



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

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by

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and

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Main Points

1. The draft bill promotes the beneficial reuse of coal combustion residuals (CCR) as non-hazardous waste, consistent with ECOS’ longstanding resolution on this subject.
2. The draft bill amends Subtitle D of the Resource Conservation and Recovery Act (RCRA) to allow states to regulate coal ash management and disposal under a set of federal standards created directly by Congress and implemented by the states. This recognizes that states are in the best position to regulate CCR units, but also properly empowers the Environmental Protection Agency (EPA) to serve as a backstop and run programs for states in certain circumstances.
3. The draft bill includes important provisions for multi-state coordination, provides reasonable timeframes for state program amendment to include new requirements, and closes enforcement gaps left by EPA’s final rule while clearly preserving citizen suits.

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, good morning. My name is David Paylor, and I am Director of the Virginia Department of Environmental Quality. I appreciate the opportunity to share with you Virginia's views on the draft bill. 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 a Past President of ECOS and serve as President of ECOS' research division, the Environmental Research Institute of the States.

ECOS' CCR History. Many state regulators like me have first-hand experience with the devastating results of CCR impoundment engineering failures. Breaches and releases devastate people's lives, destroy property, and contaminate natural resources in often irreparable ways.

For this reason, ECOS has worked on the CCR issue for many years. ECOS' resolution on CCR regulation was first passed in 2008 and reaffirmed in 2013. ECOS testified in April 2013 before the Subcommittee on Environment and the Economy in support legislation to amend RCRA to create a defensible and strong CCR program that could be run by states. After EPA signed a final CCR rule in December 2014, ECOS testified before this Subcommittee in January, supporting the final rule's technical requirements but stating that legislation to amend RCRA was still needed to address limitations and weaknesses in the final rule that are result from the statute's current structure. These limitations were that:

- the final rule creates a dual federal and state regulatory system that will be confusing and resource intensive, because EPA is unable under RCRA Subtitle D to delegate the CCR program directly to the states in lieu of the federal program;

- the final rule's schedules would require states to achieve final Solid Waste Management Plan (SWMP) amendment on an aggressive schedule which could not be met by many states; furthermore, it is unlikely that EPA has the resources to conduct a timely review and approval of state plans; and
- the final rule's self-implementing approach would make RCRA citizen suits the primary enforcement vehicle for CCRs under the final rule, marginalizing the role of state regulation, oversight, and enforcement; thus creating uncertainty for the regulated community and state regulators with respect to how compliance and enforcement activities will be managed.

ECOS has reviewed the draft bill, and find that it positively addresses the concerns identified by ECOS in our January testimony. The draft bill leverages and codifies the extensive technical work in EPA's final rule, which will enhance impoundment structural integrity provisions, promote transparency, and close environmentally degrading facilities.

State CCR Programs. The draft bill provides that states may adopt, implement, and enforce CCR programs, and provides that Governors shall notify EPA of the state's intentions to do so within six months of the bill's enactment. The draft bill would give state environmental agencies like mine 24 months to certify to EPA that our CCR program meets the bill's requirements, with a 12 month extension if needed. This would provide most states with existing CCR programs ample time to pursue the necessary state legislative and rulemaking processes to conform our programs to the new requirements. In Virginia, for example, our regulatory process can take up to 2 – 3 years, thus it is important to build in flexible certification deadlines. This is especially true in Virginia, as may be the case in other states, because there are dual authorities and agencies responsible for the operation of surface impoundments. Dam

safety requirements fall under the authority of Virginia's Department of Conservation and Recreation. Therefore Virginia would likely have two concurrent regulatory actions proceeding to enact the new requirements.

The draft bill provides that in their requests for certification to EPA, states would describe their programs for inspection, enforcement, public participation, groundwater monitoring, stability assessment, emergency plans, dust control, closure notifications, and corrective action. The state would also have to describe any definitional differences, demonstrate sufficient statutes and regulations are in place, and maintain appropriate approved RCRA hazardous waste programs.

The draft bill importantly provides that state program can be more stringent or broader in scope, which is important. For example, Virginia already has the authority under the Waste Management Act to require a solid waste permit for the operation of a coal ash management facility, including activities related to post closure and corrective action.

Preapproval of Existing State CCR Programs. The draft bill contains an important provision that allows states that already have an existing program to begin using it right away. This is important because many states already have existing programs, and EPA modeled its final rule on the best of those programs. A recent survey of states by the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) indicated that 36 states, including Virginia, have permitting programs for disposal activities with 94% of those requiring groundwater monitoring.

Impacts Beyond State Lines. The draft bill contains an important requirement for states to submit as part of their certifications a plan for coordination among states in the event of a release that crosses state lines. This type of upfront planning is relevant – and would be helpful

in Virginia particularly – where the recent Dan River release in North Carolina impacted nearly 50 miles of Virginia waterways.

Federal Backstop. The draft bill provides that EPA will operate the CCR program for a state that cannot demonstrate a sufficient program or for a state that chooses not to run such a program itself – as well as a process for a state to assume these functions after remedying a deficient program or choosing to begin a program. These provisions should give assurances to the public that states and the federal EPA are both empowered to act

Industry Requirements. The draft bill includes robust requirements for the industry permit applications, provides for public information availability, and state access to facilities. The bill incorporates the new robust technical, siting, financial assurance, run-on and run-off controls, recordkeeping, and structural integrity requirements published by EPA in the final CCR rule, which will be codified at 40 CFR Part 257. EPA did a very good job developing the technical requirements of the final CCR rule, modeling many of the final requirements on existing effective and stringent state programs. At the same time, we value the flexibility the draft bill adds that will allow states to identify alternative points of compliance for monitoring, alternative groundwater protection standards, remediation flexibility, and to allow unlined impoundments to operate for a period of time providing there are no groundwater threats and the structural integrity of impoundment berms is maintained.

We recognize that the final EPA regulations were “self-implementing,” meaning that industry would be expected to move ahead with implementation regardless of any state or federal agency action. The only way the self-implementing rule would be enforced would be through citizen suits, state action, or federal action. The draft bill sets out a three to four year process for compliance by the facilities. While this may seem like unnecessary delay, it recognizes

implementation realities and still allows action in any emergency situations and provides a process for expedited facility closure where necessary.

Coal Ash is Non-Hazardous. The legislation supports beneficial uses of coal ash, such as in concrete, road bed fill, wallboard, and other uses. Beneficial reuse of coal ash is consistent with ECOS' longstanding resolution, appended to my testimony.

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.