

Legal Lookout: EPA Responds to Coal Ash Release

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Once again, it took a major catastrophe to wake up industry and regulators to a problem that should have been addressed long ago.

Dec. 22, 2008, was a nightmare for federal and state regulators, electrical utilities, and most particularly the residents of Kingston, Tenn. On this day, approximately 5.4 million cubic yards (or 1.1 billion gallons) of coal ash from the Tennessee Valley Authority (TVA) plant collection pond near Knoxville flooded some 300 acres of land, damaging property, polluting waterways, and killing fish. This article describes the efforts the agency has initiated to prevent similar incidents.

Background

Coal ash has been accumulating for many years at the 440 electricity plants located in the U.S. Coal ash is the material that is left over after coal-fired power plants generate electricity. Ash can be stored wet or dry.

The coal ash accumulating for over 50 years at the TVA's Kingston Fossil Plant covered more than 100 acres and rose to over 65 feet above ground level. The TVA plant used wet storage, and on that fateful day, an earthen dam burst, spilling the ash over 300 acres of land. While such incidents are not common (four similar events have occurred over the past five decades), they are spectacular, costly and certainly controversial.

Coal ash is not regulated as a hazardous waste under the Resource Conservation and Recovery Act (RCRA). Congress asked EPA in 1980 whether it should be, and in 1993, the agency said no. In 2000, EPA proposed to regulate coal ash, but not as a hazardous waste, and proposed stricter management standards. The cost of the proposed rule to the electric utility industry inspired fierce opposition, and the agency relented. In 2006, a National Research Council study found that coal ash contained metals and other constituents in quantities that could pose a health risk if improperly managed. Still, however, additional regulatory controls were not forthcoming, until now.

EPA's new plan to prevent coal ash releases

Not surprisingly, the Kingston incident ignited renewed calls for stricter regulation. In January, Senate Committee on Environment and Public Works Chair, Barbara Boxer, D-Calif., convened a hearing to explore the scope of the problem. Boxer noted that the issue is not whether the material is considered hazardous waste or not, but rather what measures are or should be in place to control the material and prevent releases. The Senator directed EPA Administrator Lisa P. Jackson to look into the matter by issuing Senate Resolution 64.

On March 9, Jackson responded by announcing EPA's new program to address the TVA release and prevent future ones. Under the plan, EPA will gather and assess the information from electric utilities and develop additional regulatory measures to prevent future mishaps.

On the data side, EPA requested on March 9, 2009, information from electric utilities that have surface impoundments or similar land units to provide information about the structural integrity of the units. EPA also will compel repairs, where needed, to ensure future mishaps

do not occur. The request for information was made under Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which authorizes the agency to impose penalties for failure to respond adequately or timely to the request for information. Among other questions, EPA asks when was the last time a state or federal regulatory official inspected the coal ash management unit, when did the company last assess or evaluate the safety of the management unit, and does the company have a Professional Engineer's certification for the safety of the unit. All responses will be made available to the public.

EPA intends to issue a proposed rule later this year outlining new regulations to address the management of coal combustion residuals. Presumably, the information contained in the CERCLA Section 104 letters will be used to develop the new regulations. PE

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