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## **Hearing**

### **“EPA’s 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities”**

**U.S. House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Environment and the Economy  
January 22, 2015**

**Testimony of  
Michael G. Forbeck, P.E., President  
On behalf of the  
Association of State and Territorial Solid Waste Management Officials**

#### **Main Points:**

- ASTSWMO is in full agreement with the final EPA rule being promulgated under RCRA Subtitle D.
- ASTSWMO has concerns with State solid waste management plans as the mechanism for dealing with the issue of dual State and federal regulatory authority.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an association representing the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State program experts with individual responsibility for the regulation and management of solid and hazardous wastes.

ASTSWMO appreciates the opportunity to provide testimony on the final coal combustion residuals (CCR) rule promulgated by the U.S. Environmental Protection Agency (EPA) on December 19, 2014. The rulemaking has been of longstanding importance to the Association. We are pleased that EPA promulgated the final rule under Subtitle D of the Resource Conservation and Recovery Act (RCRA). The Subtitle D regulatory option is one that ASTSWMO has advocated since the inception of the rulemaking, in comments to EPA and in testimony before this Subcommittee in April 2011. States have been implementing and enforcing requirements for the management of CCRs under non-hazardous waste regulatory programs in the absence of federal regulations. The Subtitle D approach taken in the final federal rule supports the approach of State programs.

The focus of ASTSWMO's testimony is on State implementation issues stemming from the self-implementing construct of the final rule. Groups within the Association are looking at other technical requirements and beneficial use components and will have additional input in the near future.

As EPA explains in the preamble, due to its existing statutory authority under RCRA to establish federal minimum criteria for coal combustion residuals, EPA has issued the rule under 40 CFR Part 257, which is self-implementing. By self-implementing, owners/operators of

facilities can comply with the federal minimum criteria “without the need to interact with a regulatory authority”, as EPA notes in the preamble.<sup>1</sup> In this way, EPA’s authority under Part 257 is unlike the RCRA statutory basis for the 40 CFR Part 258 Criteria governing municipal solid waste landfills, which includes a requirement for States to develop and implement a permit program to incorporate the federal criteria, and for EPA to determine whether those permit programs are adequate to ensure compliance with the criteria. EPA can enforce the federal criteria in States where EPA has determined the State permit program to be inadequate. As EPA indicates in the preamble to the final CCR rule, the regulatory structure that is established through the statutory authority for State permit programs for the Part 258 Criteria, while less detailed than State authorization for RCRA Subtitle C, “is equally predicated on mandated implementation by a State regulatory authority of the federal requirements, rather than the potential coexistence of two separate regulatory systems.”<sup>2</sup>

In ASTSWMO’s comments to EPA regarding the Part 257 Subtitle D option proposed in 2010, we indicated our understanding that an owner or operator of a CCR disposal facility will need to fully comply with both the self-implementing national minimum CCR disposal standards and existing State requirements, even if State requirements meet or exceed the self-implementing national minimums. We pointed out that absent some type of EPA recognition of State programs that adopt the federal standards, owners/operators will be confronted with a dual State and federal regulatory regime that would be problematic for the effective implementation of requirements for CCR facilities.

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<sup>1</sup> Pre-publication copy of the EPA 2014 Final Rule, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, page 29.

<sup>2</sup> Ibid, page 106.

ASTSWMO further recommended that, if the final Subtitle D approach is promulgated under the Part 257 Criteria as proposed, EPA should establish a mechanism by which the agency acknowledges that a State permit program that meets or exceeds the federal minimum CCR standards has primary authority to directly administer the federal Subtitle D rule. We encouraged EPA to include in such a final Subtitle D rule explicit rule language that EPA views compliance with a State program that meets or exceeds the federal minimum criteria as compliance with the federal criteria, and that the self-implementing federal criteria would only apply in the absence of such a State CCR program.

We appreciate EPA's efforts, working within the confines of Part 257, to provide a mechanism through the State solid waste management plans (SWMP) to address our concerns about dual regulatory authority. However, we see difficulties with the State plan mechanism, which are:

- **Timing.** In order for States to adopt these minimum standards by amending their solid waste management plans, thereby avoiding dual regulatory authority in theory, the process would have to be completed within six months of the date of publication of the final rule in the Federal Register. This is an insufficient amount of time. There is a potential lengthy public participation process involved in the submission of State plans under 40 CFR Part 256 that means that the plans would not only have to be amended to incorporate the federal criteria, but that public notice procedures for a public hearing would need to be implemented and the public hearing held. It would be difficult to accomplish all of these steps within a six-month timeframe even if all

went smoothly, so there would still be dual State and federal implementation for a time past six months.

- SWMPs fall short on full State implementation because even after passage and approval of the plans, as stated in the preamble of the rule, “EPA approval of a State SWMP does not mean that the state program operates ‘in lieu of’ the federal program as EPA does not have the authority to make such a determination.”<sup>3</sup> Thus, the plans would not fully alleviate dual implementation of State and federal standards.
- In the preamble, EPA states that a facility that operates in accord with an approved SWMP will be able to beneficially use that fact in a citizen suit brought to enforce the federal criteria<sup>4</sup>. This is subjective and speculative as no one with absolute certainty can predict a court decision. Further, citizen suits filed in different jurisdictions could result in individual courts interpreting the plan and rule differently, thus rendering different decisions that lead to inconsistent implementation of the rule.
- There is also a concern that more sections of a SWMP than the narrow reopening of the plan to incorporate the CCR rule may be reviewed by EPA and potentially require additional revisions to State plans that may be beyond the scope of CCR.

ASTSWMO believes that legislation such as H.R. 2218 that was passed by the House in the last Congress would provide for the certainty of State primacy in implementation through State permit programs for CCR enforceable by the State. State permit programs for CCR would

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<sup>3</sup> Ibid, page 470.

<sup>4</sup> Ibid, page 470.

have the additional benefit of allowing flexibility for States to have regionally appropriate State standards, in the same way that EPA-approved State municipal solid waste (MSW) landfill permit programs are able to implement alternative site-specific designs, since the State CCR permit program would take the place of the self-implementing federal standards. It is unclear whether EPA is providing this flexibility by allowing for the incorporation into State SWMPs of “alternative requirements that are at least as protective of public health and the environment” instead of the direct incorporation and implementation of the federal minimum criteria.<sup>5</sup>

In conclusion, we appreciate EPA’s decision to regulate CCRs under Subtitle D, and providing a mechanism within the confines of 40 CFR Part 257 for implementation of the rule by the States. However, revision of the SWMP does not fully eliminate dual implementation of CCR regulatory programs. Legislation would provide for the certainty of State primacy in implementation through State permit programs for CCR enforceable by the State, and provide a clearer and consistent understanding of the permitting and enforcement roles of the States. ASTSWMO looks forward to working closely with EPA regarding implementation of any CCR rule.

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<sup>5</sup> Ibid, page 471.