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ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
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Majority (202) 225-2927
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February 15, 2012

The Honorable Lisa P. Jackson,
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Earthjustice Notice of Intent to Sue under RCRA Section 2002(b)

Dear Administrator Jackson:

On January 18, 2012, Earthjustice and other environmental organizations sent you a 60-day Notice of Intent to Sue (NOI), alleging that EPA has failed to perform “nondiscretionary duties under the Resource Conservation and Recovery Act.” The NOI cites section 2002(b) of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. §6912(b), which provides:

(b) REVISION OF REGULATIONS.—each regulation promulgated under this Act shall be reviewed and, *where necessary*, revised not less frequently than every three years. (Emphasis added.)

We urge you to recognize and defend the Agency’s regulatory discretion under section 2002(b). Section 2002(b) requires that EPA review regulations promulgated under RCRA and only, *where necessary*, revise the regulations every three years. The NOI contends that EPA has a “mandatory duty” to review *and revise* regulations under RCRA, and in particular, regulations for the disposal of coal ash to determine the toxicity of certain solid wastes and regarding surface and groundwater under 40 CFR 257.3-3 and 257.3-4.

Section 2002(b) has non-discretionary and discretionary components. EPA has a duty to review RCRA regulations every three years to determine whether revision is necessary. The decision regarding whether such revision is necessary, however, rests solely within the discretion of the Agency. *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 899 (2nd Cir. 1989) involved a citizen suit under a comparable Clean Air Act regulatory review provision. In that

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case the Court found that the Administrator's duty to review was non-discretionary but that the decision whether it was necessary to revise the standards was discretionary.

The NOI seeks to write the Agency's discretion out of section 2002(b). Thanks to the clear Agency discretion in section 2002(b), EPA need not settle a lawsuit filed on the issues raised in the NOI. We urge you to preserve the Agency's independent rulemaking authority under RCRA and the discretion afforded the Administrator, by Congress, in this subsection.

We also urge you to consider the significant stakeholder interest regarding the regulations at issue in the NOI. Establishing rule language as part of a settlement compromise and agreeing to a court-ordered deadline for issuance of such rules would prevent EPA from thoroughly considering the views of thousands of stakeholders – including the States – and may prevent completion of the review process by the Office of Management and Budget. Stakeholders are concerned about being cut out of the rulemaking process as evidenced by Headwaters Resources, Inc. now submitting its own notice of intent to sue to ensure that its voice will be heard with respect to any rule that may result from settlement. The fact that some stakeholders feel compelled to also bring suit to prevent themselves from being cut out of the rulemaking process underscores that the NOI threatens to inappropriately convert what is an open and discretionary process, that takes into account the views of all stakeholders, to a potentially closed-door, judicial process involving only the narrow interests of select parties.

In addition to the risk of precluding broad stakeholder input into a major Agency decision, we are also concerned about the expense. What would be the federal and non-federal cost of this massive regulatory undertaking? Over how many fiscal years would EPA be engaged in the activities proposed by the NOI? What would be the precedential impact of Agency action under section 2002(b) on other RCRA programs and requirements? Please respond to these questions by February 29, 2012.

For any questions, please contact Committee Majority staff David McCarthy, Tina Richards, or Jerry Couri at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

John M. Shimkus
Chairman
Subcommittee on Environment
and the Economy

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cc: The Honorable Henry A. Waxman, Ranking Member