Congress of the United States
Washington, DC 20515

January 28, 2004

Administrator Michael Leavitt
US Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Leavitt:

We write to express our serious concerns with EPA's recent proposal that would allow over three billion pounds of hazardous waste to escape federal regulation by narrowing the definition of "solid waste" under the Resource Conservation and Recovery Act (RCRA). The proposed rule would wreak havoc on RCRA's "cradle-to-grave" framework, would likely lead to a new wave of toxic waste dumps littering our communities, and could significantly undermine cost recovery at hundreds of Superfund sites across the nation.

To support legitimate recycling of hazardous secondary material, the Agency should have developed a narrowly tailored approach that addressed specific barriers impeding greater recycling while retaining basic safeguards. One example of such an approach is to exclude waste recycled on-site or intra-company waste. Another option is to conditionally exclude hazardous secondary materials as long as certain safeguards were preserved. Instead, EPA proposes to completely exempt this material from all federal oversight - an indiscriminate and inappropriate give-away to certain industries.

The preamble to the proposal suggests that the rulemaking is a response to decisions of the U.S. Court of Appeals for the DC Circuit. However, the Agency fully responded to these decisions on March 13, 2002, when the Agency removed the byproduct and sludge provisions of the 1998 mineral processing exclusion. 67 FR 11251. The courts did not require any further action by EPA, and the Agency should not imply that this rulemaking is anything other than an exercise of the Bush Administration's policy preferences

As a policy matter, we have several significant concerns. First, the proposal would blast a yawning hole in the cradle to grave hazardous waste management framework by exempting hazardous secondary materials from all of RCRA's recordkeeping and manifest requirements. These materials include toxic solvents like benzene, trichloroethylene, and xylene from the chemical industry, spent catalyst and emulsion byproducts from petroleum refineries, air pollution control dust containing heavy metals from smelters, and metal-containing liquids from printed circuit boards.

Under this proposal, there would be no way for EPA, the states, or concerned citizens to track how much hazardous secondary material was generated, where it was sent for recycling, or how it was ultimately managed. Without a tracking system, powerful economic incentives would be unleashed as generators of hazardous secondary materials could avoid hundreds of dollars per ton in recycling costs by engaging in "midnight dumping." Decades of environmental progress would be jeopardized.

Second, EPA acknowledges in the preamble to the proposed rule that recycling operations have accounted for a significant number of Superfund listings and RCRA imminent and substantial endangerment filings. 68 FR at 61562. Yet the rule would exempt recyclers of hazardous secondary material from RCRA's financial assurance requirements. Communities inevitably will be left on the hook for millions of dollars to clean up contamination at recycling sites throughout the nation.

The proposal would also, perhaps inadvertently, have significant implications for liability under the Superfund program. Under the proposed rule, secondary hazardous materials sent for recycling are considered product-like and thus are not "discarded". Based on this reasoning, industries sending material to recyclers arguably would not be "arranging for disposal" of the material, and thus would not be liable under section 107 of CERCLA. This rule might therefore let polluters off the hook for hundreds of millions of dollars of cleanups and force taxpayers to bear an even greater cleanup burden. At the very least, the definition of solid waste will be a contested issue at every Superfund site involving recyclable materials. Parties that have already settled their cost contribution claims may also seek to revisit those settlements based on this new Agency interpretation.

In addition, this proposal appears to provide significantly broader liability relief than that provided by Congress under the Superfund Recycling Equity Act of 1999. Many of us supported this Act because it promoted the reuse and recycling of scrap material with positive economic value, and included specific safeguards to ensure that handling, processing, reclamation and other management activities were conducted with reasonable care. In contrast, this proposal would effectively exempt by administrative fiat a much broader universe of hazardous waste from Superfund liability, without subjecting the material to any tracking or management safeguards.

Despite these concerns, EPA acknowledges in the proposal's supporting economic assessment that the Agency did not evaluate the potential environmental risks posed by this rule. This failure is striking since the proposal would eliminate many of the legal and financial incentives ensuring that hazardous secondary material is properly managed by the generator, transporter and recycler.

Before proceeding with such a fundamental change to the hazardous waste program, we ask EPA to evaluate the following issues and to provide us a copy of the Agency's evaluation by March 28, 2004:

(1) the risks of mismanagement posed by this broad exemption, including data on the environmental performance of hazardous waste recyclers before and after implementation of RCRA's regulatory regime. Specifically, EPA should consider the number of RCRA imminent and substantial endangerments filings related to recycling operations, the number of CERCLA listings related to hazardous waste recycling, and how many of these filings/listings related to activities at facilities that did not yet have a RCRA permit.

(2) the potential financial liability that will borne by the federal government and the states for remediation costs at these new, unregulated recycling facilities.

(3) the impact of this proposal on EPA's ability to obtain cost recovery under CERCLA section 107 from parties that sent hazardous secondary material to be recycled.

(4) whether the Administration's proposal is consistent with and satisfies the criteria established for legitimate recycling by the Superfund Recycling Equity Act of 1999 (CERCLA section 127(c) and (f)).

(5) identify each proposed or final Superfund National Priorities List site where hazardous secondary materials that would be covered by the proposed rule are suspected to be located or actually have been discovered.

Sincerely yours,

James M. Jeffords, Ranking Member
Senate Committee on Environment and Public Works

Barbara Boxer, Ranking Member
Senate Subcommittee on Superfund and Waste Management

John Dingell, Ranking Member
House Committee on Energy and Commerce

Hilda Solis, Ranking Member
House Subcommittee on Environment and Hazardous Materials