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Chairman Shimkus, Ranking Member Tonko, members of the subcommittee, thank you for the invitation to appear today to testify on "The Coal Ash Recycling and Oversight Act of 2013." My goal today is to provide an analysis of this draft legislation, based on my understanding of the Resource Conservation and Recovery Act (RCRA) and its implementation. I am currently a partner in the law firm of Barnes & Thornburg. From January 2006 to January 2009, I held the position of Assistant Administrator, EPA Office of Solid Waste and Emergency Response.

First I will provide a brief history of the status of coal ash under RCRA. Second, I will briefly discuss EPA's 2010 proposal to regulate coal ash under RCRA. Third, with that background, I will discuss the draft legislation.

EPA Review of Coal Ash Management and Risks

Under subtitle C of RCRA, EPA has the authority to regulate the management and disposal of hazardous wastes. Coal ash, when discarded, is a solid waste subject to Subtitle D of RCRA. This means that the disposal of coal ash is regulated by states and not the federal government. This division of authority is based on a determination by Congress that the protection of human health and the environment does not require federal control over wastes other than hazardous wastes, except to a limited extent to preclude open dumping.

Coal ash is not a hazardous waste. First, coal ash rarely if ever exhibits any of the hazardous characteristics used to identify hazardous wastes under EPA's subtitle C regulations.[1] Second, coal ash has not been individually listed by EPA as a hazardous waste.[2] Third, in 1980, Congress precluded EPA from listing coal ash (and other large volume, low toxicity wastes) as hazardous waste until it had conducted a study and made a report to Congress regarding the characteristics and management of these materials, to determine whether regulation under subtitle C was warranted. *See* RCRA section 3001(b)(3), 42 U.S.C. § 6921(b)(3) (Bevill Amendment). In regulatory determinations issued in 1993[3] and in 2000,[4] pursuant to the Bevill Amendment to RCRA, EPA has found that subtitle C regulation of coal ash is not warranted. In the 2000 regulatory determination EPA did say that federal regulation under subtitle D would be appropriate.

The 2000 regulatory determination that federal regulation under Subtitle D was warranted was based on a record developed by the Agency before 1995 and relied on industry practices between 1985 and 1995 and EPA's review of the eleven damage cases that EPA determined to be related

[1] *See* 40 C.F.R. § 261.11(a). The hazardous characteristics used to identify waste as hazardous are toxicity, corrosivity, ignitability, and reactivity.

[2] *See* 40 C.F.R. § 261.11(b), 261.31-261.33. In general, EPA has authority to list waste has hazardous if EPA determines that the waste is capable of posing a substantial present or potential hazard to human health or the environment based on 10 listing criteria found at 40 C.F.R. § 261.11(b)(3).

[3] In 1988, EPA completed a study and report to Congress that examined four "large-volume" types of coal combustion waste (fly ash, bottom ash, boiler slag, and flue gas emission control waste). Based on that study and report, in 1993 EPA published a regulatory determination that subtitle C regulation of those wastes is not warranted. 58 Fed. Reg. 42,466 (Aug. 9, 1993).

[4] In 1999, EPA completed a study and report to Congress that examined additional "low- volume" types of coal combustion waste, including their co-management with the four large volume types of coal combustion waste. Based on that study and report, EPA published another regulatory determination finding that these wastes also did not warrant subtitle C regulation. 65 Fed. Reg. 32,214 (May 22, 2000).

to coal ash management. While EPA had conducted an assessment of coal ash management risks, EPA did not rely that risk assessment in its regulatory determination. Too many issues had been raised about the validity of that risk assessment that EPA could not address because EPA was under a court ordered deadline to make the regulatory determination.[5]

Following the 2000 regulatory determination, EPA continued to evaluate coal ash by continuing work on the risk assessment, reviewing new alleged damage cases submitted by environmental groups,[6] developing a report in conjunction with the Department of Energy on more recent management practices, and working with the Department of the Interior to develop regulations under the Surface Mining Control and Reclamation Act to address coal ash used to fill surface or underground coal mines. EPA also reviewed a 2004 petition for rulemaking submitted by the Clean Air Task Force and the Hoosier Environmental Council and a Voluntary Action Plan submitted by the electric utility industry. In 2007, EPA made all of this information available for public review and comment in a Notice of Data Availability (NODA). 72 Fed. Reg. 49714 (Aug. 29, 2007).

In 2008, EPA sent its draft risk assessment to external peer reviewers. The reviewers raised significant concerns about the risk assessment. These concerns included the following: (1) the

[5] 72 Fed. Reg. 49714, 49717 (Aug. 29, 2007). *See also*, Technical Background Document for Supplemental Report To Congress on Remaining Fossil Fuel Combustion Wastes, Ground-Water Pathway, Human Health Risk Assessment, Revised Draft Final, June 1998, at 8-2 ("EPA found that modeling uncertainty and error may have led to substantial overestimation of risks."); and 8-4 ("As with the other waste types, EPA found that uncertainty and modeling error may have overestimated the risks associated with FBC wastes.").

[6] This review raised the total of proven damage cases from 11 to 24, of which 6 were related to disposal in sand and gravel pits. 72 Fed. Reg. at 49718-19. By the time it issued its June 2010 proposal to federally regulate coal ash under either subtitle C or subtitle D, EPA had identified 3 additional proven damage cases for a total of 27, 8 of which were damages related to surface water discharges, which are regulated under the Clean Water Act. 75 Fed. Reg. 35128, 35147 (June 21, 2010).

risk assessment assumed that 100% of the mass of any contaminants would leach out and none would remain insoluble and non-leachable, (2) the risk assessment assumed that the concentrations of those contaminants would remain constant throughout a 10,000 year modeling period and would not attenuate, (3) the modeling used in the risk assessment did not take into account that some groundwater plumes would reach surface water and would never reach receptors, and (4) EPA had no data on the existence of potential receptors and instead assumed the existence of drinking water wells based on data on wells in the proximity of solid waste landfills. In its September 1, 2009, draft response to Peer Review Comments on the CCW Risk Assessment, EPA acknowledges the issues but states that it can not address them due to limitations on available data and in the models used.

EPA's 2010 proposal to regulate coal ash under RCRA

In December 2008, a dike used to contain fly ash in the dewatering area of the TVA's Kingston Fossil Plant in Harriman, Tennessee released approximately 5.4 million cubic yards of fly ash sludge into the Emory River. Although this release was a Clean Water Act violation, EPA decided to initiate rulemaking to regulate coal ash under RCRA. EPA released its proposed regulation in June 2010. 75 Fed. Reg. 35128 (June 21, 2010). EPA proposed both a subtitle C and a subtitle D regulatory option. However, both options proposed essentially the same regulatory requirements, including removal and retrofitting or removal and closure of all surface impoundments managing coal ash.[7]

[7] An additional option, subtitle D "prime" would not require closure or retrofitting of existing unit.

EPA's 2010 proposed rule departs from prior RCRA rulemakings in three significant ways. First, under the subtitle C option, EPA is proposing to overturn a previous Bevill determination. EPA has never before taken such an action and some commentors have questioned whether EPA has the legal authority to do so. Second, EPA is proposing to apply the newly proposed management standards retroactively, to regulate disposal that has already occurred. Congress has never authorized and EPA has never attempted to apply hazardous or solid waste regulations retroactively. For example, in the 1984 Hazardous and Solid Waste Amendments, Congress imposed minimum technology requirements for hazardous waste management units, requiring double liners and leachate collection. However, units that closed before the effective date of the new requirements were not affected. Similarly, criteria for municipal landfills also requiring liners and leachate collection went into effect in 1993, but landfills that closed before that date did not have to meet the new requirements. EPA applies the same approach to newly listed hazardous wastes. If a waste is newly listed, hazardous waste management standards do not apply to the newly listed waste unless it is actively managed. Thus, EPA has never before sought to compel persons to dig up and remove wastes that have already been placed into management units.

The third significant departure from past practices is the quality of the risk assessment upon which EPA is relying. In the proposed rule, EPA admits that there are questions surrounding the risk assessment. 75 Fed. Reg. at 35133. EPA also states that it made revisions to its risk assessment based on the 2008 peer review. *Id.* at 35144. However, EPA did not make changes to the risk assessment to address the peer review comments. Instead, EPA changed the risk assessment to acknowledge the issues raised by peer reviewers and the resulting uncertainty.

Nonetheless, this risk assessment is the basis for EPA's proposal to regulate coal ash as a hazardous waste under subtitle C, or to set prescriptive standards for coal ash under subtitle D.

The defects in the risk assessment identified by peer reviewers may undermine the legal defensibility of EPA's proposed rulemaking. EPA is very cognizant of this, as is apparent from a brief filed by EPA in a case relating to its proposed rule that is pending in the District Court for the District of Columbia. In this brief, EPA argues that six months is not sufficient time to complete action on its coal ash rulemaking because EPA now has additional data on the location, size, and age of coal ash management units; the waste types in these units; and the liners present in these units; from work carried out by the Office of Water to develop new Clean Water Act effluent limitation guidelines for electric utilities and EPA wants to revise its risk assessment to incorporate that new data:

> Overall, the 2010 ICR data could allow EPA to model more precisely the risks associated with the range of practices currently used by steam electric generating unit facilities to manage and dispose of coal combustion residuals. Id. ¶ 30. For example, these data will allow EPA to model the extent to which plumes of contamination leaching from coal combustion residual disposal units into groundwater are intercepted (and reduced) by surface water bodies that exist between a landfill or surface impoundment and a down-gradient drinking water well. Id. This modeling in turn would allow EPA to better estimate the contaminant levels that people would be expected to receive in drinking water. Id. These data would also allow EPA to better model the likely environmental risks (e.g., to fish and other aquatic life) from such contaminants. Id.
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> EPA notes that one of the primary criticisms received in public comments by regulated industry was the absence of such an analysis. Id. ¶ 32. These commenters claimed that EPA, in its risk assessment underlying the rulemaking proposal, had overestimated the human health risks from the many surface impoundments that are located adjacent to large surface water bodies, because the risk assessment failed to model the extent to which plumes of contamination leaching from coal combustion residual disposal units into groundwater are intercepted (and reduced) by surface water bodies that exist between a landfill or surface impoundment and groundwater. Id. Consideration of the 2010 ICR data would allow EPA to respond to these comments. Id.

> The public has not yet had an opportunity, however, to comment on the 2010 ICR data or on the methodology EPA could use to conduct such analyses. *Id*. ¶ 34.[7] Taken together, the new data and analyses have the potential to significantly affect the risk assessment supporting the final rule. This final risk assessment, in turn, will drive many of the decisions with respect to the contents of any final regulations. *Id*. Given the importance of the final risk assessment, EPA believes the failure to provide an opportunity for additional public comment could jeopardize the legal defensibility of a final decision. *Id*. Thus, EPA needs sufficient time to make this new data available for public comment, and to assess the comments that will be received.

Appalachian Voices, et al. v. EPA, Civ. No. 1:12-cv-00523, Document 24-1 (D.D.C. Oct. 11, 2012), at 23-24.

States and the regulated community have opposed EPA's proposal to regulate coal ash as a hazardous waste under subtitle C of RCRA. On the other hand, environmental groups have opposed EPA's proposal to regulate coal ash under subtitle D of RCRA. Concern has also been raised that EPA's proposed subtitle D option does not take advantage of existing state regulatory programs. EPA itself has expressed the concern that "EPA lacks the authority to require state permits, approve state programs, and to enforce the criteria." 75 Fed. Reg. at 35194. Given the many concerns raised with EPA's proposal, any final rule is likely to be challenged in court.

"The Coal Ash Recycling and Oversight Act of 2013"

The Coal Ash Recycling and Oversight Act of 2013 addresses many of the issues identified with EPA's proposed rulemaking by giving EPA and states additional authority.

The Act would address industry and state concerns by regulating coal ash under subtitle D of RCRA and by providing for continued state regulation of coal ash. The Act would address EPA

and environmental group concerns by setting forth specific criteria for coal ash permit programs, giving EPA authority to review and approve state permitting programs, and to directly enforce a federal permitting program in states without an approved state program. Finally, by codifying the management standards directly in the statute, the Act relieves EPA of the responsibility to identify and quantify any risks associated with coal ash management, and to justify management measures to address those risks.

Some questions have been raised about how the Coal Ash Recycling and Oversight Act of 2013 would be implemented, including questions raised by the Congressional Research Service (CRS) in a March 19, 2013 analysis of legislation introduced in the 112th Congress. The draft legislation that is the subject of this hearing is essentially the same as S. 3512 from the 112th Congress so the CRS questions and responses to those questions remain relevant.

First, the CRS analyst questions the absence of a performance standard, such as "protection of human health and the environment" and notes that when authorizing regulatory programs under RCRA, Congress often establishes a performance standard and then leaves it up to EPA to decide, through regulation, what management practices will meet the performance standard.

In the case of coal ash, such a grant of general authority to EPA may not support EPA's ability to regulate coal ash at the federal level, contrary to the assumption of the CRS analyst. As noted above, EPA has been unable to develop a risk assessment that accurately reflects risks associated with the management of coal ash and therefore any regulations the Agency may issue to meet a protection of human health and the environment standard would be legally vulnerable. Instead, the legislation incorporates by reference management practices that EPA has already found to be

protective of human health and the environment, *i.e.*, standards applicable to municipal solid waste landfills under 40 C.F.R. Part 258. According to EPA:

> Based on the Agency's substantial experience with these requirements, EPA believes that the part 258 criteria represent a reasonable balance between ensuring the protection of human health and the environment from the risks of these wastes and the practical realities of facilities' ability to implement the criteria. 75 Fed. Reg. at 35193.[8]

The legislation also adopts criteria for landfills and surface impoundments that are based on criteria in EPA's June 2010 proposed subtitle D rulemaking.[9] By codifying Part 258 regulatory requirements and additional landfill and surface impoundment regulatory requirements directly in the statute, EPA is relieved of the responsibility of justifying the need for imposing these requirements through a risk assessment.

Second, while the CRS analyst concedes that the legislation gives EPA the authority to review state programs, the analyst raises the concern that the standard to be applied is whether the state program is "deficient" rather whether the state program is "adequate," a word that is used in section 4005 of RCRA. This concern appears to be based on the belief that Congress should not use words in statutes that it has not used before because old words have been interpreted by EPA while new words have not. EPA's ability to interpret statutory language is not limited by the draft legislation so it does not appear that EPA would be any less able to interpret the word "deficient" that it was able to interpret the word "adequate" when Congress first enacted section 4005 of RCRA. This question seems to imply that prior Congresses should be able to bind subsequent Congress to their word choices.

[8] In fact, EPA has already put its belief into practice by approving the disposal of coal ash recovered from the TVA Kingston spill in a subtitle D landfill. *See* Administrative Order and Agreement on Consent, In the Matter of TVA Kingston Fossil Fuel Plant Release Site, Roane County, Tennessee, (May 6, 2009), at ¶ 45.

[9] Congress has previously incorporated EPA regulations into a statute. In 1996, after EPA regulations defining the scope of Superfund liability for lenders were struck down by a court, Congress incorporated those regulatory provisions directly into the statute. P.L. 104-208 (Sept. 30, 1996).

Third, the CRS analyst questions the lack of an explicit direction to EPA to issue regulations that would codify the criteria set forth in the legislation. While EPA does have general rule-making authority in section 2002 of RCRA, given the specificity of the proposed statutory language setting forth criteria for state coal ash permit programs, it is unclear what would be added by the promulgation of federal regulations, other than a delay in implementation. The draft legislation does not compel EPA to go through what could be a meaningless regulatory exercise.[10]

Fourth, the CRS analyst creates a definition of what constitutes "backstop authority" (a word that does not appear in the legislation) and then claims that the legislation does not provide EPA with authority to backstop state programs. Under the definition created by the CRS analyst, federal backstop authority is federal authority to take enforcement actions even when a state has an authorized program. That definition of backstop is not universally accepted.[11] A different definition of "backstop," is EPA authority to take an action if a state fails to do so.[12] The draft legislation requires EPA to implement a coal ash disposal permit program if a state chooses not to or fails to develop a program that meets the criteria set forth in the legislation.

Fifth, the CRS analyst questions whether states will create different definitions of "landfill," "surface impoundment," or "land-based unit." All three of these terms exist in RCRA, without statutory definition. The terms "landfill" and "surface impoundment," and "land-based unit" are defined in

[10] As with the regulation of underground storage tanks in Indian County, EPA could decide to promulgate a federal permitting program to apply in areas not covered by state programs, should coal ash management structures exist in such areas.

[11] Courts are split on whether EPA retains authority to overfile under RCRA (*i.e*. file an enforcement action when a state with an approved program has already taken action). *Compare Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (holding that EPA may not overfile in RCRA 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 overfile in RCRA cases).

[12] *Scott v. City of Hammond***,** 741 F.2d 992, 996 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (interpreting the Clean Water Act to give EPA the authority to take an action – here the establishment of a TMDL – where the state has failed to do so).

EPA's subtitle C regulations. 40 C.F.R. 260.10. While these definitions do not apply to subtitle D, it seems unlikely that states will have trouble interpreting these terms under new section 4011 of RCRA.

In general, the CRS analysis seems to believe that because the draft legislation is not identical to the existing statutory authority to regulate municipal solid waste landfills those differences will result in uncertainty. The basis for this concern or how the differences would somehow prevent the legislation from achieving its goals is not explained.

Many of the questions raised in the CRS analysis are inherent in any authorization of new statutory authority. However, the existence of some flexibility for both EPA and states to interpret statutory language does not mean that the legislation will not achieve its purposes. In fact, given the detailed criteria for coal ash management permit programs that are specified in the draft legislation, there is less uncertainty with how this legislation will be implemented than many other environmental laws, which defer to EPA to create a regulatory program.