Testimony of John N. Ward, Chairman
Citizens for Recycling First
before the
U. S. House of Representatives
Committee on Small Business
Subcommittee on Oversight, Investigations and Regulations

May 12, 2011

About Citizens for Recycling First

Citizens for Recycling First was formed in February 2010 specifically to address coal ash recycling issues. More than 1,500 individuals have registered as supporters on the Citizens for Recycling First web page and almost 3,000 are followers on Facebook. Well over 3,000 individuals sent comments to the U.S. Environmental Protection Agency regarding its proposed coal ash disposal rules through the www.recyclingfirst.org web site, as well.

It is important to remember that these individuals are specifically interested in preserving and enhancing recycling opportunities for coal ash. This is not a "grassroots network" that has been established by spending millions of dollars in advertising to attract people who subsequently send letters to EPA on all manner of topics. Citizens for Recycling First is comprised largely of citizens with firsthand knowledge of coal ash recycling issues.

I serve as chairman and the sole staff member of the organization. Outside of Citizens for Recycling First, I also serve as the volunteer chairman of the Government Relations Committee of the American Coal Ash Association. I am a former board member and president of the American Coal Council and a former member of the National Coal Council as appointed by the U.S. Secretary of Energy. I have nearly two decades experience in coal ash recycling and have participated in numerous industry associations concerned with the manufacturing and marketing of construction materials in which recycled coal ash can be beneficially used.

About the Coal Ash Recycling "Industry"

Almost half of America's electricity is generated by burning coal. That figure is not likely to change much in the future. Because Americans continue to consume more electricity every year, renewable energy sources will do well just to keep up with increases in demand. The U.S. Department of Energy predicts that in 2030, we will actually generate 19 percent more electricity from coal than we did in 2007.

Generating that much electricity produces large volumes of coal ash — solid materials left over from the combustion process. According to the American Coal Ash Association, about 135 million tons of this material was produced in 2009. The good news is that over 41 percent of it was recycled rather than disposed.

There are many good reasons to view coal ash as a resource, rather than a waste. Recycling it conserves natural resources and saves energy. In some cases, products made with coal ash perform better than products made without it. For instance, coal ash makes concrete stronger and more durable. It also reduces the need to manufacture cement, resulting in significant reductions in greenhouse gas emissions.

In the decade from 1999 to 2009, our nation successfully recycled 519 million tons of coal ash – some 38 percent of the 1.35 billion tons of coal ash produced. We decreased greenhouse gas emissions by more than 138 million tons during that period through the use of coal fly ash in concrete products.

The businesses responsible for achieving this remarkable environmental success are overwhelmingly small businesses. The coal ash recycling industry is separate and distinct from electric utilities that produce coal ash and is comprised of several segments:

- Most utilities engage the services of third party marketers that are responsible for developing customers, providing infrastructure and logistics for delivering ash to users, providing technical support, and managing all business functions related to the sale and use of coal ash. Many of these coal ash marketers are small businesses.

- Additionally, the coal ash recycling industry includes companies that develop and deploy technologies for improving the quality of coal ash in order to ensure it meets industry standards and user specifications. Most of these innovative coal ash technology developers are small businesses.

- Finally, thousands of companies rely on coal ash as an ingredient in the products they manufacture. In some cases, such as the production of concrete, coal ash is a key ingredient used to improve concrete quality while reducing costs. (The National Ready Mixed Concrete Association notes that 85 percent of its 1,500 member companies are small businesses.) In other cases, such as the manufacturing of coal ash bricks or agricultural soil amendments, coal ash is the primary ingredient. (All of these are small businesses that were created specifically to recycle coal ash.)

In all three categories – marketers, technology providers, and manufacturers – the majority of companies are small businesses with little or no resources to weather prolonged regulatory challenges. And a prolonged regulatory challenge is exactly what the U.S. Environmental Protection Agency is subjecting them to now.

Green Isn't Always Gold: Are EPA Regulations Harming Small Businesses?

Thank you for the opportunity to testify on the topic: "Green isn't always gold…" In the case of EPA's coal ash regulations, the Agency's actions are not only "not gold," they are not very "green" either. In the Agency's single-minded quest to gain more enforcement authority over the disposal of coal ash, EPA appears resolved to ignore the negative impacts of its actions on an entire recycling industry and the small businesses that comprise it. If EPA succeeds in getting the regulations it wants, our nation will end up putting hundreds of millions of tons more material into landfills rather than safely recycling it – hardly a "green" result.

Furthermore, EPA appears content to create regulatory uncertainty that is already harming the recycling industry even though formal regulations have not been finalized. A year ago, EPA formally proposed labeling coal ash as "hazardous waste" when it is disposed. When the idea was confronted by a wall of opposition from all manner of other government agencies, academicians, recyclers, coal ash users and more, the EPA responded by simply slowing the process down. EPA officials have been quoted as saying it may now be 2013 before the Agency gets around to proposing a final rule. In the meantime, the coal ash recycling industry is twisting in the wind with the unresolved question: "Will it be hazardous waste or not?"

How We Got to This Point

On December 22, 2008, a containment dike at a Tennessee Valley Authority coal ash disposal pond failed, spilling about a billion gallons of sludge over 300 acres and into a nearby river. Calls for tougher regulation of coal ash disposal immediately followed. Then the ironies started piling up.

First, the federal government decided that the best way to respond to an engineering failure at a power plant owned by a unit of the federal government (TVA) would be to place all power plants under regulation by a unit of the federal government (Environmental Protection Agency).

Next, EPA concluded that the only legal way to get federal jurisdiction over power plant ash disposal would be to declare the material a "hazardous waste" – despite the fact that two previous EPA Reports to Congress and two formal EPA Regulatory Determinations in 1993 and 2000 had concluded that no such designation was warranted.

Next, EPA began supervising the clean-up of the TVA disaster. The agency's solution: Transport the material EPA is preparing to label as "hazardous" to a non-hazardous landfill in the next state and to stabilize large amounts of the material in place.

Meanwhile, what should have been a discussion about engineering standards for coal ash disposal morphed into a debate about the coal ash itself. That is both misguided and unfortunate. If a billion gallons of skim milk had spilled into a river, that also would constitute

an environmental disaster. But wouldn't the focus be placed on ensuring the safety of milk tanks rather than demonizing the milk?

Misuse of the Term "Toxic" is a Tragic Byproduct of EPA's Rulemaking

Since the failure of the Tennessee coal ash disposal pond in 2008, the phrase "toxic coal ash" has become a favorite of anti-coal environmental groups and environmental news reporters everywhere. Too bad most of them have never bothered to consider what "toxic" really means.

Some people seem to think a material must be toxic if it has heavy metals such as mercury or arsenic in it. But testing data from the Electric Power Research Institute clearly shows that trace elements collectively comprise less than 1 percent of coal ash volume. Furthermore, the levels of these metals in coal ash are similar to the levels found in other everyday materials. More important than whether metals are present in a given material is whether the metals can get out of the material and into you. Once again, Electric Power Research Institute data shows that the leaching potential of metals in coal ash is well below acceptable limits.

A material is "toxic" when a toxin (or poison) escapes from the material and affects a person or organism. Toxins present in coal ash are metals that are also present in most everyday materials. The levels of metals in coal ash are similar to the levels of the same metals in materials coal ash replaces when it is recycled (i.e. portland cement and aggregates.) Many of the metals of concern are ubiquitous in other products (i.e. mercury in light bulbs and dental fillings; arsenic in treated lumber; selenium in your multivitamin tablet, etc.)

The standard test used by EPA to establish whether any material is "toxic" and qualifies as a "hazardous waste" is the Toxicity Characteristic Leaching Procedure (TCLP). Coal ash does **not** qualify as a "toxic" hazardous waste based on this procedure.

EPA's current coal ash disposal rulemaking does **not** claim that coal ash qualifies as hazardous waste based on its toxicity. EPA's proposed justification for a hazardous waste regulatory approach is based on "damage cases" related to alleged failures of disposal impoundments -- not on the toxicity of the material itself. Furthermore, the actual landfill engineering standards being proposed by EPA are essentially the same under **both** the hazardous and non-hazardous proposed approaches. (Both approaches call for single liner systems with groundwater monitoring and effective phase-out of wet impoundments. A truly "toxic" material would be subjected to double liner and leachate collection systems that EPA is not proposing even under its "hazardous" proposal.)

So just how toxic is "toxic coal ash?" It falls well short of the levels defined by the U.S. Environmental Protection Agency to qualify as a hazardous waste. Coal ash is also far more benign than municipal solid waste – a material regulated by states and safely handled by communities big and small. (More than 250 million tons of household waste is disposed in

more than 1,600 landfills around the United States every year.) Municipal solid waste leachate is more noxious than ash leachate, is biologically active, emits explosive gases, contains sewage sludge ash as a component, attracts rodents and birds, and so on. None of these conditions can be found in coal ash.

EPA's "Hazardous Waste" Designation Proposal Boils Down to a Regulatory Turf Grab

New engineering standards for coal ash landfills would be essentially the same under two scenarios presented by the U.S. Environmental Protection Agency. So why does one of the scenarios risk damaging coal ash recycling by labeling ash as hazardous? Because the federal EPA wants to take regulatory enforcement authority away from individual states.

On June 21, 2010, EPA released a "proposed rule" that outlines two broad approaches to strengthening coal ash disposal regulation. Both approaches are under the Resource Conservation and Recovery Act (RCRA). Subtitle D of RCRA allows EPA to set standards that get enforced by the states. Subtitle C of RCRA is enforced by federal EPA.

The June 21 EPA proposal contains both Subtitle D and C approaches, but the guidelines for how landfills would be constructed and monitored is essentially the same under both approaches. (See EPA's own comparison of the approaches on pages 19 and 20 of this summary presented by EPA to state solid waste management regulators: http://www.recyclingfirst.org/pdfs/14.pdf)

Subtitle C is the section of RCRA that pertains to hazardous wastes. EPA's proposal does not claim that coal ash qualifies as a hazardous waste based on its toxicity characteristics. By suggesting a Subtitle C approach, EPA is simply trying to gain broad enforcement authority while risking permanent damage to coal ash recycling from the "hazardous" stigma that would be created.

Even under Subtitle D, which is primarily enforced by the states, the federal EPA can step in to directly regulate any site that poses an imminent danger to public health or the environment. So EPA's proposal for broad Subtitle C enforcement authority is more about empire building for federal regulators than for actually improving protections for the environment.

Not only are landfill engineering standards essentially the same under EPA's hazardous and non-hazardous approaches, EPA has recognized that non-hazardous landfill standards would be protective of human health and the environment in the clean-up it has supervised at the site of the TVA ash spill. That material was largely stabilized on site, with other materials being transported to a non-hazardous landfill.

Landfills won't be any stronger or better under EPA's Subtitle C proposal – nor do they need to be. But coal ash recyclers will be saddled with a hazardous waste stigma that will make continued recycling of this resource difficult or impossible.

Personal Injury Lawyers Would Win Big with EPA's Proposal

Anti-coal environmental activists are eager to label coal ash as "hazardous," but there is another group that would be happy to see that take place: personal injury lawyers.

Personal injury lawyer web sites with names like "aboutlawsuits.com" are already following coal ash in the wake of the December 2008 Kingston impoundment failure. Anyone who has ever watched late night television can figure out what their interest is. Consider this excerpt from a web site entitled "injuryboard.com":

"The chemicals found in coal ash can cause serious health problems, and in some instances of high exposure, death. See your doctor if you suspect that your drinking water may be contaminated with chemicals from a nearby coal ash depository. In addition, it may be important to contact an attorney who can help you protect your legal rights. Please keep in mind that there may be time limits within which you must commence suit."

So what happens if EPA succeeds in overturning two of its previous regulatory determinations and designating coal ash as "hazardous waste" when disposed? Ash that goes into a landfill would be "hazardous," but ash that gets used in the construction of homes, schools, roads and more would not.

Think about it. If coal ash spills out of a truck on the way to a concrete production plant, does it require a hazardous waste clean-up? Can workers file claims for being exposed to a hazardous waste? Can homeowners? Will trucks carrying coal ash require hazardous waste placards? The lawyers can have a field day.

Environmental activists counter that we use hazardous materials every day – like gasoline. But if you drive a car, you can't choose whether or not to use gasoline. If you build things, you can choose whether or not to use recycled materials containing coal ash and even if lawsuits are frivolous, you will probably choose to avoid the time and expense of defending them.

Coal Ash Recycling is Already Being Affected by EPA's Proposal

Consumers of recycled coal ash are already beginning to remove the materials from their specifications because of uncertainty regarding the safety of the material or because of concern over potential legal liability from using it. Let me give you one example of each. The Los Angeles Unified School District has prohibited the use of coal fly ash in its concrete, and I quote: "until the EPA confirms fly ash to be a non-hazardous toxic waste." A Member of Congress, Rep. David McKinley of West Virginia – who is a civil engineer by trade – has indicated that before being elected he removed coal fly ash from his concrete specifications because of liability concerns. It is important to remember that it doesn't matter whether health or legal liability concerns are scientifically or legally justified. What matters is that

people do not want to take the risks created by the potential "hazardous" designation and they can choose not to use coal ash to avoid those risks. It takes time and money to defend even unjustified lawsuits.

Manufacturers of products that compete with recycled coal ash have been fanning the stigma flames by citing the potential EPA "hazardous waste" designation. This has already occurred in markets for blasting grit, brick manufacturing, lightweight aggregate production, and concrete block manufacturing. One particularly egregious magazine advertisement featured a skull and crossbones for an illustration.

We are now beginning to see commercial liability insurance policies that contain exclusions for companies using products that contain fly ash. Examples of this disturbing development – as well as more examples of the other forms of stigma mentioned above – are being collected by Citizens for Recycling First) at this website: http://www.recyclingfirst.org/pdfs.php?cat=9

EPA's Response to Small Business Concerns

All of these concerns have been conveyed to the Environmental Protection Agency over the past two years in meetings, formal written comments, and appearances in all eight of the Agency's public hearings on its proposed coal ash disposal rules. The Agency's response to the coal ash recycling industry has focused on two points:

1. EPA has simply refused to evaluate the potential impacts of its proposed rule on small recycling businesses.

2. EPA says a "hazardous waste" designation for coal ash that is disposed will actually ***increase*** recycling of the resource.

The EPA has refused formal requests to evaluate the impacts on small business of its proposed coal ash disposal rulemaking. The Agency's explanation was that because beneficial use was technically exempt from the rulemaking, the agency was under no obligation to evaluate impacts of the regulation on the beneficial use industry, which is predominantly comprised of small businesses.

EPA Deputy Administrator Lisa Feldt testified on July 22, 2010, before another subcommittee of this House Small Business Committee. Her explanation of why no small business impact analysis was done came under questioning from the subcommittee chairman and can be seen on this YouTube video from the hearing: http://www.youtube.com/watch?v=3y52nJ7t5pQ&p=460C37F620EC8972. Ms. Feldt admits that EPA's "extensive economic analysis" completely omitted any consideration of economic impacts on recycling.

Despite the Agency's admitted failure to formally analyze impacts on coal ash recycling, EPA does assert that recycling rates will actually increase under a "hazardous waste" designation. EPA supports this position by citing the experience of a handful of other industrial byproducts and theorizing that utilities will have a greater economic incentive to recycle if disposal costs go up.

The other industrial materials cited by EPA include electric arc furnace dust, electroplating wastewater sludge, chat from lead and zinc mining, used oil, spent etchants and spent solvents. The problem is that none of these materials are anything like coal ash. Most of them actually qualify as a hazardous waste based on their toxicity. (Coal ash does not.) Almost all of them are reprocessed prior to recycling. (Coal ash is not.) Most of them get recycled in industrial processes, often by the same companies that produced the materials in the first place. (Coal ash is distributed for recycling by thousands of other companies in tens of thousands of public and residential locations all over the country.) Many of them are produced and recycled very small quantities. (Coal ash recycling is measured in the millions of tons.)

As for the position that higher disposal costs will automatically lead to greater recycling rates, please consider history: In 2000, the recycling rate for coal ash was 30 percent. In 2008, it had increased to 44 percent – a nearly 50 percent increase in less than a decade. Did the cost of disposal increase during that time? No. So what was responsible for this dramatic increase in recycling rates? Answer: In 2000, the Environmental Protection Agency provided regulatory certainty by issuing its Final Regulatory Determination that concluded coal ash does **not** warrant regulation as a hazardous waste. That sent a clear signal to producers, marketers and users of coal ash who began to invest more in the infrastructure necessary to support recycling. In 2002, the Environmental Protection Agency accelerated this effort by creating the Coal Combustion Products Partnership, or C^2P^2 program, to actively promote recycling as a preferred alternative to disposal.

Sadly, EPA has now completely reversed this trend by creating a new era of regulatory uncertainty and by stepping back from its visible support for recycling. (The Coal Combustion Products Partnership has been killed over criticism that EPA did not conduct detailed risk assessments of the recycling applications it supported, despite the fact that many of those recycling applications have been conducted for decades with no allegations of any environmental damage.)

As a result of EPA's recent actions, investments in the infrastructure necessary to support recycling have stalled and recycling rates have already begun to drop.

For those who continue to deny the existence of a "hazardous waste" stigma, just two questions should be asked: First, if the EPA is right and a hazardous waste designation would motivate people to recycle more ash, then why are the people who make their livings as recyclers unanimously opposed to it? Wouldn't they be in favor of something that would help them make more money? Perhaps it is because the people who recycle ash every day are well

aware of the response you and your neighbors would give to the second question: Would you want something that is classified as a hazardous waste in your home, school or workplace?

Coal Ash Regulations are Part of a Larger EPA Agenda

Perhaps the reason EPA has turned a deaf ear to the concerns of small business recyclers of coal ash is that this debate is not about coal ash at all. It may be all about coal.

EPA has launched a multi-pronged attack against every level of coal production and use. The Agency is aggressively pursuing new regulations on mining, increased standards for emissions, entirely new regulations on greenhouse gases and more. Draconian coal ash disposal regulations fit within that overall picture.

EPA denies that it is waging a war on coal. An EPA spokesman, Brendan Gilfillan, was quoted in *The New York Times* on October 29, 2010, as saying: "E.P.A. does not have a problem with coal, or any other industry. E.P.A. is committed to doing its job, which is to minimize the pollution that might come from these industries… E.P.A.'s actions are firmly grounded in both the best available science and the law — in fact, in many cases E.P.A. is operating under legal deadlines after rules from the previous administration were thrown out by the courts."

Applying Mr. Gilfillan's standards to the coal ash issue gives us a different picture, however. The science concludes that coal ash does not qualify as a hazardous waste based on its toxicity, yet EPA continues to pursue a "hazardous waste" regulation. The law has established through two prior EPA regulatory determinations that coal ash does not warrant regulation as a hazardous waste, yet EPA continues to try to overturn those determinations (which were made, by the way, under another Democratic Administration.) Finally, EPA has no deadlines from either Congress or the courts to do anything with coal ash regulation.

What Congress Can Do to Help

Since EPA appears content to consider the small businesses in the coal ash recycling industry as collateral damage in its larger fight against coal, help from Congress is needed as soon as possible to resolve the regulatory uncertainty surrounding a potential "hazardous waste" designation.

Citizens for Recycling First strongly endorses two House bills that were recently filed to prohibit EPA from regulating coal ash as a "hazardous waste." HR 1391, authored by Representative David McKinley and HR 1405, authored by Representative Bob Latta, would resolve the regulatory uncertainty that is damaging coal ash recycling today.

These bills would not prevent EPA from moving forward with improving coal ash disposal regulations. Under the "non-hazardous" regulatory approach also proposed by EPA, the engineering standards for coal ash disposal facilities would be essentially the same as under the "hazardous" approach. Wet impoundments would still effectively be phased out and dry

landfill standards would be improved. Ironically, the improvements would also get implemented much sooner under the non-hazardous approach.

These bills are supported by a wide array of people. The EPA's extensive public comment process during 2010 showed that those who are actually involved in recycling coal ash – from producers to marketers to specifiers to users – are unanimous in the opinion that a "hazardous" designation for coal ash would be disastrous for recycling. Proponents of the "hazardous waste" designation are essentially telling these people that they don't understand their own industry – a recycling industry they have been painstakingly building for the past four decades. (With regard to the unanimous opposition to EPA's Subtitle C "hazardous waste" approach by anyone who actually makes, sells, specifies, uses, or researches coal ash, please look at this web site: http://www.uswag.org/ccbletters.htm.)

An Appeal for Common Sense

In announcing the Agency's proposed coal ash disposal rule on May 4, 2010, EPA Administrator Lisa Jackson said: "The time has come for common-sense national protections to ensure the safe disposal of coal ash." Citizens for Recycling First agrees with the Administrator.

Common sense tells us that utilities will be reluctant to allow a material classified as "hazardous waste" on their own property to be distributed for recycling at literally thousands of locations around the countryside.

Common sense tells us that architects and engineers who are sworn to put human health and safety first will be reluctant to require use of a material that is classified as "hazardous waste" in another location.

Common sense tells us that users of coal ash will be reluctant to take on the potential liabilities and additional operational requirements that may come with using a material that is classified as "hazardous waste" in another location.

Common sense tells us that everyday citizens will be greatly alarmed if they find out that a building material used in their homes, schools, offices and roadways is classified as a "hazardous waste" on the property of the people who made it.

Common sense says that risking an entire recycling industry over a regulatory turf battle is a bad idea. Common sense says that new coal ash disposal regulations should be enacted under Subtitle D and EPA should work to promote safe and environmentally beneficial recycling as a preferred alternative to disposal.

Citizens for Recycling First supports recycling coal ash as a safe, environmentally preferable alternative to disposal. We believe that the best solution to coal ash disposal problems is to stop throwing coal ash away.

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