

REVISED REGULATORY IMPACT STATEMENT

6 NYCRR Part 351 Plastic Bag Reduction, Reuse and Recycling

INTRODUCTION

Title 27 of Article 27 of the Environmental Conservation Law (ECL) became effective January 1, 2009, and established requirements for stores with 10,000 square feet or more of retail space and chains that operate five or more stores with greater than 5,000 square feet of retail space, and which provide plastic carryout bags to customers, to place bins for the collection of plastic carryout bags and have those collected bags recycled.

Title 27 was amended and expanded, effective March 1, 2015, to also require the collection at these same stores and retail establishments of uncontaminated non-rigid film plastic packaging products composed of plastic resins, which include, but are not limited to, newspaper bags, dry cleaning bags and shrink-wrap.

Title 27 also includes requirements for the sale of reusable bags by these stores and retail establishments to help change the behavior of customers toward using reusable bags instead of plastic carryout bags.

In 2019, a new Title 28, “Bag Waste Reduction,” was added to Article 27 of the ECL. This law bans the distribution of plastic carryout bags to customers, effective March 1, 2020, by any person required to collect tax. (“Person required to collect tax” means any vendor of tangible personal property subject to the tax imposed by New York State Tax Law section 1105(a), “Imposition of sales tax.”) This law provides specific exemptions from the definition of plastic carryout bag and requires these retail entities to allow the use of reusable bags. The law also specifically identifies that the new requirements do not exempt the provisions set forth in Title 27 relating to at store film plastic collection and recycling.

Titles 27 and 28 use similar terms, have some overlapping provisions, and taken together are intended to reduce the use of plastic carryout bags and increase the recovery and recycling of film plastic. Clarification of several terms and the coordination of Titles 27 and 28 is necessary because without further defining these terms in a consistent manner, the intent of the ban on plastic carryout bag distribution will not actually be accomplished in an efficient and effective manner. Clarification is also necessary for compliance and to help eliminate loopholes regarding exempt bags and the types of establishments that will or will not be able to provide plastic carryout bags once the ban on plastic carryout bag distribution goes into effect. Additionally, clarification is needed to ensure regulated entities clearly understand violations as they relate to the ban and the enforcement role of the Department of Environmental Conservation (Department). This proposed rulemaking, Part 351, is needed for these reasons.

1. STATUTORY AUTHORITY

The Department's statutory authority to undertake the development of regulations concerning plastic bag reduction, reuse and recycling is found in ECL Sections 1-0101, 3-0301, and 27-2711.

ECL section 1-0101 declares a policy of the State to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution in order to enhance the health, safety and welfare of the people and their overall economic and social well-being.

ECL Section 3-0301 empowers the Department to adopt regulations as may be necessary to carry out the environmental policy of the State set forth in Section 1-0101.

ECL Section 27-2711 authorizes the Department to promulgate any rules and regulations necessary to implement the provisions of Title 27. New Title 28 "Bag Waste Reduction" was added to Article 27 of the Environmental Conservation Law in the FY 19/20 State Budget and specifically references Title 27. Additionally, both Titles 27 and 28 use similar terms, have some overlapping provisions, and seek the reduction of the use of plastic carryout bags. Consequently, these two provisions must be read together to ensure a consistent implementation, and this rulemaking helps to achieve that objective.

2. LEGISLATIVE OBJECTIVES

The legislative objectives for Titles 27 and 28 have been steadily-evolving, combined attempts since 2009 to reduce the use of plastic carryout bags and to provide consumers convenient outlets to recycle film plastic. Title 27 became effective January 1, 2009; it was expanded through amendment effective March 1, 2015; and now Title 28 will become effective on March 1, 2020.

New York residents use 23 billion plastic carryout bags annually. Each bag is only used for an average of 12 minutes. A significant number of these bags make their way into the environment causing litter and damaging wildlife. Bags can be found in our landscape, along our roadways, and in our oceans, rivers and lakes. These bags do not biodegrade and persist for years.

The objectives of this rulemaking are to provide clarity to Titles 27 and 28 so that they can both be effectively implemented and enforced. Regulatory clarification is required because without further defining the terms in Titles 27 and 28, the intent of these Titles will not be accomplished in an efficient and effective manner. The Department has received a plethora of inquiries related to Title 28 and its interrelationship to the requirements of Title 27.

3. NEEDS AND BENEFITS

Title 27 has been in effect since January 1, 2009, for plastic carryout bags.

Amendments effective March 1, 2015, addressed a broader film plastic recycling need.

These legal requirements have been in place for a decade. The adoption of Title 28 and its evolutionary requirements related to reduction of use of plastic carryout bags becomes effective on March 1, 2020. Titles 27 and 28 are intended to jointly move consumers away from the wasteful and environmentally damaging practice of using an overabundance of plastic carryout bags and provide for a convenient system of collection for consumers of all film plastic. Film plastic is a highly recyclable commodity, if kept separate from the fiber and container recycling stream and processed for recycling separately. In a materials processing facility setting, film plastic jams recycling equipment, and has an adverse effect on the marketability of the other more voluminous recyclables as film plastic is a contaminant.

As noted in Section 2, the Legislative Objectives section, New York residents use 23 billion plastic carryout bags annually, with each bag only used for an average of 12 minutes, yet the environmental impacts of their production, distribution, and use leave a lasting effect on the environment.

These regulations will provide necessary clarity to regulated entities and consumers and ensure the legislative intent of Titles 27 and 28 will be carried out in a coordinated and

consistent manner with respect to plastic carryout bag reduction and film plastic recycling.

4. COSTS

Costs to Regulated Parties

While the regulations will not add any direct costs to the regulated parties, the enactment of the laws themselves influence costs.

With respect to the costs related to Title 27 for stores, owners of enclosed shopping malls, and manufacturers, the collection, recycling and recordkeeping requirements have been in place for over ten years for plastic carryout bags and four years for film plastic recycling. Accordingly, their costs will likely decrease over time due to the eventual decrease in the amount of film plastic being deposited in the collection bins because the distribution of many of the plastic carryout bags will be eliminated.

With respect to the costs to stores and other retail establishments related to Title 28, these entities will no longer be able to distribute plastic carryout bags to customers. If these entities choose to provide an alternate bag to customers, the cost per bag is estimated to be three to five times greater than a plastic carryout bag. This is an option for the retailers; it is not a requirement of the regulations. Manufacturers of plastic carryout bags will experience a decline in sales of those bags in New York State. Consumers could realize a cost increase as a result of a retail establishment's choice

regarding the provision of bags. Consumers can avoid this cost by bringing their own reusable bags when shopping.

Additionally, Article 28 provides for potential fees on paper carryout bags in cities or counties in the State that choose to opt-in to the paper carryout bag reduction fee provision in the law. This rulemaking does not include or address any of those issues and concerns only plastic bags and film plastic.

Costs to the Department

The Department will not incur additional costs due to the issuance of the proposed regulations. Increased staff time needed to provide technical assistance to the regulated community will be borne by existing staff.

Costs to Local Governments

There should be no costs to local government that are directly related to the proposed regulations.

As identified above under “Costs to Regulated Parties,” it should be noted that there are other provisions of Article 28 related to potential fees related to paper carryout bags in cities or counties in the State that choose to opt-in to a paper bag reduction fee

provision in the law. This rulemaking does not include or address any of those issues and relates only to plastic bags and film plastic.

5. LOCAL GOVERNMENT MANDATES

This proposal does not directly mandate the expenditure of funds by local government and should not negatively affect local government operations. There are no mandates that need to be addressed by local governments, since the proposed regulations do not apply to these entities.

6. PAPERWORK

The proposed rulemaking will not require any additional paperwork for covered entities. Paperwork requirements for stores, owners of enclosed shopping malls, and manufacturers covered under Title 27 will still be required as part of this rulemaking but have been in place for over 10 years.

7. DUPLICATION

The proposed regulations do not duplicate any other federal or state requirements.

8. ALTERNATIVE APPROACHES

Several alternative approaches were considered prior to initiating this rulemaking.

One approach was to allow implementation to unfold based on the language in the law as had previously been done with Title 27. This alternative was considered and rejected based on the language in Title 28 on several key points that intersect with Title 27 that need clarification. Title 28 directly references the provisions in Title 27, and Titles 27 and 28 use similar terms and have some overlapping provisions.

Consequently, they must be read together to continue to reduce the use of plastic carryout bags and increase the recovery and recycling of film plastic. Clarification of several terms and the coordination of Titles 27 and 28 is necessary, because without further defining these terms in a consistent manner, the intent of the plastic carryout bag ban in Title 28 and the continued film plastic recycling in Title 27 will not be accomplished as intended. This decision was supported by the instantaneous inquiries from stakeholders seeking clarity with respect to the requirements and effects on both Titles 27 and 28 immediately after the passage of Title 28.

A second approach was to implement through issuance of guidance, such as a series of fact sheets or frequently asked questions. This alternative was considered and implemented for initial guidance for stakeholders to address early questions but proved inadequate to address the inquiries with certainty and provide the clear legal support necessary for uniform implementation and enforcement. This alternative also resulted

in additional clarity being sought immediately after the initial guidance became publicly available. Further clarification and direction continue to be required, and, accordingly, this alternative was rejected as a stand-alone alternative.

A third approach was to issue a program policy to establish program requirements. This alternative was considered in lieu of drafting regulations. While this alternative would provide for public comment, it would not carry the full legal authority of a formal rulemaking. With the wide nature of the questions received from stakeholders and desire for clear regulatory guidance, this alternative was rejected.

9. FEDERAL STANDARDS

There are no federal standards related to plastic carryout bags or film plastic recycling.

10. COMPLIANCE SCHEDULE

Title 28 of Article 27 will apply to the regulated entities beginning March 1, 2020, pursuant to the law. The Part 351 regulations will become effective 30 days after filing with the Department of State.