

STATE OF CALIFORNIA  
ENVIRONMENTAL PROTECTION AGENCY  
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the Matter of:

Daikin Applied (McQuay International)  
13600 Industrial Park Blvd.  
Minneapolis, MN 55441

ID No. CAL000159063

Respondent.

Docket HWCA 20157184

ENFORCEMENT ORDER

Health and Safety Code  
Section 25187 & 25214.8.17

INTRODUCTION and BACKGROUND

1.1. Parties. The California Department of Toxic Substances Control (Department) issues this order to Daikin Applied (McQuay International) (Respondent).

1.2. Definition of Manufacturer. California Health and Safety Code section 25214.8.11, subdivision (a) defines a Manufacturer "as a business concern that owns or owned a name brand of mercury-added thermostats sold in this state before January 1, 2006." The Respondent has been identified by the Department as a Manufacturer.

1.3. Definition of Program. California Health and Safety Code section 25214.8.11, subdivision (a) defines a Program as "a system for the collection, transportation, recycling, and disposal of out-of-service mercury-added thermostats that is financed, as well as managed or provided, by a manufacturer or collectively with other manufacturers."

1.4. The Mercury Thermostat Collection Act (hereinafter the "Act") of 2008 requires a Manufacturer to operate a Program. A Manufacturer may operate a program

individually or collectively with other manufacturers. For the calendar years 2013 and 2014, the Respondent has demonstrated that they have elected to operate a program collectively with other manufacturers.

1.5. The "Act" required a manufacturer or group of manufacturers operating a program to develop a methodology and conduct a survey to provide to the Department data on the number of mercury containing thermostats becoming waste annually.

1.6. The "Act" directed the Department to develop performance measures for a "Program" to meet in collecting waste thermostats based upon the number of thermostats becoming waste annually. The Department adopted those regulations, and also included a provision in the regulations that any party could submit additional data on the number of mercury added thermostats estimated to remain in use and the number that will become waste annually. In other words, conduct another survey. The Respondent has not utilized this provision of the regulation.

1.7. California Health and Safety Code section 25214.8.13 defines the requirements of a program, which are primarily education, outreach, promotion, incentives; and a requirement to examine what works and propose modifications to enhance program performance. The Program that Respondent elected to utilize is a national program with 30 manufacturers as members and operates in 48 states some with mandatory requirements. The Program reported national advertising and promotion expenses of \$97,161 and \$82,909 for 2012 and 2013 respectively on their Tax Form 990. This prorates to less than \$100 per manufacturer per state assuming equal effort nationally. The Programs annual report submitted to the Department state "Direct Expense for Marketing and Outreach" of \$197,741 and \$289,347 for 2013 and 2014

respectively. This prorates to about \$200 per manufacturer per state assuming equal effort nationally.

1.8. The Program that Respondent elected to utilize to meet the performance requirements of the regulations did not do so. As a result of that failure, the Department issued Statements of Violations (SOVs) to Respondent on or about July 3, 2014 for the calendar year 2013 and June 9, 2015 for the calendar year 2014.

1.9.. The Respondent replied on July 29, 2014 arguing that even though Respondent had elected to participate in a collective Program, the Respondent should not be responsible for the failure of the Program to meet the regulatory requirements. The Respondent argued that their responsibility should be calculated on an individual basis. The regulations allow for the calculation of individual collection requirements for a manufacturer or group of manufacturer's in the event more than one collection Program is operating. Respondent did not provide proof that more than one Program is operating.

1.10. The Respondent argues in their reply that regulations are arbitrary, capricious or not lawfully established. The Respondent has not taken advantage of the regulatory provisions to provide the additional data to the Department. In addition, the level of effort that Respondent has engaged in to comply with the requirements is demonstrated in Paragraph 1.7 above.

1.11. On or about, November 13, 2015 the Department issued a proposed Consent Order to the collective "Program" as a resolution to the 2013 and 2014 SOVs. Twenty five of thirty individual manufacturers entered into the Consent Order with the Department to enhance collections and pay a penalty for violations for not meeting the

performance requirements of the regulations. Respondent did not enter into a Consent Order with the Department.

1.12. The arguments of the Respondent indicate that Respondent wishes to claim they are operating as an individual entity for the purpose of complying with the regulations, while claiming the protection of the collective Program. The Respondent cannot have it both ways.

1.13. Jurisdiction. Section 25187 of the Health and Safety Code authorizes the Department to order action necessary to correct violations and assess a penalty when the Department determines that any person has violated specified provisions of the Health and Safety Code or any permit, rule, regulation, standard, or requirement issued or adopted pursuant thereto. Section 25214.8.17(a) allows the Department to order a manufacturer to take actions to comply with the Act.

1.14. Exhibits. All exhibits attached to this Order are incorporated herein by this reference.

1.15. Applicable Statutes and Regulations. Copies of the statutes and regulations applicable to this Order are attached as Exhibit A.

#### DETERMINATION OF VIOLATIONS

2.1. The Department has determined that:

2.2. California Health and Safety Code section 25214.8.12, subdivision (a), subparagraph (1) requires a Manufacturer to maintain a Program to collect out-of-service mercury-added thermostats. California Health and Safety Code section 25214.8.12, subdivision (a), subparagraph (2) allows a Manufacturer to establish a Program individually or collectively with other Manufacturers. To fulfill these obligations,

the Respondent has chosen to utilize its membership in the *TRC*, a non-profit stewardship organization founded in 1998 that facilitates and manages the collection and disposal of out-of-service mercury-containing thermostats.

2.3. The Respondent violated California Code of Regulations, title 22, section 66274.5, subsection (a) in that the Respondent failed to meet the out-of-service mercury-added thermostat collection requirements in 2013 by collecting only 73 of the required 65,100 thermostats in California.

2.4. The Respondent violated California Code of Regulations, title 22, section 66274.5, subsection (a) in that the Respondent failed to meet out-of-service mercury-added thermostat collection requirements in 2014 by collecting only 107 of the 95,400 thermostats in California.

#### SCHEDULE FOR COMPLIANCE

3.1. Based on the foregoing Determination of Violations, IT IS HEREBY ORDERED THAT:

3.2. Prepare a Thermostat Collection Program pursuant to California Health and Safety Code section 25214.8.13. See Exhibit B.

3.3. All submittals from Respondents pursuant to this Consent Order shall be sent to:

Mr. Sangat Kals, Chief  
Enforcement and Emergency Response Division  
Hazardous Waste Management Program  
Department of Toxic Substances Control  
8810 Cal Center Drive  
P.O. Box 806  
Sacramento, California 95812-0806

Within thirty (30) days of the Effective Date, the Respondent shall provide the Department with the name and address of a contact person to whom all notices

pursuant to this Consent Order shall be sent.

3.4. Communications. All approvals by the Department of the Plans required by this Order and other decisions of the Department made regarding submittals shall be communicated to the Respondent in writing by a Branch Chief, Enforcement and Emergency Response Division, Hazardous Waste Management Program, Department of Toxic Substances Control, or his/her designee. Except as otherwise provided herein, no informal advice, guidance, suggestions, or comments by the Department regarding reports, work plans, schedules, or any other correspondence by Respondent shall be construed to relieve Respondent of their obligation to obtain such formal approvals as required by this Order.

3.5. Department Review and Approval. Within sixty (60) days after receipt of any plan, report, data, request, or other item that is submitted or required to be submitted, or revised and resubmitted, to the Department for approval pursuant to this Order, the Department shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission, which part may be implemented by the Respondent, and disapprove the remainder; or (d) disapprove the complete submission. In the event of disapproval of any portion of the submission, the Department shall include a statement of the reasons for such disapproval in its response and provide an appropriate extension date for the Respondent to address such disapproval.

3.6. Compliance with Applicable Laws: The Respondent shall carry out this Order in compliance with all local, State, and federal requirements, including but not limited to requirements to obtain permits and to assure worker safety related to

hazardous waste management.

3.7. Cost Recovery: Respondent is liable for all costs associated with the implementation of this Order, including all costs incurred by DTSC in overseeing the work required by this Order.

3.8. Endangerment During Implementation: In the event that the Department determines that any circumstances or activity (whether or not pursued in compliance with this Order) are creating an imminent or substantial endangerment to the health or welfare of people on the site or in the surrounding area or to the environment, the Department may order Respondent to stop further implementation of this Order for such period of time as needed to abate the endangerment. Any deadline in this Order directly affected by a Stop Work Order under this section shall be extended for the term of the Stop Work Order.

3.9. Liability: Nothing in this Order shall constitute or be construed as a satisfaction or release from liability for any conditions or claims arising as a result of past, current, or future operations of Respondent. Notwithstanding compliance with the terms of this Order, Respondent may be required to take further actions as are necessary to protect public health or welfare or the environment.

3.10. Data and Document Availability Respondent shall permit the Department and its authorized representatives to inspect and copy all data generated by Respondent or on Respondent's behalf in any way pertaining to work undertaken pursuant to this Order. The Respondent shall maintain a central depository of the data, reports, and other documents prepared pursuant to this Order. All such data, reports, and other documents shall be preserved by the Respondent for a minimum of six (6)

years after the conclusion of all activities under this Order. If the Department requests that some or all of these documents be preserved for a longer period of time, the Respondent shall comply with that request, deliver the documents to the Department, or permit the Department to copy the documents prior to destruction. The Respondent shall notify the Department in writing at least six (6) months prior to destroying any documents prepared pursuant to this Order.

3.11. Government Liabilities: The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Respondent or related parties in carrying out activities pursuant to this Order, nor shall the State of California be held as a party to any contract entered into by the Respondent or its agents in carrying out activities pursuant to this Order.

3.12. Incorporation of Plans and Reports. All plans, schedules, and reports that require Department approval and are submitted by the Respondent pursuant to this Order are incorporated in this Order upon approval by the Department.

3.13. Extension Request: If Respondent is unable to perform any activity or submit any document within the time required under this Order, the Respondent may, prior to expiration of the time, request an extension of time in writing. The extension request shall include a justification for the delay.

3.14. Extension Approvals: If the Department determines that good cause exists for an extension, it will grant the request and specify in writing a new compliance schedule.

#### OTHER PROVISIONS

4.1. Additional Enforcement Actions: By issuance of this Order, the Department

does not waive the right to take further enforcement actions.

4.2. Penalties for Noncompliance: Failure to comply with the terms of this Order may also subject Respondent to costs, penalties, and/or punitive damages for any costs incurred by the Department or other government agencies as a result of such failure, as provided by Health and Safety Code section 25188 and other applicable provisions of law.

4.3. Parties Bound: This Order shall apply to and be binding upon the signing Respondent and its officers, directors, agents, receivers, trustees, employees, contractors, consultants, successors, and assignees, including but not limited to individuals, partners, and subsidiary and parent corporations, and upon the Department and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Order.

4.4. Time Periods. "Days" for purposes of this Order means calendar days.

#### PENALTY

5. Based on the foregoing DETERMINATION OF VIOLATIONS, the Department sets the Respondent's penalty at \$36,049. Payment is due within thirty (30) days from the effective date of the Order. Respondent's check shall be made payable to the Department of Toxic Substances Control, and shall identify the Respondent, Docket Number, as shown in the heading of this Order, and the project code (601609-48).

Respondent shall deliver the penalty payment to:

Department of Toxic Substances Control  
Accounting Office  
1001 I Street, 21st Floor  
P.O. Box 806  
Sacramento, CA 95812-0806

A photocopy of the check shall be sent to the Department contact person identified as Sangat Kals.

RIGHT TO A HEARING

6. Respondent may request a hearing to challenge the Order. Appeal procedures are described in the attached Statement to Respondent.

EFFECTIVE DATE

7. This Order is final and effective twenty days from the date of mailing, which is the date of the cover letter transmitting the Order to Respondent, unless Respondent requests a hearing within the twenty-day period.

Date of Issuance April 8, 2014

original signed by Denise Tsuji

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Denise Tsuji  
Branch Chief  
Department of Toxic Substances Control