Coal Ash Regulatory and Legislative Update

MCILVAINE WEBINAR
FLY ASH POND AND WASTEWATER TREATMENT ISSUES

JOHN N. WARD
MAY 3, 2012

wardo@wardo.com
Coal Ash Regulatory History

- **1980 Bevill Amendment to Resource Conservation and Recovery Act**
  - Instructed EPA to "conduct a detailed and comprehensive study and submit a report" to Congress on the "adverse effects on human health and the environment, if any, of the disposal and utilization" of coal ash

- **1988 and 1999 EPA Reports to Congress**
  - Recommended coal ash should not be regulated as hazardous waste

- **1993 EPA Regulatory Determination**
  - Found regulation as a hazardous waste “unwarranted”

- **2000 EPA Final Regulatory Determination**
  - Concluded coal ash materials “do not warrant regulation [as hazardous waste] ” and that “the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes”

*Between 2000 and 2008, beneficial use rates increased from 29.7 percent to 44.5 percent*
Kingston power plant impoundment failure released 5.4 million cubic yards (approx. 1 billion gallons) of ash slurry.

Heavy media and political attention

Incoming EPA Administrator Lisa Jackson announces plans to propose new coal ash disposal regulations by end of 2009.
The Environmental Protection Agency has proposed two major options for future regulation:

- Subtitle C *when disposed*
- Subtitle D *when disposed* (D and D Prime options)

**Proposed landfill construction standards are essentially the same under both proposals**

- Primary justification for Subtitle C proposal is to enable federal enforcement authority

**Beneficial use of coal ash exempt from regulation under both scenarios**

- However, EPA sought comments on beneficial uses that imply further rulemaking activity may be forthcoming
- Uses such as structural fills and embankments more likely to see increased regulatory scrutiny
- Beneficial use rates have already begun to drop because of regulatory uncertainty and threat of “hazardous waste” stigma association with potential Subtitle C regulation
Where the Political Science Stands

<table>
<thead>
<tr>
<th>Favor Subtitle C</th>
<th>Oppose Subtitle C</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Anti-Coal Environmental NGOs</td>
<td>• Everybody Else</td>
</tr>
<tr>
<td>○ EarthJustice</td>
<td>○ Over Half of Congress</td>
</tr>
<tr>
<td>○ Environmental Integrity Project</td>
<td>○ Federal Agencies</td>
</tr>
<tr>
<td>○ Sierra Club</td>
<td>○ State Elected Officials</td>
</tr>
<tr>
<td>○ Public Employees for Environmental Responsibility</td>
<td>○ State Agencies</td>
</tr>
<tr>
<td>○ Others</td>
<td>○ Utilities</td>
</tr>
<tr>
<td>• Companies manufacturing products that compete with coal ash</td>
<td>○ Ash Marketers and Users</td>
</tr>
<tr>
<td></td>
<td>○ Materials Specifiers and Standards Writers</td>
</tr>
<tr>
<td></td>
<td>○ Labor Unions</td>
</tr>
</tbody>
</table>
2011 = Congress Takes the Spotlight

- EPA in a box
  - Can’t go D because of allegiance to intractable ENGOs and desire for direct federal enforcement
  - Can’t go C because of opposition from rest of Western Hemisphere (and international coal ash organizations!)
  - No legislative or judicial deadline
  - 450,000 comments to read provides a handy excuse to do nothing

- EPA continues to show no signs of completing disposal rulemaking before 2013 at earliest
  - Expected Notice of Data Availability regarding information gathered in Steam Effluent Generating Guidelines rulemaking could further delay process

- Meanwhile, the political environment evolves...
Congressional Coal Ash Action

- HR 2273 – the “Coal Residuals Reuse and Management Act” – passed U.S. House of Representatives October 14, 2011, with 267-144 bipartisan vote
  - Would establish a non-hazardous coal ash disposal regulatory program led by states, patterned after municipal solid waste regulations
  - Minimum federal standards would be enacted and federal EPA would be allowed to step in if states do not comply
- Companion bill – S 1751 – filed in Senate October 20, 2011, by 10 bipartisan co-sponsors
- Ongoing Senate negotiations focused on amendments to attract 10-12 additional Democrat votes nearing completion
- Coal ash provisions now included in a conference committee negotiation on HR 4348, the “Surface Transportation Extension Act of 2012, Part II.”
- 2013 legislative prospects bright if Republicans win control of the U.S. Senate
New Issue: EPA Risk Evaluations

- Public Employees for Environmental Responsibility activity leading to EPA Office of Inspector General report
  - Concluded EPA should evaluate risks before endorsing beneficial use
- EPA commenced program to conduct beneficial use risk “evaluations” without notification to or involvement by stakeholders
- Deadlines now in play
  - April – Methodology (and review of?) encapsulated uses
  - Fall 2012 – Large scale structural fill guidance
  - 2nd Quarter 2014 – Methodology unencapsulated uses
- EPA continues work on methodologies without public input and is at least one month behind schedule
New Issue: Lawsuits Against EPA

- Twelve environmental groups on April 5, 2012, sued EPA to force a schedule for completing coal ash regulations
  - Novel legal argument that EPA has failed RCRA requirement to evaluate regulations *every three years*
  - Seeking review of Subtitle C exemption for coal ash, Subtitle D open dump provisions, and applicability of Toxic Characteristic Leaching Procedure

- Two coal ash marketers – Headwaters Resources and Boral Material Technologies – have also sued seeking to represent unique interests of recyclers
Minefilling Regulation Development

- Rulemaking under Office of Surface Mining
- Announced spring 2011 that it would proceed to develop draft regulation by April 2012
- Site tours and general briefings conducted late summer / early fall 2011
- No apparent activity recently and agency is refusing requests to meet
- Potential draft rule release now late 2012 or early 2013?
Helpful Stuff You Can Look Up

- American Coal Ash Association
  - [http://coalashfacts.org/](http://coalashfacts.org/)
- Citizens for Recycling First
- Utility Solid Waste Activities Group
  - [http://www.uswag.org/ccbc.htm](http://www.uswag.org/ccbc.htm)
- Veritas Jobs Impact Study
- ARTBA Roads & Bridges Impact Study
- EPRI Technical Reports
  - [www.epri.com](http://www.epri.com)
    - Comparison of Coal Combustion Products to Other Common Materials – Chemical Characteristics. Technical Report 1020556
About John Ward

- More than 20 years energy industry experience
  - Former Vice President, Marketing & Government Affairs, Headwaters Inc.
  - Former Senior Vice President, Communications & Marketing, EnergySolutions Inc.
  - Former Director and Past President, American Coal Council
  - Former Member, National Coal Council (as appointed by U.S. Secretary of Energy)
  - Director and Government Relations Committee Chairman, American Coal Ash Association
  - Chairman, Citizens for Recycling First [www.recyclingfirst.org](http://www.recyclingfirst.org)

John N. Ward
John Ward Inc.
801-560-9801
wardo@wardo.com