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Via Email mswstakeholders@dtsc.ca.gov

Department of Toxic Substances Control
1001 I Street
P.O. Box 4025
Sacramento, CA 95812-4025

Re: Public Comment on Draft Metal Shredding Evaluation

Dear Sir or Madam:

On behalf of Kramar's Iron & Metal, Inc. ("Kramar's"), we thank you for the opportunity to provide comments concerning the draft document prepared by the Department of Toxic Substances Control ("DTSC") titled, "Evaluation and Analysis of Metal Shredding Facilities and Metal Shredder Wastes" dated January 2018 ("Evaluation").

As we understand the Evaluation, DTSC reached the following two general determinations and conclusions:

(1) Classification of chemically treated metal shredder residue ("CTMSR") as a hazardous waste is not necessary to prevent or mitigate potential hazards to human health or safety or to the environment, and

(2) Regulatory oversight should remain as part of hazardous waste management and that alternative management is infeasible for Metal Shredding Facilities.

With its comments, Kramar's seeks clarification on aspects of these determinations and conclusions. The Evaluation appears to make certain assumptions that we believe need a direct response on the record to clarify not only the Evaluation's intent, but how its determinations will apply to Kramar's.

Comment #1

The first assumption appears to involve an understanding of the underlying statute that authorized the Evaluation: California Health and Safety Code Sections 25150.82 through 25150.86, enacted as SB 1249 and effective January 1, 2015 (collectively referred to as the Metal Shredding Facilities Law in the Evaluation).

The enabling legislation for section 25150.82, Senate Bill 1249, was intended to address the California Integrated Waste Management Act of 1989, which applies to appliances and vehicles (SB 1249, Preamble (1)). The Evaluation states that it is intended to address metal shredding facilities, and to support this proposition, the Evaluation (at page 3) initially references California Health & Safety Code section 25150.82(b) for the definition of a "Metal Shredding Facility" which reads, in relevant part:

“For purposes of this section, metal shredding facility means an operation that uses a shredding technique to process end-of-life vehicles, appliances, **and** other forms of scrap metal to facilitate the separation and sorting of ferrous metals, nonferrous metals, and other recyclable materials from nonrecyclable materials that are components of the end-of-life vehicles, appliances, and other forms of scrap metal.” (emphasis added).

Based on the literal language of the section, facilities that only process end-of-life vehicles, or just appliances, or only other forms of scrap metal, or any two of the three, would not qualify as a “Metal Shredding Facility.” If the term “Metal Shredding Facility” is supposed to cover an operation that handles only one (and not three) forms of scrap metal (appliance, automotive or other), then this provision should have been stated as covering “end-of-life vehicles, appliances or other forms of scrap metal...” (emphasis added). See <http://adamsdrafting.com/downloads/Ambiguity-And-Or.pdf> for a discussion on the conjunctive and disjunctive terms “and” and “or.”

Thus, by statutory definition, a “Metal Shredding Facility” is limited to an operation that processes all the described forms of scrap metal. Expanding the scope of the term to cover facilities performing less than all three shredding functions appears unsupported because it alters the term as drafted by the Legislature and approved into law. Thus, as presently written, it is unclear whether the Evaluation is interpreting the terminology differently, so that the conjunctive “and” is now considered to be a disjunctive “or”.

We respectfully request DTSC’s response and supporting documentation to support this alternative reading of the section as well as whether the universe of facilities discussed through this Evaluation is meant to cover facilities that only perform all three of the described processes.

Comment #2

In connection with Comment #1, the Evaluation (at Page 22) describes a process to determine which facilities should be included as “Metal Shredding Facilities,” apparently by applying the facility’s ability to process end-of-life vehicles, appliances, and other forms of scrap metal. While the identification is not explicit, it appears the Evaluation is limited to the six metal shredding facilities operating in California (and shown in Table 2), all of which responded to the Evaluation questionnaire (Page 23). The Evaluation (at Page 22) identifies Universal Recycling Services and Kramar’s as “additional [metal shredding] facilities”, but then states they were not part of the Evaluation. One other metal shredding facility (SA in Rancho Cucamonga) is mentioned but it is unclear whether it is part of the Evaluation.¹

Until a determination is made on the definition of “Metal Shredder Facility,” it appears inappropriate at this time to identify any other operations as “additional facilities.”

We respectfully seek clarification whether Kramar’s is being identified as a Metal Shredding Facility as defined by statute, and the basis for that conclusion.

¹ The Evaluation names six facilities which appear to conduct processing activities involving all three forms of scrap metal (especially, end-of-life vehicles (i.e., auto shredding)), thereby meeting the codified definition of a “Metal Shredding Facility”. See e.g., hazardous waste discussion at Evaluation, Page 40 (Section 2.4.1) regarding the scrap metal feedstock and metal aggregate from “vehicles, appliances and other scrap metals”.

Comment #3

The Evaluation states, “This Analysis was prepared to evaluate metal shredding processes and wastes as they are operating under current conditions.” Evaluation at Page 3. If the Evaluation is limited to the six facilities, which appear to process all three scrap metal forms, then the Evaluation lacks a basis to reach conclusions for any facility that may process less than all three categories of scrap metal.

A distinction must be made concerning the separate waste streams generated from end-of-life vehicles, versus appliances, versus other forms of scrap metal. The Evaluation (at Pages 41-42) states generally that:

Metal shredder aggregate has been demonstrated to contain levels of lead, copper, and zinc in finely divided form² that exceed their respective Soluble Threshold Limit Concentrations (STLCs) and Total Threshold Limit Concentrations (TTLCs).

Historically, metal shredder aggregate has also contained levels of cadmium and PCBs in excess of their respective STLCs and TTLCs, although the presence of these constituents has decreased in recent years.

This sort of generic statement works if the sampling universe is limited to the six evaluated facilities, but it does not properly consider the primary sources of the underlying constituents. For example, the State of California has been working to address concerns over end-of-life vehicle processing for years, including the disposal of the remaining residue. Evaluation at Page 15. Separately, the state implemented programs to address appliances and materials that require special handling. *See* AB 2277 (2004). Both these waste streams are the focus of the California Integrated Waste Management Act of 1989 and, impliedly, Section 25180.82. Processed scrap metal outside of these categories appears to be of somewhat less significance and is only generally considered in the catch-all “other forms of scrap metal.”

Page 4 of the Evaluation defines “Metal shredder aggregate” as:

The mixture of shredded material produced by the metal shredding hammer mill that typically contains recoverable ferrous and non-ferrous metals, plastics, rubber, glass, foam, fabrics, carpet, wood, residual automobile fluids, road dirt, and/or other debris. Also known as: Aggregate, intermediate manufacturing process stream.

Lumping the determinations for all three categories of scrap metal into generic “metal shredder aggregate” fails to consider the unique qualities of different scrap metal streams. For example, if end-of-life vehicles are not processed, it is unlikely and not typical that any appreciable quantities of glass, foam, fabrics, carpet or residual automobile fluids would be present. It is also unlikely that something like aluminum scrap siding would generate appreciable quantities of the aforementioned materials.

The Evaluation thus fails to address the qualifying distinctions that caused end-of-life vehicles and appliances to be separately identified by the statute. Unless the Evaluation states it

² “Fine powder” is defined by regulation, while “fine divided” is not. Although the latter term is undefined, such elemental metals do not qualify for an exemption from the STLC and TTLC thresholds. *See* Title 22 CCR Section 66261.24(a)(2), Table II, footnote b.

is limited to facilities that process all three scrap metal streams, it improperly assumes all “metal shredder facilities” generate similar “metal shredder aggregate.”

We respectfully request a response clarifying the meaning of “metal shredder aggregate” and request a comment on whether the Evaluation will be revised, or its findings reconsidered, based on the differences that exist between various scrap metal categories.

Comment #4

The Evaluation provides a good historical discussion at Section 1.4, but it is difficult to determine from it how the scrap metal process was segregated into multiple processes. The reason this separation is important since it appears to alter enforceability of existing hazardous waste regulations without the necessary promulgation of new regulations.

The Evaluation at Section 1.4 describes both the “f letters” and DTSC’s OPP 88-6, the “Auto Shredder Waste Policy and Procedures” (11/21/88) (the “1988 Policy”). The 1988 Policy was based upon Auto Shredder Waste, which in the context of the 1988 Policy, meant the metal shredder residue ultimately destined for landfills.

The 1988 Policy discusses a term, which appears relevant to an understanding of scrap metal processing. The term “in-line treatment”:

is defined as any treatment to a material in an industrial process before that material is exhausted or otherwise rendered a waste. Because in-line treatment is applied to a material that is not a waste, it is exempt from DHS hazardous waste requirements. ... To date, all successfully demonstrate in-line ASW treatment technologies have been of the chemical encapsulation/fixation type. 1988 Policy at Page 3.

The quote above identified chemical encapsulation/fixation as the treatment, and Evaluation at Page 15 correctly states the 1988 Policy “focused on the chemical stabilization process being performed on the metal shredder residue.” The Evaluation follows that the 1988 Policy interpreted “that the metal shredder aggregate that was undergoing separation at the metal shredding facilities was not yet a waste.” Evaluation at Page 15.

Ultimately, the 1988 Policy was rescinded, and replaced with the definition of a “metal shredding facility” at 25150.82(b) that now describes the shredding process as a “technique”.

Despite the 1988 Policy rescission, no regulatory changes have occurred that alter the original evaluation and discussion within the 1988 Policy concerning in-line processing of the scrap metal without chemical encapsulation/fixation. For that reason, the scrap metal processing activity should remain viable since it is a single process operation or technique, from which regulated metal shredder residue is ultimately generated.

The Evaluation should identify the statutory or regulatory section that causes the “in-line treatment” interpretation of processing in general to no longer be valid. The Evaluation text should also clarify that references to “wastes” as they pertained to the 1988 Policy, are describing metal shredder residue.³

³ See, e.g., the following paragraph: “In 2008, based on the results sampling conducted during the 2002 investigation, DTSC determined that the conditions contained in DTSC’s authorization letters and in OPP 88-6 were not sufficient to reduce the waste to a nonhazardous solid waste.

Comment #5

While Comment #4 describes scrap metal processing within the, “in-line treatment” term from the 1988 Policy, California hazardous waste regulations have a similar term for processing what is otherwise a hazardous waste as part of a manufacturing operation. Section 66261.4(c) provides in relevant part:

A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under this division or to the notification requirements of Health and Safety Code section 25153.6 until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.” (Emphasis added).

Should a metal shredder process or technique that is part of a single manufacturing unit (i.e., the in-line process), generate a material which is deemed a hazardous waste during that process, it remains unregulated until it exits that process. Except for the in-line treatment” definition discussed in Comment #4, there is no written interpretation of what constitutes a “manufacturing process unit.” The term “metal shredder facility” as defined at Section 25150.82(b) does not appear to identify what qualifies as a manufacturing process unit. Merriam’s Dictionary defines “unit” as “a single thing, person, or group that is a constituent of a whole.” In the context of scrap metal being processed in an in-line continuous process using a hammermill, magnet, eddy current and shaker, a single manufacturing process unit is both a single thing, and group that is a constituent of a whole.

The Evaluation at Page 4 presently defines the term “Metal Shredder Wastes” as:

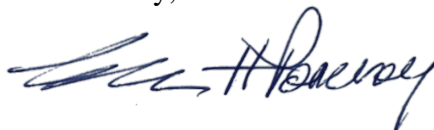
[a] collective reference to all wastes being managed at metal shredding facilities that emanate from the metal shredding process, including metal shredder aggregate, metal shredder residue, and Chemically Treated Metal Shredder Residue (CTMSR).

Since metal shredder aggregate is part of the term, it is not clear when this material becomes regulated. The Evaluation needs to clarify how the terms “processing” and “manufacturing processing unit” apply within the term “Metal Shredder Wastes” and the waste management regulations.

DTSC informed the metal shredding facilities of DTSC’s intention to rescind the nonhazardous classifications and OPP 88-6, and to impose management standards (including requiring a permit or some other form of authorization to treat the metal shredder wastes). DTSC then began discussions with industry on the process to rescind the conditional nonhazardous waste classifications and require the waste to be managed as hazardous waste. In response, industry representatives provided DTSC with a significant amount of technical information supporting the treatment and legal arguments challenging the process to rescind the authorizations and policy. DTSC’s proposed rescission was not finalized, and the “f letters” and policy continued to remain in place.” (Emphasis added).

We appreciate the opportunity to comment on the Evaluation and look forward to your response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Charles H. Pomeroy", with a stylized flourish at the end.

CHARLES H. POMEROY
StilesPomeroy LLP