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October 10, 2014

*Via Email and U.S. Mail*

Pauline Batarseh, Chief  
Policy and Program Support Division  
Hazardous Waste Management Program  
Department of Toxic Substance Control  
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P.O. Box 806  
Sacramento, CA 95812-0806

Re: Climate Master Inc., Response to July 3, 2014 Summary of Violations Letter

Dear Ms. Batarseh:

As discussed during our call with you and other Department of Toxic Substances Control (DTSC) representatives<sup>1</sup> on October 1, 2014 the Thermostat Recycling Program (TRP) is flawed. The collection and recycling requirements imposed by the DTSC on members of the Thermostat Recycling Corporation (TRC) are neither realistic nor reasonably attainable. The underlying policy of the TRP is commendable. However, as currently structured and enforced by the DTSC the TRP is neither viable nor fair. The participants need to take a step back and reevaluate the current TRP and develop new approaches to determine a realistic and statistically valid collection rate. In order to provide the time and incentive to do so the specter of onerous fines and penalties intimated in the DTSC's July 3, 2014 letter must be set aside. Threatening to take "administrative, civil or criminal action" and inviting legal action by TRC members is counter-productive. The DTSC's adversarial stance does not foster the level of cooperation necessary between the DTSC and TRC members to work towards the TRP's goal of preventing out of service mercury containing thermostats from being improperly disposed of in California.

Climate Master Inc. (CM) proposed and the DTSC did not disagree that a reevaluation of the December 28, 2009 SERA study is necessary. The pro-rated collection rate for 2013 was set at 32,500; the program collected 13,655 units, a collection rate of approximately 42%. The unit collection rate for 2014 has been set at 95,400 units (and increases annually thereafter); this is an unrealistic and unattainable requirement, and will become more so with each passing year. In response to the shortfall in meeting the 2013 collection requirements TRC proposed a series of "Program Enhancements for 2014" to the DTSC. The DTSC's response to TRC's proposal was that TRC: (1) "presented no information or data that demonstrates that its proposed program modifications and enhancements will be substantial enough to yield the increased collections"; and (2) "... must gather data and develop meaningful metrics to allow the assessment if its efforts in California and to guide future decisions to enhance or modify its thermostat collection program." During our October 1, 2014 conference call the DTSC echoed its demand for "meaningful metrics" from TRC as being necessary to justify programmatic decisions. Other TRC members will address the issue of

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<sup>1</sup> Clyde West, Robert Sullivan, and Donn Diebert.

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TRC's proposed enhancements and the DTSC's comments in greater detail. Suffice to say, CM disagrees with the DTSC's characterization of TRC's program enhancements.

In addition, CM also believes that the DTSC needs to work with TRC to improve the collection of mercury containing thermostats by, among other possible avenues of assistance, using its authority to help with:

1. Providing governmental incentives to homeowners and contractors who are removing thermostats to bring them to a recycling center;
2. Requiring big box stores (e.g. Lowes, Home Depot, etc.) that sell replacement thermostats need to have collection boxes;
3. Requiring local (e.g. City/County) Hazardous Waste collection centers to report information concerning brands recovered, etc. as is required by the current TRC Program reports so that credit is given for those collections; and
4. Helping to engage contractors in a collection process by enhancement of enforcement/collection actions.

CM disagrees with the DTSC's position that by virtue of its membership in the TRC program it is somehow "jointly and severally" liable for the collective shortfall of the TRC program. As explained during our conference call: (1) CM does not manufacture, and has never manufactured, mercury containing thermostats; (2) CM did not sell branded mercury containing thermostats into California before 1999; (3) CM only sold 806 branded mercury containing thermostats into California, between 1999 and 2006; and (4) CM branded mercury containing thermostats have a "useful" life of 30 plus years.

The implementing regulations adopted by the DTSC support CM's position. CM cannot be held liable for the shortfall in the number of units collected. Title 22 Chapter 24 section 66274 *et seq.* provides that, in cases where more than one manufacturer or group of manufacturers operates a collection program in a calendar year, the DTSC shall assign a pro rata proportion, not a per capita share, of the "total number of out-of-service thermostats" (TT) that become waste each year to each manufacturer.<sup>2</sup> A manufacturer may dispute the pro rata proportion of the TT assigned to it by the DTSC. The regulations include provisions that address the need for manufactures to be treated as individual entities not as a single undifferentiated group as the DTSC has done. CM's membership in the TRC program does not make it responsible for the units shipped into California by other manufactures. Any attempt by the DTSC to assign CM a per capita share of the 2013 "collection rate performance requirement" based upon its TRC membership contravenes the language of the regulations.

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<sup>2</sup> Pro rata is not defined in the regulations; therefore the common usage of the term will be applied. Black's Law Dictionary defines pro rata as "Proportionality; according to a certain rate, percentage or proportion. According to measure, interest or liability...." Black's Law Dictionary defines per capita as "By the heads or polls; according to the number of individuals ...." In short a per capita allocation is a total divided by the number of members, pro rata is a total allocated by a percentage.

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Taking the DTSC's interpretation of the regulations to its endpoint CM or any other TRC member could, in theory, be held responsible for meeting the entire "collection rate performance requirement" (TP) set by the DTSC in a given year. The DTSC would hold this to be true despite the fact that: (1) CM only sold 806 units into California over a seven year period (1999-2006); (2) the 2009 SERA Report concluded that 50 percent of mercury containing thermostats remain in place after 27.5 years; and (3) the 30 year life cycle of CM branded mercury containing thermostats. Based upon these facts virtually all of the CM branded mercury containing thermostats remain in use. The number of CM branded mercury thermostats collected in 2013 were more than sufficient to meet CM's pro rata share of the mercury containing thermostats taken "out-of-service" in 2013.

CM's responsibility for the number of units collected, on a pro rata basis, can be no greater than the relative percentage of the CM branded mercury containing thermostats it shipped into California on a yearly basis as compare to the TT and TP calculated for any one year. Even this *de minimis* number requires an assumption that CM branded units have been taken out of service long before their useful life cycle ends.

CM is a company committed to sustainability, recycling and the use of green products. In the spirit of cooperation CM is willing to work in concert with the DTSC and TRC to develop a mutually agreeable solution to the collection rate issue. In that regard, CM requests the DTSC provide CM and all TRC members with a "grace period" of sufficient length to collect and evaluate "meaningful metrics" such that the TRP can be updated and revised to justify the programmatic changes necessary to make the TRP successful.

Regards,



Earl L. Hagstrom

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ELH/wp

cc: James Murray, Esq., Climate Master, Inc.  
Mark Tibbetts, TRC