



*Submitted via email to plasticbags@dec.ny.gov*

February 3, 2020

Kayla Montanye  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-7253

**Re: Comments on the Department of Environmental Conservation’s Proposed Part 351, “Plastic Bag Reduction, Reuse, and Recycling”**

On behalf of Beyond Plastics, Clean and Healthy New York, New York Public Interest Research Group, and We ACT for Environmental Justice, Earthjustice submits these comments to the New York State Department of Environmental Conservation (“DEC”) on its proposed regulations, “Plastic Bag Reduction, Reuse, and Recycling,” to be codified at N.Y. Comp. Codes R. & Regs. (“NYCRR”) tit. 6, § 351 (2020).<sup>1</sup>

The signatory organizations are advocates for healthy communities and thriving environments in New York State and beyond. In concert, these organizations represent a broad range of groups impacted by lifecycle harms of plastic distribution, use, and disposal. Accordingly, these groups recognize the importance of reducing plastic carryout bag use.

For the reasons explained below, we urge DEC to make the following changes:

*Proposed exemptions—*

- **Eliminate section 351-1.2(f)(11)**, which adds reusable bags to the list of exempt bags, **section 351- 1.2(n)(5)(i)**, which defines reusable bags to include 10 mil plastic bags, and **section 351-1.2(n)(5)(ii)**, which defines reusable bags to include plastic bags over a certain weight. Title 28’s ban on the distribution of plastic carryout bags contains no exception for reusable bags, and DEC has no authority to carve such an exemption into the law. In addition, such an exemption defeats the intent and structure of the Act, which is intended to prohibit the distribution of plastic bags.
- **Eliminate section 351-1.2(f)(12)**, which adds film plastic bags—based on DEC’s case-by-case determination—to the list of exempt bags. DEC may not add to the Act’s list of

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<sup>1</sup> For the purposes of this comment letter, the proposed regulations, Part 351, will be referred to and cited simply as “section 351” or “§ 351” given that the regulations have yet to be codified in title 6 of the N.Y. Comp. Codes R. & Regs. All such references are from DEC’s regulations proposed for adoption on Nov. 27, 2019.

exempt bags, and DEC's proposal to do so by giving itself unfettered discretion is not allowed.

- **Eliminate the language in section 351-1.2(f)(1)** that adds "or other unwrapped food, flower, or plant item" to the exemption enumerated in the statute. As noted above, DEC may not add new exemptions to the plastic bag ban.
- **Clarify section 351-1.2(f)(9)** so that stores that sell both prepackaged and prepared food understand that they are prohibited from distributing plastic carryout bags for anything other than prepared food.

*Proposed definitions—*

- **Eliminate language in section 351-1.2(m)** that adds "film" to the definition of plastic carryout bag. DEC cannot narrow the Act's definition of plastic carryout bags; doing so amounts to rewriting the law.
- **Eliminate language in section 351-1.2(g)** that defines film plastic to mean bags below 10 mil. Only Title 27 defines film plastic, and DEC lacks discretion to add new conditions to that definition.

## **I. Introduction**

Plastics are "among the most pervasive materials on the planet."<sup>2</sup> Roughly two-thirds of all plastic ever produced remains in the environment—either as pollution in oceans and other landscapes, as microparticles in air, soil, and rain, or as microparticles in humans and animals.<sup>3</sup>

Plastic is problematic from the point of raw material extraction to its eventual disposal and dispersion.<sup>4</sup> Nearly all plastic produced today—99 percent—is derived from fossil fuels.<sup>5</sup> Fossil fuel extraction, transport, refining, and storage cause a myriad of harms resulting from toxic fracking chemicals, diesel-spewing trucks, pipelines that can explode, and storage facilities that can leak and contaminate water supplies.<sup>6</sup> Toxic chemical additives are also introduced when fossil fuel feedstocks are transformed into plastic resins.<sup>7</sup> As one researcher noted, "Every type

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<sup>2</sup> Center for International Environmental Law, *Plastic & Health: The Hidden Costs of a Plastic Planet* at 5 (Feb. 2019), <https://www.ciel.org/wp-content/uploads/2019/02/Plastic-and-Health-The-Hidden-Costs-of-a-Plastic-Planet-February-2019.pdf> ("Plastic and Health Report") (attached as Exhibit 1).

<sup>3</sup> *Id.*; see also Gregory A. Wetherbee et al., *It Is Raining Plastic*, U.S. Geological Survey Open File Report 2019-1048 (2019), <https://pubs.er.usgs.gov/publication/ofr20191048>; Damian Carrington, *People Eat at Least 50,000 Plastic Particles a Year, Study Finds*, *The Guardian*, June 5, 2019, <https://www.theguardian.com/environment/2019/jun/05/people-eat-at-least-50000-plastic-particles-a-year-study-finds>.

<sup>4</sup> *Plastic and Health Report* at 1, *supra* note 2.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 1, 12–15.

<sup>7</sup> *Id.* at 2; Ecology Center, *Adverse Health Effects of Plastics*, <https://ecologycenter.org/factsheets/adverse-health-effects-of-plastics/> (last visited Jan. 31, 2020) (attached as Exhibit 2); Kevin Loria, *Most Plastic Products Contain Potentially Toxic Chemicals, Study Reveals*, *Consumer Reports* (Oct. 2, 2019) <https://www.consumerreports.org/toxic-chemicals-substances/most-plastic-products-contain-potentially-toxic-chemicals/>; Health and Environmental Alliance, *New Study on Widely Used Plastic Products Confirms*

of plastic contains unknown chemicals.”<sup>8</sup> One study found toxic compounds in a variety of plastic polymer types, including high-density polyethylene (“HDPE”) and low-density polyethylene (“LDPE”)—both of which are common raw materials for plastic bags.<sup>9</sup>

As finished products, plastics continually shed particles—and, in turn, the toxic chemicals added to plastics shed as well.<sup>10</sup> Microplastics, which can enter a body via contact, ingestion, or inhalation, can cause an array of health impacts, including cancer, cardiovascular diseases, diabetes, chronic inflammation, autoimmune conditions, neurodegenerative diseases, and strokes.<sup>11</sup> Microplastics also accumulate in food chains and release toxic additives, making the plastic and component chemicals accessible throughout the food chain.<sup>12</sup>

Recycling will not solve the problems with plastics.<sup>13</sup> Even recycled plastics will ultimately be incinerated or sent to landfills after being recycled a few times.<sup>14</sup> Incinerating plastics releases toxic fumes that harm communities often already overburdened by heavily polluting industries.<sup>15</sup> Further, the ash produced from incineration creates a new waste disposal problem, and one that can expand the cycle of toxic exposure.<sup>16</sup> Off-gasses from landfills can also exacerbate climate change and air pollution.<sup>17</sup>

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Toxicity of Chemical Content—Health Groups Call on New European Commission to Make Addressing Chemical Pollution a Priority (Sept. 17, 2019), <https://www.env-health.org/new-study-on-widely-used-plastic-products-confirms-toxicity-of-chemical-content-health-groups-call-on-new-european-commission-to-make-addressing-chemical-pollution-a-priority/> (attached as Exhibit 3).

<sup>8</sup> Loria, *supra* note 7.

<sup>9</sup> Health and Environmental Alliance, *supra* note 7; *see also* Ecology Center, *supra* note 7 (noting that chemicals found in plastic bags are likely human carcinogens).

<sup>10</sup> Plastic and Health Report at 2, *supra* note 2; Heather J. Hamlin et al., *Migration of Nonylphenol From Food-Grade Plastic Is Toxic to the Coral Reef Fish Species Pseudochromis Fridmani*, 139 *Chemosphere* 223, 223 (Nov. 2015), <https://www.sciencedirect.com/science/article/pii/S0045653515006517> (attached as Exhibit 4); Ecology Center, *supra* note 7.

<sup>11</sup> Plastic and Health Report at 2, *supra* note 2.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> John Hite, *We Can't Recycle Our Way Out of the Plastic Pollution Problem*, Conservation Law Foundation (Apr. 24, 2019), <https://www.clf.org/blog/cant-recycle-out-of-plastic-pollution-problem-guide/>.

<sup>14</sup> *Id.*

<sup>15</sup> GAIA, *Burning Plastic: Incineration Causes Air Pollution, Dioxin Emissions, Cost Overruns*, <https://www.no-burn.org/burning-plastic-incineration-causes-air-pollution-dioxin-emissions-cost-overruns/> (last visited Jan. 31, 2020) (attached as Exhibit 5). Of note, the problem of plastic waste is not affecting just New Yorkers. In 2019, the Covanta Essex incinerator in Newark, New Jersey burned nearly 400,000 tons of New York City's residential trash. Sally Goldenberg & Danielle Muoio, *How de Blasio Bombed in His Attempt to Fix New York's Garbage Crisis*, Politico (Jan. 6, 2020), <https://www.politico.com/news/2020/01/06/bloomberg-de-blasio-new-york-garbage-088805>. The Newark incinerator, located in an environmental justice community, is just one mile from a school. *Id.*

<sup>16</sup> Plastic and Health Report at 46–47, *supra* note 2.

<sup>17</sup> *Id.* at 2.

As the New York legislature and Governor Cuomo recognized, the 23 billion plastic bags New Yorkers use each year contribute to environmental and health issues like those described above.<sup>18</sup> For these reasons, the State legislature passed the New York State Bag Waste Reduction Act ("the Act" or "Title 28") in order to reduce plastic carryout bag use—and in turn, aid in the reduction of the lifecycle harms intrinsic to plastic bag creation, use, and disposal.

## **II. Statutory Background**

The New York State Legislature has previously recognized the harms posed by plastic bags. In 2009, the legislature passed Title 27 of the Environmental Conservation Law, titled the Plastic Bag Reduction, Reuse, and Recycling Act ("Title 27"). N.Y. Env'tl. Conserv. Law ("ECL") §§ 27-2701 *et seq.* Title 27 requires operators of certain large stores to establish "an at-store recycling program pursuant to the provisions of this title that provides an opportunity for a customer of the store to return to the store clean plastic carryout bags and film plastic." ECL § 27-2703.<sup>19</sup> Other retail establishments that provide plastic carryout bags to customers may also implement a similar program. *Id.*

Importantly, Title 27 authorized DEC to promulgate "any rules and regulations necessary to implement the provisions" of the title. ECL § 27-2711. Despite this provision, DEC did not propose or issue any regulations to implement Title 27.

In 2016, the New York City Council adopted a local plastic bag ban. The ban required all NYC retailers to charge a 5-cent fee for each carryout bag provided at check-out.<sup>20</sup> But in February 2017, Governor Cuomo signed bills preempting New York City's plastic bag ban. The Governor promised to form a "statewide task force to develop a uniform state plan for addressing the

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<sup>18</sup> New York State Plastic Bag Task Force, *An Analysis of the Impact of Single-Use Plastic Bags*, Apx. A. at 25–26 (Jan. 2018) ("Legislative Report"), [https://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/dplast\\_icbagreport2017.pdf](https://www.dec.ny.gov/docs/materials_minerals_pdf/dplast_icbagreport2017.pdf).

<sup>19</sup> "Store" is defined as a "retail establishment that provides plastic carryout bags to its customers as a result of the sale of a product and (a) has over ten thousand square feet of retail space, or (b) such retail establishment is part of a chain engaged in the same general field of business which operates five or more units of over five thousand square feet of retail space in this state under common ownership and management." ECL § 27-2701.

<sup>20</sup> Bag It NYC, "Was Previous Legislation Introduced?" <http://bagitnyc.org/> (last visited Jan. 31, 2020). State and local government actors are not the only major players in the debate surrounding plastic bag bans in New York. The American Progressive Bag Alliance, an industry coalition, actively opposes plastic bag bans across the nation—and they aren't alone. Samantha Maldonado et al., *Plastic Bags Have Lobbyists. They're Winning*. Politico (Jan. 20, 2020), <https://www.politico.com/news/2020/01/20/plastic-bags-have-lobbyists-winning-100587>. It is well-documented that the plastic bag and chemical industries work diligently to defeat, stall, and weaken plastic bag and other single-use plastics laws. *See, e.g., id.*; Tik Root, *Inside the Long War to Protect Plastics*, Center for Public Integrity (May 16, 2020), <https://publicintegrity.org/environment/pollution/pushing-plastic/inside-the-long-war-to-protect-plastic/>.

plastic bag problem.”<sup>21</sup> The Governor then introduced proposed language for a plastic bag ban in his fiscal year 2019–20 budget.<sup>22</sup>

In 2019, after 10 years of Title 27, the legislature enacted Title 28. The New York Plastic Bag Task Force Report—a report issued to the legislature—further explains the impetus behind Title 28, stating, “[i]t is important to reduce waste regardless of where it comes from, and despite efforts by New York State to require recycling of these single-use plastic bags by certain stores, the problems have persisted.”<sup>23</sup> The Report also states that “it is time for New York State to take more decisive action to expand our efforts to reduce the use of single-use plastic bags by consumers and keep as much plastic possible from the waste stream.”<sup>24</sup>

Title 28 requires no regulatory action from DEC for the Plastic Bag Ban to take effect on March 1, 2020. Nevertheless, DEC is taking this opportunity to release regulations covering *both* Title 28 and its long-delayed Title 27 regulations.

**III. DEC lacks authority to add to and expand the Act’s enumerated list of exemptions to the plastic bag ban.**

DEC is proposing to carve out new exemptions from the plastic bag ban of Title 28 in violation of the text, structure, and purpose of that statute. Specifically, the bold and italicized text below indicates DEC’s additions to the Act’s list of exempt plastic carryout bags:

<p style="text-align: center;"><b>The Bag Waste Reduction Act</b> ECL § 27-2801(1) “Exempt bag” means a bag:</p>	<p style="text-align: center;"><b>Proposed Regulations</b> § 351-1.2(f) “Exempt bag” means a bag that is:</p>
(a) used solely to contain or wrap uncooked meat, fish, or poultry	(1) used solely to contain or wrap uncooked meat, fish, seafood, poultry, <b><i>or other unwrapped food, flower, or plant item</i></b>
(b) bags used by a customer solely to package bulk items such as fruits, vegetables, grains, or candy	(2) used by a customer solely to package items from bulk containers, including fruits, vegetables, grains, candy, <b><i>small hardware items (such as nuts, bolts, and screws), live fish, or live insects</i></b>
(c) bags used solely to contain food sliced or prepared to order	(3) used solely to contain food sliced or prepared to order
(d) bags used solely to contain a newspaper for delivery to a subscriber	(4) used solely to contain a newspaper for delivery to a subscriber

<sup>21</sup> Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, The New York Times (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html>.

<sup>22</sup> See S. B. 1508 (A. 2008) Pt. H, § 3 (N.Y. 2019).

<sup>23</sup> Legislative Report at 1, *supra* note 18.

<sup>24</sup> *Id.*

<p style="text-align: center;"><b>The Bag Waste Reduction Act</b> ECL § 27-2801(1) "Exempt bag" means a bag:</p>	<p style="text-align: center;"><b>Proposed Regulations</b> § 351-1.2(f) "Exempt bag" means a bag that is:</p>
(e) bags sold in bulk to a consumer at the point of sale	(5) sold in bulk quantities to a consumer at the point of sale <i>that were specifically prepackaged in a manner to allow for bulk sale (for example, quantities of bags prepackaged in individual pre-sealed boxes) or prepackaged in individual boxes or containers for sale to a customer</i>
(f) trash bags	(6) sold as a trash bag
(g) food storage bags	(7) sold as a food storage bag, <i>such as those in snack, sandwich, quart, and gallon sizes</i>
(h) garment bags	(8) used as a garment bag, <i>such as those used by a dry cleaner or laundry service</i>
(i) bags prepackaged for sale to a customer	(no regulation listed)
(j) plastic carryout bags provided by a restaurant, tavern or similar food service establishment, as defined in the state sanitary code, to carryout or deliver food	(9) provided by a restaurant, tavern or similar food service establishment, as defined in the New York state sanitary code, to carry out or deliver food
(k) bags provided by a pharmacy to carry prescription drugs	(10) provided by a pharmacy to carry prescription drugs
	<b>(11) a reusable bag, as that term is defined in this Part</b>
	<b>(12) a film plastic bag for which there is no reasonable or practical alternative for storing, containing or transporting items, as determined by the department</b>

DEC has no authority to expand on the enumerated exemptions in the statute. It is a basic rule of statutory construction that where the legislature "explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980); *see also Raynor v. Landmark Chrysler*, 959 N.E.2d 1011, 1015 (N.Y. 2011) ("[w]here a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."); *In re Hering*, 133 A.D. 293, 295 (N.Y. App. Div. June 18, 1909) (adding to an enumerated list is forbidden where the legislature "in express words provided exceptions to a general rule, [as] such provisions are to be deemed exclusive and to forbid the creating of any further exceptions by implication.").

Here, the legislature did not intend for DEC to expand beyond the exemptions enumerated in the Act. The legislature unambiguously signaled its intent to ban the distribution of plastic carryout bags, except in certain limited circumstances.<sup>25</sup> This Act's language plainly points to the fact that the legislature defined exempt bags, noting that eligible parties may not distribute "any plastic carryout bags . . . unless bags are exempt bags as defined in subdivision one of section 27-2801." ECL § 27-2803 (emphasis added).<sup>26</sup> Moreover, the Act's list of eleven specific types of exempt bags does not provide language (e.g., "such as," "including," or "not limited to") indicating that additional types of bags may be considered beyond the statutory language. *See id.* § 27-2801 (listing specific types of bags to be considered exempt); *Raynor v. Landmark Chrysler*, 959 N.E.2d at 1015. Indeed, the legislature plainly considered the plastic bag ban to be self-effectuating, with no provision indicating that DEC must or even should issue clarifying regulations concerning the ban.<sup>27</sup>

DEC's proposal to add exemptions warrants no special deference. An agency's interpretation of a statute is not entitled to weight if the statute did not call for the agency's special "knowledge and understanding of underlying operational practices or entails an evaluation of factual data." *Kurcsics v. Merchants Mut. Ins. Co.*, 403 N.E.2d 159, 164 (N.Y. 1980); *see also Occidental Chem. Corp. v. Pub. Serv. Comm'n*, 499 N.Y.S.2d 214, 217 (N.Y. App. Div. Feb. 20, 1986) (looking at the use of words and statutory context to determine whether the legislature "evinced[d] . . . legislative intent to delegate broad administrative responsibility" to the agency). Special knowledge or understanding of operational practices are not at play here. Furthermore, the Act's language in no way indicates that the legislature sought to delegate broad administrative responsibility to DEC. Rather, by broadening the scope of the plastic carryout bag exemptions, DEC is stepping into the shoes of the legislature and undermining the intent of the Act.

While DEC relies on unrelated sections of code—specifically, ECL §§ 1-0101, 3-0301, 8-0113, and 27-2711—for its general authority to issue rules concerning Title 28, *see* DEC, Regulatory

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<sup>25</sup> *See* Memorandum in Support of Assembly Bill No. A05753, New York State Assembly (Feb. 14, 2019), [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A05753&term=2019&Summary=Y&Memo=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A05753&term=2019&Summary=Y&Memo=Y).

<sup>26</sup> The intent of the legislature is evident elsewhere in the Act's plain language. *See* S. B. 1508-C (A. 2008- C) Pt. H § 3, p. 5 lines 1– 2 (N.Y. 2019), <https://static1.squarespace.com/static/59bd5150e45a7caf6bee56f8/t/5cdb82e6e2c483d0f99f580d/1557889766796/New+York+State+Bag+Waste+Reduction+Act+2019.pdf> (adding the language "the sale of reusable bags as defined in subdivision one of section 27-2801 of the environmental conservation law" to the alcoholic beverage control law) (emphasis added). The "as defined" language makes abundantly clear that the *statute's definition* controls what constitutes an exempt bag.

<sup>27</sup> This reading is supported by comparing the proposed bag ban language Governor Cuomo issued in the 2019–20 budget proposal—language the legislature chose not to adopt. The Governor's language would have granted greater discretionary authority to DEC to issue exemptions to the ban on plastic carryout bags. *See* S. B. 1508 (A. 2008) Pt. H, § 3 (N.Y. 2019) ("Beginning March first . . . providing plastic carryout bags to customers is prohibited *except as otherwise provided by the department pursuant to regulations.*") (emphasis added); *see also id.* (listing exemptions, including "[t]his prohibition shall not apply to . . . (i) any other bag *exempted by the department in regulations.*") (emphasis added).

Impact Statement on Proposed Part 351 Plastic Bag Reduction, Reuse and Recycling at 3 (2019) ("Regulatory Impact Statement"), none of those provisions authorize DEC to create new exemptions that are not allowed by the statute.

Sections 03-0301 and 1-0101, when read together, make clear that DEC cannot issue regulations that could worsen the State's environment and health of its people. ECL § 3-0301 establishes that "[i]t shall be the responsibility of the department... to carry out the environmental policy of the state set forth in section 1-0101," while in ECL § 1-0101, it is "declared to be the policy of the State. . . to conserve, *improve* and protect its natural resources and environment and to prevent . . . pollution, in order to enhance the health . . . of the people" (emphasis added). It logically follows from these definitions that any regulation that does not improve the State's environment—i.e., one that could lead to more pollution—is not allowed. As noted throughout this comment letter a number of DEC's proposed exemptions would allow more plastic carryout bags to be distributed than what the legislature intended. As such, DEC may not promulgate exemptions that fail to improve the environment.

Section 3-0301 further cabins DEC's authority to issue regulations only when doing so "may be necessary." ECL § 3-0301(2)(m). DEC's proposed regulations appear largely unnecessary. The legislature took careful steps when crafting the Act to make clear that certain establishments are prohibited from distributing plastic carryout bags unless such bags are exempt (*see id.* § 27-2803); the legislature then defined the operative terms, including "plastic carryout bag" and "exempt bag." *Id.* §§ 27-2801(1), (2). Nowhere in the Act does the legislature leave room for additional definitions or interpretations. Regulations adding to these terms—particularly additions allowing for greater use of plastic bags—are therefore not needed. *Andrus*, 446 U.S. at 616.

Section 8-0113 provides that the "commissioner shall adopt rules and regulations implementing the provisions of *this* article," ECL § 8-0113(1) (emphasis added). The article referred to in that section—the State Environmental Quality Review Act ("SEQRA")—sets out rules describing when and how agencies are to prepare an environmental impact statement. *Id.* § 8-0109. It is inaccurate for DEC to assert that SEQRA provides authority for it to issue regulations about a plastic bag ban.

DEC's reliance on section 27-2711 is similarly unavailing. DEC asserts that "Titles 27 and 28 use similar terms, have some overlapping provisions, and seek the reduction of the use of plastic bags." Regulatory Impact Statement at 3–4. But section 27-2711 (within Title 27) only authorizes DEC to "promulgate any rules and regulations necessary to implement the provisions of *this* title" (emphasis added). That section cannot be read to apply to Title 28, which was not even in existence when the legislature passed Title 27.

In sum, because DEC lacks authority to add to the Act's enumerated list of exemptions, the following changes must be made:



- § 351-1.2(f)(1)—DEC must remove the language “or other unwrapped food, flower or plant item from the proposed exemption,” as this language impermissibly broadens the instances in which customers may receive plastic carryout bags.
- § 351-1.2(f)(11)—DEC must remove the proposed exemption for “reusable bag[s], as that term is defined in this Part.” The Act does not list reusable bags as exemptions, and DEC is not allowed to step into the role of the legislature and do so.
- § 351-1.2(f)(12)—DEC must remove the proposed exemption for film plastic. The Act does not include film plastic as an exemption, and DEC cannot carve out an exemption for this material.

**IV. DEC must remove the “film plastic bag” exemption of section 351-1.2(f)(12) because it impermissibly grants DEC authority to determine, on a case-by-case basis, whether plastic bags are considered “exempt.”**

Under DEC’s proposed regulations, an exempt bag includes those film plastic bags that DEC alone determines qualify as exempt. § 351-1.2(f)(12) (“‘Exempt bag’ means a bag that is . . . *a film plastic bag* for which there is no reasonable or practicable alternative for storing, containing or transporting items, *as determined by the department.*”) (emphasis added). As noted in section III, *supra*, any additions to the Act’s list of exemptions is prohibited. Nor is such an exemption permissible if DEC layers a case-by-case determination process onto the exemption. Should section 351-1.2(f)(12) remain, the result will be haphazard and arbitrary application of the exempt bag provision. DEC has no rational basis for creating such unpredictable and potentially unfair results.

It is evident that the legislature didn’t intend for film plastic to be exempt under the bag ban. The Act doesn’t mention—nor require reference to—the term film plastic. The term only appears in Title 27 because film plastic is part of Title 27’s at-store recycling program. *See* ECL § 27-2701 (defining film plastic); *id.* § 27-2703 (defining store responsibilities with respect to Title 27 as including “provid[ing] an opportunity for a customer of the store to return . . . film plastic.”). Here, DEC appears to import a definition operative to Title 27 in order to carve out an exemption in Title 28. This is not what the legislature intended.

In addition, section 351-1.2(f)(12) must be eliminated because it gives DEC unfettered discretion to decide whether and how the proposed film plastic exemption applies. Regulations must contain “narrow, objective, and definite standards to guide the [decisionmaking] authority . . . to guard against the danger of arbitrary action.” *United States v. Abney*, 534 F.2d 984, 986 (D.C. Cir. 1976) (citation omitted); *see also Gurnsey v. Sampson*, 57 N.Y.S.3d 855, 856 (N.Y. App. Div. June 30, 2017) (holding that regulations must be able “to guide those who must administer the law.”) (citation omitted). Section 351-1.2(f)(12) lacks the requisite guiding standards that are the hallmark of lawful agency regulations. The proposal that DEC will determine when there are “no reasonable or practical alternatives for storing, containing, or transporting items” other than film plastic bags invites limitless and inconsistent agency discretion. § 351-1.2(f)(12). DEC

doesn't define what "reasonable" or "practical" mean in this context. The lack of clarity means that DEC staff will make determinations "based upon their own unwritten personal standards." *White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976). This will result in haphazard and uneven application, making this section of the proposed regulations unlawful. *Turner v. Mun. Code Violations Bureau of City of Rochester*, 997 N.Y.S.2d 876, 877 (N.Y. App. Div. Nov. 21, 2014) (noting that there must be "clear standards" to guide an agency).

**V. DEC must remove its proposed definitions of "reusable bag," "plastic carryout bag," and "film plastic" because these definitions undermine the Act's language and intent.**

Regulations cannot contravene a statute's plain language, intent, and framework. As New York courts recognize, "the clearest indicator of legislative intent is the statutory text, the starting point . . . must always be the language itself, giving effect to the plain meaning thereof." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 673 N.Y.S.2d 966, 968 (N.Y. 1998). Moreover, it is well-established that regulations cannot amount to public policy determinations, thereby encroaching on the role of the legislature. *See Rent Stabilization Ass'n of N.Y. City v. Higgins*, 630 N.E.2d 626, 631 (N.Y. 1993) ("As an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations"); *see also LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (N.Y. 2018) ("If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers."). A number of DEC's proposed definitions—detailed below—must be removed for failing these principles.

**A. DEC must not broaden the definition of "reusable bag" to allow various types of plastic bags, as it does through sections 351-1.2(f)(11) and (n)(5)(i) and (ii).**

As noted in section III, *supra*, reusable bags are not among the legislature's limited exemptions to the prohibition on plastic carryout bags. The Act mentions reusable bags only in two contexts: first, in ECL § 27-2801 to define the term, and second, in ECL § 27-2805(7), specifying that funds collected from the fee on paper carryout bags are to be used by cities and counties to distribute reusable bags.

In its proposed regulations, however, DEC attempts to circumvent the legislature's clear language and intent by adding what *amounts to* a plastic bag exemption into the law. DEC does this by (1) adding the term reusable bag to the list of proposed exemptions in section 351-1.2(f)(11) (providing that an exempt bag is "a reusable bag, as that term is defined in this Part"), and then (2) by defining reusable bag to explicitly include various types of plastic bags:

(n) 'Reusable bag' means a bag that . . .

(5) is hand washable or machine washable;

(i) has a minimum thickness of 10 mils for bags made of *petroleum-based or non-petroleum-based low-density polyethylene (LDPE) or high-density polyethylene (HDPE) or other plastic material* of petroleum or non-petroleum origin;

(ii) has a minimum fabric weight of 80 grams per square meter (GSM) for bags made of any . . . *petroleum based . . .* origin, including woven or nonwoven *polypropylene (PP), polyethylene-terephthalate (PET)*, cotton, jute, or canvas;

*Id.* §§ 351-1.2(n)(5)(i), (ii) (emphasis added). The italicized language above identifies plastic materials.<sup>28</sup> These sections both contradict the language and intent of the Act and must be eliminated.

<p align="center"><b>The Bag Waste Reduction Act</b> ECL § 27-2801(4) “Reusable bag” means a bag:</p>	<p align="center"><b>Proposed Regulations</b> § 351-1.2(n) “Reusable bag” means a bag that:</p>
(a) made of cloth or other machine washable fabric that has handles. . .	
(b) a durable bag with handles that is specifically designed and manufactured for multiple reuse.	(1) is specifically designed and manufactured for multiple reuses
	(2) has a minimum lifespan of 125 uses, with a use equal to the ability to carry a minimum of 22 pounds over a distance of at least 175 feet
	(3) holds at least 22 pounds for the duration of the lifespan of the bag
	(4) has at least one strap or handle that is separately attached, does not stretch and is fastened to the bag in such a manner that it allows the bag to meet the strength and durability standards in paragraphs 351-1.2 (n)(2) and (3), unless otherwise approved by the department. . .
	(5) is hand washable or machine washable (i) has a minimum thickness of 10 mils for bags made of petroleum-based or non-

<sup>28</sup> See Omnexus, “Polyethylene (PE),” <https://omnexus.specialchem.com/selection-guide/polyethylene-plastic#LDPE> (last visited Jan. 31, 2020) (noting that LDPE is a type of plastic most commonly used in plastic bags, and that HDPE, another type of plastic, has many applications across industries, including packaging).

	<p>petroleum-based low-density polyethylene (LDPE) or high-density polyethylene (HDPE) or other plastic material of petroleum or non-petroleum origin;</p> <p>(ii) has a minimum fabric weight of 80 grams per square meter (GSM) for bags made of any non-film plastic of natural, synthetic, petroleum based, or non-petroleum-based origin, including woven or nonwoven polypropylene (PP), polyethylene-terephthalate (PET), cotton, jute, or canvas;</p> <p>(iii) is made of a combination of the materials specified in subparagraphs 351-1.2(n)(5)(i) and (ii) above; or</p> <p>(iv) has a design of equivalent material strength and durability, as approved by the department.</p>
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As noted in section III, *supra*, DEC's reusable bag exemption in section 351-1.2(f)(11) is unlawful on its own, as it adds an entirely new exemption to the Act's already-enumerated list. The combination of this exemption and sections 351-1.2(n)(5)(i) and (ii), however, further violates the structure and purpose of the Act because those sections will allow continued distribution of plastic bags in such a way that the legislature did not intend. As noted in *Hines v. LaGuardia*, 56 N.E.2d 553, 553 (N.Y. 1944), agencies may not "thwart a statute [with clear] purposes." Here, the Act's purpose could not be more clear: to ban the provision of all plastic bags, less the enumerated exempt bags. ECL § 27-2803. The legislature created this ban out of recognition that plastic bags are abundant and harmful to the environment and health. *See* Regulatory Impact Statement at 4 (describing the problem of New York residents using 23 billion plastic bags annually); Legislative Report at 2-5 (describing the lifecycle harms of plastic bags). DEC cannot undermine the legislature's intent with an exemption and definition that will allow for more plastic bags.

Further, the language in the Act makes clear that the legislature does not want plastic bags to be considered reusable. This is evident when comparing the definition of reusable bag in Titles 27 and 28. In 2009, the legislature passed Title 27 with "reusable bag" defined as:

- (a) a bag made of cloth or other machine washable fabric that has handles; or
- (b) a durable *plastic* bag with handles that is specifically designed and manufactured for multiple reuse.

ECL § 27-2701(5) (emphasis added).

Title 28, on the other hand, eliminates the term italicized above—plastic. The text of Title 28 provides that reusable bag means a bag:

- (a) made of cloth or other machine washable fabric that has handles; or
- (b) a durable bag with handles that is specifically designed and manufactured for multiple reuse.

*Id.* § 27-2801(4). The legislature's purposeful cutting of the word plastic indicates that, going forward, reusable bags do not include plastic bags. *See Raynor v. Landmark Chrysler*, 959 N.E.2d at 1015 ("As the clearest indicator of legislative intent is the statutory text . . . [and] the plain meaning thereof.") (citations omitted). Indeed, now with the comprehensive plastic bag ban of Title 28, large stores that could previously comply with Title 27's requirement to have "reusable bags" available for purchase by stocking plastic reusable bags now must do so using reusable bags made of other materials. *See* ECL § 27-2705(5).

In addition to the points above, evidence in DEC's rulemaking record shows that consumers provided with 10 mil bags may use them as single-use-plastics, similar to their thinner counterparts. In fact, plastic bag bans in other states have demonstrated this principle. A legislative report prepared for the Act highlights the failure of plastic bag thickness requirements in Chicago and Hawaii:

The success of Chicago's fee came after they repealed their plastic bag ban in late 2016, which had been in effect for 16 months. Their original plastic bag ordinance was specific to banning plastic bags of a certain thickness, so stores simply purchased thicker plastic bags and the original ordinance failed to reduce the number of single-use bags used. For the same reason, the City of Honolulu, Hawaii switched from a ban on plastic bags to a fee on plastic bags.<sup>29</sup>

Faced with this evidence, the legislature wisely chose *not* to include a thickness-based exemption to the plastic bag ban, and DEC has no discretion to insert an exemption that the legislature considered but chose not to adopt. With its proposed section 351-1.2(n)(5)(i), DEC is ignoring this evidence and attempting to carve-out allowances for plastic bags above a certain thickness. Ignoring this evidence makes section 351-1.2(n)(5)(i) untenable.

The language in section (n)(5)(ii) is also concerning because its language—allowing reusable bags to include certain petroleum-based products—also facilitates the continued use of plastic. DEC cannot add language that will weaken the effect of the Act by allowing more plastic use.

For these reasons, DEC's redefinition of reusable bags in the proposed regulations cannot stand, and the agency must eliminate sections 351-1.2(n)(5)(i) and (ii).

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<sup>29</sup> Legislative Report at 13, *supra* note 18 (citations omitted).

**B. DEC must remove the proposed definitions concerning film plastic in sections 351-1.2(m) and (g) because they will defeat the legislature's intent of reducing plastic bag use.**

DEC's proposed regulations concerning film plastic are problematic because the Act does not mention—nor require reference to—film plastic, and DEC's proposed regulations importing mentions of film plastic serve only to allow more plastic bag use than what the legislature intended. Accordingly, sections 351-1.2(m) (adding the term film plastic to the definition of plastic carryout bag) and 351-1.2(g) (defining film plastic based on a bag's thickness) must be removed.

***Section 351-1.2(m)***

First, DEC's addition to the definition of plastic bag defies legislative intent and amounts to an unlawful rewrite of the statute. According to DEC, a carryout bag would mean "any *film plastic* bag, other than an exempt bag . . ." § 351-1.2(m) (emphasis added). The addition of the term film plastic stands in stark contrast to the Act's plain language, defining plastic carryout bag as "any *plastic* bag, other than an exempt bag . . ." ECL § 27-2801(2) (emphasis added).<sup>30</sup>

DEC must note that the "[l]egislature is presumed to mean what it says." *Schmidt on Behalf of McNell v. Roberts*, 548 N.E.2d 1284, 1288 (N.Y. 1989); *see also Majewski*, 673 N.Y.S.2d at 968 (holding that regulations cannot defy legislative intent and plain language). By adding film plastic to the definition of plastic carryout bag, DEC is attempting to rewrite the law. This overstep is prohibited. *See Rent Stabilization Ass'n of N.Y. City*, 630 N.E.2d at 631 ("As an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations"); *see also Kurcsics*, 403 N.E.2d at 164 (an agency may not change requirements set forth in the clear language of a statute). Here, had the legislature meant to define plastic carryout bags as film plastic, it would have done so; certainly Title 27's use of film plastic indicates that lawmakers are aware of this term. *See* ECL § 27-2701(7) (defining film plastic); *id.* § 27-2703 (defining at-store recycling requirements for film plastic).

***Section 351-1.2(g)***

The proposed regulations copy and paste Title 27's definition of film plastic. § 351-1.2(g) (defining film plastic as "plastic resin or other material . . . less than 10 mils in thickness"). As noted earlier in this section, film plastic does not play a role in Title 28. DEC therefore has no authority to add this definition—and the cascade of consequences resulting from its appearance

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<sup>30</sup> The legislature's intent to exclude the term "film" from the definition of plastic carryout bag is supported by comparing the language put forth by Governor Cuomo in his budget proposal to the final language adopted as the Bag Waste Reduction Act. The Governor proposed "plastic carryout bag" to mean "any *film plastic* bag provided" to a customer. S. B. 1508 (A. 2008) Pt. H, § 1 (N.Y. 2019) (emphasis added). The legislature chose not to adopt this language that DEC is now attempting to re-insert.

in the proposed regulations—as part this rulemaking. The Act did not envision such a result, and the law governing agency rulemaking does not allow it. *Goodwin v. Perales*, 646 N.Y.S.2d 300, 306 (N.Y. 1996) (holding that agencies cannot adopt regulations that are not “in harmony with the statute’s over-all purpose.”).

For these reasons, sections 351-1.2(m) and (g) must be removed.

**VI. DEC should clarify the contours of section 351-1.2(f)(9), the provision allowing “food service establishments” to distribute plastic carryout bags.**

DEC proposes adopting—without clarification—the legislative text defining exempt bag as including those “provided by a restaurant, tavern or similar food service establishment, as defined in the New York state sanitary code, to carry out or deliver food.” See § 351-1.2(f)(9). For the reasons set forth below, DEC should clarify the types of establishments covered by this provision, with the most important clarification being that stores selling both prepackaged and prepared foods are only permitted to use plastic carryout bags for prepared foods.

New York’s sanitary code defines food service establishments as “a place where food is prepared and intended for individual portion service and includes the site at which the individual portions are provided, whether consumption occurs on or off the premises.” 10 NYCRR § 14-1.20(a). The sanitary code excludes “retail food stores” from the definition of food service establishments. *Id.*

When read together in the context of the statute, these definitions indicate that food service establishments—those that serve prepared foods—are permitted to distribute plastic carryout bags for prepared food, § 351-1.2(f)(9), whereas retail food stores are prohibited from distributing plastic bags. Thus, an establishment that falls within the retail food store definition cannot give customers plastic carryout bags for non-prepared food products—such as boxed foods and household items—simply because it may also serve prepared foods.

DEC should clarify the contours of section 351-1.2(f)(9) so as to avoid regulatory confusion. By some estimates there are over 10,000 bodegas throughout New York City.<sup>31</sup> Add to this the number of delis and gas stations across the State, and it’s clear that for the rollout of the Act to be successful, the public and store owners must be able to easily identify which entities and products are covered by exemptions, and which are not. DEC should therefore add language to section 351-1.2(f)(9) clarifying that stores offering prepared foods may offer plastic carryout bags for those items, but for other items (e.g., non-prepared foods, boxed goods) plastic carryout bags are prohibited.

**CONCLUSION**

We appreciate the opportunity to provide our comments on DEC’s proposed regulations for the New York State Bag Waste Reduction Act. We are available should DEC have questions.

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<sup>31</sup> CBS News, *Bodegas: The Life Blood of NYC Neighborhoods* (Apr. 19, 2017), <https://www.cbsnews.com/news/bodegas-the-life-blood-of-new-york-city-neighborhoods/>.

Respectfully submitted,

/s/ Jasmine Jennings

/s/ Victoria Bogdan Tejada

Jasmine Jennings

Victoria Bogdan Tejada

Earthjustice

48 Wall Street, 15th Floor

New York, NY 10005

(212) 845-8026

[jjennings@earthjustice.org](mailto:jjennings@earthjustice.org)

[vbogdantejada@earthjustice.org](mailto:vbogdantejada@earthjustice.org)

*On behalf of Beyond Plastics, Clean and Healthy New York, New York Public Interest Research Group, and WE ACT for Environmental Justice*

**Enclosure:**

Exhibit 1: Center for International Environmental Law, *Plastic & Health: The Hidden Costs of a Plastic Planet* (Feb. 2019).

Exhibit 2: Ecology Center, *Adverse Health Effects of Plastics*.

Exhibit 3: Health and Environmental Alliance, *New Study on Widely Used Plastic Products Confirms Toxicity of Chemical Content—Health Groups Call on New European Commission to Make Addressing Chemical Pollution a Priority* (Sept. 17, 2019).

Exhibit 4: Heather J. Hamlin et al., *Migration of Nonylphenol From Food-Grade Plastic Is Toxic to the Coral Reef Fish Species *Pseudochromis Fridmani**, 139 *Chemosphere* 223, 223 (Nov. 2015).

Exhibit 5: GAIA, *Burning Plastic: Incineration Causes Air Pollution, Dioxin Emissions, Cost Overruns*.