

United States Senate

WASHINGTON, DC 20510

June 26, 2009

The Honorable Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code: 1101A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Jackson:

We understand the EPA is evaluating its regulatory options for the management of coal combustion byproducts ("CCBs") and plans to propose federal management standards for CCBs by the end of the year. This issue involves an important component of the nation's overall energy policy. EPA's decision could affect electricity costs from coal-fired plants, the continued viability of CCB beneficial use practices (which play a significant role in the reduction of greenhouse gases), and the ability of certain power plants to remain in service. It is important, therefore, that the final rule reflect a balanced approach to ensure the cost-effective management of CCBs that is protective of human health and the environment, while also continuing to promote and encourage CCB beneficial use. As explained below, we believe the federal regulation of CCBs pursuant to RCRA's Subtitle D non-hazardous waste authority is the most appropriate option for meeting these important goals.

As part of its evaluation of this issue, EPA has wisely sought input from the States regarding their preferences with respect to the three regulatory options under consideration: (1) federal regulation of CCBs as non-hazardous solid waste under RCRA Subtitle D, (2) regulation as hazardous wastes under RCRA Subtitle C, and (3) a hybrid approach where CCBs would be regulated as hazardous wastes with an exception from hazardous waste regulation for CCBs that are managed in conformance with specified standards.

We understand, thus far, approximately twenty (20) states, in addition to the Association of State and Territorial Solid Waste Management Officials, have responded to EPA's request for input on this issue and every State has taken the position that the best management option for regulating CCBs is pursuant to RCRA Subtitle D. The States effectively argue they have the regulatory infrastructure in place to ensure the safe management of CCBs under a Subtitle D program and, equally important, make clear that regulating CCBs as hazardous waste would be environmentally counter-productive because it would effectively end the beneficial use of CCBs. For the same reasons, the Environmental Council of States ("ECOS") has issued a declaration expressly arguing against the regulation of CCBs as hazardous waste under RCRA.

We respectfully suggest the unanimous position of informed State agencies and associations should not be ignored as EPA evaluates its regulatory options for CCBs. Among other things, the Bevill Amendment to RCRA directs that, as part of its decision-making process for CCBs, EPA will consult with the States "with a view towards avoiding duplication of effort."

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RCRA 8002(n). The States have made clear regulating CCBs under RCRA Subtitle C would result in regulatory overkill and effectively end CCB beneficial uses.

The States' position is not surprising since it reflects EPA's own conclusions on four separate occasions that CCBs do not warrant hazardous waste regulation. EPA has issued two formal reports to Congress, in 1988 and 1999, concluding CCBs do not warrant hazardous regulation. Most recently, in 2000, EPA again determined the better approach for regulating CCBs is "to develop national [non-hazardous waste] regulations under subtitle D rather than [hazardous waste regulations under] subtitle C." 65 Fed. Reg. 32214, 32221 (May 22, 2000). In reaching this decision, EPA agreed with the States that "the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes" and regulating CCBs as hazardous "would adversely impact [CCB] beneficial use." *Id.* at 32217, 32232.

As we know you appreciate, the impact on CCB beneficial use is another statutory consideration that EPA must consider in evaluating its regulatory options for CCBs. *See* RCRA §8002(n)(8); 65 Fed. Reg. at 32232. Both EPA and the States have recognized that regulating CCBs as hazardous waste would have an adverse impact on CCB beneficial use. As EPA reasoned in selecting the Subtitle D approach in its 2000 regulatory determination, it did not want "to place any unnecessary barriers on the beneficial uses of [CCBs], because they conserve natural resources, reduce disposal costs and reduce the total amount of wastes destined for disposal." *Id.* at 32232.

In addition to promoting increased CCB beneficial use, a Subtitle D approach appears to be protective of human health and the environment, as EPA has already concluded that State programs are in place to effectively regulate CCBs. *Id.* at 32217. A 2006 EPA/DOE report reinforces this conclusion by confirming the recent development of even more robust state controls for CCBs.

In light of the recent ash spill disaster at the Tennessee Valley Authority's Kingston facility, we certainly understand the EPA raising concerns about the handling and storage of CCBs. We believe appropriate precautions should be taken by all responsible operators, that parties who have violated regulations should be held accountable, and the public health and welfare should be protected. However, in light of how states and the EPA have historically approached the regulation of CCBs, we respectfully urge the EPA to work closely with the States in deliberating regulations for the best management of coal combustion byproducts and give thoughtful consideration to developing a performance-based federal program for CCBs under RCRA's Subtitle D non-hazardous waste authority.

Thank you for your consideration of our views.

Sincerely,



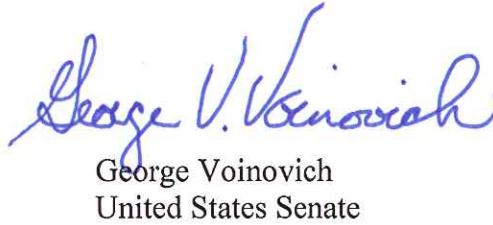
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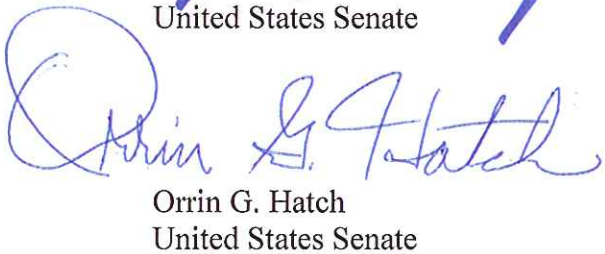
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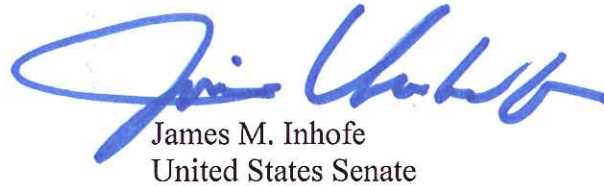
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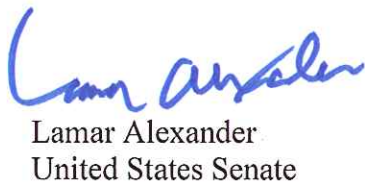
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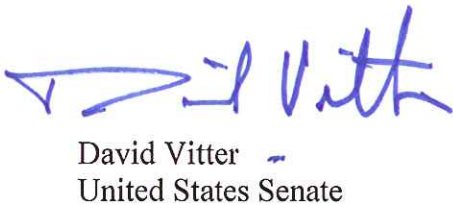
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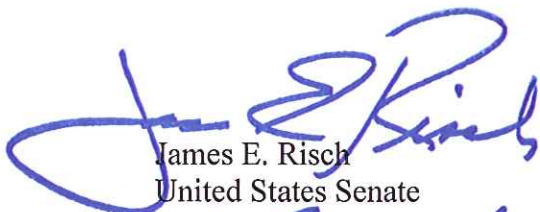
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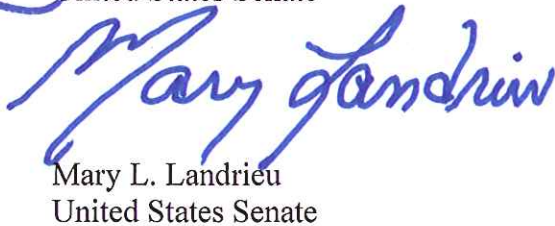
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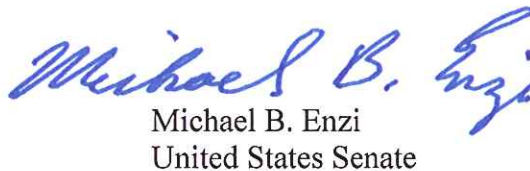
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