

June 29, 2011

Ed Benelli
Office of Pollution Prevention and Green Technology
Department of Toxic Substances Control
Sent Via E-mail: thermostats@dtsc.ca.gov

Subject: Comments on Draft Thermostat Regulations

Dear Mr. Benelli:

The California Product Stewardship Council (CPSC), a co-sponsor of the Mercury Thermostat Collection Act of 2008 (Act), appreciates the work that department staff have put into the draft regulations to implement the Act. We believe that the draft closely follows both the letter and intent of the law, and we support its structure and primary elements. This letter will detail our position, and include recommendations that we believe would improve the draft regulations.

CPSC participated directly in the legislative negotiations and has gone into the implementation phase of the Act in acknowledgement of a shared responsibility system with the retailers and producers. Here is a short list of the support and partnership CPSC has provided:

- Facilitated and funded a statewide webinar December 16, 2009 to educate the local governments and other parties about the new program and included presentations by thermostat producers;
- In several counties including Yolo and Napa, conducted site visits and reported back to producers when wholesalers did not have bins or public education materials and encouraged them to sign-up;
- Forwarded information to producers when we were made aware of opportunities for public education or when the website was not accurate;
- Published TRC information on the CPSC website;
- Promoted the TRC program at multiple presentations and venues; and,
- Wrote an article which we submitted to the Contractors State Licensing Board and they put in their newsletter to the 11,000 HVAC contractors about the law.

In short, we feel that we have done all we can to support the producers to be successful.

The hazards posed by mercury are well-documented so we will not get into those details. In addition, mercury thermostats are 100% banned from landfill disposal creating an unfunded burden on local governments and waste haulers. At the workshop on the draft regulations, DTSC stated that “first year collection totaled 3.2% of what the Skumatz study estimated would be generated.” The fact is that thermostats contain a potent neurotoxin that is banned from landfill disposal and we currently do not have an effective collection program. These facts can lead to the assumption that an estimated 96% of the mercury thermostats are going into landfills and creating a liability for local governments and

taxpayers, not to mention the resulting health and environmental impacts that can occur from mercury releases.

To say we are disappointed with this performance is an understatement.

The Act established an Extended Producer Responsibility (EPR) system for mercury thermostats, and delegates to the Department of Toxic Substances Control (DTSC) the task of setting recycling rates and methodology. The Act also directed the manufacturers to “present to the department a survey plan and methodology for a survey to provide statistically valid data on the number of mercury-added thermostats that become waste annually in California.” The Thermostat Recycling Corporation (TRC) fulfilled this responsibility with the December 2009 study by Skumatz Economic Research Associates. The study found that between 5.1 million and 10.6 million mercury-containing thermostats remain in use in California.

Because the highest numbers of thermostats will become waste during the earlier years of the program, as the Skumatz study found, recovering most of those thermostats should be an urgent priority for DTSC. Therefore, we believe the first year recycling rate of 20% is achievable, especially considering that the law was enacted in 2008, providing years of notice to the manufacturers that they would need to ramp up recycling efforts.

Each mercury thermostat that goes into a landfill represents a violation of California law and an addition to the build-up of a potent neurotoxin in our environment. Therefore, the recycling rate of 80% for 2015 and beyond is fully justified.

Similarly, the contractor reporting requirements in the draft are necessary to prevent waste thermostats from going into landfills and to bridge the gap between waste generators and thermostat manufacturers. The reporting can be easily carried out by contractors using the tools DTSC provides.

Enforcement will be vital to implementing the Extended Producer Responsibility requirements. Retaining the back-up requirement for financial incentives is vital in the event that manufacturers fail to meet the collection goals or do not quickly propose program changes to achieve those goals. The Act specifically lists “provides incentives” as one of the means manufacturers must use to encourage return of thermostats, and it also authorizes DTSC to order manufacturers to revise their programs and undertake actions to comply with the law, so DTSC has the authority to require incentives if they become necessary.

Financial incentives have proven to be the best way to raise recycling rates especially in a short period of time. In California, we have a long history of using financial incentives to ensure products are returned for proper management including programs for beverage containers, oil, and most recently, for small containers of automotive refrigerant which became effective January 1, 2010. A recent e-mail sent to the interested parties from the Air Resources Board explained the program as follows:

At the time of purchase, the DIY consumer pays a \$10 refundable deposit to the retailer for each container. In order to get the refund, consumers are required to return the used, undamaged container(s) within 90 days with a receipt. Retailers and distributors collect the used containers for return to a recycling

facility with the assistance of the product manufacturer. The target recycle rate is initially set at 90%, and rises to 95% beginning January 1, 2012.

So, we would argue that if we use financial incentives for bottles and cans which are a litter problem and have no health impacts, and for oil and most recently, the ARB imposed a \$10 per can deposit on refrigerants with a first year goal of 90% and target recycling rate of 95% two years later, that in balance it is just as important to protect the environment from climate change as it is to protect the public from the long-term health and economic impacts from mercury releases.

With that said CPSC is also a supporter of having business determine how to meet performance goals and hopes that thermostat manufacturers will quickly admit that 3.2% is an inadequate collection rate and propose significant and immediate changes to the program to dramatically improve the collection rate in California. Defending the existing program is not taking responsibility for the performance outcome.

In Section 67388.6, we recommended the regulations should be strengthened with transparency provisions. The regulations should provide that, when the enforcement process involves a consent agreement between DTSC and the manufacturers, the public has a right to participate in that process. Local governments, health and environmental groups, and other interested parties should be able to be heard, and the agreement should not be negotiated behind closed doors by the manufacturers and DTSC.

Also, in section 67388.7, in the interest of transparency, the regulations should require the manufacturers to submit to DTSC the following:

- Administration costs of the program in California;
- As part of their annual reports, state-by-state data on thermostat collection. This will allow California to use other states' programs as benchmarks, and to learn from best practices such as those in Maryland that are achieving better collection rates; and,
- Ongoing annual expenses for program operations in California.

It is not clear to us that any real investment has been made in California as there are no staff present here or consultants working in California. We feel to effectively provide oversight in a state as large and diverse as California, dedicated staff should be provided.

To summarize, CPSC has worked diligently for years to assure this first EPR program in California was a success. We are very disappointed with the lack of focus and investment in California to make this program even marginally successful. We sincerely hope that TRC and the industry realizes that what is happening is indefensible and they reach out to work with us again to design and implement a program that meets the intent of law – “Provide for the collection and recycling of the maximum feasible number of out-of-service mercury thermostats.”

Thank you for your consideration of our suggestions.

Sincerely,


Heidi Sanborn, Executive Director