



U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Evaluation Report

EPA Promoted the Use of Coal Ash Products With Incomplete Risk Information

Report No. 11-P-0173

March 23, 2011



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Abbreviations

C ² P ²	Coal Combustion Products Partnership
CCR	Coal combustion residual
EPA	U.S. Environmental Protection Agency
FBC	Fluidized bed combustion
GAO	U.S. Government Accountability Office
IWEM	Industrial Waste Evaluation Model
OIG	Office of Inspector General
ORCR	Office of Resource Conservation and Recovery
OSWER	Office of Solid Waste and Emergency Response
RCC	Resource Conservation Challenge
TCLP	Toxicity characteristic leaching procedure

Cover photo: Spreading and compacting fly ash structural fill. (EPA photo)



At a Glance

Catalyst for Improving the Environment

Why We Did This Review

We initiated this review to determine whether the U.S. Environmental Protection Agency (EPA) followed accepted and standard practices in determining that coal combustion residuals (CCRs) are safe for the beneficial uses it had promoted on its Coal Combustion Products Partnership (C²P²) program website.

Background

CCRs are generated from burning coal. More than 136 million tons of CCRs were generated in 2008. EPA defines beneficial use of CCRs as one that provides a functional benefit, replaces the use of an alternative material, conserves natural resources, and meets relevant product specifications and regulatory standards. Beneficial uses of CCRs include concrete manufacture or soil enhancement, among others.

For further information, contact our Office of Congressional, Public Affairs and Management at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2011/20110323-11-P-0173.pdf

EPA Promoted the Use of Coal Ash Products With Incomplete Risk Information

What We Found

EPA did not follow accepted and standard practices in determining the safety of the 15 categories of CCR beneficial uses it promoted through the C²P² program. EPA's application of risk assessment, risk screening, and leachate testing and modeling was significantly limited in scope and applicability. Without proper protections, CCR contaminants can leach into ground water and migrate to drinking water sources, posing significant public health concerns.

EPA officials told us they relied on individual state beneficial use programs to review and approve specific CCR beneficial uses, and to manage associated risks. EPA established, but did not implement, plans in 2005 to identify environmentally safe and beneficial use practices. Had EPA implemented its plans, it may have known earlier about risks from large-scale disposal of CCRs described as beneficial use.

EPA documented these risks in damage cases presented in its June 2010 proposed rule to regulate certain CCRs. EPA stated in the proposed rule that certain uses of CCRs, in sand and gravel pits as well as large-scale fill operations, represent disposal rather than beneficial use. After release of its proposed rule, EPA stopped promoting beneficial uses of CCRs through the C²P² program. Further, in response to a recommendation from the OIG, EPA removed access to the C²P² website.

In the proposed rule, EPA sought public comment on approaches for regulating CCRs, to include information and data on beneficial uses, particularly unencapsulated uses that may present a risk to human health and the environment. Such information will help EPA make informed decisions about safe beneficial use of CCRs. EPA should also have a sound process for evaluating and analyzing risk information that forms the basis of Agency promotions on safe beneficial use of CCRs.

What We Recommend

We recommend that EPA define and implement risk evaluation practices for beneficial uses of CCRs, and that it determine if further action is warranted to address historical CCR structural fill applications. EPA agreed with these recommendations, which were revised in response to EPA suggestions. In its final response to this report, EPA should describe its specific corrective actions to address the recommendations and provide estimated completion dates for these actions.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

March 23, 2011

MEMORANDUM

SUBJECT: EPA Promoted the Use of Coal Ash Products
With Incomplete Risk Information
Report No. 11-P-0173

FROM: Arthur A. Elkins, Jr.
Inspector General

A handwritten signature in black ink, appearing to read "Arthur A. Elkins, Jr.", is written over the typed name.

TO: Mathy Stanislaus
Assistant Administrator for Solid Waste and Emergency Response

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established resolution procedures.

The estimated direct labor and travel costs for this report are \$759,649.

Action Required

In accordance with EPA Manual 2750, you are required to provide a written response to this report within 90 calendar days. Your response should include a corrective action plan for agreed-upon actions, including actual or estimated milestone completion dates. Your response will be posted on the OIG's public website, along with our comments on your response. Your response should be provided in an Adobe PDF file that complies with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended. Please e-mail your response to Carolyn Copper at copper.carolyn@epa.gov. If your response contains data that you do not want to be released to the public, you should identify the data for redaction. We have no objections to the further release of this report to the public.

If you or your staff have any questions regarding this report, please contact Wade Najjum at (202) 566-0832 or najjum.wade@epa.gov, or Carolyn Copper at (202) 566-0829 or copper.carolyn@epa.gov.

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Chapter 1

Introduction

Purpose

The purpose of this review was to evaluate whether the U.S. Environmental Protection Agency (EPA) followed accepted and standard practices in determining that coal combustion residuals (CCRs) are safe for the beneficial uses it had promoted.¹

Background

CCRs are the residuals produced from burning coal for the generation of electricity. CCRs represent one of the largest waste streams in the United States. EPA records as of 2008 show that approximately 136 million tons are produced each year. In 2001, the EPA Office of Resource Conservation and Recovery (ORCR²) started the Coal Combustion Products Partnership (C²P²), a cooperative effort among EPA and more than 170 public and private partners to promote the beneficial use of CCRs. The goal of the program was, “By 2011, [to] increase the use of coal combustion ash to 50 percent from 32 percent in 2001.”

According to EPA, CCRs contain a range of metals such as arsenic, selenium, cadmium, lead, and mercury, in low concentrations. Without proper protections, these contaminants can leach into ground water and migrate to drinking water sources, posing significant public health concerns. Other concerns associated with CCRs include the exposure of vegetation to airborne dust and contamination, and resulting impacts on the food chain. Beneficial use of CCRs includes both encapsulated and unencapsulated uses. Encapsulated uses are bound in products such as concrete or bricks. Examples of unencapsulated uses are land applications in agriculture and road embankments.

The Bevill amendment of the Solid Waste Disposal Act Amendments of 1980 included CCRs as a “special waste” considered temporarily exempt from regulation as hazardous waste under Resource Conservation and Recovery Act

¹ In the 2010 proposed rule, EPA listed the following criteria to appropriately define legitimate beneficial use: (1) the material used must provide a functional benefit; (2) the material substitutes for a virgin material, conserving natural resources that would otherwise need to be obtained through practices such as extraction; (3) where relevant product specifications or regulatory standards are available, the materials meet those specifications, and where such specifications or standards have not been established, they are not being used in excess quantities; and (4) in the case of agricultural uses, CCRs would be expected to meet appropriate standards, constituent levels, prescribed total loads, application rates, etc.

² ORCR was formerly known as the Office of Solid Waste.

(RCRA) subtitle C, until further study was completed. A 2000 EPA regulatory determination stated that:

- Fossil fuel combustion wastes [CCRs] do not warrant regulation as hazardous waste and the exemption for these wastes is retained.
- Regulation under RCRA subtitle D for nonhazardous wastes is needed for CCRs disposed in surface impoundments and landfills.
- Beneficial uses of CCRs, other than minefills, pose no significant risk and no additional national regulations are needed.

On December 22, 2008, an estimated 5.4 million cubic yards of coal ash sludge were accidentally released from a disposal containment dike at a Kingston, Tennessee, power plant. The ash extended over approximately 300 acres of land. An estimated 3 million cubic yards of the coal ash entered the Emory River in Tennessee and adjacent tributaries. In the aftermath of this catastrophe, EPA initiated a review to determine the need to regulate coal ash waste disposal. On May 4, 2010, EPA for the first time released a prepublication version of a proposed rule to regulate CCR disposal. The proposed rule was published in the Federal Register on June 21, 2010.

During the course of this review, we determined that risk information on EPA's C²P² website was incomplete, and that information on the website appeared to inappropriately endorse commercial products. After we informed EPA of these findings in an early warning report,³ EPA removed the website. In addition, following release of its May 2010 proposal to regulate CCRs, EPA stopped promoting beneficial uses of CCRs through the C²P² program.

Noteworthy Achievements

- Following the December 2008 catastrophe in Kingston, Tennessee, EPA took steps to identify and assess the structural integrity of impoundments, dams, or other management units within the electric power generating industry that hold wet-handled CCRs. This effort led to reports on the structural stability of these units, and recommendations for actions. EPA is monitoring the implementation of these actions. EPA has made all of the information on these assessments available to the public on its website. EPA is continuing its assessment activities on units holding "wet" CCRs.
- In June 2010, EPA proposed a rule to regulate coal ash under RCRA for the first time, to address the risks from the disposal of the wastes generated by electric utilities and independent power producers.

³ EPA OIG, *Website for Coal Combustion Products Partnership Conflicts with Agency Policies*, Report No. 11-P-0002, October 13, 2010.

- EPA has held eight public meetings across the nation to provide the public an opportunity to hear the contents of the proposed rule and offer comments. These public meetings are in addition to existing opportunities to provide written comments on the proposed rule.
- EPA has held three webinars on the proposed rule. The webinars include an explanation of the proposal by EPA staff, guidance on how to give official public comment, and an opportunity to address questions from participants.
- EPA stopped its participation in the C²P² program and removed access to incomplete C²P² website content while it is taking and assessing comment on the beneficial use of CCRs through the CCR proposed rulemaking. EPA continues to support safe and protective beneficial reuse of CCRs.
- EPA and the U.S. Department of Agriculture are conducting a multiyear study on the use of flue gas desulfurization gypsum in agriculture. The results of that study should be available in late 2012.

Scope and Methodology

We conducted our work from March to December 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the evaluation to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We assessed whether EPA followed accepted and standard practices in determining that CCRs are safe for the beneficial uses it has promoted. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based upon our objectives.

We interviewed staff from ORCR and the EPA Office of Research and Development. We reviewed ORCR documents to identify existing accepted and standard practices that could be used to determine the safety of beneficial uses of CCRs. We also reviewed:

- Existing guidance, policies, and procedures governing EPA's industry partnership programs and promotion of beneficial use materials
- Regulatory documents related to the management and use of CCRs
- Prior EPA risk assessments of CCRs, as well as other materials developed by EPA to assist with beneficial use decisions
- C²P² website materials, including the types of beneficial uses of CCRs promoted and the information provided about safety concerns
- Beneficial use data from the American Coal Ash Association, which EPA uses to track progress toward its goal of recycling 50 percent of CCRs by 2011
- Information from EPA evaluations of other industrial materials, such as foundry sand and cement kiln dust

Prior Evaluation Coverage

The following recent EPA Office of Inspector General (OIG) and U.S. Government Accountability Office (GAO) reports addressed issues related to the scope of our review:

- EPA OIG, *Website for Coal Combustion Products Partnership Conflicts with Agency Policies*, Report No. 11-P-0002, October 13, 2010
- EPA OIG, *Response to EPA Administrator's Request for Investigation into Allegations of a Cover-up in the Risk Assessment for the Coal Ash Rulemaking*, Report No. 10-N-0019, November 2, 2009
- GAO, *Coal Combustion Residue: Status of EPA's Efforts to Regulate Disposal*, GAO-10-85R, October 30, 2009
- EPA OIG, *Voluntary Greenhouse Gas Reduction Programs Report*, Report No. 08-P-0206, July 23, 2008
- EPA OIG, *Voluntary Programs Could Benefit from Internal Policy Controls and a Systematic Management Approach*, Report No. 2007-P-00041, September 25, 2007

Chapter 2

EPA Did Not Follow Accepted and Standard Practices in Determining the Safe Beneficial Uses of Coal Ash

EPA did not follow accepted and standard practices in determining that the 15 categories of CCR beneficial uses it promoted through the C²P² program were safe for those uses. According to EPA, CCRs contain a range of metals, such as arsenic, selenium, cadmium, lead, and mercury, in low concentrations. Without proper protections, these contaminants can leach into ground water and migrate to drinking water sources, posing significant public health concerns. EPA's application of risk assessment, risk screening, and leachate testing and modeling was significantly limited in scope and applicability. EPA has not defined procedures for applying such practices to CCR beneficial use analyses and believed it could rely on state programs to manage risks associated with CCR beneficial use. As a result, EPA promoted beneficial uses of CCRs based on incomplete information, without knowing the risks associated with each type of beneficial use.

EPA Had Incomplete Risk Information on Coal Ash

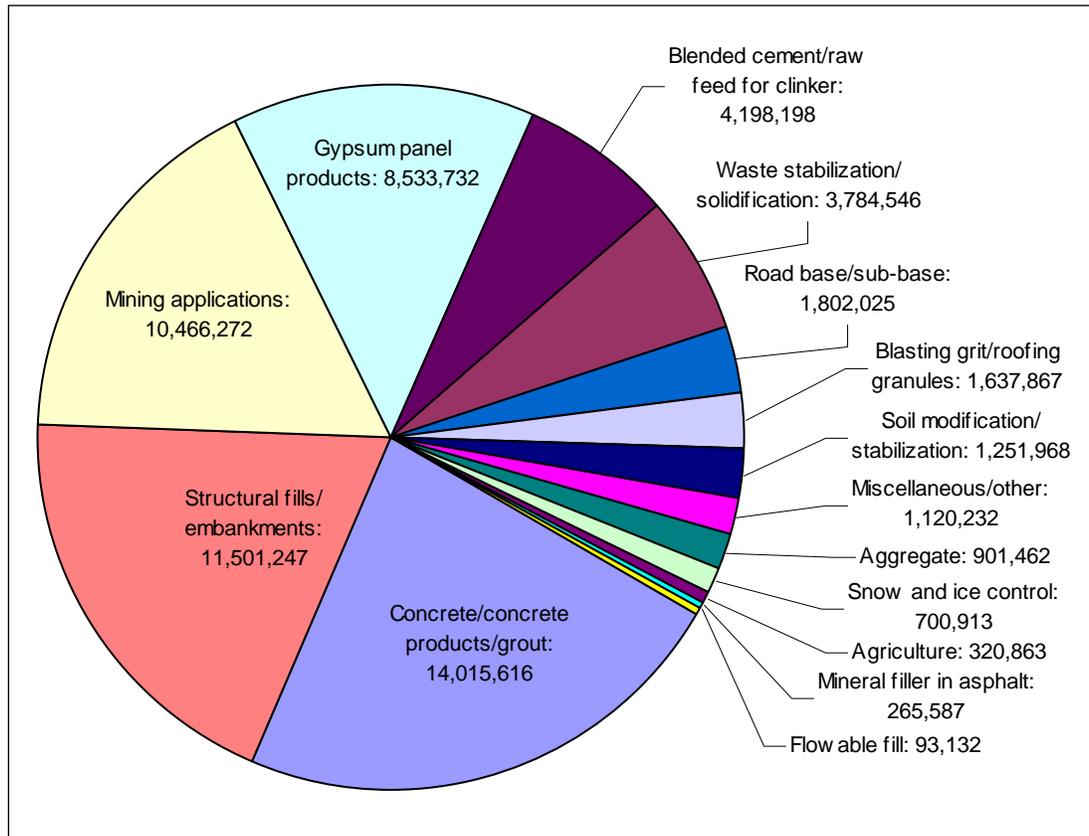
EPA did not take sufficient action to ensure that its promotion of CCR beneficial use would not result in unacceptable risk to human health or the environment. EPA initiated a risk assessment for the residuals of one specific coal combustion process,⁴ but the risk assessment was never finalized and remains a draft document. EPA did not finalize the risk assessment or take other actions to determine the risks of CCR beneficial uses. EPA could have completed additional risk assessments, evaluated whether reliance on state actions sufficiently addressed risks associated with beneficial uses of CCRs, gathered additional leachate data, and developed additional modeling procedures to determine the risks of CCR beneficial uses.

Risk Assessment

EPA only initiated a risk assessment for one beneficial use of CCRs from one specific combustion process, and the results were never finalized or peer reviewed. The draft assessment is not representative of the 15 categories of CCR beneficial uses promoted by EPA through the C²P² program (figure 1).

⁴ The risk assessment addressed CCRs (fly and bottom ashes) from the fluidized bed combustion process. Fly and bottom ashes from other combustion processes, as well as boiler slag and flue gas desulfurization gypsum, were not studied in this risk assessment.

Figure 1: Beneficial uses of coal ash in 2008



Source: OIG analysis of EPA C²P² data.

Note: Numbers indicate total tons for each type of beneficial use.

In 1998, EPA issued a draft final risk assessment for fluidized bed combustion (FBC) waste in a specific agricultural (land) application.⁵ EPA stated in the proposed rule that agriculture was selected as the beneficial use for study because “use of CCRs in this manner is likely to raise concerns from an environmental point of view.” The draft risk assessment concluded that there were no unacceptable human health risks associated with use of FBC waste as an agricultural soil amendment, and that ecological risks were unlikely. However, this draft risk assessment is limited by the following:

- The draft risk assessment was not finalized and remains identified as a draft final not to be cited or quoted. The document states it did not undergo a thorough external or internal review and does not represent Agency policy.

⁵ This assessment looked at land application of FBC waste as a liming agent for soils. We use the term “assessment” instead of “analysis” in this report, consistent with EPA’s terminology in the proposed rule.

- The draft risk assessment was not peer reviewed. EPA policy states, “Peer review of all scientific and technical information that is intended to inform or support Agency decisions is encouraged and expected.”
- The draft risk assessment for FBC waste (fly and bottom ashes) does not represent all CCRs. In 2008, FBC waste represented only about 7 percent of all CCRs, and was mostly used in minefilling. Although EPA has promoted the beneficial use of other fly and bottom ashes and flue gas desulfurization gypsum for agricultural purposes, these CCRs were not included in the risk assessment.

Risk Screening

EPA initiated, but never finished, two risk screening practices to evaluate risks of CCR beneficial uses—the draft risk compendium and the never-completed risk information assessment. EPA could have finalized and used either as an accepted practice for evaluating risks of CCR beneficial uses, but did not.

Risk Compendium—The purpose of EPA’s draft risk compendium, *Evaluating Risk of Industrial Materials Recycling: A Compendium of Information and Tools*, is to provide information to states, users of industrial materials, and the general public on how to evaluate such materials to ensure that the materials are recycled and reused in an environmentally sound manner. The compendium is designed to provide a flexible approach, highlighting current best practices for evaluating potential risks associated with industrial materials recycling, including CCRs.

The draft compendium describes a three-tiered approach to be used depending on the significance of the risk scenario and the amount of time, resources, and data that are available. According to the draft compendium, the three approaches may be used independently or together. The first two “are applicable to a variety of scenarios and will lead to a streamlined, defensible, risk-informed decision.” The third is intended to provide “the tools needed to evaluate a detailed risk assessment conducted by a risk assessment professional.” The tiers are:

1. Lines of Evidence Approach—This approach uses relevant, existing information to make a risk-informed decision about the safety of a nonhazardous, industrial material proposed for reuse. Information may include prior beneficial use decisions or case studies published in peer-reviewed journals. The results may establish a defensible decision about the appropriateness of the beneficial use, or may identify questions or data gaps to be answered using another approach.
2. Screening Approach—This approach is designed to quickly, yet conservatively, estimate risks. Screening approaches do not provide definitive estimates of risk. They may look at possible worst-case

scenarios, or they may screen out a list of chemicals to identify those that require additional research.

3. Risk Assessment Modeling Approach—This approach uses computer models to evaluate human or ecological impacts at a specific site, and is the most data intensive of the three approaches. Risk assessment models often improve the accuracy and precision of the risk estimates, but require more time and resources.

EPA began developing the risk compendium in 2006 to assist state and local programs in evaluating the potential human and ecological health risks of recycling nonhazardous industrial materials, including CCRs. EPA staff stated that EPA could have developed a screening approach (i.e., a “fast analysis”) to determine safe beneficial uses, but did not.

Risk Information Assessment—In preparation for a 2006 beneficial use conference, EPA initiated the risk information assessment. The assessment was a risk screening template structured to collect information on CCR beneficial uses from all offices within ORCR. The template requested the following information:

1. Whether adequate data existed to characterize the material and the potential risks for all beneficial uses of CCRs
2. Whether each ORCR division agreed with each type of beneficial use
3. Existing EPA documents or past analyses addressing beneficial use
4. Risk assessment tools available to address concerns about beneficial use
5. Additional data sources, such as research studies and scientific journal articles
6. Relevant regulations and data from state programs

According to an ORCR division director, the compilation of risk information was stopped in favor of developing the draft compendium, which has never been finalized and distributed. Therefore, the risk information assessment was not used by EPA to assess risks associated with CCR beneficial uses.

Leachate Testing and Modeling

EPA’s promotion of CCR beneficial uses to date has been based, in part, on limited leachate testing data that may not be applicable to beneficial use scenarios. In 1999, EPA used the toxicity characteristic leaching procedure (TCLP) to assess the mobility of CCR constituents, such as metals, and in 2000 determined that CCRs are not hazardous wastes. Recent research by the EPA Office of Research and Development shows that TCLP may not be the most accurate predictor of the mobility of metals under some beneficial use conditions. Therefore, use of the TCLP test may be limited for understanding risks of beneficial use of CCRs. TCLP attempts to mimic landfill conditions by measuring

leaching at a single pH point. However, actual CCR beneficial use applications may differ from a landfill scenario and require testing at different pH values. EPA has acknowledged in its 2010 proposed rule that TCLP alone is not a good predictor of the mobility of metals from CCRs under a variety of conditions. The Agency has, therefore, also gathered data using the synthetic precipitation leaching procedure, as well as the multiple pH Kosson approach, to evaluate leaching of CCR constituents.

EPA's Industrial Waste Evaluation Model (IWEM) assists in determining the most appropriate waste management process to minimize ground water contamination. This model was initially developed by EPA to help states determine the type of disposal liner necessary to minimize adverse ground water impacts caused by leachate from recycled industrial materials, such as CCRs. IWEM can now be used to model the use of industrial materials in roadway construction, a common beneficial use of CCRs. Although EPA could use IWEM to evaluate risks of CCR beneficial uses, it has not expanded IWEM to model other beneficial uses of CCRs. While there are some limitations of IWEM, we learned that ORCR management has discouraged further expansion of IWEM because CCR beneficial uses are not regulated by EPA.

EPA Has Not Defined Accepted and Standard Practices for Assessing Risks of CCR Beneficial Uses

EPA did not apply accepted and standard practices to analyze the beneficial uses of CCRs. Further, EPA has not defined a process for identifying and utilizing appropriate risk analysis tools that could be established as accepted and standard practices. As a result, significantly limited risk evaluations have taken place for an unrepresentative set of CCR beneficial uses.

EPA has relied on individual state beneficial use programs to review and approve specific CCR beneficial uses, and to manage associated risks. The ORCR director in place when EPA instituted CCR beneficial use promotion, as well as other managers, stated that the burden to determine the safety of CCR beneficial uses was on the states and the end users of CCR products. However, only 34 states currently have beneficial use programs for recycled industrial materials, and beneficial use requirements vary in scope and rigor from state to state. States may rely on EPA for technical guidance and assistance because many do not have sufficient resources. In addition, EPA did not conduct oversight of states' beneficial use determinations. EPA believes it has communicated CCR beneficial use precautions to states and industry in three published documents.⁶

⁶ *Using Coal Ash in Highway Construction: A Guide to Benefits and Impacts*, April 2005; *Agricultural Uses for Flue Gas Desulfurization (FGD) Gypsum*, March 2008; and *User Guidelines for Byproducts and Secondary Use Materials in Pavement Construction*, July 28, 2008.

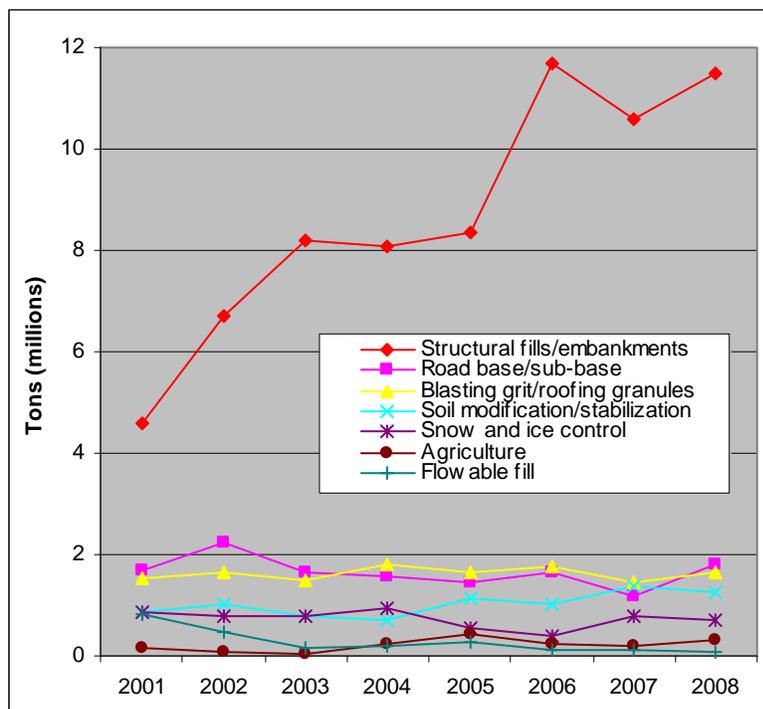
In its 2005 Resource Conservation Challenge (RCC) Action Plan, EPA stated that sound technical assessments of the safety of the materials is a strategic component central to EPA's role in increasing appropriate beneficial use practices. The RCC's overall objective related to industrial materials recycling is to increase the amounts of three industrial nonhazardous wastes, including CCRs, that are beneficially used in an environmentally sound manner. To achieve this objective, EPA's RCC Action Plan included two strategies: (1) analyze and characterize the target materials, and (2) identify environmentally safe and beneficial practices. The first strategy states, "We need these data to . . . provide a repository of information about these materials for use by the public, including States conducting beneficial use determinations." The second strategy states, "While other federal agencies such as DOE [U.S. Department of Energy] and DOT [U.S. Department of Transportation] play important roles in fostering beneficial use (e.g., demonstrating the efficacy of fly ash as a supplemental cementitious material in road construction), EPA's core mission is to protect human health and the environment. As a result, the public looks to us to assess and explain the safety of beneficial use practices." EPA could not provide evidence that it implemented these two strategies.

Had EPA acted on its 2005 RCC Action Plan to identify environmentally safe and beneficial uses, it may have recognized potential risks from large-scale application of unencapsulated coal ash used for structural fill. EPA's current position on the proposed rule is that the use of coal ash in large-scale structural fill applications, including sand and gravel pits, constitutes disposal, not beneficial use. Problems with large-scale structural fill applications, such as ground water contamination, have been documented in damage cases EPA presented in the proposed rule. The large volumes of unencapsulated coal ash reportedly used for structural fill beneficial use applications may represent a large universe of inappropriate disposal applications with unknown potential for adverse environmental and human health impacts.

From 2001 through 2008, information from the American Coal Ash Association⁷ shows a total of 70 million tons of coal ash used in structural fill applications. This type of application increased more than any other reported beneficial use of unencapsulated coal ash (figure 2).

⁷ EPA has relied on American Coal Ash Association data to determine the volumes of coal ash used in beneficial use applications.

Figure 2: Beneficial uses of unencapsulated CCRs



Source: OIG analysis of American Coal Ash Association data.

Conclusions

EPA efforts to seek reuse opportunities and establish reuse goals for a very large waste stream such as CCRs are an important and necessary part of its environmental protection mission. However, innovative but untested approaches to resource conservation and environmental protection should consider best management practices and sound scientific principles. EPA's work to develop regulations for the management of CCRs has resulted in several key improvements in the promotion and characterization of CCR beneficial uses. EPA will evaluate additional information on beneficial uses that present a risk to human health and the environment during the ongoing rulemaking. This additional information may help EPA to complete its risk information and lead to a stronger scientific foundation for EPA's promotion of CCRs. New information and disclosures that come from the rulemaking activities may include new definitions of beneficial use (versus disposal) and information on potential risk areas. EPA has an opportunity to evaluate this new information to identify new or previously unknown potential risks to human health and the environment. In our opinion, the good intentions underlying beneficial use activities do not supersede EPA's mission to protect human health and the environment. EPA should define and implement the accepted practices it will use for assessing the risks and safety of the CCR beneficial uses it promotes.

Recommendations

We recommend the Assistant Administrator for Solid Waste and Emergency Response:

1. Define and implement risk evaluation practices to determine the safety of the CCR beneficial uses EPA promotes.
2. Determine if further EPA action is warranted to address historical CCR structural fill applications, based on comments on the proposed rule and other information available to EPA.

Agency Response and OIG Evaluation

The Office of Solid Waste and Emergency Response (OSWER) provided Agency comments. We reviewed OSWER's comments, met with OSWER officials to discuss the comments, and made changes to the report, as appropriate. Appendix A provides the full text of OSWER's response and the OIG's comments.

In its response, EPA emphasized, "while the Agency recognizes the need for regulations for the management of CCRs in landfills and surface impoundments, EPA strongly supports the legitimate, beneficial use of CCRs in a protective, environmentally sound manner because of the significant environmental benefits that accrue both locally and globally."

The Agency agreed with recommendation 1, with a modification. EPA agreed to reexamine the range of risk evaluation practices that may be appropriate and determine how to proceed after evaluating the comments received on the CCR proposal, particularly for unencapsulated uses. We modified the recommendation as suggested, replacing "risk assessment" with "risk evaluation." In its 90-day response to this report, EPA should include a detailed corrective action plan with estimated milestone dates for defining and implementing these practices. This recommendation is open with agreed-to actions pending.

The Agency agreed with recommendation 2, with a modification. EPA agreed to determine if further action is warranted to address historical CCR structural fill applications based on comments on the proposed rule and other available information. We modified the recommendation as suggested. In its 90-day response to this report, EPA should include a detailed corrective action plan with estimated milestone completion dates for recommendation 2. This recommendation is open with agreed-to actions pending.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	12	Define and implement risk evaluation practices to determine the safety of the CCR beneficial uses EPA promotes.	O	Assistant Administrator for Solid Waste and Emergency Response			
2	12	Determine if further EPA action is warranted to address historical CCR structural fill applications, based on comments on the proposed rule and other information available to EPA.	O	Assistant Administrator for Solid Waste and Emergency Response			

¹ O = recommendation is open with agreed-to corrective actions pending
 C = recommendation is closed with all agreed-to actions completed
 U = recommendation is undecided with resolution efforts in progress

Agency Response to Draft Report and OIG Comment

(Received February 4, 2011)

MEMORANDUM

Subject: Response to the Draft OIG Report: EPA Promoted the Use of Coal Ash Products With Incomplete Risk Information: Project No. OPE-FY10-007

From: Mathy Stanislaus
Assistant Administrator

To: Arthur A. Elkins, Jr.
Inspector General

The Office of Solid Waste and Emergency Response (OSWER) appreciates the opportunity to review the Office of Inspector General's (OIGs) subject draft report and its recommendations. The purpose of this memorandum is to transmit our response to the OIG draft report and its recommendations. Our response addresses four main concerns with the draft report:

- EPA's technical work related to beneficial use of coal ash is much more extensive than recognized in the draft report.
- Proven damage cases associated with sand and gravel pits (which have always been considered disposal, not beneficial use) should not be used to draw conclusions regarding beneficial use.
- Important distinctions need to be recognized between encapsulated and unencapsulated beneficial uses, as well as the different manner in which EPA addressed those uses.
- Since EPA is still in the process of assessing the comments received on the proposed rule, the OIG draft report should be very cautious in treating the proposal as a final statement.

With regard to the two recommendations, OSWER suggests some clarification for the first recommendation, and cannot agree with the second recommendation as currently written.

EPA's Technical Work

EPA's technical work related to the beneficial use of coal ash is much more extensive than recognized in the draft report.

Specifically, for the majority of beneficial uses covered by the Coal Combustion Product Partnership (C2P2) program, EPA was relying on the assessments conducted to support the May

2000 Regulatory Determination (65 FR 322214, <http://www.epa.gov/fedrgstr/EPA-WASTE/2000/May/Day-22/f11138.htm>). As part of that Regulatory Determination, EPA concluded that the beneficial uses identified were not likely to present risks to human health or the environment. EPA's conclusion was based on a detailed Report to Congress (RTC),⁸ and was reached only after a robust public process that included both notice and comment and public hearings. Specific findings in the May 2000 Regulatory Determination that support this conclusion are attached. (See Attachment A)

OIG Response: The only risk assessment EPA performed in the 2000 regulatory determination was a draft risk assessment for a portion of CCRs. This risk assessment does not cover a “majority of beneficial uses,” as implied in EPA’s response. Rather, as the OIG reports on pages 6–7, the risk assessment used for the 2000 regulatory determination (1) was not finalized and is identified as a draft document not to be cited or quoted, (2) did not go through external or internal review and does not represent Agency policy, (3) was not peer reviewed, and (4) used FBC fly and bottom ashes that do not represent all CCRs. In its response to this report, OSWER did not disagree with the above OIG findings.

Further, in the proposed rule for coal ash (page 35160) EPA states, “EPA did not conduct specific risk assessments for the beneficial use of these materials, except as noted below and elsewhere in this preamble. Instead, it generally described the uses and benefits of CCRs, and cited the importance of beneficially using secondary materials and of resource conservation, as an alternative to disposal.” The risk assessment “except as noted below” is the same risk assessment mentioned in points 1–4 above. The risk assessments “elsewhere in this preamble” include one looking at flue gas desulfurization gypsum in agriculture (the OIG mentions this in the Noteworthy Achievements section) and other references that are not risk assessments performed by EPA.

Thus, EPA’s position on the beneficial use of coal combustion residuals (CCRs) was built upon the 1988⁹ and 1999 Reports to Congress on fossil fuel combustion wastes and the May 2000 Regulatory Determination. Subsequent reports, public comments, and related studies (for example, the development of the Guide for Industrial Waste Management, February 2003, which included the Industrial Waste Evaluation Model (IWEM) and further materials applicable to beneficial use concerns; the Land Disposal Restrictions program which helped form our understanding of metal stabilization; the Chat Rule, 72 Fed Reg 393331-39353, which demonstrates the effectiveness of asphalt in encapsulating metals; and numerous literature articles that EPA directly referenced or provided links to other sites, such as the Recycled Materials Resource Center, a federal-university partnership) also supported the Agency’s position on the beneficial use of CCRs¹⁰.

⁸ In the March 1999 Report to Congress: Wastes from the Combustion of Fossil Fuels, page 3-6, EPA explained that the reason for maintaining the Bevill exemption for beneficial uses “...is based on one or more of the following reasons for each use or resulting product: absence of identifiable damage cases, fixation of the waste in finished products which immobilizes the material, and/or low probability of human exposure to the material.”

⁹ Report to Congress on Wastes from the Combustion of Coal by Electric Utility Power Plants, February 1988.

¹⁰ In the June 21, 2010 Federal Register notice, EPA proposed to regulate the disposal of CCRs in landfills and surface impoundments, while at the same time proposed to retain the Bevill exclusion for the beneficial use of CCRs. However, the Agency did seek comment on the beneficial use of CCRs, particularly the unencapsulated uses of CCRs because of its potential to create risks and need more site-specific review.

While the OIG draft report does reference EPA's efforts to address highway applications by providing a module to address roadway construction, it also criticizes EPA for failing to expand IWEM for other beneficial uses of CCRs. The OIG draft report needs to acknowledge the broader applicability of IWEM, as well as available non-EPA risk assessment tools. Specifically, EPA encouraged the use of the IWEM model (in particular the land application portion) for agricultural use, and prior to the development of the highway module, EPA recognized the use of IWEM (the landfill component) as appropriate for fill applications. In addition, there are non-EPA models (such as WiscLEACH, MODFLOW, etc.) that are also available to states and industry to address beneficial uses, and references to such models were cited in publicly available EPA reports.

OIG Response: The 1988 and 1999 Reports to Congress do not provide evidence that EPA applied standard and accepted risk assessment or evaluation practices to reach decisions about the risks of beneficial uses of CCRs. In addition, as we have stated previously, the risk assessment that formed the basis for the 2000 regulatory determination is silent on most forms of the CCR beneficial uses that EPA has promoted.

Our report does acknowledge the development of IWEM and its expansion to highway construction. However, we also note that IWEM could have been expanded for other CCR beneficial uses but, according to EPA staff, this expansion was discouraged by ORCR management.

As a further example, EPA and USDA have been engaged in an extensive agricultural use study that is not mentioned in the OIG draft report, but which should provide further support for the Regulatory Determination position that national regulation is not warranted. Through conferences, newsletters, and other communications, those potentially involved in such beneficial uses were well informed that agricultural use was an area EPA believed warranted further study, and that EPA was so engaged with USDA.

OIG Response: A bullet has been added to the Noteworthy Achievements section on page 3 to acknowledge the joint effort between EPA and the U.S. Department of Agriculture. However, EPA promoted the beneficial use of flue gas desulfurization gypsum in agriculture applications through the C²P² program prior to completing this study.

Finally, in raising concern regarding the toxicity characteristic leaching procedure (TCLP) leachate testing methods and not mentioning any other data sources available to EPA, the OIG draft report gives the impression that EPA's view of beneficial use is significantly flawed based on TCLP analyses. The OIG draft report should recognize that the Agency considered a wide variety of data sources in reaching its conclusions regarding the potential risks of various beneficial uses: TCLP, the synthetic precipitation leaching procedure (SPLP) test method, the Kosson leaching test method, total constituent analysis, as well as data from direct sampling of actual leachate. All of these types of data sources help formulate the Agency's understanding of this material, and its potential environmental risks. Employing a variety of data sources and methodologies has given the Agency a broader perspective, allowing the Agency to consider potential risks in diverse scenarios.

OIG Response: The OIG’s report does not state “significantly flawed based on TCLP analyses.” Rather, our report states, “EPA’s promotion of CCR beneficial uses to date has been based, in part, on limited leachate testing data that may not be applicable to beneficial use scenarios. In 1999, EPA used the TCLP to assess the mobility of CCR constituents, such as metals, and in 2000 determined that CCRs are not hazardous wastes. Recent research by the EPA Office of Research and Development shows that TCLP may not be the most accurate predictor of the mobility of metals under some beneficial use conditions. Therefore, use of the TCLP test may be limited for understanding risks of beneficial use of CCRs.” In addition, our report states, “EPA has acknowledged in its 2010 proposed rule that TCLP alone is not a good predictor of the mobility of metals from CCRs under a variety of conditions.” Our report also acknowledges the Agency’s efforts to evaluate leaching of CCR constituents at the top of page 9.

Damage Cases

Proven damage cases associated with sand and gravel pits (which is disposal, not beneficial use) should not be used to draw conclusions regarding beneficial use.

The OIG draft report concludes that “EPA promoted beneficial uses of CCRs based on incomplete information,” in part, based on the fact that in the 2010 CCR proposed rule, EPA identified damage cases resulting from disposal of unencapsulated CCRs into sand and gravel pits and from large-scale fill operations. This is inaccurate in several regards. Placement of CCRs in sand and gravel pits has always been considered by EPA to be disposal, **not** beneficial use. Disposal of CCRs in sand and gravel pits makes up the vast majority of the proven damage cases identified in the May 2000 Regulatory Determination. Precisely because of the associated damage cases, EPA viewed placement in sand and gravel pits as disposal, not beneficial use.¹¹

With respect to the placement of CCRs in large scale fill operations, the May 2000 Regulatory Determination had not identified any such damage cases, although one can view the disposal of CCRs in sand and gravel pits as a type of large scale fill operation.¹² Thus, in developing the proposed rule, the Agency also decided that it was appropriate to propose designating large-scale fill operations as disposal. This reflects the evolution of EPA’s thinking since the RTC that large-scale placement of unencapsulated CCRs may, and has, posed greater risk than other types of fill. Thus, damage cases at sand and gravel pits should not be used to claim that problems exist generally with all beneficial uses, nor should our recent action of proposing that large scale fill be considered disposal form a basis for characterizing the environmental risks associated with the breadth of beneficial use operations.

¹¹ Sand and gravel pits are a mining operation, and had EPA not intended to regulate placement in sand and gravel pits as disposal, the operation would fall under minefilling.

¹² While beneficial use includes “fill” operations, not all “fill” operations are part of the beneficial uses promoted by EPA. For example, minefilling is a “fill” operation. Consistent with the May 2000 Regulatory Determination, our intent is to deal with minefilling through rulemaking under SMCRA and/or RCRA.

OIG Response: We disagree with EPA’s characterization of OIG conclusions. The statement in the OIG draft report, “EPA promoted beneficial uses of CCRs based on incomplete information,” contrary to EPA assertion, is not based on language in the 2010 CCR proposed rule related to damage cases for sand and gravel pits. Rather, the OIG’s conclusion that “EPA promoted beneficial uses of CCRs based on incomplete information” is based on OIG findings that “EPA’s application of risk assessment, risk screening, and leachate testing and modeling was significantly limited in scope and applicability. EPA has not defined procedures for applying such practices to CCR beneficial use analyses and believed it could rely on state programs to manage risks associated with CCR beneficial use.”

In its response, EPA states that it has always considered that coal ash in sand and gravel pits is disposal and not beneficial use. The OIG cannot attest to what EPA has “always considered.” However, as stated in our October 2010 report, *Website for Coal Combustion Products Partnership Conflicts with Agency Policies*, (text boxes on pages 9 and 10) the OIG does not agree that EPA has consistently and clearly communicated a position that coal ash in sand and gravel pits is disposal and not beneficial use. Further, EPA has not provided additional evidence here to support its position.

Furthermore, discussion of the Kingston catastrophe should be deleted as it was not associated with beneficial use, and does not reflect any known risk scenario associated with beneficial use. [Note: If the final report continues to mention the discussion of the Kingston spill, we would note that the report should correct the statement on page 2 under “Noteworthy Achievements” that EPA’s efforts to assess the structural integrity of units after the Kingston catastrophe led “... to the creation of the National Inventory of Dams hazard potential ratings, which address the potential consequences of failure or misoperation of dams.” because it is not accurate. The National Inventory of Dams (which addresses a much larger universe of dams – approximately 83,000) has been in place since 1975, and is the source of the hazard potential rating system. Prior to EPA’s assessment, many of the coal ash dams were already part of the National Inventory of Dams, and were classified according to their hazard potential. EPA adopted the existing rating system, and used the criteria to classify those units that had not previously been categorized. EPA suggests the IG reword this paragraph to say something like: This effort led to reports on the structural stability of these units, and recommendations for actions. EPA is monitoring the implementation of these actions. EPA has made all of the information on these assessments available to the public on our web site. EPA is continuing its assessment activities on units holding "wet" CCRs.]

OIG Response: EPA states that the OIG should delete mention of the Kingston catastrophe in the Background section of our report because the spill was not associated with beneficial use. We included reference to the Kingston catastrophe because it is associated with the development of the proposed rule and the rule is associated with beneficial use of CCRs. However, we have modified the language in the Noteworthy Achievements as suggested by EPA.

Encapsulated Versus Unencapsulated Beneficial Uses

Important distinctions need to be recognized between encapsulated and unencapsulated beneficial uses, as well as the different manner in which EPA addressed those uses.

The OIG draft report fails to recognize that the risks associated with CCRs are distinct, based on the different types and applications of CCRs. Thus, the risks associated with the beneficial use of encapsulated CCRs, such as in cement, gypsum panels, or waste stabilization, which account for a substantial portion of beneficially used CCRs, do not present the same level or type of potential risk associated with the use of CCRs in unencapsulated uses, such as in soil modification or deicing operations. Stemming from the Agency's May 2000 Regulatory Determination, the manner in which EPA addressed unencapsulated beneficial uses differs substantially from encapsulated uses. EPA concluded that, nationally, unencapsulated beneficial uses could pose problems in some cases, and therefore warranted more site-specific evaluation by the state and/or user to account for the specific characteristics of the coal ash being used, the site conditions, the quantity of material placed, and other site-specific factors. EPA was clear that it was incumbent on state authorities and/or industry to conduct the appropriate site-specific assessments to determine whether the particular unencapsulated beneficial uses would be safe. The following are three illustrative quotations from publicly available EPA documents (which also demonstrate how EPA has also provided guidance to states and industry):

"Conduct an evaluation of local groundwater conditions prior to using coal combustion products as a fill material. Numerous groundwater models are available such as EPA's Industrial Waste Evaluation Model..."(Using Coal Ash in Highway Construction: A Guide to Benefits and Impacts, April 2005)

"In determining the environmental suitability of FGD gypsum for a particular location, you may find the USEPA's Industrial Waste Management Evaluation Model (IWEM) and the chapter on land application (Chapter 7) in the associated *Guide for Industrial Waste Management* (<http://www.epa.gov/epawaste/nonhaz/industrial/guide/index.htm>) to be useful resources. You should also consult with your State's department of environmental protection to comply with any regulations pertaining to the management of CCPs. You may also find it helpful to consult with your State's department of agriculture and agricultural extension service, and with the USDA Natural Resources Conservation Service."(Agricultural Uses for Flue Gas Desulfurization (FGD) Gypsum, March 2008)

"Unencapsulated use, however, has the potential for trace element leaching. Use of fly ash in stabilized base or embankments requires good management to ensure the environment is not impacted negatively. Although studies have shown that coal fly ash is typically safe to use in unencapsulated applications, precautions must still be taken to ensure environmental impacts are acceptable.^(28;29;30;31) An evaluation of groundwater conditions, applicable state test procedures, water quality standards, and proper construction are all necessary considerations in ensuring a safe final product.⁽¹⁰⁾"(User Guidelines for Byproducts and Secondary Use Materials in Pavement Construction, July 28, 2008)

OIG Response: EPA’s response states, “The OIG draft report fails to recognize that the risks associated with CCRs are distinct, based on the different types and applications of CCRs. Thus, the risks associated with the beneficial use of encapsulated CCRs, such as in cement, gypsum panels, or waste stabilization, which account for a substantial portion of beneficially used CCRs, do not present the same level or type of potential risk associated with the use of CCRs in unencapsulated uses, such as in soil modification or deicing operations.” While it may be widely believed that different risks are imparted from different forms of CCRs, EPA did not provide sufficient information to support this belief. The OIG’s finding (page 5) is, “EPA did not follow accepted and standard practices in determining that the 15 categories of CCR beneficial uses it promoted through the C²P² program were safe for those uses.” These categories include both encapsulated and unencapsulated CCRs. EPA’s completion of recommendation 1, “Define and implement risk evaluation practices to determine the safety of the CCR beneficial uses EPA promotes,” should begin to address EPA’s assertion about the safety of encapsulated CCR use.

EPA’s response also states, “EPA was clear that it was incumbent on state authorities and/or industry to conduct the appropriate site-specific assessments to determine whether the particular unencapsulated beneficial uses would be safe.” EPA further provides three examples/documents to support its assertion. We disagree that the statements in these documents make EPA’s position clear, i.e., “that it was incumbent on state authorities and/or industry to conduct the appropriate site-specific assessments to determine whether the particular unencapsulated beneficial uses would be safe.” Further, our October 2010 report, *Website for Coal Combustion Products Partnership Conflicts with Agency Policies*, found that EPA’s C²P² website, its chief means of promoting beneficial use of CCRs, “did provide some general precautions on beneficial use, [however] the C²P² Website did not identify large-scale fill applications as disposal, did not list known beneficial use damage cases, and did not emphasize EPA’s concerns about beneficial use of unencapsulated CCRs in road embankments and agricultural applications.” The C²P² websites on “CCP Benefits and Risks” and “Environmental and Health Information” did not state that “it was incumbent on state authorities and/or industry to conduct the appropriate site-specific assessments.”

Finally, as the OIG reports here, reliance on state programs may have its limits. Only 34 states currently have beneficial use programs for recycled industrial materials, and beneficial use requirements vary in scope and rigor from state to state. States may rely on EPA for technical guidance and assistance because many do not have sufficient resources.

EPA’s use of differing approaches in addressing encapsulated and unencapsulated uses was reaffirmed in the 2010 CCR proposed rule:

“EPA is proposing this approach in recognition that some uses of CCRs, such as encapsulated uses in concrete, and use as an ingredient in the manufacture of wallboard, provide benefits and raise minimal health or environmental concerns. That is, from information available to date, EPA believes that encapsulated uses of CCR, as is common in many consumer products, does not merit regulation. On the other hand, unencapsulated uses have raised concerns and merit closer attention. For example, the placement of unencapsulated CCRs on the land, such as in road embankments or in agricultural uses, presents a set of issues, which may pose similar concerns as those that are causing the

Agency to propose to regulate CCRs destined for disposal. Still, the amounts and, in some cases, the manner in which they are used—*i.e.*, subject to engineering specifications and material requirements rather than landfilling techniques—are very different from land disposal.” (75 Fed. Reg. 35160)

Furthermore, as stated in the 2010 CCR Proposed Rule:

“The beneficial uses that EPA identifies as excluded under the Beville amendment, for the most part, present a significantly different picture, and a significantly different risk profile. As a result, EPA is explicitly not proposing to change their Beville status (although we do take comment on whether “unconsolidated uses” of CCRs need to be subject to federal regulation). (75 Fed. Reg. 35186)

OIG Response: The OIG acknowledges that EPA describes differing approaches to address encapsulated and unencapsulated uses in the proposed rule. However, this position comes after years of supporting and promoting both categories of beneficial uses of CCRs through the C²P² program, in the absence of adequate risk information. EPA’s concerns about unencapsulated uses of CCRs further support the OIG’s recommendation 2 in this report.

Additionally, while the Agency recognizes the need for regulations for the management of CCRs in landfills and surface impoundments, EPA strongly supports the legitimate, beneficial use of CCRs in a protective, environmentally sound manner because of the significant environmental benefits that accrue both locally and globally.

OIG Response: EPA’s continued support of CCR beneficial uses is acknowledged in the Noteworthy Achievements section on page 3, and in the Agency Response and OIG Evaluation on page 12.

The OIG draft report also criticizes EPA’s reliance on states in the context of site-specific evaluations. However, EPA’s message was not a statement that unencapsulated beneficial use is advocated solely on compliance with whatever state standards are in place, but rather that: “an evaluation of groundwater conditions, applicable state test procedures, water quality standards, and proper construction are all necessary in ensuring a safe final product.” (User Guidelines for Byproducts and Secondary Use Materials in Pavement Construction, July 28, 2008). It should also be recognized that CCRs are currently a RCRA Subtitle D waste, and outside of the municipal solid waste context, under RCRA Subtitle D, it is states, not EPA, who have primary regulatory authority over the disposal and recycling (beneficial use) of CCRs. EPA’s role is to establish minimum national criteria, which we have done, but otherwise have no direct authority to enforce or implement those requirements.

OIG Response: EPA established the C²P² program to encourage beneficial use of all types of CCRs. In establishing such a program, EPA has a responsibility to ensure that it is promoting safe practices and is clearly communicating any risks. As we identified in our October 2010 report, the risks were not clearly or fully communicated, which resulted in EPA removing access to the C²P² website. While EPA quotes a precaution from 2008 guidelines for pavement construction, this does not represent a clear communication of concerns about risks associated

with all unencapsulated CCRs. EPA's position that states are responsible for determining the risks of CCR beneficial uses is inconsistent with its stated position in the 2005 RCC Action Plan. As we note on pages 9 and 10 of this report, the 2005 RCC Action Plan included a strategy to characterize target materials and identify safe and beneficial use practices. According to the RCC, this information is needed to "provide a repository of information about these materials for use by the public, including States conducting beneficial use determinations." The action plan further states, "EPA's core mission is to protect human health and the environment. As a result, the public looks to us to assess and explain the safety of beneficial use practices." It appears that EPA used its management discretion, versus a specific authority, to seek to implement the goals of the RCC (also a voluntary program).

The Risk Assessment section of the OIG draft report, Chapter 2 (page 5), states that "EPA only initiated one risk assessment for beneficial use of a single type of CCR..." This reference is to an FBC¹³ analysis for agricultural use. As indicated previously, EPA concluded that, nationally, unencapsulated beneficial uses could pose problems in some cases, and therefore warranted more site-specific evaluation by the state and/or user. Therefore, when we issued the March 2008, Agricultural Uses for Flue Gas Desulfurization (FGD) Gypsum, the Agency did not provide direction that the FBC analysis (referenced in the OIG draft report) indicated it was safe, but rather provided direction to the reader to consider using the land application module of the IWEM to assess risks, along with contacting the state environmental and agricultural authorities.

OIG Response: EPA's response states, "As indicated previously, EPA concluded that, nationally, unencapsulated beneficial uses could pose problems in some cases, and therefore warranted more site-specific evaluation by the state and/or user." EPA has not provided sufficient evidence that it either reached or clearly communicated this conclusion. In fact, the 2000 regulatory determination does not specifically mention unencapsulated beneficial uses.

References to FBC wastes in the report have been modified based on EPA's comments in footnote 6 of its response.

Finally, in a number of places, the OIG draft report refers to EPA's failure to follow "accepted and standard practices in determining that CCRs are safe for the beneficial uses it has promoted." EPA agrees that assessment of risk is a critical component in the decision-making associated with beneficial use. There are many different and appropriate ways to evaluate risk, and we believe we have generally conducted the risk evaluations that were appropriate to the circumstances, e.g., IWEM, RTC with public comment, damage cases, case studies, and weight of evidence. We also believe that there are situations where site-specific conditions are of critical importance (i.e., unencapsulated uses), and that any national risk evaluation could not adequately substitute for a site-specific assessment. In such cases, we highlighted that states or users should do a more extensive site-specific evaluation. We need to retain the flexibility to determine the best evaluation method given the risks, our resources, and state and industry capabilities and responsibilities.

¹³ The report describes FBC wastes as one type of CCR. This is inaccurate. We define CCR as fly ash, bottom ash, boiler slag, and flue gas desulfurization sludge. FBC is a type of combustion device; not a waste type.

OIG Response: The definition of accepted and standard practices for determining the risks of CCRs is important to objectively identify the process that will be followed for the public determination of risk. In our opinion, this does not necessarily mean that EPA must perform site-specific assessments for every beneficial use application of CCRs. The practices could be defined to clarify that a site-specific assessment should be performed under specific conditions. EPA did not provide sufficient evidence that its promotion of beneficial uses was preceded by completion of appropriate risk assessments or evaluations, or that other controls were in place to ensure that risks, for all forms of CCRs promoted by EPA, were properly characterized, studied, and communicated. Had EPA implemented its 2005 RCC plans to characterize target materials and identify safe and beneficial use practices, it may have had a sufficient basis to responsibly promote many uses of CCRs.

Proposed Rule

Since EPA is still in the process of assessing the comments received on the proposed rule, the OIG draft report should be very cautious in treating the proposal as a final statement.

The proposed CCR rule included positions on a wide range of issues and solicited comment on those issues. Over 450,000 comments were received. EPA needs to assess and respond to those comments before issuing a final rule that will establish final Agency positions, including possible additional work that may be needed in the area of risk evaluation. The OIG needs to exercise greater caution in its final report in recognition of the fact that EPA's evaluation of the comments could affect the positions taken on various issues in the final rule. For example, in the proposed rule, the Agency solicited comment on a wide range of issues associated with unencapsulated beneficial uses, such as the need for and propriety of various leach tests, and the safety of agricultural uses and construction practices, etc. (65 Fed Reg 35165.) The OIG draft report appears to inappropriately use the solicitation of comment as a justification to infer a conclusive determination that problems currently exist with the beneficial use of CCRs.

OIG Response: The OIG has evaluated its references to the proposed rule and used due care in how we characterize Agency positions stemming from the rule.

The Recommendations

As an overall comment, further actions taken by EPA on the beneficial use of CCRs will be done in a manner that is consistent with decisions made as part of the CCR rulemaking effort. As previously noted, EPA received over 450,000 comments from the comment period and hearings on the proposed CCR rule. Given the magnitude of comments and the time it will take for EPA to process this information, EPA recommends the OIG add language to the final report acknowledging that the Agency has proposed regulation and solicited comment on the beneficial use of CCRs, particularly as related to the unencapsulated uses of CCRs, and that the Agency will consider those comments in making final decisions.

The draft's first recommendation is:

Define and implement risk assessment practices to determine the safety of CCR beneficial uses EPA promotes.

As discussed above, many unencapsulated uses will necessitate evaluation of safety by the state and/or user, because of the site-specific nature of such uses. The Agency has evaluated a number of CCR beneficial uses already as noted above, but agrees that it will reexamine the range of risk evaluation practices that may be appropriate and determine how to proceed after evaluating the comments received on the CCR proposal, particularly on CCR unencapsulated uses.

In addition, EPA recommends that the OIG use the phrase "risk evaluation," rather than "risk assessment," as the latter is a term of art and in recognition of the fact that there are various ways that the safety of beneficial uses could be reviewed and evaluated.

OIG Response: The Agency agrees to reexamine the range of risk evaluation practices that may be appropriate and determine how to proceed after evaluating the comments received on the CCR proposal, particularly on CCR unencapsulated uses. We have replaced "risk assessment" with "risk evaluation" in recommendation 1.

This recommendation is open with agreed-to actions pending. In its 90-day response to this report, EPA should include a more detailed corrective action plan with estimated milestone dates for defining and implementing these practices.

The second recommendation is:

Evaluate data on coal ash structural fill applications to identify and assess potential risks to human health and the environment resulting from inappropriate disposal described as beneficial use.

We agree with the OIG that the safe beneficial use of CCRs is important. However, this recommendation appears to contemplate actions that are not feasible due to lack of information and ability to collect needed information. The draft OIG report on page 11 calls for "...EPA to retrospectively evaluate existing high-risk coal ash applications to identify potential risks to human health and the environment." The apparent intent is for EPA to identify where coal ash has been historically used in structural fill applications and conduct environmental assessments at those sites. This is not feasible. EPA had no requirements for record-keeping or reporting of such activities. We do not know whether states required records to be kept or reported to them. Further, it is not clear that the power plants that generated the CCRs have that information. In short, without a readily available source of information and data, it would be infeasible and impractical for EPA to undertake this recommendation.

As noted previously, the OIG has not presented any evidence to justify the need for a special national assessment of CCR structural fills. The risks that the draft OIG report

referenced in the proposed rule relate to the placement of CCRs in sand and gravel pits and the use of CCRs for large-scale fill operations. Of the damage cases identified in the proposed rule, corrective action has been taken at each site, and thus it is not clear why EPA would need to reassess those sites. We have examined the current and proposed Superfund National Priorities List¹⁴ and out of approximately 1,700 sites, only four sites were listed on the National Priorities List (and none of them are currently listed). EPA is in the process of going through the over 450,000 comments to the proposed rule. We do not know yet whether there is sufficient justification to conduct a special national assessment of coal ash structural fill operations based on the comments submitted on the proposed rule, but at this point, it is premature to assume such action is warranted.

Prospectively, EPA will address large-scale fill operations in the rulemaking. We therefore suggest the recommendation be modified to call for EPA to determine if further EPA action is warranted to address historical CCR structural fill applications, based on comments on the proposed rule and other information available to EPA.

OIG Response: EPA’s response states that it will “prospectively . . . address large-scale fill operations in the rulemaking.” EPA also suggested a modification to recommendation 2 that it “determine if further EPA action is warranted to address historical CCR structural fill applications, based on comments on the proposed rule and other information available to EPA.” The OIG agreed to this modification and in a subsequent meeting, EPA agreed to the recommendation.

This recommendation is open with agreed-to actions pending. In its 90-day response to this report, EPA should include a corrective action plan with estimated milestone completion dates for the agreed-to recommendation.

In conclusion, OSWER appreciates the opportunity to review the OIG’s subject draft report. OSWER takes these issues very seriously, and will continue to evaluate these issues as part of the rulemaking effort.

¹⁴The *National Priorities List* (NPL) is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation. (<http://www.epa.gov/superfund/sites/npl/>)

ATTACHMENT A

The specific findings in the May 2000 Regulatory Determination are excerpted below (see 65 Fed Reg. 32229-32230).

“Beneficial purposes include waste stabilization, beneficial construction applications (e.g., cement, concrete, brick and concrete products, road bed, structural fill, blasting grit, wall board, insulation, roofing materials), agricultural applications (e.g., as a substitute for lime) and other applications (absorbents, filter media, paints, plastics and metals manufacture, snow and ice control, waste stabilization).”

“For beneficial uses other than minefilling, we have reached this decision because: (a) We have not identified any beneficial uses that are likely to present significant risks to human health or the environment; and (b) no documented cases of damage to human health or the environment have been identified. Additionally, we do not want to place any unnecessary barriers on the beneficial use of coal combustion wastes so that they can be used in applications that conserve natural resources and reduce disposal costs.”

“Currently, the major beneficial uses of coal combustion wastes include: Construction (including building products, road base and sub-base, blasting grit and roofing materials) accounting for approximately 21%; sludge and waste stabilization and acid neutralization accounting for approximately 3%; and agricultural use accounting for 0.1%. Based on our conclusion that these beneficial uses of coal combustion wastes are not likely to pose significant risks to human health and the environment, we support increases in these beneficial uses of coal combustion wastes.”

“Off-site uses in construction, including wallboard, present low risk due to the coal combustion wastes being bound or encapsulated in the construction materials or because there is low potential for exposure. Use in waste and sludge stabilization and in acid neutralization are either regulated (under RCRA for hazardous waste stabilization or when placed in municipal solid waste landfills, or under the Clean Water Act in the case of municipal sewage sludge or wastewater neutralization), or appear to present low risk due to low exposure potential. While in the RTC, we expressed concern over risks presented by agricultural use, we now believe our previous analysis assumed unrealistically high-end conditions, and that the risk, which we now believe to be on the order of 10^{-6} , does not warrant national regulation of coal combustion wastes that are used in agricultural applications.”

“In the RTC, we were not able to identify damage cases associated with these types of beneficial uses, nor do we now believe that these uses of coal combustion wastes present a significant risk to human health or the environment. While some commenters disagreed with our findings, no data or other support for the commenters’ position was provided, nor was any information provided to show risk or damage associated with agricultural use. Therefore, we conclude that none of the beneficial uses of coal combustion wastes listed above pose risks of concern.”

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