The Path Forward for the Regulation

A summary of the utility industry’s position concerning the regulation and legislation of coal combustion residuals (CCRs).

Utility Industry Supports Non-Hazardous Waste Regulation

The Utility Solid Waste Activities Group (USWAG; www.uswag.org), an association of approximately 110 utilities, electricity generators, utility operating companies, and associations, responsible for addressing solid and hazardous waste issues on behalf of the utility industry, has worked with the U.S. Environmental Protection Agency (EPA) through virtually every step of the Bevill Amendment process, including providing the agency with technical data and related input to assist EPA in evaluating coal combustion residues (CCRs)—inorganic material in coal that is not consumed or emitted as gaseous emissions when coal is combusted and is captured by pollution control equipment as fly ash, bottom ash, boiler slag, and flue gas desulfurization material.

While USWAG agrees with EPA’s 1993 and 2000 regulatory determinations that CCRs do not warrant regulation as hazardous waste, we have long advocated the development of an environmentally protective, regulatory program for CCRs under the federal Resource Conservation and Recovery Act’s (RCRA) Subtitle D non-hazardous waste program. From USWAG’s perspective, the key policy issue isn’t whether to regulate CCRs, but how to best regulate CCRs under RCRA’s non-hazardous waste program to ensure protection of human health and the environment, while also encouraging and promoting the material’s beneficial use.
EPA’s Pending Proposal Does Not Offer the Best Path Forward

EPA is considering two possible options for the management of coal ash (for additional details of the two options, see Table 1 of the introduction to this topic on page 5). Under the first option, EPA would list these residuals as special wastes subject to regulation under Subtitle C of RCRA when destined for disposal in landfills or surface impoundments. Under the second option, EPA would regulate coal ash under Subtitle D of RCRA, the section for non-hazardous wastes. While USWAG believes that the disposal of CCRs should be regulated, it is clear that both of EPA’s proposed regulatory options are flawed.

Subtitle C

The Subtitle C option is inappropriate for several reasons, not the least of which is that it would constitute an illegal reversal of EPA’s final 1993 and 2000 regulatory determinations that CCRs do not warrant hazardous waste regulation. Even assuming it were legally permissible, implementation of the Subtitle C approach does not offer the best technical or policy option. It would create disposal capacity shortfalls, cripple the beneficial use of CCRs, and impose unnecessary costs on power plants (and ultimately consumers), threatening jobs and increasing electricity costs.

Perhaps one of the greatest concerns with the Subtitle C approach—as recognized by virtually all of the states in their opposition to this option—is that it would result in a hazardous waste disposal capacity shortfall. Under the Subtitle C option, an estimated 15–21 million tons of CCRs would enter the Subtitle C hazardous waste commercial disposal market on an annual basis, in contrast to the 2 million tons of hazardous waste currently disposed of in commercial hazardous waste landfills. This influx of Subtitle C wastes into the system would quickly overwhelm the nation’s commercial hazardous waste disposal capacity (approximately 23–30 million tons), creating an immediate compliance dilemma for electric utilities and causing havoc for the entire RCRA Subtitle C hazardous waste program.

In addition, the stigma from regulating CCRs as hazardous waste would cripple the beneficial use market. The CCR rulemaking record is replete with testimony and comments from marketers and end users, states, and independent standard-setting organizations demonstrating that regulating CCRs under RCRA Subtitle C would effectively end their beneficial use. The reasoning behind this position is self-evident: consumers and end users of CCRs are understandably concerned from a liability perspective of using a material in their products that is otherwise regulated as a RCRA-listed hazardous waste when disposed.

In addition to these concerns, USWAG estimates that the regulation of CCRs under RCRA Subtitle C would impose staggering compliance costs on the electric power industry in the range of $34 billion–$100 billion over 20 years. (It is estimated that EPA’s Subtitle D Option would impose costs of $23 billion–$35 billion over the same period.) As a result, as much as 18% of current U.S. coal-generation capacity would be at risk of closure. Closure of these power plants could raise serious reliability and cost concerns for companies that provide electricity to millions of customers throughout the United States.

Subtitle D

EPA’s Subtitle D option for CCRs, while flawed in certain fundamental respects, is the preferable regulatory approach for CCRs. During the comment period on the CCRs proposals, the agency held a series of public meetings and USWAG representatives participated in all of those hearings, listening carefully to the testimony of citizen activists. What was striking was that the elements of a regulatory program that citizens and environmental groups called for—groundwater monitoring; groundwater protection standards; corrective action to address environmental impacts; liner systems for new disposal units; and dam safety and inspection standards for CCR impoundments—are all supported by USWAG. In fact, all of these protections are contained in EPA’s proposed Subtitle D rule and, most important, would be implemented...
Given the poor regulatory options under consideration, USWAG believes that it is essential Congress pass CAROA.

sooner—many years sooner—than would the comparable Subtitle C requirements. This is because the Subtitle C requirements would not become effective in all but two states (Iowa and Alaska, which do not have RCRA-authorized programs) until the states specifically adopt the new rules. In many cases, state adoption of new RCRA rules could take two to five years, and sometimes longer. Subtitle D rules, on the other hand, would take effect in all 50 states within six months of enactment.

Most important, the Subtitle D option would not result in the collateral damage associated with the Subtitle C approach, including devastating the beneficial use market for CCRs, unnecessarily burdening power plant operations, raising energy costs, and threatening an already tenuous jobs recovery. Instead, it would build on existing state regulations, by strengthening those regulatory programs, rather than requiring the implementation of an entirely new regulatory program, duplicating existing regulations and imposing significant burdens on already strained state governmental resources.

USWAG’s comments on EPA’s proposal expressed support for the regulation of CCRs as non-hazardous waste. USWAG remains concerned, however, that Subtitle D regulations should be enforced through a permit, rather than though the self-implementing, citizen-suit enforcement structure proposed in the Subtitle D option. The prospect of enforcing the Subtitle D requirements through individual citizen suits in federal district courts likely would result in patchwork decisions across the country; clearly, this is not the ideal manner for implementing a new federal program for CCRs.

In addition to the structural flaw with the Subtitle D option, the huge volume of comments on the proposal and EPA’s continued struggle to assess the myriad of complex legal, technical, and policy issues raised under both options, has complicated the timing for issuing a final CCRs rule. In a recent declaration by Suzanne Rudzinski, Director of EPA’s Office of Resource Conservation and Recovery, the agency will most likely be unprepared to issue a final rule until late 2013 or early 2014.

Given that EPA has recognized that its Subtitle D proposal would be fully protective of human health and the environment, the proposed substantive standards for CCRs disposal units—standards addressing facility location, design, groundwater monitoring, corrective action, closure, and post-closure care—under the Subtitle C and Subtitle D options are virtually identical, and therefore, there is no policy basis for EPA to pursue the Subtitle C option, which represents the most stringent regulatory option available to EPA under federal law.

**CAROA Offers the Best Solution for the Future Regulation of CCRs**

Against this backdrop of uncertainty regarding the structure and timing of EPA’s final rule, Congress is attempting to resolve the problem through the introduction of bipartisan legislation, The Coal Ash Recycling and Oversight Act (CAROA; S. 3512). This legislation would amend RCRA Subtitle D by authorizing states to adopt enforceable permitting programs incorporating minimum federal criteria for the environmentally sound management of CCRs; in those instances where a state does not implement the minimum federal criteria, EPA would step in and administer and enforce the CAROA requirements directly in that state.

CAROA contains many of the controls found in EPA’s pending CCRs proposals—including liner and leachate control requirements, groundwater monitoring, corrective action, structural integrity standards and more—yet avoids the adverse impacts on the beneficial use market for CCRs and over-regulation that would result from regulating CCRs as RCRA hazardous waste.

USWAG supports CAROA, as it is the only mechanism under consideration that would establish non-hazardous waste regulations for the disposal of CCRs through enforceable permit conditions, a regulatory structure consistent with USWAG’s long-standing position.

**Congress Needs to Act**

A lawsuit brought in early 2012 by environmental groups and marketers of CCRs could further complicate an already complicated rulemaking process. The plaintiffs in this suit claim that EPA has missed a statutory deadline under RCRA to issue the final rule for CCRs and seek to establish a court-ordered framework and deadline that would require EPA to issue a final rule as early as the middle of 2013.
Call for Abstracts: Deadline is March 4, 2013!

The Air & Waste Management Association’s conference Climate Change: Impacts, Policy, and Regulation will provide a forum for discussing the multiple facets of the climate change issue including its impact assessment, policy options and status of regulations for greenhouse gases mitigation and adaptation.

Visit http://climatechange.awma.org for more information and the full Call for Abstracts.

Abstracts should be:
- Submitted via e-mail to climatechange2013@awma.org
- 200-300 words in length
- Submitted prior to March 4, 2013

Please note preference of platform or poster presentation.

A Path Forward

Hazardous waste regulations for CCRs are unnecessary and will result in decreased beneficial use of CCRs and increased energy costs. EPA’s non-hazardous waste regulatory option is limited because of the current statutory structure of RCRA. USWAG believes that CAROA provides the best path forward: the legislation would establish strong Subtitle D non-hazardous waste controls, administered through enforceable state permits with backup enforcement authority by EPA. This is the solution that our nation needs.

References