

# **State Perspective on Regulation of Mine Placement of Coal Combustion Wastes**

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Good morning. My objective today is to provide you with an overview from the states' viewpoint about where we are in the regulatory development process in the area of mine placement of coal combustion wastes and, more specifically, about our on-going state/federal initiative to inform one another about our existing regulatory approaches. I will also touch on what the future might hold.

In May of 2000, EPA published a Notice of Regulatory Determination on Wastes from the Combustion of Fossil Fuels. Among other things, and of particular concern to the states, EPA found that, although coal combustion by-products (CCBs) (or coal combustion wastes (CCW)) did not warrant regulation under subtitle C of the Resource Conservation and Recovery Act (RCRA) as "hazardous waste", the agency had determined that national regulations under subtitle D of RCRA are warranted when these wastes are disposed in landfills or surface impoundments, and that regulations under subtitle D and/or possible modifications to existing regulations established under the Surface Mining Control and Reclamation Act (SMCRA) are warranted when these materials are used as fill in surface or underground mines. IMCC was especially concerned about the "mine placement" aspects of the determination given the significant interplay between approved state regulatory programs under SMCRA and any potential adjustments to the national SMCRA regulations (which serve as a template for state regulatory programs).

Following publication of EPA's notice, IMCC suggested to both EPA and the Office of Surface Mining (OSM) that an intergovernmental forum would serve as a valuable mechanism to initiate discussions between state and federal governments concerning next steps pursuant to the regulatory determination. This suggestion followed on the heels of a resolution adopted by IMCC in May of 2000 affirming the appropriateness and effectiveness of state regulations and policies for the safe handling, recycling, beneficial use and placement of coal combustion by-products and supporting the management of CCBs without the application of federal RCRA subtitle C requirements.

Both EPA and OSM saw the value of proceeding in this manner and the first intergovernmental forum on mine placement of CCBs was held on May 15 and 16 of 2001 in St. Louis, Missouri. The forum was open to all states, not just IMCC member states, and also involved tribal government representatives. Other federal participants included the U.S. Geological Survey and

U.S. Department of Energy. At the forum, attendees heard from OSM, EPA and the states about current issues and problems being encountered in the mine placement of CCBs in anticipation of the potential development of a new regulatory approach by EPA. One of the key objectives of the forum was to engage state and federal representatives affected by a potential mine placement rule in an open discussion about challenges being encountered in the field: identifying potential regulatory gaps, anticipating potential inter-agency jurisdictional conflicts, and discussing implementation concerns associated with any new rule. A key outcome of the forum was the establishment of an on-going dialogue among the states, tribes and federal representatives concerning the various operational, environmental and economic issues associated with the practice of mine placement of CCBs. A copy of the notes from that forum and the four that followed can be found at EPA's website: [www.epa.gov/epaoswer/other/fossil/index.htm](http://www.epa.gov/epaoswer/other/fossil/index.htm).

Following the initial forum, the states met separately and developed a discussion outline that contains the basic position of the states/tribes concerning the regulation of CCB placement at mine sites. The outline has served as the basis for continuing discussions with EPA and OSM regarding the need for national regulations given the adequacy of existing state and tribal regulatory programs. The outline addresses categories of coal ash management; principles for beneficial use; regulatory requirements; and disposal/placement at minesites other than beneficial use.

Throughout the discussions on mine placement of CCBs, the states and tribes have attempted to reflect the input and positions of the various departments and/or agencies within each state that have jurisdiction over this matter. This often includes the mining regulatory agencies within the Departments of Natural Resources or Environmental Protection; the solid waste regulatory agencies within the Departments of Environmental Protection or Environmental Quality or the Departments of Health; and the water quality regulatory agencies within the Departments of Environmental Protection or Environmental Quality.

In preparation for the second state/federal dialogue, the states requested that EPA make available for state and tribal review two draft documents that the agency had been developing: "Regulation and Policy Concerning Mine Placement of Coal Combustion Waste in 26 States" and "Mine Placement of Coal Combustion Waste -- State Program Elements Analysis". These documents provide an overview of state regulations and policy (under both mining and solid waste programs) concerning CCB mine placement, with an emphasis on coal mines. The reports summarize the elements of existing state programs that are applicable to CCB mine placement, including permitting and public participation; planning and enforcement; waste characterization and monitoring; design and operational program elements; and closure and post-closure care.

These reports by EPA are dynamic documents and their accuracy and completeness have changed as states continue to provide information to the agency concerning current state regulatory program requirements. Since the initial release of the reports, several of the states, including some that were not represented in the early drafts of the reports, have provided updates, clarifications and new information to EPA in an effort to improve the nature and usefulness of the reports. In addition, EPA has incorporated changes to the reports based on site

visits and interviews that the agency conducted in various states.

Two additional intergovernmental forums were held, one in November of 2001 and another in April of 2002 that focused on the states' outline on coal ash management. EPA and OSM presented a detailed response to the states' outline, which was helpful in informing the on-going debate and clarifying EPA's and OSM's positions and concerns. Finally, and perhaps most valuable to our on-going discussions, the participants spent time reviewing EPA's minefill regulatory concerns, primarily from a RCRA perspective. This discussion was most promising in terms of bridging the gap between how the states currently operate under their respective SMCRA and RCRA programs and what EPA is anticipating based on its understanding of those RCRA elements that it believes should be applicable to mine placement of CCBs.

Over the course of the state/federal discussions, the states have consistently articulated the following concerns to EPA and OSM, several of which remain to be addressed or resolved within the context of EPA's determination concerning next steps:

1. SMCRA appears to serve as an adequate and effective baseline for any type of regulatory analysis concerning mine placement of CCBs. In this regard, we see the SMCRA permit serving as the platform for CCB mine placement at coal mines. For non-coal mines, we believe that the existing state permitting framework, which is often RCRA-based, is adequate.
2. it is essential to examine the effectiveness and comprehensiveness of existing state programs before adding additional regulatory requirements. Experience at the state level in implementing existing state and federal laws substantiates the adequacy of the existing regulatory structure.
3. there is a need to coordinate among all applicable statutes/regulations that impact the regulation of mine placement of CCBs, including SMCRA, RCRA, the Clean Water Act and the Safe Drinking Water Act. There is a belief that many of the necessary regulatory requirements are already in place in the context of these statutes and their respective regulatory programs.
4. there is an absolute need for flexibility to accommodate differences among the states related to geology, climate, ash characterization and agency operation. Comprehensive federal regulation will be difficult to implement on a nationwide basis due to these differences.
5. there needs to be consideration given to both coal and noncoal sites and the differences between them (possibly a segmented approach). In this regard, heavy-handed federal efforts to achieve some sort of uniformity will only undermine effective and efficient regulation at the state level.

As an overall objective in the area of regulating mine placement of CCBs, the states are hoping to strike a balance between existing state regulatory program requirements and any gaps that may be defined and justified. To date, although there are differences among the states in the way they regulate mine placement of CCBs (for instance, in terms of sharing jurisdiction among several state agencies; relying primarily on the SMCRA program for mine placement at coal

mines; and differentiating between beneficial use and classic disposal), there has been little evidence of major gaps that require filling through new national regulations under either SMCRA or RCRA. And in those states that do not have well defined programs for mine placement of CCBs, it is usually because they have not had to deal with its beneficial use or disposal within their borders. Even in those states, a comparison of their programs with states who actively regulate mine placement of CCBs demonstrates that most, if not all, of the program elements are in place and would likely operate effectively when needed.

The few areas within state programs that have been shown to need some degree of shoring up can best be addressed through intergovernmental discussions, such as have occurred over the past several years. Also, through a benchmarking type of approach, states can identify areas in their programs that would benefit from fine-tuning and this can be accomplished by patterning these areas after other state programs. If and when specific regulatory gaps are found to exist in a significant majority of state programs, then it would be appropriate to consider national guidance from EPA and/or OSM. However, all of EPA's program analyses to date do not yet justify the need for such guidance, and OSM has stated on numerous occasions that it believes state programs are adequate (at least as far as SMCRA programs for CCB mine placement at coal mines are concerned).

The states have prepared additional documents supporting their view of the CCB regulatory world, including four documents that address several components of the minefill program. One is a regulatory matrix that attempts to capture the minimum SMCRA and RCRA regulatory components applicable to mine placement of CCBs at minesites. The second is a table that lists the various beneficial uses of CCBs, both in terms of use, applicable industrial standards, environmental and practical benefits, and the applicable "regulatory safety net" (which consists of state and federal requirements that are potentially applicable to each beneficial use). The third is a narrative and diagram description of applicable jurisdictional authorities with respect to CCB placement and utilization at active and abandoned coal and noncoal sites, which is intended to serve as a summary of the states' understanding of overall jurisdictional authorities and requirements. The fourth document is a summary description of the applicability and impact of minefill regulations associated with abandoned mine land projects and sites.

All of these documents are interrelated and should be read together. They not only respond to EPA's regulatory concerns document, but compliment the analysis that OSM has done in response to those same concerns. Furthermore, and most importantly, the states assert that these working draft documents provide the case for why existing state regulatory programs under both SMCRA and RCRA are adequate and comprehensive enough to insure the appropriate regulation of minefilling practices where CCB's are used.

The most recent facilitated discussion regarding mine placement was a meeting of stakeholders held on May 19 and 20, 2003 in Washington, DC. Representatives from the federal government, the states, the mining and utility industries, the environmental community and citizen groups participated in the two-day session. From the states' perspective, we believe this was a productive sharing of information and further informed the debate about the need for federal

regulation in the area of minefilling. We believe that the information presented at the meeting supports our view that the states are doing an effective job of regulating in this area and that the need for additional or supplemental federal regulation has not been adequately demonstrated. The forum also provided an opportunity to focus on the handful of issues that may require additional enhancements in some state regulatory programs such as post-closure care and financial guarantees, each of which can be addressed at the state level without expansive new federal rules.

There will be at least one additional opportunity to address the handling of CCBs at minesites. During the last session of Congress, Congressman Rahall of West Virginia called for a study by the National Research Council (which is part of the National Academy of Sciences) concerning whether what he labels “power plant wastes” are being placed and disposed in coal mine sites with adequate safeguards and whether this activity is degrading water supplies in coal mines in contravention of SMCRA. Funding was approved for this study and the NRC has established a Committee on Mine Placement of Coal Combustion Wastes consisting of a panel of experts who will oversee the study. The first meeting of the Committee took place on October 27 in Washington, DC and IMCC, among other interested and affected parties, presented an overview of the states’ perspective on the regulation of mine placement of CCBs. With the initiation of this study, we will see an additional opportunity for all affected parties to make their case to yet another reviewing body. It is our hope that this study will result in an objective analysis of the subject matter and will further inform the debate as we move toward an ultimate conclusion that CCBs are adequately and fully regulated by the states.

What does the future hold? From the states’ perspective, we are hopeful that EPA and OSM will now move forward expeditiously with a jointly developed position on the need for additional federal regulation of minefill practices for coal combustion wastes. We believe that all of the information required by the two agencies to make this decision is in hand and that they are well poised to render that decision. We fully expect, however, that both agencies will await the findings of the NRC before taking final action. That study is expected to take 18 months to complete. In the end, we anticipate that EPA and OSM may appropriately recommend that the states continue their on-going efforts to work cooperatively with both agencies to assess the effectiveness of their respective regulatory programs and make appropriate adjustments. Furthermore, we anticipate that the states will continue their benchmarking initiatives, which provide for the analyses and comparison of state program elements with the overall objective of enhancing their respective programs through the adoption of lessons learned during program implementation and the incorporation of innovative approaches. In the final analysis, we believe that our citizenry and the environment will be well served by state regulatory programs that fully comply with applicable federal laws and that reflect the results of the laboratories of invention inherent in state primacy. We also believe that an effective regulatory regime for the mine placement of coal combustion wastes will insure that there are effective and safe alternatives to classic land disposal while enhancing the reclamation of both active and abandoned mined lands.