Testimony
"EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
Thursday, January 22, 2015
by
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and
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Main Points

1. States support the U.S. Environmental Protection Agency's (EPA's) regulation of coal combustion residuals (CCR) as non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA).

2. States support the final rule's recognition that states are in the best position to regulate CCR units. However, because EPA is unable under RCRA Subtitle D to delegate the CCR program directly to the states in lieu of the federal program, we believe the final rule poses both implementation and enforcement problems for states.

3. Provisions of the final rule would be enhanced, clarified, and made more permanent through federal legislation. The Environmental Council of the States (ECOS) previously testified in support of CCR legislation.

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee -

Representative Bucshon of Indiana - good morning. My name is Thomas Easterly, and I am

Commissioner of the Indiana Department of Environmental Management, also known as IDEM. I bring you greetings from Governor Pence of Indiana, and appreciate the opportunity to share Indiana's views on EPA's final coal combustion residuals (CCR) rule. I am also representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies. I am the Region 5 Representative to ECOS' Executive Committee. ECOS has worked on the CCR issue for many years. ECOS' resolution on CCR regulation was first passed in 2008 and reaffirmed in 2013. EPA's final rule responds to some of the concerns outlined in ECOS' resolution. However, as I will discuss today, other long time state concerns remain unaddressed.

Coal Ash is Non-Hazardous. As an initial point, I express agreement with EPA's finding that coal ash is not a hazardous waste, and that coal ash can be safely and beneficially reused. The final rule's promulgation of regulations under RCRA Subtitle D, rather than RCRA Subtitle C, is consistent with multiple studies of coal ash conducted under different Administrations. EPA's determination to regulate coal ash as a solid waste ensures that important coal ash reuses will continue, such as in concrete, road bed fill, wallboard, and other uses. EPA's use of RCRA Subtitle D for coal ash is consistent with ECOS' resolution.

Advancing Structural Integrity and Reducing Environmental Risks. As a long time regulator, I have observed firsthand the tragic adverse environmental and human impacts of CCR surface impoundment failures. These engineering failures devastate people's lives, destroy property, and contaminate natural resources in often irreparable ways. Subsequent inspection and enforcement often reveal that the impoundment failure could have been prevented with more robust investigation and higher standards and requirements. EPA's self-implementing final rule outlines robust national structural integrity provisions, as well as hazard and safety assessment

requirements. As facilities carry out the final rule's requirements, combined with the oversight, support, and input of states, the federal government, and citizens, our nation should experience a meaningful reduction in CCR impoundment failures in the future.

The final rule creates a comprehensive and consistent national set of requirements, many of which are already in place in various states, to protect groundwater, ensure the structural stability of surface impoundments, advance groundwater monitoring and corrective action programs, prevent inappropriate unit siting, and ensure proper liners for CCR disposal units. The final rule also focuses on reducing the environmental impacts of the day-to-day operations of CCR units by establishing air criteria, erosion controls, leachate management, and run-off and run-on requirements. New documentation requirements for CCR owners and operators will provide additional sources of information about these units to states and the public and will enhance transparency. Units unable to meet the new technical criteria, unlined units contaminating groundwater, or units unable to meet minimum structural integrity and safety requirements will have to close.

Key Role of States in CCR Oversight and Enforcement. Most important to IDEM and other states is that EPA's final rule explicitly recognizes the major role state regulatory agencies currently have, and will continue to maintain, in overseeing CCR. EPA's final rule Fact Sheet states:

- "EPA recognizes that some states have already adopted requirements that go beyond the minimum federal requirements."
- "The final regulations require owners or operators of regulated CCR units to notify the state of actions taken to comply with the requirements of this rule."
- And, "EPA will work closely with states on implementation issues."

However, the reality of how the rule will be implemented yields a very different outcome. By finalizing a self-implementing rule that can only be enforced through the citizen suit provisions of RCRA, ECOS is concerned citizen suits will become the primary enforcement vehicle for CCRs under the final rule. As a result, the role of state regulation, oversight, and enforcement will be significantly marginalized.

EPA envisions that the key state role in this program will be maintained by states amending their Solid Waste Management Plans (SWMPs) through a public process to incorporate the new federal requirements. The amended plans will provide an easily accessible roadmap to how CCRs will be regulated in a state. I expect the amended plans to be robust, as it would make no sense for states to go through the time consuming and resource intensive process of amending their plans to be less stringent than the federal requirements, particularly given that many states have preexisting more stringent requirements. EPA expects that once approved by EPA, the amended plans will receive deference by courts and citizens. While the requirements of the rule are self-implementing for the regulated units, the rule's schedules would require states to achieve final SWMP amendment on an aggressive schedule which cannot be met by many states - including Indiana. In order to ensure transparency, Indiana's laws require my agency - IDEM - to have four public notices with associated comment periods for a new regulatory action. This public process normally takes at least eighteen months, yet some of the self-implementing deadlines in this regulation are as short as six months - making it impossible for Indiana to have regulations in place to implement those portions of the rule.

And here is where a prime concern remains. After the state plan is amended and approved by EPA, no matter how diligent the state's subsequent oversight and enforcement may be, the new CCR rules will remain independently enforceable through RCRA citizen suits in

federal district courts. EPA does not have the legal authority under RCRA Subtitle D to delegate the new rules to the states, as acknowledged in the Agency's fact sheet - "EPA has no formal role in implementation of the rule. EPA does not issue permits, nor can EPA enforce the requirements of the rule."

The Potential Role of Federal Legislation. I would like to address the role of legislative amendment of RCRA on CCR issues, now that the final rule is out and states have had time to reflect on implementation and on the relationship between the new federal rules and existing state CCR rules. ECOS testified before this Committee in April 2013 in support of the bi-partisan efforts in the House and Senate 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. Legislation still could be beneficial in several ways to achieving this goal.

First, legislation could codify EPA's determination that coal ash is non-hazardous, as opposed to it being reviewed every three years under current law. This would stabilize beneficial reuse markets across the nation by removing the possibility of coal ash being regulated as hazardous waste at some future point.

Second, state programs cannot operate in place of the federal program without legislation. EPA's Questions and Answers (Q & As) on the final rule acknowledge the current statutory limitation, stating "EPA approval of a SWMP revision does not mean that the State program operates "in lieu of" the federal program, as EPA has no authority under the statute to make such a determination." Legislation can set forth the elements of a federal CCR management program and provide clear statutory authority for EPA to delegate the criteria to states to adopt, implement, and enforce. This clarity would be valuable in the era of constrained resources in

which we operate at all levels of government, as well as would reduce the risk of citizen suits for regulated unit owners and operators or of challenges to EPA's approval of state plans.

Third, legislation can add certainty to the process of EPA approving state SWMPs by making clear the criteria EPA would apply to determine whether a state program meets the federal CCR standards. Legislation could provide a route for EPA oversight of delegated programs to ensure their effectiveness and quality, and for EPA to take the program back if a state cannot come into alignment - placing the CCR program on par with other delegated environmental programs.

Fourth, legislation could enhance and clarify enforcement of CCR requirements. EPA's Q & As state that currently "enforcement of these requirements will be by citizen suits (or by States acting as citizens). States may also incorporate the federal requirements into state law – whether through revisions to existing legislation or regulation, or through incorporating them into any permits issued to CCR facilities – and where they do so, such laws or requirements are enforced by the state." Once the provisions are adopted as regulations by the various states, they can be directly enforced by the states using existing processes that include both injunctive relief and the imposition of civil and criminal penalties. As a regulator I am fully conscious of, and I appreciate, the role of citizens in advancing environmental program – sometimes through litigation. However, I am concerned that a new federal regulatory program that from the outset will rely on citizen suits for enforcement will be costly, consume limited judicial resources, waste state resources, and reduce certainty. A more effective and fair approach would be through state inspection and enforcement of a delegated federal program. Citizens would still retain the right to bring suit in the absence of effective state action, to seek EPA withdrawal of a state program, and to pursue other approaches.

Conclusion. Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee, I thank you for the opportunity to present my views, and those of ECOS, to you today. I am happy to answer any questions.

Appendix

ECOS

Resolution Number 08-14
Approved September 22, 2008
Branson, Missouri
Revised March 23, 2010
Sausalito, California
Revised March 5, 2013
Scottsdale, Arizona

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.