



**STATEMENT OF WILLIAM R. WEISSMAN, PIPER RUDNICK LLP,
ON BEHALF OF THE UTILITY SOLID WASTE ACTIVITIES GROUP
AT EPA LISTENING SESSION ON COAL COMBUSTION PRODUCTS,
DALLAS, TEXAS**

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April 13, 2004

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My name is William Weissman. I am a partner with the Washington, D.C. office of Piper Rudnick LLP and I am here today on behalf of the Utility Solid Waste Activities Group, commonly known as USWAG.

I would like to express my appreciation to EPA for taking the time to schedule these public listening sessions on coal combustion products. In my statement at the Listening Session in Pennsylvania, I discussed what I called some "old myths" and suggested some "new realities" that I hoped would advance the dialogue among EPA, industry and the public relating to the regulatory process currently underway with respect to coal combustion products. I would like to focus on that subject again because few, if any, of the interested citizens here in Dallas were present at the previous Listening Session. Many of these "myths" have been repeated by various groups for many years, but repetition does not make them true or accurate. It is time to dispel these "myths" and to express the true realities regarding coal combustion product management.

Myth No. 1. In the absence of enforceable Federal regulations, CCPs are not subject regulatory controls. Many advocates simply refuse to acknowledge the existence of enforceable state regulatory controls. This is one of the oldest false myths. The states, in general, have active regulatory programs to govern the disposal of coal ash. Texas waste management and water quality regulations impose a variety of effective controls over coal ash management and disposal that have proven to be protective of human health and the environment.

When Congress enacted RCRA in 1976, it made a clear distinction between Subtitle C (the program for hazardous wastes) and Subtitle D (the program for nonhazardous solid wastes). Some groups keep urging EPA to adopt "enforceable Federal regulations." That is code for hazardous waste regulations. But that option is not on the table. When EPA decided in the Bevill regulatory determination in May 2000 to develop nationwide RCRA regulations, they were talking about retaining the primary role of the states in regulating CCPs, and simply filling in gaps in state programs where EPA's Bevill study had identified areas of environmental concern. Any effort to supplant state regulatory control with a full scale Federal regulatory program will be opposed by the states, by industry, by the Congress, and most likely even by EPA itself.

I would note that an earlier speaker urged EPA to adopt specific RCRA Subtitle D standards for a range of waste management issues. All but one of the subjects suggested by the speaker have already been adopted by EPA. They will be found in the Industrial Solid Waste Guidance Document adopted by EPA in 2003. The only subject requested by the speaker not adopted in that guidance document is waste tracking, which is typically applied only to Subtitle C hazardous waste.

Myth No. 2. Allegations that CCPs contain harmful levels of organic constituents and thallium are false. In a recent petition filed with EPA, some of the environmental lobby groups that have been the loudest in their criticisms of coal ash have also fallen short in verifying their facts. One example in the petition is their claim that the "wastes produced as a by-product of combustion" contain "detectable and dangerous levels" of numerous organic constituents such as PAHs, benzene, phenols, dioxins, and PCBs. Hoosier Environmental Council ("HEC") et al. Petition, p. 16. EPA has already addressed this issue several years ago and flatly rejected it. In its 1999 Report to Congress on Wastes from the Combustion of Fossil Fuels, the Agency reported on studies on the presence of organics in coal combustion ash (including specifically PAHs and dioxins) and stated that "total and leachable organics are generally reported to be at or below analytical detection limits." EPA Report to Congress, Vol. 2, p. 3-13 (March 1999).

Myth No. 3. Reduced mercury emissions will increase mercury levels in coal ash to unsafe levels. This mercury claim is a red herring. This is an issue undergoing careful scientific research, but even at this early stage of the research, the evidence indicates that a substantial decrease in mercury emissions will not prevent utility compliance with environmentally sound disposal standards for coal ash.

Myth No. 4. The Environmental Benefits of CCP Mine Placement Are Unproven. In the face of overwhelming evidence of the environmental benefits of CCP placement in mines, we repeatedly hear claims that such benefits have never been proven. To these critics, we would like to point to a report issued last month by the Pennsylvania General Assembly's Joint Legislative Air and Water Pollution Control and Conservation Committee (the "Joint Committee"). This Joint Committee investigating a demand by environmental groups for a state-wide moratorium on CCP mine placement carefully examined the pros and cons of CCP mine placement. The 16 bipartisan legislators who made up the Joint Committee unanimously rejected the proposed moratorium and expressed their strong support for continued use of CCPs for mine reclamation and other beneficial purposes. A copy of that report has been previously given to EPA.

EPA is poised to complete its own in depth study CCP mine placement. This work on mine placement began in 1998 and many of us had hoped that the Agency's report would soon be available to help resolve the regulatory uncertainty surrounding the use of CCPs in mine reclamation. As you know, Congress has directed EPA to contract with the National Academy of Sciences to undertake a study of this issue. However, nothing in that congressional mandate prevents EPA from completing the work it began and publishing its findings and recommendations. Congress certainly didn't intend for EPA to discard six years of hard work on this important issue or for the NAS to begin its work on a blank slate. Rather than stopping work on its study of mine placement, EPA should now expedite the development of recommendations for future regulatory policy on the use of CCPs in mine reclamation and then make its research and expertise available to the NAS.

Myth No. 5. "EPA has recognized 65 cases of damage where drinking water, groundwater or surface water has been contaminated with hazardous

constituents from power plant waste.” HEC Petition, p. 16. This claim is patently false. Making an accusation about a site is a far cry from demonstrating that it is a proven damage case. If you read the words of the Bevill Amendment, you will find that the law requires EPA to focus its study of CCPs on “documented cases in which danger to human health or the environment from surface runoff or leachate has been *proved*.” RCRA § 8002(n)(4) (emphasis added). Moreover, EPA’s interpretation of what constitutes a proven damage case was itself subject to public comment in a formal rulemaking. EPA’s interpretation is now binding on all of us. See 65 Fed. Reg. 32214, 32224 (May 22, 2000). Under that interpretation, no more than 21 cases have been identified by EPA as proven damage cases, and most of these 21 cases are sites that have been closed for years, others involve historic management practices that would not satisfy today’s regulatory standards, and at some, new information refutes the initial conclusion that they were proven damage cases.

Several speakers mentioned three reservoirs in Texas for which the Texas Department of Health (“TDH”) imposed health advisories related to selenium. These are not legitimate proven damage cases under EPA’s own test of proof. First, these sites have nothing to do with coal ash management – the environmental concerns stem from past wastewater management practices. Second, the conditions that led the TDH to issue the health advisories have been corrected to the satisfaction of the Department. I am providing to EPA a copy of the TDH notice lifting the health advisory and the press release announcing this action.

In sum, for a proven damage case to have a bearing on EPA’s implementation of its Bevill regulatory determination, the damage must stem from management of CCPs and must demonstrate some inadequacy in current Federal or State regulation of CCP management. Historic damage cases tell us nothing about the adequacy of existing regulations and whether additional RCRA regulations would correct any inadequacy. We would urge EPA to apply a relevancy test in its compilation of damage cases.

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Again, I thank EPA for scheduling these listening sessions on CCP management. If the Agency’s staff has any questions, I would be pleased to answer them.