

ASTSWMO Position Paper
Federal Regulation of Coal Combustion Residuals

Background

On June 21, 2010, the U.S. Environmental Protection Agency (EPA) proposed the rule, Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities (75 FR 35127). In this rulemaking, EPA co-proposed two options for regulation of coal combustion residuals (CCRs). Under one option, EPA would reverse its August 1993 and May 2000 Bevill Regulatory Determinations regarding CCRs and list CCRs as a special waste subject to regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA) when they are destined for disposal in landfills or surface impoundments. The other option would leave the Bevill determination in place and regulate disposal of CCRs under RCRA Subtitle D, with EPA issuing national minimum criteria under 40 CFR part 257 Criteria for Classification of Solid Waste Disposal Facilities and Practices. The proposal did not address the placement of CCRs in mines, or non-landfill uses of CCRs at coal mine sites. The proposal also did not change the May 2000 Regulatory Determination for beneficially used CCRs, which as EPA noted are currently exempt from the hazardous waste regulations under Section 3001(b)(3)(A) of RCRA. However, EPA did indicate that it was clarifying the determination and seeking comment on potential refinements for certain beneficial uses.

This position paper is based in large part upon comments that ASTSWMO provided to EPA on November 19, 2010 in response to the proposal.¹

Issues Informing ASTSWMO's Positions

Proposed Subtitle D Option - Part 257 Criteria

Since enactment of the 1979 federal Subtitle D regulations, 40 CFR part 257 has established the minimum national performance standards necessary to ensure that "no reasonable probability of adverse effects on health or the environment" will result from solid waste disposal facilities or practices. States either already had existing State requirements or voluntarily adopted rules that meet or exceed the Subtitle D national performance standards.

¹ http://astswmo.org/Files/Policies_and_Publications/Cross-program/Coal_Combustion_Residuals/ASTSWMO%20comments%20Docket%20ID%20EPA%20HQ-RCRA-2009-0640.pdf

When State regulators were asked in 2009 whether existing State standards/regulations for non-MSW facilities are mostly compatible with or more stringent than the existing Part 257 minimum standards, 46 out of 47 States responded “yes” (the negative response came from a State in which CCR is not disposed).

In the proposal, EPA raises issues regarding the reliance of RCRA Subtitle D on citizen suit enforcement authority given that States are not required to adopt the federal minimum standards into State regulations. However, a number of State programs already have enforceable State requirements that meet or exceed many of the proposed CCR federal minimum standards. Also, the history of 40 CFR part 257 demonstrates that many States will voluntarily establish compatible State regulations. Specific to a citizen suit under the CCR proposal, the proposed RCRA Subtitle D requirements are clear and unambiguous. The requirements that owners or operators of CCR disposal facilities maintain independently reviewed documentation of compliance on publically available web sites and provide notice to the State environmental agency ensures public access. These requirements establish a substantial basis for both citizens and those States without equivalent State requirements to successfully enforce under RCRA citizen suit authority.

In many States, the authority to regulate surface impoundments is vested in other State agencies pursuant to statutes other than solid waste statutes. While it may be other State agencies that have enforcement authority for surface impoundments, 43 out of 44 States indicated that they coordinate with the enforcing entities to require that steps are taken to protect human health and the environment. This high level of involvement by State waste programs is good evidence that if national waste management standards for CCR were promulgated, States would adopt those standards just as they have adopted the Part 257 standards.

Despite the concerns expressed in the proposal, the State enforcing entities in 42 out of 42 States have the authority to require remediation. The majority of State agencies noted State authority for surface impoundments include repair and maintenance during operation (43 out of 44 States) and closure (41 out of 43 States), as well as:

- impoundment design and engineering;
- leachate collection;
- gas collection;
- groundwater and leachate monitoring;
- financial assurance;
- post-closure care and maintenance;
- removal; and
- replacement of water supply.

The Subtitle D approach has existed since 1979 without identification of significant programmatic problems being identified by EPA. State programs meet or exceed the 40 CFR part 257 national standards for solid waste disposal facilities. In many respects, many State programs already meet

or exceed much of the EPA proposed CCR national standards. Upon adoption under Subtitle D, national CCR standards will be established quickly and nationwide allowing States to continue enforcement under their State regulations with the ability to file citizen suits where State enforcement authority is limited.

Self-Implementing Feature of the Proposed Subtitle D Option

Under the Subtitle D option in the June 2010 EPA proposed rule, 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. This appears to be true even if the State requirements meet or exceed the self-implementing national minimum CCR disposal standards. Therefore, 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.

Financial Assurance

The proposed Subtitle D option did not include financial assurance requirements. EPA indicated that any such requirements would be proposed separately, and referred to the January 2010 EPA Advance Notice of Proposed Rulemaking identifying classes of facilities within the electric power generation, transmission and distribution industry, among others, as those for which it plans to develop, as necessary, financial responsibility requirements under CERCLA § 108(b). In addition, EPA sought comment on whether financial assurance should be a key program element under a Subtitle D approach if EPA promulgated regulations for CCR under Subtitle D, and whether and how the proposed Subtitle D regulatory approach might integrate with existing State financial assurance requirements for CCR disposal facilities.

Beneficial Use

As previously indicated, EPA did not propose to change its determination that beneficially used CCRs do not warrant federal regulation. Though EPA noted that, based upon available information, encapsulated uses do not merit regulation, it also indicated that concerns had been raised regarding unencapsulated uses that warranted further consideration. EPA indicated that it was proposing to remove the placement of CCRs in sand and gravel pits and the use of large volumes of CCRs in restructuring landscape from the category of beneficial uses, and they would instead be considered disposal, subject to the management standards in a final rule.

Risk

EPA evaluated the potential risks to human health and the environment of CCRs. Provided CCRs are maintained in approved Subtitle D units (e.g., lined), no unacceptable risks were observed. The results of the Notice of Data Availability of the 2010 Combustion Risk Residuals Risk Assessment supports EPA opting to regulate CCRs under Subtitle D standards and regulations.

Positions

ASTSWMO views regarding various aspects of the regulation of CCRs follow:

Regulatory Option and its Implementation Mechanism:

States have been implementing and enforcing requirements for the management of CCRs under non-hazardous waste regulatory programs in the absence of federal regulations. A number of States also have recently revised their regulations to enhance their existing programs. If a final federal rule for CCRs is adopted, it should be promulgated under RCRA Subtitle D, not Subtitle C. In essence, EPA should continue to build upon existing State programs through use of the Subtitle D approach.

If the final Subtitle D approach is promulgated under the Part 257 Criteria as proposed, ASTSWMO believes that 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 encourage 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 also urge EPA to provide 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.

EPA should work directly with those States with limited State enforcement to support State's voluntary enactment of authority and adoption of compatible enforceable State requirements.

EPA should also clarify in the final Subtitle D rule that the CCR regulations do not apply to any State permitted MSW landfill that has previously accepted or may accept CCR. While most CCR are currently disposed at electric utility owned CCR disposal sites, there is no prohibition against CCR being disposed in State permitted MSW landfills. However, the proposed Subtitle D approach could be interpreted to mean that State permitted MSW landfills that have accepted or may accept CCR are subject to regulation under both a final Part 257 CCR rule and the RCRA Subtitle D Part 258 Criteria. The final CCR regulations should explicitly state that only the Part 258 Criteria is applicable to MSW landfills that have accepted or may accept CCR.

Financial Assurance:

ASTSWMO supports the inclusion of financial assurance as a key program element in a final Subtitle D rule. Financial assurance is an important component in State waste programs. A federal Subtitle D requirement for financial assurance for CCR disposal facilities is key to supporting State financial assurance requirements.

Federal Enforcement and Oversight:

There have been suggestions that regulation of CCRs under Subtitle C is needed to provide for federal enforcement and oversight. ASTSWMO does not believe this to be the case. States have been exercising enforcement and oversight authority over the management of CCRs through State programs in the absence of federal regulation. Federal enforcement is available through RCRA Section 7003 and Section 106 of the Comprehensive Environmental Response, Compensation and Liability act (CERCLA) in situations that may pose imminent and substantial endangerment to human health or the environment.

Beneficial Use:

ASTSWMO recommends EPA continue to develop guidance for beneficial use rather than try to define it in a rule. Detailed guidance is preferred to provide States with flexibility in decisions and implementation. States have or are establishing beneficial use programs for CCRs, which may include regulatory approaches. It would be helpful to States for EPA to focus on developing guidance for the review and approval of beneficial use projects.

With regard to unencapsulated uses, ASTSWMO recommends that EPA define the parameters used in removing certain uses from the category of beneficial use. For example, EPA's determination should, at a minimum, specify individual constituent concentration limits, leachate limits, and volume used as the basis for its decision. The States can consider these parameters when evaluating proposed uses on a case-by-case basis. It is very difficult to have a one-size-fits-all approach. However, the use of large quantities of CCRs without functional benefit which causes environmental harm should not be viewed as a beneficial use.

Approved by the ASTSWMO Board of Directors on July 23, 2014.