

August 10, 2009

The Honorable Lisa Jackson
Administrator
United States Environmental Protection Agency
Room 3000
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson,

Headwaters Resources strongly opposes any designation of coal combustion products (CCPs) as hazardous waste. Such action would have significant and long lasting effect upon society's willingness to beneficially re-use fly ash and other CCPs by destabilizing their markets. Regulatory schemes that would designate these materials as hazardous for purposes of disposal will stigmatize them and eliminate many examples of environmentally and socially sound beneficial use. CCP disposal standards can be addressed without unnecessarily stigmatizing resources with high potential for safe beneficial use as a preferred alternative to disposal. We welcome dialogue with the Agency and the environmental community to ensure that future regulatory frameworks promote the safe beneficial re-use of CCPs.

With on-going projects at 103 utility locations and approximately 20 million tons of coal combustion products under management annually, Headwaters Resources is the largest manager and marketer of coal ash resources in the United States. Headwaters Resources is also responsible for more than half of the nation's total sales of coal fly ash for use in concrete applications – an important contributor to reducing greenhouse gas emissions associated with concrete construction.

RCRA requires that EPA consider the "current and potential utilization" of CCPs in evaluating its regulatory options [See RCRA § 8002(n)(8)]. EPA and the States have consistently recognized that regulating CCPs 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 CCP regulatory options. On the other hand, regulation of CCPs under RCRA Subtitle D would not adversely impact CCP beneficial use, while at the same time allowing for the development of federal regulations that would ensure that CCPs are managed in a manner protective of human health and the environment.

On May 22, 2000, the EPA published its Final Regulatory Determination on Wastes from Fossil Fuels in which the Agency concluded that these materials "do not warrant regulation under subtitle C of RCRA." EPA also stated that it did "not wish to place any unnecessary barriers on the beneficial uses of these wastes, because they conserve natural resources, reduce disposal costs and reduce the total amount of waste destined for disposal."

The concern with the impact of hazardous waste regulations is even greater now. In 1999, CCP utilization was estimated to be 30% or approximately 30 million tons annually. In 2008, that number had risen to 43% and 56 million tons annually, nearly double the tonnage reported in 1999. This is a remarkable achievement, considering total tonnage of CCPs has grown significantly during the same period.

One of the reasons for a significant increase in CCP beneficial use rates since EPA's 2000 Final Regulatory Determination has been the reliance of State regulatory agencies, CCP producers and marketers on EPA's decision. The Final Regulatory Determination was issued after a vigorous public discussion that gave industry confidence that matters pertaining to a hazardous waste designation were settled and that they could move forward on beneficial use implementation with little fear of retroactive liability. Many CCP producers began increasing capital investments in facilities needed to direct CCPs to beneficial use rather than disposal. Clearly defined state regulations encouraging beneficial use have supported the development of a robust market for CCPs in a manner protective of the public health and environment. State policies encouraging CCP beneficial use provide a powerful incentive to producers and marketers of CCPs.

If the EPA were to reverse its Final Regulatory Determination and assign a hazardous waste designation for CCPs, even for the limited purpose of disposal operations, we believe it would have a devastating effect on the beneficial use of the resource. Producers, marketers and users of CCPs would be confronted with myriad new uncertainties and perceived risks associated with marketing, handling, transporting and utilizing CCPs. By impeding the beneficial use of CCPs, a hazardous waste designation would have the unintended consequences of dramatically increasing the volumes of material disposed and eliminating the significant environmental, economic, and sustainability benefits accomplished by beneficial use. The valuable mineral resources contained in coal combustion products need to be matched nationally to environmentally sustainable practices rather than destined for disposal. The net effect will be an increase in the amount of these mineral resources wasted and disposed, and at the same time create an increase in the mining of equivalent "natural" minerals with their associated environmental production impacts.

Any proposal to regulate disposal of CCPs as "hazardous waste" threatens to undo the considerable progress that industry, in partnership with EPA, has made to increase CCP beneficial use. Nearly 30 years of technical study with high scientific integrity has concluded that there is no basis for a hazardous waste designation for CCPs – for disposal or beneficial use. Similarly, going back to 1980, years of federal regulatory determinations have also concluded that a hazardous waste designation is unwarranted. And most importantly, a hazardous determination would undo and nearly completely stop beneficial uses for all CCPs.

In 2005, the American Coal Council performed an economic assessment of the impact that the CCP industry has on the nation's economy. At that time, it was estimated that the combined direct and indirect economic benefits that CCPs provided was approximately \$4.5 billion. That number has grown substantially since 2005 since production and utilization has increased nearly ten percent and green building has expanded even more since the study was completed. This incorporation of CCPs into the "green supply chain" has created jobs and has been used in countless sustainable projects that illustrate the long term benefits of products containing CCPs as well as reducing greenhouse gases and providing locally available materials to many sites. Reducing the amount of waste generated in this nation, while reducing the costs of projects and conserving other materials for higher values of use are essential elements of a more sustainable America.

We believe that a hazardous waste designation is not supported by nearly three decades of EPA study and formal determinations marked by strong scientific integrity. The regulation of CCP disposal as non-hazardous waste under RCRA Subtitle D will ensure protection of human health and the environment without unnecessarily stigmatizing resources that have the high potential for safe beneficial use as a preferred alternative to disposal. This approach will ensure that CCPs are safely managed while continuing to promote and expand their beneficial use.

Thank you for your consideration of Headwaters Resources' views.

Sincerely,



Bill Gehrman
President
Headwaters Resources, Inc.

cc: Robert Sussman, EPA
Matt Hale, EPA