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OVERSIGHT HEARING BEFORE THE HOUSE SUBCOMMITTEE ON ENVIRONMENT & THE ECONOMY ON EPA's RULE ADDRESSING COAL COMBUSTION RESIDUALS, "HAZARDOUS AND SOLID WASTE MANAGEMENT SYSTEM; DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES"

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Good morning. My name is James R. Roewer. I am the Executive Director of the Utility Solid Waste Activities Group (USWAG), and I am pleased to present this statement on behalf of USWAG, the Edison Electric Institute (EEI)[1] and the American Public Power Association (APPA)[2] regarding the Environmental Protection Agency's (EPA's) rule regulating the residuals from the combustion of coal by electric utilities and independent power producers, "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities" (CCR Rule).

[1] The Edison Electric Institute is the association that represents U.S. investor-owned electric companies, with international affiliates and industry associates worldwide. EEI's U.S. utility company members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly employ more than 500,000 workers. With more than $90 billion in annual capital expenditures, the electric power industry is also responsible for millions of jobs outside of our direct operations. Reliable, affordable, and sustainable electricity powers the economy and enhances the lives of all Americans.

[2] The American Public Power Association is the national service organization representing the interests of more than 2,000 municipal and other state- and locally-owned, not-for-profit electric utilities throughout the United States (all but Hawaii). Collectively, public power utilities deliver electricity to one of every seven electricity consumers (approximately 47 million people), serving some of the nation's largest cities. However, the vast majority of APPA's members serve communities with populations of 10,000 people or less. Overall, public power utilities' primary purpose is to provide reliable, efficient service to local customers at the lowest possible cost, consistent with good environmental stewardship. Public power utilities are locally created governmental institutions that address a basic community need: they operate on a not-for-profit basis to provide an essential public service, reliably and efficiently, at a reasonable price.

USWAG is a consortium of EEI, APPA, the National Rural Electric Cooperative Association (NRECA), and approximately 130 electric utilities, power producers, utility operating companies, and utility service companies located throughout the country. EEI is the national association of U.S. investor-owned electric utilities, international affiliates, and industry associates worldwide. APPA is the national association of publicly-owned electric utilities. NRECA is the national association of rural electric cooperatives, many of which are small businesses. Together, USWAG member companies operate nearly 75 percent of the total coal-based generating capacity in the United States.

We support EPA's decision to regulate CCRs, including coal ash, as non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA). That decision is consistent with the rulemaking record and EPA's previous regulatory determinations that coal ash does *not* warrant regulation as a hazardous waste. Indeed, USWAG's long-standing position has been that EPA *should* develop a regulatory program for coal ash patterned after the federal regulations in place for municipal solid waste landfills, which include unit design standards, location restrictions, dust controls, groundwater monitoring and corrective action, as well as structural stability controls for coal ash surface impoundments.

Importantly, however, while we support EPA's regulation of coal ash as a non-hazardous waste, there are serious flaws in the new rule due to statutory limitations. The problem is that RCRA's Subtitle D program generally does not authorize the implementation of federal Subtitle D rules through state permit programs; nor does it allow for enforcement of Subtitle D rules by EPA. The only exception is the Subtitle D provisions under which EPA issued the municipal solid waste landfill rules, which are

enforceable through state permit programs, with backup EPA enforcement authority. USWAG urged EPA to use this authority in issuing the final coal ash rule under RCRA § 4010(c), but the Agency determined that it could not. Therefore, we are left with a coal ash rule issued under the general Subtitle D provisions that cannot be delegated to the states and which EPA cannot enforce.

Because the rule *cannot* be delegated to the states, it is self-implementing, meaning that regulated facilities must comply with the rule's requirements irrespective of whether it is adopted by the states. Even if adopted by a state, the federal rule remains in place as an independent set of federal criteria that must be met. This results in dual, and potentially inconsistent, federal and state regulatory requirements for coal ash. And, most troubling, we are hearing that some states may not even attempt to adopt the new coal ash rules, which will guarantee the problem of dual federal and state regulation of coal ash.

Further, the rule's only compliance mechanism is for a state or citizen group to bring a RCRA citizen suit in federal district court against an alleged non-compliant facility. This means that legal disputes regarding compliance with any aspect of the rule will be determined on a case-by-case basis by different federal district courts across the country. The result is that federal judges will be making complex technical decisions regarding how to comply with the coal ash rule, instead of allowing these questions to be resolved by regulatory agencies that have the technical expertise and experience to answer such questions.

For example, any disputes regarding whether a company has installed the proper number of groundwater monitoring wells in the correct locations to determine up-gradient and down-gradient groundwater quality – a highly technical and site-specific issue critical to the rule's groundwater monitoring program – will have to be decided in drawn-out litigation by a federal judge, instead of by state regulators who have both the technical experience and localized knowledge to make such determinations through state-issued permits. We do not believe substituting federal judges for state environmental regulators is a sound strategy for implementing a federal environmental program of such broad scope and complexity.

In addition, this process will produce differing and likely inconsistent decisions regarding the scope and applicability of the federal rule, depending on where a citizen suit is brought, and will undermine the uniform application of the rule. For example, a federal court in one state may decide that a company's closure of an impoundment in that state meets the rule's performance standard, while a federal court in a neighboring state may decide that the company's use of the same closure design for an impoundment in that state does not meet the rule's performance standards. This will not provide the regulatory certainty that companies need to implement the rule in a compliant and cost-effective manner.

In addition, because the final rule is self-implementing, EPA has dropped the risk-based options for implementing elements of the groundwater monitoring program and for conducting cleanups, reasoning that such risk-based decisions require regulatory oversight. As a result, the federal rule will effectively override existing state

risk-based regulatory programs for coal ash that have proven protective of human health and the environment. This is extremely problematic. The federal rule's lack of recognition of state risk-based closure and/or cleanup programs will effectively negate these state-based efforts.

For example, I am aware of several USWAG members currently in the middle of well thought-out and complex risk-based, state-approved coal ash remediation programs tailored by the state to fit the site-specific characteristics of the facility. These state-approved programs will be usurped by the one-size-fits all, inflexible corrective action requirement in the final rule, effectively removing state regulators from exercising any technical discretion to address a CCR site in a manner that departs from the federal rule. This is directly attributable to the self-implementing nature of the final rule, which does not allow for delegation of the program to the states.

The rule also regulates inactive impoundments, namely impoundments that are no longer receiving coal ash on the effective date of the rule, but which still contain water and have not been closed. We fully appreciate that such inactive sites may pose risks and that steps should be taken to address such risks. However, we have a disagreement with EPA as to the Agency's legal authority under RCRA to regulate inactive sites under the rule. RCRA does not give EPA the authority to subject sites no longer receiving wastes to regulations designed for active units. Rather, Congress authorized EPA to address the risks from past disposal practices under Superfund and through the issuance of site-specific remedial orders if a past disposal practice poses an imminent and substantial endangerment to health or the environment. If EPA wants

authority to establish a regulatory program that would apply across-the-board to all past disposal practices – to supplement its authority to issue site-specific orders to address the risks from inactive sites – we believe the statute must be amended to grant EPA such authority.

Finally, the rule does not provide the desired certainty that coal ash will *not* be regulated as a hazardous waste. EPA makes clear that it will, at some point in the future, issue a new regulatory determination regarding whether coal ash warrants hazardous waste regulation. Therefore, while EPA has, for the meantime, settled on the Subtitle D non-hazardous waste option, the Agency explicitly leaves the door open to revising the rules and regulating coal ash under RCRA's Subtitle C hazardous waste program. This also raises serious concerns.

Companies across the country will be investing huge resources to amend their operations to come into compliance with the new Subtitle D rules. Yet, because of the way the rule is written, EPA could come back at some point in the future and issue a whole new regulatory program under RCRA's Subtitle C hazardous waste program that could effectively negate the huge capital expenditures being incurred now to comply with this rule. Utilities need regulatory certainty regarding the status of coal ash under RCRA; this rule does not provide that.

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I would like to thank the Subcommittee for the opportunity to present the views of USWAG, EEI and APPA on EPA's CCR Rule. I would be glad to answer any questions you have concerning my testimony.