HEADWATERS RESOURCES

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21 May 2013

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515

Re: Reducing Excessive Deadline Obligations Act of 2013

Dear Chairman Shimkus and Ranking Member Tonko:

We are writing on behalf of Headwaters Resources, Inc. ("Headwaters") and Boral Material Technologies, Inc. ("Boral") regarding the Reducing Excessive Deadline Obligations Act of 2013. We appreciate this opportunity to submit this brief comment on the draft legislation, which, in part, would amend the Resource Conservation and Recovery Act ("RCRA") by deleting Section 2002(b), 42 U.S.C. § 6912(b). Section 2002(b) requires that each regulation EPA has promulgated under RCRA "*shall be reviewed and, where necessary, revised not less frequently than every three years*."

Headwaters is America's largest manager and marketer of coal combustion residuals ("CCRs"), playing a critical role in finding beneficial use opportunities for utilities that generate CCRs and for customers that beneficially use the CCRs in a variety of products and applications. Boral is also a leading marketer of CCRs and a pioneer in the development of new construction material technologies that use CCRs to produce "green" construction materials. Utilization of CCRs improves performance of concrete and building products while creating significant environmental benefits.

In June 2010, EPA proposed upgraded standards for the management of CCRs that are disposed in impoundments and landfills. Under one proposed option, EPA would designate the disposed CCRs as hazardous waste, and under an alternative option the disposed CCRs would remain a nonhazardous waste. For nearly three years uncertainty has persisted as EPA has neither finalized nor withdrawn its proposed rule. The possibility that disposed CCRs would be regulated as hazardous waste created enormous stigma in the marketplace, causing contractors, architects and engineers to reduce their beneficial use of CCRs in products and applications and causing utilities to limit their interest in supplying CCRs for beneficial use. This led Headwaters and Boral to file so-called deadline suits against EPA to compel it to complete its review of its current rules that regulate CCRs. Headwaters and Boral based their suits on RCRA Section 2002(b).

We understand there was discussion during the May 17, 2003, hearing on the Reducing Excessive Deadline Obligations Act of 2013 suggesting that Headwaters and Boral would be in favor of keeping Section 2002(b) in RCRA to enable such deadline suits to be brought. While

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Headwaters and Boral utilized Section 2002(b) of RCRA in an attempt to end the recent uncertainty, as a matter of overall governance, we think Section 2002(b) of RCRA makes for poor public policy. Specifically with regard to coal ash regulations, we fear that should EPA finalize a subtitle D rulemaking for coal ash as the agency has recently said it intends to do, special interest groups will turn around and sue EPA again every three years in repeated attempts to force revisions of the agency's regulations, indefinitely perpetuating the very uncertainty that has plagued the recycling market. We support the implementation of upgraded federal standards for coal ash disposal that will solve this problem for the long term, and not be subject to repeated attacks through the courts that could revive uncertainty and stigma at the whim of a frivolous plaintiff.

Moreover, as a matter of general public policy, to require EPA every three years to review each of its hundreds, if not thousands, of RCRA regulations, places an unworkable demand on EPA's resources, as the agency noted in its own testimony. It could enable special interest groups, through deadline suits, to set EPA's agenda. It could lead to rearview mirror decision-making. It could ultimately create systemic problems for the agency in addressing regulatory issues of critical importance.

Section 2002(b) was adopted by Congress in 1976 when EPA did not yet have any waste management rules in place. Congress may have then assumed that EPA would promulgate only a few waste rules and, therefore, reviewing them every three years would not be a major administrative burden. But in the ensuing 36 years, in part due to several rounds of major Congressional amendments to RCRA, EPA now has waste management rules that take up more than five inches in the Code of Federal Regulations. What may have been a prudent requirement in 1976 – to review each RCRA rule every three years and revise them as necessary – does not appear appropriate today. Therefore, Headwaters and Boral would not object to Section 2002(b) being deleted entirely from RCRA.

Thank you for this opportunity to clarify the record. As always, Headwaters and Boral are available to respond to questions or provide additional information to the Committee.

Sincerely,

Bill Gehrmann
President, Headwaters Resources, Inc.

Terence Peterson
President, Boral Material Technologies, Inc.

cc: The Honorable Fred Upton, Chairman, Committee on Energy and Commerce
The Honorable Henry Waxman, Ranking Member, Committee on Energy and Commerce