

**EXECUTIVE SUMMARY OF LEGAL CHALLENGE
TO THE NEW YORK CITY DEPARTMENT OF SANITATION'S ILLEGAL DETERMINATION
THAT EXPANDED POLYSTYRENE ("EPS" OR "FOAM") IS NOT RECYCLABLE**

A broad coalition consisting of the Restaurant Action Alliance NYC, individual restaurant owners, and foam foodservice manufacturers and recyclers (the "Coalition") has filed suit in New York State Supreme Court to overturn the de Blasio Administration's January 2015 decision to ban foam foodservice products in New York City.

The Sanitation Commissioner's determination (the "Determination") violated the New York City Council's clear statutory mandate requiring the recycling of foam foodservice products so long as it would be "economically feasible" and "environmentally effective" to do so. The Commissioner's Determination to the contrary was belied by an indisputable record confirming that foam foodservice products can be recycled to the City's economic and environmental benefit. Indeed, this Coalition's industry representatives committed to buy and recycle all of the City's polystyrene waste (not just foam foodservice products). Moreover, it would cost the City nothing to add polystyrene to the products the City already picks up for recycling, but the City would generate savings as a result from reduced landfill costs and even generate revenue. Thus, recycling all of the City's polystyrene would reduce the amount of waste that the City sends to landfills more than a foam foodservice ban alone and constitutes a windfall to the City's coffers. That's a win-win that makes this ban nonsensical.

The plan to recycle foam would advance the City's long-standing, overarching statutory objective of increasing citywide residential recycling. It would also address one of the City's "dirty little secrets": For the first time, the City would actually recycle its solid polystyrene waste. Although the City announced that it would be collecting solid polystyrene for recycling in 2013, the City has since recycled none of the thousands of tons of such waste its trucks have collected, because the City never developed a plan to actually recycle it.

The law required the Commissioner to determine whether foam "can be recycled" after "consulting" with manufacturers, recyclers, and other stakeholders. But what followed was a farce. Although the Sanitation Commissioner spent months gathering evidence confirming the recyclability of foam foodservice products and receiving commitments from market participants that they would process, buy, and recycle all of New York City's polystyrene at a guaranteed rate of return for at least the next five years, Mayor de Blasio had other ideas and campaign promises to keep. He vowed to ban foam foodservice products during his campaign and even at the announcement of his Sanitation Commissioner's appointment. After her top aide acknowledged that "the Commissioner's research confirms foam can be recycled," the Commissioner was summoned to City Hall in mid-December 2014 and directed to ban foam foodservice products to further the Mayor's political agenda, regardless of the evidence. Then, to try to justify the irrational decision forced upon the Department of Sanitation, the Commissioner resorted to imposing impossible conditions—such as a recycling readiness date of January 1, 2015, before any recycling determination would even be made, and "guarantees of the ultimate economic feasibility or environmental effectiveness" of recycling—that are nowhere to be found in the statute itself, further rendering this Determination illegal and inconsistent with the statutory standard for recycling.

As a result of this irrational, arbitrary, and capricious Determination, starting on July 1, 2015, restaurants throughout the City will no longer be able to use cost-effective, highly functional, and preferred foodservice foam items, such as cups, plates, trays, and containers, when serving their customers. This will force them to purchase more expensive foodservice items (many of which are themselves not recycled), driving up their costs of doing business, and thereby endangering their livelihoods.

The Coalition's legal challenge is being brought under Article 78 of the New York Civil Practice Law and Rules. An Article 78 petition is an expedited lawsuit permitting challenges to government decisions that are affected by errors of law, are arbitrary and capricious, or are abuses of discretion.

The Coalition seeks a court order overturning this ban on foam foodservice products and requiring the Department of Sanitation to recycle it instead. The Coalition looks forward to setting the record straight on foam foodservice products and compelling the de Blasio Administration to live up to its statutory mandate to recycle.