

## **6 NYCRR Part 353**

### **Expanded Polystyrene Foam Container and Polystyrene Loose Fill Packaging Reduction**

#### **RURAL AREA FLEXIBILITY ANALYSIS**

#### **INTRODUCTION**

A new Title 30 of Article 27 of the Environmental Conservation Law (ECL), “Expanded polystyrene foam container and polystyrene loose fill packaging ban” established a ban on disposable food service containers that contain expanded polystyrene foam and polystyrene loose fill packaging, which goes into effect on January 1, 2022. This rulemaking is intended to implement the provisions of the “Expanded polystyrene foam container and polystyrene loose fill packaging ban” by defining statutory terms such as “comparable costs” and “undue financial hardship,” and setting forth the details of the financial hardship waiver application process, which are necessary to ensure the bans on expanded polystyrene foam containers and expanded polystyrene loose fill packaging are implemented in a consistent, efficient and effective manner. The regulations will also help ensure that regulated entities clearly understand their compliance obligations and the process for obtaining a financial hardship waiver.

#### **1. TYPES AND NUMBERS OF RURAL AREAS AFFECTED**

For purposes of this Rural Area Flexibility Analysis (RAFA), “rural area” means those portions of the state so defined by Executive Law section 481(7). SAPA section 102(10). Under Executive Law section 481(7), rural areas are defined as “counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of

two hundred thousand or greater population, ‘rural areas’ means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein.” There are 44 counties in New York State (State) that have populations of less than 200,000 people and 71 towns in non-rural counties where the population densities are less than 150 people per square mile.

The proposed regulations apply statewide (excluding New York City), including rural areas of the state. The law and regulations do not apply in cities with a population of one million or more that have a local polystyrene ban in place (this includes New York City). In addition, any local law, ordinance or regulation of any county will not be preempted if such local law provides environmental protection equal to or greater than Title 30 or the proposed Part 353 regulations, and the county files a written declaration of its intent to administer and enforce such county law with the Department. All applicable areas of the state, including stores and covered food service providers, located in rural areas that sell, offer for sale or distribute expanded polystyrene foam containers and stores and manufacturers located in rural areas that sell, offer for sale or distribute expanded polystyrene loose fill packaging (commonly known as packing peanuts) could be affected directly or indirectly by the law and the proposed rulemaking.

## **2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND NEED FOR PROFESSIONAL SERVICES**

While the regulations will not add any mandatory reporting, recordkeeping, other compliance requirements, or the need for additional professional services to regulated entities, the enactment of the law itself requires regulated entities to comply with the ban on expanded polystyrene foam

disposable food service containers and loose fill packaging. Regulated entities are state-wide, including in rural areas.

The additional administrative requirements only relate to those entities that elect to complete an application for a financial hardship waiver or counties that enact a polystyrene ban through a local law that provides environmental protection equal to or greater than the state law and choose to file a written declaration with the Department to continue to administer and enforce the county law. Title 30 provides that local polystyrene bans will be preempted by the state law, except for laws in counties that choose to file such written declaration. A financial hardship waiver is available for entities that meet certain requirements related to the prohibition on selling, offering for sale or distributing disposable food service containers that contain expanded polystyrene foam. The hardship waiver is the only component of the regulations that would result in any additional administrative obligations, but the waiver is optional and not required under the Part 353 regulations. Additionally, a county that enacts a polystyrene ban by local law that provides environmental protection equal to or greater than the state law could choose to file a written declaration with the Department if it intends to continue administering and enforcing its local law. However, the written declaration is also optional, and, if pursued, would involve minimal paperwork.

### 3. COSTS

While the regulations will not add any additional direct costs to regulated parties, the requirements of the law itself and its ban on expanded polystyrene foam disposable food service containers and loose fill packaging may impact costs for regulated entities, including those in rural areas. Beginning January 1, 2022, the law prohibits covered food service providers and

stores from selling, offering for sale, or distributing disposable food service containers that contain expanded polystyrene foam in New York State. Depending on the type of container and alternative material chosen, alternative acceptable containers have the potential to cost more. Therefore, there is a possibility of increased costs for covered food service providers if the purchase and use of food service containers that do not contain expanded polystyrene foam cost more than products containing expanded polystyrene foam. In a cost analysis performed in Maryland, (See <https://takomaparkmd.gov/government/police/neighborhood-services/polystyrene-ban/> (last visited May 3, 2021); <https://documents-takomapark.s3.amazonaws.com/public-works/polystyrene-ban/PW-20150624-cost-for-business-fact-sheet.pdf>) it was estimated that alternatives to expanded polystyrene foam will cost anywhere from \$0.04 cents to \$0.10 more per unit than expanded polystyrene foam items, however costs vary. Any increase in cost would differ based on the quantity of expanded polystyrene foam containers a business is selling or distributing. If retail and wholesale stores choose to provide alternatives in place of expanded polystyrene foam containers, these could cost more for stores to purchase than expanded polystyrene foam items. However, the likely increase in demand for alternative products could increase sales of alternative products, potentially offsetting any higher costs to purchase these items, and possibly generating increased profits from alternatives.

This prohibition applies across the state — in urban, suburban and rural areas — and variation in costs for different types of public and private entities in rural areas is not anticipated. Manufacturers of disposable food service containers that contain expanded polystyrene foam do exist in some locations across New York State. However, the Department has not identified any manufacturers of banned products that are located in rural areas of the state who could realize

decreased sales of banned products or decreased profits. There are no direct costs to manufactures and distributors from the regulations or the law itself. The law and regulations will be applied across the state equally, except for cities to which the law does not apply, or counties who file a written declaration to administer and enforce their own local law, according to the requirements in the state law.

Manufacturers and distributors of disposable food service containers that do not contain expanded polystyrene foam could experience an increase in sales due to a likely shift to other containers by covered food service providers and stores. Due to the many options currently available on the market, it is not anticipated that there will be a lack of supply of alternative disposable food service containers that do not contain expanded polystyrene foam. The law and proposed regulations may also result in an increased focus on reusable containers as an alternative and a shift to a more circular system, which can also provide cost savings. This would again boost prospects for those businesses that provide alternatives. Switching to reusable containers as an alternative can save money by reducing disposable food service ware costs, prevent litter, and lower waste collection services.

Title 30 also contains a ban on polystyrene loose fill packaging. Beginning January 1, 2022, no manufacturer or store shall sell, offer for sale, or distribute polystyrene loose fill packaging in New York State. Similar to the above, alternative packaging may cost more. If stores replace expanded polystyrene foam loose fill packaging with alternatives, it may cost more to purchase some of these items. However, demand for these items will likely increase, and increased sales of alternatives could offset any increased costs to purchase and provide alternative packaging options. In reviewing some existing available alternative packaging options, the Department found cost competitive options, with some even providing a cost savings. In addition,

manufacturers, distributors, and stores offer product lines beyond expanded polystyrene foam loose fill packaging, including alternatives or items that will not be banned under the law, which can continue to be sold in New York State after the ban goes into effect. No direct costs to manufactures and distributors from the regulations or the law itself are anticipated. The prohibitions within the legislation do not favor one industry over another but rather promote a shift to more environmentally preferable solutions to ensure a healthy future for all in New York State.

#### **4. MINIMIZING ADVERSE IMPACTS**

Part 353 will implement Title 30's financial hardship waiver provisions, which will help to minimize adverse impacts on facilities and covered food service providers in rural areas. Covered food service providers that meet certain criteria (have an annual gross income under \$500,000 per location, do not operate 10 or more locations in New York State, and are not operated according to a franchise agreement), as well as facilities operated by a not-for-profit corporation or by a federal, state, or local government agency that provide food and meals to food insecure individuals, may request from the Department a renewable 12-month hardship waiver of the requirements of Title 30. Hardship waivers may be granted for one or more disposable food service containers to a covered food service provider that demonstrates there is no alternative product of comparable cost that is not composed of expanded polystyrene foam and that the purchase or use of an alternative product would create an undue financial hardship.

#### **5. RURAL AREA PARTICIPATION**

The Department held one widely-attended virtual public meeting, which was advertised all

over the state and to which stakeholders from all over the state, including rural areas, were invited and also attended. This provided public and private interests in rural areas with the opportunity to participate in the rule making process without having to travel to an in-person meeting. Additional meetings with interested stakeholders will be held to explain the requirements of the law and stakeholders in rural areas will again be invited to attend. The Department will be accepting public comments and evaluating the feedback and comments for input into the proposed rulemaking. The proposed regulations are intended to merely implement and clarify the requirements of the law.

## **6. INITIAL REVIEW OF RULE**

The initial review of this rule shall occur no later than in the third calendar year after the year in which the rule is adopted.