November 7, 2002

The Honorable Marianne Horinko
Assistant Administrator for Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Mail Code 5101
USEPA Headquarters, Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, D.C. 20460

Re: EPA's Proposed Issuance of Guidance Concerning the Disposal of Power Plant Waste in Mines

Dear Ms. Horinko:

It has come to our attention that EPA is considering issuing guidance in lieu of promulgating rules under subtitle D of the Resource Conservation and Recovery Act (RCRA) for the disposal of power plant waste in mines. The issuance of guidance in this context is wholly inappropriate and reflects a flagrant disregard for the potential harm this burgeoning practice will cause to human health and the environment if effective federal regulations are not mandated.

In a letter to you dated January 7, 2002, we expressed our concerns that power plant waste (PPW) disposal in mines was not adequately addressed by the Surface Mining Control and Reclamation Act (SMCRA) and must be regulated under RCRA. We argued that only RCRA has the authority to address the problems presented by the disposal of PPW. Our letter pointed out the numerous deficiencies of SMCRA and the critical need for the application of minimum RCRA safeguards such as restrictions on waste placement in groundwater, long-term groundwater monitoring, financial assurance, corrective action, post-closure care, and post-closure use restrictions.

Following our protest, EPA last year asserted jurisdiction under RCRA for PPW mine disposal. But now the Agency is considering issuing guidance to state regulators concerning the disposal of PPW in mines instead of promulgating mandatory subtitle D regulations, according to recent statements of Thea McManus, head of the EPA's Municipal and Industrial Solid Waste Division at a meeting of the Association of State and Territorial Solid Waste Management Officials. As we have repeatedly stated, voluntary guidance would have little effect in states that have already determined that their management of PPW is adequate under existing SMCRA programs. Concerning the adequacy of state management of PPW, we have clear evidence to the contrary, including evidence of significant environmental damage at PPW minefill sites.

This change of heart by EPA appears to be the result of strong and effective pressure applied by the Interstate Mining Compact Commission (IMCC). We are aware that for the past 18 months, EPA has been meeting with the IMCC for the sole purpose of discussing PPW minefill regulation. The consistent view of the IMCC has been that no further federal regulation of PPW minefill is needed and that PPW poses little or no risk to the environment. They argue that

existing SMCRA authority, as currently applied by the states, is sufficient to deal with this "beneficial use" of "coal combustion by-products."

Unfortunately, EPA has allowed no environmental stakeholders to attend the multi-day proceedings jointly held by EPA and IMCC at four separate sessions on May 15-16, 2001, November 14-15, 2001, April 15-16, 2002 and in October, 2002, despite requests to open these meetings to other interest groups. These closed sessions are in likely violation of the Federal Advisory Committee Act (FACA), which requires that such meetings be open to the public.

The purpose of EPA's meetings with the IMCC is to obtain advice and recommendations concerning the practice of PPW minefill. The fact that these meetings (1) established a preferred source of advice; (2) required participation by federal officials; and (3) solicited the consensus of the IMCC triggers significant concerns under FACA. If the IMCC is considered an "advisory committee" under FACA, the exclusion of the public from even the observation of these meetings is a violation of federal law. In addition, the total lack of balance in the composition of this "advisory committee" would also be an obvious violation.

Whether or not the authority of FACA can be invoked, certainly the spirit of the statute has been violated. EPA's series of meetings with one interest group, the IMCC, to the exclusion of any meetings with environmental stakeholders and community representatives where the minefilling occurs has not only threatened to skew the rulemaking to favour the interest group with which it is consulting, *it has apparently even dissolved the rulemaking itself.*

The failure of EPA to regulate PPW minefill is of great import. In 2000, EPA estimated that nine million tons of PPW was dumped in mines. This amount is growing annually. With the imposition of more stringent CAA regulations rendering some PPW unsuitable for recycling and the opening of new minemouth FBC plants, the amount of PPW placed in mines is likely to increase substantially. Dumping of PPW in mines is particularly problematic because there are few restrictions on its placement in many states. In fact, in our review of minefills in every coal basin in the U.S., we have yet to find a single PPW minefill regulated by a permit that requires long-term groundwater monitoring. Furthermore, out of dozens of permits examined, we have found only a handful that set any levels of contamination that will trigger legally enforceable corrective actions by mine operators. Given the slow resaturation time of many groundwater systems in coal mines and the dumping of PPW directly into groundwater tables in these mines, these deficiencies in groundwater monitoring programs are particularly egregious and must be corrected in RCRA subtitle D rules. Data from the few cases where credible groundwater monitoring has been undertaken around minefills clearly shows significant plumes of contamination from total dissolved solids, boron, sulfates, chlorides, manganese, iron, selenium, arsenic, nickel or other contaminants downgradient of PPW minefills in Pennsylvania, Indiana, Illinois, North Dakota and New Mexico. EPA must impose legally enforceable safeguards on the national level before minefilling becomes more widespread.

The issuance of a guidance document in lieu of mandatory regulations under Subtitle D would be ineffective. Many states, such as Kentucky, have clauses that were incorporated into state law (often at the behest of coal industry lobbyists) that preclude the state administrative agencies from adopting regulations or standards "more stringent than" the corresponding federal

regulations under the Clean Air Act, Clean Water Act, Surface Mining Control and Reclamation Act and Resource Conservation and Recovery Act. Many states also have laws which prohibit the agencies from imposing substantive requirements by policy. (See, for example, Ky. Rev. Stat. Chapter 13B.) The cumulative effect of these two prohibitions is that, in the absence of federal mandatory regulations on permitting, design standards and performance requirements for management of these wastes, states will not be able to incorporate any "policy" or to extend any further the existing reach of regulation concerning such wastes. IMCC, it should be noted, is keenly aware of these constraints. For these reasons, adoption of mandatory minimum standards is absolutely necessary.

Last year, you expressed an interest in meeting with environmental and community groups to discuss power plant waste issues. This meeting has yet to be scheduled. We had hoped that this reflected a genuine intention to pursue a fair and inclusive decision-making process. As we said last January, EPA must examine the risks posed by PPW in an unbiased way. Given the damage wrought by PPW when improperly managed and disposed, there is a great deal at stake. The importance of EPA's upcoming decisions regarding PPW minefill to the undersigned groups cannot be underestimated.

Thank you for this opportunity to comment. We hope that this letter will initiate a new working relationship, and we look forward to your response. Correspondence can be sent electronically to Lisa Evans, Clean Air Task Force at Lisevans@aol.com or by mail to Clean Air Task Force, c/o Grants Management Associates, 77 Summer St., Boston, MA 02110.

Sincerely,

Tom Anderson, Executive Director,
Save the Dunes Council, Inc.
Beverly Shores, Indiana

Myron Arnowitt, Western PA Director
Clean Water Action
Pittsburgh, Pennsylvania

John Blair, Director
Valley Watch, Inc.
Evansville, Indiana

Doug Bogen, Program Director
NH Clean Water Action
Portsmouth, New Hampshire

Beverly Braverman, Executive Director
Mountain States Watershed Association
Melcroft, Pennsylvania

Diane Brown, Director
Illinois Public Interest Research Group
Chicago, Illinois

Jane Bright, President
HealthLink, Inc.
Salem, Massachusetts

Neil Carman, Ph.D.
Sierra Club

Doyle Coakley
Citizens Coal Council
Denver, Colorado

Wyona S. Coleman, Chair, Mining Committee
Pennsylvania Chapter Sierra Club
Washington, Pennsylvania

Tracy Davids, Executive Director
Southern Appalachian Biodiversity Project
Asheville, North Carolina

Felicia Davis, Executive Director
Benjamin E. Mays Center
Jonesboro, Georgia

Tom Dureka, President
Bastrop County Environmental Network
Bastrop, Texas

Lisa Evans, Project Director, Power Plant Waste Project
Clean Air Task Force
Boston, Massachusetts

Mimi Filippelli, Administrative Director
Tri-State Citizens Mining Network
Washington, Pennsylvania

Michael Fiorentino, Director
Clean Air Council
Harrisburg, Pennsylvania

Tom FitzGerald, Executive Director
Kentucky Resources Committee
Frankfort, Kentucky

Jeff Gleason
Deputy Director
Southern Environmental Law Center
Charlottesville, Virginia

Karen Hadden, Deputy Director
Sustainable Energy and Economic Development (SEED) Coalition
Austin, Texas

Amy Hennen, Regional Coordinator, Midwest Power Plant Campaign
Izaak Walton League of American, Inc.
Gaithersburg, Maryland

Jayme Hill, Executive Director
Alabama Environmental Council
Birmingham, Alabama

Laura Huth, Executive Director and Founder
Illinois Student Environmental Network
Urbana, Illinois

B.J. Lower, President
Save Our Bays and Canals, Inc.
Tampa, Florida

Rita Kilpatrick, Executive Director
Georgians for Clean Energy
Atlanta, Georgia

Marc Looze, Air Pollution Campaign Director
Wisconsin's Environmental Decade
Madison, Wisconsin

Cindy Luppi, Northeast Coordinator
Clean Water Action Alliance
Boston, Massachusetts

Lisa Graves Marcucci, President
Jefferson Action Group, Inc.
Jefferson Hills, Pennsylvania

Diana S. McKeown, Energy Program Coordinator
Clean Water Action Alliance of Minnesota
Minneapolis, Minnesota

Jeremy P. Muller, Executive Director
West Virginia Rivers Coalition
Elkins, West Virginia

Janice Nease, Executive Director
Coal River Mountain Watch
Whitesville, West Virginia

Jan Nona
People In Need of Environmental Safety (PINES)
Town of Pines, Indiana

Mary Ellen O'Farrell, President
West Virginia Environmental Council
Charleston, West Virginia

Carol Lee Rawn
Conservation Law Foundation
Boston, Massachusetts

Bernard Reilly, President
Dickenson County Citizens Committee
Clinchco Virginia

Tiffany Schauer, Executive Director
Our Children's Earth
San Francisco, California

Robin Schneider
Texas Campaign for the Environment
Austin Texas

Jan Schlichtmann, President
Wenham Lake Watershed Association
Beverly, Massachusetts

Patricio Silva, Midwest Coordinator
Natural Resources Defense Council
Washington, D.C.

Steven Smith, Executive Director
Southern Alliance for Clean Energy
Knoxville, Tennessee

Rev. Fred Taylor, Environmental Chair
Georgia Coalition for the Peoples' Agenda
Atlanta, Georgia

John Taylor (Advisor)
Illai Kenny (Middle School)
Anthony Dorsey (High School)
Georgia Kids Against Pollution
Jonesboro, Georgia

Lynn Thorp, National Campaign Coordinator
Clean Water Action/Clean Water Fund
Washington, DC

Mark Trechock, Staff Director
Dakota Resource Council
Dickinson, North Dakota

Brian P. Urbaszewski, Director of Environmental Health Programs
American Lung Association of Metropolitan Chicago
Chicago, Illinois

Kurt Waltzer, Executive Director
Ohio Environmental Council
Columbus, Ohio

Nathan Willcox, Energy & Clean Air Associate
PennEnvironment
Philadelphia, Pennsylvania

Jane Williams, Director
California Communities Against Toxics
Rosamond, California

Matthew L. Wilson, Director
Toxics Action Center
Boston, Massachusetts

Billie Woods, President
Neighbor for Neighbor
Elgin, Texas

Brian Wright, Coal Policy Associate
Hoosier Environmental Council
Indianapolis, Indiana

Frank Young, President
WV Highlands Conservancy
Ripley, West Virginia

Susan Zingle, Executive Director
Lake County Conservation Alliance
Grayslake, Illinois