

**Hearing on “The Coal Ash Recycling and Oversight Act of 2013”  
April 11, 2013**

**Responses of Susan Parker Bodine to questions for the record from the Honorable John Shimkus:**

1. As a former regulatory official, how do you define backstop authority? Does the Discussion Draft have a federal backstop?

Backstop authority exists where one entity can take action if another entity fails to act. In the context of federal environmental laws, I define federal backstop authority as authority for EPA to take action where a state agency has failed to act. This is the backstop authority that EPA has under Subtitle D of RCRA. EPA has no separate enforcement authority in states with approved Subtitle D programs. EPA can regain enforcement authority by taking away state program approval. This also is the backstop authority provided by the Discussion Draft.

I would contrast backstop authority with over-filing. Over-filing occurs where a state has taken action, but EPA chooses to second-guess the state action and take its own action. Subtitle D of RCRA does not give EPA the authority to over-file. In fact, the case law is mixed on whether EPA has over-filing authority related to the management of hazardous wastes under Subtitle C. Compare *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (holding that EPA may not over-file in RCRA Subtitle C cases given the unique statutory language that state programs operate “in lieu of” the federal program), with *United States v. Power Eng’g Co.*, 303 F.3d 1232 (10th Cir. 2002) (holding that EPA may over-file in RCRA Subtitle C cases).

2. Please explain the steps EPA would have to take to legally issue a new regulatory determination for coal ash.

First, it is unclear whether or not EPA has authority to issue a new regulatory determination. Congress required the determination authorized under the Bevill amendment to be made by a date certain. Subsequent changes to a determination would undermine that congressionally mandated deadline. However, assuming that EPA can change a regulatory determination, any new determination must still meet the requirements of section 3001(b)(3)(C). Thus, any new regulatory determination must be based on information developed or accumulated pursuant to a study conducted under section 8002(n) of RCRA which has to be submitted to Congress. In its 2000 regulatory determination EPA cites 3001(b)(3)(C) as the authority for its action. The 2010 proposed rule does not mention 3001(b)(3)(C) and EPA does not claim to be acting under that authority --- that is EPA’s only authority for making a regulatory determination for coal ash.

3. Please explain the steps EPA would have to take to issue a legally defensible rule under Subtitle C.

An EPA regulation listing waste as hazardous must meet the criteria established by Congress under section 3001(a). These criteria, promulgated at 40 C.F.R. 261.11(a), are as follows:

- (a) The Administrator shall list a solid waste as a hazardous waste *only* upon determining that the solid waste meets one of the following criteria:

- (1) It exhibits any of the characteristics of hazardous waste identified in subpart C.
- (2) It has been found to be fatal to humans in low doses or, in the absence of data on human toxicity, it has been shown in studies to have an oral LD 50 toxicity (rat) of less than 50 milligrams per kilogram, an inhalation LC 50 toxicity (rat) of less than 2 milligrams per liter, or a dermal LD 50 toxicity (rabbit) of less than 200 milligrams per kilogram or is otherwise capable of causing or significantly contributing to an increase in serious irreversible, or incapacitating reversible, illness. (Waste listed in accordance with these criteria will be designated Acute Hazardous Waste.)
- (3) It contains any of the toxic constituents listed in appendix VIII and, after considering the following factors, the Administrator concludes that the waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed:
  - (i) The nature of the toxicity presented by the constituent.
  - (ii) The concentration of the constituent in the waste.
  - (iii) The potential of the constituent or any toxic degradation product of the constituent to migrate from the waste into the environment under the types of improper management considered in paragraph (a)(3)(vii) of this section.
  - (iv) The persistence of the constituent or any toxic degradation product of the constituent.
  - (v) The potential for the constituent or any toxic degradation product of the constituent to degrade into non-harmful constituents and the rate of degradation.
  - (vi) The degree to which the constituent or any degradation product of the constituent bioaccumulates in ecosystems.
  - (vii) The plausible types of improper management to which the waste could be subjected.
  - (viii) The quantities of the waste generated at individual generation sites or on a regional or national basis.
  - (ix) The nature and severity of the human health and environmental damage that has occurred as a result of the improper management of wastes containing the constituent.
  - (x) Action taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste or waste constituent.
  - (xi) Such other factors as may be appropriate.

Coal ash does not exhibit a hazardous characteristic and is not fatal to humans in low doses. Thus, EPA can only list coal ash as a hazardous waste based on a determination that coal ash poses a “substantial present or potential hazard to human health or the environment.” EPA must support such a determination with a risk assessment. However, has not developed a risk assessment that can support this determination for coal ash.

In my written testimony I point out the flaws in EPA's risk assessment that have been identified by peer reviewers. These issues suggest the risk associated with coal ash is less than estimated by the EPA risk assessment. EPA has never addressed the issues raised by the peer review. In briefs filed in court EPA has acknowledged these issues and has said that it wants to take more time with its coal ash rulemaking so that it can address them. In fact, in a December brief, EPA said that after considering the new information it has on coal ash facilities, the risks in its risk assessment could change by an order of magnitude. I anticipate the direction of that change will be down – showing a reduced risk.

Given the flaws in the risk assessment identified in a peer review, and EPA's admission that its risk assessment is wrong by an order of magnitude, if EPA tried to issue a final rule that regulated coal ash as a hazardous waste based on its record, that rule would be very vulnerable to a claim that the rule is arbitrary and capricious.