States United over Coal Ash

State environmental agencies continue to oppose EPA regulation of coal ash as a hazardous waste.

For the past four years, state environmental agency leaders—through the Environmental Council of the States (ECOS; www.ecos.org)—have spoken with a single voice on the matter of coal ash. Their message to the U.S. Environmental Protection Agency (EPA) and Congress: regulation should remain with the states, which have successful programs for ensuring proper management of the material. Moreover, EPA must steer clear of a hazardous waste designation for coal ash, lest it send the beneficial reuse market into a tailspin.
Working with EPA
ECOS is the national nonpartisan, nonprofit association of the commissioners of the state and territorial environmental agencies, which implement much of the federal environmental law through delegation agreements with EPA. For some environmental issues, however, there is no federal regulation—or less federal regulation—and states may establish their own regulatory programs. This has been the case with coal ash disposal.

In 2008, ECOS passed its first resolution on coal ash entitled, “The Regulation of Coal Combustion Products.” A revised version was passed in 2010 and remains in effect. Noting that states have demonstrated a continued commitment to ensuring proper management of coal combustion waste (CCW), ECOS asserts that “adoption and implementation of a federal CCW regulatory program would create an additional level of oversight that is not warranted.” As explained in the resolution, states should continue to be the principal regulatory authority for regulating CCW, as they are best suited to develop and implement regulatory programs tailored to specific climate and geological conditions. The resolution also addresses the difficulties likely to ensue if EPA regulated coal ash, especially if it were to do so under Subtitle C of the Resource Conservation and Recovery Act (RCRA)—that is, as a hazardous waste. ECOS points specifically to potential stigma and liability concerns of RCRA Subtitle C designation, which could undermine the beneficial use of CCW.

In addition, states express concern that EPA regulations under Subtitle C would impose tremendous (and unfunded) costs on state environmental agencies. We submitted comments in EPA’s pending rulemaking reflecting the views expressed in our resolution, and in 2012, we wrote EPA Administrator Lisa Jackson urging EPA to contest a legal threat from environmental activists to sue the agency to force a hard legal deadline for issuing a rule. ECOS warned that any settlement could create an ill-advised precedent forcing rapid reviews for RCRA rules.

Making the Case to Congress
On the congressional front, in 2011, we joined with our colleagues at the Association of State and Territorial Solid Waste Management Officials and other stakeholders to provide input to the House Energy and Commerce Committee, which was working on a bipartisan bill that addressed the issues contained in our resolution. Many ECOS members subsequently contacted their delegations to express individual agency support. The bill passed, and we then joined with others in working with the Senate on its bipartisan bill (S.3512) in an effort to make it acceptable to 60 or more Senators. This measure was introduced with an equal number of sponsors from both parties. The House subsequently passed it as part of broader legislation.

Enactment of such legislation would have a salutary effect on states because it would provide federal standards, allow for EPA oversight, and equalize the regulatory platform across all states. While setting standards for such items as ash pond lining and inspections, the Senate bill created a permitting program that states can assume under the municipal solid waste provisions of RCRA. The overall approach is to provide a framework that promises responsible and predictable regulation for coal ash and a level playing field among states that administer it. EPA continues its traditional role of oversight. Importantly, the bill adopted a nonhazardous designation for coal ash, making it suitable for reuse in appropriate ways.

Although states are always reluctant to support new regulations without adequate federal funding, in this case, the tradeoff is that we will have more control at the state level without the federal hazardous waste stigma. Funding of the program would have to be addressed by the state legislatures, but we expect a fee on permits to be a likely solution. ECOS is hopeful about the passage of a bill, and our members embrace the prospect of implementing the new law in a manner that best ensures protection of public health and the environment within our borders. em