

Coal Ash: The New Toxic Tort?



Disaster Strikes

Three days before Christmas in 2008, a dike ruptured at the Tennessee Valley Authority's coal-fired plant at the confluence of the Clinch and Emory Rivers in Kingston, TN. More than 1 billion gallons of coal ash streamed from the ruptured impoundment, flooding more than 300 acres, damaging homes and property and polluting the two rivers. Clean-up costs exceeded \$230 million in the first year after the spill and may ultimately reach \$825 million.

In the aftermath of the Kingston disaster, EPA announced that it would reconsider regulating the handling, disposal and reuse of coal ash and other products derived from coal combustion. If EPA determines that coal residuals should be regulated as "hazardous wastes," the new classification could devastate the coal-fired power industry and construction, building materials and agriculture sectors that rely heavily on coal ash.

Coal combustion residuals are widely used in construction, transportation, and agriculture. Although coal residuals contain arsenic and other metals considered toxic, coal ash is a component of cement and concrete that is used in buildings, bridges, dams, highways, roadbeds, highway embankments. The ash is increasingly used as an alternative to Portland cement in concrete. Coal ash is often used as a sculpting or fill material in site grading. Coal residuals are also often used as gypsum component in drywall. Coal ash is commonly used in agriculture to amend and stabilize crop soil.

If coal residuals become “hazardous wastes,” the exposures to industries that utilize, generate or rely on coal products may include:

- For contractors, subcontractors, and design professionals, liability for utilizing and/or bringing a hazardous material onto a job site in the form of building materials (i.e. dry wall, fill material, concrete);
- For owners of buildings with products containing coal products, such as gypsum in dry wall, property damage and personal injury liability for exposing occupants to a hazardous material;
- For owners and operators of golf courses where coal ash has been used as a fill material, liability for owning or operating a hazardous waste dump site, including clean-up and property damage claims;
- For farmers using coal ash in soil, liability for clean-up claims for impact to the environment caused and a decreased demand for products grown using a “hazardous” material; and
- For coal-powered utilities, regulatory and third party liability for clean-up claims related to the release of coal into the environment.

If EPA designates coal residuals as a “hazardous waste,” the agency will reverse decades of its own policy. Following a 1980 amendment to RCRA and again as recently as 2000, EPA has determined that coal products should not be regulated as “hazardous wastes.” In fact, prior to the Kingston disaster, EPA had identified recycling and reuse of coal combustion products as a “national priority.”

What are coal residuals?

Coal-fired power plants generate coal residuals such as fly ash, bottom ash, boiler slag, flue gas desulfurization (“FGD”) gypsum, and other FGD materials captured by emissions controls. As air regulation requires more stringent emissions controls and less coal is released into the air, more coal residuals are produced. The utilities generate more than 130 million tons of coal residuals each year.

Does your business rely on residuals?

Forty-three percent of coal ash generated in the United States is recycled rather than disposed, according to the American Coal Ash Association. Coal residuals are used in drywall, as fill materials in site grading and landscaping, as a concrete component, and in road bases. The availability, lower cost, and relative “clean” nature of coal products has made the products prevalent across the construction, building materials, landscaping and transportation industries. EPA, in partnership with the power, transportation and construction industries, leads the Coal Combustion Products Partnership. The Partnership promotes the recycling and reuse of coal ash and other residuals.

What is happening with EPA?

Coal ash and other coal combustion products are currently regulated under the Resource Conservation and Recovery Act, or RCRA, at the federal level. Coal combustion

products are classified as “solid wastes” under RCRA, and regulation of solid wastes is largely left to individual states.

EPA’s proposed new regulations were due in December 2009, but the agency postponed releasing the new rules, citing the need for more time for study. Industry groups have suggested a compromise “hybrid” regulation, where coal products slated for beneficial reuse will not be considered “hazardous,” but coal residuals destined for disposal would be considered hazardous.

Since the Kingston spill, EPA has launched a massive investigation of coal-fired power plants and has released “grades” for the structural integrity of hundreds of coal ash impoundments at utility plants across the country. The depth and breadth of EPA’s investigation has rocked the power industry.

Utilities enjoy between \$5 billion and \$10 billion in revenues each year from the sell of coal ash, according to the Electric Power Research Institute. The utility industry estimates that a determination to regulate coal products as “hazardous” would force as many as 200 power plants across the nation to close.

If EPA tightens discharge limits and makes enforcement against the utilities a national priority, the number of plant closures will increase. New regulations could outlaw impoundments, require more expensive liners, or mandate more frequent testing of soil and groundwater to detect leaks from existing impoundments

In addition to revisiting coal residuals, EPA is evaluating new water pollution standards to limit discharges from coal-fired power plants. In the fall-out from the Kingston spill, a coalition of environmental groups is pressuring EPA to make regulation of coal-fueled power plants an enforcement priority, including investigating groundwater and surface water quality violations resulting from coal waste contamination, targeting coal ash impoundments for clean-up, and retiring or repowering plants with failing impoundments.

What are the risks?

If EPA designates coal residuals as “hazardous,” then builders, contractors, subcontractors and distributors who handled, delivered or installed materials containing coal residuals will face an increased likelihood of a lawsuit from a plaintiff claiming exposure to a harmful material. Since the Kingston spill, homeowners living near a Virginia golf course which contains coal ash as fill have brought a \$1 billion lawsuit alleging the golf course is a toxic waste dump. Utilities may face clean-up, bodily injury and property damage claims arising from leaking or failing impoundments.

The multi-million dollar property damage and environmental claims from the Kingston spill were immediately apparent – slurry-filled rivers and marshes, contaminated farms and residences. The bodily injury claims arising from residents exposed to the contamination is a lingering exposure with damages that are impossible to quantify.

Synapse Can Help

Synapse offers a variety of services that can assist clients in preparing for and managing risks associated with the uncertain future of coal products. For more information on how Synapse can help your business assess the risks associated with coal products and insurance coverage that may be available for coal products, contact us at:

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