



NATURAL RESOURCES DEFENSE COUNCIL
THE EARTH'S BEST DEFENSE



**Mercury
Policy Project**



February 19, 2013

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

Regarding: Notice of Document Availability and DTSC Post-hearing Changes to Regulations for Mercury Thermostat Collection and Performance Requirements

Dear Director Raphael,

On behalf of the above-signed organizations, we submit these comments in support of the Department of Toxic Substances Control (DTSC) proposed post-hearing changes to regulations on mercury thermostat collection. Overall, these changes are an improvement to the regulations as originally proposed, and will contribute to the effectiveness of California's thermostat collection program.

Before addressing specific aspects of the post-hearing changes, it bears repeating from our prior comments that this rulemaking is a critical means of bringing transparency and

accountability to the poorly performing manufacturer-sponsored collection program administered by the Thermostat Recycling Corporation (TRC). This importance is further demonstrated in one of the new documents added to the rulemaking file, the Supplemental Economic and Fiscal Analysis.

In California, TRC collected 19,297 thermostats in 2011 (the most recent year for which collection data are available), representing 4.1–8.5% of the thermostats becoming waste in the state that year. TRC's poor program performance reflects the relatively meager resources manufacturers devote to the program, both in California and nationally. Below are the TRC annual national program costs for 2009-2011, as provided in the supplemental Economic and Fiscal Impact Analysis for this rulemaking.¹

TRC 3-YR NATIONAL PROGRAM COST

	Activities	2009	2010	2011
Direct Costs	TRC - Staff and Administration	\$248,066.00	\$231,757.00	\$255,617.00
	Recycling Costs	\$222,755.00	\$300,096.00	\$299,877.00
	Insurance	\$18,706.00	\$17,771.00	\$13,945.00
	New Collection Containers	\$18,130.00	\$18,219.00	\$18,859.00
	Marketing & Outreach	\$96,867.00	\$76,696.00	\$123,221.00
Other	Travel	\$16,105.00	\$28,809.00	\$28,108.00
	Legal	No-Report Cost	No-Report Cost	\$93,272.00
	Statutory Incentive Payments (not in CA)	\$27,496.00	\$40,380.00	\$37,860.00
Number of Thermostat Collected		155,733	200,064	300,000
Totals		\$648,125.00	\$713,728.00	\$870,759.00

As this table indicates, TRC spent on average less than \$100,000 per year for education and outreach to cover the entire country during this three year period. With this meager expenditure of resources, the TRC program results in California (or nationally) are not surprising. Perhaps what is surprising is that TRC has been able to squeeze by with so little financial investment for so long. Without the meaningful performance standards provided for in this rulemaking, the easy and cheaper road will remain available to TRC, and the mercury thermostat collection capture rate in California will continue to be pathetically small.

Methodology for Determining Number of Mercury Thermostats Becoming Waste

¹ <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/Attachment-to-399-Economic-and-Fiscal-Impact-Analysis-2.pdf>, p. 5.

The post-hearing proposed regulations continue to rely appropriately upon a study submitted by TRC as the basis for determining the number of mercury thermostats becoming waste in California annually.² As we noted in our previous comments, TRC submitted this study in response to a statutory mandate, since the Legislature anticipated it would be used for this express purpose. Accordingly, the DTSC methodology is fully consistent with the statutory framework.

We have reviewed the two external peer reviews of the TRC 2009 Waste Flow Report, and find nothing in these reviews which warrants a different approach. Indeed, to the extent the peer reviewers find technical flaws in the TRC study, those flaws appear to involve mercury flows from commercial entities and other issues which result in the potential underestimation of the number of mercury thermostats becoming waste.³ Accordingly, the peer reviews further reinforce the very conservative nature of DTSC's proposal to rely upon the low end estimates in the TRC 2009 Waste Flow Report.

We support the proposed post-hearing changes providing for a 2013 pro rata value, in the event the rules become effective in July of this year. These regulations are already long overdue, and should become effective in 2013 to the maximum extent possible, even if only for half the year.

We also support the changes to section 66274.4(b) related to the submission of additional data on the number of thermostats becoming waste in California, in particular the mechanism for submitting the plan or methodology for collecting the data at least six months in advance of actual data collection to facilitate DTSC (and presumably stakeholder) review. However, as articulated in our earlier comments, we believe the plan or methodology submission should be a mandatory obligation, and not left to the discretion of the entity intending to submit the data. While it is true the entity proceeds at its peril by collecting the data before thoroughly vetting the plan or methodology with DTSC and others, we also consider the potential waste of DTSC and stakeholder resources that may occur in forcing "after the fact" changes to a study inadequately undertaken in the first instance. It is best for everyone involved if the plan is adequately vetted before the time and expense associated with data collection are incurred.

Annual Collection Rate Performance Requirements

The post-hearing changes to the regulations maintain the performance standards as originally proposed. We continue to find these performance standards too conservative, particularly given the likely underestimation of the number of thermostats becoming waste. As illustrated in the new Economic and Fiscal Impact Analysis, the per capita collection rates in the early years of

² Mercury Containing Thermostats: Estimating Inventory and Flow from Existing Residential & Commercial Buildings, prepared for TRC by Skumatz Economic Research Associates (SERA), dated December 28, 2009 (hereafter "TRC 2009 Waste Flow Report").

³ <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/Mercury-Peer-Review-Crespi.pdf>, p. 2;
<http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/Mercury-Peer-Review-Jewel.pdf>, p. 9.

the California program as proposed (2013-2014), are less than half of the currently achieved Maine and Vermont per capita collection rates.⁴ The early years of the program are of greatest concern because this is when the numbers of mercury thermostats becoming waste are the largest, since the number of thermostats with mercury remaining in use is declining over time, California has many consumer product recycling programs that achieve recycling rates in excess of what is proposed for mercury thermostats.⁵ As we have noted previously, we believe a higher final collection rate of thermostats containing mercury is achievable and appropriate, yet given these rules are already overdue, we prefer this program begin without further delay and stronger performance standards for the later years promulgated sometime in the future.

Annual Reporting Requirements

We support the proposed post-hearing changes to the reporting requirements, particularly the changes to 66274.8(i) related to providing mercury thermostat collection numbers from other states. DTSC has the authority to require this information, and it will be critical for DTSC to have this information to assess both the quality of California's program versus programs in other states, and the measures DTSC might pursue in California to improve program performance.

DTSC's authority to require such reporting can be found in §§ 25214.8.20 and 25214.8.17 of the statute. Section 25214.8.20 of the statute specifies that the intent of the law is to "provide for the collection and recycling of the maximum feasible number of out-of-service mercury-added thermostats." Accordingly, Section 25214.8.17(a) provides DTSC with broad authority to order a manufacturer to "revise its program and undertake actions to comply with this article." In addition, § 25214.8.17(b) requires the agency to adopt regulations "to develop performance requirements that specify collection rates expressed as a percentage of out-of-service mercury-added thermostats becoming waste annually."⁶

Together, these provisions authorize DTSC to require reporting on other state collection programs as needed to facilitate the development (and potential revision) of appropriate performance requirements, and to facilitate the continual achievement of the statutory goal of maximum feasible collection of out-of-service mercury-added thermostats. Such information will

⁴ <http://www.dtsc.ca.gov/LawsRegsPolicies/Regs/upload/Attachment-to-399-Economic-and-Fiscal-Impact-Analysis-2.pdf>, p. 4.

⁵ For example, the record now includes several CalRecycle reports with the following information.

- In 2011, 84% of all beverage containers were recycled.
- In 2010, 81% of tires were diverted from landfills.

<http://www.calrecycle.ca.gov/Tires/Overview.htm#TireDivDis>

<http://www.calrecycle.ca.gov/BevContainer/Rates/BiannualRpt/12MonPeriod.htm>

Similarly, a BCI report finds the recycling rate for lead-acid batteries in the U.S. for the years 2007 – 2011 to be 98.7%. Battery Council International, National Recycling Rate Study, Prepared by: SmithBucklin Corporation, Statistics Group, Chicago, Illinois, May 2012; Page 1.

⁶ In the proposed post-hearing changes to the regulations, DTSC expressly preserves its discretion to revise the performance requirements for calendar years 2018 and beyond.

certainly be needed to revise the California performance requirements if DTSC elects to do so, so that DTSC can readily compare California's rates with the best performing state programs elsewhere in the country. Similarly, the collection numbers from other states will be critical for DTSC in discharging their ongoing obligation to revise the California TRC program if the program is not meeting the required performance requirements, since information from other states' collection programs is the best means of identifying successful measures in other states achieving significant program results. As discussed further below, unless DTSC requires this reporting, the necessary information on other state collection programs needed to determine and evaluate the experience in other states, and thereby ensure collection of the maximum feasible number of out-of-service mercury-added thermostats, will not be available to DTSC.

Left to its own devices, TRC will continue to obscure its poor performance in two significant ways. First, beginning with the 2009 performance results, TRC ceased to release actual state-by-state thermostat collection numbers, except in states where they are required to do so by law. Limiting the data availability in this way blocks any meaningful level of accountability.

Second, TRC uses increases in collection numbers from year to year as its measure of success, even where it's clear only a small fraction of mercury thermostats are still being recycled. In its 2011 Progress Report, TRC describes the Texas program as a huge success story, because collections are up 400% since 2009, largely due to the actions of one wholesale company.⁷ However, TRC fails to note that very few mercury thermostats were collected in 2009 and before. Using previously released data from TRC, only 344 mercury thermostats were collected in 2007, the base year for TRC's new measure of program success.⁸ In 2008, 1,820 thermostats were collected, again based on data TRC previously released. From these data and the TRC Progress Report, it is clear the Texas program results were worse for 2009 than 2008; we estimate about 960 thermostats were collected given the magnitude of decline versus 2008. So the increases TRC touts are measured off a Texas program that was collecting fewer than 1,000 thermostats, in a state with a population in excess of 25 million.

Therefore, even after the increases in 2010 and 2011, we estimate the Texas program still collected less than 5,000 thermostats in 2011, as compared to the Maine program which collected over 1,500 more thermostats in the same year with a population 20 times smaller. Or to put it another way, given the size of the Texas population, the TRC program is still not collecting the vast majority of mercury thermostats becoming waste in Texas. Similarly, Georgia is ranked first according to the TRC's year-to-year improvement index, but still collected only an estimated 1,655 thermostats in 2011 statewide, and thus ranks near the bottom in state per capita collection rates.⁹ We note the Georgia and Texas programs are not mandated by state

⁷ Keeping Mercury Out of the Waste Stream – One Thermostat At A Time, TRC 2011/2012 Progress Report (hereafter "TRC Progress Report"), p. 5. <http://www.thermostat-recycle.org/files/media/20120808125856.pdf>.

⁸ Turning Up The Heat, Exhibit 5, available at <http://mercurypolicy.org/wp-content/uploads/2010/02/turning-up-the-heat-3.pdf>

⁹ TRC Progress Report, p. 13. <http://www.thermostat-recycle.org/files/media/20120808125856.pdf>.

law, thus the post-hearing changes to 66274.8(i) are necessary to ensure the necessary collection numbers on all state programs would be provided.

The post-hearing changes to the proposed rules in this subsection could be further improved by requiring manufacturers to provide data on other state programs during 2009-2012, to coincide with the period of time TRC refused to release its state-by-state thermostat collection data. We note TRC routinely collects the data on the number of thermostats collected in order to create the TRC Progress Report. Therefore, the reporting obligation in the post-hearing changes, and any reporting for previous calendar years DTSC might include in response to these comments, poses no increased burden upon those manufacturers participating in the TRC program.

We Urge DTSC to Move Forward to Finalize this Important Regulation as Swiftly as Feasible.

We are grateful for the hard work of many DTSC staff on these regulations, including the agency's efforts to engage in an extensive and thorough stakeholder input process. We urge a swift conclusion to the rulemaking so that greater numbers of mercury thermostats are collected and properly disposed of. Thank you for your consideration.

Sincerely,

David Lennett, Senior Attorney
Natural Resources Defense Council

Michael Bender, Executive Director
Mercury Policy Project

Heidi Sanborn, Executive Director
California Product Stewardship Council

Abby King, Toxics Policy Advocate
Natural Resources Council of Maine

Bob Wendelgass, President and Chief
Executive Officer
Clean Water Action

Laura Haight, Senior Environmental
Associate
New York Public Interest Research Group

Amber Meyer Smith, Director of Programs
and Government Relations
Clean Wisconsin

Scott Cassel, Chief Executive Officer
Product Stewardship Institute

Jen Walling, Executive Director
Illinois Environmental Council

Annie Pham, Policy Advocate
Sierra Club California