

6 NYCRR Part 353

Expanded Polystyrene Foam Container and Polystyrene Loose Fill Packaging Reduction

REGULATORY IMPACT STATEMENT

INTRODUCTION

A new Title 30 of Article 27 of the Environmental Conservation Law (ECL), “Expanded polystyrene foam container and polystyrene loose fill packaging ban,” went into effect on April 3, 2020, and established a ban on disposable food service containers that contain expanded polystyrene foam and polystyrene loose fill packaging. This rulemaking is intended to implement the provisions of the “Expanded polystyrene foam container and polystyrene loose fill packaging ban.”

1. STATUTORY AUTHORITY

The Department’s statutory authority to undertake the development of regulations concerning the provisions of the expanded polystyrene foam container and polystyrene loose fill packaging ban in Title 30 of Article 27 of the ECL is found in ECL sections 1-0101, 3-0301, and 27-3003.

ECL section 1-0101 declares it the 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 27-3003 authorizes the Department to promulgate any rules and regulations necessary to implement the provisions of Title 30, including criteria related to what constitutes comparable costs pursuant to subdivision two of section 27-3005 of the ECL.

2. LEGISLATIVE OBJECTIVES

The legislative objectives for Title 30 build on the accomplishments of Titles 27 (Plastic Bag Reduction, Reuse, and Recycling) and Title 28 (Bag Waste Reduction) to reduce the negative environmental and community impacts of the disposal of single-use plastic items. Polystyrene foam is a concern for people and the environment. It is lightweight, breaks apart easily, and does not readily biodegrade, contributing to litter that persists in the environment and that may also become microplastic pollution (plastic particles less than 5mm in diameter). In the study “Plastic Debris in 29 Great Lakes Tributaries,” foam was listed as the third most common plastic particle type detected (*Environ. Sci. Technol.* 2016, 50, 19, 10377–10385, Sept. 14, 2016, <https://pubs.acs.org/doi/10.1021/acs.est.6b02917> (last visited April 27, 2021)). An additional study conducted by Hudson River Park and Brooklyn College, “The Presence and Significance of Microplastics in the Lower Hudson River Estuary 2016-2019,” found that microplastic pollution has been detected in New York’s Hudson River, NY Harbor, the Mohawk River and other tributaries (Polanco, Helen, *et al.*, “The Presence and Significance of Microplastics in the Lower Hudson River Estuary 2016 – 2019: A Research Note,” <https://hudsonriverpark.org/app/uploads/2020/12/PrePrint-Draft-Microplastics-in-the-Lower-Hudson-River-2016-to-2019.pdf> (last visited April 27, 2021)). In data from the “Riverkeeper Sweep 2020 Report” and the Ocean Conservancy’s “International Coastal Cleanup 2020 Report,” foam packaging was found to be one of the top contributors of environmental litter,

causing negative impacts to wildlife, waterways, and other natural resources, as well as littering our communities and natural areas (<https://www.riverkeeper.org/blogs/ecology/riverkeeper-sweep-2020-results/> (last visited April 27, 2021); https://oceanconservancy.org/wp-content/uploads/2020/10/FINAL_2020ICC_Report.pdf (last visited April 27, 2021)). In addition, foam containers and loose fill packaging, such as packing peanuts, are not accepted in most recycling programs in New York State because the foam is a low value and difficult to recycle material. These items are not a solution to a more circular economy based on sustainable materials management, which is being recognized through a growing number of foam bans across the country, around the world, and through the voluntary discontinued use of foam products by large corporations. To protect the people of New York State and the environment, the Legislature enacted Title 30 to address the negative impacts associated with manufacturing and use of disposable single-use plastics.

This rulemaking is intended to establish the requirements and procedures necessary to implement the Legislative goals and objectives set forth in Title 30 so that the law can be effectively implemented and enforced.

3. NEEDS AND BENEFITS

The purpose of this rule is to ensure that the provisions of Title 30 are efficiently and effectively implemented in a coordinated and consistent manner so that the legislative objectives described above are met. Title 30 provides that effective January 1, 2022, no covered food service provider or store (retail or wholesale) will be allowed to sell, offer for sale, or distribute disposable food service containers that contain expanded polystyrene foam in New York State. In addition, no manufacturer or store will be allowed to sell, offer for sale, or distribute

polystyrene loose fill packaging (commonly referred to as packing peanuts) in the state.

“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: food service establishments, caterers, temporary food service establishments, mobile food service establishments, and pushcarts as defined in the New York State Sanitary Code; retail food stores as defined in Article 28 of the Agriculture and Markets Law; delicatessens; grocery stores; restaurants; cafeterias; coffee shops; hospitals, adult care facilities, and nursing homes; and elementary and secondary schools, colleges, and universities.

Disposable food service containers made of expanded polystyrene that will be banned under the law include bowls, cartons, hinged “clamshell” containers, cups, lids, plates, trays, or any other product designed or used to temporarily store or transport prepared foods or beverages, and includes any container generally recognized as designed for single use. The law provides specific exemptions for raw meat, pork, seafood, poultry, and fish, prepackaged foods filled or sealed prior to receipt at a covered food service provider, and food service containers made of rigid polystyrene. Polystyrene loose fill packaging (commonly referred to as packing peanuts) will also be banned under the law. The enforcement provisions for Title 30 of Article 27 of the ECL, found in ECL Section 71-2730, specify penalty amounts for violations and those who are authorized to enforce provisions of the law.

Title 30 preempts all local laws, ordinances or regulations governing the sale, offer for sale, or distribution of disposable food service containers containing expanded polystyrene foam and polystyrene loose fill packaging. There are, however, exceptions to this preemption. Title 30 does 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 (New York City). In addition, any local law, ordinance or regulation of any county will not be preempted if such local law, ordinance, or regulation provides environmental protection equal to or greater than Article 27 of Title 30 of the ECL 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.

Title 30 also includes a financial hardship waiver component. 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 a renewable 12-month hardship waiver of the requirements of Title 30 from the Department.

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 the use of an alternative product would create an undue financial hardship.

Title 30 is intended to move consumers, businesses, government agencies, and non-profits away from the wasteful and environmentally damaging practice of using disposable, single-use expanded polystyrene foam containers and loose fill packaging. Expanded polystyrene foam (especially food and beverage soiled containers) is difficult to recycle and robust markets and widescale, readily available recycling options do not currently exist for expanded polystyrene foam. Therefore, expanded polystyrene foam containers and loose fill packaging are often disposed of in landfills or incinerators. Although not recyclable at most materials processing facilities, expanded polystyrene foam still ends up in the recycling stream due to confusion over

recycling rules. In a materials processing facility setting, expanded polystyrene foam containers and loose fill packaging have an adverse effect on the marketability of the other more voluminous recyclables as the foam breaks down into small pieces and is a contaminant to the recycling stream.

This rule is needed to facilitate the implementation and enforcement of the law in a consistent, efficient, and effective manner by defining key statutory terms, such as “comparable costs” and “undue financial hardship,” and setting forth the details of the financial hardship waiver application process, waiver approval criteria, the approval and renewal processes, and describing when a waiver may be revoked, suspended or modified.

These definitions and processes are all essential to the implementation of the law and will help ensure that regulated entities clearly understand the law and their compliance obligations and the process for obtaining a financial hardship waiver. Alternative approaches, such as the issuance of guidance, would be inadequate to provide the legal authority necessary to implement and enforce the law on a uniform basis. The benefits to be derived from this rule include regulated entities having a clear understanding of their obligations and how to comply with the law and the achievement of the statutory goal of reducing the use of expanded polystyrene foam containers and packaging in New York State, and thereby reducing the negative environmental and community impacts of the disposal of these items.

4. COSTS

Costs to Regulated Parties

While the regulations will not add any additional direct costs to the 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 the 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. However, as discussed in depth below, there are many cost competitive alternatives. Stores currently selling or distributing expanded polystyrene foam disposable food service containers will be required under the law to find alternatives, and to the extent that these products may cost more for regulated entities that cannot sell the products to their customers for a higher price, there could be added costs. However, this rule provides a mechanism for certain facilities and covered food service providers to receive a financial hardship waiver of the ban's requirements from the Department. Manufacturers and distributors of expanded polystyrene foam disposable food service containers and loose fill packaging may see a decrease in profits from the sales of these items in New York state, and manufacturers and distributors of alternatives may see an increase in sales in the state. However, there are no direct costs to manufactures and distributors from the regulations or the law itself. Alternative items could cost more for distributors to purchase, but demand for alternative containers and packaging will also increase in the state, which could drive down costs.

Although expanded polystyrene foam is often chosen for its low cost, insulating, and cushioning properties, there are many cost competitive alternatives to expanded polystyrene foam containers and packaging. Materials such as rigid plastic, paper, aluminum, plant fibers and starches, compostable bioplastics, and reusable items are all readily available from many retail or online stores as alternatives. In some cases, some of these alternatives may also be recyclable or

compostable, biodegradable, or reusable, increasing the environmental benefits of the expanded polystyrene foam container and loose fill ban, and appealing to customers who are increasingly looking for safer, environmentally preferable options. A recent survey in the report “Chemical (Re)Action: Growth Opportunities in a Circular Economy” by Accenture (a global services and consulting company) of 6,000 consumers in 11 countries across North America, Europe and Asia shows a shift in consumer behavior towards environmentally preferable products, indicating that providing environmentally preferable products could be an asset to businesses due to consumer demand (https://www.accenture.com/_acnmedia/PDF-107/Accenture-Chemicals-Circular-Economy-Growth.pdf). In addition, switching to an alternative, such as reusable containers, can save money by reducing disposable food service ware costs, preventing litter, and lowering waste collection service costs.

In an alternative material cost analysis performed by Takoma Park Public Works Department (TPPWD) in Takoma, Maryland, TPPWD found a four cent (\$.04) increase in total unit cost when purchasing four alternative material items from one supplier, as opposed to polystyrene foam products. The TPPWD cost analysis summary also demonstrated that one of the most widely used containers, a 9-inch one-compartment clamshell, was available at a cheaper cost produced from a specific plant fiber (bagasse) than one composed of polystyrene foam. In the cost analysis performed by TPPWD in 2015, minimum cost changes ranged from 1 cent to 5 cents (\$.01-\$0.05) per unit for seven items that included common takeout containers, cups and plates with an average cost change of two cents (\$.02) per unit. However, in another cost analysis, the county in which Takoma Park is located separately estimated a ten-cent (\$.10) cost increase per unit from switching from polystyrene to an alternative product, which differs from TPPWD (<https://documents-takomapark.s3.amazonaws.com/public-works/polystyrene-ban/PW->

20150624-cost-analysis-hand-out.pdf (last visited May 4, 2021). Therefore, some regulated entities may have an increased cost associated with alternative packaging, but these costs will vary depending on what alternative container or packaging material is chosen, what type of container or packaging needs to be replaced, (e.g., cups and plates), and the vendor chosen. As the ban goes into effect and more entities purchase alternative packaging, this may also drive down the cost of alternative packaging. There are some alternative materials that can provide a cost savings or are the same cost, and some that will be more costly. Though some of the materials may show a cost increase per unit, the costs for commonly available alternatives do not appear to be substantial.

The expanded polystyrene foam container and loose fill packaging ban also contains a financial hardship waiver provision if compliance would create an undue financial hardship for certain facilities and covered food service providers. 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 apply for a renewable 12-month hardship waiver of the requirements of the law. In addition, food service providers that 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 may also apply for a hardship waiver. 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.

In determining a definition for “comparable cost” for this rule, the Department reviewed other New York State laws and policies that define similar terms; reviewed other state and city laws,

regulations, and ordinances banning expanded polystyrene foam products; and had discussions with representatives from other states and cities with expanded polystyrene foam bans. The Department also reviewed cost comparison data from other cities and states regarding prices for foam containers and packaging and available alternatives, and reviewed current pricing for foam containers and alternatives. Several New York State laws, such as General Municipal Law section 104-a, discuss the purchasing of recycled products for public, county, and other municipalities' use and provide that recycled products may be purchased if the price is "reasonably competitive," meaning that the cost of the recycled product does not exceed a cost premium of ten percent above the cost of a comparable product that is not a recycled product or, if at least fifty percent of the secondary materials utilized in the manufacture of the product are generated from the waste stream in the state, the cost of the recycled product does not exceed a cost premium of fifteen percent above the cost of a non-recycled comparable product. Some other states' laws, and other local laws in New York State banning expanded polystyrene foam products that include cost comparisons, define comparable cost to mean the products cost the same or less than expanded polystyrene foam products. After reviewing all of these approaches, the Department determined it was reasonable to define comparable cost to mean 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.

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 additional costs to local government that are directly related to the proposed regulations.

5. LOCAL GOVERNMENT MANDATES

This proposal does not directly mandate the expenditure of funds by local governments and should not negatively affect local government operations. If a local government agency that provides food and meals to food insecure individuals applies for a 12-month financial hardship waiver, the local government agency is responsible for applying for, renewing, and keeping on file any approved hardship waiver approval. Any county that enacts a polystyrene ban by local law, ordinance, or regulation that provides environmental protection equal to or greater than the state law or regulations can file a written declaration with the Department to continue implementing the local law. If a county files such a written declaration, that county is responsible for submitting the written declaration, keeping declarations on file, and notifying the Department of any changes that occur to the local law, ordinance, or regulation.

6. PAPERWORK

As noted in section 5, additional paperwork will only be required for covered entities who apply for a financial hardship waiver or a county with a local law providing environmental protection equal to or greater than the provisions of Title 30 or state regulations, which chooses to file a written declaration with the Department, as stated above.

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 forgo rulemaking. This alternative was considered and rejected. The Department believes that the implementation of the law will be facilitated by defining key statutory terms, such as “comparable costs,” and setting forth what constitutes an undue financial hardship and the process for submitting a hardship waiver application, which are essential to the implementation of the law. This approach will ensure that the law is understood by the regulated community and that the statutory goal of reducing the use of expanded polystyrene foam containers and packaging is achieved

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 for initial guidance for stakeholders, but the Department deemed it inadequate to provide the legal authority necessary to implement and enforce the law on a uniform basis. Moreover, this alternative would not have addressed the issues of statutory interpretation that would have likely arisen as regulated entities tried to comply with the law. 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. Therefore, this alternative was also rejected as a stand-alone alternative.

9. FEDERAL STANDARDS

There are no federal standards related to a ban on expanded polystyrene foam containers or loose fill packaging.

10. COMPLIANCE SCHEDULE

Title 30 will apply to the regulated entities beginning January 1, 2022, pursuant to the law. The Part 353 regulations will become effective 30 days after filing of the Notice of Adoption with the Department of State for publication in the “Official Compilation of Codes, Rules, and Regulations of the State of New York.”