

November 19, 2010

BY ELECTRONIC MAIL

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Comments on EPA's Proposed Rule, "Hazardous And Solid Waste Management System; Identification And Listing Of Special Wastes; Disposal Of Coal Combustion Residuals From Electric Utilities," 75 Fed. Reg. 35,128 (June 21, 2010), Docket No. EPA-HQ-RCRA-2009-0640

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments on the Environmental Protection Agency's (EPA's) notice of proposed rulemaking, *Hazardous And Solid Waste Management System; Identification And Listing Of Special Wastes; Disposal Of Coal Combustion Residuals From Electric Utilities*.¹ EPA's notice, which set forth two co-proposals, would establish a new program for the regulation of Coal Combustion Residuals (CCRs) from electric utilities under either Subtitle C or Subtitle D of the Resource Conservation and Recovery Act (RCRA). Although EPA has certified that this proposed action would not have a significant economic impact on a substantial number of small entities, Advocacy is concerned that this certification lacks a sufficient factual basis and that EPA should have conducted a Small Business Advocacy Review (SBAR) panel and prepared an Initial Regulatory Flexibility Analysis in support of the notice of proposed rulemaking.

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.² The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),⁴ gives small entities a voice in the federal rulemaking process. For all rules that are expected to have a "significant

¹ 75 Fed. Reg. 35128 (June 21, 2010).

² 15 U.S.C. § 634a, *et. seq.*

³ 5 U.S.C. § 601, *et. seq.*

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 5 U.S.C. § 601, *et. seq.*).

economic impact on a substantial number of small entities,”⁵ EPA is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the proposed rule on small entities,⁶ and to consider less burdensome alternatives. Moreover, federal agencies must give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy and must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule.⁷

Background

The Resource Conservation and Recovery Act establishes requirements for the regulation of hazardous wastes by the Federal government and the regulation of solid waste by the States. Under Subtitle C, EPA determines what wastes are hazardous and imposes a cradle-to-grave regulatory regime that covers every step of the handling of hazardous waste, from generation to transportation to storage and disposal. For non-hazardous wastes, Subtitle D requires EPA to establish guidelines for state solid waste management plans and minimum regulatory standards for landfills.

Section 3001(b)(3)(A)(i) of RCRA (known as the Bevill exclusion or exemption) excludes certain large-volume wastes generated primarily from the combustion of coal or other fossil fuels from being regulated as hazardous waste under Subtitle C, pending completion of a Report to Congress required by Section 8002(n) of RCRA and a determination by the EPA Administrator either to promulgate regulations under RCRA Subtitle C or to determine that such regulations are unwarranted.

In 2000, EPA published the last of a series of regulatory determinations on wastes covered by the Bevill exclusion.⁸ In its determination, EPA concluded that these wastes could pose significant risks if not properly managed, although the risk information presented at that time was limited. EPA identified and discussed a number of documented examples in which CCRs caused damage, as well as examples indicating at least a potential for damage to human health and the environment, but did not rely on its quantitative analysis of risks to human health, as EPA concluded that it was not sufficiently reliable at the time. However, EPA concluded that significant improvements were being made in waste management practices due to increasing state oversight, although gaps remained in the current regulatory regime. On this basis, the Agency decided to retain the Bevill exemption, and stated it would issue a regulation under Subtitle D of RCRA, establishing minimum national standards. However, those Subtitle D standards were not issued.

⁵ See 5 U.S.C. § 609(a), (b).

⁶ Under the RFA, small entities are defined as (1) a “small business” under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a “small organization” that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a “small governmental jurisdiction” that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

⁷ 5 U.S.C. § 604, *as amended by the Small Business Jobs Act of 2010*, Pub. Law No. 111-240, Sec. 1601.

⁸ 65 Fed. Reg. 32214, available at <http://www.epa.gov/fedrgstr/EPA-WASTE/2000/May/Day-22/f11138.htm>.

With this notice of proposed rulemaking, EPA is revisiting its regulatory determination for CCRs under the Beville amendment. This decision is driven in part by the catastrophic failure of a surface impoundment retaining wall in Kingston, Tennessee, in December 2009. EPA has presented two equal co-proposals and has not identified either as preferred. The first co-proposal would reverse the 2000 regulatory determination and regulate CCRs under Subtitle C as “special wastes.” This would require any entity who creates or handles CCR to obtain a permit and be subject to direct EPA regulation. EPA’s proposal would also cover sites containing CCR that are closed or inactive when these rules become effective. This co-proposal would exclude CCRs put to “beneficial uses” from regulation under Subtitle C, such as the incorporation of CCRs into concrete or asphalt.

The second co-proposal would establish the national minimum standards under Subtitle D required by the 2000 regulatory determination and rely on state regulatory programs. EPA presents two options under this co-proposal, one (“D”) which would impose new requirements on existing surface impoundments and one (“D prime”) which would allow existing surface impoundments to continue operating without new requirements for their useful life.

Office of Advocacy Comments and Recommendations

Advocacy has significant concerns that EPA has not fully considered the effects of this rulemaking on small entities and has not presented a sufficient factual basis to support its certification under the Regulatory Flexibility Act. Although Advocacy strongly recommends EPA not move forward with regulation of CCRs under Subtitle C and would prefer EPA select option D prime if it does move forward, regulation under Subtitle D would not resolve all of Advocacy’s concerns about this rulemaking. Advocacy recommends delaying further action on this rulemaking until EPA can complete a full review of this rulemaking for small business impacts and ensure its compliance with the RFA.

Advocacy has significant doubts about the strong, and sometime contradictory, assumptions EPA makes regarding the response of the regulated industry to RCRA regulation. These assumptions include:

- Declaration of CCR as a “special waste” under Subtitle C will not stigmatize the beneficial uses of CCR.
- Management patterns of CCR disposal will remain unchanged.
- Demand for electricity is sufficiently inelastic across all relevant price ranges that all increases in capital and operating costs can be passed along to consumers.
- Small Entities other than generators of CCR will not be affected.

Advocacy believes these assumptions lead EPA to understate the true costs of these proposals and undermine its RFA certification.

1. *Declaration of CCR as a “special waste” under Subtitle C will undermine beneficial uses of CCR.*

Although EPA acknowledges the possible stigma of declaring CCRs a “special waste” under Subtitle C, it nonetheless models significant *increases* in the beneficial uses of CCRs as a result of increasing the costs of disposal.

Affected small entities believe, and Advocacy agrees, that beneficial reuse of CCRs are more likely to be *reduced* significantly, rather than expanded, by a listing of CCRs as hazardous waste. There are a number of important questions regarding the “special waste” that EPA did not address in the notice of proposed rulemaking that would lead to such a reduction.

- Will consumers want a product that EPA has labeled hazardous in one use but not in another? For example, EPA’s partial withdrawal of registration as a pesticide of the wood preservative Chromated Copper Arsenate (CCA)⁹ led to overwhelming consumer rejection of the product for all applications, even though there were still approved uses CCA in several applications.¹⁰
- Would businesses want to handle a product EPA has labeled as hazardous in a landfill and accept the potential liability for handling a hazardous product? Were CCRs labeled “hazardous,” workers and consumers would likely to resist assurances that CCRs are rendered safe by virtue of their beneficial reuse.
- What is the regulatory status of CCRs prior to assignment for reuse (e.g., interim handling and storage)? If the generator, transporter, and ultimate re-user must handle CCRs as a hazardous waste until the point at which it is reused, these costs may increase to the point that the incentives to reuse will be significantly reduced.
- Would products containing CCRs be subject to Subtitle C when they are disposed? The preamble implies that this would be a case-by-case determination, which creates a potential unknown future liability for handling and disposal. In this environment, Advocacy doubts that states and localities would be as willing as the Federal government to allow beneficial reuse in public works.

Without public acceptance of the safety of CCRs outside the waste stream, beneficial reuses will be subject to a stigma that will hinder its use in the market place. It is unlikely that the public will be reassured by the creation of a “special waste” label just for CCRs when EPA would be regulating CCRs under Subtitle C of RCRA, “Hazardous Waste Management.” It is unreasonable for EPA to expect that beneficial uses of CCRs would increase in that environment.

2. *Existing patterns of CCR disposal will be significantly disrupted by this rule.*

EPA’s certification is premised on the assumption that small entities that generate CCRs will continue to be able to arrange for CCRs to be beneficially reused or sent for disposal

⁹ See <http://www.epa.gov/oppad001/reregistration/cca/>.

¹⁰ See, e.g., http://www.bancca.org/CCA_Timeline/CCA_Eventschart.html.

at an offsite facility. We disagree with EPA's assumption that offsite disposal of either Subtitle C or Subtitle D CCRs would be only marginally more expensive than current disposal.

This assumption is inconsistent with the requirements of Subtitle C and Subtitle D. Under Subtitle C, EPA projects all existing surface impoundments will be closed within four years because few waste managers would choose to or be able to comply with the new requirements. Under Subtitle D, most surface impoundments would likely close as well (although not under option D prime). For those small entities that rely on surface impoundments, these regulatory requirements would significantly increase their costs of disposal.

EPA also assumes that transportation costs will increase only for CCRs currently trucked to non-hazardous waste landfills and that distance traveled will only increase by an average¹¹ of six miles for this subset of small entities. This presumes that all entities currently disposing onsite or via beneficial uses will be able to continue that practice unchanged. It also presumes the ready availability of hazardous waste transporters and facilities or that existing solid waste landfills will be willing or able to make the significant capital upgrades necessary to accept hazardous waste.

Advocacy is concerned that these assumptions are not reasonable. First, under either co-proposal, onsite disposal will increase in cost and complexity, making it more likely that small entities would need to dispose of additional CCRs offsite. This would increase the number of trucks and truckloads necessary to transport CCRs and raise transportation costs. Second, as stated in the public hearings, some states completely lack Subtitle C landfill facilities, so the distance to transport CCRs would increase significantly. Third, EPA implicitly presumes that all transportation currently used for non-hazardous wastes will be ready and able to become subject to Subtitle C regulation as a transporter of hazardous wastes. Should existing transporters choose not to become subject to Subtitle C, availability of transport will decrease, and transport costs would likely increase. For these reasons, affected small entities believe that offsite disposal costs would be significantly greater than acknowledged by EPA.

3. Electric Utilities may not be able to raise electric rates immediately and to fully cover the costs of compliance.

Affected small entities are also very concerned that EPA asserts they have the ability to pass-through significant capital and operating costs onto consumers as a basis for the certification under the RFA. Small entities believe that, as a practical matter, they cannot immediately pass increased costs through to their communities or customers.

Relatively inelastic demand for electricity only exists over a certain range of price changes. With current high energy input costs, and a significant number of new

¹¹ Advocacy cautions EPA from basing certification on average impacts, since the basis for certification is "a substantial number of small entities." Certification may not be justified if a substantial minority of small entities experience significantly greater than average costs.

regulatory costs in the industry,¹² it is debatable whether a baseline price elasticity is appropriate for determining the market effects of new regulatory costs or whether state and local utility commissions will be as willing to impose a string of rate hikes on consumers. In economic terms, for a downward sloping demand curve, demand becomes significantly more elastic as price increases. In practical terms, increased prices limit the ability of the electricity generator to recover costs. With the type of energy price changes seen in recent years, it is doubtful whether demand continues to be as inelastic as EPA assumes. Thus, the assertion of a simple cost pass-through for small municipal utilities and small electric cooperatives may not be warranted.

EPA's assumption about full cost recovery also ignores the important reality of financing capital investment in the utility markets. Even where rates can be raised to cover regulatory compliance costs, such rate increases lag well behind the required investment. Small entities must often obtain financing and complete the capital upgrade before they can approach regulatory authorities to raise rates. If capital markets are particularly tight, lending costs may exceed the small entity's ability to carry the investment cost for the entire payback period.

4. EPA does not address all Small Entities directly affected by this rule

EPA's certification and supporting materials in the Appendix to the Regulatory Impact Analysis only discuss the economic impact the rule would have on utilities that generate CCRs. It does not discuss potential impacts the rule would have on the full range of small entities that would be subject to Subtitle C or Subtitle D regulations. If CCRs are regulated under Subtitle C, what economic impact would this have on small entity landfill operators? Even if the impact were only to force these landfills to stop accepting coal ash in the future, this is an economic impact (e.g., lost tipping fees). Do any small entities operate surface impoundments that would likely be closed under either co-proposal? How will small entities that transport CCRs be affected if CCRs must be treated as a hazardous waste?

In the absence of this information, Advocacy is concerned that EPA has not presented a sufficient factual basis for its certification with respect to all small entities directly affected by this rulemaking.

Conclusion

Advocacy appreciates the opportunity to comment on this EPA rulemaking. Of the options presented by EPA, Advocacy prefers regulation under Subtitle D, option D

¹² For example, the upcoming greenhouse gas regulations, the continuing tightening of the National Ambient Air Quality Standards, ongoing rulemakings to establish National Emissions Standards for Hazardous Air Pollutants for Industrial Boilers and Electricity Generating Units. See EPA's Rulemaking Gateway list of priority rulemakings at <http://yosemite.epa.gov/opei/RuleGate.nsf/content/allrules.html?opendocument>. See also Chart attached to Letter from Reps. Joe Barton and Michael Burgess to Environmental Protection Agency Administrator Lisa Jackson, October 14, 2010, available at http://republicans.energycommerce.house.gov/Media/file/News/101410_CAA_Regs_Chart.pdf.

prime. However, even under that option, Advocacy is concerned that EPA has not fully considered the effects of this rulemaking on small entities and has not presented a sufficient factual basis to support its certification under the Regulatory Flexibility Act. Advocacy recommends delaying further action on this rulemaking until EPA can complete a full review of this rulemaking for small business impacts and ensure its compliance with the RFA.

Please do not hesitate to call me or Assistant Chief Counsel David Rostker (david.rostker@sba.gov or (202) 205-6966) if we can be of further assistance.

Sincerely,

/s/

Winslow Sargeant, Ph.D
Chief Counsel for Advocacy

/s/

David Rostker
Assistant Chief Counsel

cc: Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget