



AGENDA NO: B-2

MEETING DATE: January 20, 2016

Staff Report

TO: Public Works Advisory Board **DATE:** January 12, 2016
FROM: Janeen Burlingame - Management Analyst
SUBJECT: Discussion of Expanded Polystyrene Regulation

RECOMMENDATION

Staff recommends the Public Works Advisory Board (PWAB) review the staff report and recommend the City Council adopt the proposed ordinance in Attachment 1.

ALTERNATIVES

The Public Works Advisory Board could recommend a different option for a hardship exemption, non-City sponsored special events and/or ordinance effective date.

FISCAL IMPACT

Other than staff time for public outreach and the subsequent deferral of work on other Public Works activities, there would be no fiscal impact to the general fund should the draft ordinance be adopted.

BACKGROUND

At the September 8, 2015 City Council meeting, the Council discussed an informational memo prepared by the City Attorney regarding a possible ban on the use of certain expanded polystyrene (EPS) products. The Council approved a motion to support pursuing adoption of an ordinance banning the use of EPS food containers and the retail sale of EPS products, such as foam coolers and packing "peanuts," within Morro Bay, including reaching out to affected businesses. Staff was directed to return with a draft ordinance for consideration.

The PWAB discussed this item at its November 18, 2015 meeting and continued the discussion to the January 20, 2016 meeting to get additional information from businesses from the survey that had been distributed shortly before the PWAB meeting.

DISCUSSION

Over 80 cities and counties in California have enacted regulations focused on restricting the use of food and drink containers made from EPS (commonly referred to as Styrofoam™) and some of those agencies have also prohibited the retail sale of most EPS products within their respective jurisdictions. Main reasons cited by for banning EPS: environmental impacts, potential health effects and potential for recycling opportunities to divert trash from the landfill.

EPS contains the toxic substances Styrene and Benzene which are suspected carcinogens and neurotoxins that are hazardous to humans. EPS food containers leach the toxin Styrene when coming in contact with warm food or drink, alcohol, oils and acidic foods causing human contamination and posing a health risk to people.

Prepared By: JB

Dept Review: RL

EPS is harmful to the environment because it is a durable material that is not biodegradable, taking several decades to hundreds of years to deteriorate in the environment or landfill. Its foam structure allows it to break down easily into smaller pieces, making it more difficult and expensive to remove from the environment. Due to the lightweight nature, floatability and prevalence of the material to be blown around even when properly disposed of, it travels easily through gutters and storm drains, eventually reaching the ocean. The material absorbs pollutants like sponges, picking up and concentrating contaminants in the environment. As EPS litter moves through the environment, fish and wildlife mistake it as food and ingest the plastic. Several studies approximate that plastic products, including polystyrene, make up 80-90% of floating marine debris. During the beach cleanup at Morro Rock last year, 94 pounds of trash were collected with the most prevalent material collected being plastics and cigarette butts. Much of the plastic collected was polystyrene that is not recyclable.

What Other Cities Have Done

In July 2015, SLO City adopted an ordinance that included the following provisions:

- Prohibit use of EPS for prepared food; require food providers to use biodegradable, compostable, or recyclable food containers
- Prohibit vendors and event promoters from selling or otherwise providing EPS which is not wholly encased within a more durable material
- One-time one year exemption for “undue hardship” (more than 15% increase in product cost) and a process for the City Manager to go through in determining whether to grant such exemption - only 1 business applied for the hardship by the deadline
- For food provider violating the code, a violation that would result in administrative fines with having the option for their first violation to pay for equivalent amounts of allowable alternatives in lieu of paying the fine
- For event promoter violating the code, a violation that would result in a fine with varying rates depending on the size of the event
- Effective date 6 months after final ordinance adoption

Since the PWAB heard this item in November 2015, the City of Pismo Beach adopted an ordinance in mid-November 2015 (final adoption in mid-December 2015) that is virtually identical to the SLO City ordinance with two notable differences:

- Effective date 30 days after final ordinance adoption
- Hardship exemption included but for a one-time 6 month exemption and no criteria set for defining undue hardship

Staff from Pismo Beach noted that as most all of the affected businesses were no longer using EPS for prepared food containers, their Council did not feel the need to have a longer period of time between final adoption and the effective date. Additionally, they would be sending out notices to affected businesses before the effective date. Regarding the issue of using up existing stock, they indicated the business could apply for the hardship that would be specific to the time frame needed by the individual business and also have the option to purchase alternative products “in lieu” of a fine to address any issues of not being done using their stock of existing EPS products.

Outreach

Staff prepared an informational handout regarding Council’s direction to pursue an ordinance prohibiting the use and sale of EPS food containers and products in the City for mailing to affected businesses. In addition, a survey was created to get input from affected businesses on the draft ordinance, including feedback on what an acceptable percentage of total cost increase would be used to qualify for an “undue hardship” exception. Both the informational handout and survey were mailed out in early November to affected businesses and an online survey was also created to make it easier for businesses to provide feedback to staff.

Additionally, between November and January, PWAB Member Stu Skiff visited these businesses to talk about the proposed ordinance and identify if they currently use EPS containers that would be affected by the ordinance or other alternative products.

At the writing of this report, staff received 30 total survey responses (5 paper and 25 online). Of those responding to the question of what food containers the business currently use, 52% responded other alternatives were used and 48% responded using EPS products.

However, when Boardmember Skiff conducted his visits to the businesses, he identified 85% as already using alternative products for food and 35% for beverages with 15% using EPS products for food and 18% for beverages. When asked whether the business knew about the proposed ban on EPS products, only 6% stated they were unaware.

Boardmember Skiff also visited the grocery stores and mini marts, noting that many of the store managers wanted to keep EPS products and indicated they would stop selling items considered in the proposed ordinance when their competitor did.

Draft Ordinance

Staff feels using SLO City's ordinance as a template for a Morro Bay ordinance achieves what the City Council desired given the parameters of what they wanted to include in the development of an ordinance for Morro Bay. Attachment 1 is draft ordinance language for consideration to enact.

Hardship Exemption

Council indicated inclusion of an exemption whereby a business could apply for a one time exemption delaying the implementation of the ordinance requirement prohibiting the use of EPS food containers due to a financial hardship.

The SLO City ordinance included an affordability exclusion, using 15% as the threshold. It was unclear how this number was selected and SLO City staff noted several of the other cities and counties it researched used 15%. In the survey sent to affected Morro Bay businesses, staff asked what would be an acceptable percentage increase of operating costs to qualify for the exemption. Of those responding to the paper or online survey, 38% responded 10% or less, 23% responded 11-15%, 15% responded 16-20%, 8% responded 21-25%, 8% responded 26-30%, and 8% responded 41-50%.

The City of Pismo Beach, included the ability to apply for a hardship exemption, but did not tie it to affordability, and it would only be for a one-time 6 month exemption. There is no specific criteria set and staff from Pismo Beach indicated the business would have to make its case for hardship as there are different business types and one percentage may not be a hardship for one but would be for another. Pismo Beach staff also noted that most all of its businesses already use alternative food container products and those still using EPS should have no more than 1 or 2 months' supply to work through.

Options for hardship exemption:

1. SLO City Approach - include hardship exemption of a one-time 1 year exemption; 15% percentage increase in **product** cost to qualify for exemption
2. Pismo Beach Approach – include hardship exemption of a one-time 6 month exemption; no affordability criteria to qualify for exemption
3. Include hardship exemption of a one-time 1 year exemption; 10% percentage increase in **total operating (not product)** cost to qualify for exemption (percentage coming from City survey responses)
4. Include hardship exemption of a one-time 6 month exemption; 10% percentage increase in **total operating (not product)** cost to qualify for exemption (percentage coming from City survey responses)

- Staff recommendation: After reviewing information from SLO City, the City of Pismo Beach and the City's survey and business visits, staff recommends the Pismo Beach approach (this language is included in the proposed ordinance in Attachment 1). As a vast majority of the affected businesses already use alternative products, this approach would still provide for a hardship exemption in case there is a business of the few remaining who still use EPS products who has a hardship to be able to get relief for a period of time.

Effective Date

Generally, ordinances go into effect 30 days after final passage, but the Council can specify a different length of time. The cities of SLO and Pismo Beach differed on when each cities' ordinance would take effect. SLO City's ordinance went into effect 6 months after final adoption (January 1, 2016) and Pismo Beach's went into effect 30 days after final adoption (January 15, 2016).

Given Council's desire to make sure affected businesses would be aware of any ban on EPS products and wanting to work with businesses on obtaining compliance by its effective date, 30 days after final adoption for the effective date is not recommended.

During the Board's discussion of this item in November 2015, it was expressed to have the effective date be such that it did not occur during the summer when affected businesses are experiencing their busiest times and also to give enough time to work through existing stocks of product before transitioning to alternative products. Given the timeframe when Council is expected to hear this item at its January 26, 2016 meeting and its potential final adoption in February 2016, a 6 month effective date would be in the middle of August.

A third option would be to extend the effective date a few more weeks to get past the summer season and make the effective date be October 1, 2016.

- Staff recommendation: Make the effective date be October 1, 2016. This would allow time for notification to the affected businesses and provide enough time to work through existing EPS stock and make the transition to alternative products.

Non-City Sponsored Special Events

Council did not indicate at its September 8 meeting to include these events in the proposed ordinance; however, given the previous adoption of Resolution No. 10-08 to not use city funds by any department or agency of the City to purchase Styrofoam™ products and discourage the use of Styrofoam™ by private parties who use City facilities, and the Council's recent direction to pursue an ordinance prohibiting the use of EPS food containers and the retail sale of EPS products, inclusion of non-City sponsored special events prohibiting the use of EPS food containers seemed logical to include.

- Staff recommendation: Include non-City sponsored special events in the ordinance (this language is included in the proposed ordinance in Attachment 1).

CONCLUSION

Staff recommends the PWAB review the staff report and recommend the City Council adopt the proposed ordinance in Attachment 1.

Attachments:

1. Draft ordinance regulating EPS food containers and products

ORDINANCE NO. 600

**AN ORDINANCE OF THE CITY COUNCIL
OF THE CITY OF MORRO BAY, CALIFORNIA
TO ADD CHAPTER 8.17 EXPANDED POLYSTYRENE REGULATING THE USE OF
EXPANDED POLYTYRENE PRODUCTS WITHIN THE CITY TO
THE MORRO BAY MUNICIPAL CODE**

**THE CITY COUNCIL
City of Morro Bay, California**

WHEREAS, The City of Morro Bay ("City") has the police power to protect the health, safety and welfare of the community, including the ability to protect and enhance the natural environment; and

WHEREAS, according to the California Department of Transportation, expanded polystyrene comprises approximately 15% of storm drain litter and is the second most common form of beach debris in California, and plastic products, including expanded polystyrene, make up 80 -90% of floating marine debris; and

WHEREAS, the City is situated adjacent to the Pacific Ocean and during regular beach clean-ups, expanded polystyrene products are found and discarded; and

WHEREAS, items made from expanded polystyrene are not biodegradable, compostable, or recyclable locally and expanded polystyrene as litter is high durable; and

WHEREAS, expanded polystyrene breaks into small, lightweight pieces that may be picked up by the wind even when it has been disposed of property, and flow or be flown into creeks and the Pacific Ocean, contributing to water quality and habitat protection concerns; and

WHEREAS, marine animals and birds often confuse expanded polystyrene with pieces of food, and when ingested, it can impact their digestive tracts, often leading to death; and

WHEREAS, expanded polystyrene is manufactured from petroleum, a non – renewable resource; and

WHEREAS, expanded polystyrene is not recycled at the Cold Canyon Landfill and there are no current plans to recycle it, and regulating the use of expanded polystyrene products will therefore maximize the operating life of the landfills; and

WHEREAS, take-out food packaging that is biodegradable, compostable, and recyclable is the most responsible and sustainable choice for the City's tourist economy, its citizenry and its environment and when these products are recycled, natural resources are spared, less energy is used for the production of new products; and

WHEREAS, regulating the use of expanded polystyrene products within the City will help protect the City's natural environment from contamination and degradation; and

NOW, THEREFORE, the City Council of the City of Morro Bay does hereby ordain as follows:

SECTION 1: There is hereby added to the Morro Bay Municipal Code, a new Chapter 8.17 to Title 8 to read, in its entirety, as follows:

Chapter 8.17
EXPANDED POLYSTYRENE

8.17.010 Definitions.

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

A. "ASTM standard" means meeting the standards of the American Society for Testing and Materials (ASTM) international standard D6400 or D6868 for biodegradable and compostable plastics, as those standards may be amended.

B. "Biodegradable" means compostable (separately defined) or the ability of organic matter to break down from a complex to a more simple form through the action of bacteria or to undergo this process.

C. "City facility" means any building, structure or vehicle owned and operated by the city of Morro Bay, its agents, agencies, and departments.

D. "City contractor" means any person or entity that enters into an agreement with the city to furnish products or services to or for the city.

E. "Compostable" means all the materials in the product or package will break down, or otherwise become part of usable compost (e.g., soil-conditioning material, mulch). Compostable disposable food containers must meet ASTM standards for compostable materials.

F. "Disposable food container" is interchangeable with "to go" packaging and "food packaging material" and means all containers that are used to hold prepared food or drinks. Disposable food containers include clamshells, bowls, plates, trays, cartons, boxes, and cups that are intended for single use, including, without limitation, food containers for takeout foods and/or leftovers from partially consumed meals prepared by food providers. This does not include single-use disposable items such as straws, cup lids, or utensils, nor does it include single-use disposable packaging for unprepared foods.

G. "Events promoter" means an applicant for any event permit issued by the city or any city employee(s) responsible for any city-organized event.

H. "Expanded polystyrene" or EPS means blown expanded and extruded polystyrene or other plastic foams which are processed by any number of techniques including, but not limited to, fusion of monomer spheres (expanded bead plastic), injection molding, foam molding, and extrusion-blown molding (extruded foam plastic). Expanded polystyrene and other plastic foam is generally used to make cups, bowls, plates, trays, clamshell containers, meat trays, ice chests, shipping boxes and packing peanuts.

I. “Expanded polystyrene products” means any item such as coolers, ice chests, cups, bowls, plates, clamshell containers, shipping boxes, or any other merchandise made from expanded polystyrene that is not wholly encapsulated or encased by a more durable material.

J. “Food provider” means any establishment located within the city that is a retailer of prepared food or beverages for public consumption including, but not limited to, any store, supermarket, delicatessen, restaurant, shop, caterer or mobile food vendor.

K. “Person” means an individual, business, event promoter, trust, firm, joint stock company, corporation, nonprofit, including a government corporation, partnership, or association.

L. “Prepared food” means food or beverages, which are served, packaged, cooked, chopped, sliced, mixed, brewed, frozen, squeezed or otherwise prepared within the city. Prepared food does not include raw, butchered meats, fish and/or poultry sold from a butcher case or similar food establishment.

M. “Recyclable” means any material that is specified in the franchise agreement with the city’s solid waste removal provider including, but not limited to, aluminum, tin and bi-metal cans, clear and colored glass containers, high density polyethylene (HDPE), polyethylene terephthalate (PET), clear or rigid polystyrene, corrugated cardboard and mixed paper.

N. “Vendor” means any retail store or business which sells or offers goods or merchandise, located or operating within the city of Morro Bay, including those referenced in the definition of “food provider.”

8.17.020 Expanded polystyrene disposable food containers prohibited.

A. Food providers within the city of Morro Bay may not provide prepared food in or provide separately any disposable food container made from expanded polystyrene, except as exempted in Section 8.17.050.

B. Disposable food containers made from expanded polystyrene are prohibited from use in all city facilities.

C. City contractors in the performance of city contracts and events promoters may not provide prepared food in disposable food containers made from expanded polystyrene.

8.17.030 Required biodegradable, compostable, or recyclable disposable food containers.

A. All food providers within the city utilizing disposable food containers shall use biodegradable, compostable or recyclable products.

B. All city facilities utilizing disposable food containers shall use biodegradable, compostable or recyclable products.

C. City contractors and events promoters utilizing disposable food containers shall use biodegradable, compostable, or recyclable products while performing under a city contract or permit.

8.17.040 Prohibited sales.

No vendor or events promoter in the city may sell or otherwise provide any expanded polystyrene product which is not wholly encapsulated or encased within a more durable material, except as exempted in Section 8.17.050. This specifically includes, but is not limited to, cups, plates, bowls, trays, clamshells and other products intended primarily for food service use, as well as coolers, containers, ice chests, shipping boxes, packing peanuts, or other packaging materials.

8.17.050 Exemptions.

A. The city manager or designee may exempt a food provider from the requirements set forth in Section 8.17.020(A) for a single, six-month period upon written application by the vendor or food provider showing that this chapter would create an undue hardship or practical difficulty. The city manager or designee's decision shall be in writing, and the decision shall be final and not subject to appeal. The city manager or designee may approve the exemption application in whole or in part, with or without conditions.

B. Exemptions to allow for the sale or provision of expanded polystyrene products may be granted by the city manager or designee, if the vendor can demonstrate in writing a public health and safety requirement or medical necessity to use the product. The city manager or designee shall put the decision to grant or deny the exemption in writing and the decision shall be final.

C. An exemption application shall include all information necessary for the city manager or designee to make a decision, including but not limited to documentation showing factual support for the claimed exemption. The city manager or designee may require the applicant to provide additional information.

D. Foods prepared or packaged outside the city and sold inside the city are exempt from the provisions of this chapter.

E. Raw meat, fish and other raw food trays are exempt from the provisions of this chapter.

F. Products made from expanded polystyrene which are wholly encapsulated or encased by a more durable material are exempt from the provisions of this chapter. Examples include surfboards, life preservers, and craft supplies which are wholly encapsulated or encased by a more durable material, and coolers encased in hard plastic.

G. Construction products made from expanded polystyrene are exempted from this chapter if the products are used in compliance with Title 14, Buildings and Construction, and used in a manner preventing the expanded polystyrene from being released into the environment.

H. In a situation deemed by the city manager to be an emergency for the immediate preservation of the public peace, health or safety, city facilities, food providers, city contractors and vendors doing business with the city shall be exempt from the provisions of this chapter.

I. Expanded polystyrene packaging products which have been received from sources outside the city may be reused to be kept out of the waste stream.

8.17.060 Violations.

A. Any violation of the provisions of this chapter by any person is subject to administrative fines as provided in Chapter 1.03, which may be appealed pursuant to the procedures in that chapter.

B. For the first violation, the city manager or designee may allow the violating food provider, in lieu of payment of the administrative fine, to submit receipts demonstrating the purchase after the citation date of biodegradable, compostable, or recyclable products in an amount equal to the amount of the citation.

C. Food providers or vendors who violate this chapter in connection with city permitted special events shall be assessed fines as follows:

1. A fine not to exceed two hundred dollars for an event of one to two hundred persons.
2. A fine not to exceed four hundred dollars for an event of two hundred one to four hundred persons.
3. A fine not to exceed six hundred dollars for an event of four hundred one to six hundred persons.
4. A fine not to exceed one thousand dollars for an event of six hundred or more persons.

B. In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the city attorney, including but not limited to administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

SECTION 2. This ordinance is exempt from review under the California Environmental Quality Act (CEQA) (California Public Resources Code Section 2100 et seq.). Pursuant to Section 15061(b)(3) of Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. Further, the proposed Ordinance is exempt from CEQA on the separate and independent ground that it is an action of a regulatory agency (the City) for the protection of the environment because, among other things, it will regulate the use and sale of expanded polystyrene products and reduce the amount of expanded polystyrene products that enter local landfill and waterways. Thus, this Ordinance is categorically exempt from the requirements of CEQA under Section 15308 of Title 14 of the California Code of Regulations as an action by a regulatory agency for the protection of the environment.

SECTION 3. If any section, subsection, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Morro Bay hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions thereof may be declared invalid or unconstitutional.

SECTION 4. This Ordinance shall be in full force and effect on October 1, 2016 after its adoption following second reading.

SECTION 5: The City Clerk shall certify to the adoption of this Ordinance and cause it to be published, in accordance with Government Code, section 36933.

INTRODUCED at a regular meeting of the City Council of Morro Bay, held on the 26th day of January, 2016, by motion of Councilmember _____, seconded by Councilmember _____.

PASSED AND ADOPTED on the ____ day of January, 2016.

JAMIE L. IRONS, Mayor

Attest:

DANA SWANSON, City Clerk

APPROVED AS TO FORM:

Joseph W. Pannone, City Attorney

I, Dana Swanson, City Clerk for the City of Morro Bay, hereby certify that the foregoing ordinance was duly and regularly introduced at a meeting of the City Council of the 26th day of January, 2016, and hereafter the said ordinance was duly and regularly adopted at a meeting of the City Council on the _____ day of _____, 2016, by the following vote, to wit:

AYES:

NOES:

ABATAIN:

ABSENT:

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the City of Morro Bay, California, this _____ day of _____, 2016.

City Clerk of the City of Morro Bay