

A new Part 353 is being added as follows:

PART 353

**EXPANDED POLYSTYRENE FOAM CONTAINER AND POLYSTYRENE LOOSE
FILL PACKAGING REDUCTION**

Statutory authority: Environmental Conservation Law, title 1 of article 1, title 3 of article 3, title
30 of article 27

SUBPART 353-1 GENERAL PROVISIONS

353-1.1 Purpose and Applicability

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Section 353-1.1 Purpose and applicability.

(a) Purpose.

The purpose of this Part is to implement Title 30 of Article 27 of the Environmental Conservation Law. This Part sets forth the requirements for a prohibition on expanded polystyrene foam containers and expanded polystyrene loose fill packaging.

(b) Applicability.

This Part applies to any covered food service provider or store, that sells, offers for sale, or distributes expanded polystyrene foam containers in New York State, and any manufacturer or

store that sells, offers for sale, or distributes expanded polystyrene loose fill packaging in New York State.

Section 353-1.2 Definitions.

As used in this Part, the following terms have the following meanings. Unless otherwise noted, all words and terms in this Part are defined by their plain meaning.

(a) ‘Covered food service provider’ means a person engaged in the business of selling or distributing prepared food or beverages for on-premises or off-premises consumption, including but not limited to:

(1) food service establishments, caterers, temporary food service establishments, mobile food service establishments, and pushcarts as defined in the New York State Sanitary Code;

(2) retail food stores as defined in article 28 of the agriculture and markets law;

(3) delicatessens;

(4) grocery stores;

(5) restaurants;

(6) cafeterias;

(7) coffee shops;

(8) hospitals, adult care facilities, and nursing homes; and

(9) elementary and secondary schools, colleges, and universities.

(b) ‘Department’ means the New York State Department of Environmental Conservation.

(c) ‘Disposable food service container’ means a bowl, carton, clamshell, cup, lid, plate, tray, or any other product that is designed or used for the temporary storage or transport of a prepared

food or beverage, including a container generally recognized by the public as being designed for single use.

(d) ‘Environmental Conservation Law’ or “ECL” means chapter 43-B of the Consolidated Laws of New York State.

(e) ‘Expanded polystyrene foam’ means expanded foam thermoplastics utilizing a styrene monomer and processed by any number of techniques. Such term does not include rigid polystyrene.

(f) ‘Manufacturer’ means every person, firm or corporation that produces or imports polystyrene loose fill packaging that is sold, offered for sale, or distributed in New York State.

(g) ‘New York State Sanitary Code’ means Title 10 of the New York Codes, Rules and Regulations.

(h) ‘Polystyrene loose fill packaging’ means a void-filling packaging product made of expanded polystyrene foam that is used as a packaging fill, commonly referred to as packing peanuts.

(i) ‘Pre-packaged’ means enclosing food fully or partially in such a way that the contents cannot be accessed without opening or changing the packaging.

(j) ‘Prepared food’ means food or beverages that are cooked, chopped, sliced, mixed, brewed, frozen, heated, squeezed, combined or otherwise prepared on the premises of a covered food service provider for immediate consumption and require no further preparation to be consumed. Prepared food includes, but is not limited to, ready to eat takeout foods and beverages.

(k) ‘Rigid polystyrene’ means plastic packaging made from rigid, polystyrene resin that has not been expanded, extruded, or foamed.

(l) 'Single-use' means designed and intended by the manufacturer to be used only one time in its same form and then discarded, and is not designed or intended for repeated use.

(m) 'Store' means a retail or wholesale establishment other than a covered food service provider.

Section 353-1.3 Exemptions.

This Part does not apply to the following:

(a) Prepackaged food filled or sealed prior to receipt at a covered food service provider;

(b) Raw meat, pork, seafood, poultry, or fish sold for the purpose of cooking or preparing off-premises by the customer; or

(c) Food service containers made from rigid polystyrene resin (e.g., clear plastic containers marked with a #6 resin identifier).

353-1.4 Preemption.

(a) Except as provided in subdivisions b and c of this section, the provisions of this Part supersede and preempt all local laws, ordinances, or regulations governing the sale, offer for sale, or distribution of disposable food service containers containing polystyrene foam and polystyrene loose fill packaging.

(b) Any local law, ordinance, or regulation of any county will not be preempted if a county's local law, ordinance or regulation provides environmental protection equal to or greater than the provisions of Title 30 of Article 27 of the Environmental Conservation Law and this Part, and if the county files with the department a written declaration of its intent to administer and enforce the local law, ordinance or regulation.

(1) The following must be submitted to the department with the county's written declaration of its intent to administer and enforce the local law, ordinance or regulation:

(i) a copy of the local law, ordinance, or regulation;

(ii) a statement explaining how the local law, ordinance or regulation provides environmental protection equal to or greater than the provisions of Title 30 of Article 27 of the ECL and this Part; and

(iii) any other information requested by the department.

(2) The county must notify the department if it intends to discontinue administering and enforcing the local law, ordinance, or regulation, or if the local law, ordinance, or regulation has been amended or repealed.

(c) The provisions of Title 30 of Article 27 of the Environmental Conservation Law and this Part do not apply in a city with a population of one million or more that has a local law, ordinance or regulation in place restricting the sale, offer for sale, or distribution of expanded polystyrene containers and polystyrene loose fill packaging polystyrene ban in place, including New York City.

353-1.5 Violations and enforcement.

(a) Any person who violates any provision of or who fails to perform any duty imposed by this Part, or any final determination or order of the commissioner issued pursuant to this Part, or Title 30 of Article 27 of the ECL, will be liable for all applicable penalties or sanctions set forth in Article 71, including section 71-2730 and Title 30 of Article 27 of the ECL and, as appropriate, any other New York State law. Such penalties will be assessed by the commissioner after an opportunity to be heard pursuant to the provisions of Part 622 of this Title, ECL sections 71-1709 and 71-2727. In addition, such person may by similar process be enjoined from continuing such violation and any permit or registration issued to such person may be revoked or suspended

or a pending renewal application denied. Each day a violation continues or exists is considered a separate violation.

(b) A county must notify the department if it intends to enforce the provisions of section 27-3003 of the ECL.

(c) Any county that has filed a written declaration pursuant to subdivision 2 of section 27-3007 of the ECL and subdivision 353-1.5(b) of this Part shall not enforce the provisions of Title 30 of Article 27 of the ECL.

353-1.6 Severability.

If any provision of this Part, or its application to any person or circumstance is held to be invalid, the remainder of this Part, and the application of that provision to other persons or circumstances, will not be affected.

SUBPART 353-2

EXPANDED POLYSTYRENE FOAM CONTAINER AND POLYSTYRENE LOOSE FILL
PACKAGING BAN

353-2.1 Expanded Polystyrene Foam Container Ban

353-2.2 Polystyrene Loose Fill Packaging Ban

353-2.3 Financial Hardship Waivers

353-2.4 Waiver Approval Criteria

353-2.5 Approval, Renewal, and Revocation

Section 353-2.1 Expanded Polystyrene Foam Container Ban.

Beginning January 1, 2022, no covered food service provider or store shall sell, offer for sale, or distribute disposable food service containers that contain expanded polystyrene foam in New York State.

Section 353-2.2 Polystyrene Loose Fill Packaging Ban.

Beginning January 1, 2022, no manufacturer or store shall sell, offer for sale, or distribute polystyrene loose fill packaging in New York State.

Section 353-2.3 Financial Hardship Waivers.

(a) Eligibility for waiver. The following facilities and covered food service providers described in paragraphs (1) and (2) of this subdivision are eligible to apply to the department for a financial hardship waiver from the requirements of subdivision 1 of section 27-3003 of the ECL and Section 353-2.1 of this Subpart for one or more disposable food service containers sold, offered for sale, or distributed by a facility or covered food service provider:

(1) Any facility, including but not limited to a community meal program, food pantry, or place of worship that meets the following criteria:

(i) The facility provides food to food insecure individuals at no or nominal charge; and

(ii) The facility is operated by either one of the following:

(a) a federal, state, or local government agency; or

(b) a not-for-profit corporation authorized to conduct activities in New York State.

(2) Any covered food service provider that meets the following criteria:

(i) The covered food service provider has an annual gross income under \$500,000 dollars per location as stated on the income tax filing for the most recent tax year;

(ii) The covered food service provider does not operate 10 or more locations within New York State; and

(iii) The covered food service provider is not operated pursuant to a franchise agreement.

(b) Waiver application.

A complete application for a hardship waiver must be submitted on a form prescribed by the department and include the following information for facilities and covered food service providers, as applicable:

(1) a list and description of all disposable food service containers that contain expanded polystyrene foam containers the facility or covered food service provider wants to continue selling, offering for sale, or distributing, including information on container type, size, cost per unit, and quantity purchased per calendar year;

(2) a list of comparable alternative products for each container with information concerning the container type and material, size, cost per unit, and annual cost for purchasing the alternative container;

- (3) calculations showing the annual cost difference of switching to an alternative container from a single-use disposable expanded polystyrene foam container;
- (4) an explanation and showing as to how the purchase or use of an alternative product that is not composed of expanded polystyrene foam would create an undue financial hardship for the facility or covered food service provider;
- (5) any other relevant information the facility or covered food service provider chooses to submit to support the waiver application; and
- (6) any other information or documentation requested by the department.

Section 353-2.4 Waiver approval criteria for covered food service providers.

In addition to the requirements in section 353-2.3, a covered food service provider seeking a waiver must demonstrate the following:

- (a) After making all efforts to find the lowest cost alternative available, there is no alternative product of comparable cost that is not composed of expanded polystyrene foam. As used in this section, comparable cost means the purchase cost that is the same, less than, or does not exceed a cost of ten percent (10%) above the purchase cost of a comparable product that contains expanded polystyrene foam.
- (b) The purchase, distribution, or use of an alternative product that is not composed of expanded polystyrene foam would create an undue financial hardship. An undue financial hardship may be demonstrated by showing any one or more of the following:
 - (1) Increased costs are expected to result in at least a five percent (5%) increase of business operating costs;
 - (2) Increased costs are expected to result in reduction of at least five percent (5%) in operating profits; or

(3) The covered food service provider can demonstrate unique circumstances particular to it that create an undue financial hardship.

Section 353-2.5 Approval, renewal, and revocation.

(a) Financial hardship waivers are valid for a maximum of twelve months.

(b) The department will issue a written approval or denial of a financial hardship waiver to the facility or covered food service provider. An approval or denial may be issued electronically. If the department issues an approval, the approval must be retained and available for inspection at the facility or covered food service provider.

(c) A waiver application will be rejected if the facility or covered food service provider provides materially false, misleading, or inaccurate statements in the waiver application or supporting papers.

(d) A facility or covered food service provider may apply to the department for the renewal of a financial hardship waiver on an application form prescribed or approved by the department.

Complete applications for renewal of a financial hardship waiver must be received by the department at least 60 days prior to expiration of the financial hardship waiver.

(e) Revocation, suspension, or modification.

A waiver may be revoked, suspended, or modified by the department at any time based on any of the following reasons:

(1) materially false, misleading, or inaccurate statements were provided in the waiver application or supporting papers;

(2) the waiver was issued erroneously or by mistake; or

(3) the waiver was obtained through fraud, deceit, or through submission of incorrect data.