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VIA MAIL & VIA ELECTRONIC MAIL

Robert M. Sussman, Senior Counsel
U.S. Environmental Protection Agency
Ariel Rios Building, Room 3000
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: ***Follow-up From the March 26th Meeting With Industry-Respondents To Discuss Sierra Club's Petition for Reconsideration of the Definition of Solid Waste Rule***

Dear Mr. Sussman:

On behalf of the Metals Industries Recycling Coalition ("MIRC"),[1] the American Chemistry Council, the Alliance of Automobile Manufacturers, the American Coke & Coal Chemicals Institute, the National Paint and Coatings Association, the Treated Wood Council, the American Forest and Paper Association, and the Society of Chemical Manufacturers and Affiliates (hereinafter, collectively referred to as "Industry-Respondents"), I want to thank you and your colleagues for having taken the time to meet with us on March 26, 2009, regarding the Sierra Club's petition for reconsideration of the Revisions to the Definition of Solid Waste ("DSW") Rule. I write briefly to clarify the group's position on several of the topics discussed during the meeting, and to reaffirm that the Industry-Respondents support the final DSW Rule as promulgated and would vigorously oppose the Agency acceding to Sierra Club's requests by initiating yet another DSW rulemaking.

[1] MIRC is comprised of several metals companies and trade associations representing the interests of the iron, steel, nickel, chromium, copper, and brass industries. MIRC members include: the American Iron & Steel Institute ("AISI"), the Copper and Brass Fabricator's Council, the Copper Development Association Inc. ("CDA"), the International Metals Reclamation Company, Inc. ("Inmetco"), the Specialty Steel Industry of North America ("SSINA"), and the Steel Manufacturers Association ("SMA").

Initiating a new DSW rulemaking would be a mistake. The final Rule is the product of enormous and prolonged EPA staff effort going back over fifteen years and reflects numerous well-reasoned decisions that have both technical and legal support. The success of EPA's efforts is reflected in the wide-spread support for the Rule from diverse stakeholders including the broad array of industry groups represented by our coalition, the Environmental Technology Council, and many states. Indeed, the final Rule includes numerous changes designed in part to address the very concerns raised by Sierra Club in its comments on the proposed rule. These changes impose numerous additional conditions on generators, transporters, intermediate facilities, and reclaimers that, in many respects, are essentially the same as, or equivalent in stringency to, those required under the full Resource Conservation and Recovery Act ("RCRA") Part B program.[2]

With the vast majority of the concerns it expressed having been addressed by provisions added in the final Rule, Sierra Club's petition makes clear that it will not be satisfied with anything less than the full imposition of all RCRA Part B requirements on all hazardous secondary materials operations (generators, transporters, intermediate facilities, and reclaimers alike). Sierra Club takes this position based on its view that the D.C. Circuit has misconstrued RCRA and approved regulatory actions that Sierra Club claims are inconsistent with congressional intent. In fact, however, Sierra Club, not the D.C. Circuit, is distorting congressional intent.

Sierra Club's request to impose full RCRA Part B requirements on all parties handling hazardous secondary materials being reclaimed would negate the statutorily-driven purposes underlying the Rule—to encourage recycling and protect the environment by reducing waste disposal—and would eliminate any of the Rule's benefits. Under the Rule, the economic and environmental benefits are driven in large measure by reduced regulatory transactional costs, *viz.*, the reduced monetary and related burdens associated with hazardous waste manifesting and transportation requirements, reporting and recordkeeping obligations, and status as a large quantity generator. These "de-regulatory" benefits will not lead to "sham recycling"; to the contrary, the specification of legitimacy criteria in the DSW Rule will, if anything, diminish any sham recycling that may be occurring currently. Nor will achieving these benefits result in any material diminution of environmental protection. Rather, as noted in our response to Sierra Club's petition, EPA has painstakingly developed conditions that are more than sufficient to ensure that recycling is legitimate and that the environment is protected. At the same time, by

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[2] The conditions under the transfer-based exclusion are similar to, or more stringent than, RCRA Part B permit requirements. Under this exclusion, generators must provide notice (which is not currently required under Part B), must track the materials and ensure they arrive at their intended destination, and must conduct periodic due diligence reviews of the reclamation facilities aimed at assessing the legitimacy of their operations, including adequacy of equipment, training, and personnel (*see* similar Part B requirements under 40 C.F.R. § 270.14(b)(8), (12)). In turn, reclamation facilities must also report their activities, must contain and confirm receipt of the materials, and must maintain full RCRA financial assurance.

creating a regime in which secondary materials can be legitimately reclaimed without incurring all of the burdens associated with full RCRA Part B regulation, the DSW Rule creates additional incentives for reclaiming and reusing materials that otherwise might be destined for disposal in landfills—thereby serving the resource conservation and recovery objectives of RCRA. Rescinding the Rule—or initiating a new rulemaking to appease Sierra Club by imposing additional conditions on the transfer-based exclusion—would eliminate these incentives and, ironically, increase the risks of environmental damage, as secondary materials that would be recycled under the Rule are landfilled instead.

As you noted during the meeting, the companies and associations represented by Industry-Respondents represent a truly unique, wide swath of interests, ranging from manufacturers of forest, paper and wood products, mining, to automotive, steel, and nonferrous metals manufacturers, to chemical manufacturers, to metals reclaimers. These industries support the DSW Rule because, while it may be less than ideal from their perspective, the Rule, on balance, is a well-conceived and thoughtfully crafted approach to encouraging the recycling of reclaimable secondary materials and reducing unnecessary burdens, while protecting the environment in the bargain. Equally important—if not more so from a legal standpoint—the Rule properly respects the limits on EPA's RCRA jurisdiction to regulate as "solid waste" only those secondary materials that are truly "discarded" and become part of the waste disposal problem. Sierra Club disputes the necessity for "discard" and argues that the D.C. Circuit's most recent decision on this issue, *Safe Food and Fertilizer v. EPA*,[3] was wrongly decided. Sierra Club is entitled to its view, but we respectfully suggest that the D.C. Circuit's decisions should carry more weight than the views of Sierra Club in guiding EPA's implementation of RCRA. And, under those decisions, hazardous secondary materials like the ones covered by the DSW Rule—that are being legitimately reclaimed, protectively managed, and not discarded—are not "solid wastes" and, therefore, should not (indeed, may not) be regulated as hazardous wastes under Subtitle B of RCRA. If EPA were to rescind the Rule, or re-open and modify it in a manner inconsistent with this fundamental point, it would undoubtedly prompt litigation from industry groups, challenging the Agency's action *inter alia* on jurisdictional grounds and further delaying implementation of a rule (and its attendant environmental benefits) that has been more than fifteen years in the making.

Such a delay would be tragic, because, among other things, it would mean that the economic benefits of the Rule would not be realized at a time when our country's economic situation (and the financial positions of the affected companies) could hardly be more precarious. By EPA's estimate, the Rule will impact 1.5 million tons of hazardous secondary material per year, with 23,000 tons being diverted from disposal to recycling, providing an economic benefit of approximately $95 million per year. As Industry-Respondents indicated in their rulemaking comments, these numbers are conservative and likely understate the true economic benefits of the Rule by a substantial margin. Delaying the realization of these benefits in these struggling industries during these harsh economic times reflects regressive economic policy.

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[3] 350 F.3d 1263 (D.C. Cir. 2003).

Industry-Respondents acknowledge that EPA has discretion to ensure that hazardous secondary materials qualifying for the DSW Rule exclusion are being reclaimed legitimately and are not being discarded. The DSW Rule provides assurance on both counts and does not need to be modified in either respect. Indeed, we believe it abuts the outer limits of EPA's discretion in this regard. Should EPA believe it necessary to address the concerns raised in Sierra Club's petition regarding the alleged vagueness of the terms "contained" or "significant release," it could do so by issuing interpretive guidance to clarify how these terms are to be applied under the Rule.[4] We can see no reason, however, to go beyond that by undertaking a new rulemaking and casting aside the efforts by EPA staff, state solid waste administrators, affected industries, and environmental organizations.

For these reasons, and the reasons stated in our Response to Sierra Club's Petition for Reconsideration filed with EPA on March 6, 2009, Industry-Respondents respectfully request that you deny Sierra Club's petition for reconsideration of the DSW Rule. As noted, if the Agency believes further clarification of some issues is warranted to address Sierra Club's concerns, it may issue interpretive guidance to address those issues. Thank you again for taking the time to meet with us. Please do not hesitate to contact me should you have any further concerns or questions regarding the matters discussed above.

Sincerely,

John L. Wittenborn

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[4] As discussed during the March 26th meeting, Industry-Respondents believe Sierra Club's argument that "contained" and "significant release" are vague terms under the Rule is meritless. EPA sufficiently explained the meaning of both of these terms in the DSW preamble, and other RCRA regulations contain similar terms without formally codified definitions. For example RCRA regulations in 40 C.F.R. Parts 264 and 265, Subparts C and D, require "immediate" cleanup of unplanned releases. As EPA has stated, there is no federal definition of what constitutes an immediate response. *See* Letter from J. Winston Porter to Mr. Fred Hansen, "Responses to Accidental Spills of Listed or Characteristic Hazardous Wastes" (September 29, 1986); *see also* 57 Fed. Reg. 61,492, 61,494 (Dec. 24, 1992) (EPA stating that for purposes of contingency plans for wood preserving plants, the term "immediate" must take into account the nature of the incident and other facility-specific factors). And, with respect to Sierra Club's claim that the term "significant release" is unlawfully vague, we would call your attention to the Supreme Court's recent decision in *Entergy Corp. v. Riverkeeper, Inc.*, No. 07-588 (S.Ct., April 1, 2009), which, among other things, found no problem in EPA's using (without further defining) the test of whether costs are "significantly greater than" benefits as a criterion for granting variances from cooling water intake standards under the Clean Water Act.