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LEGISLATIVE HEARING BEFORE THE HOUSE SUBCOMMITTEE ON ENVIRONMENT & THE ECONOMY ON DRAFT "H.R. __, THE IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT of 2015"

March 18, 2015

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], the American Public Power Association (APPA)[2], and the National Rural Electric Cooperative Association ("NRECA")[3] on the discussion draft of the "Improving Coal Combustion Residuals Regulation Act of 2015."

[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 48 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.

[3] The National Rural Electric Cooperative Association is the national service association of more than 900 not-for-profit rural electric cooperatives and public power districts providing retail electric service to more than 42 million consumers in 47 states and whose retail sales account for approximately 12 percent of total electricity sales in the United States. NRECA's members include consumer-owned local

USWAG is a consortium of EEI, APPA, NRECA, and approximately 130 electric utilities, power producers, utility operating companies and utility service companies located throughout the country. Together, USWAG member companies operate nearly 75% of the total coal-based generating capacity in the United States.

When I testified before this Subcommittee during your January oversight hearing on EPA's final 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), I made clear that we supported EPA's decision to regulate coal ash as non-hazardous waste under Subtitle D of 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.

Importantly, however, while we support EPA's regulation of coal ash as a non-hazardous waste, there are serious flaws in the new coal ash rule because 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. This is unlike most other federal environmental regulatory regimes, including RCRA's Subtitle C hazardous waste program, where Congress views the states as key partners in implementing and enforcing federal regulations and expressly

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distribution systems and the generation and transmission (G&T) cooperatives that supply wholesale power to their distribution cooperative member-owners. Distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable electric service at the lowest reasonable cost.

authorizes the states to adopt and implement the federal regime *in lieu of* EPA. In this case, however, because EPA's 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.

I identified several of the flaws in this self-implementing scheme that will effectively undermine the implementation of the new rule. Among other things, the fact that state coal ash regulations cannot operate in lieu of the federal rule means that coal ash facilities must comply with dual and potentially inconsistent federal and state regulations for the same material. This is especially problematic because EPA has dropped from the final rule site-specific, risk-based options for implementing elements of the coal ash rule that were contained in the proposed rule, reasoning that such risk-based decisions require regulatory oversight. Thus, state coal ash programs that enable regulators to issue tailored, site-specific, risk-based management options for coal ash management are effectively usurped by the one-size-fits all approach in the self-implementing rule.

In addition, the rule's only compliance mechanism is for a state or citizen group to bring suit in federal district court against an alleged non-compliant facility. This means that legal disputes regarding compliance with any aspect of the rule can only be determined on a case-by-case basis by different federal district courts across the country. This requires federal judges to make complex technical decisions regarding compliance under the rule in place of regulatory agencies that have the technical

expertise and experience to better address these issues. This also will produce differing and likely inconsistent decisions regarding the scope and applicability of the federal rule depending on where a citizen suit is brought.

Given these fundamental flaws with the statutory structure under which the final rule was issued, I indicated during my earlier testimony that legislation amending RCRA is necessary for EPA's new coal ash rule to be implemented in an effective and practical manner. The discussion draft would achieve this objective.

First, and foremost, the bill would establish a permit program for implementation of the new coal ash regulations issued by EPA, thus eliminating the problems associated with the self-implementing nature of the current rule. Under the bill, virtually all the aspects of the rule would be implemented solely through state CCR permit programs, or by EPA if the states do not adequately adopt and implement the rule. The bill also would require coal ash permits to include conditions *not* included in EPA's rule – including financial assurance requirements and surface water protection standards – and would preserve the state's ability to regulate more stringently than the federal rule. This statutory structure would be similar to the manner in which Congress previously revised RCRA to allow EPA's Subtitle D municipal solid waste landfill rules to be implemented through state permit programs, or by EPA if states fail to do so, as the bill does.

Authorizing the states to implement the rule through permit programs also would eliminate the problem of dual and inconsistent federal and state regulation of coal ash. Equally important, having EPA's rule implemented by a regulatory body eliminates the compliance dilemma where our members and the public at large are left to own their devices to try to discern what is required to come into compliance. The utility industry will be investing huge capital resources to comply with the rule. The bill will provide regulatory certainty for those investment decisions since compliance will be specified by a regulatory body and spelled out in a permit.

In addition, the bill would bring about a more rational and efficient enforcement scheme. While it does not limit in anyway the ability of citizen groups to bring enforcement actions under RCRA's citizen suit provision against facilities alleged to be in non-compliance with a permit condition, it would augment the rule's enforcement options by enabling the permitting body also to take direct enforcement action against a non-compliant facilities, as opposed to having enforcement responsibility borne solely on the back of citizen suits. In addition, whereas EPA currently has no role in administering and enforcing the CCR rule, the bill would increase EPA's authority by directing it to review the adequacy of state coal ash permit programs and directing EPA to implement the permit program where the states choose not to do so or a state's permit program is inadequate. This approach also eliminates exclusive reliance on federal district courts for interpreting and enforcing the rule, thereby avoiding the

specter of differing and potentially inconsistent application of the rule between the states and even within particular states with multiple federal district courts.

We also appreciate that the bill properly restores the ability of the implementing agency to include site-specific, risk-based management options in permits. EPA included this concept in the proposed Subtitle D CCR rule, but eliminated this approach from the final rule *precisely* because the rule was self-implementing and could not be administered through a permit program. The bill would require regulatory oversight in implementing the rule and therefore appropriately allows the implementing agency to tailor certain aspects of the rule to accommodate site-specific factors, consistent with the approach in EPA's proposed coal ash rule and the federal municipal solid waste landfill program under 40 C.F.R. Part 258.

For example, the proposed coal ash rule would have allowed a facility to establish an alternative risk-based groundwater protection standard instead of defaulting automatically to background levels in circumstances where EPA has not established a maximum contaminant level for the constituent of concern. However, EPA removed that option in the final rule *precisely* because there was no regulatory oversight regarding the establishment by an owner/operator of an alternative, risk-based groundwater protection standard. However, because the bill requires the rule to be implemented through a permit program, it would allow the permitting agency to establish, where appropriate, the use of an alternative risk-based groundwater

protection standard. Indeed, this is precisely the option provided to permit writers under EPA's municipal solid waste landfill rule.

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I would like to thank the Subcommittee for the opportunity to present the views of USWAG, EEI, APPA, and NRECA on the draft CCR legislative discussion draft. We think the legislation is necessary to allow EPA's new coal ash rule to be implemented in an effective and practical manner. I would be glad to answer any questions you have concerning my testimony.