

## **DISTRICT DEPARTMENT OF THE ENVIRONMENT**

### **NOTICE OF FINAL RULEMAKING**

#### **Regulations on Retail Establishment Carryout Bags**

The Acting Director of the District Department of the Environment (“DDOE”), in accordance with the authority set forth in section 107(4) of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq.*), section 5(a) of the Anacostia River Clean Up and Protection Act of 2009 (the “Act”), effective September 23, 2009 (D.C. Law 18-55; D.C. Official Code § 2-1226.51 *et seq.*), Mayor’s Order 2006-61, dated June 14, 2006, and Mayor’s Order 2010-27, dated February 1, 2010, hereby gives notice of the adoption of a new Chapter 10, entitled Retail Establishment Carryout Bags, to Title 21 (Water and Sanitation) of the District of Columbia Municipal Regulations (DCMR).

This new chapter implements the provisions of the Act, which mandate that retail establishments charge a fee of five cents (\$0.05) for each disposable carryout bag provided to a customer, specify the material and labeling requirements of disposable carryout bags, authorize the retail establishment to retain a portion of the fee charged for each bag, allow the retail establishment to provide a credit to customers who provide their own carryout bags to package their purchases, and provide for penalties for violations of the requirements of the Act.

The rules explain how DDOE will implement and enforce the requirements of the Act. These rules do not set forth the procedures through which the Office of Tax and Revenue, or the Department of Motor Vehicles will implement and enforce requirements of the Act that are within their jurisdictions.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on February 5, 2010 (57 DCR 1260). The thirty (30) day comment period ended on March 7, 2010, and fourteen (14) sets of comments were received. Although the comments were considered, DDOE has determined that no substantive changes to the regulations were necessary pursuant to the comments. A summary of the comments and DDOE’s responses may be viewed on DDOE’s website at [www.ddoe.dc.gov](http://www.ddoe.dc.gov), Regulatory and Legislative Affairs.

The following rules will be effective upon publication of this Notice in the *D.C. Register*:

**Title 21 (Water and Sanitation) of the DCMR is amended by adding a new Chapter 10, entitled Retail Establishment Carryout Bags, to read as follows:**

## **CHAPTER 10: RETAIL ESTABLISHMENT CARRYOUT BAGS**

### **1000 PURPOSE**

The purpose of this chapter is to implement the provisions of the Anacostia River Clean Up and Protection Act of 2009, effective September 23, 2009 (D.C. Law 18-55; D.C. Official Code § 2-1226.51 *et seq.*).

### **1001 DISPOSABLE CARRYOUT BAG FEE REQUIREMENT**

- 1001.1 Except as provided in Section 1006, a retail establishment shall charge each customer making a purchase from the establishment a fee of five cents (\$0.05) for each disposable carryout bag provided to the customer with the purchase.
- 1001.2 The fee imposed by Section 1001.1 shall be charged to a customer making a purchase whether the purchase is in person, through the internet, by telephone, by facsimile, electronically, or by any other means.
- 1001.3 The retail establishment shall indicate on the customer transaction receipt the number of disposable carryout bags provided, and the total amount of the fee charged.

### **1002 DISPOSABLE CARRYOUT BAG MATERIAL AND LABELING REQUIREMENTS**

- 1002.1 Starting on April 1, 2010, each disposable carryout bag provided by a retail establishment shall meet the following requirements:
  - (a) All paper and plastic disposable carryout bags provided shall be one hundred percent (100%) recyclable;
  - (b) All paper and plastic disposable carryout bags shall display in a highly visible manner the phrase “Please Recycle This Bag”, or a substantially similar phrase. The lettering of the phrase shall meet the following requirements:
    - (1) The lettering of the phrase shall be at least one half of an inch (0.5”) in height or at least seventy-five percent (75%) of the width of the front panel of the bag;

(2) The lettering of the recycling statement shall appear on the exterior of either the front or back panel of the bag, and not on a gusset or the base of the bag; and

(3) The lettering of the recycling statement shall be in a boldface font.

(c) A disposable carryout bag made of paper shall contain a minimum of forty percent (40%) post-consumer recycled content; and

(d) A disposable carryout bag made of plastic shall be made of high-density polyethylene film marked with the SPI resin identification code 2, or low-density polyethylene film marked with the SPI resin identification code 4.

1002.2 A disposable carryout bag shall meet the requirements of this section, even if the bag is biodegradable or compostable.

1002.3 A disposable carryout bag made of both plastic and paper shall meet the paper carryout bag requirements of this section for the paper components of the bag, and shall meet the plastic carryout requirements of this section for the plastic components of the bag.

### **1003 RETAIL ESTABLISHMENTS SUBJECT TO CARRYOUT BAG REQUIREMENTS**

1003.1 For the purposes of this chapter, the term “retail establishment” means:

(a) Any business required to have a Public Health: Food Establishment Retail endorsement to a basic business license pursuant to D.C. Official Code § 47-2827; and

(b) Any business required to have an off-premises retailer’s license, class A or B, pursuant to D.C. Official Code § 25-112.

1003.2 Such retail establishments include, but are not limited to, the following types of business:

(a) Bakeries;

(b) Delicatessens;

(c) Grocery stores;

(d) Convenience stores that sell food;

(e) Restaurants (subject to the exception set forth in section 1006);

- (f) Food vendors;
- (g) Street vendors that sell food;
- (h) Liquor stores; and
- (i) Any business that sells food items, whether or not the principal purpose of the business is to sell food items, including a department store or electronics store that has a Public Health: Food Establishment Retail endorsement to its basic business license.

**1004 APPLICATION OF CARRYOUT BAG REQUIREMENTS TO RETAIL ESTABLISHMENTS SELLING BOTH FOOD AND NON-FOOD ITEMS**

1004.1 The disposable carryout bag fee, and material and labeling requirements of this chapter, shall apply to a disposable carryout bag provided with the purchase of any item from a retail establishment subject to this chapter, even if the item is a non-food item.

**1005 APPLICATION OF CARRYOUT BAG REQUIREMENTS TO RESTAURANTS**

1005.1 A restaurant with seating, as described in D.C. Official Code § 47-2827(e)(2), shall comply with the fee, and material and labeling requirements of Sections 1001 and 1002, for each of the following disposable carryout bags provided to a customer to take food away from the restaurant:

- (a) A plastic carryout bag;
- (b) A paper carryout bag, if:
  - (1) The bag includes a non-food item, whether or not the bag also contains a food item; and
  - (2) The restaurant directly charges the customer for the non-food item.

1005.2 A retail establishment where food is prepared and sold only for consumption off the premises, such as a delicatessen without seating or a carry-out establishment, that does not qualify as a restaurant under D.C. Official Code § 47-2827(e)(2), shall comply with the fee, and material and labeling requirements of Sections 1001 and 1002, for all paper and plastic disposable carryout bags provided to a customer with his or her purchase.

**1006 CARRYOUT BAGS NOT SUBJECT TO THIS CHAPTER**

- 1006.1 For the purposes of this Chapter, the term “disposable carryout bag” shall not include:
- (a) A bag used by a customer inside stores to package bulk items, such as fruit, vegetables, nuts, grains, or candy;
  - (b) A bag used by a customer inside a store to contain or wrap frozen foods, meat, or fish, whether or not the items are prepackaged;
  - (c) A bag used by a customer inside a store to contain or wrap flowers, potted plants, or other items where dampness may be a problem;
  - (d) A bag used by a customer inside a store to contain unwrapped prepared foods or bakery goods;
  - (e) A bag used by a customer by a pharmacist to contain prescription drugs;
  - (f) A newspaper bag, door-hanger bag, laundry-dry cleaning bag, or bags sold in a package intended for use as garbage, pet waste, or yard waste bags;
  - (g) A bag provided to a customer by the retail establishment for the purpose of transporting a partially consumed bottle of wine, as required by D.C. Official Code § 25-113(b)(5)(C);
  - (h) A paper carryout bag provided to a customer to take food away from a restaurant with seating, as described in D.C. Official Code § 47-2827(e)(2), if the bag contains only:
    - (1) Food items; or
    - (2) Food and non-food items that the restaurant does not directly charge the customer for; and
  - (i) A reusable carryout bag, as defined in Section 1099.

**1007 RETENTION AND REMITTANCE OF THE CARRYOUT BAG FEE**

- 1007.1 Except as provided in Section 1008, a retail establishment shall retain one cent (\$0.01) of each fee of five cents (\$0.05) charged pursuant to section 1001 and shall remit the remaining four cents (\$0.04) of each fee of five cents (\$0.05) charged pursuant to section 1001 to the Office of Tax and Revenue.

**1008 CARRYOUT BAG CREDIT PROGRAM**

- 1008.1 If a retail establishment participates in the voluntary Carryout Bag Credit Program, the establishment may retain an additional one cent (\$0.01), for a total

of two cents (\$0.02), from each fee of five cents (\$0.05) charged pursuant to Section 1001. The remaining three cents (\$0.03) of each fee of five cents (\$0.05) charged pursuant to Section 1001, shall be remitted to the Office of Tax and Revenue.

- 1008.2 The voluntary Carryout Bag Credit Program means a program under which the retail establishment:
- (a) Credits the customer at least five cents (\$0.05) for each carryout bag provided by the customer for packaging his or her purchases, regardless of whether the bag is paper, plastic, or reusable;
  - (b) Prominently advertises its participation in, and the substance of, the Carryout Bag Credit Program at each of its checkout registers;
  - (c) Reflects the total credit amount on the receipt of the customer who provides his or her own bag or bags; and
  - (d) Registers its participation in the Carryout Bag Credit Program with the District Department of the Environment.
- 1008.3 A retail establishment shall not be required, as a prerequisite to participating in the Carryout Bag Credit Program, to provide a credit to a customer for any portion of the customer's purchase for which the customer declines the use of a carryout bag.
- 1008.4 The retail establishment shall credit a customer a total number of five cent (\$0.05) credits that reasonably relate the amount of goods purchased to the number of carryout bags reasonably required to carry the purchased goods.
- 1008.5 A credit provided to a customer pursuant to a Carryout Bag Credit Program shall not reduce the amount of fees due to the Office of Tax and Revenue under Sections 1007.1 and 1008.1.
- 1008.6 A retail establishment that withdraws from the Carryout Bag Credit Program shall provide notice to the District Department of the Environment of its withdrawal at least ten (10) business days before its withdrawal.
- 1009 TAX STATUS OF FEES RETAINED BY RETAIL ESTABLISHMENT**
- 1009.1 The fees retained by a retail establishment under this Chapter shall not be classified as revenue and shall be tax-exempt for the purposes of Chapters 18, 20, and 27B of Title 47 of the District of Columbia Official Code.

1009.2 The fees retained by the retail establishment under this section shall be excluded from the definition of a retail sale under D.C. Official Code § 47-2001(n)(2) and from the definition of gross receipts under D.C. Official Code § 47-2761(5).

1009.3 The fees to be remitted to the District under Sections 1007.1 and 1008.1 shall be added to other tax payments in determining whether the electronic payment requirement under D.C. Official Code § 47-4402(c) applies.

## **1010 PROHIBITION ON CERTAIN FEE-RELATED PRACTICES**

1010.1 A retail establishment shall not assume or absorb, or refund to the customer, the disposable carryout bag fee.

1010.2 A retail establishment shall not advertise or hold out or state to the public or to a customer, directly or indirectly, that the reimbursement of the disposable carryout bag fee or any part of the fee to be collected by the retail establishment will be assumed or absorbed by the retail establishment or refunded to the customer.

## **1011 PROHIBITION ON SALE AND DISTRIBUTION OF CERTAIN DISPOSABLE CARRYOUT BAGS**

1011.1 Disposable carryout bags made of plastic that is not one hundred percent (100%) recyclable shall not be sold or distributed, retail or wholesale, in the District.

1011.2 The prohibition set forth in this section applies to all disposable carryout bags sold or distributed, retail or wholesale, to or by any establishment in the District, whether or not the establishment is a retail establishment.

## **1012 PENALTIES FOR VIOLATIONS**

1012.1 Violation of any of the requirements of this chapter, except for Sections 1007, 1008.1, 1008.5, and 1009, shall subject a retail establishment to the penalties set forth in this Chapter.

1012.2 If the Director of the District Department of the Environment (“Director”) determines that a violation of this chapter covered by subsection 1012.1 has occurred, the Director shall issue a warning notice to the retail establishment for the initial violation.

1012.3 If the Director determines that an additional violation of this chapter has occurred after a warning notice has been issued for an initial violation, the Director shall issue a notice of infraction and shall impose a penalty against the retail establishment.

- 1012.4 The penalty imposed by the Director shall not exceed the following, for each violation that occurs after the issuance of the warning notice:
- (a) One hundred dollars (\$100) for the first violation in a calendar year;
  - (b) Two hundred dollars (\$200) for the second violation in a calendar year; and
  - (c) Five hundred dollars (\$500) for the third and each subsequent violation in a calendar year.
- 1012.5 No more than one (1) penalty shall be imposed upon a retail establishment within a seven (7) calendar day period.
- 1012.6 A retail establishment shall have fifteen (15) calendar days after the date that a notice of infraction is issued to pay the penalty.
- 1012.7 The penalty shall double after fifteen (15) calendars days if the retail establishment:
- (a) Does not pay the penalty; or
  - (b) Fails to respond to a notice of infraction by either denying or objecting in writing to the infraction or penalty.
- 1012.8 A recipient may request a hearing pursuant to instructions contained in the notice of infraction.
- 1012.9 Hearings or adjudications of violations under this Chapter shall be conducted pursuant to the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code §§ 2-1831.01 *et seq.*).

## **1099 DEFINITIONS**

When used in this Chapter, the following words and phrases shall have the meanings ascribed:

**100 percent (100%) recyclable** - capable of being collected, separated, and recovered from the solid waste stream through the District's recycling programs, and either used again or reused in the manufacture or assembly of another package or product.

**Act** - means the Anacostia River Clean Up and Protection Act of 2009, effective September 23, 2009 (D.C. Law 18- 0055; D.C. Official Code § 2-1226.51 *et seq.*).



**Disposable carryout bag** - a bag of any material, commonly plastic or kraft paper, which is provided to a customer at the point of sale to carry purchases.

**Post-consumer recycled content** - any material that has completed its use as a consumer item and that would otherwise have been disposed of as municipal solid waste, but that has instead been reused or reconstituted as a product or raw material.

**Reusable carryout bag** - a bag with handles that is specifically designed and manufactured for multiple reuse and is made of cloth, fiber, other machine-washable fabric, or durable plastic that is at least two and one-quarter millimeters (2.25 mm) thick.

**Public comments to the Proposed Regulations on Retail Establishment Carryout Bags and DDOE's responses are as follows:**

1. Comment: Seven (7) comments were received in support of the bag fee.
2. Comments from Councilmembers Tommy Wells (Ward 6) and Mary Cheh (Ward 3):
  - a. Comment: The preamble to the notice of proposed rulemaking invited comments on the possible creation of a hardship exemption for certain types of retail establishments. Councilmembers Wells and Cheh wrote that the Act does not contain a provision for a hardship exemption, and that it was not the legislative intent of the Act to provide an "exit ramp" to any retailer within the named license categories. Accordingly, they state that the creation of such an exemption is outside the scope of the law and the authority of DDOE.

Response: No public comments were received in response to the request for the public to comment on the possible creation of a hardship exemption. DDOE concurs, and is consequently not making a change to the regulations. Indeed, DDOE has received comments that in fact, the 5-cent fee and consequent reduction in the use of disposable bags was saving businesses money, as customers could no longer expect businesses to provide them "free" disposable bags.

- b. Comment: Section 1001.2 imposes a fee on customers "making a purchase whether the purchase is in person, through the internet, by telephone, by facsimile, electronically, or by any other means." Councilmembers Wells and Cheh commented that the Act states in Sec. 2(1) that a disposable carryout bag is one provided to a consumer at the point of sale. In those cases where consumers are purchasing groceries via the internet using a grocery delivery service, there is no payment at the front door. Since in their view, the point of sale is the computer where no items are bagged, the customers cannot control the delivery apparatus.

Response: DDOE points to section 4(a)(1) of the Act, which makes clear that the fee for each disposable carryout bag shall be paid by the customer "at the time of purchase." The time of purchase may be in person, through the internet, by telephone, by facsimile, electronically, or by any other means. Although the retail establishment controls the delivery apparatus, the customer can influence the delivery practices of retail establishment by favoring those establishments with environmentally friendly delivery policies (over those that do not have environmentally friendly delivery policies). DDOE therefore determines that no change to the regulations is appropriate.

3. Comment: Section 1099 defines a "Reusable carryout bag" in part, as "durable plastic that is at least two and one-quarter millimeters (2.25 mm) thick." One commenter stated that they believed that section 2(4) of the Act and section 1099 of the proposed regulations were in error, and intended to define a "Reusable carryout bag" as being 2.25 *mils* thick, and not as 2.25 *mm* thick. The commenter stated that no 2.25 mm thick reusable were sold or distributed in the district, and thus they were concerned that the law might be unconstitutionally vague.

The commenter continued by stating that when a law or regulation “...provides no standard by which conduct falling within its scope may be ascertained. Such enactments infringe upon due process rights by failing to provide fair warning of what is prohibited and inviting capricious and arbitrary enforcement by public officials. Here, retail establishments cannot be sure which bags are allowed and which are not because all reusable carryout bags currently being distributed (including those provided by the District) are technically banned under the Act’s as-written language.”

Response: As the comment addresses legislative language and not the language of the proposed regulation, DDOE has determined that no change to the definition of a “Reusable carryout bag” is appropriate.

Additionally, DDOE states that the Act is not unconstitutionally vague since: (1) the Act *does* provides a clear definition as to which reusable bags are allowed in section 2(4) of the Act, when it defines a “Reusable carryout bag” as “a bag with handles that is specifically designed and manufactured for multiple reuse and is made of cloth, fiber, other machine washable fabric, or durable plastic that is at least 2.25 millimeters thick”, and (2) the Act *also* permits *cloth, fiber, and other machine washable fabric* reusable bags, which are available in great numbers in the District.

4. Comment: Another commenter stated that low-income families and those using food stamps should be exempt from the tax; that retailers whose revenues are primarily from sales of items other than food should also be exempt; that a tax on bottles or cans might be a better alternative; and that other than canvas or cotton bags, many reusable bags are not machine washable and can become unsanitary with frequent use.

Response: As the first three comments address legislative language and not the language of the proposed regulation, DDOE has determined that no change to the proposed regulations is appropriate. The fourth comment is outside the scope of the proposed regulations.

5. Comments from a national restaurant chain:
  - a. Comment: Section 1002.1(b) describes the labeling requirements for disposable carryout bags. The commenter opined that the bag design specifications are “confusing,” open to different interpretations, and “excessive.”

Response: Section 3(b)(3) of the Act requires the phrase “Please Recycle This Bag,” or a substantially similar phrase, be displayed on the bag’s exterior in “a highly visible manner.” Section 1002.1(b)(1) of the proposed regulations clearly states that the phrase “Please Recycle This Bag” shall be “at least one half of an inch (0.5”) in height or at least seventy-five percent (75%) of the width of the front panel of the bag”. DDOE believes that specific numerical requirements can be easily applied to phrases printed on a bag, and are therefore neither confusing nor open to varied interpretations. As the Act requires the phrase to be displayed in “a highly visible manner,” DDOE concludes that they are not “excessive,” are consistent with the Act, and that no change to the proposed regulations is appropriate.

- b. Comment: The commenter also noted that Section 1004.1 contained a typographical error that required the deletion of the word “by.”

Response: DDOE concurs, and the word “by” will be deleted from the final regulations. As this is a technical change, DDOE is not re-proposing the regulations as a result of this change.

- c. Comment: Sections 1005.1(b)(2) and 1006.1(h)(2) draw distinctions between paper carryout bags that contain food, plus a non-food item for which a restaurant “directly charges” (*e.g.* a CD or a coffee mug), versus a non-food item for which a restaurant only “indirectly charges” (*e.g.* a “free” toy with a child’s meal or the plastic cutlery and napkin provided with takeout meals). The commenter believes that this distinction is arbitrary, and not permitted by the Act.

Response: Section 2(1) of the Act defines a “disposable carryout bag” as “...a bag ... provided to a consumer ... *to carry purchases*” (emphasis added). Items such as CDs or coffee mugs that a restaurant directly charges for are *purchases*. Items such as a “free” toy with a child’s meal are *not purchased*, and are more akin to the plastic cutlery and napkin provided for “free” with a meal (in a paper bag).

Since these items are *not purchased* by the consumer, and the fee only applies to items that are *purchased*, these items are not relevant to the determination of whether the five-cent fee must be charged for paper carryout bags provided by restaurants. DDOE has therefore determined that no change to the proposed regulations is appropriate.

- d. Comment: Section 1005.2 requires delicatessens and carryout establishments to comply with the material and labeling requirements of sections 1001 and 1002. Such establishments are not eligible for the exception provided in sections 1005.1 and 1006.1(h). The commenter believes this section is not consistent with the Act.

Response: Section 2(1)(D) of the Act *only* excludes from the definition of a “Reusable carryout bag,” paper carryout bags provided to customers to take food away from restaurants. Retail establishments that are not restaurants, such as delicatessens and carryout establishments, are not included in this exception (*see* D.C. Official Code § 47-2827(e)(2)). DDOE has therefore determined that no change to the proposed regulations is appropriate.

6. Comments from representatives of the plastic industry :

- a. Comment: Section 1002.1(b) describes the labeling requirements for disposable carryout bags. Although the representative accepted the labeling provisions of the proposed regulations, they commented that they believed that there are certain public health risks associated with reusable bags, and that the regulations should require a warning about those suggested risks.

Response: As this comment goes beyond the scope of the Act, DDOE has determined that no change to the proposed regulations is appropriate.

- b. Comment: Sections 1005.1 and 1006(h) provide an exemption from the fee for paper carryout bags provided to customers to take food away from restaurants. The commenter requested that the exemption be extended also to plastic carryout bags provided to customers to take food away from restaurants. They stated that “...Almost every scientific study shows that plastic is better for the environment than paper.”

Response: Section 2(1)(D) of the Act *only* excludes from the bag fee paper carryout bags provided to customers to take food away from restaurants. As the comment addresses legislative language, and not the language of the proposed regulation, DDOE has determined that no change to the proposed regulations is appropriate.

- c. Comment: One commenter stated that: “The 40+% of litter in the Anacostia river attributed to plastic bags is so far out of scientific range to be “junk science,” and I question its publication.”

Response: The Anacostia River Trash Reduction Plan, prepared for DDOE by the Anacostia Watershed Society in December 2008, states on page xv: “The single largest component of trash in the streams, and most likely in the river, is plastic bags. Legislation requiring convenience store, grocery and food items bags to be biodegradable or to eliminate the use of any kind of “free” bag will effectively remove 47% of the trash from the tributaries and 21% from the main stem of the river.” The study may be accessed at:

[http://ddoe.dc.gov/ddoe/lib/ddoe/2009.01.29\\_Trash\\_Report\\_1.pdf](http://ddoe.dc.gov/ddoe/lib/ddoe/2009.01.29_Trash_Report_1.pdf).

- d. Comment: One commenter asked that the District “consider repealing the bag tax in favor of implementing a program like California, Delaware, and other coastal areas have done to educate residents to recycle more and encourage retailers to use plastic bags responsibly (pack more in a bag, do not provide a bag for larger items with handles).”

Response: Any repeal of the bag tax in favor of implementing an educational program addresses legislative language and not the language of the proposed regulation, and thus DDOE has determined that no change to the proposed regulations is appropriate.

7. Comments from a representative of a drug store:

- a. Comment: Section 1001.2 imposes a fee on customers “making a purchase whether the purchase is in person, through the internet, by telephone, by facsimile, electronically, or by any other means.” The commenter sought clarification on whether this section applies to a business unit that is not located in the District and that does not ship goods to customers in plastic bags.

Response: Section 1001.2 applies to “disposable carryout bags” as defined in section 2(1) of the Act. If a store provides “disposable carryout bags” (regardless of the origin of the delivery) then

the bag fee applies. However if the store provides to customers other types of containers to carry purchases, such as cardboard boxes, then the bag fee does not apply.

- b. Comment: Section 1012 provides for penalties to be imposed by the Director. The commenter suggested that the penalties for this act must only be applied “for the most egregious of actions,” and that the penalties should only apply if an establishment fails to participate in the District Bag Law. The commenter recommended that the penalties should not apply if a clerk “simply fails to correctly apply the plastic bag fee.”

Response: Section 5(b)(2) of the Act requires that “the Mayor shall impose a penalty on the retail establishment” and does not grant enforcement discretion to DDOE. Thus, the comment addresses legislative language and not the language of the proposed regulation, and thus DDOE has determined that no change to the proposed regulations is appropriate.