximately two dozen comments related to the lack of knowledge or lack of enforcement of the existing requirements in Article 27, Title 27 requiring the collection of plastic carryout bags and film plastic. The requirement for collection of plastic carryout bags has been in place since 2009 and the law was expanded to include other film plastic in 2015.

Any general comments that can be responded to have either been addressed with general outreach information on the Department's website or will be addressed in that manner after the rulemaking is complete. To view the full assessment of public comments received on the revisions to the plastic bag regulations, please visit the Department's website <https://www.dec.ny.gov/regulations/propregulations.html#recent>.