

# Coal Ash Regulatory and Legislative Update



**MCILVAINE WEBINAR  
FLY ASH POND AND WASTEWATER TREATMENT ISSUES**

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MAY 3, 2012**

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# Coal Ash Regulatory History

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- 1980 Beville 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*

# December 22, 2008

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- 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



# EPA's Current Proposal

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- 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

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## Favor Subtitle C

- **Anti-Coal Environmental NGOs**
  - EarthJustice
  - Environmental Integrity Project
  - Sierra Club
  - Public Employees for Environmental Responsibility
  - Others
- **Companies manufacturing products that compete with coal ash**

## Oppose Subtitle C

- **Everybody Else**
  - Over Half of Congress
  - Federal Agencies
  - State Elected Officials
  - State Agencies
  - Utilities
  - Ash Marketers and Users
  - Materials Specifiers and Standards Writers
  - Labor Unions

# 2011 = Congress Takes the Spotlight

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- 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
  - 2<sup>nd</sup> 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://coalahfacts.org/>
- Citizens for Recycling First
  - <http://www.recyclingfirst.org/>
- Utility Solid Waste Activities Group
  - <http://www.uswag.org/ccbc.htm>
- Veritas Jobs Impact Study
  - [http://www.uswag.org/pdf/2011/FinalCCRNetJobImpacts\\_June2011.pdf](http://www.uswag.org/pdf/2011/FinalCCRNetJobImpacts_June2011.pdf)
- ARTBA Roads & Bridges Impact Study
  - <http://www.artba.org/mediafiles/study2011flyash.pdf>
- EPRI Technical Reports
  - [www.epri.com](http://www.epri.com)
    - ✦ Comparison of Coal Combustion Products to Other Common Materials – Chemical Characteristics. Technical Report 1020556
    - ✦ Comparison of Risks for Leachate from Coal Combustion Product Landfills and Impoundments with Risks for Leachate from Subtitle D Municipal Solid Waste Landfill Facilities. Technical Report 1020555

# About John Ward



- **More than 20 years energy industry experience**
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  - 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
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