

STATE/FEDERAL INITIATIVE ADDRESSING MINE PLACEMENT OF COAL COMBUSTION WASTES

Gregory E. Conrad
Interstate Mining Compact Commission
Herndon, Virginia

Abstract

Beginning in May of 2001, the Interstate Mining Compact Commission (IMCC) has sponsored a series of meetings between State and Tribal representatives and representatives from the Federal government including the Environmental Protection Agency, the Office of Surface Mining, the U.S. Geological Survey, and the Department of Energy. The purpose of these meetings has been to discuss potential adjustments to existing State and Tribal regulatory programs relating to the placement of coal combustion waste (CCW) into surface and underground mines. The meetings have been in response to EPA's Regulatory Determination on Wastes from the Combustion of Fossil Fuels published on May 22, 2000 and, more specifically, the finding that regulations under Subtitle D of RCRA and/or possible modifications to existing regulations established under SMCRA are warranted when CCW is used to fill surface or underground mines. State and Tribal regulatory programs are in varying stages of maturity with regard to the placement of CCW in mines. Some are well established and have rich experience to share, while others are in the initial stages of development. Over the course of the past year, the States and Tribes have had the opportunity to learn from one another about existing approaches that are being used and potential enhancements to their programs. Discussions have focused on the various operational, environmental, and economic issues associated with the practice of placing CCW in mines, including how States and Tribes can adjust or improve current regulatory practices, identify existing or potential regulatory gaps, and examine the impacts of various Federal regulatory proposals on the content and implementation of existing State and Tribal programs. This presentation will report on the progress of State/Federal discussions concerning placement of CCW in mines and the expected next steps in terms of potential State/Tribal or Federal regulatory adjustments.

Introduction

The focus of our attention this afternoon is on the direction that we may see the U.S. Environmental Protection Agency (EPA), the Federal Office of Surface Mining (OSM), and the States take with respect to the regulation of coal combustion by-products (CCBs). Consequently, my remarks will be from a policy perspective, not a technical one. My objective is to provide you with an overview from the States' viewpoint about where we are in the regulatory development process and, more specifically, about a State/Federal initiative to inform one another about our existing regulatory approaches and what the future might hold.

IMCC Forum on CCB Rulemaking Related to CCB Placement at Mine Sites

Following EPA's publication of its Notice of Regulatory Determination on Wastes from the Combustion of Fossil Fuels in May of 2000 (at 65 Federal Register 32214), the member States of the Interstate Mining Compact Commission (a multi-State governmental organization representing the natural resource and environmental protection interests of its 20 member States) suggested to both EPA and OSM, in the U.S. Department of the Interior, 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. The resolution also supported the management of CCBs without the application of Federal RCRA Subtitle C requirements. The IMCC States were particularly focused on EPA's finding that, although 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 latter “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 (that serve as a template for State regulatory programs).

IMCC CCB All Government Meeting, May 15-16, 2001

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 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. The forum began with several presentations from EPA, OSM, and State representatives regarding current mine placement practices and regulatory programs. These presentations also allowed attendees to hear 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 current challenges being encountered in the field. The goals of the discussion were to identify potential regulatory gaps, anticipate potential interagency jurisdictional conflicts, and discuss implementation concerns associated with any new rule. A key outcome of the forum was the establishment of an ongoing 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 the meeting can be found at EPA’s website: www.epa.gov/epaoswer/other/fossil/index.htm.

IMCC CCB State and Tribal Government Meeting August 13, 2001

The intergovernmental forum was followed by a meeting of the States and Tribes on August 13 and 14 in St. Louis. Among the issues discussed were: characterization methods and tests for CCBs; placement requirements; use of liners; closure requirements; site characterization and volume restrictions; definition of beneficial use versus classic disposal; the need for Federal regulations, guidelines, or policies; and which Federal agency should take the lead: EPA or OSM. The outcome of this meeting was the development of a draft 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. A copy of the outline is available on EPA’s website. The outline addresses categories of coal ash management; coal ash management principles for beneficial use; coal ash regulatory principles for beneficial use; disposal/placement at mine sites other than beneficial use; and conclusions. Among the conclusions drawn by the States were the following:

- C Approved beneficial use determinations by the States preclude the need for further waste regulation by EPA or OSM.
- C Experience at the State level in implementing existing State and Federal laws substantiates the adequacy of the existing regulatory structure.
- C Comprehensive Federal regulations will be difficult to implement from a nationwide perspective due to differences in regional geology, climate, ash composition, and other factors.
- C State data and information supports these conclusions and are available for review.

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, Environmental Quality, or Health; and the water quality regulatory agencies within the departments of Environmental Protection or Environmental Quality. IMCC also has coordinated its efforts with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), which has been active for many years on this issue and has begun to consider potential guidelines for nonhazardous industrial waste management that may serve as a model for potential guidance in the CCB mine placement arena.

IMCC CCB All Government Meeting November 14-16, 2001

In preparation for the second State/Federal dialogue, the States requested that EPA make available for State and Tribal review two draft documents which 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." Copies of both draft documents were provided to the States in early November and are available from EPA. These documents provide a detailed 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:

- C administrative program elements (i.e., permitting and public participation);
- C planning and enforcement program elements (i.e., reclamation plans, site characterization and restrictions, and special requirements related to acid mine drainage);
- C waste characterization and monitoring program elements (i.e., required chemical analyses, groundwater and surface water monitoring);
- C design and operational program elements (i.e., groundwater table restrictions, compaction, interim cover, fugitive dust controls, and erosion/surface runoff controls); and
- C closure and post-closure program elements (i.e., final cover, revegetation, financial assurance/bonding, and post-closure site utilization restrictions).

These reports by EPA are dynamic documents and their accuracy and completeness will change 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 is incorporating changes to the reports based on site visits and interviews that the agency is conducting in various States. In the final analysis, the States and Tribes are hopeful that these reports will assist all of the parties to the discussion (EPA, OSM, the States, and Tribes) in determining (1) what the agreed-upon program elements should be for the regulation of mine placement of CCBs, and (2) how effectively the States and Tribes are currently implementing those elements. The need for additional national guidance or regulation should emerge from our continuing discussion of these reports.

The second State/Tribal/Federal meeting took place on November 14 and 15 in San Antonio, Texas. Among the topics discussed at the meeting were:

- C an explanation and status report on EPA's Minefill Risk Assessment/Modeling (MRAM) Project and its relationship to EPA's Coal Ash Regulatory Program;
- C a presentation on the State of Illinois' Data Management System for Mine Placement Activities;
- C review and discussion of EPA's Draft Reports mentioned above;
- C an overview of EPA's program of site visits and interviews with individual State agencies that regulate mine placement of CCBs; and
- C review and discussion of the States' outline on coal ash management, including:
 - o the topics of use of coal ash (beneficial use versus disposal);
 - o principles for beneficial use of coal ash;
 - o the effectiveness of existing state regulatory programs (both coal and noncoal); and
 - o interagency cooperation and coordination, both within the States and within the Federal government.

A copy of the meeting notes is available at EPA's website, noted above.

IMCC All Government Meeting April 15-16, 2002

The most recent meeting of State/Tribal/Federal government representatives was held April 15 and 16 in Golden, Colorado in conjunction with OSM's technical interactive forum on "Coal Combustion By-Products and Western Coal Mines." At that meeting, representatives received updates on the MRAM project, EPA's State program reports, and EPA's site visits. The State of Indiana provided an overview of its CCB database and how the State is using this data to effectively monitor and regulate mine placement of CCBs. EPA and OSM presented more detailed responses to the States' outline on coal ash management, which were helpful in informing the ongoing 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 mine fill 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 the 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. As the States attempt to

continue informing the debate on these issues, we anticipate building on the good work that EPA has undertaken to date in its two State regulatory program reports and the valuable efforts OSM has made to articulate the SMCRA regulations that apply to CCBs. We then hope to engage in an analysis of what the State could do to supplement the current permitting information and data that we collect and analyze as part of our SMCRA or other non-coal programs by specifically addressing those RCRA elements that appear to be different or that require additional information or approaches.

State Concerns about CCB Rule Making

Over the course of the State/Federal discussions, the States/Tribes have consistently articulated the following concerns to EPA and OSM, several of which remain to be addressed or resolved within the context of continuing State/Tribal/Federal government debate:

- C 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.
- C It is essential to examine the effectiveness and comprehensiveness of existing State/Tribal programs before adding additional regulatory requirements.
- C 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 sense that many of the necessary regulatory requirements are already in place in the context of these statutes and their respective regulatory programs.
- C There is an absolute need for flexibility to accommodate differences among the States related to geology, climate, ash characterization, and agency operation.
- C There needs to be consideration given to both coal and non-coal sites and the differences between them (possibly a segmented approach).

As a final product 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, 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 are occurring at the present time. 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). Interestingly, in those States without SMCRA regulatory programs (i.e., the non-coal States), their solid waste programs tend to play a more active role from a regulatory perspective, and these States have structured their RCRA programs to address mine placement of CCBs from coal mines that are used beneficially or disposed of within their borders.

Conclusion

As we continue to pursue the ultimate resolution of this regulatory challenge, the States look forward to a continued effective working relationship with EPA and OSM as we seek to design an appropriate approach to the regulation of mine placement of CCBs.

Greg Conrad is the Executive Director of the Interstate Mining Compact Commission (IMCC), a multi-State governmental organization representing 20 mineral producing States, since 1988. He is responsible for overseeing issues of importance to the States in the legislative and regulatory arenas. Prior to joining IMCC, Greg served for nine years as senior counsel with the American Mining Congress, which is now part of the National Mining Association. Greg has spoken and presented papers at conferences hosted by such organizations as the Eastern Mineral Law Foundation, the Conference of Government Mining Attorneys, the Colorado School of Mines, the Office of Surface Mining, the National Mining Association, the Environmental Law Institute, and State government groups. He has written extensively on mining issues for professional journals and magazines. Greg holds degrees from Michigan State University in business administration and from the University of Detroit School of Law.

Resolution

BE IT KNOWN THAT:

WHEREAS, the Environmental Protection Agency (EPA) is required by law to make a determination as to the applicability of Resources Conservation and Recovery Act (RCRA) Subtitle “C” hazardous waste regulations to coal combustion by-products (under the Beville Amendment); and

WHEREAS, based upon a preponderance of technical evidence, a wide variety of commentors, including business and environmental leaders, and Federal, State, and local government officials, have urged EPA not to designate coal combustion by-products as hazardous; and

WHEREAS, States have effectively managed the handling of coal combustion by-products through regulations and/or policy appropriate to the level of risk they present without the need for further Federal rule making; and

WHEREAS, coal combustion by-products are widely employed in beneficial uses such as mine site reclamation including stabilization, acid mine drainage prevention/remediation, and soil amendment; and

WHEREAS, a number of private companies are using waste coal as fuel — and in the process are utilizing coal combustion by-products for cleaning up abandoned mine sites and waste coal piles at no cost to the taxpayer; and

WHEREAS, a decision by EPA to regulate coal combustion by-products as hazardous would jeopardize these beneficial uses and inhibit environmental cleanup without a commensurate reduction in environmental risk; and

WHEREAS, the Interstate Mining Compact Commission represents the natural resources and environmental protection interests of its member States, and is composed of the Governors of said States who act as Commissioners;

NOW THEREFORE BE IT RESOLVED:

That the Interstate Mining Compact Commission (IMCC) affirms the appropriateness and effectiveness of State regulations and policies for the safe handling, recycling, beneficial use, and placement of coal combustion by-products; and

That the IMCC supports the management of coal combustion by-products without the application of Federal RCRA Subtitle “C” requirements.

Issued this 10th day of May, 2000

ATTEST:
Executive Director
