

D I A L O G U E

EPA's Coal Ash Rule: Implications for Regulated Entities, Results for the Environment

Summary

The disposal of coal ash, a combustion byproduct from coal-fired power plants, came to national attention when, on December 22, 2008, the Tennessee Valley Authority Kingston power plant suffered one of the largest coal ash spills in history. The Duke Energy Dan River spill on February 2, 2014, reignited the focus on the handling of coal ash. In December 2014, the U.S. Environmental Protection Agency Administrator signed a rule that, for the first time, regulates the disposal of coal ash. Under the new rule, coal ash is to be regulated as a solid waste under Subtitle D of the Resource Conservation and Recovery Act, not as a hazardous waste. The rule also provides new national minimum criteria for the coal ash disposal. On March 24, 2015, the Environmental Law Institute convened a panel of experts to provide an in-depth examination of the final coal ash rule. Below we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Tom Munteer (moderator) is a Partner at Paul Hastings and a lecturer at George Washington University Law School.

Lisa Widawsky Hallowell is an attorney with the Environmental Integrity Project.

Douglas H. Green is a Partner at Venable LLP.

Tom Munteer: Today's topic is the final coal ash rule¹ issued by the U.S. Environmental Protection Agency (EPA) on December 19, 2014, pursuant to the Resource

Conservation and Recovery Act (RCRA).² The rule concerns managing coal combustion residuals (CCRs). CCRs are fly ash trapped in air pollution control equipment, bottom ash that collects on boilers' floors, and scrubber sludge generated by plants using wet limestone scrubbers for air pollution control. We're talking about two general types of land-based management units for this material: landfills that receive dry CCRs and can be located offsite from the coal-fired power plant; and surface impoundments or ponds typically on the power plant's property into which CCRs are sluiced with water.

Let me begin by introducing our two panelists. Lisa Hallowell is an attorney with the Environmental Integrity Project. Her focus is on reducing pollution from coal ash disposal sites. Doug Green chairs Venable's Environmental Practice Group and is lead counsel for the Utility Solid Waste Activities Group, which he has represented for 25 years on solid and hazardous waste management issues.

In our discussion today, we're going to assume that our audience members have a general familiarity with the regulatory scheme of RCRA: its Subtitle C cradle-to-grave regulation of hazardous waste; and its Subtitle D regulation of solid waste such as municipal trash that is generally left in the hands of states.³ For those of you who are looking for more background information, let me refer you to a few sources. First, EPA's web page on coal ash regulation, epa.gov/coalash. I particularly call your attention to an EPA PowerPoint slideshow available there.⁴ I also recommend the websites of our panelists' organizations. If you go to the coal issue area on the Environmental Integrity Project's website, environmentalintegrity.org, you'll find the Ashtracker function, among other things. And if you click on the public resources feature on the Utility Solid Waste Activities Group, USWAG.org, they too have postings regarding the CCR issue. Finally, I notice that a D.C.

1. U.S. EPA, Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302 (Apr. 17, 2015). At the time of this seminar, the rule had not yet been published in the *Federal Register*. It was released on December 19, 2014, but it was not published in the *Federal Register* until April 17, 2015, which began the 90-day clock for filing a challenge. Several entities, including both the Utility Solid Waste Activities Group and the Environmental Integrity Project, challenged the rule in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in August. The rule went into effect 180 days after publication, on October 19, 2015.

2. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

3. RCRA Subtitle C, 42 U.S.C. §§6921-6939e, authorizes EPA to regulate hazardous wastes from cradle to grave, including the generation, transportation, and treatment, storage, or disposal of hazardous wastes. Subtitle D, 42 U.S.C. §§6941-6956, addresses nonhazardous solid wastes, such as municipal and household waste, as well as certain hazardous wastes that are exempted from the Subtitle C regulations.

4. U.S. EPA, Coal Ash Final Rule Webinar Presentation Slides (Mar. 4, 2015), http://www2.epa.gov/sites/production/files/2015-03/documents/ccr_webinar_slides_508.pdf.

practitioner, Richard Stoll with Foley & Lardner LLP, published an eminently readable article in BloombergBNA's *Daily Environment Report* on March 12, 2015.⁵

Issues we plan to touch on today include the limited universe of facilities that are regulated under the rule; a little background on the Bevill determination concept (we'll explain what a Bevill determination is) and the consequences of proceeding under Subtitle C versus Subtitle D of RCRA; what it means to beneficially reuse CCR under the rule so as to escape application of the rules; the technical standards that the rule would impose on land-based management of CCR; how EPA envisions states implementing federal guidelines; and how it's envisioned that the rule will be enforced.

We will also briefly touch on the likelihood of a challenge to the rule, the outcome of such a challenge, and the movement afoot for a legislative fix. This being Washington, D.C., and EPA's coal ash rule being a major rule with significant impacts, a challenge may be inevitable. From some perspectives, the origins of part of the complexity emanate from statutory sources, so a legislative approach is another possibility. I'll ask the panelists to flag those areas of the rule that they think are potentially vulnerable to challenge or amenable to a legislative fix. As far as vulnerability to challenge is concerned, we're thinking that an action might be brought alleging that EPA's rule is arbitrary and capricious.

I. Affected Facilities

Tom Munteer: With respect to the first issue I mentioned, the limited universe of affected facilities, we are talking about 495 coal-fired power plants operating 584 impoundments. The rule doesn't apply to landfills that stopped receiving CCR before the rule's effective date. The rule doesn't apply to units that are not part of an electric utility, some manufacturers, hospitals, or universities that operate coal-fired power plants, and the use of CCR in filling mine sites or as a landfill daily cover. Lisa, any concerns about the limited universe subject to the rule?

Lisa Hallowell: I guess we weren't very surprised. EPA's final rule largely reflected what the Agency had proposed. I will note that the exclusion of mine filling is a particularly important one because of the large volume of coal ash that ends up in minefills. According to the most recent American Coal Ash Association numbers available on their website, about 25% of all CCRs utilized went into mine-filling application. So, that is a big exclusion. EPA said from the start that they were not going to cover that; they were going to leave that to the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE). We look forward to seeing what OSMRE ends up doing with the rule. I'm looking at this from a public

health and environmental standpoint. I practice in Pennsylvania where there are large mine-filling practices. We're hoping that OSMRE will carry that torch since EPA has passed on it.

Tom Munteer: Doug, any surprise that you were singled out for attention by the rule?

Douglas Green: Commenting with respect to scope, what's interesting about the rule (and I think this is an area that generated some controversy at least during the public comment period), is the regulation of what are called inactive units, inactive impoundments. You don't see that under Subtitle C, and I don't think EPA has done it before under Subtitle D. I don't think we have a difference of opinion about that. Getting into the substantive details, what's interesting about the rule is that it does regulate surface impoundments that are no longer receiving coal ash on the effective date of the rule, but that still contain coal ash and water. That's the definition of an inactive impoundment. While the Agency clearly has authority to take remedial action against inactive units under its imminent and substantial endangerment authority, subjecting a unit that is no longer receiving the regulated material to a regulatory program is new. It's an area that generated some controversy during the comment period.

Lisa Hallowell: The public interest community and EPA have strongly disagreed with that. Concerns that industry raised related to CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act],⁶ and the CERCLA definition of inactive sites, which is very different from RCRA Subtitle D. From its inception as early as the 1979 guidelines for state waste management plans, RCRA Subtitle D was intended to include inactive units. In fact, the definition of disposal includes leaking, and that has been broadly interpreted to include passive leaking.

There's a long history under Subtitle D especially and under RCRA generally of covering inactive units. We had advocated previously that we've seen a lot of damage, we've seen many situations where there have been concerns about public health and environmental exceedances of certain pollutants at inactive sites. We believe those should have been more broadly covered in the rule.

Tom Munteer: That's a topic we'll come back to when we discuss the technical standards and the application of groundwater protection and the corrective action program. We're going to come back to it when we talk about enforcement.

Douglas Green: It's an important legal issue. It's an important issue with respect to how EPA should address these sites, particularly what's the best mechanism.

5. Richard G. Stoll, *EPA's New Coal Combustion Residuals Rule: A 745-Page Deferral With a 12,400-Ton Surprise*, DAILY ENV'T REP. (Bloomberg BNA Mar. 12, 2015).

6. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

Lisa Hallowell: Absolutely.

Tom Munteer: I go back to the early days of RCRA Subtitle V, the corrective action program, the definition of “solid waste management unit,” the definition of “areas of concern,” and getting the jurisdictional hook first and then broadly cleaning up “facilitywide.” There are numerous machinations we’ve had to deal with on the corrective action side as well. But before we get to the technical cleanup standards, I want to spend some time on the origin, laying a bit of foundation in terms of the statutory construct and history of this particular rulemaking. It was a high-profile catastrophe that spurred the Agency’s action here.⁷ But this isn’t the first time EPA has actively inspected the CCRs.

II. Bevill Amendment, Bevill Determination, and RCRA Subtitles C and D

Tom Munteer: Let’s go back in time to the 1980 Bevill Amendment and the 2000 Bevill determination⁸ that preceded the rulemaking. Additionally, we can take a look at the evolution of the rulemaking, particularly with respect to the neutral proposal that was ultimately published in the *Federal Register*.

Douglas Green: I’ll try to give you a thumbnail history of the Bevill Amendment and EPA’s study and eventual regulation of coal ash under RCRA. The 1980 Bevill Amendment to RCRA directed EPA not to regulate coal ash under Subtitle C of the statute until such time that EPA studied this material, issued a report to [the U.S.] Congress and then issued a final regulatory determination as to whether coal ash warranted Subtitle C regulation. Congress directed EPA to take similar action with respect to some other high-volume waste streams.

With respect to coal ash, what happened is that the regulatory determination was bifurcated into two determinations. The first one came out in 1993, where EPA determined that coal ash does not warrant regulation as

a Subtitle C hazardous waste. In that determination, EPA was clear that it was covering only coal ash when managed without other low-volume waste. So, the first determination focused only on coal ash when managed without other low-volume waste utility waste streams.

The second portion of the bifurcated determination was issued in 2000, which concluded the Bevill determination process, where the Agency found that coal ash, when co-managed with other low-volume waste, does not warrant RCRA Subtitle C regulation.

At the time, EPA suggested that there should be uniform federal criteria under RCRA’s Subtitle D nonhazardous rules for coal ash, but the Agency didn’t propose regulations. Ultimately, EPA was sued in a RCRA citizen suit alleging that the Agency had a duty under RCRA §2002(b) to review and revise all of its RCRA regulations every three years. That was used as the basis for the plaintiffs to argue that EPA had to make a decision whether to regulate coal ash residue with Subtitle D regulations. As a result of the litigation, EPA agreed to get out its final rule by December 19, 2014, and the Agency met that deadline. They issued a final rule determining—consistent with the Agency’s Bevill determination—that coal ash should be subject to regulation under RCRA as a nonhazardous solid waste under Subtitle D.

What is interesting about the rule (at least the prepublication version that we have before us today) was that EPA reserved the ability to go back and revisit its Bevill determination. In fact, in the preamble to the prepublication version, the Agency states that it will issue a final determination, leaving open the possibility that it might decide to reverse its 2000 determination and regulate coal ash as a Subtitle C hazardous waste. While EPA believes, at this point in time, that the Subtitle D option is appropriate for coal ash, I think the Agency’s view is that it’s still going to evaluate whether it will issue another regulatory determination. The question will be whether EPA sticks to its decision to regulate under Subtitle D, or attempts to reverse that decision and regulate coal ash as a “hazardous waste.”

Tom Munteer: I think it’s not a flight of fancy to talk about the Agency changing its position. I wonder if we can pull back the curtain a bit and reveal what went on before they published the proposal in 2010, in terms of what was submitted to the Office of Management and Budget (OMB) and what actually happened.

Douglas Green: It was very interesting that the proposal that went to OMB would have listed coal ash as a “hazardous waste” under Subtitle C. That was the option that went to OMB during the review process where other regulatory agencies have an opportunity to comment. During the OMB interagency review process, it was determined that the proposal should actually be a co-proposal, that the public should be able to comment on the Agency’s proposal to either regulate coal ash as a listed hazardous waste under Subtitle C or as a nonhazardous waste under Subtitle D.

7. The high-profile disaster involved the December 2008 spill at the Tennessee Valley Authority (TVA) Kingston Fossil Plant in Roane County, Tennessee, in which one billion gallons of coal ash entered the Clinch and Emory rivers.

8. Congress amended RCRA in 1980 to temporarily exclude from RCRA Subtitle C regulation fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels; solid waste from the extraction, beneficiation, and processing of ores and minerals; and cement kiln dust waste. This is referred to as the Bevill Amendment and can be found at 42 U.S.C. §6921(b)(3)(A) (i)-(iii). Congress also directed EPA to either promulgate Subtitle C regulations for such waste or find that such regulations are unwarranted and that the exclusion should continue. *Id.* §6921(b)(3)(C). On May 22, 2000, EPA issued its Bevill Determination in which it opted to retain the hazardous waste exemption. However, the Agency also determined national regulations under RCRA Subtitle D were warranted for coal combustion wastes when they are disposed in landfills or surface impoundments or used to fill surface or underground mines. U.S. EPA, Notice of Regulatory Determination on Wastes From the Combustion of Fossil Fuels, 65 Fed. Reg. 32214 (May 22, 2000).

And so we had a co-proposal that came out as the final proposal from the Agency.

Tom Munteer: Lisa, any comments on the rulemaking history that brought us to where we are today?

Lisa Hollowell: A couple of things I think are important. There is not a real possibility that EPA will reopen this. We've seen that it's taken lawsuits to get to a Bevill determination first, and then additional lawsuits to get to technical standards, even a final rule that (as of today) still has yet to be published. I think that the fear that EPA on a whim will switch its decision is a bit of a stretch. EPA has made statements indicating that they're going to stick with regulation under Subtitle D at this point.

Tom Munteer: Let me throw something at you, Lisa: the stigma issue. Richard Stoll, the D.C. practitioner and author of a helpful article I mentioned earlier, apparently has done the research and found out that "stigma" is used only once in the entire final rule. EPA says the stigma issue was removed because of the Agency's decision not to proceed under Subtitle C. Was that ever really a threat?

Lisa Hollowell: We think it was largely a distraction from the main issue, which is that the rule is supposed to be about disposal of waste. EPA initially proposed the rule in 2010 on the heels of the TVA Kingston disaster in which a billion gallons of coal ash spilled into the Clinch and Emory rivers. But from the beginning, the stigma language kind of dominated the conversation despite the fact that EPA, even in its 2010 proposal, always intended under either its Subtitle C or D regulation to completely exempt beneficial uses from any regulation. The Agency's definition from the beginning has been rather broad, in my opinion, as to what comes under the purview of the term beneficial use.

Another thing worth noting is that much of the concern about stigma was that stigma would attach because the word "hazardous" would come into play with a Subtitle C listing. EPA also attempted to block that off early in the rulemaking process. The Agency would only have called coal ash, even under the Subtitle C proposal, "special waste," which does not have a pejorative meaning in and of itself. I think the public would have to be fairly nuanced in its understanding of RCRA (something that even environmental lawyers may not be) to know that typically under Subtitle C regulation, there's the "hazardous" word. EPA had leeway under the Bevill Amendment to just call it "special waste," which wouldn't have the "hazardous" stigma.

But at this point, now that they've gone ahead with the Subtitle D rule, that should be a moot issue. EPA has come out publicly in support of safe beneficial uses. We and the environmental community support safe recycling as well. Hopefully, that's a non-issue, but it really did dominate the rulemaking process and, unfortunately, took a lot of the wind out of the sails of the real health and environmental

protections that we had hoped to see. In many ways, those protections are absent from the final rule.

Tom Munteer: Doug, you've talked about statutory constraints on the Agency's authority to act. What constrained the Agency's authority to issue this set of guidelines?

Douglas Green: Two things. First, the regulated industry's position is that EPA was constrained from pursuing the Subtitle C option. Our comments on the proposed rulemaking were quite clear that the Bevill regulatory determination directs the Agency to take certain specific steps by a certain time period and issue a final determination, which it did. And that there's nothing in the statute (although Congress can always amend the statute) that enabled EPA then to simply reverse course after they issued the right determination.

So, we continue to adhere to the position that EPA cannot pursue a Subtitle C option. Even if the Agency could, the way they went about doing it in this proposal or in the co-proposal was flawed. The Bevill Amendment is quite clear that if EPA is going to issue a determination, it must go through a step of statutory study factors and issue a report to Congress. Then, based on that report, Congress will issue a final determination. After the final determination is issued, depending on what it is, it's contemplated that the Agency would develop regulations.

The Agency conflated that process in this proposal by (1) alleging it was going through the statutory study factors and (2) simultaneously proposing to issue Subtitle C regulations. Those are supposed to be distinct steps under the statute. And then (3) the Agency was doing all of this without issuing a final report to Congress, upon which the final determination is supposed to be based.

So, we believe that there were statutory restraints on EPA pursuing the Subtitle C option. I think the Agency disagrees with that. That's another area where I know there are disagreements with respect to what the statute authorizes the Agency to do.

Tom Munteer: When we start to talk about the implementation of this rule, I'm going to have you revisit the limits on the Agency's authority under Subtitle D. But for now, anything further on Bevill? Have we exhausted the topic?

Lisa Hollowell: No. We would be more in agreement with EPA's take on the issue, but I'll save that for later.

Tom Munteer: Anyone giving odds on the West Virginia congressman's legislation to curtail all of this?

9. Rep. David McKinley (R-W. Va.) has introduced several legislative vehicles to block or weaken the EPA rule. The most recent bill, H.R. 1734, Improving Coal Combustion Residuals Regulation Act, was passed by the U.S. House of Representatives on July 22, 2015. See generally Samantha Page, *House Passes Bill That Would Allow Toxic Coal Ash Into Groundwater*, THINKPROGRESS.ORG, July 23, 2015, at <http://thinkprogress.org/climate/2015/07/23/3683507/house-passes-coal-ash-bill/>. The Barack Obama Ad-

Douglas Green: Odds on Congress passing legislation? I'll take a bet on that.

III. Beneficial Reuse of CCR

Tom Munteer: We have already alluded to the topic of beneficial reuse. I've seen different numbers. I've seen the statistic EPA gave that 30% or 39 million tons of CCR were put to beneficial use in 2012. I think there's a reference in the rules package that EPA has. It's currently 48% of CCRs are put to beneficial reuse. We're talking about two types of uses: (1) encapsulated: substituting it for Portland cement in the manufacture of concrete or in wallboard, roofing materials, or bricks; and (2) unencapsulated: placing it directly on the ground such as the road bed, structural fill, soil amendment. Doug, starting with that, what are the criteria? What are the beneficial reuses? What's the definition?

Douglas Green: Lisa is absolutely correct in that the final rule retains EPA's Bevill determination that CCR that is beneficially used should not be regulated as a hazardous waste or under the new Subtitle D disposal rules. What's interesting about the rule is that it actually includes the definition of what beneficial use is. If coal ash is beneficially used in the manner defined in the rule, then it is not subject to the criteria under the rule. (Some of the beneficial use criteria in the CCR rule track some of EPA's legitimacy criteria in its final rule on the definition of solid waste for RCRA Subtitle C hazardous waste purposes.)¹⁰ While the legitimacy criteria in the Subtitle C rule are not precisely the same as the beneficial use criteria in the CCR rule, both revolve around the notion that the material is being used for a legitimate purpose in lieu of virgin materials and that there are not undue environmental impacts from beneficial use or recycling of the secondary material.

Basically there are four steps, four elements of the definition of CCR beneficial use, which I'll paraphrase from the rule: (1) the ash must provide a functional benefit; (2) the ash must substitute for the use of a virgin material and thereby conserve natural resources that would otherwise be used to mine or extract virgin materials; (3) the ash must meet relevant product specifications or a regulatory standard, if available; or (4) when not available, the ash must not be used in excess quantities. These are important criteria where basically the Agency is saying, look, if you're using it, its characteristics are appropriate for the use and it's not being used at excess amounts. You don't have, in effect, sham disposal going on.

The first three criteria apply to all beneficial uses of CCR. The fourth criterion applies when the ash is used

in placement on the land in amounts greater than 12,400 tons in an unencapsulated manner and non-roadway applications. What we're really talking about here is large-scale structural fill. For the ash to be considered as used for beneficial use, a demonstration must be made by the user, and records have to be maintained, that demonstrate that that type of use will not result in release to groundwater, surface water, soil, and air at levels that are higher than analogous products, so there has to be equivalency in terms of environmental impact. And if there are releases, you have to show that they are at or below relevant regulatory and health base benchmarks for human and ecological receptors during use. So, those are really the parameters and the constraints around large-scale beneficial use.

Tom Munteer: It sounds a lot like tailoring the speculative accumulation rule under Subtitle C and the toxics-along-for-the-ride criteria from the definition of solid waste legitimacy criteria.

Douglas Green: I think where it comes from, what EPA was trying to do, is to say, look, we'll allow for this large-scale structural fill application. But if it's in a non-roadway application, if it's above a certain threshold, then we want to ensure that there's not an environmental impact and that there are protective steps being taken in this large-scale structural fill application. The Agency is clear in the preamble that there may have to be fairly substantial engineering factors or steps taken to ensure that that type of large-scale use of fly ash is done in an environmentally protective manner. I don't think it's the toxics-along-for-the-ride issue as much as it is ensuring that, when used in that application, the environmental impact is equivalent to analogous virgin materials.

Lisa Hallowell: EPA had specifically solicited comments on large-scale structural fills and how to define those. I will note that the fourth prong, applicable to structural fills above 12,400 tons, is a departure from the proposed rule. EPA had originally proposed treating all large-scale structural fills as disposal sites. They would have been completely subject to the disposal rule. So, this is a change where the Agency was trying to address some of the industry concerns. As for that number, it seems that it was derived based on comments the Agency received concerning what tonnage has led to damage.

I just wanted to put it in perspective. We roughly calculated 12,400 tons of coal ash as a football field six feet deep with coal ash, so it's a fairly large quantity of material that we're talking about. So, to insert a qualitative assessment, we do have concerns about that amount of unencapsulated material not being prohibited.

While EPA is requiring this qualification, it would have to make a demonstration. Notice is not required, which hinders the public from even knowing where and when these structural fills are going to be placed in their community. If you can meet those benchmarks with your

administration has threatened to veto the legislation. See Executive Office of the President, Statement of Administration Policy, H.R. 1734, Improving Coal Combustion Residuals Regulation Act of 2015 (July 21, 2015), available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1734r_20150721.pdf.

10. Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015). The rule became effective July 13, 2015, and is codified at 40 C.F.R. pts. 260 and 261.

qualified professional engineer (who does not have to be independent, another issue we could get into later), you can continue business as usual.

We have seen many damage cases, situations where human health or environmental standards have been exceeded at sites that were beneficial use sites, including many structural fills. We do have concerns about that and the way EPA broadened the rule in that definition.

Tom Munteer: One of our audience members has a question that I'll put to both of you. It sounds like a typical sham recycling question under Subtitle C, but can you elaborate with respect to the new criteria—what would look illegitimate, what would look like a sham? What kind of experience have we seen that would not satisfy the criteria and fall outside them?

Douglas Green: I don't have an example, but something I think that the beneficial users have to be cognizant of is not using a material in excessive amounts. When we counsel clients, it's an important issue that the use of the CCR be for a beneficial use—whether that use might be for structural fill, or in an embankment, or a roadway application, or for closure of a unit—that in fact the amount used is indeed providing a functional benefit and you are not using more than is needed for the beneficial use. I believe industry is well aware of this point.

Lisa Hallowell: I think if you were someone who's interested in engaging in beneficial use, the third prong of the test that talks about regulatory standards and specifications (such as LEED standards to use in a lot of these products) is something you should be mindful of and make sure you're within the parameters for the types of uses that they do provide with credits and certifications for it.

Douglas Green: Lisa, you reminded me of something. In the preamble, the Agency, in talking about how the use criteria can be met, EPA does point to state standards. I believe this is right, that if your state has criteria, then that's one factor that can be looked to in terms of whether you're meeting some of the beneficial use criteria.

IV. Technical Standards

Tom Munteer: Let's turn to the heart of the rules. These are technical standards for land-based management. If you aren't beneficially using CCR in the manner just discussed, if you're disposing it on the ground, EPA encourages the states to amend their solid waste management plans to require such land disposal be subject to certain technical standards. For all the details of these standards, I direct you to EPA's website. I'll list the technical standards and then ask Lisa and Doug to provide commentary.

By and large, the technical standards follow a familiar pattern for those who operate in this world. They look a lot like the patterns set for municipal solid waste landfills

or for treatment, storage, and disposal facility land-based units. They follow familiar patterns, although the details may differ.

- There are location standards: keeping the landfills away from wetlands, fault areas, or areas of seismicity problems.
- There are liner and leachate collection aspects: composite liners, geosynthetic clay, and geomembranes.
- There are structural integrity aspects: weekly visual inspections, periodic stability assessments.
- There are groundwater monitoring and corrective action requirements: CCR units will have to monitor the wells and check the presence of hazardous constituents that might have escaped from the units.
- And there are closure and postclosure care requirements.

Doug already alluded to the controversial aspect of the rule that requires existing inactive surface impoundments to close and imposes closure and postclosure care obligations, unless the impoundments were constructed with a composite liner and at least two feet of compacted soil.

Rather than complain about the rule, let's talk about what we believe are very favorable aspects of the rule. Lisa, why don't you start by telling us what the Environmental Integrity Project likes about the rule. Then, I'll give Doug a chance to tell us what he likes about the rule, and then we'll circle back to talk about some of the weaknesses you perceive in it.

Lisa Hallowell: From the perspective of the public interest community and the folks who live near the sites, the primary stakeholders we represent and work with, we've gotten a lot of benefits from this rule that we didn't have before. One example is a fairly robust groundwater monitoring program. There's monitoring required, detection monitoring, and then if they're exceeding the detection monitoring parameters, an assessment monitoring program for a variety of other pollutants. The groundwater monitoring information is required to be publicly noticed, which is incredibly important because it's very difficult for us in the nonindustry world to actually get access to that data, even when the states are collecting it and requiring it.

So, the groundwater monitoring provisions are in a lot of ways really good. A lot of the main pollutants that we've seen cause damage are covered. Some of them aren't, and I can get into that later. But a fair number of these would be required to be monitored. If you trigger this assessment monitoring program, if you have a statistically significant increase over the background, then corrective action would be triggered.

One thing we really like about the corrective action requirements is that they are very much keyed to groundwater protection standards for those assessment monitoring parameters. EPA has those listed in an appendix.

Appendix 4 contains pollutants that will have groundwater protection standards, but typically, most of those pollutants have a maximum contaminant level (MCL) and that would be the groundwater protection standard, or if its background is higher than the MCL standard, then the background is the standard. So, corrective action is geared toward the groundwater protection standards, which from our perspective would help ensure cleanup that is protective of human health. And also in terms of corrective action, there's a notification requirement in the event of a release, which I think is really important. We talk a lot about public notification because that's been a real obstacle for us over the many decades that we haven't had a federal rule in many states.

So, recordkeeping, notice, and specifically the Internet posting requirements are really strong in this rule. There are a variety of requirements and demonstrations that have to be made under this rule. The majority of them have to be kept in the operating record, submitted to the state under the provisions of the rule. Then, within 30 days, many of these requirements have to be posted to an owner or operator's publicly accessible Internet site. This, from the perspective of the public, eliminates the extremely cumbersome filing process that we typically have to go through to collect groundwater monitoring data and structural integrity assessments. It even includes hazard potential assessments and information on liners. These are some of the important things that we don't always have access to.

Another important requirement that we think is a good thing is the closure of unlined ponds that exceed groundwater protection standards. They have to cease accepting waste within six months and close. All ponds would have to close if they failed to meet safety factor assessments for structural stability, federal safety factors, or failed to demonstrate compliance with location standards that trigger closure. Active landfills that can't meet location restriction for unstable areas would have to close, as would new landfills that don't have a five-foot separation from groundwater. So, if you were within five feet of the groundwater aquifer and you can't demonstrate that you can meet other safety factors, that could trigger closure as well.

Tom Munteer: There's a lot to like. I also recall your liking the structural integrity, the visual inspection assessment.

Lisa Hallowell: There is a really robust structural integrity and inspection program in the rule that we really like. For example, ponds would have to be inspected every seven days for structural weakness, and also every 30 days for unit instrumentation. There's an additional structural stability assessment performed annually, and then every five years. This is a main concern when we're talking about the catastrophic spills like TVA Kingston and Dan River.¹¹

The more frequent the inspections are, hopefully, the more likely we are to catch a potential breach before it occurs. We're definitely generally in favor of those increased inspection and structural integrity requirements.

There are also helpful location restrictions. In addition to the five-foot separation from water, there are restrictions on placement of units in fault areas, seismic zones, wetlands, and unstable or karst zones. All of this makes a lot of sense when you're thinking about the potential for pollutants to leak out into groundwater, and all of these things could potentially create either leaking or a breach if they weren't properly taken into account.

Postclosure care would be required for 30 years. Some would prefer to see a longer period. EPA said in its original risk assessment that peak leach time with pollutants could occur as late as 87 to 105 years postclosure. It seems that the Agency walked that back in their final risk assessment to 75 years. We think that 30 years of postclosure care, which would involve making sure that final cover is strong and doing additional groundwater monitoring, is beneficial for the public and reasonable for industry.

Tom Munteer: The Environmental Integrity Project has a lot to like in the technical standards. Doug, what about your Utility Solid Waste Activities Group members?

Douglas Green: It's a very robust rule. What I can add is that EPA had a challenge here once the Agency determined that it was going to promulgate a self-implementing rule. It had to establish regulations that were not going to be administered by a permitting agency. So, the Agency will have to effectively say that criteria must be established that can be met by all of these units irrespective of how they may differ because it's a self-implementing rule. There's not a permitting agency involved to refine the rules as applied to a permit. So, that was a challenge.

Having said that, I think in certain areas, EPA tried to recognize that a closure and the operation of these units can be very different and is very different, and meeting these standards does require some type of site-specific evaluation.

For example, the proposal said that units must be closed within 90 days. To EPA's credit, it recognized that you can't close some of these large surface impoundments in five years, let alone 90 days. You have to dewater them to do it safely, to ensure that the unit is in fact closed properly. It takes time. It has to be dewatered properly. The caps must be designed properly. EPA focused on that and they did provide for a reasonable closure time frame: a presumption of five years with the opportunity to obtain an extension if the owner/operator could demonstrate that there were other factors, such as weather, permitting delays, requiring more time than anticipated to properly close the impoundment. I think the Agency listened to industry concerns in providing for an extension of the closure deadline if a dem-

11. The "Dan River" spill refers to a February 2014 event during which tens of thousands of tons of coal ash and 27 million gallons of contaminated water spilled into the Dan River near Eden, North Carolina, from a closed coal-fired power plant owned by Duke Energy. See David Zucchini, *Tons of Coal*

Ash Spill Into North Carolina River, L.A. TIMES, Feb. 4, 2014, at <http://www.latimes.com/nation/la-na-coal-ash-20140205-story.html#axzz2sUqN4ngB>.

onstration was made and certified by the owner/operator of the facility.

Another area where I think EPA was trying to be very practical was with respect to the very robust groundwater monitoring program. As a practical matter, you've got to think about it in terms of the installation for a lot of these facilities of groundwater monitoring systems where they may or may not already have groundwater monitoring systems in place. There's going to be a lot of groundwater monitoring wells going in. EPA recognized the concept of allowing for a groundwater monitoring system to embrace a series of units, provided that the system ultimately meets the rule's groundwater performance standard, which is whether you can measure the impact to groundwater from the unit.

That's going to be a hard issue for the qualified professional engineers under the rule. They're the ones who have the burden of certifying compliance with the rule's performance standard. But there is some flexibility, some deference given to the engineers in terms of where these wells can be located, as long as they meet the groundwater performance standards.

The other thing EPA considered was the establishment of the alternative liner criteria. I think the proposal had one set of design standards. EPA said they would have wanted more alternatives. We think there are a lot of good double-liner systems that are not recognized as a liner system in the rule. There was an alternative liner system included in the final rule—that if a demonstration was made that the performance criteria are met, an alternative liner could be used.

Another area where we were pleased has to do with the requirement of certification by a professional qualified engineer. EPA's coal ash rule is a self-implementing rule, which means: Have you demonstrated compliance? If I'm an owner/operator of a facility, the way I demonstrate compliance, the proposal said, was to have certification by an independent professional qualified engineer.

We took issue with that. We said that the qualified engineer who certifies doesn't have to be independent. An owner/operator can have a qualified professional engineer who is working for the company, but nonetheless has a professional license on the line. We believe there's enough on the line for these qualified professional engineers, irrespective of whether they're employed by the company, to make fair certifications. We don't think there's going to be unfair bias if the engineer is not independent. In fact, EPA has adopted this approach in other programs, including EPA's SPCC program.¹²

In the end, EPA agreed with us and allowed qualified professional engineers to be company employees, recognizing these licensed professionals were not going to show any bias due to fear of losing their licenses. We appreciated that change. But the important thing for our audi-

ence today to understand is the unique nature of this rule in terms of enforcement. We are discussing how to demonstrate compliance. My clients are demonstrating compliance by having a professional certify that they are meeting the rule's technical criteria. That's going to go on the record and it's going to go on the company's publicly available internet site.

I think that is a unique element of this rule. I'm not really aware of a rule of this magnitude being implemented in that manner where you're basically self-certifying with groups like Lisa's and other citizens' groups and the states are really evaluating that. And if you disagree, file a lawsuit. For EPA to switch from requiring certification by an independent qualified professional engineer to certification by any qualified professional engineer was a reasonable change.

Tom Munteer: You both found things you liked about the rule. I want to give you each a chance to talk about what you don't like on the technical standards. Lisa, questions have come in from audience members, and I think you're probably in a position to answer this one. What's the history to date of EPA or state agencies' efforts to have the same data you're so happy to have posted on the Internet, actually posted? Is there a track record with this?

Lisa Hallowell: There's very little. My organization, the Environmental Integrity Project, has presented a lot of what we called damage case reports to EPA, as you'll see at our website. My organization, working with many other public interest groups, has presented to EPA evidence of damage at over 200 sites nationwide in 37 different states. The way we're able to do that is by collecting groundwater data for the most part or other evidence of harm to human health.

We did this because two of the Bevill factors cover proven and potential damage from coal ash disposal. It's been a patchwork without federal regulation. Some states have stronger coal ash regulation, some haven't had any over the years, and some now do. There's a wide variety in terms of what data is publicly accessible.

I don't know that there's any state that, for example, provides five years of groundwater monitoring data on an Internet site. Usually, the process is we have to figure out whom to contact, which state agency, which office of the state agency; then we send a request, ask for information, schedule a file review. I know that in Pennsylvania, for example, it always takes about six weeks just to get in the door to first review the files, sometimes even longer, and we used to pay to copy them.

I work for an organization, but if I was a citizen who lived next to one of these sites and wanted the information, then I would have to take a day off from work. I would have to figure out how to do all this stuff, and then I would have to pay 25 cents per page for a copy. That may not seem like significant money to attorneys, but for a citizen paying out of pocket, it can really add up when you're talk-

12. 40 C.F.R. Part 112 (requiring oil storage facilities to develop and implement Spill Prevention, Control, and Countermeasure Plans and establishing procedures, methods, and equipment requirements).

ing about groundwater monitor reports where one quarter's data can be as much as 400 pages long. It's difficult. I've seen it. It would be a huge benefit to have that information accessible on the Internet.

Tom Munteer: Are there elements of the disclosure obligations that are ambiguous or not as detailed as you would have liked to have seen, or are you getting what you want to see?

Lisa Hallowell: A major area for improvement in terms of notification is that the notification provision itself requires notification through the state that information is available on the operating record and for the state. Public notification as to when certain information would be available would be helpful, though if everything is posted on the Internet site, separate public notification may not be necessary. That's very important in the context of potential legislation that would completely cut out notification and Internet posting for some requirements. There's a bill currently before Congress.¹³

With respect to technical issues, my list of shortcomings in the rule is a little longer. Many of the things that Doug talked about as strengths of the rule, we might see as drawbacks. The main thing that we lost in this rule is federal enforceability. The onus is on states and citizens to bring citizen suits to enforce these self-implementing regulations. We have limited resources and abilities, and that creates kind of a site-by-site approach to implementing or enforcing these regulations, rather than having EPA being able to step in and inspect and do other things that it would have been authorized to do under Subtitle C. For example, there's no phaseout of ponds. The proposed rule would have phased out all disposal in wet ponds. EPA's risk assessment in 2010 found that unlined ponds can pose as high as a 1-in-50 risk of cancer due to arsenic leaking into groundwater.

I will note as a caveat that EPA only looks at risks from arsenic where there are over 30 pollutants that are common indicator pollutants that we find in coal ash. Therefore, a 1-in-50 increased risk of cancer is much more dangerous than what EPA typically deems an acceptable cancer risk. We were surprised that EPA proposed Subtitle C and Subtitle D and they also threw in this "D prime option" that would have allowed continued operation of the ponds.¹⁴ EPA ended up going with the D prime option, which was a big surprise to us. We think it really creates some public health concerns.

We're generally pretty pleased with the robustness of the groundwater monitoring program, but there are certain

areas where we find fault. We don't have access to EPA's risk assessment, so I might walk this back once I'm able to see the risk assessment. But we were surprised with the limited universe of Appendixes 3 and 4—the pollutants for which they would have to do detection monitoring and assessment. For example, there are no groundwater protection standards associated with the detection monitoring list. Meaning, there's no corrective action that would be required for a lot of pollutants that we commonly see in coal ash damage cases. That includes aluminum, boron, chloride, copper, iron, manganese, pH [hydrogen ion concentration], sulfate, sulfide, and total dissolved solids. Even if these show very high levels, corrective action would never be triggered under this rule.

There's also a lot of leeway given to industry to extend many of the deadlines. For example, if detection monitoring results in a statistically significant increase, industry has the opportunity to try to say, well, that's not really due to the coal ash, it's due to something else. There are a lot of off-ramps where industry is given an opportunity to explain away even exceedances of the standards, which in some ways might be very reasonable. But when you have a self-implementing rule and industry's engineers are not independent, that can raise red flags for us in the public interest community. Industry also has an opportunity to seek less-frequent monitoring. There's discretion on the part of the engineer in terms of well placement, which we think could end up masking pollution that's migrated.

Inactive landfills are completely unregulated. Inactive ponds at inactive power plants are unregulated. There are multi-year extensions for closure. Doug sees that as a positive. I would agree that in some instances, the proposed closure time lines probably would have been unreasonable. But the extensions are vast. For example, EPA originally proposed a five-year closure with the potential for two years and a maximum of seven years for closure. But under the rule, in certain instances, there can be up to 13.5 or 15 years for closure with the longest extensions. That doubles EPA's original proposed time line. In some instances, such lengthy extensions may be warranted, but it's a very long time. The ponds can close in three years and avoid all post-closure monitoring requirements. And closure can include closure in place without requiring removal of the waste materials, which can pose some potential problems.

An additional concern is that some of our damage cases were not water-based, but instead were concerns due to fugitive dust emissions. The proposed rule had a concrete numeric fugitive dust standard that was keyed to fine particulate matter pollution (PM_{2.5}) designation requirements. The rule completely removed that numeric requirement, which makes it harder from the perspective of enforcement by citizens. But they do have to post a fugitive dust annual report. So, we just thought it was some good information.

We already talked about beneficial use. Large-scale fills can still operate and are not banned as they would have been. And finally liners: There are some good aspects of the liner requirements, but existing landfills are not required

13. See *supra* note 10.

14. EPA's June 21, 2010, proposal to regulate the disposal of CCRs included three options: (1) regulate CCRs as a "special waste" under RCRA Subtitle C; (2) regulate CCRs as nonhazardous wastes under Subtitle D; and (3) the "D prime option," a variant of the Subtitle D option, under which existing surface impoundments would not be required to close or install composite liners but could continue to operate for the remainder of their useful lives. U.S. EPA, Disposal of Coal Combustion Residuals From Electric Utilities, 75 Fed. Reg. 35127 (June 21, 2010).

to install liners. The unlined existing sites could continue to receive waste even without a liner as long as they complied with groundwater monitoring requirements. Unlined ponds without a composite liner, alternate composite liner, or two feet of clay with the requisite permeability rate would have to directly be closed. Our basic point is that there were a lot of concessions made to industry. I'm not surprised that organizations like the Utility Solid Waste Activities Group came out saying they were very pleased with the Subtitle D rule.

Tom Munteer: Doug, for your comments, let's hold off on the implementation and enforcement issues and focus on the technical standards. One thing that particularly struck me was the uncertainty of cleanup end points.

Douglas Green: The Utility Solid Waste Activities Group generally came out in favor of the rule when it was first issued. Upon further reflection, I don't think that they were commenting so much on the technical standards, but generally on the Subtitle D approach overall. One of the things that industry, and I think the states also, have a problem with regarding the technical standards is that EPA's proposal would have contained some flexibility with certain of technical standards in a manner employed under Part 258 for the municipal solid waste landfill program,¹⁵ where certain of the standards could be modified if there was a risk-based rationale for the modification. Much of that flexibility is gone in the final rule.

I'll give you an example. The rule establishes a very robust groundwater protection program. What happens is that once any unit detects a constituent above a background standard, it must establish a groundwater protection standard for that constituent. The groundwater protection standard is either the maximum contaminant level for that constituent or background. Now, the proposal would have said, look—and this is consistent with Part 258 of the municipal solid waste landfill program and I believe the Subtitle C hazardous waste groundwater monitoring program—in situations where you don't have a maximum contaminant level—and I know this is the case with Part 258 where you don't have an MCL—you do default to background, unless you can demonstrate there's an alternative state or federal risk-based number that's not background but can also serve as the groundwater protection standard.

The final rule eliminated that option precisely because there was no implementing agency overseeing the rule. The Agency felt that such site-specific determinations could be abused with a self-implementing program with that type of determination made by a professional engineer who would rely on the professional advice of a hydrologist or toxicologist to say, look, there is an alternative federal standard for this constituent. It's higher than background, but if we're below that number, that should suffice for a groundwater protection standard, which

is the approach used in other groundwater monitoring regimes. That option is not available here. The background number has to be used as a groundwater protection standard if it's not an MCL.

So, we were disappointed by that elimination in terms of the technical standard. I think the states were disappointed too as they started to evaluate this, and some of the end points for corrective actions—for instance, there's a specified standard for corrective action, what your remedy must be. And the remedy is that you must demonstrate that you meet your groundwater protection standard for three straight years at the edge of the regulated unit. Now, that may be reasonable. But in some cases, it departs from the states' ability to look at an alternative point of compliance that is not going to be at the downstream slope of the unit, but rather to say that given the site-specific factors, there may be a different corrective action point of compliance remedy that would suffice. That type of flexibility is removed from the rule because the rule is self-implementing. Some of the states' corrective action programs have effectively been superseded by this federal rule. We're disappointed with the inflexibility in the technical standards.

Tom Munteer: That provides a good segue to move into state implementation issues. The hallmark of EPA's decision to regulate under Subtitle C or D means that regulations and enforcement are generally left to the states. EPA issues suggested guidelines and states develop their own solid waste management plans and permitting programs that aren't enforceable by EPA and are not an adoption of the Subtitle C cradle-to-grave regime. States aren't required to adopt the rule. EPA can't enforce and can't sanction states that don't enforce. I think both our panelists would agree that this approach is less than optimal. Lisa, your comments on the proposal expressed skepticism that states would update their existing solid waste management plans to incorporate EPA's standards. Explain your skepticism and where you stand.

Lisa Hallowell: It's not just our skepticism. EPA and its regulatory impact analysis calculated in large part the cost of the Subtitle D rule being lower because they expected that most of the states that carry about 50% of the coal ash disposal sites would not adopt the regulation under Subtitle D. That was in large part why the rule is expected to cost less: because the states wouldn't do anything.

EPA claims it has put in some incentives for states to adopt the rule. But without incentives, we've seen over the decades that states have not taken the initiative on their own to adopt most of the requirements that came out of this rule and certainly not most of the requirements that we would have seen under a Subtitle C rule. We had been pushing for Subtitle C rules so that there would be an assurance that states would have to adopt the minimum criteria, rather than guidelines that we had no evidence they would plan to adopt.

15. Criteria for Municipal Solid Waste Landfills, 40 C.F.R. pt. 258.

Tom Munteer: Doug, I think you also agreed this framework is not optimal for your members.

Douglas Green: We believed that EPA cannot pursue the Subtitle C option. At the same time, we saw the problems with the implementing regime, and we see the enforcement scheme being borne entirely on the backs of citizen suits. Our clients are operating with a certain degree of uncertainty with respect to whether their decisions on how to comply are correct. Our clients can't go to a permitting agency and say, did we place this groundwater monitor well in the correct spot? Does this alternative liner meet the design standards? They're saying, we think it meets the design standards. We think our inspection program meets the criteria.

The type of certainty that the regulated industry wants to operate under is not available under this regime until such time that a company is alleged to be in noncompliance, is sued, and a federal district court judge makes the decision. That degree of uncertainty is a drawback. So, what we said to EPA was, look, you don't have to go with Subtitle C. We've always advocated that a Subtitle D program for coal ash should be implemented in a state permitting program. In our comments, we suggested that EPA develop a regulatory program for coal ash just as it's done for municipal solid waste under RCRA §§4010 and 4005 to the Subtitle D provisions. Those provisions of RCRA direct EPA to develop regulations for those units, and for states that do not adopt and implement a permit program to enforce those Subtitle D regulations, EPA will step in and enforce the Subtitle D rules.

We thought that statutory regime, which has worked so well for municipal solid waste facilities, was the approach EPA ought to take in this rule. It would have provided for a permit program, a set of federal criteria enforced by the states. If the states didn't do it properly, EPA, just as it does with municipal solid waste landfills, would have stepped in and enforced. I think everybody agrees that that program has worked pretty well.

So, it was really a question of what was the best statutory provision the Agency should use for implementing this rule. We suggested to EPA that there is a permit program under Subtitle D that they could employ. The Agency disagreed and said their only option was what they've done, to promulgate this rule under §§1008 and 4004, which does not have a separate permitting regime. So, we're back with what we have today: the self-implementing regulatory regime.

Tom Munteer: If a representative from EPA had joined us on this panel today, what do you suppose they would say was the reason for choosing the approach they chose, which neither of you are big fans of?

Douglas Green: I think the hypothetical EPA panelist would say that the Agency felt that they don't have the authority under §§4005 and 4010 to regulate coal ash

units. And those provisions were limited to a different universe of Subtitle D units. EPA just didn't agree with the statutory approach we were suggesting. I think it's that simple.

Lisa Hallowell: Right.

Douglas Green: Again, we were trying to find a way. We believed that what we were suggesting was a reasonable construction of the statute. It would have provided EPA with a better way to develop the Subtitle D program for coal ash that wouldn't have resulted in the self-implementing regime. We were trying to assist EPA, giving them a suggestion for how this could be developed in a more practical way.

V. Enforcement

Tom Munteer: We have a question from an audience member that leads us to our next topic: enforcement. I think you two panelists will share some common ground in believing that the enforcement regime may not be optimal either. Certain provisions in RCRA Subtitle D provide that a disposal facility that doesn't meet the criteria that EPA has included in the guidelines could be deemed an "open dump," and therefore subject to the imminent and substantial endangerment citizen suit enforcement. So, the question our audience member asks is: What is it that citizens will enforce? If you're a student of the imminent and substantial endangerment provision in the statute, that is the essential question.

Lisa Hallowell: I want to make a distinction that there are two separate enforcement options here. One is the imminent and substantial endangerment provision; the other distinct enforcement option involves the open dumping provisions. Those are two separate options. Imminent and substantial endangerment existed previous to this rule. The public interest community has used that provision. That would remain unchanged.

The open dumping provisions are another option for citizen enforcement or citizen suits. RCRA §4005, entitled closing or upgrading of existing dumps, generally establishes key implementation enforcement provisions under the open dumping provisions. Section 4004 generally requires EPA to promulgate regulations with criteria to distinguish between an open dump and a sanitary landfill. The statute directs that, at a minimum, the criteria are intended to ensure that units are classified as sanitary landfills only if there's no reasonable probability of adverse effects on health or the environment from disposal of solid wastes at such a facility.

So, enforcement is in the form of citizen suits. Citizens or states can sue for violations of the rule, whereas EPA cannot under the scheme. The option of citizen suits under the imminent and substantial endangerment scheme would not be affected. That's separate.

Tom Munteer: What standards are they issuing? These are federal guidelines and yet a citizen suit is being brought. Are the federal guidelines enforceable on a particular landfill if it's in a state that doesn't require a permit?

Lisa Hallowell: Yes, these are self-implementing regulations, right? So, if we had evidence (and as I said, the notification provisions are incredibly important so that we have access to the data to evaluate whether the standards are being met at a particular facility), there are some potential triggers to enforceability of open dumping. We have a lot of questions in terms of the point at which liability would be triggered and about the quality of information we may be able to get, which may not always be enough for us to take action on. Public interest groups generally do not have large resources, and it takes a lot to obtain and evaluate some of this data.

So, it's a heavy lift to bring a suit like this. It's not entirely clear that we're going to get necessarily the quality of data that will be required in many of these cases, but we should be assured of getting more data, especially in states that currently have really weak groundwater monitoring and notification requirements or only require monitoring for a couple of pollutants.

Tom Munteer: What's the alternative, then? Doug said he tried to convince the Agency to use their authority as if it were the municipal solid waste landfill permit program. Would that be satisfactory?

Lisa Hallowell: Well, we had advocated that Subtitle C was really the clearest approach to getting everything that we wanted. Pretty much all of the issues that Doug and his counterparts are wrestling with right now would have been addressed in a Subtitle C rule but for that pesky stigma issue that we addressed earlier.

Douglas Green: Lisa is identifying correctly some of the challenges. One of the things I want to emphasize is that there's going to be dual regulation by definition under these rules while EPA encourages the states to adopt the rules into their state solid waste management programs. If the Agency encourages and the states adopt, there's still a problem in that state programs do not operate in lieu of these federal criteria.

The Agency is quite clear about that in the preamble. You're going to have a state CCR rule and a federal rule. Now, let's say the states don't adopt the federal criteria. We've heard this from some of the states. Amending their state solid waste management programs is something that they aren't inclined to do. They are going to stay with what they have with respect to coal ash regulation.

And then you're going to have these federal criteria, and facilities are going to comply with both state and federal criteria to the extent that the federal criteria are different or more stringent than the state criteria. The federal criteria, almost by definition, are going to apply. They're going to be

enforced, as Lisa correctly says, through citizen suits. That dual regulatory approach is problematic.

The other problem with this regime is that you're going to have different federal district court judges making rulings on what constitutes compliance under the rule. Different individual federal district judges will be deciding, for example, whether that groundwater monitoring well is in the right location. You could have a judge in the Eastern District of Pennsylvania ruling that it is because that's how that particular judge reads the groundwater protection standard. But then, a federal judge in the western district of the same state could come to a different conclusion. We're concerned about that potential inconsistency in judicial rulings. I think it is one of the most problematic aspects of EPA's approach, in addition to the fact that the regulated industry lacks compliance certainty until they are sued. We talked to EPA about this and encouraged them to look at the §4010(c) approach. Our efforts didn't succeed, so we're stuck with what we have.

Tom Munteer: That's a tough situation for you to find yourself in because that type of situation is not susceptible to an arbitrary rulemaking challenge, right? It's a question of legal authority and the exercise of that.

Douglas Green: Oh, with EPA now? I think it's not. That is an issue of statutory construction. Is this a rule that should have been promulgated under §4010(c)? Or did the Agency choose the right statutory provision? These are simple issues of EPA evaluating what authority it had under the respective provisions of RCRA Subtitle D.

VI. Legislation

Tom Munteer: Let's segue to legislation. Is there a legislative vehicle to provide clarity on your point?

Douglas Green: Lisa and I say, "Look. There's a flaw in how this Subtitle D rule is implemented because there is no permitting authority." If we agree with EPA that they had no choice under the statute, then the statute has to be amended. If you want a Subtitle D permitting program for this material, it's going to require a statutory amendment. I don't see another way out.

Lisa Hallowell: I largely disagree. RCRA has operated for many years with what you're calling a flaw. Enforcement has always been in federal courts under many of the RCRA programs. It really hasn't been an issue. We think it would be much more dangerous and create much more of a patchwork situation to have 50 different states with 50 different regulations, none of which are keyed to a federal protective standard.

Furthermore, we think what's happening with the legislative approach is that industry was given an inch and they're trying to take a mile. They got the D rule that they had really asked for originally before they also asked for

the §4010(c) option. And now what industry is doing is cherry-picking the few protections that are in the rule. Many of the protections we advocated for are absent in the legislation—for example, access. Some of the notification requirements will not be mandatory for states to adopt. There's a multi-year delay for most of the regulations that would be in EPA's rule. There's a lot of cause for concern for an issue that we think if a state were to just adopt the federal standards, there doesn't have to be. There isn't a dual requirement situation necessarily if the state were to pick up the regulations from EPA.

Douglas Green: I hear the argument that this is the way RCRA has always been administered, through citizen suits in federal district court. I think that's an overstatement. Subtitle C is a federally delegated program to the states. A citizen suit option is a fallback if the state and/or EPA don't take enforcement action. This is the only program of this magnitude where there is no permitting agency that can take an enforcement action. The program relies solely on federal district court action. So, to say that this is the way RCRA has always been administered is not accurate. No program has been administered or enforced this way since the statute was enacted.

Tom Munteer: Let me try and understand this. If a plaintiff provides notice by citizen suit, there's no one who can step in and say, no, I've got this one. There's no preclusion

by diligent prosecution. So, that would be the difference with Subtitle C regulation?

Douglas Green: The real difference is that the primary enforcement system under Subtitle C and the Part 258 regulatory programs, EPA's two sophisticated hazardous solid waste programs under RCRA, is through a regulatory agency. A permitting program with citizen suits and enforcement authority is a backup if the states or the permitting agency doesn't take action. That's why you have a 60-day notice letter.

Lisa Hallowell: My main concern has been that this bill is just not necessary. The legislative approach in particular is not necessary. The concerns are being overstated.

Douglas Green: Going back to the original question, what we're saying is that a self-implementing approach for implementing this program is flawed and if EPA doesn't think it has the authority under Subtitle D to do anything else, then a statutory amendment is needed. It's that simple. If you want a permit program for implementation of this rule, and it's EPA's view that they don't have that authority under the statute, then by definition, this requires an amendment to the statute.

Tom Munteer: We've run out of time. Many thanks to our panelists and audience members.