

# Environmental Law

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## California Revamps Draft Green Chemistry Regulations for Safer Consumer Products

Author: [Peter Duchesneau](#)

**On October 31, 2011, the California Department of Toxic Substances Control (“DTSC”) issued informal draft regulations for Safer Consumer Products, making significant revisions from earlier drafts. DTSC will hold a workshop on December 5, 2011 and has requested comments by December 30, 2011.**

In the face of concerns raised from across the spectrum of stakeholders and after already substantially revising a prior draft set of regulations, in December 2010, DTSC put its proposed Safer Consumer Products Alternatives regulations on hold. Despite a statutorily mandated January 2011 adoption date, DTSC reconvened its Green Ribbon Science Panel in an attempt to put the cornerstone of its Green Chemistry initiative back on track, whereupon it spent the better part of the year collecting additional input from stakeholders.

The revised regulations establish a four-step process to identify safer consumer product alternatives:

- *Chemicals of Concern* – Upon taking effect, the regulations would initially establish a list of Chemicals of Concern (COC) exhibiting an expanded list of hazard traits or environmental or toxicological endpoints specified under OEHHA regulations and listed under authoritative bodies. DTSC may list additional COCs based upon the potential chemical adverse impacts, potential exposures, the availability of reliable information and the availability of safer alternative chemicals. Unlike the previous versions of the draft regulation that proposed development of a priority chemical list by 2013, the COCs will be listed within 30 days of the regulations’ taking effect.
- *Product Prioritization* – DTSC will evaluate and prioritize products that contain COCs to develop a list of Priority Products for which an alternative assessment must be conducted, although any person may petition DTSC to evaluate a chemical or product as previously proposed. The proposed product list will be made available for public comment no later than 180 days after the regulations take effect. The regulations no longer limit the initial product categories to children’s products, personal care products, and household cleaning products and certain exemptions have been eliminated, such as unintentionally added chemicals and no exposure pathway.

DTSC will consider the potential adverse public health and environmental impacts posed by COCs in the product due to potential exposures during the manufacture, useful life, and end-of-life disposal or management of the product; the

### Newsletter Editor

Craig A. Moyer  
Partner  
[Email](#)  
310.312.4353

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### Author



Peter Duchesneau  
Partner  
[Email](#)  
310.312.4209

availability of reliable information to substantiate the potential adverse impacts and exposures; the extent to which other federal and state regulatory programs and applicable international trade agreements address such consideration with regard to the product or COCs; and the existence of known readily available safer alternatives that are functionally acceptable and technologically and economically viable.

- *Alternatives Assessments* – Responsible entities, including manufacturers, importers and retailers, must notify DTSC when their product is listed as a Priority Product. The primary responsibility for compliance falls on the manufacturer. However, responsibility for compliance has been expanded to include importers should the manufacturer fail to comply. Retailers must comply in the event neither the manufacturer nor importer complies.

Responsible entities must perform an Alternatives Assessment (AA) for the product and the COCs in the product to determine how best to limit potential exposures or the level of potential adverse public health and environmental impacts posed by the COCs in the product. A Preliminary AA Report must be submitted within 180 days after a product is listed and a final AA report must be submitted no later than 12 months after DTSC issues a notice of compliance for the Preliminary AA Report. Provisions allow for extensions. While third-party verifications have been eliminated, assessments must be prepared by or under the responsible charge of certified assessors by an accreditation body designated by DTSC. Manufacturers may no longer avoid an AA by removing the COC after a product is listed as a Priority Product and must provide notice to DTSC when a product is removed from the California market place and replaced with a similar product containing a COC.

- *Regulatory Responses* – In response to Alternative Assessments, there are three categories of regulatory responses: products manufactured as a selected alternative, Priority Products for which an alternative is not selected, and Priority Products that will remain in commerce pending development and distribution of the selected alternative. Certain regulatory responses are self-implementing, such as providing product information to consumers where a manufacturer chooses to retain a Priority Product and end-of-life product stewardship programs for alternative products and Priority Products required to be managed as a hazardous waste at end-of-life. Regulatory responses triggered by DTSC findings and determinations, include requests for additional information; ceasing the sale of a Priority Product in California within one year and an inventory

recall within three years where DTSC determines that a safer alternative exists for a product that does not contain a COC and is functionally acceptable and technologically and economically feasible; and a variety of other responses such as measures to control access and to limit exposures to COCs in a product and restrictions on the use of a COC.

With efforts to update the federal Toxic Substances Control Act (TSCA) stalled in Congress, California's green chemistry program will in all likelihood proceed sooner or later on its own. As with previous drafts, this draft regulation promises to have implications well beyond the borders of California and throughout the supply chain with its initial impacts occurring sooner than previously proposed.

Time will tell whether provisions permitting petitions for DTSC review of chemicals or priority products will play a significant role in the prioritization process and be divisive, or serve as a means of fostering collaboration on the program's priorities. In the mean time, however, if adopted, DTSC anticipates that the initial list of Priority Products will include 2 to 5 products. Manufacturers and others that may be responsible for compliance would be wise to keep an ear to the ground as the regulation is promulgated and initiated so they can anticipate as early as possible if they will be among those ushering in California's *Safer Consumer Products* requirements and plan accordingly. Although an initial list of Priority Products may be limited, the responsible parties that find themselves with an inaugural Priority Product subject to compliance may experience a significant burden as they and DTSC work through the implementation of the new program.

[back to top](#)

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