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Transforming Ideas Into Solutions

STATE AND FEDERAL PARTNERSHIP TO MANAGE ENVIRONMENTAL PROTECTION

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Environmental protection issues can be both complex and challenging, particularly when dealing with varying factors across different regions and states. Federal, state, and local governments all play an important role in protecting the environment, and they all share the same goal. But too often, one-size-fits-all government mandates from Washington do not address local needs.

Policy decisions should be made at the appropriate level of government, namely, the level closest to the people, which has the intrinsic authority to make and implement the decision. The broader central authority should have a subsidiary function performing only those tasks which cannot be performed effectively at a more immediate or local level. Environmental policy is no exception. Sorting out when the U.S. Environmental Protection Agency (EPA) and when a state or local government should implement environmental policy is not easy, and it has been an important focus of the Environment and the Economy Subcommittee. Management of coal combustion residuals offers a good case study on how to resolve this dilemma.

Background of Coal Combustion Residuals Regulation

On December 22, 2008, a coal ash containment facility in Kingston, Tennessee ruptured. The Tennessee Valley Authority and state and federal officials took action to contain the damage but the incident spurred discussion regarding the appropriate regulatory standards to manage coal ash in order to prevent such spills, and who should implement those standards, the states or the federal government.

In June 2010 EPA proposed two basic options for regulating coal ash. The first EPA proposal was to regulate coal ash management and disposal under Subtitle C of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA), which regulates hazardous materials, and would require "cradle to grave" regulation of coal ash, from the point of generation, through transportation, storage, and disposal.

An alternative EPA proposal was to regulate coal ash under Subtitle D of SWDA, the title regulating non-hazardous solid waste. Under Subtitle D, the disposal of nonhazardous solid wastes is regulated primarily by the states pursuant to federal guidelines. RCRA Subtitle D requirements relate just to the disposal of waste, and do not require regulation of transportation or storage of waste, from the point of generation. Under Subtitle D, EPA proposed detailed coal ash regulations some of which would phase out the use of surface impoundments for management and disposal of coal ash.

The EPA proposals attracted broad-based opposition. Regulating coal ash as hazardous waste was particularly controversial because EPA on two previous occasions had analyzed coal ash and concluded that, based upon the lack of toxicity, regulation as hazardous waste was not warranted. In the meantime, an entire industry had grown up around the reuse of coal combustion residuals including fly ash. They are used extensively in concrete production to strengthen roads, bridges, and buildings. They also enhance the durability of sheet rock and such consumer products as countertops and bowling balls.

Moreover, the sale and reuse of coal ash can be an important factor in the economics of power plant operations. Industry expressed concern that even talking about regulating coal ash as though it is hazardous risked stigmatizing this valuable reuse, needlessly chilling industry growth.

There was also resistance to EPA's June 2010 proposal to regulate coal ash under Subtitle D. Industry objected to EPA's proposed automatic phase-out of surface impoundments for management and disposal of coal ash. States objected to EPA's top-down, self-implementing regulatory regime because many states already have in place detailed permit programs for regulating coal ash management and disposal. These state programs are tailored to the distinct needs and characteristics of disposal of coal ash in the state. State and industry stakeholders agreed that a more localized regulatory program for coal ash would provide protection for human health and the environment through enforceable permit programs while allowing for more regulatory flexibility.

Regulation of Coal Ash – EPA vs. States

The SWDA, as amended by RCRA, like other environmental statutes such as the Clean Air Act and the Clean Water Act follow a particular regulatory construct. Congress provides the framework in the underlying statute which directs EPA to promulgate regulations to interpret the statute. EPA in turn may delegate all or part of the implementation responsibilities to a state if EPA determines that the state will be able to adequately carry out the regulatory program prescribed by EPA. Once a state has received delegated authority, state autonomy versus continued oversight by EPA is often at the center of debate over implementation and enforcement. In the wake of the Kingston spill and EPA's June 2010 proposed rule, a key issue is whether EPA or the states are better positioned to regulate the management and disposal of coal ash and under what authority.

In regulating coal ash, EPA faces a dilemma: EPA's only option for creating an enforceable permit program for coal ash is under Subtitle C of the SWDA which means treating coal ash as a hazardous waste. In order to regulate coal ash as a non-hazardous waste under Subtitle D, the agency may only promulgate self-implementing standards for managing coal ash, which would leave enforcement to citizen suits and litigation.

Problems with EPA treating coal ash as a hazardous waste are complex and costly. First, hazardous wastes under Subtitle C must be regulated from cradle to grave and Subtitle C standards are far more expensive to comply with than standards for other solid waste. Further, a "hazardous" designation could chill the market for the beneficial reuse of coal ash in a host of products including concrete, wallboard, and dozens of others. By stigmatizing the reuse of coal residuals, the designation would increase the cost of everything from housing to road construction.

Meanwhile, EPA regulation of coal ash under existing Subtitle D of the SWDA would also present problems. The self-implementing approach does not recognize the existence of any state regulatory requirements. An EPA-based regulation under Subtitle D would be

enforced solely through citizen suits leading to an unpredictable array of regulatory interpretations.

These limitations on EPA's ability to regulate coal ash raise two key questions:

- Would states be better positioned to regulate coal ash using a minimum set of federal standards?
- Can Congress prescribe, in statute, such minimum federal standards that will be implemented and enforced by the states?

The answer to both questions is yes. H.R. 2218, the Coal Residuals Reuse and Management Act, introduced in the 113th Congress and passed by the House on July 25, 2013, by a vote of 265 to 155 meets both challenges. Instead of handing the regulatory pen to EPA as most federal pollution control statutes do, H.R. 2218 would set minimum federal standards within the statute itself, and then allow the states to create and implement a regulatory program that meets the minimum criteria. The basis for the minimum federal standards in H.R. 2218 is an existing, successful regulatory program – municipal solid waste (MSW) – which was promulgated by EPA and implemented by the states to protect human health and the environment.

The coal ash legislation explicitly applies some basic requirements for handling MSW to structures that contain coal ash. This makes sense because MSW landfills are engineered like structures that would contain coal ash, and regulation of coal ash would require safeguards similar to those for municipal solid waste. For example, the MSW regulations contain citing restrictions, liner and cover design criteria, financial assurance, and corrective action requirements. The coal ash legislation sets minimum criteria for state regulatory programs over coal ash that contains these same elements – including requiring financial assurance, groundwater monitoring, and liners for all new landfills and impoundments and expansions of existing units. However, the coal ash legislation also acknowledges that certain standards are needed to address issues particularly associated with coal ash. For example, as coal ash is stored in surface impoundments the MSW regulations (which only apply to landfills) need tweaks to address storage of waste in surface impoundments. Coal ash also has constituents of concern that vary slightly from those identified in the MSW regulations. The coal ash legislation adds those coal ash-specific constituents to the lists to be monitored for by the states.

What makes the coal ash legislation different from other environmental laws is that the standards are set and voted on by the democratically elected representatives of the people - members of Congress. Then the program is turned over to state officials to make all the day-to-day decisions such as whether and when to issue permits, how to do site inspections, how and when to issue permits, and how to enforce the regulatory program. Every state has an agency experienced in implementing the SWDA, and each of those agencies knows the distinct needs of its own state, and has ongoing local relationships with the community. The direct accountability that comes from this closeness to the people served accounts for the program's success. Meanwhile, the states do not need to constantly

look over their shoulders for the next regulatory change imposed by an agency in Washington, DC.

Why Coal Ash Legislation is a Model for Other Environmental Regulation

The coal ash legislation is a model that could be applied to other environmental pollution control statutes where certain elements make it better suited to deal with environmental issues at the state level. One example is the 'opt in' opportunity for states that have already demonstrated an ability to run similar types of regulatory or permitting programs. States that have a proven track record with EPA for issuing and enforcing permits would be able to capitalize on that experience and avoid the delegation morass with EPA and state resources could be better spent on implementing the regulatory programs and protecting the environment. By lessening the EPA approval burden at the outset and by truly putting states in the driver's seat, states will be more inclined to shoulder new regulatory programs if they needn't go through the process of seeking delegation from EPA or be subject to over-filing by the agency.

The model set out in the coal ash legislation also shortens the lead-time for regulatory programs to be implemented because it eliminates a step when EPA would promulgate rules to define the regulatory requirements. There is no need to duplicate on the federal level, successful programs that already exist on the state level. Using the minimum federal guidelines in the statute, states can build on successful programs already in place.

Conclusion

H.R. 2218, the Coal Residuals Reuse and Management Act, delivers an innovative solution to a complex problem. It allows states and the federal government to work together to achieve important environmental protections and provides the flexibility needed to protect local economies. Enactment of this legislation would satisfy all federal regulatory requirements but empower the states to implement programs in a way that is best suited to fit the needs of a community. It is a win-win for both the environment and the economy and for EPA and the states, and it should serve as a model to solve future environmental challenges.