Testimony
"EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"
Senate Environment and Public Works Committee
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by
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Main Points

1. The Environmental Council of the States supports the U.S. Environmental Protection Agency's (EPA's) scientifically based determination that coal combustion residuals (CCR) should be regulated as non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA).

2. States have concerns with the complexities of the self-implementing program finalized in EPA's final rule for CCR facilities under Subtitle D Part 257 of RCRA.

3. The development and passage of federal legislation to amend RCRA will allow states and EPA to more successfully and effectively regulate and respond to the environmental impacts of CCR facilities.

Chairman Inhofe, Ranking Member Boxer, and Members of the Committee,

good morning. My name is Alexandra Dapolito Dunn, and I am the Executive Director and General Counsel of the Environmental Council of the States (ECOS). ECOS is the national non-

profit, non-partisan association of U.S. state and territorial environmental commissioners. I appreciate the opportunity to be here with you today to discuss state views on the final coal combustion residuals (CCR) rule and the clarity federal legislation in this arena could provide.

States are familiar with the devastating environmental, property, and human health impacts that coal impoundment releases can cause. In recent years several states have had to respond to and remediate such incidents. In the absence of a comprehensive federal rule, many states have developed sophisticated permitting programs for CCR facilities and these states have shared best practices with one another regarding the regulation of these facilities.

The extensive dialogue around CCR management and surface impoundments means that I bring you a uniquely aligned, common, and longstanding state position on these topics. In 2008, ECOS passed and in 2013 renewed and amended a comprehensive resolution, on this subject. The resolution, attached, in principal documents that:

- coal combustion residuals should be regulated under RCRA Subtitle D as non-hazardous waste so that they can continue to be beneficially reused;
- states have effective programs for managing these residuals; and that
- a federal regulatory program could prove to be duplicative of existing state requirements and as such, close collaboration with states is important.

EPA's final rule, signed on December 19, 2014 and published April 17, 2015, will become effective on October 14, 2015. States and the regulated sources are already taking steps to implement the rule and to prepare for its impacts. The impending implementation of the federal rule has highlighted some of the rule's limitations, which are a direct result of RCRA's

structure. As discussed below, Congress has a clear opportunity to improve the implementation of this new program through narrow changes to the existing RCRA statute.

Support of Coal Ash as Non-Hazardous. First, ECOS supports EPA's categorization in the final rule of coal ash as non-hazardous waste under RCRA Subtitle D. ECOS is joined in this support by many other organizations, including the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). EPA's non-hazardous categorization means that coal ash can continue to be safely and efficiently reused as an ingredient in many products such as concrete, road bed fill, and wallboard. It is important to our economy and environment to make regulatory decisions that promote material reuse when supported by science and research.

The Final Rule and its Limitations. Second, ECOS commends EPA's development of the final CCR rule. The rule reflects extensive and important research and study, and presents a rigorous approach to managing the over 250 facilities located in 33 states. States generally find that the technical elements of EPA's final rule are very sound; however, the minimum standards do not necessarily take into account the differences between the states and their hydrology, climate, and other unique features that a state permitting program would incorporate.

Due to EPA's appropriate determination that it will regulate coal ash as non-hazardous waste, the regulatory program EPA developed in the final rule falls under RCRA Subtitle D. RCRA Subtitle D Part 257 does not allow EPA to eliminate duplicative regulation with existing state permitting programs. Other complications also result from RCRA's structure, including: (1) that the rule is self-implementing, meaning that regulated entities make all compliance decisions without regulatory oversight; and (2) that citizen suits are the only mechanism for enforcement of the rule. Below ECOS offers additional detail about these limitations, which would support this Committee's consideration of legislation to address these shortcomings.

Concern with a Dual Regulatory System. As noted previously, many states already have successful CCR permit programs. Under the final rule, there is no clarity of primacy between the state and federal government. Typically, when the final rule creates a permitting program, that program is then adopted and implemented by states who adapt it to be more stringent and state-specific as needed. Where a state does not choose to adopt the program, EPA implements and oversees the permitting and enforcement. This process results in a clear and consistent understanding of the permitting and enforcement roles of the states and EPA.

Instead, due to RCRA's structure, EPA does not have authority to approve a state regulatory program for CCR, so facilities may now face duplicative federal and state regulatory requirements, a result that ECOS has long been concerned with due to the fact that regulatory duplication makes ineffective use of limited state and federal time and resources. Duplicative programs also make compliance difficult and confusing for the regulated entities, and present a challenge to members of the public who desire to participate in and monitor the regulatory process.

Given its limited authority under RCRA Subtitle D, EPA found the most workable solution under RCRA to be to encourage states, in the final rule, to amend their Solid Waste Management Plans (SWMP) to incorporate the new final CCR rule's requirements. EPA then will approve the plans to demonstrate federal approval of the state requirements. However, because of the limitations of RCRA's structure, this still does not accomplish the most straightforward end; even if states directly incorporate the federal rule, the requirements of the federal rule continue to apply in tandem with the requirements of a state permit program. Michael Forbeck, President of ASTSWMO, recently referenced in his testimony before the Subcommittee on Environment and the Economy of the House of Representative's Committee

on Energy and Commerce (Subcommittee) the final rule's statement that "EPA approval of a state SWMP does not mean that the state program operates 'in lieu of' the federal program." The reality is that only federal legislation can amend RCRA to allow state permitting programs to operate in place of the federal program.

In addition, it is important to recognize that the process of amending state solid waste management plans is not quick. In January, Thomas Easterly, Commissioner of the Indiana Department of Environmental Management (IDEM) testified before the Subcommittee that his state would not be able to achieve a final SWMP amendment within the timeframes set out by the final rule. IDEM must have four public notices with an associated comment period for a new regulatory action. This process takes approximately eighteen months and some of the self-implementing deadlines are set for six months. Indiana is not alone on this forefront. In March, David Paylor, Director of the Virginia Department of Environmental Quality, also testified before the Subcommittee that, like in Indiana, the solid waste plan amendment process would require Virginia to invest both time and meaningful resources.

Concern with Citizen Suit Exposure. Enforcement of regulatory requirements is as important as reflecting on their implementation. ECOS is concerned that under RCRA's existing statutory language, the only way that the self-implementing rule will be enforced will be through citizen suits. States acknowledge that citizen suits play an important role in the enforcement of federal environmental law and regulation. However, in this situation, regulated entities following the requirements of an existing state permitting program will also have to comply with the final federal rule, and may find themselves facing conflicting provisions. Citizen groups may allege in a complaint that the facility failed to implement the most stringent of the provisions or that it failed to clearly demonstrate compliance with both federal and state requirements. The

state will be placed in a role of attempting to sort out and align differences. Rather than the clarity that this significant federal rule could bring, we may instead create a patchwork of varying federal court decisions interpreting the federal rule.

The Need for Legislation. Only legislation can resolve these concerns by allowing state permitting programs to operate in lieu of the federal program. Through legislation, states and EPA would invest the same amount of time and resources as amending and approving state solid waste management plans – but with a more effective result. With legislation, the result will be a state permitting program that provides certainty, clarity of roles, and even incorporates sufficient flexibility so that requirements can be risk based and environmentally appropriate to the soil and hydrology of an area.

On April 13, 2015, the House introduced Bill H.R.1734 - Improving Coal Combustion Residuals Regulation Act of 2015. The approach that is being taken in the House is generally workable in the states' opinions. Other approaches may be possible; however, time is of the essence and we might encourage the Senate to think strongly about a similar approach. As always, ECOS remains willing to assist in any way that we can.

ECOS is also committed to the position we took before the House on this very subject over two years ago: we support bi-partisan efforts in the Senate and House to develop legislation to authorize a federal oversight program that would allow the states to regulate coal ash management and disposal using EPA's excellent technical work, implemented through approved state permitting programs. There is precedent for this under many statutes, and including RCRA Subtitle D Part 258 for municipal solid waste landfills.

Eliminating a dual regulatory system is an important public policy outcome. Federal legislation can set clear expectations regarding implementation authority, stringency, and still empower citizens to step in where there is regulatory inaction or gaps.

Conclusion. Mr. Chairman, Ms. Ranking Member, and Members of the Committee, I thank you for the opportunity to present ECOS's views to you today. I am happy to answer any questions.

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.