

## Client Alert

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October 4, 2016

# Consumer Products Face New Challenge: State Finds That Many Common Products Must be Managed as Hazardous Waste When Disposed Of

By Michael Steel and Alejandro Bras

California's Department of Toxic Substances Control (DTSC) has released the results of aquatic toxicity testing on over-the-counter remedies, health and beauty products, and cleaning products. The results indicate that over one-in-four of the tested everyday products fail the department's acute aquatic toxicity fish bioassay test, and thus, according to DTSC, they should be managed upon disposal as hazardous waste. A summary of the results of the testing can be found on the DTSC website here, [with links to individual test reports](#).

DTSC regulations rely on various tests, including the aquatic toxicity test, to determine whether a product should be classified as hazardous waste when it can no longer be used for its intended purpose. California's aquatic toxicity test is more sensitive than the test relied upon by the U.S. Environmental Protection Agency under federal law. Thus, more products are likely to be characterized as hazardous under California law than federal law.

The DTSC's aquatic toxicity testing program began some years ago, largely as a result of enforcement actions initiated by a group of California District Attorneys. Those actions have targeted almost every major retailer doing business in the state and have resulted in fines totaling well over \$150 million.

Using funding from some of these settlements, DTSC tested just over 400 consumer products, identified by manufacturer, description, and UPC. The products range widely by manufacturer and type, from vitamins and supplements, to detergents and cleaners, to beauty products and sunscreens, to medicines and tobacco products. Samples were submitted to multiple different laboratories, although in most cases individual products were only tested by a single laboratory.

The DTSC's summary of test results shows over 100 "failing" products out of the close to 400 tested. Examples of the types of these products follow no immediately perceivable pattern and include:

- Shampoo
- Soap
- Insect repellent
- Sunscreen
- Toothpaste
- Glue
- Hand sanitizer
- Vitamins and dietary supplements

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Retailers have grappled with California's hazardous waste regulations for several years. Educating a retail workforce to identify products we eat or bathe with as hazardous waste has proven to be a challenge. Many retailers have turned to third party databases to streamline their waste classification systems to minimize the need for employees to exercise judgment. DTSC's testing simply means that these challenges are here to stay.

Morrison & Foerster LLP has years of experience assisting with regulations regarding management of hazardous wastes, including actively participating in the Retail Waste Workgroup. This Workgroup allows the exchange of information between representatives of retailers, product makers, DTSC, and other regulators and enforcement agencies.

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