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January 27, 2012

Debbie Raphael, Director
Department of Toxic Substances Control
1001 I Street
Sacramento, CA 95814

Dear Director Raphael:

Thank you for the opportunity to comment on the Department's December draft mercury thermostat collection regulations. We represent a broad coalition of environmental and public interest groups seeking a California program which provides for the maximum feasible number of mercury thermostats collected, consistent with the Legislature's intent. As discussed below, we believe significant improvements to the draft rules are necessary to meet this statutory objective. We look forward to working with you and your staff to make these improvements, issue the regulations, and then achieve an effective program in California.

Calculating the Number of Mercury Thermostats Becoming Waste Annually

In the pre-proposal June 2011 draft regulations, DTSC proposed two approaches for calculating the number of mercury thermostats entering the California waste stream each year. For calendar years 2012 and 2013, DTSC proposed to rely upon the data in a report submitted by TRC in December 2009, as discussed further below.¹ For calendar year 2014

¹ Mercury Containing Thermostats: Estimating Inventory and Flow from Existing Residential & Commercial Buildings, prepared for TRC by Skumatz Economic Research Associations (SERA), dated December 28, 2009 (hereafter "TRC 2009

and beyond, DTSC proposed to rely upon contractor reporting obligations to generate this estimate.

In our comments on the June draft rules, we observed the DTSC estimates for 2012 and 2013 were too low, because DTSC did not use the correct data from the TRC 2009 Waste Flow Report. We also recommended that DTSC rely upon the data in the TRC 2009 Waste Flow Report for 2014 as well, since achieving the necessary compliance with the proposed contractor reporting obligations could pose a challenge for the Department.

Unfortunately, DTSC in its latest draft chose to weaken rather than strengthen this aspect of the rules. In the December 2011 draft rules, DTSC proposes to lower the number of mercury thermostats coming out of service in 2012 by almost 30%, from 313,500 to 222,000. And for 2013, DTSC proposes a similar reduction of 29%, from 306,500 to 217,000 mercury thermostats. **The effect of these reductions is to drastically reduce the number of thermostats TRC must collect in 2012 and 2013.** Under the collection rates DTSC proposes to require in its latest draft rules (which are too low as explained further below), **DTSC would allow an additional 161 pounds of mercury in 18,300 thermostats to go uncollected in 2012 through this weakened aspect of the proposal alone.** Moreover, DTSC continues to propose use of the contractor requirements for estimating the number of mercury thermostats becoming waste in 2014 and beyond.

In this portion of the comments, we will address TRC's arguments against relying upon its 2009 Waste Flow Report as the basis for calculating the number of mercury thermostats becoming waste in California, and the proper incorporation of data in that report for use in this rulemaking. Building on this discussion, we will then address why the December 2011 draft rules are unsupportable.

First, DTSC must consider the statutory context for both the TRC report and the instant rulemaking. Under Health and Safety Code section 25214.8.17(b), DTSC is required to adopt regulations which establish a methodology for calculating the number of out-of-service mercury thermostats becoming waste in California annually, and using this number as the denominator, develop collection rate performance requirements for the TRC program. In anticipation of this rulemaking, the Legislature required TRC to develop and then implement a survey to provide "statistically valid data" on the number of mercury thermostats becoming waste in California. See section 25214.8.18 of the Health and Safety Code. **The TRC 2009 Waste Flow Report is the statutorily mandated report containing the very data the Legislature required TRC to provide for the instant rulemaking.** As such, use of the data in the report by DTSC is not only reasonable under the circumstances, but was expected by the Legislature.

Waste Flow Report"), available at http://www.dtsc.ca.gov/HazardousWaste/upload/TRCThermostat-Report-12_09.pdf.

Incredibly, TRC now seeks to discourage DTSC use of the Report, notwithstanding the statutory construct. TRC's argument is twofold. First, TRC contends DTSC is barred from actually estimating the number of thermostats in the regulation itself, because the statute calls for the regulation to "establish a methodology" rather than calculating an actual number.²

This claim is absurd, since the purpose of the regulation is to produce a collection rate that specifies, in part, the number of mercury thermostats becoming waste in California as the denominator. The rule must produce a number, not just a methodology. In any case, even if this argument had merit, DTSC could simply reference the TRC survey methodology and report, required by statute, as the "methodology".

Secondly, and perhaps more importantly, TRC now seeks to distance itself from its own Report, by admitting the Report provided "statistically valid data", but contending these data alone are insufficient for DTSC to rely upon. According to TRC, its Report identified "numerous survey problems" so it cannot be used as a basis for larger extrapolations.³

This dance TRC attempts to do, by claiming the Report satisfies the statutory requirement of providing statistically valid data but not a sufficient basis for the rulemaking defy both statutory logic and the language in the Report itself. That TRC was required to submit a survey plan and methodology to DTSC for its review, prior to the preparation of the Report, is further evidence that the Legislature expected DTSC to rely on this Report for the rulemaking. See section 25214.8.18 of the Health Safety Code. Why else would the Legislature demand "statistically valid data" in the Report?

Moreover, the language in the Report itself belies TRC claim the Report is somehow flawed because it contains numerous problems. The introduction of the Report reads, in pertinent part:

*The State of California requires delivery of a "study" that provides estimates of the number of thermostats potentially available for disposal/recycling/management. This chapter describes the approach we used to produce **high quality, defensible estimates** of –*

- *The inventory or "count" of thermostats in place in California households and businesses; and*
- *The annual "flow" of this equipment out of the buildings, potentially subject to capture through a thermostat recycling program.⁴*

² Comments from Robert Hoffman, Paul, Hastings, Janofsky, & Walker LLP to DTSC, June 24, 2011, p. 7.

³ *Id.*, p. 9.

⁴ TRC 2009 Waste Flow Report, p. 8 (emphasis added).

Indeed, the only aspect of the Report where significant uncertainty is expressed concerns the percentage of thermostats coming off the wall which contain mercury. In that regard, the study provides a range based upon sampling site visits and other data collected. The computed range for commercial buildings is 22-46% for commercial buildings, and 27-47% for residential buildings.⁵ Therefore, the only real question facing DTSC is whether this range provides a reasonable basis for calculating the denominator, and if so, what is the most reasonable value to select within this range.

Even TRC acknowledges that for 2012 at least, use of the computed range is a reasonable choice for TRC. In its proposed changes to the rules submitted to DTSC in October 2011, TRC proposed using 222,000 thermostats as the denominator for 2012. **The sole basis for this number is the low end of the range for year 3 in the TRC Report.**⁶ So even for TRC it is not a question of whether the Report can be used to set the denominator, but which values to use.⁷

As noted above, the low end denominator value TRC recommended and DTSC has now included in its December draft regulations assumes only 22% of thermostats in commercial buildings coming out of service, and 27% of thermostats in residential buildings coming out of service, contain mercury. Significantly, no justification has been provided from either TRC or DTSC for choosing the lowest possible value in the Report or the underlying percentages of thermostats containing mercury.

In contrast, when Maine calculates the denominator based upon its experience, it uses percentages ranges from 60-80% for the percentage of out-of-service thermostats containing mercury.⁸ While we acknowledge Maine's percentages may be higher than California's due to California's longer-standing restrictions on mercury thermostat installation in new construction, the discrepancy is too large to be ignored, particularly without any rationale within the TRC report or otherwise.

Without justification for using the lowest value in the TRC Report, given comparable percentages used in other jurisdictions, and given the statutory intent of the legislation to provide for the collection and recycling of the "**maximum feasible number of out-of-service mercury-added thermostats**" (section 25214.8.20 of the Health and Safety Code), we ask that DTSC at a minimum return to the mid-point values in the TRC Report previously relied upon in the June 2011 pre-proposal draft rules. This would return the 2012 denominator to 313,500 thermostats and the 2013 denominator to 306,500

⁵ TRC 2009 Waste Flow Report, pp. 1-2.

⁶ TRC 2009 Waste Flow Report, Table 1.5.

⁷ Since the statute required TRC to provide valid data on the number of "mercury-containing thermostats" becoming waste annually, the TRC Report must provide a defensible means of estimating the percentage of thermostats becoming waste which contain mercury.

⁸ Telephone conversation with Ann Pistell, Maine DEP, January 18, 2012.

thermostats. Even more accurately, as we stated in our earlier comments, DTSC should use the adjusted mid-point values to account for underreporting in survey results, which would result in a 2012 denominator of 341,000 and a 2013 denominator of 333,000 thermostats.

For 2014 and beyond, we continue to believe use of the TRC report remains a viable option for the Department, rather than requiring annual contractor reporting. If TRC is uncomfortable with this approach, TRC can supplement the survey data with additional information on the percentages of thermostats containing mercury, and then petition the Department to revise its rules. While TRC is not under a statutory obligation to do this work, it had a statutory obligation to provide valid data for use in this rulemaking by the end of 2009. Accordingly, if TRC now believes the data originally provided can be improved upon, TRC can undertake this work. In the meantime, DTSC bears no legal obligation to supplement the TRC Report. In any case, if DTSC elects to gather more data, DTSC should consider relying upon the TRC Report for estimating the flow of thermostats becoming waste generally, and undertaking a more limited, one-time survey of contractors, targeted to estimate the percentage of waste thermostats containing mercury.

Manufacturer Reporting Obligations

In our comments on the June 2011 draft rules, we urged DTSC to require manufacturers (TRC) to provide data regarding the performance of their collection program in other states. The December 2011 draft rules do not incorporate this reporting requirement. We have been told by DTSC staff that these obligations were not included in the current draft because of TRC objections, but there are no TRC objections on the record to which we can respond.

TRC no longer provides historic state-by-state collection data on its website, and for 2009-2011, has not released the state-by-state program collection data. Therefore, if these data will be useful in the future to DTSC and other stakeholders in California, DTSC should require the reporting of these data through the instant rulemaking.

DTSC will need the state-by-state collection data to determine and achieve maximum achievable collection rates. The data will be useful to identify the best performing state programs, identify favorable or unfavorable trends in state collection programs, ascertain which programs have achieved substantial improvements and why, and evaluate the effectiveness of financial incentives and other initiatives to improve collection results. Indeed, DTSC staff presentations at the June 2011 workshop demonstrated both the importance of having the data for comparison purposes, and staff's inability to easily access the data needed, since staff prepared state comparison slides to illustrate a variety of points about the California program, but were unable to obtain 2010 collection data for Rhode Island and Illinois.

While reporting on other state collection programs is not expressly included within the manufacturer obligations specified in section 25214.8.13, nothing in the statute specifies this list is exclusive, particularly as it relates to reporting obligations.⁹ The statute's intent to provide for "maximum feasible" collection and recycling of out-of-service mercury-added thermostats, coupled with the Department's authority to "require a group of manufacturers...to undertake actions to comply with this article" (beyond just program revisions) supports a broad reading of DTSC's authorities to require reporting as needed to make the TRC program in California function as effectively as possible. H&S Code § 25214.8.17.

We thus reiterate our recommendation that DTSC include within its regulations a requirement for state-by-state collection reporting. TRC collects these data anyway, thus no additional burden is imposed upon TRC for requiring it to be submitted. Even if TRC now reversed course and offered to provide California with these data voluntarily, there is no guarantee this commitment would continue indefinitely, and there would be no assurances other stakeholders in California would have similar access to the data to facilitate their participation in the California collection program. We recommend the reporting requirement apply to the three previous calendar years, to ensure state-by-state data for calendar years 2009-2011, and to ensure trends in individual states can be easily identified.

The draft rules also lack reporting on education and outreach activities implemented by TRC to ensure that contractors and the public are aware of the program and use it, and lack reporting on the financing of the program and administration costs. We continue to be concerned that TRC has not funded even one staff person to administer this program in California and that TRC continues to reference national work instead of work specific to California's program success. The annual reports in producer responsibility systems around the world and in California on carpet and paint are standard in requiring a transparent program on every level from programmatic reporting, to how the program is funded, and how the uses of those funds achieve the performance goals. We ask DTSC to add to the annual reporting requirements that the producers explain their program in detail and provide examples of the outreach materials developed, describe how they were distributed and whether they are effective or will be modified to be more effective, how much financial investment has been made to develop and implement the stewardship program, and how the money was utilized to ensure achievement with performance goals.

Manufacturer Compliance Requirements

In its June 2011 pre-proposal draft regulations, DTSC had laid out a process for

⁹ DTSC apparently agrees the obligations specified in the statute are not exclusive, since its proposal to require contractor reporting to calculate the denominator, as discussed above, is not expressly included in the contractor obligations specified in section 25214.8.15 of the Health and Safety Code.

developing and enforcing program changes necessary in the event TRC fails to meet the thermostat collection performance standards specified during the instant rulemaking. This “Consent Agreement” process, proposed as Section 67388.6 of the June draft regulations, contained critical elements to be considered during these program changes, including incorporation of a financial incentive into the TRC program. In our comments on the June 2011 draft regulations, we supported this provision, but requested that language be added to ensure all stakeholders, including us, would be part of the Consent Agreement program revision development process.

Unfortunately, DTSC has deleted the entire Consent Agreement section from its current draft of the rules, perhaps in response to TRC objections. We find the TRC objections without merit, as explained below, and thus request DTSC to retain the Consent Agreement provisions of the draft regulations released in June 2011, with our proposed revisions ensuring stakeholder involvement. We believe specifying in regulation the process and incentive component of potential program revisions is the best means for achieving the goals of the Mercury Thermostat Collection Act of 2008.

TRC argued the Consent Agreement portion of the June 2011 draft rules sets TRC up to fail, and as a consequence, fails to specify the program revisions DTSC will eventually require in violation of the “Necessity and “Clarity” standards of California law.¹⁰ This is a bogus argument since the June 2011 draft rules merely tracked the statutory construct of revising programs once performance standards are not met. DTSC cannot specify the program revisions required without knowing the extent of failure, and what areas TRC performs inadequately in 2012 which may have contributed to the failure. Moreover, to the extent TRC anticipates failure, this is a consequence of running an ineffective program in California, refusing to devote meaningful resources, and steadfastly resisting a financial incentive we know has been proven to greatly improve program performance. In any case, TRC’s claim lies with the 2012 performance standard, not with the Consent Agreement portion of the rules.

As noted above, the intent of the Mercury Thermostat Collection Act of 2008 is to require the collection and recycling of the “maximum feasible” number of out-of-service mercury-added thermostats. H&S Code § 25214.8.20. To meet this intent, the statute authorizes DTSC to require revisions to manufacturers’ collection programs and to undertake other actions to comply with the article. *Id.* § 25214.8.17. The statute further requires manufacturer collection programs to provide both incentives and education to contractors, service technicians, and homeowners to encourage the return of out-of-service mercury-added thermostats. *Id.* § 25214.8.13(g). Thus, the June 2011 draft rules were consistent with the statute.

¹⁰ Comments of Robert Hoffman, *supra*, p. 4.

The June draft rules were also transparent and provided clear expectations for industry, citizens, and the agency to achieve compliance with performance requirements. Because the contingency steps to achieve compliance when targets are not met are clearly delineated in the regulation, the regulation would allow for expedited consideration of program revisions, including the financial incentive. It would also reduce miscommunication, delays, and disputes at the program implementation stage. We do not seek to bind DTSC to one enforcement mechanism or otherwise limit its enforcement authorities. But we fervently believe it is better to work out disagreements (and possible legal challenges) at the front end of the process about key issues in this rulemaking, such as DTSC's authority to impose financial incentives through program revisions, than dispute them at the implementation stage, disrupting the program and creating further uncertainty.

Manufacturer Annual Collection Rate Performance Requirements

In its June 2011 pre-proposal draft regulations, DTSC had set out annual collection rate performance standards starting at 20% in 2012, 40% by 2013, 60% by 2014, and 80% by 2015. In the December draft regulations, the first year remains at 20% by 2012, but then changes in 2013 to the larger of either 30% or the collection rate achieved in 2012 plus 10%. This two-tiered performance standard approach with 10% annual improvements continues until 2019, when the performance standard is fixed at 85% for that year and beyond.

The December draft performance standards are a dramatic step backwards from the June pre-proposal draft regulations in the collection rates required during the initial years of the program, when we know that more mercury thermostats will be discarded and time is of the essence in retrieving them. For example, under the December proposal, the 2013 performance standard requires 10% fewer thermostats collected, and in 2015, the December draft represents a 30% reduction in the number of mercury thermostats to be collected in that year. These percentages represent huge increases into the amount of mercury not captured by the TRC program, and thus available for environmental release, because they are associated with the time period when more mercury thermostats are coming out of service.

Instead of reducing the performance rates, DTSC should be raising them. As we pointed out in comments on the June proposal, the 20% collection rate proposed for 2012 would represent a standard less than one-third of the effectiveness of the Maine program. Because of the enormity of the volume of mercury at stake, it is essential that the first year rate be set at the highest achievable level to address the environmental health threat. Accordingly, we recommended a minimum collection rate of at least 40% for 2012. This rate would still be well below Maine's 2010 collection rate, but would capture substantially more mercury than the currently proposed rate and provide an appropriate benchmark to measure the collection program's results.

We note lead acid battery recycling rates in the United States exceed 90% and find tragically ironic TRC's arguments that these recycling rates are somehow not instructive for the instant rulemaking. TRC contends this program enjoys "certain advantages" not applicable to thermostats, such as financial incentives to homeowners and economic value to others in the recycling chain.¹¹ We applaud this TRC latent recognition that financial incentives are a crucial ingredient to mercury thermostat collection, and simply note the obvious that if financial incentives and increased economic value are what is needed to achieve comparable recycling rates for thermostats, TRC is compelled by the statute to include these elements in its program rather than attempt to dismiss their applicability. Accordingly, DTSC should consider lead acid battery recycling rates in the instant rulemaking, as an example of a properly incentivized program.

Moreover, as CPSC stated in their letter dated June 23, 2011, it is instructive to compare how the Air Resources Board (ARB) under the same umbrella of CalEPA as the DTSC has approached the recycling of refrigerants. ARB imposed a \$10 deposit on the retail cost of the containers and set a recovery rate at 90% as an initial recycling rate in 2011, followed by a performance standard of 95% in 2012. An e-mail sent to the interested parties from the ARB in early 2011 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.

Thus, for refrigerants, CalEPA established aggressive recycling rates as the program performance standard, and recognized a financial incentive was an essential element in reaching the recycling goal. Since mercury impacts on health and food chain contamination rises to a comparable level of importance as refrigerants, we urge DTSC to reconsider its backwards direction in establishing mercury thermostat collection program performance standards.

Section 67388.6 Contractor Requirements

As discussed above, the TRC 2009 report's own language indicates it provides "high quality, defensible estimates" of the number of thermostats becoming waste in California each year. The only significant uncertainty noted in the report is the percent of those thermostats containing mercury. We recommend that instead of relying on annual reporting of contractors for the entire denominator, it would make more sense for TRC (or

¹¹ Comments of Robert Hoffman, supra, p. 2.

DTSC) to do a one-time survey of a **random sample of contractors** to simply get at this data point.

Contractors are small California businesses that do not need the added burden of annual reporting to the State where alternatives would suffice. During AB 2398 deliberations, contractors were assured that in producer responsibility systems, they would not have added administration burdens, as the manufacturers are the primary responsible parties. DTSC should promulgate rules consistent with these understandings, particularly if there is another way to proceed.

To ensure that all contractors know how important it is to identify mercury thermostats and recover them, the Contractors State Licensing Board (CSLB) added three questions to the contractors licensing exam starting on December 16, 2011. This again was the result of work by DTSC, not TRC, so we continue to be disappointed with the TRC's lack of outreach that was discussed at length during the legislative negotiations.

Conclusion

Thank you again for the opportunity to submit these comments. We appreciate your consideration of our comments as you prepare DTSC's formal rulemaking proposal.

Sincerely,

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