



## Interstate Mining Compact Commission

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November 3, 2009

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### EXECUTIVE DIRECTOR

GREGORY E. CONRAD

The Honorable Peter Orszag  
Director  
Office of Management and Budget  
725 17<sup>th</sup> Street, N.W.  
Washington, DC 20503

Dear Director Orszag:

We understand that the Office of Management and Budget is in the final process of reviewing a proposed rule by the U.S. Environmental Protection Agency (EPA) for the disposal of coal combustion waste (CCW) at landfills and surface impoundments. This action follows on the heels of several Congressional actions to address the matter, including Senate Resolution No. 64 and a bill introduced by House Natural Resources Committee Chairman Nick Rahall II (H.R. 493). As state agencies responsible for regulating the placement of CCW at both coal and noncoal mines nationwide, we have a vested interest in EPA's proposed rule and therefore requested the opportunity to work closely with EPA as co-regulators in the development of the proposal. See the attached letter to Administrator Jackson dated March 26, 2009. However, to date we have been provided no opportunity to weigh in on this important rule. We are particularly concerned about an EPA determination that would designate CCW as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA). We oppose such a determination and assert that nothing in the science or regulatory practice supports such a move. In this regard, we associate ourselves with comments recently submitted to EPA from the Environmental Council of the States dated October 15.

As you know, in May of 2000, the U.S. Environmental Protection Agency (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 wastes (CCWs) 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 and/or possible modifications to existing regulations established under the Surface Mining Control and Reclamation Act of 1977 (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 SMCRA federal regulations (which serve as a template for state regulatory programs).

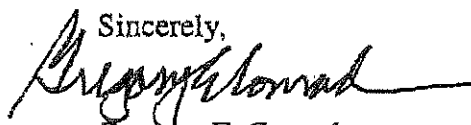
Following publication of EPA's notice, IMCC took the lead on behalf of the states to address the matter and initiated a series of discussions between states, the Office of Surface Mining (OSM) and EPA concerning next steps pursuant to the regulatory determination. The first of the state/federal dialogues occurred in May of 2001 and over the course of the next three years, the parties shared and discussed information and analyses of their respective regulatory programs under SMCRA and RCRA. The states also provided data and information from state approved permits where mine placement was predominant to demonstrate the types of environmental controls applicable in these situations and the environmental protection afforded by existing regulatory standards. Copies of the various documents and notes generated at the four state/federal dialogues are available at <http://www.epa.gov/epawaste/nonhaz/industrial/special/fossil/regs.htm>.

On March 1, 2006, the National Research Council (NRC) within the National Academy of Sciences released a report entitled *Managing Coal Combustion Residues in Mines*. The study was in response to a request from Congress and was initiated in June of 2004. The NRC conducted the study to examine the health, safety, and environmental risks associated with using coal combustion residues (also referred to as coal combustion wastes or coal ash) in reclamation at active and abandoned coal mines. The study was to determine whether CCWs were placed and disposed of in coal mines with adequate safeguards and whether this activity is degrading water supplies in coal mines in contravention of SMCRA. IMCC, on behalf of the states, once again provided data and information to the NRC regarding the nature and status of state regulatory program requirements for the placement of CCWs in mines. The NRC report concluded that placement of CCWs in mines would be appropriate with the proper characterization of the CCW and with the proper site design and monitoring to avoid significant environmental and health impacts. The report did not recommend or suggest that CCWs be considered hazardous wastes.

Most recently, IMCC submitted statements to the House Energy and Mineral Resources Subcommittee for inclusion in the record of two hearings held by the Subcommittee: one on June 10, 2008 regarding "How Should the Federal Government Address the Health and Environmental Risks of Coal Combustion Wastes?" and another on February 12 concerning H.R. 493, the "Coal Ash Reclamation, Environment and Safety Act of 2009". Copies of those statements are attached. In both statements IMCC articulates the perspective of the states as primary regulators in the area of mine placement concerning the development of any new federal regulatory program by OSM or EPA. In this regard, we would note that OSM has already developed a draft proposed rule on mine placement which we believe serves as a reasonable starting point for further discussions about developing any new federal regulatory framework. We would also note that several states have initiated or completed actions to enhance their existing regulatory programs in response to the NRC report discussed above, prior to OSM or EPA taking action. A copy of our comments on the advance notice of proposed rulemaking dated June 13, 2007 is attached.

The states, through the IMCC, have been active participants in the regulatory development arena with OSM and EPA over the past fifteen years. As noted in the attached resolution adopted by IMCC, we trust that we will continue our close working relationship on this important matter with both agencies. In this regard, we would request an opportunity to meet with you or members of your staff to discuss the specifics of EPA's regulatory proposal and provide a perspective from the states. We also urge you to disapprove any proposed rule

by EPA that would re-classify CCW as a hazardous waste under Subtitle C of RCRA. Finally, we request that you clarify that the Interior Department, and specifically the Office of Surface Mining, be designated as the agency of jurisdiction over any new regulatory approach for the mine placement of CCW.

Sincerely,  
  
Gregory E. Conrad  
Executive Director

Attachment

- cc. All Commissioners
- EPA Administrator Lisa Jackson
- Matthew Hale, EPA
- Glenda Owens, OSM

**Statement of Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission to the House Subcommittee on Energy and Mineral Resources re the Legislative Hearing on H.R. 493, the "Coal Ash Reclamation, Environment, and Safety Act of 2009"**

My name is Gregory E. Conrad and I serve as Executive Director of the Interstate Mining Compact Commission (IMCC), a multi-state governmental organization representing the natural resource and environmental protection interests of its 24 member states. We appreciate the opportunity to submit this statement for the record of the legislative hearing held by the Subcommittee on February 12, 2009 regarding H.R. 493, the "Coal Ash Reclamation, Environment, and Safety Act of 2009. The IMCC member states share the concern of Chairman Rahall, the bill's sponsor, that effective government oversight is necessary, regardless of whether coal ash is placed in surface impoundments, landfills or active or abandoned mines. As state agencies responsible for the regulation of coal and noncoal mining operations throughout the United States, IMCC's member states are committed to implementing and enforcing national and state laws that provide for the proper disposal and placement of coal combustion wastes in a manner that protects public health and safety and the environment.

Our understanding is that H.R. 493 is targeted primarily at the safety and structural stability of coal ash impoundments throughout the United States. We agree that this is a very important matter. As Chairman Rahall noted in his opening remarks at the February 12<sup>th</sup> legislative hearing: "The bill I have introduced deals with just one aspect of the issue of regulating the management of coal combustion wastes. It is a rifle shot aimed at ensuring the structural stability of coal ash impoundments. There remains the much broader issue of regulating the disposal of these wastes in landfills and coal mines." We address the "broader issue" of mine placement below. However, with respect to the intended purposes of H.R. 493, we have several concerns.

The bill anticipates that those states with primacy programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) can elect to implement the regulatory requirements under the legislation for the safe storage and disposal of covered wastes in impoundments upon approval by the Secretary of the Interior. While we are uncertain from the definition of "covered wastes" in H.R. 493 exactly what types of waste this might include, we do know that these types of impoundments are generally not located at or near surface coal mining operations. Rather, they are generally sited near coal-fired power plants. The additional duty to regulate coal ash storage and disposal impoundments under SMCRA is a significant expansion of SMCRA's intent and purposes.

SMCRA primacy states have a fair amount of experience and expertise with respect to coal waste impoundments at surface coal mining sites. Expanding the states' jurisdiction beyond these traditional mining activities to include coal ash impoundments wherever they may be found could significantly impact overall program operations. The bill does not seem to provide a specific funding mechanism for the additional resources that will be required to permit and inspect these coal impoundments, much less undertake

enforcement actions. It could be argued that, since the Secretary would be approving the extension of existing SMCRA state programs to include the regulation of coal ash impoundments under the bill, Title V funding under SMCRA should be increased to include the expenses associated with this additional program activity. However, this would likely be a significant fiscal impact and it should therefore be explicitly addressed in the legislation. In this regard, we urge that 100 percent federal funding be made available to support this new regulatory component of state programs. Even with that, some states may still be either unable or uninterested in taking on this additional regulatory responsibility under their SMCRA programs due to fiscal and other resource constraints.

There also remains the problem of how these coal ash impoundments will be regulated in those states without SMCRA programs. Obviously, these states will not be in a position to consider taking on these regulatory programs, even if they desired to do so, without adjustments to the legislation permitting them to do so. If the legislation is adjusted to authorize non-SMCRA program states to assume regulation of coal ash storage and disposal impoundments, the legislation should also provide the states with the necessary funding to perform these regulatory activities. Funding for states to do this additional work should be 100 percent federal.

We also believe it is critical in the legislation, or in report language, to distinguish between the purposes and intent of this bill (i.e. structural stability and safety of coal ash impoundments) and the placement of coal ash at active and abandoned mines. The IMCC member states recognize that coal ash, in appropriate circumstances, can be successfully used in the reclamation of mines. We also are of the view that coal ash is only to be used at a mine in a manner that does not cause pollution and is protective of the environment and public health and safety.

In May of 2000, the U.S. Environmental Protection Agency (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 residues (CCRs)) 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 and/or possible modifications to existing regulations established under 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 took the lead on behalf of the states to address the matter and initiated a series of discussions between states, the Office of Surface Mining (OSM) and EPA concerning next steps pursuant to the regulatory determination. The first of the state/federal dialogues occurred in May of 2001 and over the course of the next three years, the parties shared and discussed information and

analyses of their respective regulatory programs under SMCRA and RCRA. The states also provided data and information from state approved permits where mine placement was predominant to demonstrate the types of environmental controls applicable in these situations and the environmental protection afforded by existing regulatory standards. Copies of the various documents and notes generated at the four state/federal dialogues are available at [www.epa.gov/cpaoswer/other/fossil/index.htm](http://www.epa.gov/cpaoswer/other/fossil/index.htm).

On March 1, 2006, the National Research Council (NRC) within the National Academy of Sciences released a report entitled *Managing Coal Combustion Residues in Mines*. The study was in response to a request from Congress and was initiated in June of 2004. The NRC conducted the study to examine the health, safety, and environmental risks associated with using coal combustion residues (also referred to as coal combustion wastes or coal ash) in reclamation at active and abandoned coal mines. The study was to determine whether CCRs were placed and disposed of in coal mines with adequate safeguards and whether this activity is degrading water supplies in coal mines in contravention of the Surface Mining Control and Reclamation Act (SMCRA). IMCC, on behalf of the states, once again provided data and information to the NRC regarding the nature and status of state regulatory program requirements for the placement of CCRs in mines. Most recently, IMCC submitted a statement to this Subcommittee for inclusion in the record of the hearing held on June 10, 2008 regarding "How Should the Federal Government Address the Health and Environmental Risks of Coal Combustion Wastes?" A copy of that statement is attached and we request that it be incorporated into the record of this hearing.

As an overall objective in the area of regulating mine placement of CCBs, the states have attempted to strike a balance between existing state regulatory program requirements and any gaps that may be defined and justified. The few areas within state programs that have been targeted for some degree of shoring up, as suggested in the NRC report, can best be addressed through continued inter-governmental efforts between the states, OSM and EPA. Where specific regulatory gaps are confirmed to exist, then it would be appropriate to consider national guidance from OSM (the agency recommended by the NRC to take the lead in this area). In this regard, IMCC adopted a resolution in May of 2006 that addresses this issue, a copy of which is attached.

From the states' perspective, now that the NRC has completed its work and issued its report, we are hopeful that OSM, in coordination with EPA, will move forward with its 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 agency to make this decision is now in hand and that it is well poised to render that decision. In this regard, we understand that OSM has drafted a proposed rule that addresses placement of CCBs at active and abandoned coal mine sites. In the end, we anticipate that OSM, in coordination with EPA, can appropriately recommend that the states continue their ongoing efforts to work cooperatively with both agencies to assess the effectiveness of their respective regulatory programs and make appropriate adjustments, given the flexibility and discretion afforded the states under SMCRA's state primacy design. 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 by-products will insure that there are effective and safe alternatives to classic land disposal while enhancing the reclamation of both active and abandoned mined lands.

With respect to H.R. 493, we urge the Subcommittee to seriously consider the concerns articulated above regarding the potential impacts of the legislation on existing state regulatory programs, especially in the area of funding and resources. We welcome the opportunity to work with the Subcommittee and others to address these concerns. Thank you for the opportunity to submit this statement. We would be happy to answer any questions that you may have or to provide additional information.

# Resolution

## Interstate Mining Compact Commission

### ***BE IT KNOWN THAT:***

***WHEREAS***, in 1980 Congress passed the Bevill Amendment to the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. Sec. 6982(n)), which required the U.S. Environmental Protection Agency (EPA) to conduct a detailed and comprehensive study and submit a report on the adverse effects on human health and the environment, if any, from the disposal and utilization of fly ash waste, bottom ash waste, slag waste, flue gas emission control waste, and other byproduct materials generated primarily from the combustion of coal or other fossil fuels; and

***WHEREAS***, on May 22, 2000, EPA published a regulatory determination on wastes from the combustion of fossil fuels (65 Fed. Reg. 32214), wherein it concluded that coal combustion wastes do not warrant regulation under subtitle C of RCRA when they are disposed in landfills or surface impoundments, and that regulations under subtitle D of RCRA and/or the Surface Mining Control and Reclamation Act (SMCRA) are warranted when these wastes are used to fill surface or underground mines; and

***WHEREAS***, concerns about the potential public health and environmental risks associated with using coal combustion wastes for reclamation in active and abandoned mines led Congress in 2004 to direct EPA to commission an independent study to examine this topic, pursuant to which the National Research Council (NRC) established the Committee on Mine Placement of Coal Combustion Wastes; and

***WHEREAS***, on March 1, 2006, the NRC released its report on *Managing Coal Combustion Residues in Mines*; and

***WHEREAS***, beginning in May of 2001, the Interstate Mining Compact Commission (IMCC) sponsored and facilitated a series of intergovernmental discussions with the Office of Surface Mining (OSM), EPA and other stakeholders concerning existing state and federal regulatory programs and controls for the mine placement of coal combustion residues; and

***WHEREAS***, IMCC endorses the finding in the NRC report that OSM and its SMCRA state partners should take the lead in developing any new national standards for the placement of coal combustion residues in mines because the framework is already in place to deal with mine-related issues

***NOW THEREFORE BE IT RESOLVED:***

That the Interstate Mining Compact Commission encourages OSM and EPA to formally confirm OSM's lead role in the development of any new national rules regarding mine placement of coal combustion residues; and

That OSM, in coordination with EPA, work closely with the states through IMCC in responding to the recommendations of the NRC report and developing any new rules.

Issued this 3<sup>rd</sup> day of May, 2006

ATTEST:

Gregory E. Conrad [Signed]

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Executive Director

**Statement of Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission to the Subcommittee on Energy and Mineral Resources re Oversight Hearing on "How Should the Federal Government Address the Health and Environmental Risks of Coal Combustion Wastes?"**

My name is Gregory E. Conrad and I serve as Executive Director of the Interstate Mining Compact Commission (IMCC), a multi-state governmental organization representing the natural resource and environmental protection interests of its 24 member states. We appreciate the opportunity to submit this statement to the Subcommittee regarding the environmental risks associated with the disposal and/or beneficial use of coal combustion by-products (CCB's) or residues (CCR's). We will focus our statement primarily on the mine placement of CCB's, given the fact that our organization consists of state agencies who regulate both the coal and noncoal mining industries throughout the United States.

In May of 2000, the U.S. Environmental Protection Agency (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 residues (CCRs)) 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.

The first of the state/federal dialogues occurred in May of 2001 and over the course of the next three years, the parties shared and discussed information and analyses of their respective regulatory programs under SMCRA and RCRA. The states also provided data and information from state approved permits where mine placement was predominant to demonstrate the types of environmental controls applicable in these situations and the environmental protection afforded by existing regulatory standards.

Copies of the various documents and notes generated at the four state/federal dialogues are available at [www.epa.gov/epaoswer/other/fossil/index.htm](http://www.epa.gov/epaoswer/other/fossil/index.htm).

On March 1, 2006, the National Research Council (NRC) within the National Academy of Sciences released a report entitled *Managing Coal Combustion Residues in Mines*. The study was in response to a request from Congress and was initiated in June of 2004. The NRC conducted the study to examine the health, safety, and environmental risks associated with using coal combustion residues (also referred to as coal combustion wastes or coal ash) in reclamation at active and abandoned coal mines. The study was sponsored by the Environmental Protection Agency (EPA). The NRC looked at the placement of coal combustion residues (CCRs) in abandoned and active surface and underground coal mines in all major coal basins. The study also considered coal mines receiving large quantities of coal combustion residues. A profile of the utility industry was taken into consideration in designing the study to focus on the sources producing the greatest quantities of coal combustion residues. The study was to determine whether CCRs were placed and disposed of in coal mines with adequate safeguards and whether this activity is degrading water supplies in coal mines in contravention of the Surface Mining Control and Reclamation Act (SMCRA).

Throughout the state/federal discussions referenced above and in response to the NRC study, the states consistently articulated the following concerns to NAS, EPA and OSM, several of which were addressed in the NRC report:

1. most importantly, it is abundantly clear that states are in the best position to regulate in this area. Those states that have seen a significant amount of mine placement activity have developed sophisticated, comprehensive, high quality regulatory programs that incorporate, among other things, adequate ash and site characterization and clear performance standards.
2. SMCRA appears to serve as an adequate and effective baseline for any type of regulatory analysis concerning mine placement of CCBs. In this regard, the states see the SMCRA permit serving as the platform for CCB mine placement at coal mines. For non-coal mines, the states believe that the existing state permitting framework, which is often RCRA-based, is adequate.
3. it is essential to examine the effectiveness and comprehensive nature of existing state programs before adding additional regulatory requirements. Experience at the state level in implementing existing state and federal laws substantiates the overall adequacy of the existing regulatory structure.
4. 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.
5. 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.

6. there needs to be consideration given to both coal and noncoal sites and the differences between them. In this regard, heavy-handed federal efforts to achieve some sort of uniformity will only undermine effective and efficient regulation at the state level.
7. to date there have been no proven, documented environmental damage cases found with respect to ground water pollution associated with mine placement at coal mining sites. Where data has been presented concerning alleged damage cases, and states have been provided an opportunity to address this data, the states have demonstrated that the allegations relate to pollution parameters that are either aberrations, are not associated with mine placement of coal ash, or are irrelevant to a determination that ground water pollution has occurred.
8. it must be kept in mind that mine placement of CCBs is a necessary and beneficial alternative to landfills. Inappropriate and unnecessary restrictions on the use of this practice will complicate the environmental challenges associated with the disposal of coal ash. Upwards of 50 percent of the energy generated in many states is produced from coal, with the associated by-product of coal ash that must be handled in an appropriate manner, such as mine placement. Furthermore, without appropriate beneficial uses of CCBs such as mine placement, those who produce energy from waste coal using co-generation technology will find themselves in an untenable position.
9. it is vitally important to understand the value of re-mining in the overall equation, particularly as it impacts the remediation of abandoned mine lands. Without the availability of re-mining operations in areas such as the Anthracite region of Pennsylvania, we will miss a once-in-a-lifetime chance to reclaim abandoned mines that will otherwise likely go unaddressed.

As an overall objective in the area of regulating mine placement of CCBs, the states have striven to strike a balance between existing state regulatory program requirements and any gaps that may be defined and justified. 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 limited 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 the issue 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, as suggested in the NRC report, 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. We have seen this play out in several of our member states

over the past several months, including Maryland, Pennsylvania and Virginia. If and when specific regulatory gaps are confirmed to exist in a significant majority of state programs, then it would be appropriate to consider national guidance from OSM (the agency recommended by the NAS to take the lead in this area). In this regard, IMCC adopted a resolution in May of 2006 that addresses this issue, a copy of which is attached.

From the states' perspective, now that the NAS has completed its work and issued its report, we are hopeful that OSM, in coordination with EPA, will move forward expeditiously with its position on the need for additional federal regulation of minefill practices for coal combustion by-products. We believe that all of the information required by the agency to make this decision is now in hand and that it is well poised to render that decision. In the end, we anticipate that OSM, in coordination with EPA, can 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, given the flexibility and discretion afforded the states under SMCRA's state primacy design. Furthermore, we anticipate that the states will continue their benchmarking initiatives, which provide for the analysis 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 by-products will insure that there are effective and safe alternatives to classic land disposal while enhancing the reclamation of both active and abandoned mined lands.



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### EXECUTIVE DIRECTOR

GREGORY E. CONRAD

June 13, 2007

Brent Wahlquist  
Acting Director  
Office of Surface Mining  
1951 Constitution Avenue, NW  
Washington, DC 20240

Dear Mr. Wahlquist:

This letter represents the comments of the Interstate Mining Compact Commission (IMCC) regarding an advanced notice of proposed rulemaking (ANPR) published by the Office of Surface Mining (OSM) on March 14, 2007 at 72 Fed. Reg. 12026. IMCC is a multi-state governmental organization representing 24 states throughout the country that regulate both coal and noncoal mining operations. Many of IMCC's member states administer approved regulatory programs under the Surface Mining Control and Reclamation Act of 1977 (SCMRA), while others regulate noncoal mining operations pursuant to state laws enacted for that purpose. Most of the member states also have solid waste regulatory authority pursuant to the Resource Conservation and Recovery Act (RCRA) and the Solid Waste Disposal Act (SWDA). Many also possess authority to issue NPDES permits pursuant to the Clean Water Act. We appreciate the opportunity to submit these comments.

In May of 2000, the U.S. Environmental Protection Agency (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 residues (CCRs)) 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.

The first of the state/federal dialogues occurred in May of 2001 and over the course of the next three years, the parties shared and discussed information and analyses of their respective regulatory programs under SMCRA and RCRA. The states also provided data and information from state approved permits where mine placement was predominant to demonstrate the types of environmental controls applicable in these situations and the environmental protection afforded by existing regulatory standards. Copies of the various documents and notes generated at the four state/federal dialogues are available at [www.epa.gov/cpaoswer/other/fossil/index.htm](http://www.epa.gov/cpaoswer/other/fossil/index.htm). We request that the various state submissions contained in this EPA file be incorporated by reference in OSM's ANPR proceeding.

On March 1, 2006, the National Research Council (NRC) within the National Academy of Sciences released to the public its final report entitled "Managing Coal Combustion Residues at Mines." The study was in response to a request from Congress and was initiated in June of 2004. The NRC conducted the study to examine the health, safety, and environmental risks associated with using coal combustion residues (also referred to as coal combustion wastes or coal ash) in reclamation at active and abandoned coal mines. The study was sponsored by the Environmental Protection Agency (EPA). The NRC looked at the placement of coal combustion residues (CCRs) in abandoned and active surface and underground coal mines in all major coal basins. The study also considered coal mines receiving large quantities of coal combustion residues. A profile of the utility industry was taken into consideration in designing the study to focus on the sources producing the greatest quantities of coal combustion residues. The study was to determine whether CCRs were placed and disposed of in coal mines with adequate safeguards and whether this activity is degrading water supplies in coal mines in contravention of the Surface Mining Control and Reclamation Act (SMCRA). IMCC participated extensively throughout the course of the NRC's deliberations, including the submission of extensive comments, which are hereby incorporated by reference. In its final report, the NRC made several findings and recommendations regarding mine placement of CCRs, many of which directly impact the regulatory regime that attends this practice. In its ANPR, OSM is seeking comments on how the NRC recommendations should be implemented, including how the agency should revise the regulations implementing Titles IV and V of SMCRA to regulate the placement of CCRs on active and abandoned coal mine sites and what type of guidance documents, if any, the agency should issue.

Throughout the state/federal discussions that occurred over the past several years, the states consistently articulated the following concerns to OSM and EPA, several of which were addressed in the NRC report:

1. SMCRA appears to serve as an adequate and effective baseline for any type of regulatory analysis concerning mine placement of CCRs. In this regard, the states see the SMCRA permit serving as the platform for CCR mine placement at coal mines. For non-coal mines, the states 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 CCRs, 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. 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 CCRs, the states have striven to strike a balance between existing state regulatory program requirements and any gaps that may be defined and justified. Although there are differences among the states in the way they regulate mine placement of CCRs (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 limited 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 CCRs, 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 that actively regulate mine placement of CCRs demonstrates that most, if not all, of the program elements are in place and would likely operate effectively when needed.

To the extent that adjustments to existing state programs are necessary, particularly in light of the NRC's recommendations, we assert that SMCRA should serve as the platform for these rules. In this regard, we have attached a resolution adopted by IMCC in May of last year advocating that OSM play a lead role in the development of any new national rules regarding mine placement of CCRs. We believe that the provisions of SMCRA provide

adequate authority for the adoption of regulations governing the placement of CCRs with respect to both permitted mines and abandoned mine reclamation projects in order to protect against adverse impacts on public health and the environment, including impacts to surface waters and groundwater. We also believe that the permit application requirements and performance standards in OSM's existing regulations at 30 CFR Chapter VII can be relied upon to structure specific rules that would apply to the use and disposal of CCRs in mines. OSM's Western Region policy guidance document on CCR disposal would appear to be a logical starting place to develop a model for the applicable permitting requirements and performance standards that are necessary to ensure proper management of CCRs.

With regard to CCR placement on abandoned mine lands, while we agree that 30 CFR Part 874 could be revised to include minimum requirements that would apply to AML reclamation projects funded or otherwise conducted under an AML reclamation plan or program approved under section 405 of SMCRA, we caution OSM to structure any proposed rules in such a way that does not unduly or inappropriately discourage the use of CCRs at AML sites. Some have labeled these uses as "beneficial", a term the NRC disfavored. In actual practice, however, there are several uses of CCRs at both coal and noncoal mines, whether active or abandoned, that result in beneficial results for purposes of reclamation, especially where acid mine drainage is abated (alkaline addition), highwalls are restored, topsoil is replaced (soil substitution) or enhanced (soil additives), dangerous pits are filled and subsidence-prone areas are stabilized. It is critical that rules or policy guidance that is developed by OSM does not discourage these uses, however they may be labeled.

OSM notes in the ANPR that it does not have authority to regulate CCR disposal in mines for which no permit is required under Title V of SMCRA (i.e. noncoal mines). While we agree, we also believe that properly structured rules for the coal sector could serve as a template for state regulation of other minerals, in coordination with EPA and pursuant to other authorities available to the states. However, there are unique conditions at these mines that must be taken into consideration in structuring any regulatory regime for mine placement. We welcome the opportunity to work with both OSM and EPA to investigate the appropriate application of rules for the noncoal sector.

The states, via IMCC, had an opportunity to discuss their perspectives and concerns regarding the NRC report on July 26, 2006 with both OSM and EPA. During the discussions, the states raised the following issues that relate to the specific findings and recommendations in the NRC report concerning the regulation of mine placement of CCRs. As OSM moves forward with the development of regulations in this area, we urge the agency to be mindful of and to formally address these issues and concerns.

1) CCR Characterization

- Test methods – the states believe that this is the key issue with regard to CCR characterization. There has been considerable controversy surrounding this matter, both in terms of the most reliable existing test method and the need for a newer, better test. The states are using what they believe are the best test methods available at this time. It would be helpful if OSM and EPA would consider developing a list of

acceptable methods/tests from which the states can select, until such time as either OSM or EPA develop a better test. It is important for the states to have flexibility in choosing what they believe is the most appropriate method under the circumstances.

- Parameters – there needs to be agreement on what parameters we need to test for. The list on page 114 of the draft NRC report is very complete, but it includes some parameters, such as uranium, that may not be appropriate under the circumstances. Before the states request mine operators to test for these various parameters (which in most cases can be done in the labs), we need to be sure that there is a solid basis for doing so.
- Frequency – the frequency of testing must be left up to the states based on the conditions of the CCR and the site. Flexibility is key here.
- “Significant mine placement” – this is one of several terms used throughout the NRC report that needs to be defined. Is it necessary to characterize small amounts of ash that are being used at minesites? Are there thresholds that can be established?
- OSM should consider the differences between coal ash and flue gas desulfurization (FGD) ash when designing its rules or guidelines, given the composition and properties associated with FGD material and how it reacts in the environment.

## 2) Site characterization

- “Substantial placement of CCRs” – again what does this term mean? It should be defined with some specificity.
- Performance measures and permitting requirements – this is an area that lends itself well to referencing existing SMCRA performance measures and permitting requirements that would be applicable to mine placement (as they are to other aspects of the mining operation). The states recognize that it will be necessary to demonstrate more specifically how and to what extent existing requirements and standards do, in fact, apply to mine placement. A specific permit finding would likely be helpful here that documents the application of these requirements.

## 3) Management, Design and Monitoring

- Compliance point – with regard to monitoring, this is the key issue, from the states’ perspective. We need to know where we are going to measure/monitor water quality with regard to mine placement of CCRs. This could be the permit boundary, a certain distance beyond the permit boundary or mine placement location, a receptor, etc. In any event, it must be defined in the new rules. And in setting this compliance point, OSM must keep in mind that some states have specific laws in place for well placement as part of their groundwater monitoring requirements.
- “Minimize reactions with water” – this is another term that needs to be defined. Consideration must be given to site conditions in doing so. There are places in the country where there is very little water (and hence no leachate), where placing CCRs below the water table is not problematic, and where the “water table” is defined on a regional basis, not on a site-specific basis. All of these situations must be taken into consideration.

- Site-specific management plan – these plans are critical to how the states structure permitting requirements and must be designed for the site conditions.
  - Duration – in defining the duration of monitoring, it should be kept in mind that we are not dealing with landfills and therefore a RCRA approach will not work. Mine placement involves a higher degree of CCR characterization than is the case with landfills and hence the duration of monitoring will be different. Also, we need to be mindful of the impacts of monitoring duration on reclamation bonds. These bonds are tied to classic reclamation scenarios and do not lend themselves to long-term situations. If we move in the direction of extended periods of responsibility for monitoring of CCR placement, a different type of financial guarantee will be needed.
- 4) Performance Measures – similar to site characterization, the states believe that many of the existing SMCRA performance measures are applicable to mine placement, just as they would be for any part of the mining and reclamation operation. The only potential enhancements would be those noted above with respect to parameters for CCR characterization. In this regard, the Commonwealth of Pennsylvania has already developed several adjustments to its existing performance measures and permitting requirements, most of which reference existing standards that will now be applicable to mine placement.
- 5) Public Participation
- “Substantial quantities of CCRs” – this term needs to be defined, as suggested above. If we’re dealing with small quantities of coal ash, this should not be considered a “significant permit revision”. Furthermore, changes in the source of the ash should not be considered a significant revision. Only where an operator initially proposes placing CCRs at a permitted site should a significant permit revision be required. Also, there should be a grandfathering provision once the rule is adopted for those situations where a permit already exists.
- 6) Reporting – what type of reporting does OSM anticipate? OSM should be cognizant of the impacts that quarterly reporting will have on both the states and mine operators, as well as the relative value of such frequent reporting. The states are also concerned about requirements for electronic reporting and the potential for one stop/one location reporting, both of which have merit but may require time to implement.

Other issues and perspectives raised during the meeting included the following:

- The western states emphasized the importance of site-specific flexibility that will allow states to account for unique differences based on climate, geology, etc.
- OSM and EPA should be aware that in some states (ND, TX, CO) there are separate regulatory authorities that deal with the RCRA aspects of mine placement of CCRs and that SMCRA rules and permitting requirements may need to be coordinated with these agencies.

- From a noncoal state's perspective, it was noted that flexibility will be important, especially with regard to mine placement at industrial mineral or metal/non-metal mines. It was suggested that the rules for disposal at landfills and surface impoundments be coordinated with those for minefilling to be sure that there are no serious conflicts. Test methods will also be critical to the on-going efforts to regulate in this area.

To the extent that it is necessary to specifically demonstrate how and to what extent existing regulatory requirements are applicable to mine placement of CCRs, we believe OSM can accomplish this through the promulgation of narrowly drawn regulations or program guidance. In this regard, we reference the program guidelines and enhancements that have been adopted by states such as Ohio and Pennsylvania concerning mine placement of CCRs as examples of what states have done and continue to do in addressing this matter. Furthermore, we anticipate that the states will continue their benchmarking initiatives, which provide for the analysis 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 residues will insure that there are effective and safe alternatives to classic land disposal while enhancing the reclamation of both active and abandoned mined lands.

Should you have questions or require additional information, please do not hesitate to contact us.

Sincerely,



Gregory E. Conrad  
Executive Director

Attachment



## Interstate Mining Compact Commission

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March 26, 2009

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### EXECUTIVE DIRECTOR

GREGORY E. CONRAD

The Honorable Lisa Jackson  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Constitution Avenue, N.W.  
Mail Code 1101A  
Washington, DC 20460

Dear Administrator Jackson:

Recently, the U.S. Environmental Protection Agency (EPA) announced that it would be undertaking the development of a regulatory proposal for the disposal of coal combustion waste (coal ash) by the end of the year. This announcement follows on the heels of several Congressional actions to address the matter, including Senate Resolution No. 64 and a bill introduced by House Natural Resources Committee Chairman Nick Rahall II (H.R. 493). As state agencies responsible for regulating the placement of coal ash at both coal and noncoal mines nationwide, we have a vested interest in EPA's future proposal and request the opportunity to work closely with EPA as co-regulators in the development of the proposal, whatever form it may take.

As you know, in May of 2000, the U.S. Environmental Protection Agency (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 wastes (CCWs) 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 and/or possible modifications to existing regulations established under the Surface Mining Control and Reclamation Act of 1977 (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 SMCRA federal regulations (which serve as a template for state regulatory programs).

Following publication of EPA's notice, IMCC took the lead on behalf of the states to address the matter and initiated a series of discussions between states, the Office of Surface Mining (OSM) and EPA concerning next steps pursuant to the regulatory determination. The first of the state/federal dialogues occurred in May of 2001 and over the course of the next three years, the parties shared and discussed information and analyses of their respective regulatory programs under SMCRA and

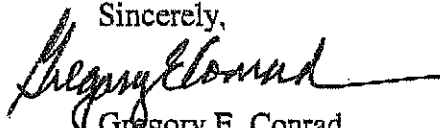
RCRA. The states also provided data and information from state approved permits where mine placement was predominant to demonstrate the types of environmental controls applicable in these situations and the environmental protection afforded by existing regulatory standards. Copies of the various documents and notes generated at the four state/federal dialogues are available at [www.epa.gov/epaoswer/other/fossil/index.htm](http://www.epa.gov/epaoswer/other/fossil/index.htm).

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Most recently, IMCC submitted statements to the House Energy and Mineral Resources Subcommittee for inclusion in the record of two hearings held by the Subcommittee: one on June 10, 2008 regarding "How Should the Federal Government Address the Health and Environmental Risks of Coal Combustion Wastes?" and another on February 12 concerning H.R. 493, the "Coal Ash Reclamation, Environment and Safety Act of 2009". Copies of those statements are attached. In both statements IMCC articulates the perspective of the states as primary regulators in the area of mine placement concerning the development of any new federal regulatory program by OSM or EPA. In this regard, we would note that OSM has already developed a draft proposed rule on mine placement which we believe serves as an reasonable starting point for further discussions about developing a new federal regulatory framework.

The states, through the IMCC, have been active participants in the regulatory development arena with OSM and EPA over the past ten years. As noted in the attached resolution adopted by IMCC, we trust that we will continue our close working relationship on this important matter. In this regard, we would request an opportunity to meet with you or members of your staff to discuss the specifics of your regulatory proposal and provide early input from the states.

Sincerely,



Gregory E. Conrad  
Executive Director

Attachment

cc. All Commissioners  
Matthew Hale  
Richard Kinch  
Glenda Owens, OSM