

COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF  
NEW YORK  
TITLE 6. DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
CHAPTER III. AIR RESOURCES  
SUBCHAPTER A. PREVENTION AND CONTROL OF AIR CONTAMINATION  
AND AIR POLLUTION  
PART 239. PORTABLE FUEL CONTAINER SPILLAGE CONTROL

Subpart.

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**Subpart 239-1: Applicability**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*

§239-1.1 Applicability

Except as provided in Subpart 239-4 of this Part, this Part applies to any person who sells, supplies, offers for sale, advertises or manufactures for sale in the State of New York, portable fuel container(s), spout(s), or both portable fuel container(s) and spout(s) for use in the State of New York.

**Subpart 239-2: Definitions**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*

§239-2.1 Definitions.

For the purpose of this regulation, the following definitions apply:

- (a) *ASTM* means the American Society for Testing and Materials.
- (b) *Consumer* means any person who purchases or otherwise acquires a new portable fuel container or spout or both portable fuel container and spout for personal, family, household, or institutional use. Persons acquiring a portable fuel container or spout or both portable fuel container and spout for resale are not consumers for that product.
- (c) *Distributor* means any person to whom a portable fuel container or spout or both portable fuel container and spout is sold or supplied for the purpose of resale or distribution in commerce. This term does not include manufacturers, retailers, and consumers.
- (d) *Fuel* means all fuels subject to any provision of Part [225-3](#) of this Title, including gasoline and diesel.
- (e) *Kerosene* means any light petroleum distillate that is commonly or commercially known, sold or represented as kerosene, that is used in space heating, cook stoves, and water heaters, and is suitable for use as a light source when burned in wick-fed lamps.
- (f) *Manufacturer* means any person who imports, manufactures, assembles, produces, packages, repackages, or re-labels a portable fuel container or spout or both portable fuel container and spout.
- (g) *Nominal capacity* means the volume indicated by the manufacturer that represents the maximum recommended filling level.
- (h) *Outboard engine* means a spark-ignition marine engine that, when properly mounted on a marine water craft in the position to operate, houses the engine and drive unit external to the hull of the marine water craft.
- (i) *Permeation* means the process by which individual fuel molecules may penetrate the walls and various assembly components of a portable fuel container directly to the outside ambient air.
- (j) *Person* means any individual, public or private corporation, political subdivision, government agency, department or bureau of the State, municipality, industry, co-partnership, association, firm, estate or any legal entity whatsoever.
- (k) *Portable fuel container* means any container or vessel with a nominal capacity of 10 gallons or less intended for reuse that is designed, used, sold, advertised or offered for sale for receiving, transporting, storing, and dispensing fuel or kerosene.

(l) *Product category* means the applicable category that best describes the product with respect to its nominal capacity, material construction, fuel flow rate, and permeation rate, as applicable, as determined by the department.

(m) *Retailer* means any person who owns, leases, operates, controls, or supervises a retail outlet.

(n) *Retail outlet* means any establishment at which portable fuel containers, spouts, or both portable fuel containers and spouts are sold, supplied, or offered for sale.

(o) *Spill proof spout* means any spout that complies with 40 CFR section 59.653 (see Table 1, section [200.9](#) of this Title).

(p) *Spill-proof system* means any configuration of portable fuel container and firmly attached spout that complies with 40 CFR section 59.653 (see Table 1, section [200.9](#) of this Title).

(q) *Spout* means any device that can be firmly attached to a portable fuel container through which the fuel in such container is dispensed.

(r) *Target fuel tank* means any receptacle that receives fuel from a portable fuel container.

### **Subpart 239-3: Performance Standards For Portable Fuel Containers and Spill-Proof Spouts**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*

#### **§239-3.1 Performance standards for portable fuel containers and spill-proof spouts**

(a) Except as provided in Subpart [239-4](#) of this Part and subdivision (c) of this section, no person shall import, sell, supply, advertise for sale, offer for sale, or manufacture for sale in the State of New York on or after September 1, 2009, any portable fuel container, spout, or both fuel container and spout which does not comply with 40 CFR section 59.653 (see Table 1, section [200.9](#) of this Title).

(b) Compliance with this section does not exempt spill-proof systems or spill-proof spouts from compliance with other applicable Federal and State statutes and regulations such as State fire codes, safety codes, and other safety regulations.

(c) Notwithstanding the provisions of this Subpart, a portable fuel container, spout, or both portable fuel container and spout manufactured before January 1, 2009, may be sold, supplied, or offered for sale at any time prior to January 1, 2010, if:

- (1) it is clearly marked or labeled with the date of manufacture or date code representing the date of manufacture; and
- (2) it could be lawfully sold, supplied or offered for sale as of December 31, 2008.

#### **Subpart 239-4: Exemptions**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*

##### §239-4.1 Exemptions

(a) This Part does not apply to any portable fuel container or spout or both portable fuel container and spout manufactured in the State of New York for shipment, sale, and use outside of the State of New York.

(b) This Part does not apply to a manufacturer or distributor who sells, supplies, or offers for sale in the State of New York a portable fuel container, spout, or both portable fuel container and spout that does not comply with 40 CFR section 59.653 (see Table 1, section [200.9](#) of this Title), as long as the manufacturer or distributor can demonstrate that:

- (1) the portable fuel container, spout, or both portable fuel container and spout is intended for shipment and use outside of the State of New York; and
- (2) that the manufacturer or distributor has taken reasonable prudent precautions to assure that the portable fuel container, spout, or both portable fuel container and spout is not distributed to the State of New York.

This subdivision does not apply to portable fuel containers or spouts or both portable fuel containers and spouts that are sold, supplied, or offered for sale by any person to retail outlets in the State of New York.

(c) This Part does not apply to safety cans meeting the requirements of 29 CFR section 1926.155. (see Table 1, section [200.9](#) of this Title).

(d) This Part does not apply to portable fuel containers with a nominal capacity less than or equal to one quart.

(e) This Part does not apply to rapid refueling devices with nominal capacities greater than or equal to four gallons, provided such devices are designed for use in officially sanctioned off-highway motorcycle competitions or either create a leak-proof seal against a stock target fuel tank or are designed to operate in conjunction with a receiver permanently installed on the target fuel tank.

(f) This Part does not apply to portable fuel tanks manufactured specifically to deliver fuel through a hose attached between the portable fuel tank and the outboard engine for the purpose of operating the outboard engine.

### **Subpart 239-5: Innovative Products**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*

#### §239-5.1 Innovative products

(a) A portable fuel container or spout or both portable fuel container and spout may be exempted from one or more of the requirements of Subpart [239-3](#) of this Part if a manufacturer demonstrates by clear and convincing evidence that, due to the product's design, delivery system, or other factors, the use of the product will result in cumulative VOC emissions below the highest emitting representative spill-proof system or representative spill-proof spout in its product category as determined from applicable testing.

(1) For the purposes of this section, *representative spill-proof system* or a *representative spill-proof spout* means a portable fuel container or spout or both portable fuel container and spout which, at the time of application in paragraph (2) of this subdivision, meets the performance standards specified in Subpart [239-3](#) of this Part.

(2) A manufacturer (applicant) must apply in writing to the director, Division of Air Resources, Department of Environmental Conservation for an innovative product exemption. The application must include the supporting documentation that quantifies the emissions from the innovative product, including the actual physical test methods used to generate the data. In addition, the applicant must provide any information necessary to establish enforceable conditions for granting

the exemption. All information including proprietary data submitted by a manufacturer pursuant to this Section shall be handled in accordance with the procedures specified in Part 616 of this Title.

(3) Within 30 days of receipt of the exemption application the department shall determine whether an application is complete.

(4) Within 90 days after an application has been deemed complete, the department will determine whether, under what conditions, and to what extent, an exemption from the requirements of Subpart [239-3](#) of this Part will be permitted. The applicant and the department may mutually agree to a longer time period for reaching a decision. An applicant may submit additional supporting documentation before a decision has been reached. The department will notify the applicant of the decision in writing and specify such terms and conditions that are necessary to ensure that emissions from use of the product will meet the emissions reductions specified in this subdivision, and that such emissions reductions can be enforced.

(5) In granting an innovative product exemption for a portable fuel container or spout or both portable fuel container and spout, the State of New York shall specify the test methods for determining conformance to the conditions established. The test methods may include criteria for reproducibility, accuracy, and sampling and laboratory procedures.

(6) For any portable fuel container or spout or both portable fuel container and spout for which an innovative product exemption has been granted pursuant to this Subpart, the manufacturer shall notify the department in writing at least 30 days before the manufacturer changes a product's design, delivery system, or other factors that may effect the VOC emissions during recommended usage. The manufacturer must also notify the department within 30 days after the manufacturer learns of any information that would alter the emissions estimates submitted to the department in support of the exemption application.

(7) If the performance standards specified in Subpart [239-3](#) of this Part are amended for a product category, all innovative product exemptions granted for products in the product category, except as provided in paragraph (8) of this subdivision, have no force and effect as of the effective date of the amended performance standards.

(8) If the department believes that a portable fuel container, spout, or both portable fuel container and spout for which an exemption has been granted no longer meets the criteria for an innovative product specified in this subdivision, the department may hold a public hearing in accordance with the procedures specified in Part [621](#) of this Title, to determine if the exemption should be modified or revoked.

## **Subpart 239-6: Administrative Requirements**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*

### §239-6.1 Administrative requirements

(a) Each manufacturer of a portable fuel container, spout, or portable fuel container and spout subject to and complying with section [239-3.1](#) of this Part must also comply with 40 CFR section 59.615 (see Table 1, section [200.9](#) of this Title).

(b) Each manufacturer of a portable fuel container or spout or both portable fuel container and spout subject to and complying with Subpart [239-3](#) of this Part that due to its design or other features cannot be used to refuel one or more on-road motor vehicles must clearly display the phrase "not intended for refueling on-road motor vehicles" in type of 34-point or greater on each of the following:

(1) for a portable fuel container or portable fuel container and spouts sold together as a spill-proof system, on the system or on a label affixed thereto, and on the accompanying package, if any; and

(2) for a spill-proof spout sold separately from a spill-proof system, on either the spill-proof spout, or a label affixed thereto, and on the accompanying package, if any.

## **Subpart 239-7: Variances**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 10/4/02. Effective 30 days after filing.]*

### §239-7.1 Variances

(a) Any person or manufacturer who cannot comply with the requirements set forth in Subpart [239-3](#) of this Part, due to extraordinary reasons beyond the person's reasonable

control, may apply in writing to the department for a variance. The variance application must set forth:

- (1) the specific grounds upon which the variance is sought;
- (2) the proposed date(s) by which compliance with the provisions of Subpart [239-3](#) of this Part will be achieved; and
- (3) a compliance report detailing the method(s) by which compliance will be achieved.

(b) No variance may be granted unless all of the following findings are made:

- (1) that, due to reasons beyond the reasonable control of the applicant, required compliance with Subpart [239-3](#) of this Part would result in extraordinary economic hardship;
- (2) that the public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in avoiding any increased emissions of air contaminants that would result from issuing the variance; and
- (3) that the compliance report proposed by the applicant can reasonably be implemented, and will achieve compliance as expeditiously as possible.

(c) Any approval of a variance shall specify a final compliance date by which compliance with the requirements of Subpart [239-3](#) of this Part will be achieved. Any approval of a variance shall contain a condition that specifies increments of progress necessary to assure timely compliance, and such other conditions that the department, in consideration of the testimony received at the hearing, finds necessary to carry out the purposes of this regulation.

(d) A variance shall cease to be effective upon failure of the party to whom the variance was granted to comply with any term or condition of the variance.

(e) Upon the application of any person, the department may review, and for good cause, modify or revoke a variance from requirements of Subpart [239-3](#) of this Part after holding a public hearing in accordance with the provisions of subdivision (b) of this section.

### **Subpart 239-8: Test Procedures**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 06/30/09. Effective 30 days after filing.]*



§239-8.1 Test procedures

(a) Testing to determine compliance with section [239-3.1](#) of this Part shall be performed by using the procedures in 40 CFR sections 59.650-59.653 (see Table 1, section [200.9](#) of this Title).

(b) Alternative methods that are shown to be accurate, precise, and appropriate may be used upon written approval of the department.

**Subpart 239-9: Severability**

(Statutory authority: Environmental Conservation Law, §§ 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0305, 71-2103, 71-2105)

*[Filed 10/4/02. Effective 30 days after filing.]*

§239-9.1 Severability

Each Subpart of this Part is severable, and in the event that any Subpart of this Part is held to be invalid, the remainder of this Part continues in full force and effect.