



February 11, 2008

Notice of Data Availability on the Disposal  
Of Coal Combustion Wastes in Landfills & Impoundments  
Environmental Protection Agency  
Mailcode: 5305T  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

**Attention Docket ID No. EPA-HQ-RCRA-2006-0796**

To Whom It May Concern:

The National Mining Association (NMA) appreciates the opportunity to share its views on the Environmental Protection Agency's (EPA) notice of data availability (NODA) on the disposal of coal combustion wastes in landfills and impoundments. 72 Fed. Reg. 49,714 (Aug. 29, 2007). NMA is a national trade association whose members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

NMA members produce 75 percent of the coal mined in the United States. Many NMA members also use coal combustion products (CCPs)<sup>1</sup> in their mining reclamation practices to improve environmental performance. Such uses include employing CCPs to help achieve approximate original contour requirements, to eliminate highwalls, as a soil amendment, to neutralize acid mine drainage, and for other beneficial uses.

**I. General Comments Regarding Regulation of CCPs**

As noted by the National Academy of Sciences (NAS), the use of CCPs in coal mines as part of the reclamation process is a viable management option provided CCP placement is properly planned and carried out in a manner that avoids significant adverse environmental and health impacts and the regulatory process for issuing permits includes clear provisions for public involvement.<sup>2</sup> When properly managed

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<sup>1</sup> NMA uses the term "CCPs" to refer to coal combustion products consistent with EPA's Coal Combustion Products Partnership (C2P2) which encourages the beneficial use of CCPs. These are the same materials as "coal combustion wastes" and "coal combustion byproducts" that are used in other contexts by other entities such as the National Academy of Sciences and the Office of Surface Mining (OSM).

<sup>2</sup> See National Research Council, *Managing Coal Combustion Residues in Mines* 1 (Mar. 1, 2006).

and placed, the beneficial use of CCPs can significantly improve conditions at active and abandoned mine sites and improve the environment.

Accordingly, NMA urges EPA to maintain its recognition of the importance of beneficial uses of CCPs:

We do not wish to place any unnecessary barriers on the beneficial uses of these coal wastes, because they conserve natural resources, reduce disposal costs and reduce the total amount of waste destined for disposal . . . EPA believes that such reuse when performed properly, is by far the environmentally preferable destination for these wastes, including when minefilled.

*EPA Regulatory Determination on Wastes from the Combustion of Fossil Fuels*, 65 Fed. Reg. 32,214, 32,217 (May 22, 2000) (hereinafter "2000 Regulatory Determination").

In addition, NMA strongly supports the recommendation made by NAS that the Office of Surface Mining (OSM) and its state partners under the Surface Mining Control and Reclamation Act (SMCRA) "take the lead role in developing new national standards for [CCP] use in mines because the framework is in place to deal with mine-related issues."<sup>3</sup> NMA agrees that under SMCRA, OSM and related state agencies currently have the regulatory framework in place to address CCPs used in mine reclamation, and have considerable expertise in reviewing, permitting, and managing mined lands.<sup>4</sup>

Moreover, OSM is already in the process of promulgating new rules that address the placement of CCPs in mines.<sup>5</sup> NMA strongly supports OSM taking the lead role in regulating the coal mine placement of CCPs, and urges EPA to continue to defer to OSM's expertise as the exclusive regulator of these materials in mines. There is no need for EPA to regulate mine placement of CCPs when OSM is already preparing to issue such regulations, especially when: "[EPA] has identified no damage cases involving minefilling . . . ."<sup>6</sup>

## **II. Specific Comments Related to EPA's NODA**

Many changes have occurred since EPA issued its 2000 Regulatory Determination. First, many states have considerably increased their regulation of CCPs. Second, CCP generators have greatly improved their management of CCPs over the past several years. Both of these significant factors are recognized and documented in

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<sup>3</sup> *Id.* at 154.

<sup>4</sup> *Id.*

<sup>5</sup> See Placement of Coal Combustion Byproducts in Active and Abandoned Coal Mines, 72 Fed. Reg. 12,025-12,030 (Mar. 14, 2007).

<sup>6</sup> 65 Fed. Reg. at 32,231.

the government's own 2005 report, *Coal Combustion Waste Management at Landfills and Surface Impoundments 1994-2004* (hereinafter "DOE/EPA Report").

Based on these changed circumstances, and the continuing trends towards greater state regulation and improved industry practices in handling CCPs, it is unnecessary for EPA to promulgate regulations under subtitle D of the Resource Conservation and Recovery Act (RCRA) to further regulate CCPs. EPA should likewise reject the extreme proposals by environmental organizations suggesting practices that are akin to regulation under RCRA subtitle C. Such measures were already considered and rejected by the agency in its 2000 Regulatory Determination, which explained that RCRA subtitle C regulation was not warranted for CCPs.<sup>7</sup>

#### **A. State Regulation of CCPs**

Numerous states have already increased their regulatory requirements for coal ash placement. Indeed, the Department of Energy (DOE) and EPA joint report found that: "Between 1994 and 2004, the amount and quality of environmental controls used at CCW management units appear to have increased . . . in eight areas of regulatory control . . . more CCWs destined for landfills in the States reviewed had tightened regulatory controls than had relaxed controls . . ."<sup>8</sup> States have not only tightened their CCP programs, but have generally applied them consistently and appropriately. For example, the agency's own report also found that state regulators did not issue variances from existing CCP rules, unless there were sound scientific bases to support variance requests.<sup>9</sup>

Not only have states increased regulation of CCPs, but this trend is continuing. Several other states are now in the process of tightening their rules. These include Florida, which plans to develop a new rule to establish design, operation and closure requirements for CCP storage or disposal facilities, including requirements or protocols for the beneficial use of CCPs. Likewise, Maryland has already proposed regulations that would establish new requirements for generation, storage, handling, processing, disposal, recycling, beneficial use or other uses of CCPs. Ohio has also proposed draft rules for industrial waste, groundwater, and multi-program regulations and has proposed draft rules for the beneficial use of industrial waste. Such findings demonstrate that states already effectively regulate CCPs, and that this trend toward more state regulation will likely increase in the future.

#### **B. Improvement in CCP Practices**

It is clear that there is a significant trend of increasing regulation and voluntary compliance measures that obviate the need for developing new RCRA subtitle D regulations. The DOE/EPA report found that 100 percent of surveyed landfills and

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<sup>7</sup> See 65 Fed. Reg. 32,214-32,217 (May 22, 2000).

<sup>8</sup> See DOE/EPA Report at pp. S-5 and S-7.

<sup>9</sup> *Id.* at S-10.

surface impoundments were authorized by one or more permits. Likewise, 100 percent of surveyed units either underwent a pre-permit site characterization, or a site characterization was required as part of a permit. Ninety-one percent of identified units built or expanded between 1994 and 2004 have groundwater monitoring—compared to only 38-45 percent in 1995 for surface impoundments and landfills, respectively.<sup>10</sup> In addition to all of these trends, the Utility Solid Waste Activities Group (USWAG) has established a voluntary action plan that will result in even further improvements in environmental performance over time. Simply put, to the extent that there were any gaps in regulation of CCPs at landfills and impoundments, such gaps are already being filled without new federal regulations.

### **C. The Risk Assessment Overstates CCP Risks**

EPA's risk assessment document, *Human and Ecological Risk Assessment of Coal Combustion Wastes*, has several problems that, when aggregated, make it ill-suited to support large scale policy development. The risk assessment is based on pre-1994 data. As demonstrated above, the strong trend has been toward more stringent regulation of CCPs and more rigorous management practices of these materials. Reliance on such old data in a dynamic and more stringent regulatory environment and with constantly-improving CCP management practices will overestimate the risks posed by such materials.

In addition, the risk assessment does not comport with the agency's procedure and guidance on the development of risk assessments requiring sound technical methods that are both transparent and reproducible. The document relies upon modeling to estimate exposure risks from CCPs, but fails to validate the modeling despite the availability of real world data to test the assumptions in the model. Finally, it uses unrealistic assumptions that are contrary to the agency's own earlier findings,<sup>11</sup> which cause it to significantly overestimate the risks of CCPs. Taken together, these problems suggest that the risks of CCPs are substantially overstated by this document, and therefore, it should not be used as a basis to support new federal regulations.

### **D. The Earth Justice Proposal Must be Rejected**

NMA strongly opposes the Earth Justice proposal.<sup>12</sup> If accepted, it would federalize regulation of CCPs and regulate activities that were never identified in EPA's 2000

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<sup>10</sup> See DOE/EPA Report at pp. S-5, S-6.

<sup>11</sup> For example, the risk assessment assumes that there is always a drinking water well within the vicinity of CCP placement, but the agency previously reported that CCP sites pose limited potential for human exposure because they are frequently located significant distances from population centers and are typically near surface water bodies that dilute and divert groundwater plumes. See 58 Fed. Reg. 42,475; 1988 Report to Congress at 5-68-5-97.

<sup>12</sup> See *Proposal for the Federal Regulation of Coal Combustion Waste*, Earth Justice, et. al. (Jan. 31, 2007).

Regulatory Determination as areas of concern. It would over-regulate, and therefore discourage, beneficial uses of CCPs. This is contrary to EPA's 2000 Regulatory Determination, which expressly warned against overregulation of beneficial uses because doing so will discourage their use. Worst of all, it would essentially reverse EPA's 2000 Regulatory Determination, which expressly found that: "regulation of fossil fuel combustion wastes under subtitle C of RCRA is not warranted."<sup>13</sup>

Adopting the Earth Justice proposal is also contrary to the purpose of RCRA subtitle D, which is "to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources including energy and materials that are recoverable from solid waste and to encourage resource conservation."<sup>14</sup>

### **III. Conclusion**

EPA's concerns as expressed in the 2000 Regulatory Determination have been addressed, and therefore new RCRA subtitle D regulations for CCPs are not warranted. As previously noted, OSM is appropriately taking the lead regulatory role in addressing the placement of CCPs at mines, consistent with the recommendations of the NAS Report. Regarding CCP placement in landfills and impoundments, regulation of CCPs has been significantly improved through improved state regulatory programs, and this trend is increasing. Likewise, the management practices governing CCP placement have also improved. Both of these trends are confirmed by the agency's own 2005 joint report with DOE. To the extent that isolated problems arise, both EPA and the states have ample existing regulatory authority to address these situations on a site specific basis, if necessary, without the need for a new layer of federal regulation.

We appreciate the opportunity to share our views. Should you have any questions, please contact me (202) 463-2643 or [bfrisby@nma.org](mailto:bfrisby@nma.org).

Sincerely,



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National Mining Association

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<sup>13</sup> See 65 Fed. Reg. at 32,215.

<sup>14</sup> See 42 U.S.C. § 6941.