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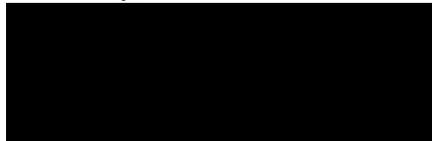
March 2, 2015

Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Chairman Shimkus:

On behalf of the Utility Solid Waste Activities Group ("USWAG"), I appreciate the opportunity to respond to your letter of February 13, 2015, setting forth additional questions from the hearing of the Subcommittee on Environment and the Economy on Thursday, January 22, 2015, regarding "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities." Attached please find the responses to your questions. Please contact me with any questions.

Sincerely,



Jim Roewer
Executive Director

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment and the Economy

Nick Abraham, Legislative Clerk, Committee on Energy and Commerce

**For Submission to the Record:
Responses of Jim Roewer, the Utility Solid Waste Activities Group, to the Supplemental
Questions of Chairman Shimkus from the Hearing of the Subcommittee on Environment
and the Economy on “EPA’s 2014 Final Rule: Disposal of Coal Combustion Residuals
from Electric Utilities”(January 22, 2015)**

1. EPA in the final rule expressly leaves open the possibility of regulating coal ash as a hazardous waste under Subtitle C in the future. Can you explain whether EPA has the authority to re-open the Bevill Regulatory Determination and explain why leaving the decision open is problematic for your member companies?

1. Congress did not give EPA the authority to conduct multiple regulatory determinations. The statute sets forth specific procedures and timelines for EPA to determine whether coal combustion residuals (“CCR”) warrant regulation as hazardous waste under RCRA Subtitle C. EPA has met its obligations under the statute by determining that CCR does not warrant hazardous waste regulation. The statute simply does not authorize the Agency to conduct another determination utilizing different procedures and/or deadlines, as it contemplated doing in the proposed CCR rule.

Utilities will be investing considerable resources to comply with the Subtitle D rule. If EPA were to regulate CCR as a hazardous waste at some point in the future (assuming it could), the substantial investments that utilities have incurred to develop systems to meet the Subtitle D criteria would be largely lost. In addition, the continued specter of potential hazardous waste regulation for CCR perpetuates uncertainty in the CCR beneficial use market, frustrating emerging CCR beneficial use markets and investments in CCR beneficial use technologies. CCR legislation passed by the House in the last two Congresses would eliminate the concerns with EPA potentially revisiting its determination that CCR does not warrant hazardous waste regulation.

2. Does the final rule provide a sufficient length of time for closure of disposal units that are required to be closed?

2. The fact that EPA provides for the ability to extend the five year closure deadline for surface impoundments and the six month closure deadline for landfills is acknowledgement that there is not a one-size-fits-all framework for closing CCR units and that some sites will not be able to close under the deadlines established in the rule. Nonetheless, while extensions are technically available, they are limited to a maximum of 10 additional years for surface impoundments and two years for landfills. There is no guarantee that these extensions will provide adequate time for the safe closure of all large or complex sites. Extensions also can be challenged in RCRA citizen suits by groups that seek to rush the closure of sites when such accelerated closures could actually undermine the environmentally sound closure of a CCR unit. The method and schedule for closure is most appropriately established in site-specific closure plans overseen by a state regulatory agency. This construct is what the CCR legislation passed by the House in the last two Congresses would have established.

a. With respect to the closure of inactive impoundments in order to not be subject to all of the regulatory requirements that apply to active disposal units, these inactive units must be closed within 3 years and that closure must include dewatering, stabilization, and installation of a final cover. In your opinion, is 3 years enough time?

a. Three years is not enough time to properly dewater and cap many of these facilities. EPA itself recognizes that the three year closure timeframe for inactive impoundments to close and be excluded from further regulation will not be practical for many large impoundments (*i.e.*, those over 40 acres). *See* Pre-Pub. Rule at 389. For active impoundments, EPA established a default closure timeframe of five years. But in doing so, the Agency provided a mechanism for extending the closure time period, recognizing extensions of up to 10 years may be necessary. The time period for inactive units to close and be excluded from further regulation should be the same amount of time provided for active units, including the possibility of extending the deadlines for circumstances beyond the owner/operators' control.

3. What are the key problems associated with the final rule being enforced solely through the use of citizen suits?

3. Our biggest concern with the citizen suit enforcement mechanism established in the rule is the fact that there will almost certainly be a patchwork of regulatory interpretations regarding compliance with the rule issued by different federal District Courts. This will result in different interpretations of the same regulatory requirements between, and even within, states, and undermine the ability of utilities to make consistent compliance determinations for their facilities.

a. Your written testimony noted that federal judges will be making complex technical compliance decisions that are better left to state regulators. Can you provide us with any examples of that and explain why it is a problem?

a. Examples include whether a groundwater monitoring system is adequate, including evaluating a qualified professional engineer's certification that a facility's background and downgradient groundwater monitoring wells have been properly located to meet the rule's groundwater performance standard. In addition, federal District Court judges will have to evaluate the adequacy/accuracy of highly technical and complex certifications regarding whether a facility has met the applicable location restrictions and certifications and demonstrations regarding when an impoundment meets the rule's structural integrity requirements, including the dam safety factors. Federal judges also will be called on to decide disputes regarding whether an owner/operator has selected the appropriate corrective action remedy, the adequacy of a facility's certification for an extended closure timeframe and, in cases where an owner/operator seeks to use the alternative closure process, whether the owner/operator has properly determined that no on- or off-site disposal capacity is available. These are highly technical, site-specific decisions best left to environmental professionals and state regulatory agencies.

Here too, CCR legislation passed by the House in the last two Congresses would eliminate the concerns with a self-implementing regulatory regime by placing enforcement responsibility with the CCR controls directly on the implementing agency, which would be either the state or EPA if the state does not implement the federal criteria.

4. Your written testimony stated that EPA does not have the legal authority under RCRA to regulate inactive sites and that RCRA does not give EPA authority to subject sites no longer receiving wastes to regulations designed for active units. Would you please provide a detailed explanation of why EPA does not have the requisite authority to regulate inactive

units?

4. EPA's legal theory for regulating inactive sites is based on the notion that the act of passive migration from units no longer receiving wastes constitutes active disposal under the statute. As we detailed in our comments, numerous federal courts have squarely rejected this theory. This position also is inconsistent with RCRA's statutory text, which specifically provides that the risks from past disposal practices are to be addressed through RCRA's imminent and substantial endangerment provision (in addition to EPA's response authority under the Comprehensive Environmental Response Compensation and Liability Act, or Superfund), and not by subjecting inactive sites to regulatory programs designed for operating units. Notwithstanding EPA's pronouncements to the contrary, this is the first instance under RCRA where the Agency has attempted to impose a regulatory regime on inactive sites no longer receiving wastes.

5. Please explain the impact of the final rule on the use of risk-based decision making.

5. Because this is a self-implementing rule, the Agency has eliminated the ability of an owner/operator to deviate in *any* manner from the rule's groundwater monitoring and corrective action requirements, thus eliminating any risk-based decisions by owner/operators in implementing and/or undertaking the rule's groundwater monitoring and corrective action requirements that in any way depart from the text of the final rule. EPA explains that it has removed this flexibility in the final rule because, in the Agency's view, without the oversight of a state regulatory body, there is the possibility of "abuse" of any self-implementing risk-based decisions that deviate from the rule's requirements. *See e.g.*, Pre-Pub. Rule at 347-348. Curiously, EPA expressly included such risk-based flexibility in the Subtitle D proposal, when the Agency was fully aware at that time that any final Subtitle D rule would be self-implementing.

In any event, as the result of the elimination of any risk-based decision making, the rule does not allow for risk-based decision making, including, for example, in (1) establishing alternative points of compliance and alternative groundwater protection standards, (2) determining alternative corrective action remedies, or (3) determining whether corrective action is even necessary. The Subtitle D rules for municipal solid waste landfills (MSWLFs) expressly allow for such risk-based decision making, recognizing that there is not a one-size-fits-all standard for remediating a site.

Equally important, the lack of risk-based flexibility in the rule effectively overrides existing state regulatory programs that make use of risk-based decision making to ensure the appropriate and protective management of CCR. For example, if a state determines, on a site-specific basis, that a particular CCR unit undertaking corrective action does not have to meet the groundwater protection standard for an Appendix IV constituent at the edge of the unit boundary, the owner/operator would still have to meet that standard to comply with the federal rule. *See* 40 C.F.R. § 257.98(c)(1). Thus, the state's site-specific corrective action remedy is effectively nullified.

CCR legislation passed by the House in the last two Congresses would preserve these important site-specific risk-based options by requiring that there be a regulatory body – either the state or EPA – directly implementing the CCR requirements. In this way, the implementing agency

could exercise its sound discretion in determining, based on site-specific factors, whether a risk-based alternative to a specified criterion is preferable, while also being protective of human health and the environment.

6. Because State permit programs will not operate in lieu of the Federal rule, please explain the problems that will cause for your member companies with respect to compliance.

6. Even if the states were to adopt the federal rule, those state programs cannot and would not operate in lieu of the federal rules. This is a point made clear by EPA at several points in the rule's preamble. *See* Pre-Pub. Rule at 107 & 470. Therefore, even if the states do adopt the federal CCR rules into their respective state solid waste management program, utilities must still comply with both the state regulatory requirements and the federal rules, with the state rules enforced by state courts and the identical federal rules enforced by federal courts. This creates the very real likelihood of conflicting state/federal court interpretations regarding identical state/federal rules

Moreover, if the state CCR rule differs from the federal rule, utilities would be in an untenable position of having to comply with two sets of different rules for the same material. Utilities would also be faced with the dilemma of interpreting the federal CCR rule on their own, rather than in consultation with an implementing regulatory authority, with a federal District Court being the ultimate arbiter in legal disputes regarding whether compliance has been met. CCR legislation passed by the House in the last two Congresses would expressly eliminate the concerns with dual regulation of CCR by placing responsibility for administration and enforcement of the CCR requirements in the hands of one regulatory body – either the state or EPA if a state does not adopt and implement the federal criteria.