

Environmental **LAW**

Makers of household cleaning products required to come clean about ingredients

In 1972, in the midst of a period that might be considered the boom time for new environmental law in New York, the Legislature enacted Article 35 of the Environmental Conservation Law relating to the distribution and sale of household cleansing products in the state. The law restricted the manufacture of products containing phosphorus and authorized the commissioner of the Department of Environmental Conservation (DEC) to require manufacturers of household cleansing products to furnish information regarding such products “in a form prescribed by the commissioner.”

The Legislature defined “household cleansing product” to include soaps and detergents used for domestic or commercial cleaning purposes, but specifically excluded foods, drugs, cosmetics, insecticides, fungicides and rodenticides or cleansing products used primarily in industrial manufacturing processes.

Four years later, in July 1976, the DEC issued regulations in Part 659 of Title 6 of the New York Codes, Rules and Regulations requiring the manufacturers of household cleaning products to furnish to the commissioner “such information regarding such products as the commissioner may require, in such form as may be prescribed by the commissioner.” However, DEC never specified the form in which the disclosures should be made and so no disclosures were required — until now. On June 6, DEC issued a “DEC Program Policy” document establishing a Household Cleansing Product Information Disclosure Program.



By **RONALD G. HULL**
Daily Record
Columnist

Rediscovered and reinvigorated in Gov. Andrew Cuomo’s 2017 State of the State message, the governor proposed using the “existing, underutilized authority” to require all manufacturers of household cleaning products to disclose chemical ingredients on their websites, and to use the program as “a pilot for potential expansion to other consumer products of concern, such as personal care or children’s products.”

Several months later, in April 2017, DEC released the “Draft 2017 Household Cleansing Product Information Disclosure Program Certification Form and Guidance Document” for public comment. Despite the lapse of almost 42 years while the aspirations of the 1972 Legislature languished, the DEC was still able to boast in 2017 that the new program would make New York “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.”

The proposed guidance document was published in the Environmental Notice Bulletin on April 25, 2017, and the public comment period ended on July 14, 2017. DEC received 864 comments, including 14 individual comments and 850 copies of a form letter. Although DEC only had

to address 15 sets of comments, nothing further was heard until a Response to Comments and a final policy document emerged on June 6.

Interestingly, DEC chose to roll out its ground-breaking program as a policy document, a not-quite regulation. Although DEC gave notice and accepted public comments, the policy does not have the same legal footing as a formal rulemaking. Moreover, because the program is based on statutory priorities established in 1972, it is limited in scope and leaves to another day regulation of a myriad of household and personal care products that have appeared since the 1970s.

Despite these limitations, the new program is cleverly designed to make use of the web (which did not exist in 1972) as the vehicle for disclosure. This also has limitations, as web access is widespread but not quite universal. Nevertheless, the program is designed to limit the administrative burden on DEC by making the program largely self-implementing, and making DEC the after-the-fact monitor rather than a collector of information and gatekeeper.

The program lays down a framework and general rules for appearance, content and accessibility, but gives each company’s web designers the flexibility and challenge of meeting those requirements without pre-clearing their approach with DEC. The DEC has also removed itself from a daunting technical burden of creating a hierarchy and defined list of ingredi-

Continued on next page

Continued from page 1

ents by basing the program around a list of lists created and updated by others.

Manufacturers or distributors must submit a Disclosure Certification to DEC, signed by a senior management official, certifying that the required information has been disclosed and identifying by product name and Universal Product Code (UPC) the products sold in New York with the URL of the web page on which product information is disclosed.

For purposes of the disclosure program, any information that would be exempt from disclosure as either a trade secret or confidential commercial information under the Freedom of Information Law may be withheld from public access. Avoiding the burden of judging in advance whether disclosure would compromise a trade secret, the program allows manufacturers to claim the exemption, which will be evaluated after the fact and in accordance with the procedures that apply to freedom of

information requests.

The program requires the disclosure and identification of nanoscale materials, relying on a definition in the federal Toxic Substances Control Act. It also mandates that for each intentionally added ingredient, a term describing its functional purpose should be disclosed. Nonfunctional ingredients and contaminants or impurities should also be disclosed as such.

In addition to ingredients, manufacturers must post information on their websites regarding the nature and extent of investigations and research concerning the effects on human health and the environment of covered products or the chemical ingredients of such products.

Overall, the approach of allowing manufacturers to develop individual disclosures within a generally defined playing field allows DEC to require a quicker rollout, minimizes the burden on the agency to staff the program to collect and review

disclosures, and defers battles over compliance to another day. As a result, DEC is requiring manufacturers to post the first phase of disclosure by July 1, 2019 (independent manufacturers employing 100 or fewer persons get an additional year, to July 1, 2020), with full implementation by January 1, 2023.

DEC appears to have created a program which will be implemented without significant agency involvement and policed by consumers. The approach appears to require disclosure in a way which allows for individualized formats, but within a framework intended to ensure the information is accessible and not hidden behind artificial barriers.

Ronald G. Hull is a senior attorney in Underberg & Kessler LLP's Environmental and Litigation Practice Groups. He has over 25 years of experience in the areas of environmental and municipal law and litigation.