S. 3512 "Coal Ash Recycling and Oversight Act of 2012" and the Resource Conservation and Recovery Act

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Many have described the Resource Conservation and Recovery Act (RCRA) as "an inch wide and a mile deep." That description reflects the fact that under RCRA, Congress directed EPA to promulgate and implement detailed and extensive regulations prescribing specific requirements for the management of materials that are hazardous wastes. These regulations are authorized under Subtitle C of RCRA. However, if a waste material is not a hazardous waste it is essentially unregulated at the federal level. This division of labor reflects that fact that impacts from solid waste management are local and that Congress has determined that the management of non-hazardous waste does not rise to the level of federal interest.

The exception to this general rule is the regulation of municipal solid waste landfills authorized under Subtitle D of RCRA. Under Subtitle D, EPA is authorized to establish guidelines to assist in the development and implementation of state solid waste management plans. If approved by EPA, these plans make the state eligible for federal assistance. Under Subtitle D, EPA also is required to promulgate regulations that establish criteria for sanitary landfills. Landfills that do not meet the EPA-established criteria are classified as open dumps. Under section 4005 of RCRA, open dumping of solid waste is prohibited and open dumps must either be upgraded to meet the sanitary landfill criteria or be closed. The prohibition on open dumping is enforceable by citizens under 7002 of RCRA, and, in states that do not have an adequate permit program, is directly enforceable by EPA under section 3008 of RCRA. In addition, EPA has authority under section 7003 to take action against any person who is contributing to an imminent and substantial endangerment caused by the management of solid or hazardous waste, authority under 106 of the Comprehensive Environmental Response, Liability and Compensation Act (CERCLA) to order responsible parties to respond to releases of hazardous substances into the environment, and authority under section 104 of CERCLA to take direct action to respond to such a release. This statutory framework reflects the view of Congress that states should be the lead regulators of non-hazardous waste, while allowing EPA to take action if a state program is inadequate or if there is a specific environmental risk that must be addressed.

In May 2000, EPA made a Regulatory Determination under section 3001(b)(3)(C) that regulation of fossil fuel combustion wastes is not warranted under Subtitle C of RCRA. As a result, the disposal of such wastes is left to that states, subject to the prohibition on open dumping under Subtitle D and the EPA authorities discussed above.

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S. 3512, the Coal Ash Recycling and Oversight Act of 2012, is consistent with the structure of RCRA. S. 3512 would amend Subtitle D of RCRA to establish criteria for the design, ground water monitoring, corrective action, closure, and post-closure care for structures (including surface impoundments) that receive coal combustion residuals. The Act also would establish specific requirements for state permit programs to implement the new criteria. If a state decides not to implement such a program, or develops a program that does not meet the statutory criteria and fails to correct the deficiencies, then the Act gives EPA the authority to implement the program in lieu of the state, and can enforce that program under section 3008 of RCRA. It would be a violation of the 10th Amendment to the Constitution for Congress to purport to compel states to adopt a federal regulatory scheme. Authorizing EPA to implement a program in the case of state inaction is a way to constitutionally ensure that a regulatory program is carried out in a state, and this is the mechanism adopted by S. 3512.

S. 3512 goes further than Subtitle D of RCRA and also gives EPA express authority to implement the coal ash structure permitting program for lands in a state over which the state has limited jurisdiction, such as Indian Country. The Act also goes further than Subtitle D in that it allows EPA to provide enforcement assistance to states, upon request.

S. 3512 does not require EPA to issue implementing regulations. However, it is not necessary for EPA to promulgate federal regulations to operate in lieu of state regulations should EPA implement a coal combustion residuals permitting program in a state. The requirements of the program include reference to existing federal regulations for sanitary landfills at 40 C.F.R. Part 258. In addition, EPA has demonstrated its ability to implement RCRA without promulgating implementing regulations. For example, EPA never promulgated regulations governing the application of the Hazardous and Solid Waste Amendments of 1984 to existing hazardous waste surface impoundments under section 3005(j) of RCRA. Notwithstanding the lack of federal regulations to implement this section of RCRA, some states chose to adopt regulations and seek authorization to implement it, but most did not. So, this section of RCRA was implemented by EPA with no regulations. Further, while EPA has promulgated regulatory procedures to approve state Subtitle D landfill permitting programs (40 C.F.R. Part 239) EPA has never promulgated federal regulations that would apply in the case of disapproval of a state program. "In states with no approved permitting program, Subtitle D landfill owners and operators must follow the specific, self-implementing provisions of the federal requirements." EPA530-F-98-024 (Oct. 1998). This same regulatory structure is adopted by S. 3512.

Fossil fuel combustion wastes are not hazardous wastes so S. 3512 appropriately leaves the regulation of these wastes to states, while establishing federal criteria for the disposal of these wastes, to be implemented through state law and enforced through state authorities, while authorizing a federal program in the case of state inaction. This is not the same statutory and regulatory structure that Congress created under RCRA Subtitle C for hazardous wastes, but that is appropriate given the fact that coal combustion residuals are a high volume, low toxicity waste stream for which the comprehensive "cradle-to-grave" regulatory regime would be inappropriate. In fact, attempting to regulate coal combustion residuals under Subtitle C of RCRA likely would overwhelm the resources of both states and EPA. Any criticism of S. 3512 as "inconsistent with

RCRA" for choosing a Subtitle D model rather than a Subtitle C model is inappropriate and demonstrates a failure to understand the choices Congress has made to distinguish between hazardous and non-hazardous wastes.