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October 31, 2008

Colleen Heck
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Re: Proposed Rescission of Declassification Letters for Treated Auto
Shredder Residue — Extension of Effective Date

Dear Ms. Heck:

Thank you for meeting with us on October 29 to discuss the Department's and the auto shredder industry's respective approaches for regulation of treated auto shredder residue in California. This industry provides critical recycling services to the state of California by effectively and efficiently managing the huge quantities of scrap metal that are produced by society on a daily basis. The shredder industry conserves vital resources by restoring to beneficial use vast amounts of ferrous and non-ferrous metal that would otherwise be recklessly discarded, blight our roads and open space, and wastefully consume limited landfill capacity. The shredder industry, and related collection and dismantling operations, employ thousands of people in the state, many of whom are at the lower end of the socio-economic scale and who depend on these jobs for their well-being.

As we explained during the meeting, the Department's proposed revocation of Policy and Procedure 88-6 and the declassification letters issued to individual shredder companies in the late 1980's and early 1990's would have severe adverse consequences on this industry. The January 1, 2009 effective date set forth in Maureen Gorsen's September 29, 2008 letter is wholly untenable. This precipitous action — threatened after 25 or more years of industry practice and reliance on past Department decisions — will have unintended environmental and other consequences, including massive increases in vehicle miles traveled and associated greenhouse gas emissions, cost increases, job losses, and radical changes to disposal practices. The economics within the industry are also highly sensitive to a host of internal and external factors, and the recent collapse of the credit markets and related

economic repercussions have had a very pronounced and negative impact on the industry. The timing of the Department's announced actions could not come at a worse time and they are environmentally unjustified.

The Department's proposed precipitous action stands in sharp contrast to the industry's clearly expressed commitment on numerous occasions over the past several years to work cooperatively to develop an alternative regulatory approach for auto shredder residue. The Department's insistence on resolving these complex issues over a period of two months is not realistic. In the absence of a clear and present danger to public health and safety or the environment, it is not reasonable to change summarily the entire regulatory construct that has applied to this industry for decades. The Department has not identified any such risk, and the industry is not aware of any situation where management of auto shredder residue — treated or untreated — has posed a significant risk to human health or the environment. Further, there is significant disagreement and uncertainty surrounding the Department's articulated basis for rescission of the declassification letters and policy, and the shredders do not believe they are "out of compliance" as claimed by the Department.

Policy and Procedure 88-6 and the related declassification letters have served as the cornerstone for environmentally responsible and economically viable operations in this important industry over the last 20 years. As discussed at the October 29 meeting, this regulatory scheme constitutes a *de facto* regulation because it is a written policy that the agency has generally applied, unrelated to a specific case, that has governed how the agency has regulated this industry and the waste it generates. See Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557 (1996) ("Tidewater"). The Department has applied Policy 88-6 as a *de facto* regulation, including the issuance of authorization letters based on Policy 88-6, and has applied these articulated standards of general application to the in-line treatment of auto shredder waste, since 1988. The auto shredder industry has made very substantial investments in these treatment processes in reliance on the Department's policy and declassification letters.

Pursuant to the Administrative Procedures Act ("APA"), such a change in agency regulation, interpretation, or policy may not occur without adequate procedural safeguards, namely, the statutorily mandated rulemaking process. Because the new policy amounts to a new, *de facto* regulation under Tidewater, it may only be implemented through a formal rulemaking process, in accordance with the APA (Gov. Code, § 11340 et seq.). See California Advocates for Nursing Home Reform et al. v. Bonta et al., 106 Cal. App. 4th 498 (2003) (holding that in the context of cost recovery under Medi-Cal, DHS violated the APA when it suddenly changed its

interpretation of a definition so as to create a new exemption, without going through the formal rulemaking process set forth in the APA).

In addition to the mandated rulemaking procedure, California due process requires the Department to provide each shredder with an adjudicative hearing prior to any decision to rescind Policy 88-6, as applied to that company, and its respective declassification letter (or conditional authorization/variance, as the case may be). California due process law follows a balancing approach. See Saleeby v. State Bar, 39 Cal. 3d 547 (1985) (applying a four-part test).¹ The auto shredders each have an important private interest in conducting a lawful business, in reliance on the Department's published policies, and have a substantial vested investment interest. Moreover, the Department's proposed course of action ignores the industry's dignitary interest in informing the government of the nature, grounds, and consequences of its actions and in being able to effectively present their side of the story. The refusal to grant due process prior to rescission would foreclose vital relevant input and significant, negative environmental consequences would flow from an erroneous and uninformed decision. The fiscal and administrative burdens on the Department that a hearing would entail are minimal. In short, based on Saleeby balancing, due process requires an adjudicative hearing before the Department may rescind its prior procedure and letters.

We also believe that, in light of the Third Appellate District Court of Appeal's recent decision in Sunset Sky ranch Pilots Association, et al., v. County of Sacramento, et al., C055224 (Super. Ct. No. 06CS00265), the proposed rescission is a "project" under CEQA, necessitating environmental analysis under that statute.

At the end of our meeting on October 29, you suggested that we submit a letter to you providing specific reasons why the industry cannot physically come into compliance with the hazardous waste regulations by January 1, 2009 and why an extension of this deadline is warranted. While we believe these are self-evident propositions, we are willing to provide the Department with a brief overview of the key reasons why immediate compliance is not achievable or necessary. There are many more reasons than those summarized below. Further, our response is necessarily cursory owing to the time it would take to compile all available detail and supporting documentation.

¹ These factors include [1] the private interest that will be affected by the official action, [2] the risk of an erroneous deprivation of such interest through the procedures used, [3] the dignitary interest, and [4] the government interest involved. See Saleeby v. State Bar, 39 Cal. 3d 547 (1985).

Nevertheless, the industry vouches for the general accuracy of the information provided below and believes it clearly supports the necessity for extension.

Characteristics of Auto Shredder Residue. As discussed at the October 29 meeting, the shredders do not agree with the Department's assertion that the characteristics of auto shredder residue have materially changed since the declassification letters were issued. The implementation of rigorous acceptance policies by each shredder, improvements in the treatment process, the elimination of lead from automotive fuels, and the regulatory requirements to remove batteries, mercury switches and sources of other hazardous materials from auto bodies, has resulted in reduction in soluble metal concentrations in shredder residue over time. For example, we have reviewed data generated in 2008, in the possession of the Department, which shows that auto shredder residue can be treated to levels markedly below the results presented by the Department at our meeting. With a limited extension of time, the industry could provide the Department with a detailed analysis, using the statistical procedures described in SW-846, which demonstrates that the purported basis for the proposed action is inaccurate.

No Risk to Workers. The shredder industry is subject to numerous OSHA requirements establishing permissible exposure levels for a variety of compounds found in the workplace. The industry conducts periodic risk-control evaluations for insurance purposes, industrial hygiene reviews, and breathing space analyses, without identification of any significant or unacceptable exposures. The Department has not provided any factual basis for its assertion that levels of total zinc in dust at the landfills are posing a risk to landfill workers, all of whom are themselves protected by OSHA standards and wear appropriate personnel protective equipment in the workplace. We also note that zinc is not regulated under RCRA, and that millions of tons of untreated auto shredder residue have been disposed of in landfills across the country for decades, without any known or suspected adverse effects on workers. Any such worker exposures would, of course, fall within the regulatory jurisdiction of OSHA, rather than the Department.

Absence of Any Adverse Impact to Groundwater. Based on years of groundwater monitoring data collected at Class 2 and Class 3 landfills that have accepted auto shredder residue for disposal or for use as alternative daily cover (untreated and/or treated), there is no evidence of migration of soluble metals from this material. This is confirmed by the January 12, 2005 letter from the San Francisco Bay Regional Water Quality Control Board, a copy of which was previously provided to Peter Wood, and by a plethora of sampling data using landfill leachate as the extraction medium.

DTSC Permit Considerations. Based on our review of the Department's tiered permit program, we are not able to identify any category that would clearly encompass the treatment operations currently conducted by the shredders. Accordingly, absent amendment of the Health and Safety Code sections pertaining to conditional authorization and conditional exemption, or amendment to the regulatory provisions governing the permit by rule program, the shredders would be required to apply for and obtain either standardized or full permits from the Department. The shredders could not even prepare and submit permit applications by January 1, let alone expect to receive permits from the Department. The Department's permitting activities are also subject to CEQA, which eliminates any prospect for meeting a January 1, 2009 deadline. If the declassification letters were revoked, treatment operations would be forced to cease.

Local Land Use Considerations. All of the shredder facilities are existing facilities that operate in accordance with, and may be grandfathered under, local zoning and land use ordinances applicable to recycling operations. None of the facilities is a permitted hazardous waste management facility. At a minimum, conditional use permits would likely have to be obtained in order to operate under a DTSC permit, and in some cases, actual rezoning may be required. Some facilities are located in port areas and may be unable to obtain such permission at all. In any event, local permitting decisions are subject to CEQA and none of these local authorizations can be obtained in time to meet the January 1 date.

Compliance with Title 22 Requirements. If the declassification letters were revoked, the Department has indicated that shredders would also have to come into compliance with all hazardous waste generator requirements by January 1, as well as the requirements applicable to hazardous waste treatment facilities. While the shredders already comply with generator requirements with respect to ancillary hazardous wastes produced by their operations, the task of expanding their compliance obligations to address all pertinent Title 22 requirements by January 1 is simply not possible.

Transportation of Hazardous Waste. If no longer declassified, all auto shredder waste would have to be disposed of in one of the two active Class I landfills in California, both of which are located at great distances from the facilities, or be transported out of state. Long-distance hauling of the residue would result in significant consumption of fuel, with commensurate increases in greenhouse gas emissions and particulate diesel emissions. As a matter of sound public policy, the industry does not believe it is appropriate for the state of California to adopt a regulatory position that drives a large-volume waste stream out of state for disposal. As also discussed at the meeting, if auto shredder residue were required to be transported in registered hazardous waste

vehicles, the shredders' ability to backhaul scrap to their facilities for recycling would be eliminated.

Disposal of Hazardous Waste. Disposal of auto shredder residue in Class I landfills would consume large amounts of available hazardous waste landfill capacity (adversely affecting other industries) and would likely result in significant increases in disposal charges. It should also be noted that "auto shredder residue" is classified as a "special waste" under Arizona law and may not be accepted for treatment, storage or disposal if generated outside the state. ARS 49-867.

Interim Management Measures. As discussed at the meeting, the shredders currently store treated auto shredder residue on concrete surfaces and manage the material in containment areas that are protected from exposure to the elements or that otherwise ensure that storm water that may come into contact with the residue is not discharged to waters of the state. Ongoing rigorous enforcement of acceptance policies ensures that hazardous materials are effectively prevented from entering the facilities. The industry has offered to remove tires from auto bodies before they are shredded and hereby reconfirms this element of its proposal. Given an appropriate implementation schedule, we believe the disruption that would likely result in the upstream dismantling and auto body supply operations can be minimized or avoided.

For all of the foregoing reasons and others, the effective date of the proposed rescission of the declassification letters and policy should be deferred until March 30, 2009, at the very earliest. By that date, we are optimistic we will have time to work out a process for transition (e.g., a consent agreement) from the present regulatory scheme to an alternative scheme that meets the needs of the Department and the shredder industry. The ultimate date by which the industry will be required to achieve compliance with the new management requirements will be a vital part of the transition mechanism. This extension will also enable the industry to provide additional waste characterization data which supports the industry proposal submitted to you in advance of the October 29 meeting.

We look forward to your immediate reply to this letter.

Very truly yours,



Margaret Rosegay

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cc: Peter Wood
Steve Shinn, Sims Metal
Marc Madden, Schnitzer Steel
George Adams, SA Recycling
Chuck Siroonian, Ecology Auto Parts
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