

STATE ENVIRONMENTAL REGULATION

Expert Analysis

So, Where Is the Disclosure Program For Household Cleaning Products?

In his 2017 State of the State address, New York Governor Andrew M. Cuomo announced that the state would require manufacturers of household cleaning products to disclose chemical ingredients on their websites. Several months later, on April 25, 2017 (coinciding with Earth Week), the New York State Department of Environmental Conservation (NYSDEC) took a major step toward that end when it released the “Draft 2017 Household Cleansing Product Information Disclosure Program Certification Form and Guidance Document,” available at https://www.dec.ny.gov/docs/administration_pdf/cleanpdtingr.pdf. The NYSDEC’s public comment period on the draft document ended on July 14, 2017.

The accompanying announcement, available at <https://www.governor.ny.gov/news/governor-cuomo-announces-new-regula->

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tions-require-disclosure-chemicals-household-cleaning, boasted that “New York is the first state in the nation to require manufacturers to disclose ingredients in household cleaning products, which may contain chemicals with negative health impacts for humans and the environment.”

As of this writing, however, the NYSDEC has not yet finalized its program or the disclosure form. In fact, *Newsday* reported in mid-April that Basil Seggos, the NYSDEC commissioner, said that the NYSDEC was in the process of incorporating the 864 comments it received on the proposal and that he was “not concerned whatsoever” with the “slight delay we’ve had.” *Newsday* added in its article, available at [4-dioxane-1.18019931, that state officials “would not give a timeline as to when the disclosure form and guidance would be finalized.”](https://www.newsday.com/news/region-state/1-</p></div><div data-bbox=)

In the meantime, California leapfrogged over New York to become the first state to require ingredient labeling for cleaning products. The “Cleaning Product Right to Know Act of 2017” was signed into law

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by California Governor Jerry Brown last October 15, and it went into effect on Jan. 1, 2018 (although companies have two years to comply with the law’s online disclosure requirements and three years to comply with its labeling rules).

The NYSDEC’s Proposal

The proposal put forth in April 2017 by the NYSDEC was bold, with a clearly stated goal: “to require

the public disclosure of chemical ingredients in household cleaning products.”

The NYSDEC asserted that it had the authority to adopt the program under New York Environmental Conservation Law (ECL) Article 35 and New York Code of Rules and Regulations (NYCRR) Part 659. According to the NYSDEC, ECL Article 35 and 6 NYCRR Part 659 authorize the NYSDEC commissioner “to require manufacturers of domestic and commercial cleaning products distributed, sold, or offered for sale in New York State to furnish information regarding such products in a form prescribed by the [c]ommissioner.” In particular, 6 NYCRR §659.6 requires that “manufacturers of household cleansing products distributed, sold, or offered for sale” in New York State must furnish to the NYSDEC commissioner “such information regarding such products as the [c]ommissioner may require, in such form as may be prescribed by the [c]ommissioner.”

Household cleansing products, under ECL 35-0103 and 6 NYCRR §659.1, include but are not limited to “soaps and detergents containing a surfactant as a wetting or dirt emulsifying agent and used primarily for domestic or commercial cleaning purposes, including but not limited to the cleansing of fabrics, dishes, food utensils and household and commercial premises.” Those same provisions exclude from the definition of household cleaning products “foods, drugs and cosmetics,

including personal care items such as toothpaste, shampoo and hand soap”; “products labeled, advertised, marketed and distributed for use primarily as pesticides, as defined in [ECL] Article 33”; or “cleansing products used primarily in industrial manufacturing, production and assembling processes.”

The draft guidance document issued by the NYSDEC notes that the information required to be disclosed includes, but would not be limited to, “a list naming each ingredient,” “the content by weight of each ingredient,” and “the nature and extent of investigations and research performed by or for

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the manufacturer concerning the effects on human health and the environment of such product[s] or such ingredients.” The draft proposal also allows for confidential business information (CBI) to be withheld from disclosure.

Under the proposed program, manufacturers of cleaning products sold in New York State have to identify all of the ingredients and impurities in their products, including nanomaterials and those that appear on “authoritative lists of chemicals of concern” (such as a chemical designated as an asthma

causing agent by the Association of Occupational and Environmental Clinics or a chemical identified by the Agency for Toxic Substances and Disease Registry as a neurotoxicant and listed in its Toxic Substances Portal under “Health Effects of Toxic Substances and Carcinogens, Nervous System”).

Under the proposed program, the required disclosures have to be posted on a manufacturer’s website in a manner that is “obvious, noticeable and readily accessible,” via the internet, to the public. All ingredients intentionally added to a covered product have to be disclosed, including those present in trace quantities, unless they are withheld as CBI. For intentionally added ingredients, “trace quantity” is defined in 6 NYCRR §659.1(b)(1)(ii) as “an incidental amount which is part of the household cleansing product formulation, and does not exceed one tenth of one percent (0.1%) of the contents of the product by weight.”

The draft guidance is quite specific as to the form of disclosure. It provides that information “should be posted on the manufacturer’s main website, domain name, or uniform resource locator (URL) used to communicate with consumers.” It also could “be posted on a separate website, domain name, or URL as long as such site is no more than one ‘click’ away from the home page of the manufacturer’s main website.” Thus, under the draft proposal, “the home page of

the manufacturer's main website should contain a direct link to the separate website." Under the draft proposal, "[t]he web page on which information is posted should be no more than four 'clicks' away from the home page of the website on which it is posted."

The draft proposal also provides that "[t]he main web page used by a manufacturer to provide marketing information on a product should either contain the information disclosed under this program, or contain a direct link to the web page containing the disclosed information." Moreover, information disclosed under the proposed program may not be restricted from indexing by internet search engines.

The draft proposal also provides that information be posted in a form that is "readily accessible to all users." Manufacturers may not require users to register or provide personally identifiable information to gain access. The information has to be machine readable by automated systems, including, but not limited to, web browsers, accessibility software to aid the disabled, automated scripts, and other software programs or applications. Access to the information also may not "be limited through the use of CAPTCHA or similar challenge-response test technologies, whether visual, auditory, or otherwise." The posted information has "to conform to the most current version of the

Web Content Accessibility Guidelines (WCAG) adopted by the Web Content Accessibility Guidelines Working Group of the World Wide Web Consortium."

The proposed program requires that all information disclosed under the program "be posted on one web page, including but not limited to the manufacturer's name and contact information." Marketing language can "be posted on the same web page, but it may not be inserted within or between required information entries."

The proposed program provides that manufacturers have to disclose a product's name, the level of information being disclosed about the product, the chemical ingredients in the product, and whether any ingredient appears on lists of chemicals of concern. In cases where information is withheld from the public as CBI, the nature and degree of the information being withheld have to be disclosed, but that information does not have to be submitted to the NYSDEC or posted on the web.

Under the proposed program, manufacturers have to submit the disclosure certification form, signed by a senior member of management (such as a plant manager, superintendent, manager of environmental programs, or person of equivalent responsibility) to the NYSDEC.

The NYSDEC's proposal also explains how products with different ingredient formulations should

be treated, how information for a single product should be posted, what information should be grouped into categories, and the category headings that should be used, namely "Product and Manufacturer Information," "Level of Disclosure," "Ingredients," "Chemicals of Concern," "Human Health and Environmental Effects," and "Date of Disclosure."

Conclusion

When (or if) the NYSDEC's proposed disclosure program for household cleaning products will take effect remains to be seen. In a similar vein, it is worth noting that (as described in this column on May 24, 2012, and March 23, 2017), in 2012, the NYSDEC proposed changes to its State Environmental Quality Review Act (SEQRA) regulations and, in 2017, it proposed amendments to its SEQRA regulations. Neither the 2012 nor 2017 proposals were adopted. On April 4, 2018, the NYSDEC released another set of proposed SEQRA amendments. Whether the 2018 version is ultimately enacted remains to be seen.