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Via Electronic and U.S. Mail
Ms. Sherry Green
Office of Site Remediation Enforcement
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Potential EPA Guidance Regarding The Superfund Recycling Equity Act

Dear Ms. Green:

The Steel Manufacturers Association ("SMA") submits the following comments in response to the United States Environmental Protection Agency's ("EPA's") announcement that it is considering issuing guidance dealing with prospective recycling transactions under the Superfund Recycling Equity Act of 1999 ("SREA"). See 65 Fed. Reg. 37,370 (June 14, 2000).

I. THE STEEL MANUFACTURERS ASSOCIATION

SMA is the largest steel trade association in North America, in terms of membership, and the primary trade association of electric arc furnace ("EAF") steel producers that make various steel products, including carbon, alloy and stainless steels, from a feedstock of scrap metal. The SMA also includes a few integrated, or ore-based, steel producers. The forty-seven United States member companies of the SMA are geographically dispersed across the country and account for almost sixty percent of total domestic steel production. Under SREA, most SMA steel company members are considered "consuming facilities" because they purchase scrap from scrap brokers and dealers, i.e. the persons arranging for recycling. Also, several SMA members have scrap processing facilities that generate scrap for their own mills and to sell to other steel mills, and are therefore considered both consuming facilities and persons arranging for recycling.

A. Environmental Contributions Of The Steel Recycling Industry

The member companies of the SMA represent an environmental success story. Steel is the nation's most recycled material. Last year, the steel industry recovered over 67 million tons of iron and steel scrap which would have otherwise been landfilled or littered the countryside. We melt down the scrap that was processed from obsolete junked cars, appliances and machinery, the steel reinforcing beams of demolished buildings, furniture, storage containers, food cans, and guns

confiscated by law enforcement authorities and turn it into new, high quality steel mill products. Without the EAF and integrated steel mills, persons who arrange for recycling of scrap metal within the meaning of SREA would have no customers.

By recycling enormous tonnages of scrap, the EAF steel industry also accomplishes tremendous energy savings. For every pound of steel made with recycled scrap, 5450 BTU's of energy are conserved; enough to light a 60 watt bulb for 21 hours. Every ton of steel re-used saves 2,500 pounds of iron ore, 1,400 pounds of coal and 120 pounds of limestone. EAF steel producers generate significantly smaller amounts of emissions and wastes, as reported on the annual Toxics Release Inventory ("TRI"), than other segments of the primary steel making industry.

B. Impact Of The Superfund Recycling Equity Act On SMA Members

SMA members have an economic interest in promoting the recycling of steel. And the SMA recognizes the environmental benefits of recycling, having designated "promotion of recycling" as the first of the SMA' s Guiding Environmental Principles adopted by the SMA Board of Directors in 1998. SMA's promotion of recycling for economic and environmental policy reasons, we believe, is conducive to EPA's objective of protecting the environment. Accordingly we support the Congressional intent behind SREA in promoting recycling.

II. COMMENTS

A. Whether EPA Should Issue Guidance

EPA requested comments on whether it should issue guidance on what constitutes "reasonable care" as contemplated by CERCLA § 127(c)(5) & (6). We believe that EPA needs to consider the issue seriously. SMA supports the issuance of guidance, in principle. We want to work closely with EPA to ensure that any guidance related to SREA provides SMA members the flexibility to maintain and improve upon their relationships with their scrap suppliers.

We cannot support guidance that places undue burdens on SMA members, most of whom are not obtaining any direct benefit from SREA's provisions. Additionally, we cannot support the issuance of guidance that is inconsistent with EPA's Congressional mandates under SREA and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Such guidance would not be helpful to industry, because a court potentially could force EPA to withdraw it, either in a direct judicial challenge against the guidance, or in a private contribution action in which a potentially responsible party relies on the guidance. And, we cannot support guidance that in any way undermines SMA members' rights under CERCLA to seek contributions from scrap suppliers who caused contamination at their steel mills and who have not met the conditions in SREA for obtaining relief from liability. SREA clarifies the liability provisions in CERCLA by defining recycling

and distinguishing it from disposal or treatment. It does not indemnify scrap sellers and therefore any guidance that could be interpreted to do so would be exceeding EPA's mandate.

B. SMA Suggestions

1. Flexibility

We would like to suggest that EPA provide guidance, if at all, on a limited basis, that offers flexibility to steel companies and their scrap suppliers, to respond to different situations. There are significant variations across the industry arising out of geographic location, access to scrap markets, and the character of the relationships between steel companies and their scrap brokers. Scrap prices can vary widely from one region of the country to another and from one quarter to the next. They are often influenced by availability of the supply and transportation options.

Ownership and location of scrap processing facilities in relation to their steel company customers are also factors. Several SMA members have their own scrap processing operations on site and occasionally purchase scrap from other dealers, junkyards, from small family owned and operated scrap businesses. Other companies have exclusive agreements with major scrap dealers that work closely with their steel company customers as part of a team. A few major scrap companies even employ metallurgists to work closely with the steel mill engineers to ensure an optimal scrap mix for making certain steel products. In other cases, steel company scrap purchasers buy on the open market from several scrap processors who have little contact with the steel mill technical staff. Additionally, many SMA members purchase industrial scrap from metal fabricators and stamping plants, either directly or through brokers. Finally, all steel producers recycle small quantities of "home scrap," typically steel that did not meet specifications and is therefore recharged back into the furnace. Accordingly, guidance that is rigid or imposes one-size-fits all requirements on the entire industry would be unworkable.

2. "Substantive" requirements

To take advantage of the relief from liability provided under SREA, scrap sellers have to exercise reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by the steel company was in compliance with substantive (not procedural or administrative) provisions of any Federal, State or local environmental law or regulation applicable to the handling, processing, reclamation, or other management activities associated with recyclable material. CERCLA § 127(c)(5). EPA guidance should clarify what is meant by "substantive" and "procedural or administrative." Scrap sellers need to know exactly which requirements should be the subject of inquiry and which should not. It would be helpful to provide several examples that enable scrap sellers to distinguish substantive from procedural or administrative elements of the major environmental statutes.

In passing SREA, Congress intentionally excluded "procedural or administrative" requirements to protect persons arranging for recycling from losing protection afforded by the Act simply because of "a recordkeeping error, missed deadline, or similar infraction by the consuming facility which is out of control of the person arranging for recycling." 145 Cong. Rec. S15049 (daily ed. Oct. 25, 1999) (statement of Sen. Lott). Accordingly, requirements that deal with monitoring or recordkeeping should not be included in scrap sellers' inquiries to their customers.

Substantive requirements should be limited to those which regulate the discharge or release of pollutants into one or more types of media, either through the establishment of ambient standards, technological standards, or both. Renewal of permits, such as storm water permits, or paperwork requirements, such as maintenance of files, also should not be considered relevant in determining a facility's compliance with substantive requirements.

3. Limited scope of inquiry

Significantly, any EPA guidance that is issued must recognize that the Act narrows the scope of the required inquiry to those regulations that pertain to the recycling of scrap metal. The Act limits the scope of the inquiry to laws and regulations that are "applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material." CERCLA § 127(c)(5). Specifically with respect to scrap metal, the inquiry is similarly limited to "applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal that the Administrator promulgates under the Solid Waste Disposal Act. . . ." CERCLA § 127(d)(1)(B). Hence, EPA's guidance must make clear that the required inquiry should focus only on those "substantive" requirements that are directly related to scrap handling and management at the consuming facility, and not on other regulatory requirements to which a facility may be subject. Facility activities beyond the scrap management stage of the production process should be excluded.

4. Publicly Available Databases

Scrap sellers should be encouraged to start the process of determining whether scrap consumers are in compliance with applicable substantive laws and regulations by looking at publicly available information. Possible compliance issues, if any, flagged in publicly available databases should then serve as the basis for further inquiries into the scrap consumer's operations. These databases can serve as a screening tool, placing scrap sellers on notice of the possibility of a compliance issue about which they should make further inquiries, when an incident of non-compliance is listed. This approach would streamline the inquiry and avoid burdening Federal, State, and local environmental agencies with repeated compliance status inquiries.

5. Radioactive Contamination

Any EPA guidance on SREA should make clear that SREA does not limit scrap seller's liability under CERCLA for radioactive contamination that results from radioactively contaminated scrap or sealed sources present in shipments of scrap send to steel mills. The liability exemption in SREA does not apply if a scrap seller "had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing or recycling." CERCLA § 127(f)(1)(B). Scrap sellers aware that their materials originated at a facility that was operated by the Department of Energy or by a Nuclear Regulatory Commission or Agreement State licensee should be aware of the likelihood that their scrap is radioactively contaminated. Given that radionuclides are CERCLA "hazardous substances," 40 C.F.R. § 302.4 & App. B, scrap sellers should be advised that they could be held liable for radioactive contamination at steel mills that later become CERCLA sites.

C. Additional EPA Questions

EPA stated in the Federal Register announcement that it plans to address several questions at the meeting. Two questions relate to scrap suppliers only, and we have not prepared answers to them. Other questions numbers (numbers 1, 3, and 5 -10) are relevant to steel producers. Following are our answers on which we intend to follow up during the meeting:

(1) How does a generator of scrap material currently exercise reasonable care in determining whether a consuming facility has been in compliance with substantive provisions of federal, state or local environmental laws?

The Institute of Scrap Recycling Industries ("ISRI") developed and distributed to its members a model checklist that scrap sellers could use in making inquiries directly to their customers regarding compliance. SMA and ISRI sent a joint memorandum to their respective members advising them of the checklist. SMA advised its members that the checklist is voluntary, but also that the checklist is a tool designed to ensure that implementation of SREA does not place an untenable burden on scrap consumers. While perhaps a useful tool, EPA should not require use of such a checklist or impose on scrap consumers any certification requirement that would, in effect, compel scrap consuming facilities to guarantee that the conditions of the SREA have been satisfied.

(3) What prevailing industrial practices are used when assessing a facility's compliance status?

In the steel industry, each company has its own practices for assessing compliance status internally. Most have environmental management systems in place. Almost all SMA member companies facilities have an on-site environmental manager or team responsible for compliance, in addition to relying on local and trade association environmental counsel.

(5) As part of the assessment of what constitutes sufficient information, how much weight should standard industrial practices or prior business relationships with a particular facility or company be given in determining an individual consuming facility's behavior and compliance status?

We believe that EPA should give substantial weight to standard industrial practices and prior business relationships. Both are indicators of the ability of a scrap seller to detect the nature of the consuming facility's scrap handling, processing, reclamation, or other management activities associated with scrap metal, which is one of the factors used to determine whether the scrap seller exercised "reasonable care." CERCLA § 127(c)(5)(B). Checklists, if included as part of the guidance, should be strictly voluntary.

(6) How do the criteria contained in Section 127(c)(6) regarding "reasonable care" shape or direct the type of inquiry that is necessary to determine that a consuming facility is in compliance with substantive provisions of federal, state or local environmental laws?

Section 127(c)(6) requires that "reasonable care" be determined using three criteria that include, but are not limited to these criteria. We address the three criteria as follows.

<u>Price paid in the transaction</u> - The price paid as an indicator of the exercise of reasonable care is probably irrelevant in the steel industry.

<u>The ability of the seller to detect the nature of the consuming facility's operations concerning handling, processing, reclamation, or other management activities associated with the scrap</u> - This criteria injects an element of subjectivity into what should be an objective standard. The ability of the seller to detect the nature of the consuming facility's operations is not relevant to whether the seller exercised reasonable care. For example, we do not believe that a small scrap company should be held to a lower standard of reasonable care, simply because it does not have an environmental engineer on staff to assess the customer's operations for compliance. EPA should downplay this criterion as much as possible.

The burden must be on the scrap seller to show an inability to obtain information about the scrap consuming facility. There should be a readily ascertainable standard for determining exactly what information the steel companies should be expected to provide to a scrap seller who requests it.

An equitable solution is to make the reasonable care standard as objective as possible. Under CERCLA's strict liability scheme, owners and operators of facilities and the person who arranged for transport of hazardous waste to a property can be held liable for the cost of clean-up if there is contamination, regardless of the exercise of reasonable care. Persons arranging for recycling are already gaining a tremendous advantage under SREA by obtaining relief from CERCLA liability, provided they meet certain conditions. EPA should not lower the bar and make it easier for scrap

sellers to take advantage of the indemnification provision just because they did not make the effort to obtain minimal information about a customer's facilities. Accordingly, scrap sellers should be required to show that they made a set of minimal inquiries about the nature of the consuming facility's operations, and only if the inability to obtain the information resulted from the consuming facility, should this be considered one of the criteria.

The results of inquiries made to appropriate federal, state or local environmental agencies - Consulting with publicly available databases provided by Federal, State, and local agencies should be considered sufficient to satisfy this condition. Requiring more formal and direct inquiries with such agencies would only serve to burden these agencies unnecessarily, given the large number of scrap consumers for which such inquiries will be necessary. Accordingly, EPA's guidance should encourage scrap sellers first to consult publicly available databases for compliance information and then follow-up with their customers as appropriate.

(7) Under what circumstances should site visits be required?

We do not believe that site visits should be required. Any such requirement would impair the flexibility in guidance that is supposed to assist scrap sellers and their steel company customers and to make the process more efficient. Scrap sellers can always ask to visit a steel mill's operations, but we do not believe that site visits are necessary for obtaining a reasonable assurance of compliance with applicable laws and regulations.

(8) What compliance information is available from state and local authorities? From other authorities?

We have found that state and local governments provide little in the way of searchable databases on individual facilities.

(9) How often/frequently should generators be required to re-check the compliance status of consuming facilities?

EPA should suggest that scrap sellers make an inquiry once per year, and more frequently if the scrap dealer becomes aware of a condition or potential violation that raises concern about scrap management activities.

(10) Under what circumstances is it appropriate/sufficient to rely on a consuming facility's checklist or self-certification to satisfy the "reasonable care" standard?

SMA does not believe that reliance on a consuming facility's checklist should be considered sufficient to satisfy the requirements of the Act, absent an explicit guarantee by the consuming facility. The Act places the onus of ensuring that the conditions of the SREA are met on the scrap supplier, who is the only party that benefits from the CERCLA liability exception provided by the Act. SMA

believes, as noted above, that the most proper course of action is for a scrap supplier first to consult publicly available databases regarding a facility's compliance status, and then to approach the scrap customer about any "red flags" that are raised through such an inquiry. A checklist or similar certification from a scrap supplier may be useful as one element of satisfying the reasonable care standard, but absent an explicit guarantee by the scrap consumer, should not be considered definitive.

III. CONCLUSION

SMA supports EPA's efforts to provide a workable guidance document for scrap sellers and consumers to assist in compliance with SREA. We look forward to working with EPA on the development of a guidance document.

If you have any questions, please do not hesitate to call us (**202/296-1515**) or send us an e-mail (**danjczek@steelnet.org**).

Very truly yours,

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