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Hazardous Waste Management System
Identification and Listing of Special Wastes
Disposal of Coal Combustion Residuals from Electric Utilities Docket
Attention Docket ID No., EPA-HQ-RCRA-2009-0640
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities; 75 Fed. Reg. 35,128 (June 21, 2010); Docket ID No., EPA-HQ-RCRA-2009-0640.

Dear Administrator Jackson:

The National Mining Association (NMA) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) proposed rule on the "Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities." 75 Fed. Reg. 35,128 (June 21, 2010). This complex proposed rule involves: (1) a potential reversal of the agency's final "Regulatory Determination on Wastes from the Combustion of Fossil Fuels," 65 Fed. Reg. 32,214 (May 22, 2000) (Regulatory Determination); (2) dueling regulations under Subtitle D (non-hazardous) and Subtitle C (hazardous) of the Resource Conservation and Recovery Act (RCRA) for the disposal of coal combustion residuals (CCRs)¹ generated by the electric utility

¹ This term, which refers to fly ash, bottom ash, boiler slag and flue gas desulfurization materials destined for disposal, is the latest term used by the agency since 1980. EPA has also called these materials: fossil fuel combustion waste, coal combustion waste, and coal combustion byproducts in different rulemaking and policy settings. In the past, Office of Surface Mining Reclamation and Enforcement in the U.S. Department of Interior called these materials coal combustion byproducts. See 72 Fed. Reg. 12,026 (March 14, 2007). The National Research Council (NRC), a research arm of the National Academy of Sciences, has referred to these materials as coal combustion residues. NRC, "Managing Coal Combustion Residues in Mines" (March 1, 2006). For the purpose of these comments, NMA will use the term CCRs only to be consistent with the wording in EPA's proposed rule. NMA does not support any views that treat or characterize the use of these materials at surface and underground coal mining and reclamation operations as disposal activities.

industry and independent power producers; and (3) a range of possible regulatory controls for the beneficial use of CCRs.

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Many NMA member companies use CCRs at their coal mining and reclamation operations.² Such uses include but are not limited to: fill material for mine reclamation and subsidence control; achieving the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requirements of approximate original contour; eliminating dangerous highwalls; low permeability capping material; soil amendment; neutralizing acid mine drainage; road stabilization; and other beneficial uses.

Notably, EPA claims that it is not "proposing to address the placement of CCRs in mines, or non-minefill uses of CCRs at coal mine sites in this action," 75 Fed. Reg. at 35,128, and is deferring to the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSM) to take the lead in developing federal regulations for such uses under SMCRA. See *id.* at 35,165. This language aside, and as discussed in detail below, other relevant statements in the preamble and the proposed regulatory text show quite prominently that the agency did not properly execute its intention in the proposed rule to exclude coal mining operations from this rulemaking. As written, EPA's proposed rule could improperly subject coal mining operations who use and manage CCRs in certain applications to regulation under RCRA. Consequently, EPA's treatment of CCRs in the proposed rule is of a direct interest to NMA members.³

² According to the American Coal Ash Association (ACAA), a total of 136,073,107 tons of CCRs were produced in 2008. Of this total, 60,593,660 tons were used in 2008, representing nearly 45 percent of the total. Of the total amount produced, 10,466,272 tons (approximately 8 percent) were used in mining applications. See ACAA, 2008 Coal Combustion Product (CCP) Production & Use Survey Report, available at <http://acaaffiniscap.com/displaycommon.cfm?an=1&subarticlenbr=3> (last visited Nov. 8, 2010).

³ NMA has a longstanding interest in this issue. NMA submitted comments on the agency's "Report to Congress on Wastes from the Combustion of Fossil Fuels" issued in March 1999. NMA also submitted comments on the Regulatory Determination issued in May 2000. NMA participated in EPA's stakeholders meeting on "Minefill Practices for Coal Combustion Residue" held in Washington, DC, on May 19-20, 2003. NMA also submitted comments on EPA's notice of data ability on the disposal of CCRs in landfills and impoundments issued in August 2007.

As EPA conducted its activities on this issue, NMA also participated in NRC's independent study on "Managing Coal combustion Residues in Mines" by attending hearings, testifying, and submitting comprehensive comments to the Committee. NMA also submitted comments on OSM's advance notice of proposed rulemaking, "Placement of Coal Combustion Byproducts in Active and Abandoned Coal Mines." 72 Fed. Reg. 12,025 (March 14, 2007). All in all, NMA has participated in every aspect of this issue.

I. EPA'S GENERAL APPROACH TO USES OF CCRS AT MINE SITES

A. NMA Supports EPA's Decision Recognizing the National Research Council's Recommendation that OSM take the Lead in Regulating the Use of CCRs at Mine Sites under SMCRA

At the outset, EPA claims that it is not regulating the placement or use of CCRs at mine sites. 75 Fed. Reg. at 35,128 ("EPA is also not proposing to address the placement of CCRs in mines, or non-minefill uses of CCRs at coal mine sites in this action."). Instead of addressing the Regulatory Determination on minefilling, the agency "will work with the OSM to develop effective federal regulations to ensure that the placement of [CCRs] in minefill operations is adequately controlled." *Id.* at 35,165. In coming to this decision, EPA relies on findings and recommendations published by the National Research Council (NRC) on March 1, 2006, in the report "Managing Coal Combustion Residues in Mines" (NRC Report). *Id.* at 35,165.

In this report, which examined the health, safety, and environmental risks associated with the use of CCRs in the reclamation of active and abandoned coal mines, the NRC found that:

Under SMCRA, the OSM and related state agencies that implement SMCRA currently have the regulatory framework in place to deal with CCRs used in mine reclamation and have considerable expertise in review, permitting, and management of mine lands.

NRC Report at 10 & 154. The NRC recommended that "OSM and its SMCRA state partners should take the lead in developing new national standards for CCR use in mines because the framework is in place to deal with mine-related issues." *Id.* at 154. The NRC also recommended that OSM and EPA coordinate their rulemaking efforts on CCRs. *See id.* at 10 & 154.

NMA agrees with this recommendation and supports EPA's decision that OSM should take the lead in regulating CCRs used at coal mine operations under SMCRA. *See* 75 Fed. Reg. at 35,165 ("Consistent with the recommendations of the [NRC], EPA anticipates that the [DOI] will take the lead in developing these regulations."). This decision is not the first time that EPA has recognized the appropriateness of OSM taking the lead in promulgating regulations under SMCRA to address how coal mines use CCRs in reclamation projects. In its Regulatory Determination, EPA acknowledged that SMCRA is "expressly designed to address environmental risks associated with coal mines" when discussing appropriate federal regulatory programs for "minefilling." 65 Fed. Reg. at 32,217 & 32,232; *See also id.* at 32,221 (noting that "modifications to existing regulations established under authority of SMCRA" would be appropriate).

OSM is the proper agency for issuing any new federal regulations governing CCRs at coal mining and reclamation operations. OSM and the state regulators have over

30 years of regulatory experience with regulating coal mining operations under SMCRA, including their use of CCRs in various applications. In fact, placement or use of coal ash at coal mines is currently subject to state and/or federal regulation.⁴ For example, leachate tests are required as part of the SMCRA permit application. See 30 C.F.R. § 780.21. Groundwater monitoring is specifically required by OSM regulation and must be submitted to the state at least once every three months. See 30 C.F.R. § 816.41(c). SMCRA regulations also require surface mining activity, including placement of CCRs, to be conducted so as to minimize disturbance of the hydrologic balance in the permit and adjacent area and to prevent material damage to the hydrologic balance outside the permit area. See 30 C.F.R. § 816.41(a).

SMCRA regulations have and continue to be the most appropriate for ensuring that uses of CCRs at coal mining operations are safe and not adversely impacting the environment. In fact, Congress recognized the rigor of the SMCRA regulatory program in regulating the environmental impacts of coal mines as reflected in the RCRA Amendments of 1980, which deems any valid SMCRA permit to be valid as a RCRA permit. See 42 U.S.C. § 6925(f) (“[A]ny surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under [SMCRA] shall be deemed to be a permit issued pursuant to this section with respect to treatment, storage, or disposal of such wastes or overburden.”).

As EPA is aware, OSM started the rulemaking process to promulgate regulations on the placement of CCRs in active and abandoned coal mines. 72 Fed. Reg. 12,026 (March 14, 2007). OSM’s advance notice of proposed rulemaking (ANPRM) responded to the recommendations made by the NRC in 2006. *Id.* at 12,027. OSM also consulted with EPA and its SMCRA state partners in determining to revise its regulations to “expressly provide for the placement of [CCRs] as part of surface coal mining and reclamation operations permitted under Title V of SMCRA and in the reclamation of abandoned mine lands under an AML reclamation program approved under section 405 of [SMCRA].” *Id.* at 12,030.

Through the ANPRM, OSM put forward a regulatory approach to “minimize the possibility that the placement of [CCRs] could cause adverse impacts on public health and the environment.” 72 Fed. Reg. at 12,030. OSM recognized in the ANPRM that “[t]he use of properly managed [CCRs] on both active and abandoned mines can contribute to successful reclamation,” such as reducing or eliminating the formation of acidic or toxic mine drainage and improving soil quality and productivity. *Id.* at 12,029. OSM also recognized the benefits of CCRs in the construction of haul and access roads and in the restoration of mine lands to their approximate original contour. *Id.*

⁴ SMCRA regulations, while not yet in place to specifically address CCRs used at coal mine sites, do generally apply to the placement of CCRs in permitted mine sites. See *Pacific Coast Coal Co. v. OSM*, 158 IBLA 115, 125 (Jan. 6, 2003), *aff’d*, *Pacific Coast Coal Co. v. OSM*, Civ. No. 03-0260Z (W.D. Wash. Feb. 2, 2004) (“Thus, OSM may properly approve a permit revision to ensure that fill material directly or incidentally utilized in mine reclamation meets applicable statutory and regulatory environmental standards and does not endanger the public health and safety, such as by restricting the sources of fill material that may be disposed on a site.”)

NMA supported in concept OSM's decision to promulgate reasonable nationwide regulations that address the placement of CCRs in coal mines.⁵ NMA agreed that such regulations, if properly structured, would provide additional assurances that state regulators would make even better permitting decisions for placement of CCRs in mines. NMA also supported a SMCRA regulatory framework specific to CCRs because it would provide the public with additional confidence that the practice of "putting CCRs in coal mines as part of the reclamation process is a viable management option" and can actually improve the environment in certain circumstances. See NRC Report at 1 (noting the advantages of using CCRs in meeting reclamation goals and avoiding the unnecessary disturbance of otherwise undeveloped land).

According to OSM Director Joseph Pizarchik, OSM received approximately 1,900 comments on the ANPRM. See Letter from Joseph G. Pizarchik, Director of OSM, to Cortney Higgins, Office of Management and Budget (OMB) (Nov. 19, 2009) (OSM Letter).⁶ EPA was one of the many interested stakeholders that provided comment on the ANPRM. In a letter to OSM, EPA stated that it reviewed the ANPRM and "ha[d] no major concerns." At that time, EPA acknowledged that "placing [CCRs] in active or abandoned coal mines [was] one of a variety of approaches EPA [was] considering for the safe use and recycling of [CCRs]." Letter from Anne Norton Miller, Director of EPA's Office of Federal Activities, to John Craynon, Chief, Division of Regulatory Support, OSM (June 13, 2007). EPA also acknowledged that it had worked closely with OSM "to develop safe uses of [CCRs] in active or abandoned coal mines to improve the current condition of a mine and reduce or eliminate possible mismanagement of [CCRs]." *Id.*

OSM subsequently drafted a proposed rule that would impose "minimum requirements for regulatory program provisions for permits for surface coal mining and reclamation operations that include placement of [CCRs] as part of those operations."⁷ OSM Draft Rule Text, § 787.1 (July 16, 2008). Specifically, the draft proposed rule applied to operations that intended to place CCRs "within the mined-out area of a surface coal mining operation,"⁸ use CCRs "in the construction or

⁵ NMA submitted comments on OSM's ANPRM on June 13, 2007. See OSM Docket No. 1029-AC54. These comments are incorporated by reference. NMA provided comments on eight specific recommendations made by the NRC and how OSM should address them in a proposed rule. NMA also commented on OSM's western regional guidance and other implementation issues.

⁶ This letter reflects OSM's concerns regarding EPA's draft proposed rule during the interagency review process under Executive Order 12866.

⁷ OSM excluded CCRs used as soil amendments from the draft proposed rule, as long as those uses met applicable ASTM standards. OSM based this exclusion on EPA's May 2000 Regulatory Determination. The draft proposed rule also excluded uses of CCRs on roads because it believed that these uses would be de minimus. See OSM Draft Rule Text, Section H (preamble).

⁸ The statutory definition of "surface coal mining and reclamation operations" is broad and includes "surface mining operations and all activities necessary and incident to the reclamation of such operations after August 3, 1977." 30 U.S.C. § 1291(27). The term "surface coal mining operation" is

reclamation of a coal mine waste disposal facility," or return CCRs "to the site of a coal refuse processing operation." OSM Draft Rule Text, § 787.3.

The draft proposed rule required operators to include certain information in their permit applications, including a description of the types of CCRs that would be placed at the mine site, a detailed analysis of the chemical, engineering, and physical properties of the CCRs, detailed baseline hydrologic data on 33 parameters, and a groundwater monitoring plan. See OSM Draft Rule Text, § 787.4. The draft proposed rule also imposed performance standards on the placement of CCRs at surface coal mining operations such as testing the material, monitoring surface water and groundwater, requiring remedial measures for adverse impacts to surface water and groundwater, and requiring certain actions for revegetation and preventing erosion. See OSM Draft Rule Text, § 826.11. Finally, the draft proposed rule would apply similar requirements to CCRs used in abandoned mine land reclamation projects. See OSM Draft Rule Text, § 874.18.

OSM submitted the draft proposed rule to the OMB for review, but OMB did not complete its review prior to the change in Administrations. OSM withdrew the proposed rule from the interagency process for the incoming Administration's review. See OSM Letter at 2. According to Pizarchik's letter to OMB, the draft proposed rule is ready for review and approval by the OSM and DOI management. *Id.* OSM's semi-annual regulatory agenda indicates plans to issue a notice of proposed rulemaking in January 2011.⁹

Given the NRC recommendations and OSM expertise, EPA's decision to defer to OSM's authority under SMCRA to regulate the use of CCRs at coal mining and reclamation operations is well founded. See 75 Fed. Reg. at 35,165. Since OSM is in the process of promulgating new rules that address the placement of CCRs in mines, there is no reason for EPA to regulate CCRs used at coal mining and reclamation operations under RCRA as part of its larger efforts to regulate CCRs disposed of in surface impoundments and landfills. NMA encourages EPA to retain its position in the final rule and continue to defer to OSM in developing appropriate regulations under SMCRA.

B. EPA Must Clarify that Placement of CCRs and Non-Minefill Uses of CCRs at Mine Sites are in Fact Not Subject to RCRA Regulation

EPA's stated intent to exclude placement of CCRs in mines or non-minefill uses of CCRs at coal mine sites from the scope of the proposed rule is muddled by use of

also very broad and is defined as: "activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine . . ." 30 U.S.C. § 1291(28).

⁹ OSM has publicly stated that it is waiting for EPA to finalize its proposed rule under RCRA for the disposal of CCRs from electric utilities prior to moving forward with its own proposed rule for coal mines under SMCRA. Thus, the timeframe OSM has established for issuing an NPRM may change. Regardless, OSM remains committed to completing its rulemaking.

imprecise drafting, unclear definitions, and conflicting treatment under the proposed regulatory scenarios.

1. From the Outset EPA Creates Confusion over the Application of the Proposed Rule

The first page of the preamble to the proposed rule explicitly states: "EPA is also not proposing to address the *placement of CCRs in mines, or non-minefill uses* of CCRs at coal mine sites in this action." 75 Fed. Reg. at 35,128 (emphasis added). Yet, on the very next page, EPA inexplicably drops the phrase "or non-minefill uses" in its discussion of whether the proposed rule applies to a particular industry sector and narrows this statement to: "[T]his proposed rule does not address the *placement of CCRs in minefills.*" *Id.* at 35,129 (emphasis added).

In fact, after the initial explicit statement on applicability of the rule, EPA fails to reference non-minefill uses ever again. For example, EPA further indicates that it "will address the management of CCRs *in minefills* in a separate regulatory action(s), consistent with the approach recommended by the National Academy of Sciences, recognizing the expertise of DOI's [OSM] in this area." *Id.* (emphasis added). Similarly, in discussing new developments since the Regulatory Determination, EPA states that it "will work with OSM to address the management of CCRs in *minefills* in a separate rulemaking action." *Id.* at 35,143 (emphasis added). In the short section devoted to this issue, EPA for the third time limits its language to "minefilling operations." *Id.* at 35,165 ("In today's proposal, EPA is not addressing its Regulatory Determination on *minefilling*, and instead will work with the OSM to develop effective federal regulations to ensure that the placement of [CCRs] in minefill operations is adequately controlled.").

NMA's initial gratification that EPA agreed with the NRC recommendations and intended to exclude both the placement of CCRs in mines *and* the non-mine fill uses of CCRs at coal mining operations has given way to confusion over the scope of the proposal. NMA remains perplexed as to the applicability of the proposed rule to the operations of our member companies. NMA members use CCRs in a variety of applications. CCRs are effectively and safely used in stabilizing roads, as an alkaline amendment that prevents acid mine drainage, and in sealing coal seams, mine pits, and coal refuse areas to minimize water contact with potentially acid producing materials.

While this is not a complete list of uses of CCRs at coal mining operations, it reflects the types of uses outside of "mine placement" or "minefill" that are important to mine reclamation activities and the daily operations at coal mines.¹⁰ NMA

¹⁰ The NRC described various mine-specific CCR applications in its report. See NRC Report at 45-46 (noting minefilling, capping, mine sealing, achieving approximate original contour in surface mines, preventing subsidence in underground mines, and treating acid mine drainage). The NRC recognized the advantages of using CCRs to "assist in meeting reclamation goals (such as remediation of abandoned mines)" and to "[avoid] the need, relative to landfills and impoundments, to disrupt undisturbed sites." *Id.* at Summary. NRC urged government agencies to "examine ways in which they can promote CCR use or remove impediments to its use." *Id.* at 148.

encourages EPA to remove the inconsistencies highlighted above and be explicit in the preamble to the final rule that none of the regulatory provisions apply to the use of CCRs at underground and surface coal mining and reclamation operations. Furthermore, it is imperative that EPA properly convey its decision not to regulate the placement of CCRs in coal mines or non-minefill uses of CCRs at coal mine sites throughout all portions of the preamble as well as in the regulatory text.

2. EPA's Definition of "Minefill" Creates Further Confusion

EPA hones in on the term "minefill" on the third page of the preamble, which provides definitions of key terms. See 75 Fed. Reg. at 35,130. EPA then narrowly defines the term "minefill" as a "project involving the placement of CCRs *in coal mine voids* for use as fill, grouting, subsidence control, capping, mine sealing, and treating acid mine drainage, whether for purposes of disposal or for beneficial use." *Id.* (emphasis added). EPA inexplicably fails to incorporate this definition in the Subtitle D or Subtitle C proposed regulatory text.

There are several concerns with this definition. First, it does not specify whether it applies to both surface and underground mines. Arguably, EPA's use of the phrase "in coal mine voids" implies that the term is not applicable to surface mine land reclamation and is limited to underground mines. Second, by delineating only certain uses, the definition implies that those uses not listed are subject to regulation, which contradicts the broader exclusion EPA characterizes in the preamble as including both minefill and non-mine fill uses. Finally, the phrase "whether for purposes of disposal or for beneficial use" creates additional confusion by suggesting that some of the uses listed are considered disposal while others are considered beneficial use. EPA should not be making judgment calls in this rulemaking on whether the uses of CCRs at surface and underground mining and reclamation operations are disposal or beneficial use.

3. Conflicting Treatment of "Minefilling Operations" under Subtitle C and Subtitle D Regulatory Scenarios Exacerbates the Uncertainty

These issues in the preamble extend prominently into the proposed regulatory text. For example, EPA's proposed Subtitle C regulations specifically exclude "minefilling operations," See Proposed 40 C.F.R. § 261.4(b)(4)(i), 75 Fed. Reg. at 35,254. EPA also explains in proposed Subpart F that coal ash "placed in minefilling operations" is not covered by the special waste listing. See Proposed 40 C.F.R. § 261.50(b), 75 Fed. Reg. at 35,254. As pointed out above, EPA does not define the term "minefilling" in the proposed regulatory text. See Proposed 40 C.F.R. § 261.1300, 75 Fed. Reg. at 35,255. But, presumably, EPA would apply the narrow definition of "minefill" found in the preamble to determine what type of operation or activity is subject to the special requirements for CCR wastes under proposed Subpart FF. And this definition, as argued above, appears to be inappropriately limited to underground mines.

A similarly egregious situation presents itself in the proposed Subtitle D regulations. EPA does not once reference the exclusionary language found in the proposed Subtitle C regulatory text for "minefilling operations." In fact, the only reference to mining is in the definition of "CCR landfill," where EPA states that this disposal facility does not include "an underground mine." See Proposed 40 C.F.R. § 257.2, 75 Fed. Reg. at 35,239. EPA repeats this language in the proposed Subpart D standards for the receipt of CCRs in landfills and surface impoundments. See 40 C.F.R. § 257.40, 75 Fed. Reg. at 35,240.

By choosing to use the term "underground mine," EPA singles out—intentionally or not—those mines as being excluded from regulation, while leaving the door open to regulating surface coal mining operations. This result contradicts the stated intentions of EPA not to regulate minefill or non-minefill uses at coal mine sites. The use of "underground mine" in the proposed Subtitle D regulations only serves to bolster the inconsistencies found in the proposed rule and adds confusion as to the applicability of the rule to NMA member companies.

4. NMA Recommendations for Clarification

As written, EPA's proposed regulatory language is ambiguous, contradictory, and does not reflect the intentions of the agency as stated on the first page of the proposed rule that its rulemaking does not "address the *placement of CCRs in mines, or non-minefill uses* of CCRs at coal mine sites in this action." 75 Fed. Reg. at 35,128 (emphasis added). Thus NMA recommends that the agency: (1) clearly state in the preamble to the final rule that all uses of CCRs in surface and underground coal mining and reclamation operations for any purpose are excluded from regulation; (2) eliminate the definition of "minefill" from the preamble and the references to "minefilling," "minefilling operation," and "underground mine" from the regulatory text to avoid this regulatory quagmire; and (3) revise the regulatory text, regardless of the regulatory approach taken,¹¹ to ensure that all uses of CCRs at surface and underground coal mining and reclamation operations are outside the scope of the final rule.

In terms of the last recommendation, if EPA were to adopt the Subtitle D regulatory approach, the agency should adopt the following language:

§ 257.1 Scope and purpose.

- (a) * * * Unless otherwise provided, the criteria §§ 257.1 through 257.101 are adopted for determining which CCR

¹¹ As described in more detail in Section III(A), NMA opposes listing CCRs as a "special waste" and regulating the disposal of CCRs in surface impoundments and landfills as a hazardous waste under Subtitle C of RCRA. However, regardless of the regulatory approach taken by EPA against the electric utility industry in this rulemaking, EPA should exempt uses of CCRs at surface and underground coal mining and reclamation operations from both RCRA Subtitle C and Subtitle D. As EPA correctly acknowledged in the proposed rule, these uses should be dealt with under a separate rulemaking spearheaded by OSM under SMCRA consistent with the recommendations of the NRC.

Landfills and CCR Surface Impoundments pose a reasonable probability of adverse effects on health or the environment under sections 1008(a)(3) and 4004(a) of the Act. * * *

- (c) These criteria apply to all solid waste disposal facilities and practices with the following exceptions:

(11) *The criteria do not apply to the use of coal combustion residuals in surface or underground coal mining and reclamation operations for any purpose, provided such use is authorized by a permit approved by the regulatory authority under the Surface Mining Control and Reclamation Act of 1977, or for those lands and waters eligible for reclamation under a State reclamation plan approved under 30 C.F.R. Part 884.*

Additionally, EPA should revise 40 C.F.R. § 257.1 and 40 C.F.R. § 257.40 by removing the phrase "underground mine" and replacing it with the following language:

§ 257.2 Definitions

CCR landfill means a disposal facility or part of a facility where CCRs are placed in or on land and which is not a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, **a surface or underground coal mining or reclamation operation**, a cave, or a corrective action management unit. * * *

§ 257.40 Disposal standards for owners/operators of CCR landfills and CCR surface impoundments

CCR landfill means a disposal facility or part of a facility where CCRs are placed in or on land and which is not a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, **a surface or underground coal mining or reclamation operation**, a cave, or a corrective action management unit. * * *

If EPA were to adopt the Subtitle C regulatory approach, the agency should remove the term "minefilling operations" from 40 C.F.R. § 261.4(b)(4)(i) and broaden the language to explicitly exclude the use of CCRs in surface and underground coal mining and reclamation operations:

§ 40 C.F.R. § 261.4 Exclusions

(b) * * *

(4)(i) Fly ash, bottom ash, boiler slag, and flue gas emission control wastes, generated primarily from the combustion of coal for the purposes of generating electricity by the electric power sector if the fly ash, bottom ash, boiler slag, and flue gas emission control wastes are beneficially used or ***used in a surface or underground coal mining or reclamation operation, provided such use is authorized by a permit approved by the regulatory authority under the Surface Mining Control and Reclamation Act of 1977, or for those lands and waters eligible for reclamation under a State reclamation plan approved under 30 C.F.R. Part 884.***

Similarly, EPA should revise 40 C.F.R. § 261.50(b)(3) by removing the phrase "placed in minefilling operations" and including language to clarify that the special waste listing does not apply to uses of CCRs in surface and underground coal mining and reclamation operations.

§ 261.50 General

(a) * * *

(b) For the purposes of the S001 listing, . . . This listing does not apply to coal combustion residuals that are:

- (1) Uniquely associated wastes as defined in paragraph (c) of this section;
- (2) Beneficially used as defined in paragraph (d) of this section;
- (3) *Used in a surface or underground coal mining or reclamation operation;***

* * *

EPA should also revise the definition for "CCR landfill" in 40 C.F.R. § 264.1301 and 40 C.F.R. § 265.1301 and remove the term "underground mining operation" and include language to clarify that uses of CCRs at surface and underground coal mining and reclamation operations are not subject to regulation.

§ 264.1301/§ 265.1301 Definitions

* * *

CCR landfill means a disposal facility or part of a facility where CCRs are placed in or on land and which is not a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, ***a surface or underground coal mining or reclamation operation***, a cave, or a corrective action management unit. * * *

Finally, EPA should revise 40 C.F.R. § 268.40, which deals with the applicability of treatment standards, to exclude all uses of CCRs at surface and underground coal mining and reclamation operations from the S001 waste code description. See 75 Fed. Reg. at 35,262. Specifically, the recommendation above regarding changes to 40 C.F.R. § 261.50, which would remove the exclusionary language that applies only to CCRs “placed in minefilling operations,” would also apply to 40 C.F.R. § 268.40.

C. EPA Must Clarify that the Term “CCR Landfill” Does Not Include the Placement of CCRs at Surface Coal Mining Operations

The inconsistencies in EPA’s treatment of CCRs used at surface and underground coal mining and reclamation operations extend to EPA’s definitions of “CCR landfill” and “Beneficial use of Coal Combustion Products (CCPs).” See 75 Fed. Reg. at 35,129-130. Both definitions reference “large scale fill” operations or projects and create considerable confusion and uncertainty over the application of the disposal regulations in the proposed rule to surface coal mining and reclamation operations.

In particular, NMA is concerned that if these terms are adopted in the final rule without further explanation and definition then surface coal mining operations that use CCRs in SMCRA-authorized reclamation permits for backfilling open pits would be improperly subject to regulation under RCRA as a “CCR landfill.” Such a result would directly contradict EPA’s stated intention to allow OSM to take the lead on regulating uses of CCRs at coal mines in accordance with the NRC’s recommendations. See 75 Fed. Reg. at 35,143 & 35,165.

1. EPA’s Definitions are Overly Broad

First, EPA defines the term “CCR landfill” broadly by only expressly excluding “underground mine[s].” See Proposed 40 C.F.R. § 257.40(b) (Subtitle D); 75 Fed. Reg. at 35,240; See *also* 40 C.F.R. § 264.1301 (Subtitle C); 75 Fed. Reg. at 35,255. At the same time, EPA’s regulatory definition of “CCR landfill” includes “large scale fill operations” as a disposal facility covered by the rule. *Id.* The definition of “CCR landfill” found in the proposed regulatory text tracks the definition provided in the preamble to the proposed rule. Compare 75 Fed. Reg. at 35,129-130 with 75 Fed. Reg. at 35,240 & 35,255.

Second, EPA defines “Beneficial use of Coal Combustion Products (CCPs)” as expressly excluding the use of CCRs in “large scale fill projects, such as for restructuring the landscape.” 75 Fed. Reg. at 35,129-30. EPA’s proposed Subtitle C regulations track the preamble language. See Proposed 40 C.F.R. § 261.50(d); 75 Fed. Reg. at 35,254. EPA’s proposed Subtitle D regulations do not contain a definition of “beneficial use.” However, as stated above, the proposed Subtitle D regulations define “CCR landfill” as including “large scale fill operations.”

Importantly, EPA's use of the terms "large scale fill operations" and "large scale fill projects" are not specifically defined in the preamble or the proposed regulations. See 75 Fed. Reg. at 35,163 (recognizing the need "to define or provide guidance on the meaning of 'large scale fill operation.'"). Without a more concrete definition or discussion of this term, NMA cannot decipher with confidence the extent to which this term could be interpreted to apply to surface coal mining operations.

2. EPA's Discussion of Beneficial Uses and Damage Cases Supports a Conclusion that Surface Coal Mining and Reclamation Operations are Outside the Scope of the "CCR Landfill" Definition

Despite EPA's failure to adequately define what constitutes a "large scale fill operation," the agency's discussion of beneficial uses of CCRs is relevant and of particular importance. See 75 Fed. Reg. at 35,160-31 & 35,163. In that discussion, EPA refers to seven proven damage cases involving large-scale placement of CCRs to confirm its position that "large scale fill operations" do not fall under the beneficial use category and should be subjected to RCRA Regulation. *Id.* EPA specifically references two damage cases. First, EPA cites to the disposal of coal ash in a sand and gravel quarry in Gambrills, Maryland as a proven damage case because of reported groundwater contamination. Second, EPA cites to the use of coal ash as fill for contouring a golf course in Chesapeake, Virginia as a potential damage case, even though an April 2010 study established that residential wells were not contaminated. 75 Fed. Reg. at 35,147 & 35,231.

Notably, EPA does not once cite a damage case involving a surface coal mining operation. Importantly, EPA has never publicly identified a proven damage case relating to the use of CCRs at coal mines. In its Regulatory Determination in 2000, EPA could not identify "any proven damage cases resulting from the use of coal combustion wastes for minefilling." 65 Fed. Reg. at 32,231. The NRC also recognized in 2006 that "EPA [had] not identified any cases in which exceedances of water quality standards could be attributed directly to CCR mine placement." NRC Report at 3.

In the proposed rule at hand, EPA reveals for the first time that since its Regulatory Determination, it has identified six alleged potential damage cases involving minefills. EPA, however, dismisses these alleged damage cases as involving a "management method" that is outside the scope of the proposed rule. 75 Fed. Reg. at 35,147. In fact, EPA provides no details in the text of the preamble or the docket that identifies any specifics (i.e., location, type of alleged contamination, or potential responsible party involved) on these alleged damage case sites.

The complete lack of evidence in the record on damage cases concerning surface coal mining operations suggests that these facilities are outside the scope of what EPA considers to be a "large scale fill operation" and thus a regulated "CCR landfill." The regulated community, however, deserves more regulatory certainty and EPA must provide clarification on this issue in the final rule. To the extent EPA has

evidence of any potential or proven damages from surface coal mining and reclamation operations and believes such evidence supports regulating such facilities as a "large scale fill operations," it must make such data public and available for comment before subjecting these facilities to regulation under RCRA.

Even OSM pointed out in the interagency review process the lack of clarity in terms of what types of damage cases EPA in fact analyzed in developing the proposed rule. According to OSM Director Pizarchik, EPA's "risk assessment references a significant number of 'mine' sites as data collection sites, but fails to clarify if they are coal mines under the jurisdiction of SMCRA." OSM Letter at 2. NMA agrees with Pizarchik's concern that EPA's failure to provide this information "could add confusion to the promulgation of a regulatory program under SMCRA and hamper the beneficial use of CCRs at coal mining sites as envisioned in EPA's proposal." *Id.* at 2-3.

3. NMA Recommendations for Clarification of "CCR Landfill"

It is imperative that EPA clarify that the term "CCR landfill" in fact does not include the use of CCRs at surface coal mining and reclamation operations. It is also essential that EPA exclude surface coal mining and reclamation operations from the term "large scale fill operation." This clarification can be accomplished by adopting the revisions suggested above in removing references to "minefill," "minefilling operation," and "underground mine," which all suggest that surface coal mining and reclamation operations are not excluded from regulation as disposal facilities, and replace that language with an explicit statement that all surface and underground coal mining and reclamation operations are exempt from EPA's regulation.

EPA should also define the phrase "large scale fill operation" in the final regulatory text to exclude surface coal mining and reclamation operations. By specifying that surface coal mining and reclamation operations are excluded from this term, it ensures that they will not be treated as "CCR landfills" and not regulated under RCRA. Instead, OSM's authority to regulate these facilities under SMCRA will be preserved consistent with the recommendations made by NRC.

II. EPA'S REEXAMINATION OF THE BEVILL STATUS OF WASTES FROM THE COMBUSTION OF FOSSIL FUELS

A. EPA Lacks the Authority to Reverse its 1993 and 2000 Bevill Regulatory Determinations Regarding CCRs

EPA proposes two alternative regulatory approaches for the regulation of CCRs. The so-called Subtitle C option would require EPA to reverse its prior August 1993 and May 2000 Regulatory Determinations for CCRs. It is clear from RCRA, relevant case law, and EPA's prior positions in Bevill cases that EPA lacks the authority to reverse its August 1993 and May 2000 Bevill Regulatory Determinations regarding CCRs.

1. The Bevill Amendment Establishes a One-Time Special Process For Making Bevill Regulatory Determinations

Congress enacted RCRA in 1976. Subtitle C of RCRA, 42 U.S.C. §§ 6921-6931, generally established a "cradle to grave" management scheme governing the generation, transportation, treatment, storage and disposal of the hazardous wastes that would be subject to this stringent RCRA Subtitle C program.

On December 18, 1978, EPA proposed regulations identifying hazardous waste under RCRA Subtitle C. 43 Fed. Reg. 58,946 (Dec. 18, 1978). EPA proposed to regulate wastes from fossil fuel combustion, including CCRs, as well as certain other wastes, as "special wastes." 43 Fed. Reg. at 59,015. The EPA 1978 proposal explained that special wastes would be subject to fewer regulatory requirements because they were generated in "very large volumes," "posed relatively low" risks, and "were not amendable [sic] to the control techniques" proposed for hazardous waste treatment, storage and disposal. 43 Fed. Reg. at 58,992.

EPA abandoned the special waste concept, however, when the agency promulgated final hazardous waste regulations in 1980. 45 Fed. Reg. 33,084 (May 19, 1980). Thus, EPA's final rule, which was scheduled to take effect on November 19, 1980, would have treated CCRs as any other waste, subject to the full requirements of the final RCRA Subtitle C regulations.

Recognizing the absurdity of regulating CCRs and other special wastes in such an inflexible, onerous manner, Congress stepped in before the effective date of the final Subtitle C regulations and provided relief in October 1980 with the Bevill Amendment. See 42 U.S.C. §§ 6921(b)(3)(A), (c)6982(n). As a counterpoint to EPA's prior actions described above, the Bevill Amendment established a special process which EPA was required to follow before CCRs and the other special wastes could be regulated as hazardous wastes under Subtitle C of RCRA. See also, *Environmental Defense Fund v. EPA*, 852 F.2d 1309, 1314 (D.C. Cir. 1988) (EDF) ("Indeed, our reading of the statute and legislative history strongly suggests that Congress designed the Bevill Amendment to break with the previous approach to regulation of hazardous industrial wastes.").

First, the Bevill Amendment established a temporary exemption from regulation under Subtitle C, until the completion of the study and submittal of the report described below. 42 U.S.C. § 6921(b)(3)(A). Congress directed EPA to conduct a "detailed and comprehensive study" on the adverse effects on human health and the environment of CCRs and other special wastes. 42 U.S.C. § 6982(n). In contrast to the manner in which EPA otherwise was going to decide how to determine if wastes were hazardous and subject to Subtitle C under the regulations that were to become effective on November 19, 1980, Congress expressly directed that the Bevill study include an analysis of:

- 1) the source and volumes of CCRs generated per year;
- 2) present disposal and utilization practices;
- 3) potential danger, if any, to human health and the environment from the disposal and reuse of such materials;
- 4) documented cases in which danger to human health or the environment from surface runoff or leachate has been proved;
- 5) alternatives to current disposal methods;
- 6) the costs of such alternatives;
- 7) the impact of those alternatives on the use of coal and other material resources; and
- 8) the current and potential utilization of such materials.

Third, Congress directed that EPA publish a report on such study, which was to include "appropriate findings," not later than 24 months after October 21, 1980. *Id.* The Bevill Report was to be submitted to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives. *Id.*

Fourth, the Bevill Amendment further stipulated that within six months after the Report to Congress, EPA, after public hearings and the opportunity for comment, had to determine whether to promulgate regulations under Subtitle C for CCRs, or determine that such regulations were unwarranted. 42 U.S.C. § 6921(b)(3)(C). Finally, if EPA determined that such regulations were warranted, EPA could then engage in notice and comment rulemaking to promulgate the Subtitle C regulations. *See American Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996) ("Section 3001(b)(3)(C) provides that the product of the notice and comment process [on the Report to Congress] will be a determination of whether regulation is warranted in the future, not regulations themselves.")

EPA failed to meet the Bevill Amendment's statutory deadline of October 21, 1980, for publication of a Report to Congress on fossil fuel combustion wastes. In *Gearhart v. Reilly*, No. 91-2435 (D.D.C. June 30, 1992), EPA entered into a Consent Decree which divided fossil fuel combustion wastes into two categories, and agreed to follow the Bevill process separately for the two categories. EPA had actually published its First Report to Congress on fossil fuel combustion wastes from coal fired utilities on March 8, 1988. 53 Fed. Reg. 9976 (Mar. 28, 1988). On August 9, 1993, EPA issued a regulatory determination that regulation of four large volume fossil fuel combustion wastes from coal fired utilities (fly ash, bottom ash, boiler slag, and flue gas desulfurization waste) as hazardous is "unwarranted" under RCRA Subtitle C. 58 Fed. Reg. 42,466.

In the second phase of the Bevill utility industry process, EPA addressed issues of co-management, ash derived from co-burning of coal from non-hazardous solid waste, ash derived from clean coal combustion, and combustion residues from burning oil and natural gas. EPA submitted its second utility Report to Congress on March 31, 1999. 64 Fed. Reg. 22,820 (April 28, 1999). On April 25, 2000, EPA issued its Phase II Regulatory Determination. 65 Fed. Reg. 32,214 (May 22, 2000). EPA concluded in the Phase II Bevill Regulatory Determination that hazardous waste regulation under Subtitle C for the remaining fossil fuel combustion wastes “[was] not warranted.” 65 Fed. Reg. at 32,215. EPA reserved the right to revise this determination. See *Id.* at 32,215 & 32,218.

An analysis of the Bevill Amendment reveals that the above-described special Bevill process established by Congress provided for a one-time evaluation of CCRs and the other special wastes that cannot be subsequently reversed. First, the Bevill Amendment by its terms calls for a “study” and a “report.” 42 U.S.C. §§ 6982(n). The use of the singular, as well as the statutory context, means that Congress deliberately established a one-time study and one-time Report to Congress obligation. Similarly, Congress called for a one-time regulatory determination when it stated that “not later than six months after the date of submission of the applicable study” EPA should “either determine to promulgate regulations . . . or determine that such regulations are unwarranted.” 42 U.S.C. § 6921(b)(3)(C).

Second, Congress made it clear it was establishing a one-time study, report and regulatory determination obligation when it required that the report and study be completed by a date certain, *i.e.*, October 21, 1980. 42 U.S.C. § 6982(n). Finally, the Bevill Amendment established a temporary exemption from RCRA Subtitle C regulation for the special wastes, an approach consistent with a one-time study, report, and regulatory determination. 42 U.S.C. § 6921(b)(3)(A). If Congress had intended to extend the Bevill process thirty years beyond the 1980 date Congress established for completion of the Bevill study and report, Congress would have done so explicitly. That Congress did not do so, further confirms that it intended that the Bevill process consist of a one-time report, study, and regulatory determination for CCRs.

Accordingly, with the issuance of the 2000 Regulatory Determination, the Bevill process for fossil fuel combustion wastes, including CCRs, was completed. For all the above reasons, the Bevill Amendment established a one-time study, report, and regulatory determination for CCRs. Accordingly, EPA lacks the authority to reverse its 1993 and 2000 Regulatory Determinations. Any attempt by EPA to do so in the final rule would be unlawful.

2. The D.C. Circuit Has Ruled that the Bevill Amendment Established a One-Time Study, Report, and Regulatory Determination Process

In *Solite Corp. v. EPA*, 952 F. 2d. 473 (D.C. Cir. 1991), NMA argued that future waste streams from the mineral processing industry should be eligible for the Bevill

study, report and Regulatory Determination process before they were subject to Subtitle C regulation. Parallel provisions of the Bevill Amendment establish the same study, report and regulatory determination process for wastes generated from the extraction, beneficiation, and processing of ores and minerals as are established for CCRs. 42 U.S.C. § 6982(p). In *Solite*, NMA challenged EPA's decision that only those mineral processing wastes that were generated between 1983 and 1988 were eligible for Bevill Amendment coverage, 54 Fed. Reg. at 36,596, and that processing wastestreams generated at some future point would therefore be subject to Subtitle C regulation.

In denying NMA's challenge, the D.C. Circuit relied on the explicit language of the Bevill Amendment for extraction, beneficiation, and processing wastes, which is virtually identical to the Bevill Amendment language for CCRs. The Court stated as follows:

The statutory provision directing EPA to study Bevill wastes suggests by its terms that a one-time study is sufficient. See 42 U.S.C. § 6982(p) ("The Administrator shall conduct a detailed and comprehensive study. . . . [and] shall publish a report of such study. . .").

Solite, 952 F.2d at 491.

The Court adds that:

The way in which the temporary nature of the Bevill Amendment is expressed in the statute also lends support to EPA's interpretation [that the Bevill Amendment establishes a one-time Bevill process]. See 42 U.S.C. § 6921(b)(3)(A) (Bevill exclusion operative "until at least six months after....submission of the applicable study").

Id. Finally, the Court states that:

In any event, this court's holding in *EDF II* secures EPA's position that a one-time determination is sufficient. There we interpreted the Bevill Amendment as an exclusion specifically for "the category of wastes designated as 'special wastes[]'....in EPA's 1978 proposed hazardous waste regulations." *EDF II*, 852 F.2d at 1329 (quoting 51 Fed. Reg. 36,234 (1986)). While we did not go so far as to foreclose Bevill status for a future waste that might satisfy a pre-set criterion, we clearly enough rejected the theory that Congress intended the coverage of the Bevill exclusion to evolve with time.

Id. The D.C. Circuit has already ruled that the Bevill Amendment creates a one-time Bevill study, report and regulatory determination process. Therefore, EPA cannot pursue its proposed Subtitle C option.

It is also important to emphasize that EPA—in *Solite* and during the challenged rulemaking—took a position diametrically opposed to the one it espouses today, *i.e.*, EPA then argued that the Bevill Amendment established a one-time process. In a notice of proposed rulemaking that was part of the regulatory history of the rule challenged in *Solite*, EPA stated that:

Both the administrative record and Congressional intent clearly indicate that the Bevill Amendment was intended to provide a temporary exclusion, pending further study, over a fixed time period. Congress directed EPA to conduct a single study of wastes generated by mineral mining and processing facilities, because of concern that existing wastes might not be readily amenable to Subtitle C controls and might pose relatively low hazard to human health and the environment. Moreover, contrary to some commenter's assertions, the statutory language includes explicit time limits on the Bevill exclusion, which apply to the submission of the required Report to Congress and subsequent regulatory determination.

In addition, EPA believes that making a one-time reinterpretation is not contrary to the interests of either industry or the environment. With regard to the concern raised by several commenters that the development of new technologies would be stifled, EPA notes that any new wastes generated in the future will be regulated under an established regulatory scheme (*i.e.*, either the Subtitle C or D program). Therefore, rather than facing regulatory uncertainty and incentives to generate large volumes of any new mineral processing wastes, industry will instead have substantial knowledge of the regulatory regime that it will face.

54 Fed. Reg. 15,316, 15,338 (April 17, 1989).

In justifying its position that the Bevill amendment created a one-time obligation in *Solite*, EPA then stated to the D.C. Circuit in its Brief for Respondent that:

This decision followed from EPA's reading of congressional intent based on the statutory language and scheme of sections 3001(b)(3) and 8002(p) of RCRA, which establish a temporary exclusion for a fixed period of time and which fail to expressly impose a continuing obligation to study new wastestreams. EPA's construction was also based on other indicia, such as the strict statutory time periods governing the mineral processing waste exclusion in section 3001(b)(3)(A) of RCRA. 54 Fed. Reg. at 15,338; 54 Fed. Reg. at 36,956. From this evidence of congressional intent, EPA reasonably determined that Congress authorized EPA to make a one-time interpretation or snapshot of mineral processing wastes, rather than a continuing series of studies and regulatory determinations. . . .

Brief for the Respondent, *Solite Corp. v. EPA*, at 68, May 8, 1991 (Final Brief). EPA concluded that:

There is nothing in the statute itself which suggests that the Bevill process should be an ongoing, evolving process, with updated reports to Congress and regulatory determinations.

Brief for Respondent, *Solite Corp. v. EPA*, at 69, May 8, 1991 (Final Brief).

EPA should not be allowed to reverse the position it previously took in a parallel Bevill rulemaking and before the D.C. Circuit. For this reason also, EPA's Subtitle C option cannot move forward.

B. Even if EPA was Authorized to Reverse its 1993 and 2000 Regulatory Determinations, EPA has Failed to Comply with the Statutorily-Mandated Bevill Process

In the proposed rule, EPA states that it "is reevaluating its August 1993 and May 2000 Bevill Regulatory Determinations regarding CCRs generated at electric utilities and independent power producers." 75 Fed. Reg. at 35,148. Even if EPA had the authority to reverse its August 1993 and May 2000 Bevill Regulatory Determinations, which it does not as demonstrated above, EPA has failed to go through the Bevill process before proposing a reversal of the Bevill Regulatory Determinations, and therefore cannot proceed with its Subtitle C option.

As stated above, the Bevill process as established by Congress must include each of the following steps:

- 1) EPA must study CCRs pursuant to the eight study factors;
- 2) EPA must then submit a Report to Congress, *i.e.*, a report on such study and the findings of the study to the House Committee on Energy and Commerce and the Senate Committee on Environment and Public Works; and
- 3) Following submission of the Report to Congress to the enumerated congressional committees, EPA must conduct public hearings and provide an opportunity for comment on the Report, and then either determine to promulgate regulations under Subtitle C or determine that such regulations are not warranted.
- 4) If EPA determined that such regulations were warranted, then engage in a notice and comment regulation to promulgate the regulations.

EPA has failed to comply with this special Bevill process. First, its purported analysis of the eight Bevill study factors as applied to CCRs is insufficient and superficial. Among other things, EPA is explicitly required to evaluate the "costs of alternatives" to current disposal methods. EPA's evaluation of the costs to the

industry of the Subtitle C options in the proposed rule is woefully lacking in scope and depth.

Moreover, EPA has not even attempted to argue that it has met the Report to Congress prong of the Bevill process. Prior to EPA's proposal to reverse its 1993 and 2000 Regulatory Determinations and adopt a Subtitle C approach for CCRs, EPA has not prepared a Report and did not submit a Report to the enumerated Congressional committees before proposing to reverse its Regulatory Determinations in the proposed rule.

In addition, EPA's proposal to reverse its 1993 and 2000 Regulatory Determinations is not based, as explicitly required by statute, on public hearings and public comment on the non-existent Report to Congress. Therefore, EPA has not met its statutory obligation which conditions any Regulatory Determination on an evaluation of the results of such public hearings and any comments on the Report to Congress. See *EDF*, 852 F. 2d. at 1314. ("The statute clearly states that the agency is to base its regulatory determinations on the information gathered for the § 8002(p) [the extraction, beneficiation and processing waste] study").

The legislative history supports this reading. Representative Bevill, the sponsor of the statutory amendment that bears his name, stated explicitly that any EPA regulatory determination would be based in part on the public hearings and any comments that were submitted on the Report to Congress. "Finally, let me direct the House's attention to the fact that after EPA concludes these studies, it will be required to obtain public views on them and to make known whether as a result of this process EPA believes any regulation of these materials is necessary." 126 Cong. Rec. at 3362.

Finally, EPA's proposed rule envisions a decision-making process involving the simultaneous reversal of the prior Regulatory Determination for CCRs, the issuance of a new regulatory determination for CCRs, and the adoption of new Subtitle C regulations for CCRs. This accelerated approach violates the sequential nature of the Bevill process established by Congress, which provided for a regulatory determination to be followed at a later time by subsequent issuance of regulations.

To the extent EPA is authorized to reverse its 1993 and 2000 Regulatory Determinations, it cannot do so without complying with the statutorily mandated Bevill process. EPA's failure to do so prevents it from proceeding with the Subtitle C option.

III. EPA'S CO-PROPOSAL FOR REGULATING THE DISPOSAL OF CCRS FROM ELECTRIC UTILITIES AND INDEPENDENT POWER PRODUCERS

EPA's co-proposal contains a Subtitle D and Subtitle C regulatory approach to the disposal of CCRs at landfills and surface impoundments. EPA also describes in two paragraphs of the proposal alternative Subtitle D approaches and identifies a "Subtitle D prime" option. See 75 Fed. Reg. at 35,210. Of these options, NMA supports the "Subtitle D prime" regulatory approach. However, none of these

options should obstruct OSM's ability and authority to implement a separate federal program for the use of CCRs at coal mining and reclamation operations.

A. NMA Opposes EPA's Proposed Hazardous Waste Regulations under RCRA Subtitle C

NMA strongly opposes EPA's proposal to list CCRs as "special wastes" and subject these materials to hazardous waste regulation under Subtitle C of RCRA. EPA extensively evaluated whether large-volume wastes generated by the combustion of coal, including CCRs, should be subject to hazardous waste regulations under Subtitle C of RCRA. EPA held in a 1988 and 1999 Report to Congress that these materials do not exhibit any of the four characteristics of hazardous waste: corrosivity, reactivity, ignitability and toxicity. EPA further concluded in two regulatory determinations, published in 1993 and 2000, that these materials do not warrant regulation under Subtitle C hazardous waste regulations. These regulatory determinations are one-time decisions that cannot be undone.¹² Even if EPA was authorized to reverse its regulatory determinations, EPA failed to comply with the statutorily-mandated Bevill process for doing so. Furthermore, EPA's proposed listing of CCRs as a special waste is not supported by the record and is legally defective.¹³ Consequently, EPA cannot lawfully regulate CCRs as hazardous wastes under RCRA Subtitle C.

Putting these fundamental legal issues aside, NMA also has practical concerns with the language used in the proposed Subtitle C regulatory text as applied to our members. EPA's description of the S001 waste code excludes only "minefilling operations." See 75 Fed. Reg. at 35,262. Again, NMA is faced with uncertainty on how this term would apply to our member companies. First, the term "minefilling operation," if read in tandem with the definition of "minefill" in the preamble, could be interpreted as only applying to underground mines. Second, the term does not embrace EPA's stated intention of also excluding "non-minefill uses of CCRs at coal mine sites." 75 Fed. Reg. at 35,128. Thus, the Subtitle C regulations could be interpreted to apply to surface coal mining and reclamation operations and non-minefill uses of CCRs at coal mining operations if they do not fall under the beneficial uses protected in the final rule. Yet, nothing in the record supports this result.

¹² See Section II(A)(1).

¹³ EPA failed to individually evaluate the four categories of waste included in the definition of CCRs to determine whether they in fact meet the ten listing criteria in 40 C.F.R. § 261.11(a)(3). EPA's decision to instead evaluate these four distinct categories of waste as a single class of waste is arbitrary and capricious and inconsistent with the plain language of the regulations. Additionally, EPA failed to give serious consideration to all of the listing criterion in 40 C.F.R. § 261.11(a)(3). For example, EPA provides no analysis in the proposed rule of the effectiveness of existing state controls for CCRs. EPA also adopted unrealistic scenarios for assessing the plausible mismanagement criterion. Furthermore, EPA's risk assessment is fatally flawed and cannot be relied upon to support a Subtitle C regulatory program for the disposal of CCRs in surface impoundments and landfills. Specifically, the fate and transport model does not represent realistic, real-world risk scenarios for CCR management units. Finally, EPA's draft screening assessment of fugitive dust risks is flawed and should not be relied upon for listing CCRs as a special waste under Subtitle C of RCRA.

In its May 2000 Regulatory Determination, EPA acknowledged that it received public comments from industry and the states regarding concerns that a Subtitle C regulation “could cause a halt in the use of [CCRs] to reclaim abandoned and active mine sites.” 75 Fed. Reg. at 32,217. EPA responded: “We recognize that when done properly, minefilling can lead to substantial environmental benefits.” *Id.* EPA concluded “that Subtitle D controls, or upgraded SMCRA controls or a combination of the two, should provide sufficient clarity and incentive to ensure proper handling of this waste when minefilled. . . . EPA does not see a basis in the record for carving this one practice out for separate regulatory treatment [under Subtitle C].” *Id.* at 32,232. EPA provides no new evidence in the proposed rule to reverse this determination for minefilling.

NMA agrees with concerns voiced by OSM Director Pizarchik during the interagency review process that “if EPA lists all CCRs as hazardous wastes, the current placement of CCRs at some SMCRA permitted coal mines will have to cease . . . [and] a separate regulatory action concerning development of specific CCR regulations for SMCRA minefills will be moot for some states.” See OSM Letter at 2. Pizarchik also warns EPA that “if EPA lists CCRs as a hazardous waste under Subtitle C of RCRA, it will become more difficult to [sic] for OSM to allow placement of CCRs on minesites because doing so could be construed as an arbitrary and capricious action subject to legal action.” *Id.* at 3. This result is in direct contravention of EPA’s stated intent of this rule and its past decisions to defer to and work with OSM to regulate uses of CCRs at coal mining operations under SMCRA.

B. NMA Supports EPA’s Proposed “Subtitle D Prime” Approach with Modification

NMA supports EPA’s efforts to implement a federal Subtitle D non-hazardous waste regulatory program for the disposal of CCRs at surface impoundments and landfills.¹⁴ As mentioned above, the Subtitle D approach is the only lawful option available to the agency. NMA, however, shares the concerns of its utility customers on various aspects of the Subtitle D regulatory approach provided in the final rule. One important concern is the automatic closure of CCR surface impoundments under the proposed Subtitle D regulatory program that are currently operating in a manner that is fully protective of human health and the environment.

NMA supports EPA’s alternative “Subtitle D prime” approach because it would ensure the development of fully protective controls for the disposal of CCRs at landfills and surface impoundments. The “Subtitle D prime” approach would provide the environmental safeguards EPA is seeking while not imposing

¹⁴ NMA is not alone in supporting this approach. During the last year or so, a bi-partisan group of 165 members of Congress, including the majority of the House Energy and Commerce Committee, 45 U.S. Senators, the National Governors’ Association, the Western Governors’ Association, a majority of states, several municipal and local governments, the Association of State and Territorial Solid Waste Management Officials, the Environmental Council of the States, over two dozen state environmental protection agencies and state departments of transportations, federal agencies including the U.S. Department of Energy, and many other third-parties have expressed their support for regulation of CCRs as a non-hazardous waste under RCRA Subtitle D.

unnecessary regulatory costs on the utility sector that in turn threatens jobs and power reliability and increases the cost of electricity.

Under the "Subtitle D prime" approach, the agency would include all of the elements of the proposed Subtitle D regulatory program except that it "would not require the closure or installation of composite liners in existing surface impoundments; rather these surface impoundments could continue to operate for the remainder of their useful life." 75 Fed. Reg. at 35,210. Thus, the "Subtitle D prime" approach avoids a major flaw contained in the Subtitle D regulatory approach that would close down all surface impoundments irrespective of their environmental performance. Under the "Subtitle D prime" approach, existing CCR surface impoundments would continue to be subject to applicable groundwater monitoring standards and corrective action requirements.

Certain modifications to the "Subtitle D prime" approach should be made, however, if EPA adopts this approach in the final rule. These modifications relate to several of the requirements found in the proposed Subtitle D regulatory program. First, EPA should not adopt a specific timeframe for closure but require surface impoundments and landfills to close according to a closure plan approved by a state or developed and certified by a registered professional. Second, EPA should not impose location restrictions on existing surface impoundments and landfills since the agency has provided no evidence in the record to substantiate structural stability issues in these restricted areas.

Third, EPA should amend its run-on control requirements for surface impoundments by instead requiring that these units be designed to appropriately address peak discharge events. Fourth, in terms of groundwater monitoring, EPA should allow the state or a registered professional to delete constituents not reasonably expected to be in the waste or establish an alternative list of indicator parameters consistent with the groundwater monitoring programs applicable to municipal and non-municipal solid waste landfills.

Fifth, EPA should allow registered professionals to make compliance certifications even if they are employees of the owner/operator of the disposal unit. Finally, EPA should allow for alternate liner systems, since in some regions of the country the proposed composite liner system is simply unnecessary to ensure groundwater protection and in other instances an alternate liner system (i.e. geosynthetic clay liners) would be more appropriate than the one proscribed in the proposed rule.

IV. NMA'S COMMENTS ON EPA'S PROPOSED APPROACH TO BENEFICIAL USES OF CCRS

A. NMA Supports EPA's Decision Not To Reverse the Regulatory Determination for Beneficial Uses of CCRs

From the very beginning of the proposed rule, EPA states that it is "not proposing to change the May 2000 Regulatory Determination for beneficially used CCRs." 75

Fed. Reg. at 35,128; *See also* 75 Fed. Reg. at 35,160. NMA strongly supports the agency's decision. Currently, more than 50 million tons of CCRs (nearly 45 percent) are beneficially used.¹⁵ As EPA is keenly aware, the beneficial use of CCRs provides tremendous societal and environmental benefits. To name a few, these benefits include: reducing the amount of green space disturbed for the mining of virgin materials, eliminating the need for larger disposal sites, and creating sustainable products in a way that decreases the emission of greenhouse gases.

EPA's May 2000 Regulatory Determination recognized the following beneficial uses:

Beneficial purposes include waste stabilization, beneficial construction applications (e.g., cement, concrete, brick and concrete products, road bed, structural fill, blasting grit, wall board, insulation, roofing materials), agricultural applications (e.g., as a substitute for lime) and other applications (absorbents, filter media, paints, plastics and metals manufacture, snow and ice control, waste stabilization).

65 Fed. Reg. at 32,229. NMA is aware of one non-coal mining operation that mixes CCRs into concrete and uses the concrete in mine workings as structural fill. This use is a beneficial use as described in the Regulatory Determination. EPA provides no reasoned justification for reversing course and regulating this use or any of the beneficial uses listed above in the Regulatory Determination. EPA should maintain its position in the final rule and not regulate these beneficial uses of CCRs.

B. NMA Urges EPA to Clarify that Uses of CCRs at Coal Mining Operations do not Constitute Unencapsulated Uses Subject to Regulation

While EPA proposes to retain the Beville exemption for the beneficial uses identified in the Regulatory Determination, it opens the door to regulating unencapsulated uses. *See* 75 Fed. Reg. at 35,160-61 & 35,163. EPA identifies road embankments and agricultural uses as "unencapsulated uses," but does not provide a more specific definition of the term. *See id.* at 35,160. NMA is very concerned that this undefined and ambiguous term could be misinterpreted to subject certain uses of CCRs at coal mining operations to regulation under RCRA.

As NMA discussed at length above, we do not think it is EPA's intention to regulate any uses of coal ash at coal mining operations. We also provide ways that EPA can

¹⁵ NMA was disappointed to read that EPA does not consider placement of fill in mines to be a beneficial use. *See* 75 Fed. Reg. at 35,212 n.155. According to EPA, the definition of beneficial use touted by the ACAA "does not align with that used by EPA in this rulemaking." ACAA includes mine applications as a beneficial use. The agency, however "classifies it as a separate category of use." NMA disagrees with EPA's position. In its Regulatory Determination, EPA even acknowledges that "when done properly, minefilling can lead to substantial environmental benefits." 65 Fed. Reg. at 32,217. EPA further recognizes that "reuse when performed properly, is by far the environmentally preferable destination for these wastes, including when minefilled." *Id.* EPA's statements to the contrary in this proposed rule are unfounded and misplaced, particularly since this rulemaking is not intended to address the use of CCRs at coal mining operations.

ensure that its decision to defer to and work with OSM on a separate rulemaking regarding our industry is appropriately executed in the preamble and regulatory text. In the same vein, if EPA were to regulate “unencapsulated uses,” which NMA opposes, the agency must define that term in the final regulation to exclude all uses of CCRs at surface and underground coal mining and reclamation operations.

The damage cases EPA cites to rationalize potential regulation of “unencapsulated uses” have nothing to do with the use of CCRs at mine sites. Consequently, there is nothing in the record to support regulating non-minefill uses of CCRs at mine sites. EPA must be mindful that the terminology it uses has significant consequences for the regulated community and their understanding of what uses of CCRs are and are not regulated under RCRA. EPA must inject more regulatory certainty as it finalizes this rulemaking.

V. MISCELLANEOUS ISSUES

A. The Subtitle C Proposal to Regulate Inactive and/or Previously Closed Surface Impoundments is Unlawful

EPA proposes to extend RCRA Subtitle C jurisdiction to previously closed and/or inactive CCR surface impoundments. 75 Fed Reg. at 35,177. Even if such impoundments do not receive CCRs after the effective date of the rule, EPA would require these impoundments to close in compliance with the proposed rule. EPA attempts to tie this requirement to a new theory based on “passive leaking,” even though this theory has been rejected by five United States Courts of Appeal.¹⁶

EPA lacks jurisdiction under RCRA over such impoundments. First, there is nothing in the statute that expressly authorizes EPA to retroactively require a previously closed or inactive surface impoundment that is no longer receiving CCRs to be subject to full Subtitle C hazardous waste controls because they did not close in accordance with the interim status hazardous waste closure requirements. To the contrary, Section 3004(a) of RCRA makes clear that the Subtitle C regulations are to apply only to active, ongoing treatment, storage and disposal operations. 42 U.S.C. § 6924(a). The Supreme Court held:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power

¹⁶ See *Carson Harbor Village v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001); *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000); *ABB Industrial Systems v. Prime Technology*, 120 F.3d 351, 358 (2d Cir. 1997); *United States v. CDMG*, 96 F.3d 706, 711 (3rd Cir. 1996); *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 762 (5th Cir. 1994). Even though these cases considered the definition of “disposal” in the context of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the holdings are still pertinent as CERCLA specifically incorporates by reference RCRA’s statutory definition of “disposal.”

to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-209 (1988) (internal citations omitted). EPA's attempt to rationalize this requirement also falls short. According to the Supreme Court, "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Id.* Given that RCRA does not provide such an "express statutory grant" of authority to EPA, the agency cannot now retroactively require full Subtitle C closure requirements for previously closed and/or inactive surface impoundments.

Second, EPA's attempt to retroactively extend regulation over previously closed and/or inactive surface impoundments is inconsistent with EPA's prior rulemakings and thus arbitrary and capricious. RCRA contemplates the regulation only of units that operate after the effective date of the relevant RCRA rulemaking. EPA itself admitted in 1980 that:

RCRA is written in the present tense and its regulatory scheme is organized in a way which seems to contemplate coverage only of those facilities which continue to operate after the effective date of the regulations. The [then] Subpart D standards and [then] Subpart E permitting procedures are not directed at inactive facilities.

43 Fed. Reg. at 58,984. Because the statutory language is clear that only operating facilities should be subject to what are now the Subtitle C hazardous waste regulatory requirements, EPA's proposal to regulate previously closed and inactive impoundments containing CCRs is unlawful.

EPA also recognized in 1980 that:

Enormous technical, legal, and economic problems would arise if these standards were to be directly applied to inactive facilities [i.e., those facilities which have ceased operating prior to the effective date of the Subtitle C regulations] and all such facilities were required to upgrade. Such an approach also does not seem equitable because of the enormous difficulty of bringing a closed facility into compliance, and because the present owner of land on which an inactive site is located might have no connection (other than present ownership of the land) with the prior disposal activities.

Id. For these reasons also, EPA decided in 1980 not to regulate closed or inactive facilities that were managing wastes being brought into the Subtitle C management system.

EPA provides no meaningful justification in its current proposal for reversing its earlier decision not to subject such units to regulation. In 1980, when EPA promulgated the Subtitle C rules, the agency decided, based on a multitude of

reasons (legal, practical, economic, equitable, and technical) that the regulations and permitting would not apply to the *thousands* of closed and inactive surface impoundments in essentially every industry in America. Now, in an about-face, EPA reverses course and tries unsuccessfully to justify the retroactive nature of its current proposal by arguing in just a few sentences that the units contain large amounts of CCRs and generally refers to the "significant risk" these units impose to justify the change in regulatory approach. 75 Fed. Reg. at 35,177. EPA's proposal to regulate closed and inactive surface impoundments containing CCRs is arbitrary and capricious, and should be abandoned in the final rule.

B. EPA's "Human and Ecological Risk Assessment of Coal Combustion Wastes" Contains Errors Related to Boron

In reviewing EPA's "Human and Ecological Risk Assessment of Coal Combustion Wastes" (April 2010), it appears that EPA relied on a significant computational error in the derivation of the ecological benchmark for boron. The problem seems to come from an error copying results from a published study, which were stated in *milligrams/L*, into a table with the units as *micrograms/L*. The data was from a 1995 publication by Hamilton (Ecotoxicol. Environ. Saf. 30:134-142) and the mistake was incorporated into the boron SCV presented by ORNL (1996), which in turn was used in EPA documents. This 1000-fold error has probably led to erroneous calculations of the ecological hazard associated with boron in the EPA documents.

EPA's "Human and Ecological Risk Assessment of Coal Combustion Wastes" uses a chemical stressor concentration limit (CSCL) for boron in surface water of 0.0016 mg /L. This value is surprising as the scientific literature details numerous ecological risk assessments of boron with most arriving at a criterion of about 1 mg/L, give or take. For example, a review of the boron literature done for the Province of Ontario, Canada in 2008 recommended a chronic water quality objective for boron of 1.5 mg/L.

The following traces the derivation and source of the error:

- 1) Table 3-3 of the 2010 EPA document lists the CSCLs used in the ecological risk assessment, including the value of 1.6E-03 (0.0016) mg/L for boron. The adjacent text refers to Appendix H and U.S. EPA (1998a) for information about the development of the CSCLs.
- 2) Appendix H states (page H-1) that ecological benchmarks were taken directly from the 1998 EPA document "Non-groundwater Pathways, Human Health and Ecological Risk Analysis for Fossil Fuel Combustion Phase 2 (FFC2)."

- 3) In the 1998 EPA document, CSCLs are presented in Appendix J "Review and Comparison of Available Criteria for Chemical Stressor Concentration Limit (CSCL) Development." Table 3.1 presents the value 0.0016 mg/L as the boron SCV (secondary chronic value) for surface water established by Oak Ridge National Laboratory (ORNL). USEPA Region IV is cited as having a 0.75 mg/L AWQC for boron.¹⁷ The ORNL value appears to be the one taken forward.
- 4) The referenced ORNL document is "Toxicological Benchmarks for Screening Potential Contaminants of Concern for Effects on Aquatic Biota: 1996 revision)," authored by GW Suter II and CL Tsao for the US Department of Energy. They calculated SCVs using the methodology described in EPA's Proposed Water Quality Guidance for the Great Lakes System (1993).
- 5) The information for boron is shown on Table A.1 of the 1996 ORNL document. The data are taken from 3 publications. Values for *Daphnia magna* are taken from two publications, and several fish values are taken from one publication by Hamilton, 1995 ("Hazard assessment of inorganics to three endangered fish in the Green River Utah" *Ecotoxicol. Environ. Saf.* 30:134-142). The daphnid values are 8,800 to 226,000 micrograms/L and the fish values are reported as >100 to 552 micrograms/L (note the Table A.1 heading states that concentrations are all in micrograms/L ($\mu\text{g/L}$)).
- 6) The fish values appear to be the source of the error. The values in Hamilton (1995) are clearly stated to be in milligrams per liter (mg/L). ORNL has taken the same numbers and tabled them as micrograms per liter. This results in about a 1000-fold error in the values used in the SCV calculation.

Since boron is cited as an important driver in the ecological risk assessment with very high hazard quotients, it seems critical that EPA use a correct CSCL. It is unfortunate that the ORNL value is still being used and that reviews of EPA draft reports did not notice the problem. Revision to the draft 2010 risk assessment does seem justified, given that the data used was incorrect by three orders of magnitude. Having correct information would allow the proposed CSCL for boron to be compared with other water quality guidance values.

CONCLUSION

CCRs serve a variety of important uses at surface and underground mining and reclamation operations. EPA's proposed rule should not put these uses in peril by failing to appropriately exclude them from the disposal regulations for surface impoundments and landfills. OSM is and should continue to be the exclusive

¹⁷ The Region IV value of 0.75 mg B/L likely comes from recommendations concerning use of water for irrigation, not for protection of aquatic life. See US EPA, Water Quality Criteria 1972 at 341.

Administrator Lisa Jackson
Nov. 19, 2010
Page Thirty

regulator of these materials at mine sites. NMA urges EPA to adopt the changes recommended above to ensure that the agency's intention to exclude placement of CCRs in mines and non-minefill uses of CCRs at coal mine sites is properly carried out in the final regulation. Please feel free to contact me at (202) 463-2629 or tbridgeford@nma.org if you have any questions regarding NMA's comments on this rulemaking.

Sincerely,

A handwritten signature in black ink, reading "Tawny Bridgeford". The signature is written in a cursive, flowing style.

Tawny A. Bridgeford
Associate General Counsel