

PHOSPHATE DETERGENT REGULATIONS

I. THE PHOSPHATE POLLUTION PROBLEM

Environmentalists are concerned that our bodies of water are aging at a rate faster than normal¹ because of the introduction of man-made nutrients, particularly phosphorous and nitrogen.² These man-made nutrients cause the accelerated growth of blue-green algae that depletes the oxygen levels in the water.³ Scientific attention has focused on control of these man-made nutrients as a technique for preventing the accelerated enrichment-aging process.⁴ Environmentalists see the control of phosphorous, and phosphate detergents in particular, as a solution;⁵ the producers of phosphate detergents, of course, do not agree.⁶

A heated debate between environmentalists and the detergent industry has arisen over the proper course of action concerning phosphate detergents. Nevertheless, state and local governments have begun to act to reduce the amounts of phosphorous in their waters

1. *How Fast Are U.S. Lakes Aging and Why?*, 7 ENVIRONMENTAL SCI. & TECHNOLOGY 198 (1973).

2. Grundy, *Strategies for Control of Man-Made Eutrophication*, 5 ENVIRONMENTAL SCI. & TECHNOLOGY 1184 (1971). The article points out that the natural aging process of water involves eutrophication: "Eutrophication is a natural process which involves an increase in the biologic productivity of a body of water as a result of nutrient enrichment from natural sources. Environmental concern is for those instances where the natural aquatic growth processes are accelerated or increased. Under man's influence, excessive amounts of nutrients can enter an aquatic ecosystem, accelerating the eutrophication processes—this is known as 'cultural eutrophication.'" *Id.*

3. *Id.*

4. *Id.*

5. *Id.* The author expresses the view that phosphate detergents are unique among consumer products as a source of nutrients: "Nationally they represent about 5.5 billion lbs. annually, approximately 20 lbs. for every man, woman, and child. The phosphate fraction amounts to 2.2 billion lbs. or 30-40% of all the phosphorous entering the aquatic environment. The environmental implications of such quantities cannot be discounted." *Id.* The author expresses the view that phosphorous is considered the preferable nutrient for control. *Id.* at 1186; see Note, *Phosphates in Detergents: The Chicago-Type Ordinance and Other Remedies*, 40 U. CIN. L. REV. 548 (1971).

6. *Phosphates in Detergents*, *supra* note 5, at 551.

by limiting phosphate levels in detergents.⁷ In Florida, Dade County has restricted phosphate levels in detergents and is one of the few areas that has withstood legal attempts by the detergent industry to block enforcement of its phosphate detergent regulation. In 1973, Florida joined other states in undertaking a national survey of lakes and rivers designed to determine the causes of and solutions to the accelerated aging process.⁸ The results of the survey may become added ammunition for either the environmentalists or the industry.

II. PROHIBITION OF PHOSPHATE DETERGENTS: THE DADE COUNTY APPROACH

Dade County enacted in 1967 the "Metropolitan Dade County Pollution Control Ordinance" to specifically regulate and control all activities which may pollute the air, water, soil, and property in the county.⁹ Before the passage of the ordinance there was a loose conglomeration of pollution control legislation in the county. This ordinance consolidated all such regulations under Chapter 24 of the Dade County Code in order to facilitate more efficient operation and enforcement of the regulations. County officials also formally created section 24-43¹⁰ which added to the countywide pollution control ordinance a pre-existing detergent control regulation. This section called for the prohibition of the sale, use, and possession of biologically non-degradable (hard) detergents in Dade County.¹¹ Until 1971, this section represented the total extent of detergent regulation in the county.

In 1971, Dade County, aware of the existing phosphate discharge problem within its borders, enacted a new county ordinance¹² to be added to Chapter 24 of the Dade County Code. Section 24-44 initiated county control over the sale and use of synthetic and phosphate

7. Grundy, *supra* note 2, at 1186. As of 1971, six states and 47 localities had already passed legislation limiting phosphate levels in detergents with the majority restricting levels to 8.7% immediately, and to zero in 1972.

8. *Eutrophication Survey*, DEPARTMENT OF POLLUTION CONTROL OF FLORIDA-NEWSLETTER (October 1972); *How Fast Are U.S. Lakes Aging and Why?*, *supra* note 1.

9. Dade County, Fla., Ordinance 67-95 § 1, Dec. 19, 1967 (creating Chapter 24 of the DADE COUNTY, FLA., CODE).

10. DADE COUNTY, FLA., CODE § 24-43 (1967).

11. This definition does not include phosphate detergents.

12. Dade County, Fla., Ordinance 71-31 § 1, July 13, 1971 (adding § 24-44 to DADE COUNTY, FLA., CODE).

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detergents in Dade County utilizing a two-stage process which would culminate in a complete ban on the sale and use of phosphate detergents by 1972.¹³ This measure is considered the most restrictive of its kind, and a working knowledge of its extent and character facilitates a more comprehensive understanding of other legislative efforts in this field.

The first phase of the law was designed to regulate the amount of phosphates entering waste water from each potential source. It prohibited the sale or use of any synthetic detergent which contained more than 8.7% phosphorous by weight after April 30, 1971.¹⁴ It further prohibited the sale or use of any synthetic detergent which recommended a use level of the detergent containing more than seven grams of phosphorous after April 30, 1971.¹⁵ Taken together, these two requirements were to ensure that efforts to reduce the overall levels of phosphorous entering the waters through detergent waste water would not be counteracted by high recommended use levels of phosphate detergents.

Phase two of the ordinance, a complete ban on the sale and use of phosphate detergents in Dade County, is characterized by the Florida Department of Pollution Control as a *zero* phosphate rule.¹⁶ Specifically, phase two makes it unlawful to use, sell, or in any other manner furnish *any* synthetic detergent or detergent containing phosphorous after January 1, 1972.¹⁷ Phase two includes any detergents manufactured for use in machine dishwashers, dairy equipment, beverage equipment, food processing and industrial cleansing equipment,¹⁸ as well as laundry detergents.

To ensure compliance with the phosphate restrictions and to protect consumer interests, it was further required that manufacturers of any household laundry detergent sold in Dade County have on file with the pollution control office a current report listing all the detergent's ingredients.¹⁹ After January 1, 1972, all detergents sold in Dade County must list on the package the percentage by weight

13. DADE COUNTY, FLA., CODE ch. 24, § 24-44 (1971).

14. *Id.* § 24-44(3).

15. *Id.*

16. *Id.* § 24-44(4); *Detergent Limitations Adopted*, DEPARTMENT OF POLLUTION CONTROL OF FLORIDA-NEWSLETTER (November-December 1972).

17. DADE COUNTY, FLA., CODE ch. 24, § 24-44(4) (1971).

18. *Id.*

19. *Id.* § 24-44(6).

of each of their ingredients.²⁰ The ordinance was an attempt to protect consumers through the content and labeling regulations, while allowing the industry time to comply with the ban without suffering a severe financial hardship. Nevertheless, the manufacturers did not view this ordinance as beneficial and attempted to enjoin its enforcement.

III. CONSTITUTIONALITY OF THE BAN APPROACH

In 1971, the Soap and Detergent Association initiated a federal suit which sought a declaratory judgment that the ordinance's phosphate ban and labeling requirements were unconstitutional because they constituted an unreasonable burden on interstate commerce and requested that their enforcement be enjoined. In *Soap & Detergent Association v. Clark*,²¹ the federal district court reacted favorably to Dade County's pollution control efforts by concluding that plaintiff Association had not met its heavy burden of showing irreparable harm from enforcement and, therefore, was not entitled to an injunction.²² The court had balanced the purpose and intent of the ordinance—the protection of the health and safety of county residents—against the alleged financial harm to plaintiffs. The result of this balancing approach was the conclusion that the “scales are strongly tipped in favor” of Dade County's legislative environmental pronouncements.²³ Although the industry was able to show some financial loss if enforcement was not enjoined, it was unable to show, as it must, that there was a substantial likelihood the ordinance would later be held unconstitutional.²⁴ Relying on Supreme Court precedent in *Brotherhood of Locomotive Firemen v. Chicago*,

20. *Id.* § 24-44(2).

21. 330 F. Supp. 1218 (S.D. Fla. 1971).

22. *Id.* at 1223. The court stated and applied the rule followed by the courts when preliminary injunctions are requested that plaintiffs are entitled to injunctive relief only if they can show both that they will suffer irreparable harm if an injunction is not issued, and that there is a substantial likelihood they will prevail on the merits at a final hearing. *Id.* at 1219.

23. *Id.* at 1222. The court detailed the problem of cultural eutrophication in Dade County's waters and the contribution of phosphate detergents to augmentation of this problem. Against the evidence introduced by the county's experts to support its position, the court placed the testimony of the industry that it would have to expend hundreds of thousands of dollars to comply, and its claim that this would be wasted financial resources if the ordinance was later declared unconstitutional. *Id.*

24. *Id.* at 1221.

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Rock Island & Pacific Railroad,²⁵ the court held that if there is conflicting testimony as to the public health, safety, or welfare purpose behind state legislation and the only burden on interstate commerce is an increased cost to the "interstate commerce businessman," the court should uphold the legislative determination.²⁶ Furthermore, the court reasoned that the problem of water pollution, like air pollution, is not subject to uniform national regulation but is solely within the province of local units of government.²⁷ The court decided that no preliminary injunction could issue because plaintiffs had not shown the substantial likelihood of unconstitutionality at final hearing.²⁸ "In fact," stated the court, "based on the record here made, it appears that the ordinance in all aspects will withstand constitutional challenge."²⁹ In effect, this federal court upheld the total prohibition and package labeling approaches because it found a rational connection between those measures and the proper exercise of the police power in protecting the health, safety, and welfare of the county's residents.

No appeal of this decision was taken concerning the phosphate ban. Chemical Specialties Manufacturers Association did appeal, however, the decision upholding the labeling requirements of section 24-44 of the Code.³⁰ Plaintiff argued that Congress had preempted the field through the 1966 Amendments to the Federal Hazardous Substances Act.³¹ The Fifth Circuit agreed that the county labeling provision was invalid.³² This decision did not affect the validity of the phosphate ban provision of section 24-44.

25. 393 U.S. 129 (1968).

26. 330 F. Supp. at 1221, *citing* Brotherhood of Locomotive Firemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968).

27. 330 F. Supp. at 1222, *citing* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), where "the Supreme Court upheld the constitutionality of a Detroit smoke abatement ordinance which had as its sole aim the elimination of air pollution to protect the health and enhance the cleanliness of the local community. The court recognized that the problem of air pollution is peculiarly a matter of state and local concern." 330 F. Supp. at 1222.

28. *Id.* at 1223.

29. *Id.*

30. Chemical Specialties Mfrs. Ass'n v. Clark, No. 72-1791 (5th Cir. July 12, 1973).

31. 15 U.S.C. § 1261 (1970).

32. Chemical Specialties Mfrs. Ass'n v. Clark, No. 72-1791 at 6, 7 (5th Cir. July 12, 1973).

Other states and localities, including Florida, have initiated phosphate detergent regulation legislation. Some of these efforts have been subjected to judicial review. The following presentation is not intended to be exhaustive, but merely representative of other approaches to the problem.

IV. OTHER APPROACHES TO PHOSPHATE REGULATION

Florida enacted legislation imposing statewide detergent controls regulating the content and use levels of detergents.³³ A county or locality may not enforce a local measure regulating detergents that establishes less stringent controls than those imposed by the State law.³⁴ The standards of the State law are set by the Department of Pollution Control of Florida pursuant to its delegated powers.³⁵ These rules established by the Department make it unlawful to sell or use detergents containing more than 8.7% phosphorous by weight.³⁶ The State's intent is regulation of content levels rather than prohibition and therefore is more limited than the Dade County approach. Included in the State regulation is a prohibition of the sale of detergents having recommended use levels more than seven grams of phosphorous by weight.³⁷ The purpose of both sections is to ensure that phosphate levels in the use of the detergent do not nullify the rule's intent of keeping down overall phosphate discharges in waste water. The State law also provides exemptions to its control, including detergents used for personal body cleansing and disinfectants, but not including household laundry, commercial laundry, machine dishwashing and industrial cleaning detergents.³⁸

The State law is therefore a regulation on the sale or furnishing of detergents by phosphate content with an extensive list of exceptions. By comparison, Dade County's prohibition on sale and use is a much stronger control device.³⁹ Florida's law covers only the sale

33. FLA. STAT. § 403.061(26) (1971).

34. *Id.*

35. RULES OF STATE OF FLORIDA DEPARTMENT OF POLLUTION CONTROL ch. 17-14 (1972).

36. *Id.* ch. 17-14.03(1).

37. *Id.* ch. 17-14.03(2). The reader should recognize the fact that this statutory regulation resembles phase one of the Dade County ordinance to the extent of its restriction on phosphate levels in detergents.

38. *Id.* ch. 17-14.04.

39. By the terms of FLA. STAT. § 403.061(26) (1971), since the Dade County ordinance is "not less stringent than the state regulation," and is in fact a stronger regulation, it is not pre-empted by the State law.

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or furnishing of phosphate detergents, but not their use. It may be assumed that use coverage was intended. Nonetheless, this is a loophole that could be eliminated by inserting the word "use" into the implementing law and department rules.

Phosphate detergent controls are also utilized in New York, both at the county and state levels. Erie County, New York, has enacted Local Law No. 8—"A Local Law Prohibiting the Sale of Certain Detergents Containing Phosphorous."⁴⁰ In essence, this law is identical to Dade County's legislation, but with the same loophole that the Florida law contains, since it deals specifically only with the *sale* of detergents. The county law initiates a two-phase attack on phosphate detergents. Phase one prohibits the sale of detergents containing more than 8.7% phosphorous by weight after April 30, 1971.⁴¹ Phase two prohibits the sale or furnishing of phosphate detergents entirely after January 1, 1972.⁴² The law contains the legislative finding that the discharge of phosphates is seriously polluting the county's waters through fertilization of excessive algae growth,⁴³ but since the law covers only sale and not use of phosphate detergents, individuals could import phosphate detergents from other localities for their own use.

The State of New York has also launched a two-phase attack on the problem, culminating in a statewide ban on the *sale* of phosphate detergents after June 1, 1973.⁴⁴ In one respect this law is similar in approach to Dade County's ordinance: it is a phosphate ban. It is a ban, however, only on the *sale* of *household cleansing products*.⁴⁵ These two limitations may detract from its effectiveness. The law contains specific exemptions to its controls, among which are industrial cleansing products and other household uses.⁴⁶

Judicial reaction to the Erie County law has been favorable. In

40. ERIE COUNTY, N.Y., LOCAL LAW 8 (1971).

41. *Id.* § 2a.

42. *Id.* § 2b.

43. Colgate-Palmolive Co. v. Erie County, 68 Misc. 2d 704, 705, 327 N.Y.S.2d 488, 490 (Sup. Ct. 1971).

44. N.Y. ENVIRONMENTAL CONSERV. LAW § 35-0105(2) (McKinney 1972).

45. *Id.* § 35-0103(1).

46. *Id.* Uses not covered are those not included in the definition of household cleansing product, including foods, drugs, cosmetics, insecticides, fungicides and rodenticides or cleansing products used primarily in industrial manufacturing, production and assembling processes.

Colgate-Palmolive Co. v. Erie County,⁴⁷ plaintiff claimed that the law represented an unreasonable burden on interstate commerce and that it was pre-empted by the State law, and sought an injunction against the law's enforcement.⁴⁸ The court concluded that the dangers to the health and safety of the county's residents far outweighed plaintiff's claims of financial loss.⁴⁹ The constitutional arguments raised by plaintiff were rejected entirely by the court, which relied on and cited the discussion of Dade County's ordinance in the *Soap and Detergent Association* case as authority to support its conclusion that there was not an unreasonable burden on interstate commerce.⁵⁰ Such reliance points out that there is some judicial acceptance of the view that, where this type of legislation is concerned, local efforts to protect the safety and welfare of its residents will not constitute an unreasonable burden of interstate commerce.

In Chicago, however, a similar phosphate detergent ban was declared unconstitutional by a federal district judge because he considered it an unreasonable interference with interstate commerce.⁵¹ The suit was filed by representatives of the detergent manufacturers.⁵² The court stated that the "evidence is clear that a detergent made with phosphate is a more effective cleaning agent than a nonphosphate detergent when used with Chicago's water, and it is not at all harmful to the persons using it or wearing clothes or eating from utensils washed with it."⁵³ The court continued, "the city cannot interfere with interstate commerce merely for hortatory purposes to influence other cities from discharging phosphates into Lake Michigan."⁵⁴

The Chicago approach, which was the first comprehensive treatment of the detergent phosphate problem in the United States, pro-

47. 68 Misc. 2d 704, 327 N.Y.S.2d 488 (Sup. Ct. 1971).

48. *Id.* at 707, 327 N.Y.S.2d at 491.

49. *Id.* at 705-06, 327 N.Y.S.2d at 491. The court also concluded that the county law had not been pre-empted by the State law because it only pre-empted local regulations enacted after June 1, 1971, and Erie County's law was in force before this date.

50. *Id.*

51. *Soap & Detergent Ass'n v. City of Chicago*, 357 F. Supp. 44 (N.D. Ill. 1973).

52. The suit was filed by the Soap & Detergent Association, Proctor & Gamble Co., FMC Corp., Monsanto Co., and Amway Corp. *Id.* at 45.

53. *Id.* at 47.

54. *Id.* at 50.

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vided for a two-stage phase-out of phosphates in detergents similar to the Dade County plan.⁵⁵ The first phase limited phosphate content to 8.7%, while the second phase eliminated phosphates entirely.⁵⁶ Chicago's law, however, also presented specific exemptions to its regulations.⁵⁷

CONCLUSION

Final resolution of the constitutionality of this type of phosphate regulation must await determination by the United States Supreme Court, since at the present time there exist two divergent views on this issue at the lower federal court level.

The detergent industry argues that these local laws represent an unreasonable burden on interstate commerce; that they are unworkable because there exist no safe and effective alternatives or substitutes to phosphates;⁵⁸ that since phosphates are added to the waterways through sources other than detergents, the only truly effective remedy is sewage treatment; and finally, that there is no conclusive proof that removal of phosphates will prevent the acceleration of the aging process in local waters.⁵⁹ At least one federal district court now agrees.

On the other hand, localities and environmentalists assert that this type of regulation represents a valid exercise of the police power because it is designed to improve water quality and therefore bears a reasonable relationship to the protection of public health and welfare. They argue that phosphates have been proven to accelerate the natural aging process of local waters and that these laws are intended to prevent this phenomenon with its consequent health and environmental hazards. Since these arguments have also gained federal judicial approval, Supreme Court determination is essential in order to end speculation and doubt as to the legality of phosphate detergent regulations.

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55. CHICAGO, ILL., CODE ch. 17, art. VII, §§ 17-7.1 to 17-7.4 (1971).

56. *Id.* § 17-7.3 (1971).

57. *Id.* Although the law exempted detergents used in machine dishwashers, dairy equipment, beverage equipment, food processing equipment and industrial cleaning equipment, these exemptions applied only during the first phase.

58. Grundy, *supra* note 2, at 1186; where the view is expressed that this is an exceedingly important factor to consider since experts in and out of the industry have expressed concern that the phosphate substitutes may present more potential human health hazards than the phosphates themselves.

59. *Phosphates in Detergents*, *supra* note 5, at 552.