

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Energy and Environment

January 21, 2016

Re: Response to Comments; Proposed Rulemaking: Draft DCMR Title 21 Water and Sanitation; Chapter 23 Expanded Polystyrene Prohibition

The following are the Department of Energy and Environment's (DOEE) responses to comments on the proposed rulemaking for the Expanded Polystyrene Prohibition, published in the August 28, 2015 issue of the DC Register (62 DCR 11937). The comment period began on August 28, 2015, and closed on September 26, 2015. DOEE appreciates the time and effort taken by all parties who reviewed and commented on the proposed rulemaking. DOEE received two (2) formally submitted comments. This response document provides both comments followed by DOEE's response to each comment.

Comments

1. *Where is the language for how to apply for an [sic] exemptions and waivers? It clearly states in the law that there is an opportunity to apply for an exemption and waiver - but not addressed in these proposed regulations.*

Title VI, Subtitle R of the Fiscal Year 2016 Budget Support Act of 2015, effective on October 22, 2015 (D.C. Law 21-036; 62 DCR 10905), repealed the affordability waiver for the District's food service ware requirements. There are no exemptions or waivers for the requirements.

2. *Although the sections of the regulations dealing with enforcement mostly seem to be standard (for DC municipal regulations) and noncontroversial, 2303.6 could be strengthened. It currently reads: "Each instance or day of a violation of each provision of this chapter shall be a separate violation." To maximize the impact, we suggest inserting something like " , whichever is greater in number," after "chapter".*

As proposed, the rulemaking preserves DOEE's discretion to pursue enforcement action for every instance or day in which an entity violates the expanded polystyrene prohibition, based on the specifics of each case. DOEE could use this discretion to fine first-time violators for a single instance of violation, a low-level penalty that would likely achieve compliance in most cases. However, DOEE could also use this discretion to issue larger and more punitive penalties for repeat violators that are aware of the law's requirements and are knowingly violating the ban. The commenter's proposed language would eliminate this enforcement discretion and require DOEE to issue an enforcement action for each observed violation (e.g., each transaction in which a business provides an expanded polystyrene container to a customer). Such a requirement could be overly punitive on the regulated community and would inhibit DOEE's ability to conduct appropriate enforcement and mutually-beneficial compliance assistance.