

Ensuring Federal Enforceability of the Management Of Coal Combustion Byproducts Consistent With Preserving Beneficial Uses

In developing Federal coal combustion byproduct (CCB) regulations, it is critical that EPA ensure environmental protection without adversely affecting CCB beneficial use.

RCRA requires that EPA consider the “current and potential utilization” of CCBs in evaluating its regulatory options for CCBs [See RCRA § 8002(n)(8)]. EPA and the States have consistently recognized that regulating CCBs as hazardous waste under Subtitle C would adversely impact their beneficial use. Such a result would not be consistent with RCRA’s directive that EPA consider such beneficial uses in evaluating CCB regulatory options. On the other hand, regulation of CCBs under RCRA Subtitle D would not adversely impact CCB beneficial use, while at the same time allowing for the development of federal regulations that would ensure that CCBs are managed in a manner protective of human health and the environment.

EPA Has Ample Authority to Enforce Subtitle D CCB Rules - EPA’s imminent and substantial endangerment provision (RCRA § 7003) can be used to ensure compliance with facilities that pose any threat from CCB management due to a failure to comply with applicable Subtitle D regulations. This provision authorizes EPA to issue a unilateral administrative order or to seek injunctive relief to abate any situation involving the past or present management of any solid or hazardous waste that “may present an imminent and substantial endangerment to health or the environment” [42 U.S.C. § 6973(a)].

EPA also has separate enforcement authority under the federal Clean Water Act, as does the Office of Surface Mining (with respect to coal mine placement of CCBs under the federal Surface Mining Control and Reclamation Act (SMCRA)), to ensure that facilities manage CCBs in accordance with these additional federal controls.

State Enforcement Authority Under RCRA Subtitles C & D - The States would have primary enforcement authority for violations of federal Subtitle D CCB rules, just as they would for any hazardous waste rules applicable to CCBs (contrary to some suggestions, Subtitle C regulation of CCBs would *not* give EPA direct enforcement authority over CCBs; that authority would remain with RCRA-authorized States). The States have the necessary tools to fully implement and enforce federal Subtitle D CCB regulations, a conclusion that EPA agreed with in its 2000 CCB Regulatory Determination.

Subtitle D Regulation Is the Preferable Policy Option - The regulation of CCBs as non-hazardous waste - *i.e.*, federal Subtitle D controls implemented by the States and backstopped by EPA’s enforcement authorities under RCRA’s imminent and substantial endangerment provision - would ensure the safe management of CCBs while allowing for their continued beneficial use (which is now a \$1 billion annual industry for CCB use in Portland Cement). Under this option, EPA could proceed directly against any facility that violates CCB regulations in any way that poses a potential threat to health or the environment. Regulating CCBs as a hazardous waste, on the other hand, would have an indiscriminate adverse impact on CCB beneficial use and would not provide EPA with any more meaningful enforcement authority than that which is already available under RCRA Subtitle D.