DEPARTMENT OF ENERGY AND ENVIRONMENT

SECOND NOTICE OF PROPOSED RULEMAKING

Nonwoven Disposable Products (Wipes)

The Director of the Department of Energy and Environment ("DOEE" or "the Department"), pursuant to the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq*.); the Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.01 *et seq*.); and the Nonwoven Disposable Products Act of 2016, effective March 11, 2017 (D.C. Law 21-220; D.C. Official Code §§ 8-521 *et seq*.), hereby gives notice of his intent to adopt the following new Chapter 24 (Nonwoven Disposable Products Labeling) of Title 21 (Water and Sanitation) of the District of Columbia Municipal Regulations ("DCMR") in not less than thirty (30) days from the date of publication of this notice in the *District of Columbia Register*.

The Nonwoven Disposable Products Act of 2016 (the "Act") provides that a "nonwoven disposable product" offered "for sale in the District" can be labeled as "flushable" only if it: "(A) disperses in a short period of time after flushing in the low-force conditions of a sewer system; (B) is not buoyant; and (C) does not contain plastic or any other material that does not readily degrade in a range of natural environments." Manufacturers of non-compliant products are required to "clearly and conspicuously label" them as products that "should not be flushed."

Directions for submitting comments may be found at the end of this notice.

Background

District Litigation

After enactment of the Act in March 2017, Kimberly-Clark Corporation, a multinational corporation that manufactures personal care and hygiene products, filed a complaint against the District of Columbia and various District officials in their official capacity seeking declaratory and injunctive relief to prevent the enforcement of the Act. Shortly thereafter, it also moved for a preliminary injunction on the same grounds. In its complaint, Kimberly-Clark raised several constitutional challenges to the Act, including violations of the Commerce Clause, the First Amendment, and the Fifth Amendment's Due Process Clause. *Kimberly–Clark Corporation v. District of Columbia*, 286 F.Supp.3d 128 (D.D.C. 2017).

The Court issued a preliminary injunction against the District and its officials providing that the provisions of the Act could not be enforced against Kimberly-Clark and its products. The preliminary injunction applies only "to wipes that Kimberly-Clark engineered and believes to be flushable." The Court determined that the law likely violates Kimberly-Clark's First Amendment rights, since the definition of "flushable" is subject to debate and the District had not considered less restrictive alternatives and whether they would be sufficient. It was against this backdrop that DOEE published its first Notice of Proposed Rulemaking to implement the Act.

DOEE Initial Proposed Rulemaking

On March 15, 2019, DOEE published an initial Notice of Proposed Rulemaking proposing to establish regulations to implement the provisions of the Act. A thirty-day (30-day) comment period was initially provided, which was subsequently extended to May 3, 2019. Six (6) sets of comments were received.

The comments generally took issue with the standards proposed by DOEE as overreaching performance standards that incorrectly and inadvertently lumped true flushable products with the non-flushable products that the Act sought to prevent, lumping them together for labeling purposes, and thereby serving as a de facto ban on flushable wipes. Kimberly-Clark and others argued that the labeling requirements proposed by DOEE were not consistent with those proposed in industry standards agreed to by wastewater and industry organizations, making it difficult if not impossible for manufacturers to comply. Further, they noted, the application of the standard only to any product sold in the District was potentially violative of the Commerce Clause. They also argued that the regulations if enacted as proposed could have the impact of consumers increasing their use of non-flushable products, thereby worsening the potential issues caused by non-flushable wipes for the sanitary sewer system.

Developments After DOEE's Issuance of its Initial Proposed Rulemaking

Subsequent to the issuance of the initial proposed rulemaking, national class action litigation was brought in 2020 in federal court in South Carolina. As a result of that litigation, settlements were entered into with Kimberly-Clark, Walmart, Costco, Target, CVS, Walgreens, and Proctor & Gamble.[1] The settlements included agreements by the defendants to comply with flushable wipe dispersibility standards that are based on water service industry standards, most recently updated in November 2020, and labeling standards.

Given the progress that has been made with the manufacturers and retailers of wipes regarding the dispersibility and labeling of their products, the Department is now proposing regulations consistent with the provisions of the class action settlements in South Carolina. Those settlements have undergone national public comment and involved direct notice via several avenues to over fifteen thousand (15,000) municipal wastewater systems in the country. Notably, there were only two (2) objections to the settlement, both subsequently rejected by the Court, out of the fifteen thousand (15,000) municipal sewer system class members

Additionally, the wipes manufacturers, led initially by Kimberly-Clark, have made improvements in the dispersibility of their "flushable" wipe products. Rather than dispersing in the sub-thirty percent (<30%) range at which most products performed just four (4) years ago, the major manufacturers' flushable wipes products now typically disperse well into the ninety percent (90%) range. That product improvement is a significant benefit for both wipes consumers as well as public wastewater utilities.

[1] A nearly identical settlement was filed on May 10, 2024, between Charleston Water System and Dude Wipes, Inc.

In light of the progress and commitments made by flushable wipe manufacturers and the major retailers in the legal settlements, which address product dispersibility and labeling, the Department is revising its proposed regulations to be consistent with the legal settlements as to dispersibility and labeling, as well as with key legislation of other states that address wipe labeling requirements. This rulemaking will reinforce those performance and labeling requirements and allow for direct enforcement should any product sold in the District of Columbia not comply.

Consistent with the class action settlements, this proposed rulemaking provides a compliance period of eighteen (18) months for manufacturers to meet the dispersibility requirements for their flushable wipes and to modify their labeling for their non-flushable wipes. The compliance schedule ensures manufacturers can sell any products currently on the market. It is important to note that most of the major manufacturers currently meet both the dispersibility standard and labeling requirements. Thus, allowance for a compliance period will not significantly delay the overall beneficial impact of these regulations.

Given the updating of these proposed regulations to reflect the significant agreements reached between national wastewater systems and the manufacturers and retailers of disposable wipes products, almost all of the comments submitted on our prior draft regulations are no longer applicable. Accordingly, DOEE has not summarized and responded to those comments at this time. If commenters still feel that their comment(s) remain valid, they should resubmit their comments in response to this notice and DOEE will summarize and respond to those renewed comments as part of its adoption of a final rule.

Specific Revised Proposed Requirements

In accordance with section 5 of the Act, DOEE developed these revised proposed regulations in conjunction with the District of Columbia Water and Sewer Authority ("DC Water"), who worked with technical and legal experts familiar with the relevant class action litigation, wastewater systems, and wipes national standards. These proposed regulations focus specifically on the dispersibility standard and the labeling requirements for wipe products labelled as being "flushable."

Dispersibility. These proposed regulations require a flushable wipe product to pass the International Water Services Flushability Group's ("IWSFG") November 2020 (PAS 3) dispersibility standard, which is the key test to determine whether a disposable wipe product will actually disperse in typical indoor plumbing/public sewer system conditions. While there are ancillary tests (such as drain line clearance), the Department understands that wipe products routinely pass those tests even if the wipe does not disperse properly. Accordingly, the updated regulations focus on the IWSFG dispersibility test. Wipes that pass that test have been determined by the national municipal wastewater community to be suitable for flushing.

Labeling of non-flushable wipes. Given the dramatically improved performance of flushable wipes, the Department does not anticipate they will pose problems for consumer plumbing or municipal wastewater systems going forward. However, the flushing of non-flushable wipes remains an issue that must be addressed. Accordingly, the Department is proposing the approach

embodied in the class action settlements – namely that a prominent "DO NOT FLUSH" warning and logo will be included on the principal display panel for all non-disposable consumer wipes that may be used in a bathroom. For baby wipes, the packaging must include additional "DO NOT FLUSH" warnings on at least two (2) additional panels. The regulations require that these warnings be provided using "high contrast" between the warning and the package coloring.

The Department is proposing, based on input from DC Water and its experts, what it believes is an industry/manufacturer consensus and highly effective approach to ensuring that flushable wipes are suitable for residential plumbing and public wastewater systems. DOEE is also proposing nationally recognized labeling requirements for disposable wipe products that are not flushable. This will give consumers in the District of Columbia the fair notice they need as to which products to purchase and how to properly dispose of them.

The proposed regulations also provide for a certification process by which manufacturers will provide notice to the Department that their wipes meet the flushability standard as well as a two (2)-year reverification process to ensure that such products can consistently meet the standard. The proposed regulations include enforcement provisions if wipes products are being offered for sale in the District of Columbia that do not comply with the regulations.

Title 21 DCMR, WATER AND SANITATION, is amended by adding a new Chapter 24 as follows:

CHAPTER 24 NONWOVEN DISPOSABLE PRODUCTS LABELING

2400 PURPOSE

2400.1 The purpose of this rule is to implement the Nonwoven Disposable Products Act of 2016, effective March 11, 2017 (D.C. Law 21-220; D.C. Official Code §§ 8-521 *et seq*.) to protect the District's wastewater system from debris deposition, obstruction of flow, and operational interference caused by nonwoven disposable products (generally premoistened and typically referred to as "wipes").

2400.2 This rule sets forth standards to determine whether a nonwoven disposable product sold in the District may be labeled as flushable. The rule provides a specific test in § 2402 to determine whether a product meets the flushability requirement of the Nonwoven Disposable Products Act.

2400.3 For nonwoven disposable products that do not meet that standard and are determined to be non-flushable, this rule sets forth the labeling requirements for such products that are sold in the District.

2401 APPLICABILITY

2401.1 A manufacturer of a nonwoven disposable products for sale in the District shall comply with the rules set forth in this chapter.

2401.2 This chapter is applicable to all nonwoven disposable products that have a significant potential to be used in a bathroom and flushed, including but not limited to: baby wipes, bathroom cleaning wipes, toilet cleaning wipes, hard surface cleaning wipes, disinfecting wipes, hand sanitizing wipes, antibacterial wipes, facial and makeup removal wipes, general purpose cleaning wipes, personal care wipes for use on the body, feminine hygiene wipes, adult incontinence wipes, adult hygiene wipes, and body cleansing wipes.

2402 DETERMINATION OF FLUSHABILITY

2402.1 To be considered flushable, a nonwoven disposable product must meet the Slosh Box Test of the International Water Services Flushability Group (IWSFG) 2020: Publicly Available Specifications (PAS) 3.

2403 INDEPENDENT TESTING AND CERTIFICATION TO THE DEPARTMENT

2403.1 The test specified in § 2402 shall be performed by an independent testing organization.

2403.2 Beginning no later than eighteen (18) months after the effective date of these regulations, each manufacturer of a nonwoven disposable product for sale in the District of Columbia shall present the following information to the Director for any nonwoven disposable product that the manufacturer seeks to label as flushable:

(a) The test data documentation showing the results of the test required in § 2402; and

(b) A certification signed by both the manufacturer and the independent testing organization that the product has passed the required test in § 2402.

The data and certification shall be sent to the Department by e-mail to wipes.doee@dc.gov or by mail to the Water Quality Division, Department of Energy and Environment, 1200 First Street N.E., 5th Floor, Washington, D.C. 20002.

2403.3 Eighteen (18) months after the effective date of this regulation, any manufacturer that has not already complied with subsection 2403.2 shall provide the information required in subsection 2403.2 to the Department prior to selling nonwoven disposable products labelled as being flushable within the District of Columbia.

2403.4 Each manufacturer shall provide an annual update containing the information in subsection 2403.2 for each of the next two (2) years following their initial certification. Such re-certifications shall be due in the same month as the original certification and submitted in the same manner provided for in subsection 2403.2.

2403.5 A manufacturer that submits test results showing three (3) years of compliance with the flushability requirement in its initial submission under subsection 2403.2 is not subject to the additional two (2) years of verification testing in subsection 2403.4.

2404 LABELING OF NONWOVEN DISPOSABLE PRODUCTS

2404.1 Beginning eighteen (18) months after the effective date of these regulations, a manufacturer of a nonwoven disposable product for sale in the District of Columbia shall not label the nonwoven disposable product as safe to flush, safe for sewer systems, safe for septic systems, or otherwise flushable unless nonwoven disposable product meets the standards set forth in § 2402 of these regulations.

2404.2 Beginning eighteen (18) months after the effective date of these regulations, a manufacturer of non-flushable nonwoven disposable product for sale in the District that does not meet the standards set forth in § 2402 must clearly and conspicuously label the product as being non-flushable in the manner set forth in § 2405.

2405 LABELING REQUIREMENTS FOR NON-FLUSHABLE NONWOVEN DISPOSABLE PRODUCTS

2405.1 A nonwoven disposable product that has not met the flushability requirement in § 2402 of these regulations shall be clearly and conspicuously labeled to communicate that the non-flushable nonwoven disposable product does not meet the standard set forth in § 2402 of these regulations, as follows:

(a) Except as provided in paragraphs (b), (c), (d), (e), and (f) of this subsection, a non-flushable nonwoven disposable product shall be labeled in accordance with the following label requirements:

(1) For cylindrical or near-cylindrical packaging intended to dispense individual products, a manufacturer shall comply with one (1) of the following options:

(A) Place a “Do Not Flush” symbol and Label Notice on the principal display panel in a location reasonably viewable each time a product is dispensed.

(B) Place a “Do Not Flush” symbol on the principal display panel, and either the “Do Not Flush” symbol or Label Notice, or the “Do Not Flush” symbol and Label Notice in combination, on the flip lid, subject to the following:

(i) If the Label Notice does not appear on the flip lid, the Label Notice shall be placed on the principal display panel.

(ii) The “Do Not Flush” symbol or Label Notice, or the “Do Not Flush” symbol and Label Notice in combination, on the flip lid may be embossed, and in that case are not required to comply with subparagraph (a)(6) of this section.

(iii) The “Do Not Flush” symbol or Label Notice, or the “Do Not Flush” symbol and Label Notice in combination, on the flip lid shall cover a minimum of eight percent (8%) of the surface area of the flip lid.

(2) For flexible film packaging intended to dispense individual products, a manufacturer shall:

(A) Place the “Do Not Flush” symbol on the principal display panel and dispensing side panel and place the Label Notice on either the principal display panel or dispensing side panel in a prominent location reasonably visible to the user each time a product is dispensed;

(B) If the principal display panel is on the dispensing side of the package, two (2) symbols are not required; and

(C) For any flexible film packaging intended to dispense individual baby wipes, adhere to the requirements of this subsection and shall also place the “Do Not Flush” symbol or Label Notice on two (2) additional panels of the packaging except when the packaging is so small that inclusion of the “Do Not Flush” symbol or Label Notice on the two (2) additional panels is not practicable.

(3) For refillable tubs or other rigid packaging intended to dispense individual products and be reused by the consumer for that purpose, a manufacturer shall:

(A) Place the “Do Not Flush” symbol and Label Notice on the principal display panel in a prominent location reasonably visible to the user each time a product is dispensed; and

(B) For any refillable tubs or other rigid packaging intended to dispense baby wipes and be reused by the consumer for that purpose, adhere to the requirements of this subsection and place the “Do Not Flush” symbol or Label Notice on two (2) additional panels of packaging except when the packaging is so small that inclusion of the “Do Not Flush” symbol or

Label Notice on the two (2) additional panels is not practicable.

(4) For packaging not intended to dispense individual products, a manufacturer shall place the "Do Not Flush" symbol and Label Notice on the principal display panel in a prominent and reasonably visible location.

(5) A manufacturer shall ensure the packaging seams, folds, or other package design elements do not obscure the "Do Not Flush" symbol or the Label Notice.

(6) A manufacturer shall ensure the "Do Not Flush" symbol and Label Notice have sufficiently high contrast, as defined in subsection 2405.3.

(b) For non-flushable nonwoven disposable products sold in bulk at retail, both the outer package visible at retail and the individual packages contained within shall comply with the labeling requirements in paragraph (a) applicable to the particular packaging types, except this requirement does not apply to:

(1) Individual packages contained within the outer package that are not intended to dispense individual products and contain no retail labeling; and

(2) Outer packages that do not obscure the "Do Not Flush" symbol and Label Notice on individual packages contained within.

(c) If a non-flushable nonwoven disposable wipes product is provided within the same packaging as another consumer product for use in combination with the other product, the outside retail packaging of the other consumer product does not need to comply with the labeling requirements of subsection (a) of this section.

(d) If a non-flushable nonwoven disposable product is provided within the same package as another consumer product for use in combination with the other product and is in a package smaller than three inches by three inches (3 x 3 in.), the manufacturer may comply with the requirements of subsection (a) of this section by placing the "Do Not Flush" symbol and Label Notice in a prominent location one the combined package that is reasonably visible to the user.

(e) Except as otherwise provided in this chapter, a manufacturer shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration,

trademark, or trade name, about the flushable attributes, flushable benefits, flushable performance, or flushable efficacy (such as the term "Plumber Approved") on the packaging of a non-flushable nonwoven disposable product.

(f) Compliance with United States Environmental Protection Agency ("EPA") labeling requirements:

(1) If a non-flushable nonwoven disposable product is required to be registered by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 *et seq.*), the manufacturer shall submit a label compliant with the labeling requirements of paragraph (a) of this subsection no later than January 1, 2025, to the EPA.

(2) If the EPA does not approve a product label that otherwise complies with the labeling requirements of paragraph (a) of this subsection, the manufacturer shall use a label with as many of the requirements of this section as the EPA has approved.

(g) A manufacturer may include on a non-flushable nonwoven disposable product packaging words or phrases in addition to those required for the Label Notice so long as the words or phrases cannot be reasonably construed to imply that the product is flushable.

2405.2 The "Do Not Flush" symbol and Label Notice placed on non-flushable nonwoven disposable products as required in subsection 2405.1 shall comply with the following standards:

(a) When a manufacturer is required to affix a "Do Not Flush" symbol to the packaging of a non-flushable nonwoven disposable product, the packaging shall include the Association of the Nonwoven Fabrics Industry (INDA) Code of Practice 2 (COP2) "Do Not Flush" symbol presented in Figure 1. The "Do Not Flush" symbol shall cover at least two percent (2%) of the surface area of the side of the side of the package on which the logo is presented.

Figure 1

(b) When a manufacturer is required to affix a Label Notice to the packaging of non-flushable nonwoven disposable products, this shall mean the phrase

"DO NOT FLUSH". The Label Notice shall cover at least two percent (2%) of the surface area of the side of the package on which the Label Notice is presented.

2405.3 Any "Do Not Flush" symbol and Label Notice placed on packaging pursuant to the requirements of this Chapter shall have a sufficiently high contrast to the background by meeting both of the following conditions:

(a) Using either a light symbol or text on a solid dark background or a dark symbol or text on a solid light background; and

(b) Having at least seventy percent (70%) contrast between the symbol artwork or text and the background using the following formula:

(B1 – B2) / B1 * 100 = contrast percentage where:

B1 = the light reflectance value of the lighter area;
B2 = the light reflectance value of the darker area.

2406 ENFORCEMENT

2406.1 The Mayor may impose civil fines and penalties as sanctions for violations of the provisions of this section, pursuant to the Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801 *et seq*.) ("Civil Infractions Act") and the Civil Infractions Regulations (Title 16 DCMR, Chapter 40). Enforcement and adjudication of an infraction shall be pursuant to the Civil Infractions Act.

2406.2 In addition to the enforcement authority provided in this section, consistent with section 4(b) of the Act, the Attorney General for the District of Columbia may seek injunctive relief or other appropriate remedy in any court of competent jurisdiction to enforce compliance with the Act.

2407 **NOTICE OF NON-PERFORMANCE AND REQUIREMENT TO CURE**

2407.1 Notwithstanding any other provision of this chapter, a manufacturer who fails to comply with the flushability performance specifications in § 2402 in either of the subsequent annual verification testing periods specified in subsection 2403.4 must provide notice of such failure to the Director by electronic mail (wipes.doee@dc.gov) within ten (10) days of the manufacturer's receipt of the failing result. As long as such notice is provided, the manufacturer may continue to sell in the District any noncompliant product already produced. However, the manufacturer must, within one hundred twenty (120) days of the manufacturer's receipt of a failing result, either (1) cure the defect and provide updated certifications required by § 2403 or (2) cease distributing (after the one hundred twenty-day (120-day) grace period) the non-conforming product within the District

of Columbia until such time as the product passes the flushability performance specifications in § 2402.

2499 DEFINITIONS

2499.1 When used in this chapter, the following terms shall have the meanings ascribed:

Department - the Department of Energy and Environment.

Director - the Director of the Department of Energy and Environment

District - the District of Columbia.

"Do Not Flush" symbol – a symbol affixed to packaging in compliance with subsections 2405.2 and 2405.3 of this Chapter.

Flushable - a nonwoven disposable product that (a) disperses in a short period of time after flushing in the low-force conditions of a sewer system; (b) is not buoyant; and (c) does not contain plastic or any other material that does not readily degrade in a range of natural environment. (Statutory) A product is compliant with the criteria of paragraph (a) if it meets the flushability standard set forth in § 2402 of this Chapter.

Independent testing organization - a lab or other facility capable of carrying out the tests set forth in this chapter that is not owned or operated by a manufacturer and that has no affiliation with the manufacturer through an ownership, familial, contractual, or other relationship that results in the facility being controlled by or under common control with the manufacturer.

Label - to represent by statement, word, picture, design, or emblem on the packaging of a nonwoven disposable product.

Label notice – the phrase "Do Not Flush" affixed to packaging in compliance with subsections 2405.2 and 2405.3 of this Chapter.

Manufacturer - a business entity that produces a nonwoven disposable product for sale and distribution in the District of Columbia.

Nonwoven disposable product - a product constructed from nonwoven sheets, including moist toilet tissue or cloth, that is designed, marketed, or commonly used for personal hygiene purposes.

Principal display panel – the side of the product package that is most likely to be displayed, presented, or shown under customary conditions of display for retail sale. In the case of a cylindrical package, the surface area of the

principal display panel constitutes forty percent (40%) of the product package as measured by multiplying the height of the container by the circumference. In the case of a flexible film package in which a rectangular prism or nearly rectangular prism stack of products is housed within the film, the surface area of the principal display panel is measured by multiplying the length by the width of the side of the package when the flexible packaging film is pressed flat against the stack of products on all sides of the stack.

All persons desiring to comment on the proposed regulations should file comments in writing no later than thirty (30) days after the publication of this notice in the *District of Columbia Register*. Comments should identify the commenter and be clearly marked "DOEE Nonwoven Disposable Products Labeling Comments." Comments may be (1) mailed or hand-delivered to the Department of Energy and Environment, 1200 First St. N.E., 5th Floor, Washington, D.C. 20001, Attention: DOEE Nonwoven Disposable Products Labeling, or (2) sent by e-mail to wipesrule@dc.gov with the subject "DOEE Nonwoven Disposable Products Labeling Proposed Rule Comments."

The proposed rules are available for viewing at: http://doee.dc.gov/nonwovendisposableproducts.