



## Environmental Newsletter

May 11, 2010

### **EPA Announces Plan to Regulate Coal Ash** *Agency's proposal defers decision on whether to treat coal ash slurry as a hazardous waste*

By Loren R. Dunn

In the early morning of December 22, 2008, the problems of coal ash management burst on the political scene.

The earthen wall of a coal ash pond collapsed at the Tennessee Valley Authority's Kingston Power Plant. The catastrophe released a flood of 5.4 million cubic yards of coal slurry waste. The flood wiped out houses, filled the nearby Emory and Clinch Rivers, and covered nearly a one-half square mile of land up to 10 feet deep with sludge. The sludge contained a variety of toxic materials, including mercury, cadmium, arsenic, and other trace metals.

Within weeks, the regulatory process swung into action. The U.S. Senate held hearings on January 8, 2009. In her confirmation testimony on January 14, EPA director-nominee Lisa Jackson promised early regulatory action to address coal ash disposal sites.

The incident also unleashed a flood of litigation. Local landowners filed a \$165 million liability suit only 8 days after the accident. A number of other cases were filed, and subsequently consolidated into a single action in Federal District Court. That case is still ongoing.

TVA, the responsible party for the site, signed a Consent Order providing for performance of the needed response activities. EPA is handling oversight of the response action under its CERCLA authorities, and has closed a 6 mile stretch of the Emory River for nearly a year. Hydraulic dredging equipment has been brought in to try to remove the sludge residuals.

EPA's regulatory actions have been swift as well. As recently as 2000, EPA had ruled out federal regulations on coal ash slurry as a hazardous waste. Controls have largely been left to the states, resulting in a system of regulation that is inconsistent and, in some places, functionally nonexistent.

But in March 2009, EPA sent out information requests under CERCLA to develop an inventory of coal waste slurry impoundments, including those deemed "high risk." EPA also promised new regulatory action by December 2009. Though months delayed, that regulatory action has finally come - - sort of.

EPA has long debated whether to regulate coal ash slurry as a hazardous waste. And, it still has not decided.

On May 4, EPA proposed **new regulations** – in two flavors. Under the first option, EPA would regulate coal ash as “special waste” under RCRA C, and subject it to regulatory treatment similar to that applicable at hazardous waste facilities. EPA’s proposed RCRA C regulations would be stringent enough essentially to eliminate coal ash slurry impoundments, and would force coal ash residuals which are not recycled into products to be disposed in RCRA C landfills. The applicable regulations would require costly RCRA C permitting and impose requirements regarding slurry de-watering, waste handling, disposal facility liners, leachate collection systems, groundwater monitoring, closure and post-closure care and monitoring requirements, and financial assurances.

Under EPA’s second alternative, EPA would treat coal ash as a Subtitle D waste. EPA would prescribe performance standards, but leave the specifics of regulation to the states to develop and apply. EPA permits would not be required, and EPA would not have enforcement authority over the facilities. But, if adopted, EPA’s performance standards would likely be sufficiently stringent to force the closure of most existing impoundments.

EPA is taking comments on these proposals until the beginning of August. Whichever option EPA selects, the future for existing coal ash ponds is dim. And more costly waste management systems are on the way.

If you have any questions about this Newsletter, please contact the author listed above or the Riddell attorney with whom you normally consult.

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