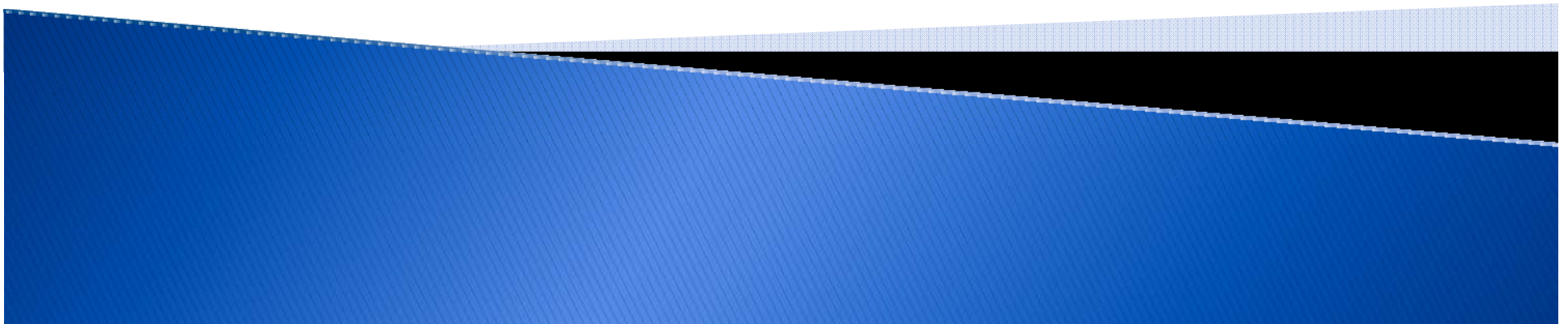


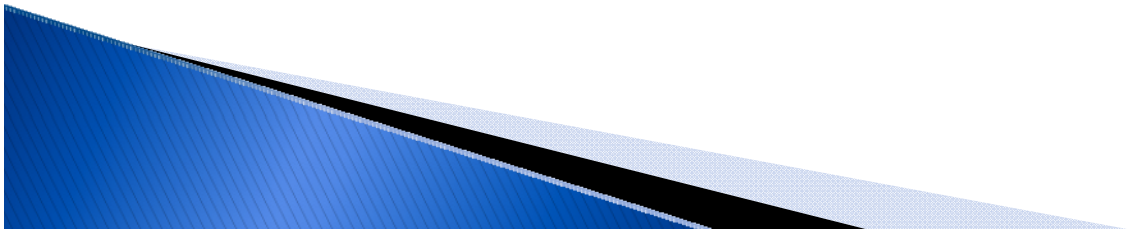
# COAL ASH REGULATORY STATUS

CIBO  
ENVIRONMENTAL/ENERGY MEETING  
Dec. 4 and 5, 2012



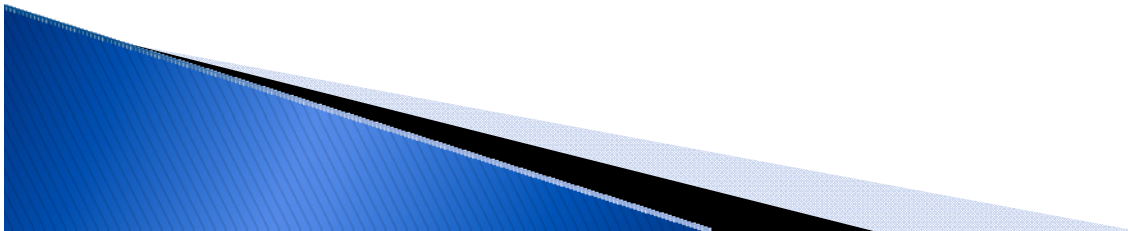
# Status Update – Where are we?

- ▶ Regulatory Efforts
- ▶ Legislation
- ▶ Litigation
- ▶ ASTSWMO



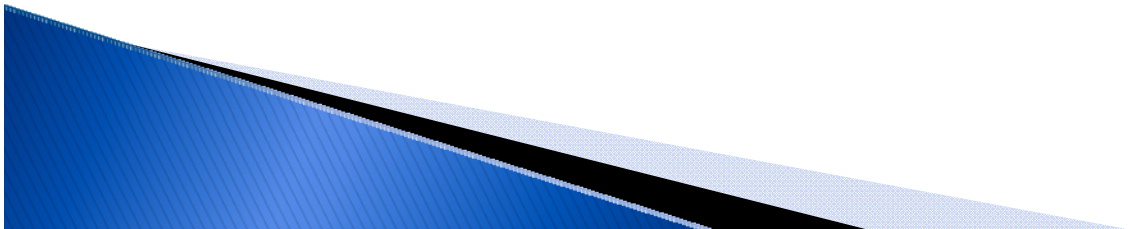
# Regulatory Efforts

- ▶ EPA Proposed Rule Making
- ▶ OSM Proposed Rule Making
  - Regulatory Initiative
  - Pennsylvania Program Approval for Beneficial Use of Coal Ash in Mine Land Reclamation



# EPA Regulatory Approval

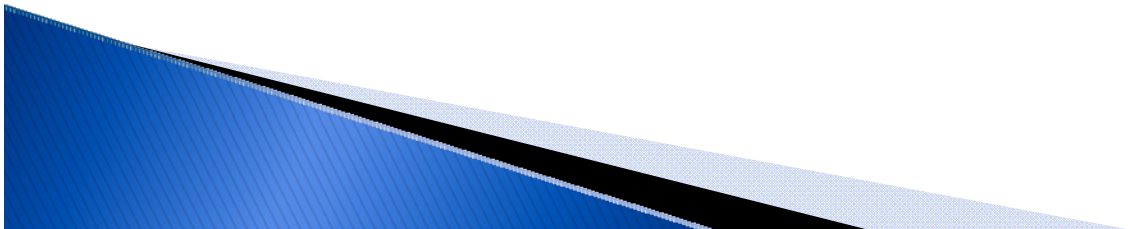
- ▶ Initiated rule making – June 21, 2010
  - Subtitle C vs. Subtitle D Approach
- ▶ There have been major efforts by Environmental Groups supporting a Subtitle C resolution.
- ▶ There have been major efforts by Industry and State Agencies supporting a Subtitle D resolution.
- ▶ EPA has pointed to a 2013 final rulemaking with regard to this regulatory effort.



# OSM Regulatory Effort

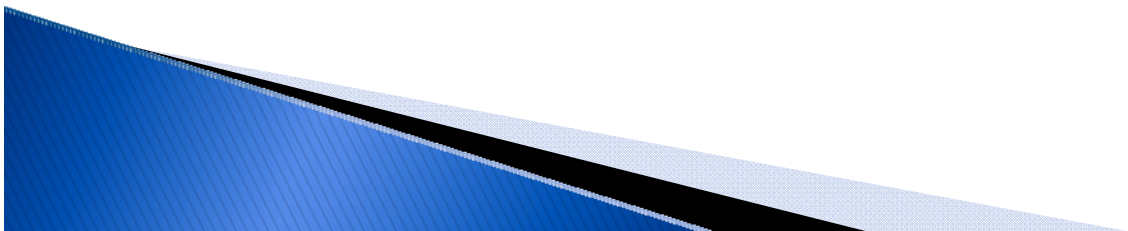
## ▶ OSM Rulemaking

- OSM has developed draft regulations regarding the utilization of coal combustion residuals in coal mine land reclamation
- OSM sent the draft of the rule to OMB
- OSM had initiated discussions with the States, Industry, and Environmental Groups prior to preparing the draft sent to OMB,
  - States Program looked at closely were probably Pennsylvania, West Virginia, Ohio, and Indiana



# OSM Regulatory Action

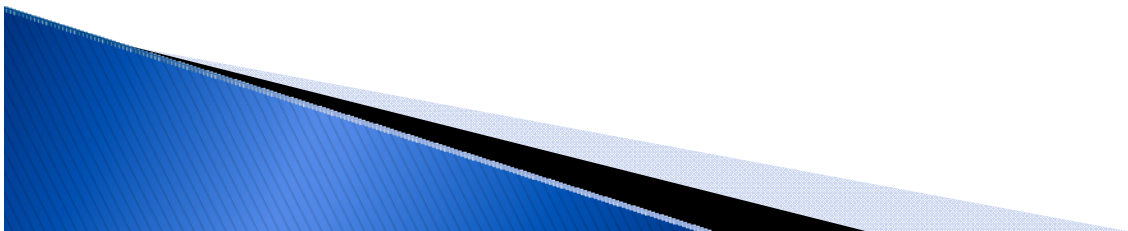
- ▶ Pennsylvania submitted a program amendment related to Pennsylvania Regulatory Program for the beneficial use of coal ash in coal mine land reclamation
- ▶ OSM is reviewing the program amendment and held public meetings
- ▶ The Environmental Groups provided significant comments regarding the program amendment and recommended that it not be approved until Federal Regulations (EPA and OSM) were finalized.



# Legislation

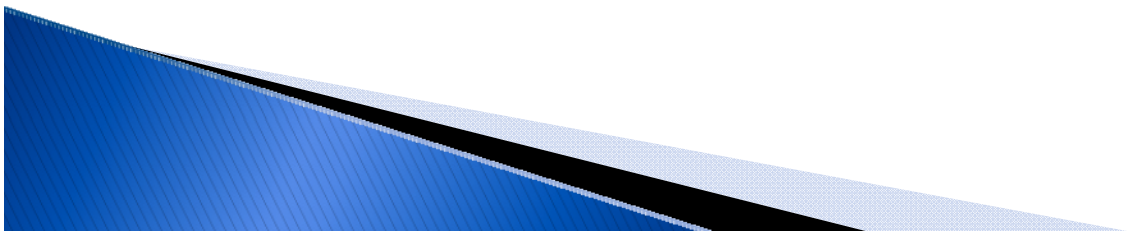
## ▶ Actions to date

- On October 14, 2011, the House passed **H.R. 2273**, the Coal Residuals Reuse and Management Act (CRRMA)
- On October 21, 2011, Senators Conrad (D-ND) and Hoeven (R-ND), with five Democrat and five Republican cosponsors, introduced **S. 1751**, a companion bill to H.R. 2273.
- On April 18, 2012, the House adopted by voice vote a McKinley Amendment to attach H.R. 2273, the House-passed Coal Residuals Reuse and Management Act to H.R. 4348, the Surface Transportation Extension Act of 2012, Part II. During the House-Senate conference on the transportation bill, the coal ash language was revised to attract bipartisan support; ultimately, the compromise coal ash language was not included in the transportation bill conference agreement.
- On August 2, 2012, Senators Conrad (D-ND) and Hoeven (R-ND), along with 11 Democrat and 11 Republican co-sponsors, introduced **S. 3512**, the Coal Ash Oversight and Recycling Act of 2012 (CAROA); this bill is virtually identical to the bi-partisan CCR legislative package that was considered by Congress for inclusion in the Transportation Bill



# Legislation Status

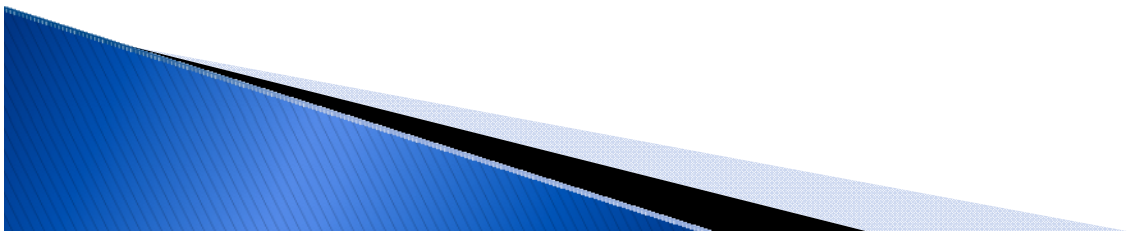
- ▶ Enactment of the CAROA is critical to ensure the proper regulation of CCRs, provide for environmentally-protective disposal, and support their continued recycling, or beneficial use. House and Senate conferees have a rare opportunity to reach agreement on legislation that will ensure that coal combustion CCRs are safely managed throughout the country without adversely impacting the economy or jobs.
- ▶ Next step is to find a vehicle to have the legislation passed.





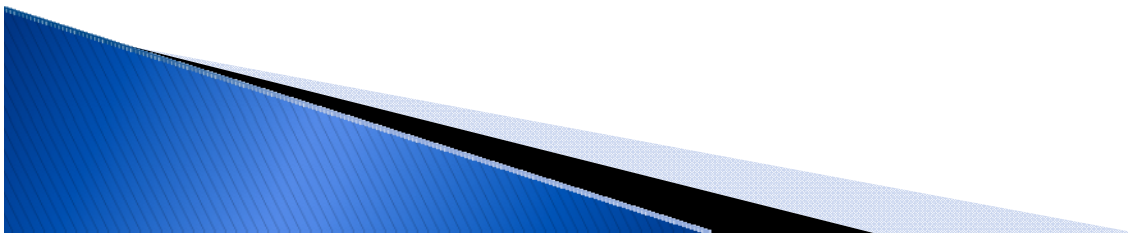
# Litigation

- ▶ **Appalachian Voices v. EPA**
- ▶ The lawsuit filed in the DC Circuit Court claims EPA failed to fulfill its duty under RCRA section 2002(b) to review and revise regulations that have long been:
  - inadequate to address the widespread risks posed by the unsafe disposal of coal ash (40 C.F.R. § 261.4(d) and 40 C.F.R. Part 257);
  - inadequate to determine the toxicity of certain solid wastes because they establish a test that does not accurately measure the leaching properties of many waste streams (40 C.F.R. § 261.24); and
  - insufficient to establish guidelines to protect groundwater and surface water and define prohibited —open dumps|| under RCRA (40 C.F.R. §§ 257.3–3 and 257.3–4).



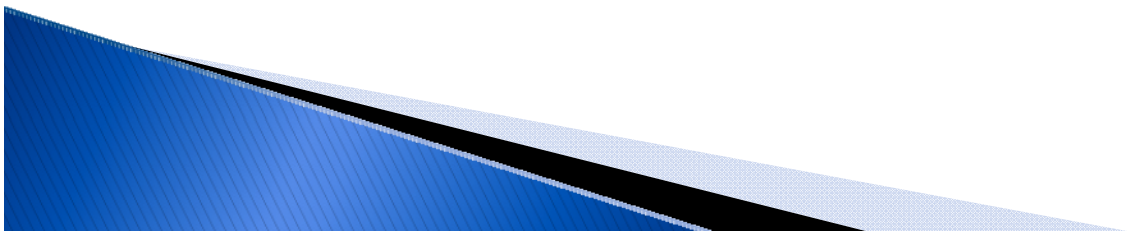
# Litigation

- ▶ EPA's October 11, 2012 opening brief concedes that this never-before-used RCRA provision requires EPA to
  - review its nonhazardous waste rules regarding coal ash;
  - review the toxicity characteristic of coal ash; and
  - review the TCLP testing protocols



# Litigation (EPA Brief)

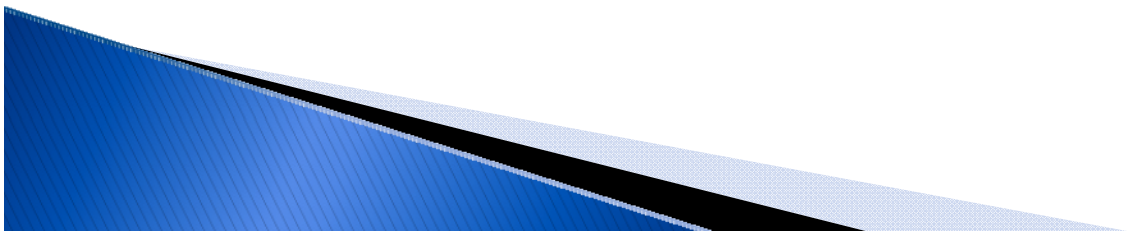
- ▶ EPA proposed to the court the following schedule:
  - complete those reviews in six months for the nonhazardous coal ash rules;
  - one year for the toxicity characteristic and TCLP; and
  - then would provide a schedule for any rule revisions the Agency thinks are necessary upon completion



# Litigation (EPA Brief)

## ▶ Concerns

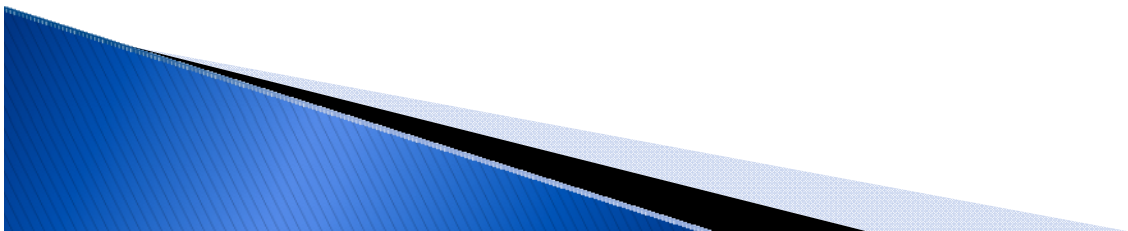
- Any revisions to the toxicity characteristic and TCLP would likely have broad implications—far beyond the management of coal ash.
- Further, Section 2002(b) of RCRA could become a common tool for industry, environmental groups and others to compel EPA to review any RCRA rule.



# Litigation (USWAG Brief)

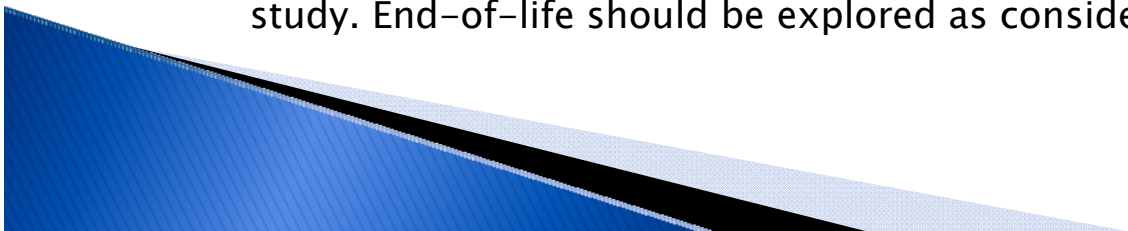
## ▶ USWAG's Position

- As a threshold matter, all of Plaintiffs' claims are time-barred by the six-year statute of limitations applicable to civil actions commenced against the United States. 28 U.S.C. § 2401(a).
- Argues that Section 2002(b) is not applicable and coal ash as it was subject to the Bevil Amendment.
- The Completion of the Bevil Amendment Process the Bevil Amendment is a permanent bar from regulating coal ash as a hazardous waste.
- EPA mandate authority to review and revise regulations is under Section 1008 of RCRA not Section 2002. is a discretionary authority not a non-discretionary authority
- In regard to TCLP, this requirement is not found in Section 2002(b), whereas Section 3001(b)(1) allows EPA to carry out its review of these rules at its discretion and not subject to a 30year mandatory review.
- If Court does one to grant some aspect of the Plaintiff's Motion for Summary Judgment, it should simply establish a schedule for compliance with RCRA Section 2002(b) rather than grant the broader substantive relief sought by Plaintiffs.



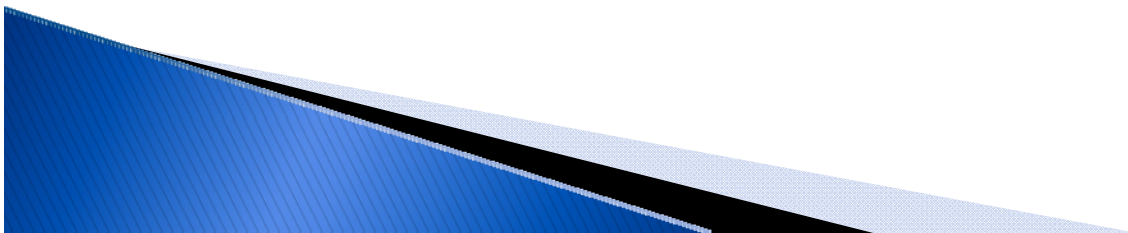
# ASTSWMO

- ▶ Completed a Survey and published the results entitled: “Beneficial Use of Coal Combustion Residuals Survey Report” dated September 2012.
- ▶ Recommendations
  - The BUTF sought information on how States determine the range of values for the classification and tiered approach considered for beneficial use of CCRs. The question should be asked: is material allowed to be used for one type of beneficial use based on higher values such as use in concrete versus material placed on the ground (un-encapsulated uses).
  - Some of the questions were open ended and, as previously mentioned, the terms “classification system” and “tiered approach” were not defined in the survey, which left them open to interpretation by individual respondents. Future surveys should better define terms to provide for a common interpretation. In addition, rather than open ended questions, future surveys should incorporate multiple choices. It is suggested that this particular section be reevaluated as part of a smaller specific survey.
  - Some States reported that there are either no set values for CCRs used for beneficial use or CCRs are exempt from solid waste definition. This is one area of questioning about which the BUTF would recommend additional follow-up.
  - Large scale fill beneficial use reviews on a case-by-case basis should be further explored. States may not have specific numeric restrictions in their law or statute (such as contaminant concentration, lateral extent, etc.), but they have the ability to regulate each project on a case-by-case basis. The statistics regarding end-of-life monitoring suggest that future uses of the material may be an area needing more study. End-of-life should be explored as consideration for beneficial use reviews.



# ASTSWMO

- ▶ *To Summarize* – The report underscores the need for clarification of certain aspects of EPA's proposed regulations regarding the management of coal ash; especially, the concepts of encapsulated and non-encapsulated use of ash.



# Summary

- ▶ Support the legislative effort to regulate coal ash under Subtitle D of RCRA
- ▶ Monitor and Pay attention to the Litigation especially the TCLP issue as it will have broader implications than an applicability to coal ash
- ▶ Sometime in 2013, EPA will be finalizing its rules regulating the management of coal ash (unless there is legislation passed and signed into law).
- ▶ Monitor and be prepared to Comment on OSM proposed rule as it may be in direct conflict with EPA regulations.





# SUMMARY

- ▶ OSM may suggest a different leaching (TLCP Type Testing than EPA)
- ▶ If this occurs, the TLCP type issue on what is an adequate testing protocol will permeate both EPA and OSM comments and could have potential implications beyond its applicability to coal ash.

