

Environmental Law

Expert Analysis

NY's Expanded Ingredient Disclosure Requirements for Cleaning Products

In New York, the requirement that manufacturers disclose chemical ingredients contained in cleaning products can be traced to 1970 when the Environmental Conservation Law (ECL) was amended to grant the newly formed Department of Environmental Conservation (DEC) authority to regulate certain household products, ECL § 35-0107. This legislation was primarily directed to protecting water quality by prohibiting phosphorus in consumer laundry detergents and dishwasher products, but it also prohibited the sale of household cleaning products unless the manufacturer “furnish[ed]” to the DEC “information regarding such products in a form prescribed by [DEC].” Two years later, the DEC adopted regulations which parroted the lan-

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guage of the ECL, 6 N.Y.C.R.R. Part 659. These rules, which have been modified only once since the 1970s, mandate that manufacturers furnish

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lists of ingredients to DEC. For several decades, the DEC's activity in this area was limited to intermittent attempts to produce ingredient disclosure forms.

All that changed in early 2017 when, during his annual State of the State address, Gov. Andrew Cuomo

announced that the DEC would soon require manufacturers of household cleaning products to disclose chemical ingredients on their websites.

In response to the governor's instructions, on April 25, 2017, the DEC released its “Draft 2017 Household Cleansing Product Information Disclosure Program Certification Form and Guidance Document.” Although the ECL 35-0105(1) requires that the DEC proceed “by regulation,” the “Household Cleansing Product Information Disclosure Program” was not formally proposed as a rule. Nevertheless, the DEC did solicit public comment. The due date for such comments was July 14, 2017. On Oct. 15, 2017, while the DEC was reviewing comments and considering how best to refine its disclosure requirements, California adopted the Cleaning Product Right to Know Act. Then, on June 6, 2018, the DEC announced new product and ingredient disclosure requirements applicable to manufacturers of household cleaning products sold in New York.

This article examines the new DEC requirements for disclosure of the contents of, and risks associated with, chemicals used in household cleaning products and also compares some of the key features of New York's requirements with those in California.

The New York ECL defines "household cleansing products" to include, but not be limited to, "soaps and detergents, containing a surfactant as a wetting or dirt emulsifying agent and used primarily for domestic or commercial cleaning purposes," ECL § 35-0103(1). "Foods, drugs and cosmetics, including personal care items such as toothpaste, shampoo and hand soap" are excluded. See 6 N.Y.C.R.R. § 659.1(a)(1). Regulated pesticides and products "used primarily in industrial manufacturing, production and assembling processes" are also excluded from coverage.

The DEC presented the "program requirements" announced in 2018 as essentially the "disclosure forms" that had been required by the ECL and the existing rules at 6 N.Y.C.R.R. Part 659 at all times since the mid-1970s. However, the DEC's 2018 guidance document goes far beyond either the ECL or DEC's present regulations by requiring that manufacturers: establish and maintain a website listing each ingredient; provide annual certifications from senior corporate officials; disclose where the manufacturer draws its water supply; provide notice of the pres-

ence of any chemicals of concern; and establish on the manufacturer's website a unique page titled "Effects on Human Health and the Environment" where all investigations and research are posted.

The DEC's updated Household Cleansing Product Information Disclosure Program requires that manufacturers disclose each ingredient by weight. The functional "role" of each intentionally added ingredient must be identified. To avoid doubt about the possible roles of ingredients, the guidance document provides the following nonexhaustive list of possible functions: surfactant, colorant, fragrance or preservative.

Despite many similarities, there are several other critical differences between the requirements for disclosing cleaning product ingredients in New York and California.

One of the most far-reaching duties which the DEC imposed upon manufacturers is the requirement to post information on their websites regarding the nature and extent of investigations and research concerning potential effects of ingredients on human health or the environment. This requirement applies to information and research "performed directly by or at the direction of the manufacturer." The DEC's guidance document makes it clear that merely posting a hazard communica-

tion safety data sheet will never be sufficient. Manufacturers must post or provide links to the actual health or environmental studies.

Although the 1970 ECL provision speaks in terms of DEC regulating the "wrapper or container" of household cleaning products, ECL § 35-0105(1), the DEC's 2018 guidance document focuses on detailed "posting parameters" for web-based disclosures. The posting parameters include both mandatory requirements and prohibitions. For example "all required information must be posted on the manufacturer's main website, domain name or URL used to communicate with consumers" or on a separate website provided it is no more than "one "click" away" from the manufacturer's main webpage. Indeed, the DEC specifically mandates that manufacturers adopt otherwise nonbinding international standards for web accessibility. Conversely, "information disclosed under this program must not be restricted from indexing by search engines, such as Google and Bing" and "technologies that prevent data from being machine read or browsed are not acceptable."

The DEC's 2018 guidance document also explains how manufacturers can seek to protect certain information as confidential as either a trade secret or confidential commercial information (CBI). However, even when information about an ingredient is protected, the presence

of the ingredient apparently needs to be disclosed. This is true regardless of whether or not the ingredient is present above trace quantities and regardless of whether the ingredient is a functional additive or a byproduct. The rules are slightly different for intentionally added trace ingredients and nonfunctional trace materials. Manufacturers will need to carefully parse these various categories in order to develop both their required disclosures and any CBI requests. Notably, one of the disclosure thresholds which the DEC has incorporated by reference is the concentration of a chemical that triggers a product warning under California's Safe Drinking Water and Toxic Enforcement Act program (commonly known as Proposition 65).

The DEC's Household Cleansing Product Information Disclosure Program includes a complex rolling compliance schedule that includes several exceptions as well as exceptions to the exceptions. As a general matter, large manufacturers must post required information concerning intentionally added ingredients (other than fragrances) and nonfunctional ingredients known to be present above trace quantities by July 1, 2019. Manufacturers with less than 100 employees have until July 1, 2020. However, by July 1, 2020, all manufacturers must post required information concerning fragrance ingredients and nonfunctional ingredients. The

full program, including disclosures concerning nonfunctional byproducts and contaminants, takes effect for all ingredients on July 1, 2023. In New York, all disclosed information must be reviewed and updated every two years.

A common requirement of both the New York and California disclosure programs is that manufacturers screen their ingredients against lists established by international, federal and state authorities which designate chemicals as carcinogens, mutagens, endocrine disrupters or toxic. However, New York's approach is more expansive and requires that manufacturers disclose ingredients exhibiting certain hazardous characteristics—even if they are not listed anywhere.

Despite many similarities, there are several other critical differences between the requirements for disclosing cleaning product ingredients in New York and California. California's new law requires disclosure of "intentionally added ingredients." By contrast, New York requires that manufacturers disclose both all chemicals known and chemicals which the manufacturer reasonably should have known would be present, including breakdown products and chemicals present as an unintended consequence of the manufacturing process. As a result, manufacturers may find it much more challenging to comply with New York's requirements.

New York and California are both moving beyond merely testing the safety and efficacy of consumer products. By pressing what are almost certainly the outer limits of its 1970s era authority to mandate ingredient disclosure, DEC appears to be attempting to provide consumers with unprecedented access to chemical product safety information. At the same time, California has moved beyond its traditional regulatory regimes and even its novel Proposition 65 program in an attempt to force similar disclosures. Moreover, both states appear to be intent on using the relative size of their in-state markets to fill perceived gaps in federal programs governing environmental protection and chemical safety. Unless Congress acts and preempt the states, or something happens to cause these states to reconsider, manufacturers of cleaning products may soon find themselves subjected to a patchwork of state-level disclosure requirements intended to drive wholesale reformulation of cleaning products by activating consumers.