



Liability In Coal Ash Management

By: Joshua R. More

Overview

- Statutory
 - Resource Conservation Recovery Act (RCRA)
 - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Common Law
 - Claims arising from physical damage
 - Claims arising from resource contamination
- Mitigating Risks
 - Managing disposal
 - Reuse programs

RCRA v. CERCLA

- Distinction Between RCRA and CERCLA
 - RCRA: Coal ash has historically been exempt from regulatory requirements -- Bevel Amendment
 - However, still considered a solid waste
 - Not exempt from endangerment provisions (citizen suits and government enforcement actions)
 - Elements:
 - » Any person;
 - » Who is or has contributed to;
 - » Handling, storage, treatment, transportation, or disposal;
 - » Solid or hazardous waste;
 - » Which may present an imminent and substantial endangerment to health or the environment
- NO ACTUAL HARM – JUST A THREAT OF HARM*

RCRA

- Endangerment Provision
 - Cannot recover response costs
 - Court imposed injunction requiring the party to take steps to address the alleged danger
 - Prevailing party is often entitled to costs
- Some have suggested that EPA can manage risks associated with ash management through the endangerment provision

RCRA

- New Regulation:
 - Potential for increased disposal, transportation, and handling costs.
 - Be prepared to assess whether steps can be taken to avoid applicability.
 - RCRA often prospective
 - Existing v. Closed facilities

RCRA

- Wet ash impoundments will likely be subject to additional requirements.
 - Leachate collection
 - Groundwater collection trench
 - Cap and dewatering upon closure
 - Groundwater monitoring

CERCLA

- CERCLA: Liability without fault and regardless of regulatory status of coal ash
- Can be ordered to clean up site or reimburse for the cost to cleanup
 - There are two types of cleanups:
 - *Removals* -- short term measures taken to minimize the dangers to human health and the environment on an emergency basis, whereas
 - *Remedial* -- are long-term efforts that attempt to rid the site of dangers on a permanent basis

CERCLA

- Imposes liability on 4 classes (PRPs)
 - Current owners or operators of facility;
 - Former owners or operators of facility at time of disposal;
 - Arrangers for disposal; and
 - Transporters
- Liability is often joint and several
 - Regardless of contribution, a PRP can be found liable for the entire cleanup!!!

CERCLA

- Potential Defense
 - Useful Product Defense
 - Denial that the party “arranged for” the disposal or treatment of a hazardous substance.
 - Asserts that the substance was a product and not a waste.
- Courts generally focus on whether a transaction was a legitimate sale or an arrangement for disposal

CERCLA

Some things to consider when contracting for beneficial use projects:

- Refer to the ash as a product and avoid language and a contractual structure that could be misconstrued as labeling the ash as a waste or the transaction as an agreement for disposal
- When appropriate, require payment from the party using the ash
- Maintain records demonstrating that the sale is of a useful product and how it impacts the bottom line
- Establish that a market exists for the ash
- Describe in the agreement the beneficial use of the ash and a description of how the ash will be used

Common Law

- Claims arising from physical damage
 - Berm/Dam collapsing
- Claims arising from resource contamination
 - Groundwater contamination
 - Surface water contamination

Common Law

- Tort theories
 - Public and Private nuisance
 - disturbs the reasonable use property;
 - endangers life and health; or
 - is offensive
- Trespass Theory
 - Contamination creates a wrongful interference with the possession of property
- Cause of action is for damages
 - Injury Cases
 - Fear Cases
 - Increase Risk Cases
 - Medical Monitoring Cases

Mitigating Risks

- Actively engage in selection of disposal/beneficial use
 - Understand hydrology and geology
 - Understand potential fate and transport
- Audit disposal/beneficial uses
- Establish criteria for beneficial use projects
- Understand state requirements
- Understand potential opportunities to avoid applicability of expected regulation



Contact Information

Joshua R. More
Environmental Group
SCHIFF HARDIN LLP
312.258.5769
jmore@schiffhardin.com

