VIA EMAIL: 1-4D.HCPCCproducts@dec.ny.gov

April 30, 2021

Emily Dominiak
Division of Materials Management
New York Department of Environmental Conservation
625 Broadway
Albany, NY 12233-7252

Re: Comments on NYDEC Draft Program Policy DMM-2, Guidelines for Waiver Process per ECL 35-0105(6) and ECL 37-0117(7)

Dear Ms. Dominiak:

The American Cleaning Institute (ACI), the Consumer Brands Association (CBA), and the Household & Commercial Products Association (HCPA) are pleased to provide the following comments regarding New York State Department of Environmental Conservation's (NYDEC) implementation of rules to comply with amendments to the Environmental Conservation Law (ECL) Articles 35 and 37 that established limits on the amount of 1,4-dioxane that can be present in household cleansing, personal care, and cosmetic products sold or offered for sale in New York State.

General Provisions

- The Department should explain the standards and criteria that it intends to apply to make product category determinations. The aforementioned trades provide the following comment regarding cleansing products and refill concentrate products sold in consumer, institutional and commercial markets. This broadly includes concentrated liquid laundry detergent and packets, hand soaps, general purpose cleaners, and manual pot and pan detergents.

- The Summary should clearly provide that products which have less than "trace amounts" of 1,4 dioxane as defined in the ECL can be sold or offered for sale without a waiver.

- The Department has failed to point to any rational relationship between present measured 1,4-dioxane concentrations and a manufacturer's ability to reach the trace concentrations levels mandated by the ECL and thus the requirement for testing to demonstrate maximum 1,4-dioxane levels cannot be justified and must be removed.

- The requirement for an "original signature" in Section V.B could conflict with the preference in Section V.E for electronic submissions and is also contrary to the letter and

intent of Section 304(2) of the NYS Technology Law and should be deleted, especially while New York operates under COVID-19 protocols. The New York Technology Law provides that "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." The risk of unauthorized persons submitting waiver requests is very low and nothing in ECL prohibits the use of electronic signatures in this circumstance. Therefore, electronic signatures should be allowed.

Definitions

- The term "covered product" should be defined. To that end, as but one issue example of the issues presented by the definitional insufficiency, the Department needs to explicitly and definitively state which is controlling: the duly promulgated category definition in ECL Section 350103(1) (including its exception for insecticides, fungicides and rodenticides) or the BRIC code referenced in the Program Policy; and similarly, consistent with our prior requests for clarification, what specific categories in the BRIC code are covered product.

- In Section V.A, the two-part test for 'manufacturer' in subdivision (1) of that definition is ambiguous ('a person who manufactures a covered product and whose name or a brand name the person is licensed to sell'). To avoid confusion about who is eligible for a waiver, we recommend that this definition track the definition of manufacture and manufacturer in EPA's Chemical Data Reporting regulations at 40 CFR 711.3. Subsection (2) of the definition of manufacturer should be revised as follows: "Manufacturer means any person who: (2) ~~any person who~~ distributes a covered product under their names . . ."

- Reference to 'distributor' as a manufacturer only when a product is imported to the United States also introduces ambiguity. If this definition were applied as written a domestic manufacturer who sells a product which is in full compliance with the ECL at the time of the sale to a domestic distributor remains the manufacturer (and faces liability) even if the distributor resells the product in New York without the manufacturer's knowledge and only after the product is no longer in compliance with 1,4-dioxane trace amounts (whereas the "first domestic distributor for a product imported into the United States" becomes the manufacturer and breaks the chain of liability). No legitimate purpose is served by this distinction. <u>See</u> <u>also</u> our comment regarding sell through provisions.

Confidential Business Information

- It is contrary to 6 NYCRR 616 for the Department to determine, in advance, that "concentration of 1,4-dioxane . . . may not be claimed as confidential." 6 NYCRR 616.7(b)(1) is controlling and provides that "[i]nformation submitted as . . . [confidential] shall be excepted from disclosure and be maintained apart by the department from all

other records until 15 days after the entitlement to such exception has been finally determined by the department or such further time as ordered by a court of competent jurisdiction." Moreover, 6 NYCRR 616.7(c) provides rights for an internal review and an appeal prior to the release of information designated as confidential. To that end, the use of Program Policy to override these long-standing procedures is not supported in the ECL and there is no basis for this novel advance determination concerning a claim of "trade secrets or confidential business information."

Waiver Operation and Requirements

We urge the Department to provide timely certainty in COVID-19 pandemic conditions via the waiver process so as to avoid significant disruptions in the availability of cleaning products for New York consumers fighting pandemic conditions. Given the long lead time for the manufacture and distribution of covered products, the relatively short duration of the waivers and the Department's assurance, announced in Subsection V.E, that it "will take no longer than six months to" act on a waiver application, a manufacturer who does not receive written notice that its waiver request has been rejected within six months should receive default approval. Similarly, the Department is urged to grant waivers based upon a certification that there are no alternatives or replacement ingredients readily available in the marketplace that would include less than trace amounts of 1,4 dioxane that are as effective in performance and comparable in price to the present formulation of the identified household cleansing product or products. This degree of certainty could mitigate significant disruptions within the broad retail supply chain. Distributors, resellers and especially retailers, who play a paramount role in supplying communities with products to combat COVID-19, require a firm timetable. Ambiguity will only lead to imbalances in the supply chain, which we believe is not the intent of the policy.

- The first sentence of Section V.B should provide that manufacturers who submit timely waiver requests containing the required justification <u>will</u> qualify for a waiver; conversely, the Program Policy should not use the phrase "may obtain a waiver" to imply that granting waivers is discretionary. These waivers are provided for in the ECL and the Department's role in granting waiver is ministerial. Accordingly, the opening sentence of this Section should be revised as follows: "This document details the process by which <u>the Department shall grant</u> manufacturers ~~may obtain a~~ waiver<u>s</u> ~~of the requirements of~~ <u>as provided for</u> by ECL 35-0105(4), 37-0117(3), or 37-0117(4)."

- The requirement that manufacturers "must be able to produce documentation of the applicable maximum 1,4-dioxane trace concentration" including test results "if requested" is a substantial new proposed requirement not within the scope of ECL 35-0105(6) and ECL 37-0117(7) or within the permissible scope of Program Policy procedures because the Department does not present any data to justify this testing

requirement which on its face presents new costs to the regulated community and should be subject to notice and comment rulemaking.

- The final portion of Subsection D.1.b should be amended as follows: "and an attestation that no other ingredients in the product ~~would~~ are known to contain 1,4-dioxane."

- Appendix D was not an active link in the version of the draft made available to us. As a result, we do not have any insights into the critical requirement of what constitutes an acceptable explanation about efforts to reduce concentrations of 1,4-dioxane in products.

- Subsection V.F states that to renew a waiver a manufacturer must "include the original information." Such duplication is unnecessary. It should be sufficient for a waiver renewal to reference the prior application/approval and certify that the justification remains unchanged.

Sell Through Provisions

The Department has adequate authority to provide guidance on the reasonable treatment of current available-for purchase 'store shelf' product caught between implementation periods. Because of the failure of the Department to include a 'sell through' provision in Subsection V.G (to ensure that compliant products with less than allowed trace amounts manufactured before a specified waiver expiration date remain in compliance even if sold to consumers after the expiration of the waiver), and considering the incomplete inclusion of distributors in the definition of manufacturer, it is incumbent upon the Department to clearly provide that a manufacturer only 'distributes, sells, offers or exposes products for sale in this state' upon its initial transfer to a reseller or distributor. See also our comment regarding the two-part test for 'manufacturer.'

Thank you for your attention to our comments and we look forward to further engagement on this matter. Please contact: Douglas Troutman (ACI) dtroutman@cleaninginstitute.org; Michael Gruber (CBA) mgruber@consumerbrandsassociation.org; or Kevin Serafino (HCPA) kserafino@thehcpa.org; if you have questions.