Testimony

Subcommittee on Environment and the Economy

Committee on Energy and Commerce

Thursday, April 11, 2013

by

Robert J. Martineau, Jr. Commissioner

Tennessee Department of Environment and Conservation

and

Secretary-Treasurer, Environmental Council of the States

Main Points

1. The states have collectively taken a position outlining how to address coal combustion residuals through an ECOS resolution.
2. ECOS supports congressional legislation that comports with the provisions of our resolution.
3. The CRS report re-released in March 2013 contains several criticisms of the legislative report which I address from a state agency leader point of view.

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Thank you for inviting me here today to talk about state regulation of coal ash and coal combustion by-products. I am representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies, and my own state. I am the current Secretary-Treasurer of ECOS.

The incident that occurred in Tennessee in 2008 made coal ash management an issue of national concern. I am here today to talk about the position that the states have collectively chosen to best manage coal ash. ECOS has adopted this position as a formal resolution entitled, "The Regulation of Coal Combustion Residuals" (CCR), which I ask to be made part of the record. ECOS first passed this resolution in 2008, and reaffirmed it last month.

In short, the resolution agrees with the multiple studies that the U.S. Environmental Protection Agency has conducted in fewer than three different administrations that coal ash is not a hazardous material. We also agree with EPA's 2005 finding that the states should continue to be the principal regulatory authority for coal ash. We recognize that there are significant

beneficial reuses for coal ash, and we support these. Regulation of coal ash as a hazardous waste would have a chilling effect on the beneficial reuse of coal ash in concrete, as road bed fill and other uses.

While we believe the states are the appropriate regulatory authority for coal ash, we also recognize there is benefit for some level of national consistency; therefore, ECOS supported the bi-partisan efforts in the House and Senate in the last Congress to create a federal program that allows states to regulate coal ash management and disposal under a set of federal standards created directly by Congress and implemented by the states. This is a new approach as some have noted, including the Congressional Research Service in its recent rewrite of an earlier report on this topic. We expect to support a similar effort in this Congress.

ECOS sees the approach in this bill as a new path forward for federal involvement in some of the environmental challenges we face. We live in an era of constrained resources at all levels of government: federal, state and local. Some national environmental challenges, air quality as an example, require significant partnerships between the states and the federal government. Other challenges, like coal ash, are suitable and would benefit from a new partnership model.

The bi-partisan bill brought forward by Rep. McKinley is a blueprint for that partnership. In this bill, the federal government sets standards that protect human health and the environment, and provides the states the opportunity to implement, enforce, and supplement the standards that are the most applicable for each state. If a state chooses not to implement the CCR program, then EPA will. There is no financial assistance from the federal government to the states. However, the states can ask for technical and enforcement assistance from EPA should they need it. In turn, EPA is required to evaluate the states' success in implementing the standards in this law. If

necessary, EPA can assume control of any state program that is unsuccessful in implementing the standards. This serves as the "backstop" protection for the public.

Because the bill does not require EPA to promulgate rules, but creates the standards directly in the legislation, there are fewer delays in the program start-up, and there is an additional savings to the federal government.

I would like to address some of the criticisms by some of the approach taken in the CCR legislation from a state point-of-view. First, we acknowledge that constructive criticism is helpful in shaping the solution to our approach for CCR management and disposal. The March 19, 2013 CRS report is the most detailed review, so I will address some of the concerns expressed in it.

First, the March CRS report noted that last year's bill lacked a timetable for implementation and other deadlines. States recognize the value of a well defined schedule for implementation of environmental regulatory programs. States commonly include implementation schedules in regulations and Compliance Orders as part of operating an effective regulatory program. So, we would support changes to the bill that beef up the CCR Management and Disposal with a reasonable implementation schedule for states and the regulated community. A timetable allows time for the states to pass new legislation, if needed, to acquire sources of funding, and to promulgate "state" rules. Some states may have coal ash programs already in place that have addressed all, or most, of the requirements, and therefore may be able to start implementation of this act relatively quickly. This is a new approach for our times, and one that we believe will serve the public well.

The CRS report also implied that the lack of direct EPA enforcement authority would make it less likely for the states to implement a program. That is not the case for Tennessee, nor do I suspect it will be the case for any of my colleagues in other states. The bill allows states to request EPA's assistance when needed, which meets our needs.

Another criticism is that standards can only be set by the promulgation of rules. We believe Congress can create regulatory standards for CCR management and disposal that are protective of human health and the environment. If states need additional regulations, the proposed federal statute allows each state to promulgate the necessary rules, as allowed by all other federal environmental programs; provided the regulations are as stringent as the federal statute or rule. The standards created in this statute provide a uniform national platform for CCR management and regulation, which states can modify to meet their individual needs. Every state is required to meet the standards in the act and these standards provide a strong foundation for CCR management and disposal. Our experience tells us that when states recognize special circumstances particular to their state that require additional regulation the individual state legislature or the Governor will direct their responsible state environmental agency to make the appropriate changes.

Fourth, the CRS report seems skeptical that EPA will be able to judge the states' performance on the coal ash programs created in this bill. EPA has been judging state air, water, and waste programs for over 40 years. ECOS continues to interact with EPA on these matters on a regular basis. The key is not to judge a state program by whether or not it operates a regulatory program as EPA would, but whether the state regulatory program effectively meets the CCR standards set by federal statute using the regulations the state has promulgated. A state must certify in detail to EPA that it has equivalent statutory and regulatory authority to operate its

CCR Management and Disposal – including permitting, inspections, monitoring, review of site data, and enforcement. If a state falters, EPA can warn it. If a state fails, then EPA can take the program. This is the same authority that EPA has in all other delegated state environmental programs.

I will close with a quotation from the CRS report that I think is accurate and appropriate:

> That a RCRA program has never been authorized or established by Congress using such n approach does not mean that this new approach would not meet a particular objective." (March 2013 CRS report at 7.). The report goes on to say: "That it [a coal ash regulatory program] would be created using a new approach does not mean that it cannot achieve its intended purpose. …The bills would establish a framework that states could use to create programs to regulate CCR disposal, allow states flexibility to develop and implement the [CCR Management and Disposal] program, and specify some level of EPA oversight after states are implementing the program. Such a program would be comparable to existing state programs to implement and enforce standards necessary to ensure facility compliance with the RCRA open dumping prohibition." (CRS Report at 14.)

Appendix

Resolution Number 08-14

Approved September 22, 2008

Branson, Missouri

Revised March 23, 2010

Sausalito, California

Revised March 5, 2013

Scottsdale, Arizona

As certified by

R. Steven Brown

Executive Director

THE REGULATION OF COAL COMBUSTION RESIDUALS

WHEREAS, the 1980 Bevill Amendment to the Resource Conservation and Recovery Act (RCRA) requires the U.S. Environmental Protection Agency (U.S. EPA) to "conduct a detailed and comprehensive study and submit a report" to U.S. Congress on the "adverse effects on human health and the environment, if any, of the disposal and utilization" of fly ash, bottom ash, slag, flue gas emission control wastes, and other byproducts from the combustion of coal and other fossil fuels and "to consider actions of state and other federal agencies with a view to avoiding duplication of effort;" and

WHEREAS, U.S. EPA conducted the comprehensive study required by the Bevill Amendment and reported its findings to U.S. Congress on March 8, 1988 and on March 31, 1999, and in both reports recommended that coal combustion residuals (CCR) not be regulated as hazardous waste under RCRA Subtitle C; and

WHEREAS, on August 9, 1993, U.S. EPA published a regulatory determination that regulation of the four large volume coal combustion wastes (fly ash, bottom ash, boiler slag, and flue gas emission control waste) as hazardous waste under RCRA Subtitle C is "unwarranted;" and

WHEREAS, on May 22, 2000, U.S. EPA published a final regulatory determination that fossil fuel combustion wastes, including coal combustion wastes, "do not warrant regulation [as hazardous waste] under Subtitle C of RCRA," and that "the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes;" and

WHEREAS, U.S. EPA is under no statutory obligation to promulgate federal regulations applicable to CCR disposal following the regulatory determination that hazardous waste regulation of CCR disposal is not warranted, and throughout the entire Bevill regulatory process, CCR disposal has remained a state regulatory responsibility and the states have developed and implemented regulatory programs tailored to the wide-ranging circumstances of CCR management throughout the country; and

WHEREAS, in 2005, U.S. EPA and the U.S. Department of Energy published a study of CCR disposal facilities constructed or expanded since 1994 and evolving state regulatory programs that found: state CCR regulatory requirements have become more stringent in recent years, the vast majority of new and expanded CCR disposal facilities have state-of-the-art environmental controls, and deviations from state regulatory requirements were being granted only on the basis of sound technical criteria; and

WHEREAS, in June 2010, U.S. EPA issued proposed rules for the management of CCR under both RCRA Subtitle C (hazardous waste) and RCRA Subtitle D (solid waste) laws, and these proposed rules have yet to be finalized; and

WHEREAS, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) conducted surveys of states in 2009 and 2010, which indicated that of the 42 states that responded which have disposal of CCR, 36 of those states have permitting programs for disposal activity, with 94% of those requiring groundwater monitoring. In addition, all 42 states have the authority to require remediation, should it be necessary, and the majority of these state regulations are under general solid waste and general industrial waste regulations; and

WHEREAS, the states have demonstrated a continued commitment to ensuring proper management of CCR and several states have announced proposals for revising and upgrading their state CCR regulatory programs; and

WHEREAS, some states and utilities have cooperatively demonstrated numerous beneficial uses of CCR, such as additives in cement, soil amendments, geotechnical fill, and use in drywall.

NOW, THEREFORE BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Agrees with U.S. EPA's repeated assessments in 1988, 1993, 1999, 2000, and 2005 that CCR disposal does not warrant regulation as hazardous wastes under RCRA Subtitle C;

Agrees with U.S. EPA's finding in the 2005 study previously cited that "the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes" and believes that states should continue to be the principal regulatory authority for regulating CCR as they are best suited to develop and implement CCR regulatory programs tailored to specific climate and geological conditions designed to protect human health and the environment;

Supports safe, beneficial reuse of CCR, including for geotechnical and civil engineering purposes;

Believes that the adoption and implementation of a federal CCR regulatory program would create an additional level of oversight that is not warranted, duplicate existing state regulatory programs, and require additional resources to revise or amend existing state programs to conform to new federal regulatory programs and to seek U.S. EPA program approval;

Believes that if U.S. EPA promulgates a federal regulatory program for state CCR waste management programs, the regulations must be developed under RCRA Subtitle D rather than RCRA Subtitle C;

Believes that designating CCR a hazardous waste under RCRA Subtitle C could create stigma and liability concerns that could impact the beneficial use of CCR; and

Therefore calls upon U.S. EPA to conclude that additional federal CCR regulations would be duplicative of most state programs, are unnecessary, and should not be adopted, but if adopted must be developed under RCRA Subtitle D rather than RCRA Subtitle C, and in addition, urges U.S. EPA to make a timely decision, and calls upon U.S. EPA to begin a collaborative dialogue with the states to develop and promote a national framework for beneficial use of CCR including use principles and guidelines, and to accelerate the development of markets for this material.