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Legislative Bulletin…….October 14, 2011

Contents:

H.R. 2273—Coal Residuals Reuse and Management Act
(Rep. McKinley, R-WV)

Order of Business: The bill is scheduled to be considered on Friday, October 14, 2011, under a structured rule (H.Res.431) that allows for one hour of general debate, the consideration of 6 amendments made in order under the rule, and allows for one motion to recommit.

Summary: H.R.2273 seeks to prevent the Environmental Protection Agency from effectively designating coal ash residuals as a hazardous waste by creating coal combustion residual (CCR) permit programs at the state-level in order be the primary regulator of the substance.

Specifically, within six months of the bill's enactment, the bill amends the Waste Disposal Act to allow the Governor of each state to provide written notification to the Administrator of the EPA to adopt and implement a coal combustion residuals permit program. If a state chooses to implement a CCR permit program, within thirty-six months of enactment, the head of the lead state agency responsible for implementing the program is required to submit a certification to the Administrator. The certification application must include the following:

- a letter identifying the lead state agency responsible for implementing the coal combustion residuals permit program, signed by the head of such agency;
- identification of any other state agencies involved with the implementation of the coal combustion residuals permit program;
- a narrative description that provides an explanation of how the state will ensure that the coal combustion residuals permit program meets the requirements of this section; and
- a legal certification and provide the EPA copies that the state has, at the time of certification, fully effective statutes, regulations, or guidance necessary to implement a coal combustion residuals permit program that meets the specifications described below.

In order qualify for a CCR state program; it must meet the following minimum requirements:

- Each structure is required, in accordance with generally accepted engineering standards for the structural integrity of such structures, to be designed, constructed, and maintained to provide for containment of the maximum volumes of coal combustion residuals appropriate for the structure. If a structure is determined by the head of the agency responsible for implementing the coal combustion residuals permit program to be

deficient, the agency has authority to require action to correct the deficiency. If the identified deficiency is not corrected, the head of such agency has authority to close the structure.

- The coal combustion residuals permit program is required to apply revised criteria promulgated under the Waste Disposal Act for the location, design, groundwater monitoring, corrective action, financial assurance, closure and post-closure under "revised criteria" defined below.
- Provides authority of each permit program to determine whether structures classified as posing a "high hazard potential" are deficient based upon structural integrity assessments and if so, to require corrective action for such deficiency. If corrective action is not taken or possible, this provision authorizes the permitting authority to require closure of a facility.
- New structures that first receive coal combustion residuals after the date of enactment of this section shall be constructed with a base located a minimum of two feet above the upper limit of the natural water table.
- In the case of a coal combustion residuals permit program implemented by a State, the State has the authority to inspect structures and implement and enforce such permit program.

The bill would provide for a "revised criteria" for permit programs for the design, groundwater monitoring, corrective action, closure, and post-closure, for new structures and lateral expansions of structures that begin receiving coal combustion residuals. The criteria would also apply location restrictions for appropriate to the type of structure that receives coal combustion residuals to comply with regulations established in the Federal Register.

The bill allows a state to decline the revised criteria requirements as part of its coal combustion residuals permit program must include in the certification process the reasons why the requirement is not needed. If the EPA disagrees with the state's assessment, the Administrator may treat the determination as a deficiency. H.R. 2273 requires the Administrator to provide written notice and an opportunity for a state to remedy the deficiency if a state fails to:

- "notify the Administrator regarding whether it intends to adopt and implement a permit program within six months of the date of enactment;
- "submit a certification that its permit program meets the minimum specifications within 36 months of the date of enactment;
- "maintain either an approved Municipal Solid Waste permit program under section 4005(c) of the Solid Waste Disposal Act or a hazardous waste permit program under section 3006 of the Solid Waste Disposal Act; or
- implement a permit program."

H.R. 2273 permits the EPA to implement a coal combustion residuals permit program for a state only if the Governor notifies the Administrator it will not adopt a program, fails to remedy deficiencies previous outlined in the bill, or submits in writing it will no longer implement a permit program. If the Administrator implements a coal combustion residuals permit program for a state, it must meet the same minimum requirements previously outlined in the bill and provides the EPA with the inspection and enforcement authorities as defined under the Solid Waste Disposal Act.

H.R. 2273 allows a state to regain control of a coal combustion residuals permit program established by the EPA by notifying the EPA of its intent to adopt and implement a permit

program and by submitting a certification within six months to the Administrator. The state must then receive a determination from the Administrator that the state coal combustion residuals permit program meets the specifications described under the bill and a timeline for transition of control of the coal combustion residuals permit program. The Administrator must provide a determination within ninety days after a state initiates the process of implementing a permit program and is required to make a determination if the proper criteria have been met for a state to take over control of its permit program. H.R. 2273 also requires a schedule and closure plan that takes into account the nature and the site-specific characteristics of the structure to be closed.

H.R. 2273 states that nothing under the bill will deny any state the authority to adopt or enforce any regulation or requirement respecting coal combustion residuals that is more stringent or broader in scope than a regulation or requirement under this new section of the Solid Waste Disposal Act. The bill also requires the Administrator to defer all coal ash regulation to the states, unless the Administrator is regulating a coal combustion residuals program or as part of the Administrator's authorities regarding Federally-funded projects involving procurement of cement or concrete under section 6005 of the Solid Waste Disposal Act. The bill also clarifies that the coal combustion residuals permit program implemented by the Administrator does not apply to the utilization, placement, and storage of coal combustion residuals at surface mining and reclamation operations.

Finally, the bill defines coal combustion residuals as:

- fly ash waste, bottom ash waste, slag waste, and flue gas emissions control waste generated primarily from the combustion of coal or other fossil fuels. “Coal combustion residuals” also includes other non-hazardous wastes
- coal combustion wastes that are co-managed with wastes produced in conjunction with the combustion of coal, provided that such wastes are not segregated and disposed of separately from the coal combustion wastes and comprise a relatively small proportion of the total wastes being disposed in the structure;
- fluidized bed combustion wastes;
- wastes from the co-burning of coal with non-hazardous secondary materials provided that coal makes up at least 50 percent of the total fuel burned; and
- wastes from the co-burning of coal with materials described above that are recovered from monofills.

Additional Background: Some conservatives have expressed concerns about the cumulative effect on the utility sector of the over dozen EPA rules that have been enacted or proposed during the Obama administration. Many conservatives argue these rules will force utilities to shut down coal fired power plants, threaten the reliability of the electricity grid, raise the cost of energy on American consumers, and cost American jobs. President Obama has even admitted in a letter to Speaker Boehner the EPA proposal to regulate coal ash as a hazardous material is one of the seven most costly regulations his administration has proposed.

Coal combustion residuals (CCRs), commonly referred to as coal ash, are solid waste produced in dry ash and wet slurry form when coal is burned to produce electricity. Under the current regulatory framework, approximately 55% of CCRs are disposed of safely in landfills or impoundment pools and the other 43% is recycled for savings of approximately $9 billion. That framework was established by Congress through the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), which gave the EPA the authority to regulate solid waste. RCRA provides states and localities with the power to regulate most non-

hazardous solid waste under Subtitle D, but reserves the authority to regulate hazardous waste to the EPA under Subtitle C. When Congress gave the EPA the authority to regulate hazardous waste, it specified that the EPA could not regulate CCRs as hazardous waste without separately determining that such regulation was warranted. Congress also specified that the EPA must provide a report to Congress on CCRs and hold a comment period on its findings within six-months of filing the report before making such a determination and promulgating regulations. The EPA twice determined, in 1993 and in 2000 during the Clinton Administration that regulation of CCRs was unwarranted and filed no report with Congress.

However, since the accidental release of 1.1 billion gallons of wet slurry CCRs in Kingston, TN in 2009, the EPA has been reconsidering those past determinations. Without meeting its statutory responsibility to file a report with Congress on its findings and hold a comment period, the EPA released a proposed rule on June 21, 2010 which outlined the two options the EPA is considering for a new regulatory framework: one based on authority from Subtitle D which leaves some discretion to states and localities and the other which would reclassify CCRs as hazardous waste and regulate them under Subtitle C. Either option would subject disposal sites for CCRs to new requirements on their location, design, and operation and increase costs for the industry and consumers.

The EPA is reconsidering that determination in spite of a finding by the Tennessee Department of Health and the U.S. Department of Health and Human Services that there were no significant health impacts from the major release of CCRs in 2009 and a separate comprehensive investigation that found no existing CCR disposal sites pose an immediate safety threat. While EPA has calculated that regulation under Subtitle C would cost $1.5 billion annually, the Utility Solid Waste Activities Group has determined that such regulations would lead to loss of 183,900 and 316,000 jobs annually and cost $79 to $110 billion over 20 years. Those dramatically increased costs would be absorbed by the millions of consumers that rely on coal powered plants to power their homes and result in the closure of up to 12 coal-fired electrical plants. All this despite the fact that CCRs have been the subject of several past EPA rulings and that the EPA stated in 2000 that "The agency has concluded that these wastes do not warrant regulation . . ."

Committee Action: The bill was introduced on June 22, 2011, and referred to the Committee on Energy and Commerce. On July 13, 2011, the full Committee held a mark-up and ordered the bill to be reported favorably by a vote of 35-12.

Administration Position: A statement of Administration policy is unavailable at press time.

Cost to Taxpayers: According to CBO, "enacting this legislation would cost $2 million over the 2012-2016 period, subject to the availability of appropriated funds. Enacting H.R. 2273 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply." CBO also goes onto estimate "that EPA's workload for this activity over the 2012-2015 period would not be significant. Based on information from EPA, CBO estimates that over the 2012-2015 period, EPA would incur costs of about $200,000 to $300,000 annually to support the initial certification process."

Groups in Support: U.S. Chamber of Commerce, National Mining Association, National Association of Manufacturers, American Public Power Association, American Road & Transportation Builders Association, Citizens for Recycling First

Does the Bill Expand the Size and Scope of the Federal Government? No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? Yes, according to CBO, H.R. 2273 would impose an intergovernmental mandate, as defined in the Unfunded Mandates Reform Act (UMRA), by requiring states to notify EPA whether they will adopt and implement a CCR permit program. CBO estimates that the cost of that mandate would fall well below the annual threshold established in UMRA ($71 million in 2011, adjusted annually for inflation).

Does the Bill Contain Any Federal Encroachment into State or Local Authority in Potential Violation of the 10th Amendment? No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: Committee Report 112-226 states H.R. 2273 is in compliance with clause 9(e), 9(f), and 9(g) of rule XXI, and contains no earmarks, limited tax benefits, or limited tariff benefits.

Constitutional Authority: The Congressional Record sites the Commerce Clause, Article I, Section 8, Clause 3 (commerce) of the Constitution to enact H.R 2273.

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