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ENVIRONMENTAL PROTECTION

AIR, ENERGY, AND MATERIALS SUSTAINABILITY

DIVISION OF SUSTAINABLE WASTE MANAGEMENT

Certain Single-Use Paper and Plastic Bags and Polystyrene Foam Food Service Products

Proposed New Rules: N.J.A.C. 7:26L

Authorized By: Shawn M. LaTourette, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1B-3, 13:1D-9, 13:1E-1, 13:1E-99.126 et seq., and 26:3A2-21 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

DEP Docket Number: 01-24-02.

Proposal Number: PRN 2024-035.

A **public hearing** concerning this notice of proposal will be held on May 1, 2024, at 9:00 A.M. The hearing will be conducted virtually through the Department of Environmental Protection's (Department) video conferencing software, Microsoft Teams. A link to the virtual public hearing and a telephone call-in option will be provided on the Department's website at <https://dep.nj.gov/rules/notice-of-rule-proposals/>.

If you are interested in providing oral testimony at the virtual public hearing, please email the Department at erin.jensen@dep.nj.gov no later than 5:00 P.M. on April 29, 2024, with your contact information (name, telephone number, email address, and, if applicable, the name of the organization on behalf of which you are speaking). You must provide a valid email address, so the Department can send you an email confirming receipt of your interest to testify orally at the hearing and provide you with a separate option for a telephone call-in line if you do not have access to a computer that can connect to Microsoft Teams. Please note the hearing will be

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recorded, and the Department will take oral testimony at the hearing in alphabetical order of the testifying person's last name. Written comments may also be submitted at the public hearing. It is requested (but not required) that anyone providing oral testimony at the public hearing provide a copy of any prepared remarks to the Department by email.

Submit written comments by close of business on May 31, 2024, electronically at www.nj.gov/dep/rules/comments. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

The Department encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Alice A. Previte, Esq.
Attn: DEP Docket Number 01-24-02
Office of Legal Affairs
Department of Environmental Protection
401 East State Street, 7th Floor
Mail Code 401-04L
PO Box 402
Trenton, New Jersey 08625-0402

This notice of proposal may be viewed or downloaded from the Department's website at www.nj.gov/dep/rules.

The agency proposal follows:

Summary

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

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Reducing single-use plastic is paramount to address plastic pollution in New Jersey and the United States. In 2017, only 8.4 percent of plastics in the United States were recycled. N.J.S.A. 13:1E-99.126. Approximately one-third of all plastics produced are single-use plastics, which are plastics designed to be used only once and then thrown away; and an estimated 100 billion single-use plastic carryout bags and 25 billion polystyrene plastic coffee cups are thrown away in the United States each year. As the Legislature found, “most single-use plastics are disposed of in landfills, are incinerated, or become litter in waterways and oceans ... Indeed, approximately eight million tons of plastic end up in the oceans annually.” Plastics also break down into microplastics, which accumulate in the environment and into the food chain, and release harmful chemicals when they break down through photodegradation. To minimize single-use plastic pollution, the Legislature passed N.J.S.A. 13:1E-99.126 et seq. (the Act), which became effective on November 4, 2020, and was amended effective March 25, 2022. The Act prohibits stores and food service businesses from providing single-use plastic bags to customers, grocery stores from providing single-use paper bags to customers, and individuals and food service businesses from providing polystyrene foam food containers. While the Act also restricts the distribution of single-use plastic straws, this is addressed in the Department of Health rules at N.J.A.C. 8:24-10.4.

The Department is now proposing new chapter N.J.A.C. 7:26L, Certain Single-Use Paper and Plastic Bags, and Polystyrene Foam Food Service Products, to implement the Act. In addition to restricting single-use carryout bags and polystyrene foam, the proposed rules include exemptions and waiver provisions for polystyrene foam food service products. The Department conducted extensive stakeholder outreach as part of its rulemaking process. These efforts

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included launching a website (www.dep.nj.gov/get-past-plastic/), creating a general mailbox (singleuseplastics@dep.nj.gov), issuing joint press releases with the New Jersey Department of State, contacting and educating mayors, and conducting approximately 40 stakeholder webinars.

Purpose and Scope, and Prohibitions N.J.A.C. 7:26L-1.1 and 1.3

Proposed N.J.A.C. 7:26L, Certain Single-Use Paper and Plastic Bags and Polystyrene Foam Food Service Products, establishes prescriptive rules governing the reduction of single-use plastics, polystyrene foam, and the use of paper carryout bags. The chapter governs distribution of single-use plastic carryout bags, single-use paper carryout bags, and polystyrene foam food service products. N.J.A.C. 7:26L-1.1, Purpose and scope. The Department's purpose and authority, consistent with the Act, is to eliminate the use of single-use plastic and paper carryout bags, as well as polystyrene foam food service products.

Proposed N.J.A.C. 7:26L-1.3, Prohibitions, codifies the Act's restrictions on the sale and distribution of single-use plastic carryout bags and polystyrene foam food service products. Pursuant to the proposed rules, no store or food service business shall provide or sell a single-use plastic carryout bag to a customer; no grocery store shall provide or sell a single-use paper carryout bag to a customer; no food bank or food pantry shall provide a single-use plastic carryout bag to a customer; no person in the State shall sell any polystyrene foam food service product; and no food service business shall provide or sell any food in a polystyrene foam food service product. Pursuant to the statute, these prohibitions have been in place since May 4, 2022, and will continue in effect, with the proposed exceptions and waivers, upon the effective date of the rules.

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The Department proposes to define “Department,” “food bank,” “food pantry,” “grocery store,” “hemp product,” “polystyrene foam,” “polystyrene foam food service product,” “single-use paper carryout bag,” “single-use plastic carryout bag,” and “store” as they are defined in the Act at N.J.S.A. 13:1E-99.127. The Department also proposes to define “Act” to mean N.J.S.A. 13:1E-99.126 et seq. See proposed N.J.A.C. 7:26L-1.4, Definitions.

Consistent with the Act, the proposed “carryout bag” definition excludes certain bags that are not considered carryout bags because they have specific, limited uses. Many of the types of bags excluded in both the Act and the proposed rules are readily understandable; however, there are certain bag types that the Department identified through stakeholders as needing additional clarification to reduce confusion and increase compliance. Consistent with the Act, the proposed rule excludes from the “carryout bag” definition, bags that are used solely: to contain or wrap uncooked meat, fish, or poultry; to contain live animals, such as fish or insects sold in a pet store; for laundry, dry cleaning, or garments; to carry prescription drugs provided by a pharmacy; and for newspapers. The Act and the proposed rules exclude bags used solely to package loose items such as fruits, vegetables, nuts, coffee, grains, baked goods, candy, greeting cards, flowers, or small hardware items. This proposed exclusion applies only to bags that do not have handles. The Department is concerned that allowing bags with handles to be used for loose items would perpetuate the use of traditional single-use plastic carryout bags.

The Act excludes from the “carryout bag” definition a bag used solely to contain food that has been sliced or prepared to order, including soup or hot food. This provision of the Act led to stakeholder confusion on what types of bags are excluded from the “carryout bag” definition; therefore, the Department is proposing language to clarify the definition. The

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proposed definition of “carryout bag” covers the Act’s “prepared to order, including soup or hot food” exclusion in proposed paragraphs 4, 5, and 6. As proposed at paragraph 4, a bag is excluded from the definition of “carryout bag” if it is used solely to contain food sliced to order, such as deli meat or cheese. A bag is also excluded pursuant to paragraph 5 if it is a square, flat bottom, moisture-proof, hot packaging bag, used solely to contain a container of soup. A bag containing a container of other liquid or semi-liquid food is not covered by this exclusion. As proposed at paragraph 6, a bag used solely to contain ready to serve hot food that has direct contact with the bag, such as rotisserie chicken, is also excluded. A bag to hold containers of a hot food, such as pasta, would be a carryout bag as defined. Thus, pursuant to the proposed rules, a single-use plastic carryout bag may not be provided to transport containers of takeout food, such as from a restaurant. Unlike a grocery store, a restaurant may provide a single-use paper carryout bag to its customers. A grocery store may make a suitable container, reusable carryout bag, or cardboard box available.

The Act allows the Department to identify and exclude bags that are similar to those excluded by the Act. Therefore, the Department is excluding from the “carryout bag” definition temperature-regulating bags, because these types of bags are designed to be reusable.

The definitions of “single-use paper carryout bag” and “single-use plastic carryout bag” in the Act and the proposed rules refer to bags that do not meet the definition of a “reusable carryout bag.” The Department is proposing clarifications to the Act’s “reusable carryout bag” definition. The Act requires that a “reusable carryout bag” must be made of polypropylene, Polyethylene Terephthalate (PET) nonwoven fabric, nylon, cloth, or hemp product. The Act also

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allows a reusable carryout bag to be made of other fabric that is machine washable. The proposed rules include these requirements.

The Act also requires a reusable carryout bag to have “stitched handles” and be “designed and manufactured for multiple reuse(s).” The proposed definition specifies the type of stitching (ultrasonic or with thread) and requires that the handles are stitched to the bag. The proposed definition of “reusable carryout bag” also includes a requirement that the bag is designed and manufactured for a minimum of 125 uses. This is similar to requirements in other states, such as California (California Public Resources Code 42281), Rhode Island (Rhode Island General Laws 23-19.18-2), New York (6 NYCRR 351-1.2), and Washington (Annotated Revised Code of Washington 70A.530.020).

In the definition of “food service business,” the Department proposes to explicitly state that a “food service business” includes both school cafeterias and businesses that provide food services to governmental entities. For purposes of the definition, “school” is interpreted broadly to include all levels of education. The Department interprets the establishments that the definition identifies to be within the Act’s category as a “business or institutional cafeteria, including those operated by or on behalf of any governmental entity.”

Likewise, the Department proposes to add language to the Act’s definition of “person” to provide enforcement clarity. Specifically, a “person” also includes a responsible corporate official, which includes a managing member of a limited liability company or a general partner of a partnership.

The Department proposes to supplement the Act’s definition of “plastic” to include materials certified pursuant to the ASTM D6400, a standard for compostable plastics (available

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at www.astm.org). Compostable plastics are an environmentally effective substitute for single-use plastics only if the material is actually composted at the end of life. If they are not composted properly under the right conditions, they will be no different from traditional plastics which, as the Legislature found, are disposed of in landfills, are incinerated, or become litter in waterways and oceans. The Department has determined that none of the composting facilities necessary to process these materials is currently located in New Jersey; accordingly, it is highly unlikely that any of the compostable plastics would be recycled, but instead would remain a part of the waste stream. Excluding these compostable plastics from “plastic” would be counter to the Act’s intention to reduce single-use plastics, since items made from these materials would effectively be single-use bags, virtually identical to regular plastic bags, which the Act prohibits. The proposed rules also prohibit bioplastics, or plastics made with non-petroleum source material, because the Department has determined that these plastics meet the definition of plastic in the statute, since they are a synthetic material that is made from linking monomers through a chemical reaction to create an organic polymer chain that can be molded or extruded at high heat into various solid forms retaining their defined shapes during the life cycle and after disposal.

Exemptions N.J.A.C. 7:26L-1.6 and 2.2

Proposed N.J.A.C. 7:26L-1.6 includes three of the five exemptions from the Act. These are for: meat and fish trays for raw or butchered meat, including poultry, or fish that is sold from a refrigerator or similar retail appliance; and any food product pre-packaged by the manufacturer with a polystyrene foam food service product. The Act allows the Department to identify and exempt additional polystyrene foam food service products if the Department determines exemption is warranted. These exemptions are valid until May 4, 2024, a period of two years

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beginning 18 months from the date the Act's prohibitions went into effect, as provided at N.J.S.A. 13:1E-99.129.c. The Act allows the Department to extend the exemption for a product upon a written determination that there is no cost-effective and readily available alternative for the item. Each extension can be for up to one year. The Department may extend an exemption beyond one year if it finds there continues to be no cost-effective and readily available alternative for the item.

On February 2, 2024, the Department issued a notice extending certain exemptions identified by the Act for a period of one year. The notice identified the three exemptions that would be extended to May 4, 2025. These extensions included the exemptions identified above. The Department did not grant an extension for the following exemptions: disposable, long-handled polystyrene foam soda spoons when required and used for thick drinks; portion cups of two ounces or less, if used for hot foods or foods requiring lids. The Department did not extend these exemptions because there are cost-effective and readily available alternatives.

The Department proposes to add polystyrene foam food service products used for the health or safety of patients and residents used in hospitals, nursing homes, and correctional facilities to the exemption list. See proposed N.J.A.C. 7:26L-1.6(a). The exemption allows these facilities adequate time to find alternative, commercially available products that reduce the health and safety concerns, as the use of plastics and paper products in these facilities may pose an undue harm to patients, residents, and employees.

The proposed rules also allow the Department to extend the exemption for an additional one-year period if no commercially available alternative product exists and sets forth the procedures for requesting an extension of a product exemption. See proposed N.J.A.C. 7:26L-

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1.6(b) and 2.2. As provided at N.J.A.C. 7:26L-1.6(b), the Department may make this determination on its own initiative, or upon request, if an application is submitted pursuant to N.J.A.C. 7:26L-2.2. To apply for an exemption extension, a person or food service business must include: the identification of the item for the exemption extension, a detailed cost analysis that there is no cost-effective alternative, and a detailed analysis that there is no readily available alternative. If an outside entity, an entity other than the Department, requests an extension the Department must receive this information no later than 60 days prior to the exemption(s) expiration date. The application must include: the identification of the item for the exemption extension, a detailed cost analysis that there is no cost-effective alternative, and a detailed analysis that there is no readily available alternative. See proposed N.J.A.C. 7:26L-2.2.

The Department may deny an extension application, in whole or in part. Any extension application the Department determines is administratively complete will be considered as “pending approval” for compliance purposes. The Department may deny an extension application when: the application does not meet the section’s requirements, the applicant does not demonstrate the section’s requirements are met, or the applicant does not remedy a deficiency noted by the Department within the prescribed deadline. Finally, if the Department determines the extension application satisfies all regulatory requirements, then the Department will issue an extension of up to one year, beginning on the date of the extension approval. The Department can further extend the exemption if it determines that there continues to be no cost-effective and readily available alternative for the item. If the Department extends an exemption, it will publish a notice of administrative change to N.J.A.C. 7:26L-2.2(a) in the New Jersey Register and post the extension notice on its website at www.nj.gov/dep/dshw/. The notice will

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identify to which of the exempted items the extension applies, and the duration of the extension.

If the Department determines to grant an extension, pursuant to its statutory authority, before the rules are adopted, the Department will publish a notice in the New Jersey Register and modify the rules on adoption to reflect the approved deadline.

Temporary Waivers N.J.A.C. 7:26L-2.1

The Act, at N.J.S.A. 13:1E-99.129, authorizes the Department to issue a waiver of the prohibitions related to polystyrene foam products for a period of up to one year from the date the Act applies to the product. Accordingly, the Department proposes a new section for waiver requests for food service products, N.J.A.C. 7:26L-2.1, to prescribe the form and manner of the waiver application. The proposed section prescribes the requirements for submitting a waiver application and the application is available on the Department's website at www.dep.nj.gov/get-past-plastic/. The proposed rules request specific information to ensure each waiver application provides uniform information of sufficient detail for Department decisions.

A waiver is available to a person or food service business if: (1) there is no feasible and commercially available alternative for a specific polystyrene foam food service product; or (2) the person or food service business has less than \$500,000 in gross annual income and there is no reasonably affordable, commercially available alternative to the polystyrene foam food service product. N.J.S.A. 13:1E-99.129e. The Department interprets "feasible" to mean there is no alternative substance or product that serves the same purpose, or the available alternatives present a risk of personal harm. For example, prior to the Act, there were health care and correctional facilities that used polystyrene foam food products because other products can be

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used as weapons. Plastic, paper, and cardboard materials can be manipulated into weapons, or they present significant safety concerns for the residents of such facilities. As of the date of publication of this notice of proposal, there is no available market alternative that would provide for similar health and safety measures as polystyrene foam food service products; thus, there is no current feasible alternative.

For applications from businesses with less than \$500,000 in gross annual income, the Department will determine what is “reasonably affordable” based on the applicant’s gross annual income, the cost of current products in use by the applicant, and the cost of the potential alternative products for the applicant’s use. The Act requires the Department to weigh these factors when reviewing a waiver application.

The Department requires a written narrative explaining that the applicant meets the eligibility requirements at proposed N.J.A.C. 7:26L-2.1(a). The required written justification and compliance explanation will allow the Department to track an applicant’s progress toward compliance, as a waiver is temporary. The proposed rules require applicants to submit a written justification addressing why the use of an alternative to a polystyrene foam food service product is unfeasible, commercially unavailable, or reasonably unaffordable, along with documentation (for example, a tax form) proving the business has less than \$500,000 in gross annual income and the prices of current polystyrene foam products and their alternatives (such as online listings, invoices, receipts, or other product information). The contact information on the waiver application ensures a copy of the Department’s decision (the written denial or approval of the application) is sent to the applicant’s correct address.

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The Department will review each waiver application to determine its administrative completeness and if the Department determines a waiver application is deficient, it may issue a Notice of Deficiency. Upon the issuance of a Notice of Deficiency, the store or food service business will then have 30 calendar days to correct any deficiencies and submit a revised waiver application to the Department. If a store or food service business fails to submit a revised waiver application or fails to fully cure the noted deficiencies within 30 days, the Department will issue a denial. The Department may deny a waiver application, or revised waiver application, in whole or in part, and request additional information necessary for it to act on the application. Any waiver application the Department determines to be administratively complete will be considered as “pending approval” for compliance with this chapter, such that an applicant need not comply with the requirement from which it has requested a waiver while its waiver application is pending. The Department will deny a waiver application if it fails to meet the requirements at N.J.A.C. 7:26L-2.1(a) or (b). Finally, if the Department determines a waiver application has met the section’s requirements, the Department will issue the waiver. Issued waivers are valid for one year, beginning on the issued date, unless extended.

Enforcement N.J.A.C. 7:26L-3

The Act prescribes the penalties for violations of the Act and its implementing rules. N.J.S.A. 13:1E-99.131. The Department, a municipality, or any entity certified pursuant to the County Environmental Health Act, N.J.S.A. 26:3A2-21 et seq., has enforcement authority. The Department proposes to codify the penalties and the Act’s enforcement provisions at N.J.A.C. 7:26L-3, Enforcement. As provided in the Act, pursuant to proposed N.J.A.C. 7:26L-3.1,

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Enforcement and right of entry, the Department, a municipality, and any entity certified pursuant to the County Environmental Health Act, N.J.S.A. 26:3A2-21 et seq., has the authority and may institute a civil action to enforce the Act and the proposed rules and enter a property, facility, building, premises, site, or place to ascertain compliance. The proposed rule expressly authorizes such entry and directs that each person, store, or business shall, upon request, provide the Department, municipality, or any entity certified pursuant to the County Environmental Health Act any information to determine compliance with the Act or the proposed rules. N.J.A.C. 7:26L-3.1(b) and (c).

Any person who violates the proposed rules shall be, upon written notice, subject to a warning for a first offense, a civil penalty of up to \$1,000 for a second offense, and a civil penalty of up to \$5,000 for a third or following offense pursuant to proposed N.J.A.C. 7:26L-3.2(a). If the violation is of a continuing nature, each day the violation continues is an additional, separate, and distinct offense. In accordance with the Act, the penalty may be collected in a civil action by a summary proceeding.

If a person receives a notice of a violation, proposed N.J.A.C. 7:26L-3.2(c) provides for a 30-day period for the person to comply before being subject to a penalty. The Department believes that in most instances, 30 days is a sufficient timeframe for a store or food service business to stop selling or providing single-use plastic bags or polystyrene foam food containers to customers. The 30-day compliance timeframe may be extended at the discretion of the enforcing organization (the Department, County Environmental Health Act entity, or municipality) for good cause, such as recognition of delays for arranging replacement containers or other necessary and appropriate reasons.

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The Department, municipalities, and certified County Environmental Health Act entities may settle any penalty action through a stipulation, settlement, or consent order pursuant to proposed N.J.A.C. 7:26L-3.2(d). Payment of a penalty pursuant to any such action will be considered a prior violation for the purpose of determining subsequent offender status.

The Act and proposed N.J.A.C. 7:26L-3.2(e) require that any penalty collected pursuant to this chapter be remitted to the State Treasurer for deposit in the Clean Communities Program Fund, with the exception that a municipality or entity certified pursuant to the County Environmental Health Act may retain 30 percent of any penalty it collects. The Clean Communities Program Fund is the funding source for the New Jersey Clean Communities program, which is a Statewide, comprehensive, litter-abatement program.

If the parties fail to resolve a penalty, the enforcing agency may pursue a summary proceeding pursuant to the Penalty Enforcement Law in accordance with proposed new N.J.A.C. 7:26L-3.2(f). The Department, a municipality, and any entity certified pursuant to the County Environmental Health Act, may also pursue civil action for injunctive relief to prohibit and prevent a violation of the law and regulations through the Superior Court, a municipal court, or any other court of competent jurisdiction. While the Department anticipates most penalty actions will be amicably resolved, it may be necessary to take action in court to address non-compliance.

Miscellaneous Provisions

Proposed N.J.A.C. 7:26L-1.5 provides information regarding where the regulated community may obtain and submit Department forms, checklists, and other information related to this chapter's requirements, including a waiver application form, frequently asked questions,

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and guidance. Online resources can be found on the Department's website,

www.nj.gov/dep/dshw/.

As provided at proposed N.J.A.C. 7:26L-1.2, the chapter is to be liberally construed and should a court find any section, subsection, provision, clause, or portion of this chapter to be unconstitutional, the remaining rules will remain in effect.

Social Impact

The Department anticipates the proposed new rules will have a positive social impact. Although most of the positive social impact is a result of the Act, which went into effect on May 4, 2022, the proposed rules codify the Act's requirements for the prohibition of single-use plastic carryout bags, single-use paper carryout bags, and polystyrene foam food service products. The proposed rules implement the statutory prohibition of single-use plastic carryout bags, polystyrene foam food service products, and the reduction in the use of paper carryout bags from grocery stores greater than 2,500 square feet, and provide greater clarity as to their scope. The proposed rules will continue to benefit the social welfare by reducing the amount of litter entering public lands and waterways, as well as reducing the improper disposal of these products and the discharge of microplastics. As the Legislature found, plastics released in the environment do not biodegrade, but instead break down into smaller pieces, known as microplastics, which accumulate in the natural environment and are eaten by fish and other marine life. See N.J.S.A. 13:1E-99.126. Microplastic pollution moves through natural food webs and accumulates in fish and shellfish tissues, which means microplastics and associated pollutants can move into the food chain. *Ibid.*

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Economic Impact

The Department anticipates the implementation of the proposed new rules will have little, if any, economic impact. The Act went into effect on May 4, 2022, and, therefore, most economic impacts have already occurred. While the Department acknowledges the Act had economic impacts, the Department does not anticipate the proposed new rules will cause any additional impacts. Specifically, entities impacted by the Act have already discontinued the use of single-use plastics bags and have switched to compliant products prior to the publication of this rulemaking. Certain entities may continue to find that compliant products have a higher cost than the products they replace, but this was already the case pursuant to the Act and additional costs are not expected specifically as a result of the proposed rules. The same is true for the costs that State residents, who may continue to face costs to purchase reusable bags while shopping, if they do not bring reusable bags with them, or in the form of higher delivery service fees.

Environmental Impact

The Department anticipates the proposed new rules will have a neutral impact on the environment because they implement provisions of the Act that are, for the most part, already in effect. However, this does not mean that the prohibition on single-use plastics will have a neutral effect on the environment.

The Legislature's findings identify the environmental harms that result from single-use plastics. N.J.S.A. 13:13-99.126. Since 1950, global annual production of plastics has increased

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from two million tons to over 381 million tons. Approximately one-third of all plastics produced are single-use plastics, which are plastics designed to be used only once and then thrown away. According to the Legislature's estimate, 100 billion single-use plastic carryout bags and 25 billion polystyrene foam coffee cups are thrown away in the United States each year. In 2017, despite efforts to encourage recycling, only 8.4 percent of plastics in the United States were recycled; instead, most single-use plastics are disposed of in landfills, are incinerated, or become litter in waterways and oceans.

When plastics are released in the environment, they do not biodegrade, but instead break down into smaller pieces, known as microplastics, which accumulate in the natural environment and are eaten by fish and other marine life. Microplastic pollution moves through natural food webs and accumulates in fish and shellfish tissues, which means microplastics and associated pollutants can move into the food chain.

Approximately eight million tons of plastic end up in the oceans annually. Without action, scientists estimate that, by 2050, the mass of plastic pollution in the ocean will exceed the mass of fish. In fact, there is a collection of litter in the North Pacific Ocean, known as the Great Pacific Garbage Patch, that is 7.7 million square miles and is composed primarily of plastics. According to the Legislature, one study found plastics in the gut of every sea turtle examined and in 90 percent of seabirds examined. Plastics have been known to cause death or reproductive failure in sea turtles, birds, and other organisms that ingest plastic.

As plastics break down through photodegradation, they release harmful chemicals, such as bisphenol A (BPA), into the environment that have been linked to health problems in humans. These chemicals enter the food chain when consumed by marine life. Further, single-use plastic

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waste creates visual pollution, degrades water quality, and impacts the tourism, fishing, and shipping industries, all of which are major contributors to the New Jersey economy.

The Legislature recognizes that New Jersey must do its part to minimize plastic pollution in the ocean, and to ensure that future generations have a clean and healthy environment to live, work, and recreate. Banning or limiting the use of single-use plastic carryout bags, polystyrene foam food service products, and single-use plastic straws is a significant step in this effort, as these items are among the most significant sources of beach and ocean pollution. The Legislature and the Department anticipate that banning or limiting the use of single-use plastics will drastically lower consumer consumption of single-use plastics.

Federal Standards Statement

N.J.S.A. 52:14B-1 et seq., requires State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The proposed new rules are not promulgated pursuant to the authority of or to implement, comply with, or participate in any program established pursuant to Federal law, or under a State statute that incorporates or refers to Federal law, Federal standards, or Federal requirements. Accordingly, no further analysis is required.

Jobs Impact

The Department does not anticipate the proposed new rules will have a major impact on Statewide job retention or creation. The Act's elimination of single-use plastics in stores, polystyrene foam in food service businesses, and single-use paper bags in grocery stores does not

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affect employment or management. In the case of a grocery store, the statutory prohibition of single-use plastic and paper carryout bags may result in savings that would allow grocery stores to invest in additional personnel, thereby having a positive impact on job creation.

Agricultural Industry Impact

The Department does not anticipate the proposed new rules will have an impact on the State's agricultural industry. The proposed new rules govern the State requirements for single-use plastic carryout bags, single-use paper carryout bags, and polystyrene foam food service products. The Act's elimination of the single-use plastic carryout bag may be a benefit to the local farming community, in that members of the farming community who sell directly to consumers, such as a farm market or stand that falls under the definition of food service business, may decrease their costs by not providing such bags to customers.

Regulatory Flexibility Analysis

As required pursuant to the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated the reporting, recordkeeping, and other compliance requirements that the proposed new rules would impose upon small businesses. The Regulatory Flexibility Act defines the term "small business" as "any business which is a resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees."

To the extent the proposed new rules impact small businesses, the various compliance requirements, associated costs, and other impacts are discussed in the notice of proposal

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Summary and Economic Impact above. The proposed new rules accommodate small businesses, insofar as N.J.A.C. 7:26L-2.1(a) allows a person to obtain a one-year waiver for a specific polystyrene foam food service product if the person demonstrates that it has less than \$500,000 in gross annual income from the previous tax year to demonstrate that there is no reasonably affordable, commercially available alternative to the polystyrene foam food service product. To allow small businesses to otherwise continue to distribute single-use plastics would defeat the goals of the Act.

Housing Affordability Impact Analysis

Pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-4.1b, the Department has evaluated this rulemaking to determine the impact, if any, on the affordability of housing. The proposed new rules govern the sale and provision of single-use plastic and paper bags, and polystyrene foam food products. Accordingly, the Department has determined the proposed new rules are extremely unlikely to evoke a change in the average costs associated with housing in the State.

Smart Growth Development Impact Analysis

In accordance with the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-4.1b, the Department has evaluated the proposed new rules to determine the potential impacts on housing production in Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan. The proposed new rules govern the sale and provision of single-use plastic and paper bags, and polystyrene foam food products. Accordingly, the

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Department has determined the proposed rules are extremely unlikely to have an impact on housing production.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Department has evaluated this rulemaking and determined it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

CHAPTER 26L

CERTAIN SINGLE-USE PAPER AND PLASTIC CARRYOUT BAGS AND POLYSTYRENE FOAM FOOD SERVICE PRODUCTS

SUBCHAPTER 1. GENERAL PROVISIONS

7:26L-1.1 Purpose and scope

(a) This chapter governs the sale and distribution of single-use plastic carryout bags, single-use paper carryout bags, and polystyrene foam food service products.

(b) The purpose of this chapter is to ban or limit the use of the products identified at (a) above and to reduce the use of paper carryout bags, in order to address the Legislative findings at N.J.S.A. 13:1E-99.126.

(c) Restrictions on single-use plastic straws are set forth in the Department of Health rules at N.J.A.C. 8:24-10.4.

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7:26L-1.2 Construction and severability

- (a) This chapter shall be liberally construed to effectuate the purpose of the Act.
- (b) If any subchapter, section, subsection, provision, clause, or portion of this chapter, or the application thereof to any person is adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall be confined in its operation to the subchapter, section, subsection, provision, clause, portion, or application directly involved in the controversy in which the judgment was rendered and it shall not affect or impair the remainder of this chapter or the application thereof to other persons.

7:26-1.3 Prohibitions

- (a) Except as provided at N.J.A.C. 7:26L-1.6, Exemptions, and 2, Temporary Waivers and Exemption Extensions:

1. No store or food service business shall provide or sell a single-use plastic carryout bag to a customer;
2. No grocery store shall provide or sell a single-use paper carryout bag to a customer;
3. No food bank or food pantry shall provide a single-use plastic carryout bag to a customer;
4. No person shall sell or offer for sale in the State any polystyrene foam food service product; and
5. No food service business shall provide or sell any food in a polystyrene foam food service product.

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7:26L-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

“Act” means N.J.S.A. 13:1E-99.126 et seq.

“Carryout bag” means a bag that is provided by a store or food service business to a customer for the purpose of transporting groceries, prepared foods, or retail goods. “Carryout bag” shall not include:

1. A bag used solely to contain or wrap uncooked meat, fish, or poultry;
2. A non-handled bag used solely to package loose items such as fruits, vegetables, nuts, coffee, grains, baked goods, candy, greeting cards, flowers, or small hardware items;
3. A bag used solely to contain live animals, such as fish or insects sold in a pet store;
4. A bag used solely to contain food sliced to order, such as deli meats and cheeses;
5. A square, flat bottom, moisture-proof, hot food packaging bag, used solely to contain a container of soup;
6. A bag used solely to contain ready-to-serve food that has direct contact with the bag;
7. A laundry, dry cleaning, or garment bag;
8. A bag provided by a pharmacy to carry prescription drugs;
9. A newspaper bag; or
10. A bag used solely to insulate food to maintain temperature.

“Department” means the New Jersey Department of Environmental Protection.

“Food bank” means the same as the term is defined at N.J.S.A. 24:4A-2.

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"Food pantry" means a nonprofit organization or government entity that distributes food to individuals in need of assistance, including, but not limited to, a soup kitchen, homeless shelter, or religious organization.

"Food service business" means a business that sells or provides food for consumption on or off the premises, and includes, but is not limited to, any restaurant, café, delicatessen, coffee shop, convenience store, grocery store, vending truck or cart, food truck, farm market or stand, movie theater, or business or institutional cafeteria, including those operated by or on behalf of any governmental entity, school cafeterias, and businesses that provide service to those entities. For purposes of this definition, a school means an establishment for teaching and learning, including, but not limited to, preschool, day care center, elementary school, junior high or middle school, high school, vocational/technical, college, and university.

"Grocery store" means a self-service retail establishment that occupies at least 2,500 square feet and that sells household foodstuffs for off-site consumption, including, but not limited to, fresh produce, meat, poultry, fish, deli products, dairy products, canned foods, dry foods, beverages, baked foods, or prepared foods. "Grocery store" shall not include an establishment that handles only prepackaged food that does not require time or temperature controls for food safety.

"Hemp product" means a finished product with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent that is derived from or made by processing a hemp plant or plant part and prepared in a form available for commercial sale.

"Person" means any individual, corporation, company, association, society, firm, partnership, joint stock company, food service business, or governmental entity. "Person" shall,

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for the purpose of enforcement of this chapter, include a responsible corporate official, which includes a managing member of a limited liability company or a general partner of a partnership.

“Plastic” means a synthetic material made from linking monomers through a chemical reaction to create an organic polymer chain that can be molded or extruded at high heat into various solid forms retaining their defined shapes during the life cycle and after disposal.

“Plastic” includes compostable plastic certified pursuant to ASTM D6400 (available at www.ASTM.org) and bioplastic, or plastic made with non-petroleum source material.

“Polystyrene foam” means blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by a number of techniques, including, but not limited to, fusion of polymer spheres (expandable bead polystyrene), injection molding, foam molding, and extrusion-blow molding (extruded foam polystyrene).

“Polystyrene foam food service product” means a product made, in whole or in part, of polystyrene foam that is used for selling or providing a food or beverage, and includes, but is not limited to, a food container, plate, hot or cold beverage cup, meat or vegetable tray, cutlery, or egg carton.

“Reusable carryout bag” means a carryout bag that:

1. Is made of polypropylene fabric, Polyethylene Terephthalate (PET) nonwoven fabric, nylon, cloth, hemp product, or other fabric that is machine washable;
2. Has handles that are stitched to the bag. Stitching shall be ultrasonic or with thread; and
3. Is designed and manufactured for a minimum of 125 uses.

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“Single-use paper carryout bag” means a carryout bag made of paper that is not a reusable carryout bag.

“Single-use plastic carryout bag” means a carryout bag made of plastic that is not a reusable carryout bag.

“Store” means any grocery store, convenience store, liquor store, pharmacy, drug store, or other retail establishment.

7:26L-1.5 Forms, checklists, information, Department address and website

(a) Forms, checklists, and other information relating to this chapter can be obtained from the Division of Sustainable Waste Management at the address at (b) below, by telephone at (609) 984-4250, or through the Division’s website at www.nj.gov/dep/dshw/.

(b) Any waiver, exemption application, or correspondence shall be submitted to:

Division of Sustainable Waste Management
Bureau of Solid Waste Planning and Licensing
PO Box 420
Mail Code: 401-02C
401 East State Street
2nd Floor, West Wing
Trenton, NJ 08625-0420

Materials sent or delivered to any address other than the listed address above shall be considered not received by the Department.

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(c) Questions regarding the requirements of this chapter can be directed to the Division of Sustainable Waste Management, Bureau of Solid Waste Planning and Licensing, by email to Singleuseplastics@dep.nj.gov.

7:26L-1.6 Exemptions

(a) The following products are exempt from the prohibitions at N.J.A.C. 7:26L-1.3 until May 4, 2025:

1. A tray used for raw or butchered meat, including poultry, or fish that is sold from a refrigerator or similar retail appliance;
2. A food product pre-packaged by the manufacturer in a polystyrene foam food service product;
3. A polystyrene foam food service product, used for the health or safety of a patient or resident of a hospital, nursing home, or correctional facility; and
4. Any other polystyrene foam food service product as determined necessary by the Department.

(b) The Department may extend the exemptions in this section if it determines, in writing, that there is no cost-effective and readily available alternative for the item. Each extension may be for up to one year. The Department may extend an exemption beyond one year if the Department determines, in writing, that there continues to be no cost-effective and readily available alternative for the item. An extension pursuant to this subsection may be at the Department's initiative or as a result of an application submitted in accordance with N.J.A.C. 7:26L-2.2. If the

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Department extends an exemption, it will publish a notice of administrative change in the New Jersey Register and post the extension notice on its website at www.nj.gov/dep/dshw/.

SUBCHAPTER 2. TEMPORARY WAIVERS AND EXEMPTION EXTENSIONS

7:26L-2.1 Waiver applications for food service products

(a) The Department may, upon written application by a person or food service business, waive the provisions at N.J.A.C. 7:26L-1.3(a)4 and 5 for the person or food service business for a period not to exceed one year, if:

1. There is no feasible and commercially available alternative for a specific polystyrene foam food service product. For purposes of this section, “feasible” means there is an alternative substance or product that serves the same purpose, or alternatives are available that prevent a risk of harm; or

2. The person or food service business:

i. Has less than \$500,000 in gross annual income from the previous tax year; and

ii. Demonstrates that there is no reasonably affordable, commercially available alternative to the polystyrene foam food service product. The Department will determine “reasonably affordable” based on factors including, but not limited to, the gross annual income of the applicant, cost of products currently used by the applicant at the time of the application, and alternative products presented by the person or food service business.

(b) To submit a waiver application pursuant to this section, the person or food service business shall provide the Department with a copy of the following:

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1. A completed application form (available at www.nj.gov/dep/dshw/). The form requires the following:

- i. The type of waiver being requested;
- ii. The name and address of the person or food service business;
- iii. The name, address, and contact information of the applicant; and
- iv. The product(s) for which the waiver is being requested;

2. A narrative demonstrating the requirements (a) above are met;

3. A detailed description of how the business shall achieve compliance during the time period of the waiver; and

4. A justification for each product a waiver sought, including reasons why an alternative to a polystyrene foam food service product is not feasible, commercially available, or reasonably affordable.

(c) In reviewing a waiver application, the Department will determine whether the waiver application contains all the information required at (b) above and, thus, is administratively complete. If the Department determines a waiver application is deficient in any manner, the Department will issue a Notice of Deficiency to the store or food service business. If the Department issues a Notice of Deficiency, the person or food service business shall have 30 calendar days, upon issuance of the Notice of Deficiency, to correct the noted deficiencies and submit a revised waiver application to the Department. The Department will review the revised waiver application for administrative completeness.

(d) A person or food service business's failure to submit a revised waiver application within 30 calendar days after receiving a Notice of Deficiency issued pursuant to (c) above or failure to

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fully correct the noted deficiencies within those 30 days shall constitute a failure to provide a complete application and shall result in denial of the application.

(e) The Department has the discretion to deny a waiver application or a revised waiver application in whole or in part, and shall request additional information, when necessary, to assist in the review process. A waiver application the Department deems to be administratively complete will be considered as "pending approval" for the purpose of this section.

(f) The Department will deny a waiver application if the application does not meet the requirements at (a) or (b) above.

(g) If the Department determines a person or food service business meets the requirements of this section, then the Department will issue a waiver for up to one year, beginning on the issue date.

7:26L-2.2 Exemption extension application

(a) A person or food service business may submit an application to the Department for an exemption extension, as identified at N.J.A.C. 7:26L-1.6(a), no later than 60 days before the expiration of an existing extension.

(b) An exempted product extension application shall include:

1. Identification of the specific item, including size or volume, if applicable, for the requested extension; and

i. A detailed cost analysis indicating there is no cost-effective alternative; or

ii. A detailed analysis indicating there is no commercially available alternative.

(c) The Department may deny an extension application in whole or in part and may request additional information for clarification during the review process. An application for extension

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that the Department deems administratively complete will be considered as "pending approval" for purposes of compliance with N.J.A.C. 7:26L-1.6.

(d) The Department will deny an extension application if:

1. The product is not exempt pursuant to N.J.A.C. 7:26L-1.6(a);
2. The application is not timely;
3. The application is not complete;
4. The applicant does not adequately respond to the Department's request for additional

information or within 30 days of the Notice of Deficiency; or the applicant has not demonstrated that there is no cost-effective or commercially available alternative.

(e) If the Department determines that the requirements of this section have been met, then the Department will issue an extension for a period of one year, beginning on the date of the extension approval.

SUBCHAPTER 3. ENFORCEMENT

7:26L-3.1 Enforcement and right of entry

(a) The Department, a municipality, and any entity certified pursuant to the County Environmental Health Act, N.J.S.A. 26:3A2-21 et seq., shall have the authority to enforce the Act and this chapter, and may institute a civil action for civil penalties as provided at N.J.A.C. 7:26L-3.2 and/or injunctive relief to enforce the Act and this chapter and to prohibit and prevent a violation thereof, and the court may proceed in the action in a summary manner.

(b) The Department, a municipality, and any entity certified pursuant to the County Environmental Health Act, shall have the authority to enter and inspect any property, facility,

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building, premises, site, or place for the purpose of ascertaining compliance or noncompliance with the requirements of the Act and this chapter.

(c) A person subject to this chapter shall provide, upon request of the Department, municipality, or any entity certified pursuant to the County Environmental Health Act, any information required to determine compliance with the Act, any rule or regulation adopted, or any waiver or order issued pursuant to the Act.

7:26L-3.2 Violations and penalties

(a) Any person who violates any provision of this chapter shall be, upon written notice, subject to a warning for a first offense, up to \$1,000 civil penalty for a second offense, and up to \$5,000 civil penalty for a third or subsequent offense, to be collected in a civil action by a summary proceeding as provided at (f) below.

(b) If the violation is of a continuing nature, each day during which the violation continues shall constitute an additional, separate, and distinct offense.

(c) A person shall be afforded 30 calendar days to attain compliance after receipt of an initial written warning notice pursuant to (a) above. The compliance timeframe may be extended at the discretion of the Department, municipality, or certified County Environmental Health Act entity that issued the warning for good cause, as necessary and appropriate.

(d) The Department, municipality, or certified County Environmental Health Act entity that issued the violation may resolve a penalty action by stipulation, settlement, or consent order. The payment of a penalty pursuant to a stipulation, settlement, or consent order shall be considered a prior violation for the purpose of determining subsequent offender status.

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(e) Any penalty collected pursuant to this chapter shall be remitted to the State Treasurer for deposit in the Clean Communities Program Fund, with an exception that a municipality or County Environmental Health Act certified entity may retain 30 percent of any penalty it collects.

(f) Any penalty ordered pursuant to this section may be imposed and collected with costs in a civil action by summary proceeding pursuant to the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. The Superior Court and the municipal court, or any court of competent jurisdiction overseeing a case in which injunctive relief has been requested, shall have jurisdiction to enforce the provisions of the Penalty Enforcement Law in connection with penalties pursuant to this section.