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**By Electronic Submission**

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW, Room CC-5610 (Annex D)  
Washington, DC 20580

Re: **Comments on the Proposed Consent Agreement *In the Matter of Nice-Pak Products, Inc.*, File No. 132-3272**

To Whom It May Concern:

The City of New York (“City”), through the New York City Law Department, submits the following comments in response to the United States Federal Trade Commission’s (“Commission” or “FTC”) proposed consent agreement *In The Matter of Nice-Pak Products, Inc.* (“Nice-Pak” or “Respondent”), File No. 132-3272 (“Order”).<sup>1</sup> While the City supports and welcomes the Commission’s attention to the pressing problems that sanitary wipes that are marketed to be flushable present to sewer and wastewater treatment utilities, the City is concerned that the proposed Order suffers from several weaknesses that may threaten its efficacy.

**A. The Impact of Flushable Wipes on New York City’s Sewer and Wastewater Treatment Infrastructure**

The New York City Department of Environmental Protection (“DEP”) operates and is responsible for 21 wastewater treatment plants (“WWTPs”), over 7,000 miles of sewer pipes, and 107 wastewater pumping stations that transport and treat an average of 1.3 billion

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<sup>1</sup> Available at [www.ftc.gov/system/files/documents/cases/150518nice-pakorder.pdf](http://www.ftc.gov/system/files/documents/cases/150518nice-pakorder.pdf) (last visited June 3, 2015).

gallons of wastewater generated from homes, businesses, schools, and streets every day. The City's WWTPs remove most pollutants from wastewater through physical and biological processes before releasing the treated water into local waterways. Depending on where wastewater enters the City's sewer system, it can travel from a New York City resident's house to a City WWTP in as little as a few minutes to just over an hour, and, under dry weather operating conditions, the City's WWTPs can fully treat wastewater in only seven hours.

Following the introduction of "flushable" sanitary wipes into the consumer market, the City noted a significant increase in the number of sanitary wipes found in its sewer and wastewater treatment infrastructure, and the volume of wipes in the City's systems continues to rise every year. Many wipes marketed as flushable are not truly "flushable," in that they do not disintegrate before they reach the City's treatment systems, where they then interfere with the treatment process. In addition, the widespread marketing of so-called flushable wipes appears to have created confusion with nonflushable wipes. Many wipes that are not designed to be flushable are poorly marked, leading consumers increasingly to flush both nonflushable wipes as well as "flushable wipes."

Once introduced into the sewer system by ill-informed consumers, flushed wipes cause problems whether they are designed to be flushed or not. Heavy accumulation of wipes and debris can obstruct and damage the pumps, screens and screening mechanisms, mixers, channels, and other equipment at City pumping stations and WWTPs. All of the wipes collected from the City's sewer and wastewater treatment infrastructure must be transported to landfills for disposal.

These problems result in additional financial burdens on municipalities already heavily burdened with the costs of operating and maintaining critical infrastructure.<sup>2</sup> The City spends millions of dollars yearly on labor, maintenance, and capital costs related to clearing flushable wipes from its systems, repairing equipment damaged by accumulated wipes, and transporting and disposing flushed wipes in landfills. As the amount of wipes disposed of by flushing increases annually, the City's costs likewise escalate. The City must divert funds to resolve the problems created by flushed wipes from other important wastewater priorities. The increased costs that the City incurs are directly attributable to the wipe industry's improper marketing practices.

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<sup>2</sup> Municipalities across the country are experiencing similar problems caused by flushed wipes, as evidenced by the numerous comments relating to this settlement submitted to the FTC by other municipal wastewater utilities and representative organizations. *See, e.g.*, Comments submitted by The Sanitary Board of the City of Charleston, West Virginia regarding *In the Matter of Nice-Pak Products, Inc.*, File No. 132-3272 (June 1, 2015); Comments submitted by Southern California Alliance of Publicly Owned Treatment Works regarding *In the Matter of Nice-Pak Products, Inc.*, File No. 132-3272 (June 15, 2015); Comments submitted by Seattle Public Utilities regarding *In the Matter of Nice-Pak Products, Inc.*, File No. 132-3272 (June 10, 2015), all available at <https://www.ftc.gov/policy/public-comments/initiative-610>.

These escalating costs are borne by water rate payers in New York City, which include not only City residents, but also businesses and institutions based in the City. Moreover, because residential water rates are borne equally by all water users, higher rates have a disproportionately burdensome impact on low-income communities. In New York City, the average annual household wastewater cost is about one percent of the median household income (“MHI”). United States Environmental Protection Agency guidance on financial capability indicates that average wastewater bills between one and two percent of MHI constitute a mid-range economic impact, and greater than two percent of MHI constitute a large economic impact. For a city like New York, with large income inequality, it is also important to look at the households below the median. Roughly 27 percent of households are estimated to pay two percent or more of their income on wastewater service alone. The FTC must consider costs to the City that are passed on to consumers through rate increases as a result of the industry’s marketing practices.

## **B. Concerns Regarding the Nice-Pak Order**

The City applauds the Commission’s attention to this issue and its enforcement action related to Nice-Pak’s dissemination of marketing materials that include information about “tests which did not accurately reflect real-world conditions Nice-Pak Wipes would encounter after being flushed (i.e., conditions that exist in household toilets, plumbing, or septic systems, or in public sewer systems or public wastewater treatment facilities).” *See In the Matter of Nice-Pak Products, Inc.*, Complaint at 2 (“Complaint”).<sup>3</sup> However, in order to ensure that wastewater utilities are not saddled with significant expenses resulting from disingenuous marketing practices of wipes manufacturers and brands and the inadequate design of wipes marketed as flushable, it is essential that Respondent establish rigorous performance standards for wipes that it markets as flushable. To ensure that the standards are designed to be protective of wastewater treatment infrastructure, they must be developed by experts in the area of wastewater treatment with input from representative wastewater utilities. The FTC should rigorously monitor Respondent’s compliance with the Order and require that all manufacturers and brand owners selling flushable wipes comply with these standards.

### **1. The Order Should Clarify That All Nice-Pak Wipes Marketed as Flushable Must Be Safe For Both Sewer and Wastewater Treatment Infrastructure**

The Complaint alleges that Nice-Pak flushable wipes “do not break down in water in a reasonably short amount of time . . . [and as] a result . . . can clog . . . public sewer systems[] and sewage treatment plant systems after being flushed.” *See* Complaint at 1. The Order specifies that Respondent “shall not make any representation . . . that [a] “Covered Product” [defined in the Order to include wipes marketed as flushable]:

A. is safe for sewer systems;

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<sup>3</sup> Available at [www.ftc.gov/system/files/documents/cases/150518nice-pakcmpt.pdf](http://www.ftc.gov/system/files/documents/cases/150518nice-pakcmpt.pdf) (last visited June 10, 2015).

- B. is safe for septic systems;
- C. breaks apart shortly after flushing;
- D. will not clog household plumbing systems;
- E. will not clog household septic systems;
- F. is safe for plumbing;
- G. is safe to flush;
- H. dissolves or disperses when interacting with water; or
- I. is flushable.

["Covered Representations"] unless . . . Respondent possesses and relies upon competent and reliable evidence, which is sufficient . . . to substantiate that the representation is true." *See* Order at 2-3. The Order continues to require that "any tests, analyses, research, studies, or other evidence purporting to substantiate any of the above representations must at least . . . demonstrate that the Covered Product disperses in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment." *See id.* at 3.

The City interprets the Order to require that any evidence used by Nice-Pak to substantiate any of the Covered Representations, or any substantially similar representation, must demonstrate that the Covered Product is safe for sewers and wastewater treatment infrastructure, even if the representation is limited to the Covered Product's compatibility with household plumbing and septic systems. It is essential that the Order be interpreted in this manner if the Order is to sufficiently protect wastewater utilities and address the problems identified in the Complaint. The Commission should confirm that it shares the City's interpretation of the Order.

In addition, it is essential that the Order explicitly require compatibility with wastewater treatment infrastructure as well as sewer systems because such infrastructure is different from, and uses different equipment from, sewer systems (including pumps, screening mechanisms, mixers, degritters, and settling tanks). While the City interprets that the Order's requirement that Respondent rely on evidence that demonstrates compatibility with "standard wastewater equipment" includes wastewater treatment infrastructure owned by municipalities and utilities, the Commission should clarify that this interpretation is correct.

## **2. The Commission Should Not Allow Respondent or the Nonwoven Fabrics Industry to Define Performance Standards**

The Order requires that Nice-Pak use "competent and reliable evidence . . . [that] is sufficient in quantity and quality based on standards generally accepted in the relevant fields to substantiate [any] representation" that a wipe is flushable by "dispers[ing] in a sufficiently short amount of time after flushing." *See* Order at 3. This evidence must "substantially replicate the physical conditions of the environment" in which the wipe is flushed. *See id.* However, the Order does not designate who will determine whether such evidence is competent or reliable, whether such tests substantially replicate conditions in sewer and wastewater treatment plants, or what constitutes general acceptance. Further, the Order fails to specify a standard for determining adequate dispersal – it does not quantify how quickly a wipe must disperse, what size a wipe must separate into, or how much agitation the wipe may be exposed to when

dispersal is being tested. It also does not identify who will define and enforce these dispersal standards.

Neutral third party oversight that relies upon the expertise of wastewater utilities is necessary to ensure that the standards developed to establish compliance with the Order sufficiently protect the affected community identified in the Complaint – the public and wastewater treatment utility owners.

Allowing Nice-Pak to determine what qualifies as competent and reliable evidence and define the standards for establishing whether a wipe adequately disperses would undercut the Order. Nice-Pak, a manufacturer of sanitary wipes, has no expertise in home plumbing or sewer and wastewater treatment infrastructure and has a financial incentive to develop lax standards. It would be equally problematic to permit Respondent to rely on other representatives of the nonwoven fabric industry to designate evidence as competent and reliable or specify dispersal standards without concurrence from wastewater utilities. Specifically, the Association of the Nonwoven Fabrics Industry (“INDA”) has issued guidance intended to provide manufacturers and brand owners with a voluntary standard to determine whether a sanitary wipe should be flushed into the wastewater stream.<sup>4</sup> Currently in its third iteration, INDA’s guidance document provides a multi-step flushability assessment as well as terms of a voluntary code of practice.<sup>5</sup> While the INDA standard has been embraced by certain manufacturers and owners of wipes brands, the City does not consider the INDA standard to be a “standard[] generally accepted” in the wastewater treatment field, does not believe the dispersal standards used by the INDA standard are representative of the “physical conditions of the environment” that wipes meet in sewer and wastewater treatment infrastructure, and does not consider the evidence on which the INDA standard relies to be “competent and reliable.” The INDA standard tests wipes using dispersal parameters that allow for significantly more time and agitation than wipes actually encounter in the City’s sewer and wastewater treatment infrastructure. Many sanitary wipes that have passed the INDA assessment do not disperse prior to their reaching the City sewer and wastewater treatment infrastructure, and other municipal wastewater utilities report similar findings.<sup>6</sup> It is of particular importance that an impartial third party develop a dispersal standard because Nice-Pak sells its products and makes representations about flushability both to consumers and to trade customers and brand owners. Not only do these trade customers and brands rely on and repeat Nice-Pak’s claims, amplifying their effect in the marketplace, but they also may participate in industry organizations such as INDA. Because they would also benefit from lax standards, they may seek to weaken any effort by an industry association to develop an adequate dispersal standard.

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<sup>4</sup> Available at [www.inda.org/issues-advocacy/flushability/](http://www.inda.org/issues-advocacy/flushability/) (last visited June 10, 2015).

<sup>5</sup> See INDA, Executive Summary: Third Edition Guidance Document for Assessing the Flushability of Nonwoven Disposable Products, available at [www.inda.org/wp-content/uploads/2015/04/GD3-and-Code-of-Practice\\_Executive-Summary\\_June-2013-FINAL.pdf](http://www.inda.org/wp-content/uploads/2015/04/GD3-and-Code-of-Practice_Executive-Summary_June-2013-FINAL.pdf) (last visited June 3, 2015).

<sup>6</sup> See *supra*, n. 2.

Therefore, the Commission should not permit Respondent to rely on the INDA standard or any other standard developed by representatives of the nonwoven fabrics industry. The Commission should also bar Respondent from using evidence and data collected by INDA to support its own findings unless such evidence has been found by experts in the area of wastewater treatment, with input from representative wastewater utilities, to accurately represent the conditions of wastewater treatment infrastructure.

### **3. The Commission Should Provide a Mechanism to Consult Wastewater Treatment Utility Owners and Incorporate Their Recommendations Into Dispersal Parameters and Performance Requirements**

Because sanitary wipes marketed as flushable impose such significant costs and expenses on the owners of sewer and wastewater treatment systems, such as the City, because wipe manufacturers and brand owners do not have expertise in the operation of wastewater collection and treatment systems, as demonstrated by the significant and widespread nature of problems caused in such infrastructure by wipes marketed as flushable, and because Respondent and other representatives of the nonwoven fabrics industry cannot be expected to objectively assess whether wipes cause problems in wastewater treatment systems insofar as they benefit from lax standards, it is essential that the Commission and Respondent consult wastewater agencies about what constitutes “competent and reliable evidence” and incorporate the recommendations of such agencies as “qualified persons” into the standards that are established to determine whether a wipe disperses adequately to be marketed as flushable. Wastewater agencies have the professionals with expertise in what is undeniably a relevant area of inquiry – what is necessary to avoid harm to sewer and wastewater treatment infrastructure from flushed wipes.

Input from a diverse set of utilities around the country is particularly important because, while sewer and wastewater treatment systems may share similarities, they can differ in important ways, including the size of the system and the equipment of which it is comprised, the distance between households and wastewater treatment plants, and the technologies used in wastewater treatment. Incorporating input from several representative utilities is essential to ensuring that any dispersal standard is sufficiently stringent to protect all sewer and wastewater treatment utilities.

### **4. The FTC Should Pursue Penalties**

If the FTC has reason to believe that Respondent had notice that wipes it represented to be flushable to consumers or its trade customers were causing problems in household plumbing or wastewater collection and treatment systems and, nonetheless, made representations that the wipes were flushable, the FTC should pursue fines pursuant to its enforcement authority established in section 5 of the Federal Trade Commission Act, which allows the FTC to seek penalties if a respondent violates the act by engaging in a covered deceptive act or practice with “actual knowledge or knowledge fairly implied on the basis of objective circumstances.” *See* 15 U.S.C. §§ 45(b), (m). The imposition of penalties would communicate to Respondent that the Commission takes the Complaint’s allegations of harm to these consumers and utilities seriously.

The FTC should also vigorously exercise oversight over Respondent's compliance with the Order and impose penalties in a timely fashion if Respondent fails to demonstrate that its products comply with a meaningful dispersal standard. Despite the allegations in the Complaint and the explicit requirements in the Order that Nice-Pak establish standards for flushability, Nice-Pak has indicated that it does not intend to change its verification practices that it claims ensure that its products are compatible with household plumbing and wastewater collection and treatment systems. It has stated that "[a]ll claims related to our current flushable product portfolio are fully substantiated as safe to flush, and the FTC consent agreement does not require any change to our existing products or claims." See Sustainable Nonwovens, *FTC Nice-Pak Release is Misleading*.<sup>7</sup> Given Nice-Pak's express refusal to make changes to its dispersal standards going forward, voiced prior to the Commission's approval of the Order, there are adequate grounds for concern that it will violate the Order by failing to make changes necessary to protect consumers and wastewater collection and treatment utilities absent future FTC enforcement. In addition, because Nice-Pak sells its products to other companies to market under private labels and other brands, the scope and extent of future misrepresentations that Nice-Pak makes about flushability will be amplified in the consumer marketplace.

### **C. The FTC Should Pursue Enforcement Action Against Other Manufacturers and Brands of Both Flushable and NonFlushable Wipes**

Following this settlement the FTC should extend its attention and enforcement efforts to include other manufacturers that market sanitary wipes as flushable even when they cause the same operational problems in sewer and wastewater treatment infrastructure that Nice-Pak-manufactured wipes cause. In addition, the FTC should also pursue brand owners that purchase and sell wipes marketed as flushable, which make representations about flushability to consumers separate from those made by wipe manufacturers. Because wipes flushed into sewer and wastewater treatment systems cause problems in the aggregate, improving on the dispersal characteristics of one manufacturer's wipes will not eliminate, and likely will not significantly decrease, the problems that sewer and wastewater treatment utility owners face. The industry as a whole, including brand owners, must cease to market as flushable wipes that do not conform to a meaningful dispersal standard that accounts for systems in municipalities throughout the country.

The FTC should also require that manufacturers and brand owners of wipes that are not designed to be flushed label those products in a manner that clearly warns consumers. Currently, there are many sanitary wipes available to consumers that are not intended to disperse in plumbing or wastewater collection and treatment infrastructure that do not include warnings against flushing on their packaging. Other nonflushable wipes are inadequately labeled – for instance, warnings are presented in small and difficult-to-read fonts, under packaging flaps where consumers will not see them, and without a visual symbol demonstrating that the wipe

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<sup>7</sup> Available at [www.sustainablenonwovens.net/index.php?option=com\\_content&view=article&id=12605:ftc-release-misleading-says-nice-pak&catid=124:news-free&Itemid=2](http://www.sustainablenonwovens.net/index.php?option=com_content&view=article&id=12605:ftc-release-misleading-says-nice-pak&catid=124:news-free&Itemid=2) (last visited June 10, 2015).

should not be flushed. It is necessary that the FTC require clear and conspicuous labeling that nonflushable wipes must not be flushed on all product packaging to counteract the widespread confusion that “flushable” wipes have created in the market place.

**D. Conclusion**

Thank you for the opportunity to comment on the proposed Order. We would be pleased to provide additional information to assist the FTC to further understand the problems that flushed sanitary wipes create for sewer and wastewater treatment systems and assist the FTC in establishing appropriate standards for sanitary wipes to avoid such problems.

Sincerely yours,

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