

Response to Comments

to

**Rules and Regulations Governing the Administration and Enforcement of the RI Mercury
Reduction and Education Act**

Adopted Pursuant to RIGL Chapter 23-24.9 (the 2001 Mercury Reduction
and Education Act) and RIGL 42-17.1.

April 2004

RI Department of Environmental Management

The following individuals submitted comments, verbally or in writing, at the February 11, 2004 public hearing held at the RI DEM in Providence or in direct written correspondence to the Department of Environmental Management between January 13, 2004 and February 20, 2004. Copies of all comments are on file and available for public review at the RI Department of Environmental Management, 235 Promenade Street, Providence, RI 02908.

Alicia Karpick	The Sierra Club
Ric Erdheim	National Electrical Manufacturers Association

The following responses by the Department of Environmental Management address both specific individual comments and general categories of similar comments offered by two or more individuals.

Comment:

There should be a section on “public education” included in the regulations.

Response:

The 2001 mercury law already calls upon the Department to initiate a public education and outreach program (RIGL §23-24.9-14). This is currently being done on an informal basis in conjunction with other environmental organizations and the Interstate Mercury Education and Reduction Clearinghouse (IMERC). In addition, regulations are generally adopted to regulate the actions of individuals, organizations, and businesses *outside* the agency, not the agency’s own actions and conduct. As such, we do not see the need to amend the regulations to include a specific section on public education. The statute is already clear on this particular topic. Additionally, the Department has been actively involved with other stakeholders (RI Dept of Health, RI Dept of Education, Brown University, Rhode Island College, Clean Water Action, and others) to educate the public regarding the dangers of mercury in the environment. Fact sheets about the mercury in fish and household products have been produced in English and several other languages and are available to the public on the Department’s web site and at the main office and have been incorporated into teachers educational packets. As more product information becomes available, we anticipate that the Department will increase their efforts in the area of public education.

Comment:

The definition of "manufacturer" includes an importer or domestic distributor of a mercury-added product produced in a foreign country. Under this definition, the local retailer would be a manufacturer directly responsible for complying with notification, labeling, collection and phase out and ban requirements and is liable for any violations.

Response:

This interpretation of potential impacts of the statute is correct. However, the regulatory definition of a manufacturer is consistent with the statutory definition in 23-24.9-3.

Comment:

Rhode Island should focus on other areas where greater gains could be achieved in reducing the amount of mercury at a reasonable cost to the state.

Response:

Rhode Island is active in addressing mercury as an environmental and public health threat. At the state, regional, national and international levels, voluntary and mandatory programs have been implemented to reduce the public health and environmental risks associated with anthropogenic sources of mercury. In June 1998, the Conference of New England Governors and Eastern Canadian Premiers adopted the *Mercury Action Plan*. The plan, which was endorsed by Lincoln Almond, Governor of Rhode Island, establishes objectives for reaching the goal of “*virtual elimination of anthropogenic mercury releases* in the region through a combination of source reduction, safe waste management practices and aggressive emissions controls.” Rhode Island does not have any coal fired electrical plants, nor residential waste incinerators, and has already adopted regulations to control mercury releases from hospital/medical/infectious waste incinerators. Mercury releases from

spills and use in consumer, commercial and household products is one of the last remaining sources of mercury emissions in Rhode Island.

Comment:

The proposed regulations, and the accompanying stakeholder process that convened to draft the regulations, reject almost all of the concerns that impacted industries raised in the process of developing the regulations.

Response:

RI DEM has gone to great lengths to ensure that these regulations reflect legislative intent. It has also gone to great lengths to draft these regulations with a significant degree of input from local environmental organizations, government agencies and impacted industry representatives. A total of five (5) advisory group meetings were convened with the purpose of drafting regulations to implement the 2001 mercury law. DEM considered all recommendations proposed by industry representatives. Some were not incorporated into the final draft of the regulations, particularly with respect to “notification” and the definition of “product category.” DEM feels some suggestions were either contrary to specific provisions in the mercury statute or would have prevented the state from achieving the many goals on the 2001 mercury reduction and education.

Comment:

Most of the deposition of mercury in Rhode Island does not come from US sources let alone Rhode Island sources (citations to specific reports were included). The regulations would address a small and declining source of mercury emissions and ignore large sources of mercury emissions. As such, the regulations will not achieve significant reductions in environmental mercury as is stated in the purpose section and do little, if anything, to reduce mercury levels in Rhode Island.

Response:

It is true that a large part of mercury deposition in Rhode Island does not come from sources inside the state. It is also true that the RI mercury statute and these regulations address a small and declining source of mercury emissions. However, the state is active in addressing mercury as an environmental and public health threat directly in the areas within our control, as well as working to address regional and national issues through interstate organizations. At the state level, voluntary measures have been planned and implemented to reduce the public health and environmental risks associated with anthropogenic sources of mercury. In June 1998, the Conference of New England Governors and Eastern Canadian Premiers adopted the *Mercury Action Plan*. The plan, which was endorsed by Lincoln Almond, Governor of Rhode Island, establishes objectives for reaching the goal of “*virtual elimination of anthropogenic mercury releases* in the region through a combination of source reduction, safe waste management practices and aggressive emissions controls.” Rhode Island does not have any coal fired electrical plants, nor residential waste incinerators, and has already adopted regulations to control mercury releases from hospital/medical/infectious waste incinerators. Mercury releases from spills and use in consumer, commercial and household products is one of the last significant sources of mercury emissions in Rhode Island. In order to meet the goal of “virtual elimination”, RI must partner with other states in the nation to address these remaining sources.

Comment:

The regulatory definition of "manufacturer" (4.12) includes an importer or domestic distributor of a mercury-added product produced in a foreign country. For some products, local retailers are direct importers. Under this definition, such a Rhode Island retailer would be a manufacturer directly responsible for complying with notification, labeling, collection and phase out and ban requirements and for penalties in the event of violations of the law. The statement in the rule making notice that the regulations will not have an affect on small businesses ignores the effect on such businesses of the definition of "manufacturer."

Response:

Agreed. There may be an impact on local importers who choose to import and sell/distribute mercury-added products. However, the regulatory definition in question (4.12) is consistent with the governing state statute (RIGL 23-24.9-3) and overall intent of the law to minimize the use of mercury in products sold in Rhode Island. To date, RI DEM has not received any notification forms from any such Rhode Island company and is not aware of any companies that meet this criteria.

Comment:

The regulations propose a definition of product category (4.21) that is inconsistent with a common understanding of the phrase "product category" and instead inserts into the definition arbitrary mercury limits. These mercury limits have no relevance to any meaning of the term "product category" and are even inconsistent with mercury levels that are found in the bill. The use of these arbitrary mercury limits for determining a product category will arbitrarily eliminate the use of product categories in clear contravention of the statute that allows for use of product categories. The mercury limits should be deleted from this definition. The proposed definition of "product category" may prevent manufacturers and trade associations from reporting on a product category basis if the mercury content of certain products within those categories varies. The language regarding mercury content should be deleted from the definition of "product category."

Response:

The statutory requirement for notification is aimed at determining what types of products contain mercury and how much mercury is contained in each unit. Specifically, §23-24.9-5(a) states that "Such notification shall at a minimum include.... the amount of and purpose for mercury in each unit of the product." In order to accomplish this effectively, DEM has crafted a definition of product category which requires that the amount of mercury be reported. Establishing clear ranges in the notification section prevents manufacturers and trade organizations from grouping together similar products (same purpose for having the mercury and the same commercial/consumer use) that have an extremely wide range of mercury. Industry representatives have already stated that similar products often contain different levels of mercury. This would serve to defeat the purpose of the 2001 mercury statute and make administering the phase-out requirement (RIGL §23-24.9-7 and Rule 7 of the regulations) moot if it is impossible for RI DEM, or a concerned customer, to figure out how much mercury is actually contained in products. In fact, the definition of product category as contained in the regulations will assist the state fulfill the reporting requirements detailed in §23-24.9-17 of the mercury statute - RI DEM is required to report to the Governor and General Assembly by January 1, 2006, on the effectiveness of the mercury statute.

To clarify the issue of "mercury limits" set in the bill, DEM notes that the definition of product category does not include mercury levels as claimed. Rather, the notification regulations establish these levels (Rule 5). DEM disagrees with the claim that these levels are arbitrary. It is RI DEM's understanding that representatives of certain industry sectors with an interest in mercury laws across New England suggested and were comfortable with these levels during an interstate discussion sponsored by the Northeast Waste Management Official's Association. They are also similar to

ranges established in NH, ME and CT. In the State of Connecticut, these ranges are specifically included in the state's mercury statute, not in regulations. In addition, the Interstate Clearinghouse (IMERC) utilizes these ranges to provide consistent reporting across member states, eliminating the need for duplicative reporting from manufacturers.

Comment:

The regulation (5.1.8) would require the use of a form developed by IMERC. This form has been adopted without any notice and comment. Unfortunately, IMERC developed such a complex form requesting inordinate amounts of detail of little value that to date it has obtained little information of value. A strict interpretation of the Act (§23-24.9-5) would require the form to be submitted to the DEM director. While it makes sense to submit information directly to IMERC, it is technically not consistent with the statutory language. The RI DEM should be using common sense for interpreting this and other provisions of the law that are discussed throughout these comments where strict interpretations of the law do not make sense. The RI DEM should not use the IMERC form.

Response:

These regulations (Rule 5) codify the information IMERC is requesting on its notification forms. These forms were developed with significant input from representatives of numerous New England state environmental agencies, including RI DEM. It is also our understanding that NEWMOA solicited comments from certain industry associations with a particular interest in mercury containing products. Detailed directions have been developed to assist companies/trade associations with the notification forms, and RI DEM/IMERC staff is available to answer questions about the forms. RI DEM disagrees with the statement that information gathered through the use of IMERC's notification forms has produced little information of value. Rather, these forms and the resulting information have allowed participating New England states to determine what products contain mercury, how much they contain and what, if any, low-mercury or no-mercury alternatives might exist. Maine's DEP has already used a significant portion of this information to develop a comprehensive report on alternatives to mercury containing products. Regarding the issue of where the forms should be sent, RI DEM agrees that §23-24.9-5 indicates the forms should be sent to the Director. However, the previous section, §23-24.9-4, clearly states the following: "The department is authorized to participate in the establishment and implementation of a regional, multi-state clearinghouse to assist in carrying out the requirements of this chapter and to help coordinate reviews of the manufacturers' notifications regarding mercury-added products... ." RI DEM is attempting to implement the 2001 mercury statute in the least burdensome way possible, and believes utilizing the Clearinghouse for processing notification forms is easiest for all manufacturers and industry trade associations. As such, RI DEM will continue to continue to use notification forms developed by IMERC and notes the general support expressed by a broad representation of industry representatives for this coordinated review process.

Comment:

The Act (RIGL Chapter 23-24.9) explicitly exempts fabricated mercury-added product manufacturers from providing mercury content information where a component manufacturer provides that information. This exemption avoids double counting that would occur if both the component and final product manufacturer report on the same mercury component. The draft regulation neglects to include this important provision.

Response:

This comment is not entirely accurate because the statute (RIGL §23-24.9-5(d) specifically reads: "A fabricated mercury-added product manufacturer is not required to provide mercury content

information on its mercury-added component if the component manufacturer has provided the information to the department *and if the fabricated mercury-added product manufacturer notifies the department of the specific components used in the fabricated mercury-added product.*" (emphasis added).

Comment:

Section 5.2.1 correctly quotes the statute that manufacturers shall provide updated information when there is a "significant change" in the information. Section 5.2.2 then defines "significant change" as any change on the notification form. The proposed definition of "significant change" is clearly at odds with the law because it makes the use of the phrase "significant change" meaningless. The phrase "significant change" should relate only to a significant change in the amount of mercury in the product or product category.

Response:

RI DEM disagrees with this interpretation of "significant change". If changes relevant only to the amount of mercury in the product triggered an updated notification form, company contact names, contact information, and whether the product is still being sold/distributed in Rhode Island could go unreported. In order to fulfill the requirement of reporting "significant changes", all a company or industry group need do is make the appropriate changes to the notification forms and resubmit them to IMERC. However, in order to address this issue, the regulations have been modified to specify the types of changes that would trigger an updated form.

Comment:

The statute requires notification of "the total amount of mercury contained in all products manufactured by the manufacturer." The statute's focus is clearly on the total mercury use by a manufacturer. In contrast, section 5.4.2 requires reporting not of the total amount of mercury use by a manufacturer or manufacturers but reporting by product or product category. Such a requirement is inconsistent with the clear language of the statute and should be deleted.

Response:

RI DEM disagrees with this interpretation of the phrase "the total amount of mercury contained in all products manufactured by the manufacturer" and notes that §23-24.9-5(a) establishes "minimum" standards for notification. The regulations are just specifying how the Department is interested in receiving the information about total mercury content.

Comment:

Paragraph 6.2 and definition 4.14 in the regulations are used to define the term "novelty." This definition is important because the Act bans the sale of mercury-containing novelties, other than those that contain a removable button cell battery. It is unclear from the proposed regulation as to which products will be considered novelties. The definition of "novelty" and the proposed criteria (not all of which have to be met for determining if a product is a novelty) do not provide clarification.

Response:

The regulatory definition of a novelty product (4.14) is consistent with the governing state statute (§23-24.9-3 (9)). In response to requests to further clarify exactly what a novelty product is, RI DEM solicited specific suggestions from members of a mercury working advisory group, which met from June-October 2002. RI DEM used recommendations put forth by industry representatives and

environmental organizations to craft section 6.2 of the regulations. In addition, manufacturers are allowed to request (pursuant to section 6.3) "Product Specific Determinations" from the Department if questions remain

Comment:

The draft regulations on novelty products propose to consider whether an alternative non-mercury product is available, a factor that is found nowhere in the Act's definition of "novelty."

Response:

Agreed. There is no reference to alternative non-mercury products. However RI DEM feels that the availability, or lack thereof, of non-mercury added alternatives is information valid and worthy of knowing before making decisions regarding the fate of novelty items. It is our determination that it is clearly within the scope of the 2001 law to consider this type of information before making a final decision.