Liability In Coal Ash Management

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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 handing 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
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