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U S W A G

**TESTIMONY OF RICHARD T. BYE
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**OVERSIGHT HEARING ON “THE TOXIC RELEASE INVENTORY
AND ITS IMPACT ON FEDERAL MINERALS AND ENERGY” BEFORE
HOUSE SUBCOMMITTEE ON ENERGY & MINERAL RESOURCES**

September 25, 2003

My name is Richard T. Bye and I am the Director of Environmental Safety and Industrial Health for Texas Genco. I am pleased to present a statement on behalf of Texas Genco, the Edison Electric Institute (“EEI”), and the Utility Solid Waste Activities Group (commonly known as “USWAG”), where I serve as chair of the Ash Management & Solid Waste Committee.

EEI is an association of U.S. shareholder-owned electric companies, international affiliates and industry associates worldwide. Our U.S. members serve roughly 90 percent of the ultimate customers in the shareholder-owned segment of the industry, nearly 70 percent of all electric utility ultimate customers in the nation, and generate nearly 70 percent of the electricity produced in the United States.

USWAG is a consortium of EEI, the American Public Power Association (“APPA”), the National Rural Electric Cooperative Association (“NRECA”), and approximately 80 electric utility operating companies located throughout the country. APPA is the national association of publicly-owned electric utilities. NRECA is the national association of rural electric cooperatives. Together, USWAG members represent more than 85 percent of the total electric

generating capacity of the United States and service more than 95 percent of the nation's consumers of electricity.

Let me first commend the Subcommittee for holding this oversight hearing on the TRI Program. TRI is a program that has been in existence for more than a dozen years, although electric utilities did not become subject to TRI reporting until 1999. Our industry has long supported the aims of the TRI Program. We believe that the communities in which we operate should be informed about the chemicals we handle at our plants that affect the environment. However, what has troubled us about the TRI Program is the way in which EPA publishes inaccurate information to the public by distorting the plain meaning of words found on the TRI reporting form. Through the use of "creative" definitions, TRI information received by the public is often highly misleading and results in undue public concern about activities that are safe, legal and promoted as environmentally-beneficial by other parts of EPA and many state environmental agencies. What the TRI Program sorely needs is a "Truth in Reporting" standard in which English words are given the meaning used by ordinary citizens in everyday communication.

I.

Let me give you one example. Our industry generates large volumes of byproducts from the combustion of coal and other fossil fuels at our electric generating facilities. In 2001, we generated approximately 118 million tons of coal combustion byproducts. Of this amount, approximately 32% were beneficially used as coal combustion products, also known as "CCPs". CCPs are the byproducts that are diverted from disposal for use in a variety of commercial applications, such as cement and concrete production, road base material, snow and ice control, construction fills, wallboard production, waste stabilization and solidification, and agricultural

soil amendment. CCPs that are not beneficially used must be managed as a waste – typically in a dedicated landfill or in a surface impoundment on utility property.

Under TRI, we are required to report the total volume of coal combustion byproducts placed in engineered waste management units as a “release” that is “entering” the environment, even though those units are designed, regulated, and properly operated to prevent the release and migration of constituents to soil and groundwater. Even when such waste byproducts are transferred to off-site commercial facilities for disposal in engineered waste management units, EPA requires the utility to report such a transfer as an off-site “release”, giving the false impression that constituents in the materials are in some way escaping from the disposal unit.

EPA’s use of the term “release” to describe successful waste management in an engineered unit connotes that the waste material is not contained by the engineered and regulated structure. In fact, the current EPA requirement is that the entire volume of each TRI reportable chemical that is properly managed in land disposal waste management unit must be reported as a “release” into environmental media. The message the public receives when it hears the word “release” is that the entire volume of waste has somehow escaped to the environment – like an oil spill. In effect, the message EPA has been sending to the public when it publishes its annual Public Data Release implies a total structural failure of the disposal unit.

What is strange about the current TRI reporting system is that the regulated community is expected to report as a “release” the total quantity of TRI chemicals successfully managed within a land disposal unit. But if the landfill were to have a structural defect and constituents in the waste were to migrate out of the unit into adjacent soil or groundwater – what most would call a “release” in every day English – those chemicals that escape from the unit would not be reported because they have already been reported along with the volumes that remain safely within the

disposal unit. Thus the current TRI form fails to collect data on issues of plausible concern to the community while providing misleading data about well-managed facilities that suggest the existence of an environmental problem when none exists.

Let me acknowledge that EPA recently took a small step in the direction of correcting this problem. On July 1, 2003, EPA proposed to amend the reporting form to distinguish between “contained disposal” and “uncontained releases.” 68 Fed. Reg. 39074. While this proposed change is a step in the right direction, it simply does not go far enough to cure public misperceptions. Instead of allowing the regulated community to base its reporting of the TRI chemicals managed in waste disposal units on whether the chemicals in fact were being contained or whether they were migrating out of the unit, EPA made advance categorical judgments as to the types of waste management units that qualify as “contained disposal” and those units that require reporting of the contents as “uncontained releases.” EPA decided that all landfills and all underground injection wells qualify as “contained disposal”, while the coal combustion byproducts placed in surface impoundments and “other land disposal” units, whether or not the waste is actually contained, must be reported as “uncontained releases.” This makes no sense. If a facility is designed and constructed to contain the TRI chemicals in waste disposed at that facility and has successfully done so, why should that disposal be classified by EPA and reported to the public as an “uncontained release”?

II.

The definition of “release” is not the only word game played by EPA in administering the TRI Program. A second example involves EPA’s interpretation of beneficial use to equate recycling and beneficial use of secondary materials with waste disposal rather than with processing a product for distribution in commerce. Although the industry has successfully

diverted about 32% of CCPs generated from waste disposal for use in such commercial applications as cement and concrete production, soil stabilization, structural fill, mine reclamation, and highway construction, the TRI Program interprets such activities as waste management subject to TRI reporting as “releases”. At the same time, however, if a company chooses not to use CCPs in these applications, but rather uses virgin material containing the same TRI chemicals, it is subject to much less stringent reporting requirements. The TRI Program, therefore, is discouraging the beneficial commercial applications of CCPs by requiring such applications to be reported as a “release” into environmental media. So instead of receiving a “pat on the back” from EPA for practicing good environmental stewardship in diverting what would otherwise require waste disposal into a well-established beneficial use application, utilities are subjected to burdensome TRI reporting that unfairly places a “waste stigma” on CCPs that inhibits increased beneficial use of these materials.

When Congress enacted the Resource Conservation and Recovery Act in 1976 (popularly known as RCRA), it established as national policy a mandate for EPA to “maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation.” RCRA § 4001, 42 U.S.C. § 6941. As part of its implementation of the Bevill Amendment to RCRA, EPA addressed the subject of beneficial use of CCPs on several occasions. In 1993, EPA announced that the “Agency encourages utilization of coal combustion byproducts and supports State efforts to promote utilization in an environmentally beneficial manner.” 58 Fed. Reg. 42466, 42490 (Aug. 9, 1993). In May of 2000, EPA announced that it wished to avoid “unnecessary barriers on the beneficial use of fossil fuel combustion wastes so that they can be used in applications that conserve natural resources and reduce disposal costs.” 65 Fed. Reg. 32214 (May 22, 2003).

Rather than build on these policies to promote beneficial use, the TRI Program has done the opposite. First, by affixing the “waste management” label to long-established and environmentally safe beneficial use applications, the TRI Program imposes a regulatory burden on the marketing of CCPs that immediately places CCPs at a competitive disadvantage vis-à-vis competing materials. In a 1994 Report to Congress, the U.S. Department of Energy identified the “waste” label as one of the most significant impediments to increased beneficial use of CCPs. *See U.S. Dept. of Energy, Report to Congress, Barriers to the Increased Utilization of Coal Combustion/ Desulfurization Byproducts by Governmental and Commercial Sectors*, p. 17 (July 1994). In addition, because the beneficial use activity is classified as “waste management” rather than “processing for distribution in commerce” (the label typically applied to management of a product containing TRI chemicals destined for commercial distribution), EPA’s *de minimis* rule does not apply. This rule, in effect, exempts products (but not wastes) from TRI reporting if the concentrations of the TRI chemicals in the product (other than certain carcinogens) are below 1%.

EPA’s strange interpretation rewards the unnecessary use of virgin materials with an interpretation that avoids TRI reporting, while penalizing the environmentally protective use of CCPs by subjecting them to TRI reporting. The virgin material and CCPs are used in the same way and they often contain the same or similar TRI chemicals. But under TRI, only the application of CCPs are classified as waste management and subject to full reporting. This is a classic case of one part of EPA working at cross purposes with other parts of the Agency.

On a positive note, EPA has taken several additional steps to implement its commitment to increased utilization of CCPs. EPA has used its authority under section 6002 of the Resource Conservation and Recovery Act to promote government procurement of products containing

CCPs such as cement and concrete containing coal fly ash (47 C.F.R. § 247.12(c)), flowable fill containing coal fly ash (id. § 247.12(i)), railroad grade crossing surfaces containing coal fly ash (id. § 247.12(j)), parking stops made from concrete containing coal fly ash (id. § 247.13(b)), and has proposed adding blasting grit made with coal slag and bottom ash and concrete and cement made with fly ash cenospheres to the list. 66 Fed. Reg. 45256 (Aug. 28, 2001).

As part of its broader Resource Conservation Challenge, EPA recently established an initiative called the Coal Combustion Products Partnership or C²P², which is aimed at diverting CCPs from land disposal and reducing greenhouse gas emissions by increasing the beneficial use of CCPs through a series of coordinated public and private efforts. C²P² involves two main areas of activity: (1) a Challenge Program directed at potential users of CCPs, informing them of the attributes and beneficial uses of CCPs and encouraging them to increase the use of CCPs; and (2) Barrier-Breaking Activities, designed to better understand obstacles to beneficial uses of CCPs and to identify both government and private initiatives to address those obstacles. The TRI Program's characterization of CCP beneficial use applications as waste management, with all the regulatory burdens that follow from that characterization, is one of the largest regulatory barriers to increased CCP utilization.

Through its CCP policy statements and initiatives, EPA has demonstrated its strong commitment to reduce the unnecessary disposal of CCPs by actively promoting and removing the barriers to CCP beneficial use. These positive efforts, however, are undermined by the TRI Program's improper characterization of CCP beneficial use applications as "waste management."

In conclusion, let me urge the Subcommittee to send a clear signal to EPA that all parts of the Agency, including the TRI Program, should "get on board" with the Agency's commitment

to increase beneficial use of CCPs and thereby minimize the volume of those materials that require waste disposal. We will do our part to achieve greater beneficial use of CCPs, but that goal is far more difficult to achieve when the TRI Program plays word games by describing beneficial use as another form of waste disposal and then applies waste reporting requirements to CCP uses that do not apply to competing products. All we ask is that CCPs be subject to the same reporting rules that apply to competing products.