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U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy

Hearing

**“Discussion Draft of H.R. ____, The Coal Ash Recycling
and Oversight Act of 2013”**

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Testimony of

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Summary

EPA has attempted to resolve the regulatory status of CCRs since the early 1980s, but has had considerable difficulty due to two facts – first, CCRs generally do not meet the established criteria for classification as hazardous wastes under Subtitle C of RCRA; and second, there is no provision for a national permitting program for these materials as a non-hazardous solid waste under Subtitle D of RCRA. Establishing a national permitting program for CCRs should build from MSW requirements which will provide the needed protections.

To include CCRs in the “Hazardous Waste” category would pose a risk of neglecting the wastes that are currently classified as hazardous due to the massive expansion of waste quantities caused by including CCRs in this category. Because states have been successfully implementing MSW permit programs for many years, a CCR permitting program could be adopted sooner than developing a new program from scratch, and will help to prevent the needless duplication of regulatory programs and regulations.

Congress can look to the fact that Alabama and other States have routinely adopted and implemented those programs required and authorized by federal law as clear evidence that States will appropriately implement the national CCR program. As a safeguard, there is a role for EPA to evaluate our implementation of the permitting program and demand changes if the state program is not meeting the national program requirements, as well as for EPA to take over implementation of the permitting program if the State does not do so.

Enactment of minimum national standards and a permitting program for CCRs must be done in a manner that: 1) provides the needed protections, 2) can be implemented quickly and efficiently by the States, 3) does not disrupt the established tiered system of waste management in this country, and 4) does not result in needless duplication and proliferation of regulations and regulatory programs. The Discussion Draft appears to achieve this balance.

Full Statement

Chairman Shimkus, Ranking Member Tonko, Honorable Subcommittee Members, ladies and gentlemen, my name is Stephen Cobb and I represent the Alabama Department of Environmental Management, or ADEM, which is the environmental regulatory agency for the State of Alabama. Thank you for the opportunity to address the Subcommittee this morning regarding the "Discussion Draft of H.R. ___, The Coal Ash Recycling and Oversight Act of 2013" that is the subject of this hearing, and the regulation of the management and disposal of coal combustion residuals, or CCRs, also often referred to as coal ash. My remarks are intended to share ADEM's perspective based on more than thirty years of experience implementing programs for the management of solid and hazardous wastes in the State, including my personal experience in this area over the last twenty-five years.

Alabama has one of the largest Hazardous Waste disposal facilities in the nation, and ADEM has extensive experience managing higher risk wastes. We clearly understand that a massive influx of lower risk solid waste, such as coal combustion materials, into the Hazardous Waste classification would pose a threat to the level of attention needed for the safe management of all materials classified as hazardous waste. We also understand the challenges and regulatory resources required to permit and inspect such facilities. Alabama is also home to twenty-nine medium to large municipal solid waste, or MSW, landfills, and therefore also has considerable experience in implementing the MSW landfill (MSW) permitting program. As a result, ADEM has a very good understanding of the protections provided by the MSW standards under 40 CFR Part 258 to: 1) ensure safe waste management, 2) prevent future releases, and 3) require corrective action to address past releases where needed. As a result of having both types of

facilities, Alabama has a unique perspective on the contrasts and considerations which should be taken into account in considering how best to regulate materials such as CCRs.

The U.S. Environmental Protection Agency (EPA), has attempted to resolve the regulatory status of CCRs since the early 1980s, but its considerable difficulty in doing so may be attributed to two facts – first, CCRs generally do not meet the established criteria for classification as hazardous wastes under Subtitle C of the Resource Conservation and Recovery Act (RCRA); and second, there is no provision for a national permitting program for these materials as a non-hazardous solid waste under Subtitle D of RCRA in the absence of a national directive or minimum federal standards. The enactment of new Section 4011, as described in the Discussion Draft, will solve this problem by requiring that CCR structures be designed and permitted pursuant to national standards under Subtitle D – the standards required for MSW facilities. In Alabama, for many years these materials and structures were statutorily exempt from the State solid waste requirements. However, in anticipation of enactment of first-ever minimum national standards for CCRs, our Legislature in 2011 removed this exemption and authorized ADEM to “develop and adopt rules as necessary to implement a state regulatory program consistent with the federal requirements.”¹ ADEM is prepared to revise our program as necessary to meet federal standards, whether set by EPA regulations, or by Congress, to enable and require a non-hazardous waste permit program for CCRs.

In establishing a national permitting program for CCRs, we must recognize that CCRs are solid wastes – they routinely do not meet the long-established criteria for designating a material as a hazardous waste, a fact which has been supported by multiple EPA Regulatory Determinations through the years. To force CCRs into the Hazardous Waste classification would serve to dilute the protections needed for “real” Hazardous Waste. In addition, there is no need to “re-create

¹ Act No. 2011-258, as codified at Section 22-27-3(h), Code of Alabama (1975), as amended.

the wheel” for non-hazardous solid wastes – we can build from long-established MSW requirements, which will provide the needed protections. In fact, the preamble presented in EPA’s Proposed Rule of June 21, 2010 states:

“In developing the proposed RCRA subtitle D option for CCRs, EPA considered a number of existing requirements as relevant models for minimum national standards for the safe disposal of CCRs. The primary source was the existing requirements under 40 CFR part 258, applicable to municipal solid waste landfills, which provide a comprehensive framework for all aspects of disposal in land-based units, such as CCR landfills. Based on the Agency’s substantial experience with these requirements, EPA believes that the part 258 criteria represent a reasonable balance between ensuring the protection of human health and the environment from the risks of these wastes and the practical realities of facilities’ ability to implement the criteria. The engineered structures regulated under part 258 are very similar to those found at CCR disposal facilities, and the regulations applicable to such units would be expected to address the risks presented by the constituents in CCR wastes. Moreover, CCR wastes do not contain the constituents that are likely to require modification of the existing part 258 requirements, such as organics; for example, no adjustments would be needed to ensure that groundwater monitoring would be protective, as the CCR constituents are all readily distinguishable by standard analytical chemistry. As discussed throughout this preamble, each of the provisions adopted for today’s subtitle D co-proposal relies, in large measure, on the record EPA developed to support the 40 CFR part 258 municipal solid waste landfill criteria,

*along with the other record evidence specific to CCRs, discussed throughout the co-proposed subtitle C alternative.*²

The MSW permit program is currently limited to MSW. CCRs are similar to MSW, but arguably less dangerous (in that CCRs typically pass toxicity characteristic leaching potential, or TCLP tests, do not contain putrescible organics, do not contain household hazardous waste, contain fewer overall constituents of concern, etc.). An option which should be avoided is attempting to create a new regulatory regime from whole cloth (as opposed to building from the existing RCRA Subtitle D building blocks), which would result in unnecessary regulatory proliferation, add unneeded bureaucracy to the regulatory process, and add substantially to the overall costs to the taxpayers of properly regulating solid wastes. Proposed Section 4011 as described in the Discussion Draft will appropriately build the CCR permitting program from the MSW program requirements. Proposed Section 4011 accomplishes this by using the existing MSW regulations where applicable, and adding to the MSW framework needed requirements for structural integrity and provisions to address new and existing surface impoundments, as well as providing for appropriate inspection and enforcement authorities, public participation in the regulatory process, and EPA review of State permitting programs.

We must be cognizant of the established tiered method by which we have regulated and controlled wastes in this country for the last 5 decades. Basically this structure imposes restrictions on the management of wastes commensurate with the level of risk of permanent harm to human health and the environment posed by mismanagement, and is generally classified by category of wastes. Looking at this system from the highest risk materials down, we see Nuclear/Radiological wastes at the top, followed by Hazardous Wastes, Municipal Solid

² Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. (proposed June 21, 2010) (Section D.IX.A.1."Regulatory Approach", pg. 35139).

Wastes, Industrial Wastes, Construction/Demolition Wastes, and other wastes (such as yard trimmings) at the bottom. Of these categories, only Municipal Solid Waste, Hazardous Waste, and Nuclear/Radiological wastes are subject to federally mandated management and permitting requirements, with the remainder effectively addressed through the jurisdiction and authority of the individual States. EPA has been attempting to establish a regulatory program for CCRs for several years, but has not yet achieved its goal. Proposed Section 4011 as described in the Discussion Draft would accomplish this.

To include CCRs in the “Hazardous Waste” category would pose a risk of neglecting the wastes that are currently classified as hazardous due to the massive expansion of waste quantities caused by including CCRs in this category. For example, about one hundred twenty thousand (120,000) tons³ of Hazardous Wastes are land disposed in Alabama each year, compared to approximately four (4) million tons⁴ of CCRs generated annually in our state. Nationally, about two (2) million tons⁵ of Hazardous Waste are disposed in landfills and surface impoundments annually, as compared to a national generation rate for CCRs of about one hundred forty-nine (149) million tons⁶ per year. Proposed Section 4011 as described in the Discussion Draft will ensure that CCRs are disposed in a protective manner without diverting the attention and protections which are necessary for more harmful materials.

³ National Biennial RCRA Hazardous Waste Report: 2011 Edition, USEPA; and National Biennial RCRA Hazardous Waste Report: 2009 Edition, USEPA; and National Biennial RCRA Hazardous Waste Report: 2007 Edition, USEPA.

⁴ Regulatory Impact Analysis For EPA’s Proposed RCRA Regulation Of Coal Combustion Residues Generated by the Electric Utility Industry – Appendix C. USEPA ORCR, April 30, 2010.

⁵ National Biennial RCRA Hazardous Waste Report: 2011 Edition, USEPA; and National Biennial RCRA Hazardous Waste Report: 2009 Edition, USEPA; and National Biennial RCRA Hazardous Waste Report: 2007 Edition, USEPA .

⁶ Regulatory Impact Analysis For EPA’s Proposed RCRA Regulation Of Coal Combustion Residues Generated by the Electric Utility Industry – Appendix C. USEPA ORCR, April 30, 2010.

Section 4011(c) of the Discussion Draft Legislation would establish a national permitting program similar to the one for MSWs that draws upon existing state MSW permit program requirements. Because states have been successfully implementing MSW permit programs for many years, a CCR permitting program could be adopted sooner than developing a new program from scratch, and will help to prevent the needless duplication of regulatory programs and regulations. Sections 4011(b) and 4011(c) of the Discussion Draft mandate an aggressive implementation schedule for CCR permitting programs, including implementation of groundwater monitoring and corrective action for existing CCR surface impoundments.

Congress can look to the fact that Alabama and other States have routinely adopted and implemented those programs required and authorized by federal law as clear evidence that we will again rise to the occasion and implement the national CCR program. It is important to acknowledge that the implementation of this new program, and particularly the initial issuance of permits under it, will be a significant resource challenge for Alabama, and presumably for other States as well. However, it is a challenge that we recognize must be met, and we will meet that challenge.

As a safeguard, proposed Sections 4011(d) and 4011(e) provide a significant role for EPA to evaluate a State's implementation of the permitting program and demand changes if the State is not meeting the national program requirements, as well as the authority for EPA to take over implementation of the permitting program if the State does not do so.

States such as Alabama have repeatedly demonstrated our ability to implement waste programs, for both hazardous waste and for MSW – and it does not make sense to have yet another laborious pre-implementation demonstration of State capabilities, especially given the already strained State and federal budgets we operate under. However, it does make sense for EPA to have a role in reviewing a program as it is implemented to verify that it is meeting the

required objectives and standards of the national program requirements, and to be able to step in and implement the program should the State not do so. Ensuring that CCRs are properly and safely managed should be about actually implementing the programs in a timely and effective manner. The similarities between the permit program in the Discussion Draft and the MSW permit program make it feasible for States to implement these programs without spending years providing demonstrations of capability before we get about the business of doing the job that needs to be done. This type of State-EPA partnership ensures that programs are implemented quickly and effectively, while at the same time providing the checks and balances necessary to assure Congress and the American public that programs are indeed protective of human health and the environment. As Senator Shelby from Alabama reminded me in a hearing on another matter years ago, it's not what we say that matters ... it's our actions that count. We can spend years studying and talking about how best to implement and document an effective State regulatory program, or we can implement that program and hold it accountable for achieving the desired results.

MSW-based controls, in addition to ensuring the safeguards needed to prevent harmful impacts from CCRs, also do not bring other unintended and undesirable consequences – such as the stigma and long-term uncertainty regarding the future disposition of products made from recycled materials that discourage safe and appropriate recycling of a significant portion of these materials. Given the extremely high volume of the CCR waste stream, it is critically important to consider that the safe and appropriate reuse of these materials not only reduces the volume of waste that must be permanently disposed, but also substantially reduces the demand for virgin raw materials, and thus reduces the costs and environmental impacts associated with the extraction and processing of the replaced natural resources.

Thus, it is critical that in establishing needed minimum national standards for CCRs, that we enact those standards necessary to provide adequate protections. But in doing so, 1) we must not undermine the regulation of materials with greater potential for harm, and 2) we must not unnecessarily discourage reuse and recycling that is in the overall national interest. Based on our experience and evaluation in Alabama, we believe a permitting program administered by the States and based generally upon existing MSW standards, as proposed in the Discussion Draft, achieves this balance.

Further, building a national CCRs permitting program utilizing the pre-existing MSW framework will enable States to implement effective and protective programs with less fiscal impact to already strained State budgets, and without the need for a major influx of new federal grants and funding which would be required under a Subtitle C approach.

In conclusion, Mr. Chairman, ADEM stands ready to implement a comprehensive permitting program for CCRs in Alabama based on national standards, so as to ensure that these materials are properly managed now and into the future. But we must do so in a manner that: 1) provides the needed protections, 2) can be implemented quickly and efficiently by the States, 3) does not disrupt the established tiered system of waste management in this country, and 4) does not result in needless duplication and proliferation of regulations and regulatory programs. Thank you, again, for the opportunity to address the Subcommittee this morning. I will be glad to answer any questions you may have.