

**Public Comments Received on Manufacturers' Program
Modification Plan for the Collection of Mercury Added
Thermostats in California**

As of January 24, 2017

Comment 1

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Subject: Comments on TRC Program Modification Plan
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Attachments: [Comments on TRC January 2017 Program Modification Plan.pdf](#)

Please find attached for your consideration comments on the TRC submittal of January 5.

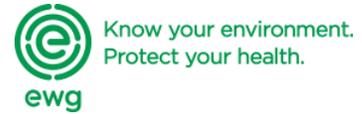
Best,

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COMMENTS ON TRC'S MERCURY THERMOSTAT COLLECTION PROGRAM MODIFICATION PLAN

January 20, 2017

Introduction

On January 5, 2017, the Thermostat Recycling Corporation (TRC) submitted proposed revisions to the manufacturers' mercury thermostat collection program (hereafter "TRC Modification Plan").¹ The revisions expressly seek to weaken key provisions of the Outreach Plan approved just a little over three months ago.² Moreover, while TRC claims to seek no changes to the approved Pilot Plan (covering financial incentives), both the proposed revisions and TRC's actions over the past several months would weaken the approved Pilot Plan as well.

Before addressing specific aspects of the TRC Modification Plan, we make three overarching comments. First, the document TRC submitted is not a program modification plan as envisioned by the Consent Order. The Outreach Plan is separate from the program elements proposed by TRC in its most recent annual report, and particularly since the Outreach Plan was approved just three months ago, it is inappropriate for TRC to suggest delays and/or weakening changes in implementing key elements of that Plan.

¹ See <http://www.dtsc.ca.gov/HazardousWaste/upload/TRC-Program-Modification-Plan-2017-01-05.pdf>.

² See <http://www.dtsc.ca.gov/HazardousWaste/upload/DTSC-Approval-Letter-10072016.pdf>.

Second, TRC admits many of the proposed modifications reflect TRC’s “prioritizing and focusing of “available resources”.³ We note TRC does not provide any information on what it considers “available resources”, does not generally indicate which proposed modifications are principally or largely driven by its perceived resource constraints, and does not explain whether or how resource constraints have changed since the Outreach and Pilot Plans were approved on October 7, 2016.

Since insights gained thus far from implementing the Outreach and Pilot Plans are very limited, many of the proposed modifications can be presumed to reflect the apparent limited resources that TRC is dedicating to this program. However, the Consent Order provision under which the TRC Modification Plan is submitted does not authorize program changes based on resource constraints.⁴ Nor has TRC estimated the impacts on thermostat collection for the weakening changes it has proposed, as expressly required by the Consent Order. For these reasons, the TRC Modification Plan is legally deficient, and should be rejected accordingly.

Assuming arguendo DTSC wishes to further consider key elements of the TRC Modification Plan, DTSC should investigate the precise resource constraints upon which TRC or its contractor relies, and how those constraints are reflected in the proposal. As part of this investigation, DTSC should expressly request: (1) the budget for the Outreach and Pilot Plans, and other program elements; (2) the incremental cost of implementing each element of the approved Outreach or Pilot Plan, or any associated enhancement, as identified in these comments; and (3) and any all documentation related to budget constraints TRC has placed on its contractors or agents in designing or implementing the Pilot and Outreach Plans. Moreover, as required by the Consent Order, TRC must be required to estimate the impacts on thermostat collection of those weakening elements addressed in these comments. DTSC cannot allow TRC to avoid its statutory and Consent Order obligations on the basis of artificial, self-imposed, and hidden resource constraints. Nor can DTSC allow TRC to choose recalcitrance over compliance, because the manufacturers perceive it’s a cheaper path.

Third, we do not understand the meaning or utility of Table 1 of the TRC Modification Plan. For each of the audience categories listed under “Continue Outreach”, why are the thermostat collection and bin return objectives not more widely applied? As explained in Figure 1, only these objectives measure the output of number of thermostats collected, which is ultimately how the Outreach Plan and the program generally should be judged. At best, Figure 1 is confusing or misleading. At worst, it is just plain wrong.

³ TRC Modification Plan at 4.

⁴ See <http://www.dtsc.ca.gov/HazardousWaste/upload/ExecutedMercuryThermostatConsentOrder.pdf>, Exhibit B-1.5.

As explained below, we also believe many of the specific modifications lack merit and can be summarily rejected or improved on policy grounds.

Large HVAC Contractors

First we note that TRC has already added 42 large HVAC contractor bins to the collection program since implementing the Outreach Plan. In 2015, TRC had 284 active bin locations in California. These additional 42 bins thus represent an additional 15% in the number of collection bins. We consider this a success but must ask why the number is not higher.

TRC claims to have contacted 731 large contractors, but does not indicate what percentage of large contractors this represents, or whether companies accepting bins are the largest of the large statewide. Also TRC identifies the “most frequently cited” reasons provided for why large HVAC contractors did not request collection bins, but does not indicate what that phrase means. How often were these reasons actually provided, and by which segment of the audience group? Moreover, to the extent large contractors indicate they are going to a wholesaler to drop off thermostats, did TRC explain to the large HVAC contractors the financial incentive they will receive by having their own collection bin?⁵ DTSC should request the script for these contacts, and if that point was not made, DTSC should modify the program plan to address this failure.

Indeed, the TRC Modification Plan fails to even mention the statewide incentive pilot for large HVAC contractors, and thus never links the outreach to the pilot even though the two efforts should be closely connected and coordinated. We note TRC’s plan to collaborate with DTSC on some aspects of further outreach, but this is not a substitute for a coordinated approach on materials, messaging, contacts, and metrics. The program plan is the mechanism for combining the two elements into one seamless effort.

Demolition/General Contractors

For both demolition and general contractors, TRC proposes to discontinue further outreach because the information obtained thus far from these audience groups indicates other entities are typically hired to handle mercury thermostats and other hazardous substances, namely what TRC calls “environmental compliance contractors”.

⁵ TRC also states large HVAC contractors are indicating they are taking thermostats to another contractor to recycle their thermostats (p. 6). We question how this would happen, and thus the accuracy of this finding.

Indeed, one of these companies indicated it had 60+ mercury thermostats waiting to be recycled.⁶

Yet rather than aggressively pursuing environmental compliance contractors, TRC proposes to delay indefinitely further outreach to this audience group. TRC indicates it needs more information to correctly identify the right companies and the best ways to reach these companies, but proposes no activities or timetable for undertaking this work. Nor is any justification provided for delaying this outreach. This is one example where alleged “resource constraints” has improperly driven TRC’s proposed inaction, and should be categorically rejected.⁷

Household Hazardous Waste (HHW) Facilities

In its October 7, 2016 letter approving the Outreach and Pilot Plans, DTSC ordered TRC to implement a \$10.00 financial incentive pilot for HHW facilities. Following issuance of the letter, it is our understanding TRC unilaterally chose to limit the HHW pilot incentive to three cities. Since DTSC ordered this HHW pilot incentive to apply to “anyone who turns in thermostats at HHW facilities”,⁸ without limitation to three municipalities, TRC’s implementation of the HHW element of the Pilot Plan violates DTSC’s express instructions, and DTSC should use this opportunity to require that the HHW pilot be implemented statewide.

Assuming arguendo any ambiguity regarding the scope of DTSC’s October 7 instructions, the information contained in the TRC Modification Plan confirms the statewide HHW facility motivation to participate in the TRC program,⁹ and thus the opportunity to drive thermostat collection in 2017. TRC must begin to address the thermostat collection deficit it faces, and there is no credible non-resource justification for limiting the financial incentive to just three municipalities.¹⁰ The information in the TRC Modification Plan regarding HHW facilities makes TRC’s unilateral pilot scoping decision particularly egregious, and should be reversed by DTSC. The HHW pilot incentive should be statewide to maximize collection, particularly if TRC is no longer seeking retail participation outside of the pilot locations (see below).

⁶ TRC Modification Plan at 9.

⁷ DTSC’s hazardous waste officials may be able to assist TRC in identifying universal waste handlers and other environmental compliance contractors. It should not be very difficult to find environmental compliance firms, since they often advertise their services.

⁸ <http://www.dtsc.ca.gov/HazardousWaste/upload/DTSC-Approval-Letter-10072016.pdf>, p. 2.

⁹ TRC Modification Plan at 11 (“...this group is the most motivated to participate in the program”, but this audience group would benefit from increased consumer interest and returns).

¹⁰ It is both revealing and unfortunate that in proposing metrics for this sector, TRC proposes # bins returned, but not the actual number of thermostats collected. TRC Modification Plan at 9.

We also note TRC elected to utilize a coupon reimbursement system to implement the financial incentive at HHW facilities. While DTSC's October 7 letter authorizes this approach, we urge DTSC to reconsider and require immediate incentive payments at HHW facilities through the use of gift cards. The long delays associated with the coupon reimbursement system may adversely affect pilot results.

Retailers

While claiming no intent to revise the Pilot Plan, TRC proposes to modify the Pilot Plan approved by DTSC on October 7 as it applies to retailers. On October 7, DTSC expressly rejected TRC's proposal to include "control" retailers in the target pilot locations by requiring all retailers in the target locations to offer either the \$5.00 or \$10.00 financial incentive.¹¹ Yet in the TRC Modification Plan, TRC proposes to recruit 12 pilot participants, "nine incentive stores, three controls".¹² This aspect of the TRC Modification Plan must be summarily rejected.

TRC's proposal to limit the number of retailers offering a financial incentive to three per city must also be rejected. TRC offers no analysis of how the three retailers would provide sufficient geographic coverage in each city for the pilot to be useful. TRC claims they have encountered difficulty in securing retailer participation, but never clearly identifies the contacts made within the target locations, particularly of stores run by franchisees. Given the success of the retailer programs in Maine and Vermont,¹³ we question whether TRC made a sufficient effort to identify participating retailers in the pilot locations. We urge DTSC to reject this aspect of the TRC Modification Plan, request TRC to identify each retailer in the target location, specify when and how each of the retailers were contacted and the contact results, objectively assess and evaluate the number of retailers needed to reach sufficient geographic coverage in each city, and

¹¹ <http://www.dtsc.ca.gov/HazardousWaste/upload/DTSC-Approval-Letter-10072016.pdf>, p. 2.

¹² TRC Modification Plan, p. 13.

¹³ Through the Modification Plan, TRC seeks DTSC's approval to downplay retailer collection generally, and instead focus on directing consumers to HHW facilities. TRC Modification Plan at 13. This is contrary to the recently approved Outreach and Pilot Plans, and somewhat ironic given TRC's unilateral decision to limit the HHW financial incentive pilot, as discussed above. Perhaps most importantly, TRC's proposed approach completely contradicts the experience of the Maine and Vermont programs upon which TRC based its proposed Pilot and Outreach Plans. Retail locations were the primary collection locations in Maine and Vermont during 2015, responsible for 52 % of all thermostats collected in Maine and 38% in Vermont. See https://www.thermostat-recycle.org/files/uploads/2015_ME_Annual_Report_FINAL.pdf, p. 3, https://www.thermostat-recycle.org/files/uploads/2015_VT_Annual_Report_FINAL.pdf, p. 3. Many of the leading collection outlets in Maine and Vermont over the last four years are retailers. See https://www.thermostat-recycle.org/files/uploads/2015_ME_Annual_Report_FINAL.pdf, Figure 2.7; https://www.thermostat-recycle.org/files/uploads/2015_VT_Annual_Report_FINAL.pdf, Figure 3.2. Retail locations are typically more convenient for consumers than HHW facilities.

propose outreach activities (with DTSC’s review and cooperation) aimed at reaching the necessary coverage in each city.¹⁴

TRC admits it needs to increase consumer awareness and interest to make retail collection a success, but fails to provide any advertising budget or program to make this happen.¹⁵ Again, this is a significant omission in the TRC Modification Plan driven by artificial and self-imposed “resource constraints”.

Wholesalers

In its October 7 letter, DTSC required TRC to implement a wholesaler financial incentive pilot “for each bin returned by wholesalers”, without limitation.¹⁶ Nevertheless, it is our understanding that TRC has improperly limited the wholesaler pilot to three cities, instead of applying it statewide. DTSC should use this opportunity to clarify the scope of its October 7 instructions.

We note that if the DTSC mandate does not apply statewide, DTSC is left with TRC’s default “loyalty program”, which only yielded 4,485 thermostats in the first nine months of 2016.¹⁷ Since wholesalers currently account for 89% of thermostat returns,¹⁸ the impact of this loyalty program is minimal at best, and will not significantly address the huge performance shortfall facing the TRC program.

Incredibly, TRC proposes to discontinue its efforts to expand wholesaler collection sites in California. TRC claims “a large number already have bins”, so no further increase is needed. No data are provided regarding the percentage of wholesalers with bins,¹⁹ the geographic coverage of the wholesalers with bins, or whether current geographic coverage is sufficient. In addition, there is no discussion of the impact this approach would have on the incentive pilot, either as applied statewide or in just the three cities. In fact, there is absolutely no discussion or attempt at integration with the pilot incentive program.

This portion of the TRC Modification Plan is apparently driven by TRC’s self-imposed resource constraints, and should be categorically rejected.

¹⁴ Again we note TRC’s failure to include the actual number of thermostats collected as a metric for evaluating the retailer outreach.

¹⁵ TRC Modification Plan at 12. Only in-store flyer ads are proposed, and only related to event promotion, not the underlying retailer collection or pilot incentive projects. No public advertising, or ads in retailer weekly sales materials, are included.

¹⁶ <http://www.dtsc.ca.gov/HazardousWaste/upload/DTSC-Approval-Letter-10072016.pdf>, p. 2.

¹⁷ TRC Modification Plan at 7.

¹⁸ TRC Modification Plan at 14.

¹⁹ TRC indicates the “majority” of wholesalers have bins, without any data supporting this claim. Even if true, a “majority” of wholesalers does not translate to adequate coverage without further analysis.

Audience Group B and C

TRC previously proposed an approach and sequencing for reaching out to audience groups covered by the Consent Decree not targeted for outreach immediately. In its October 7 letter, DTSC essentially agreed to the groupings, and ordered TRC to prepare outreach and pilot plans for Group B by February 7, 2017, and for Group C by June 6, 2017.

Now less than three months later, in its Modification Plan, TRC proposes an indefinite delay for Group B and C activities, in violation of DTSC's October 7 letter. The only justification provided is limited "available resources".²⁰ Perhaps this is the best example of TRC's "resource" excuse to avoid its legal obligations, and TRC's miserly approach to the thermostat collection program generally. Again, we call upon DTSC to reject this aspect of the Modification Plan, and reiterate our comments above about the indefinite delay proposed for environmental compliance contractors.²¹ We further call upon DTSC to seek significant penalties from the manufacturers if TRC does not submit the required Group B Outreach and Pilot Plans by February 7, 2017.

Conclusion

DTSC should reject the TRC Modification Plan, use this opportunity to clarify the meaning of its October 7 letter regarding key elements of the Pilot Plan, and otherwise address TRC's "resource" excuses for inaction and recalcitrance. TRC must be instructed to maximize its efforts in the face of 2017 collection requirements, and to address their egregious collection deficiencies of prior years.

Respectfully submitted,

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²⁰ TRC Modification Plan at 15.

²¹ We recommend DTSC expressly include environmental compliance contractors in Group A of the Outreach and Pilot Plans to the extent TRC proposes to substitute this group for other audiences in Group A.

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