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COAL ASH WASTE: A HISTORY OF LEGISLATIVE INACTION

by JESSICA LIENAU

Coal ash. Unlike the quintessentially trendy environmental issue of global warming, few Americans are even aware that millions of tons of toxic coal ash are piling up in over 1,300 waste disposal sites in 32 of the 50 states.¹ In the midst of an international financial crisis, the media portrays Washington, D.C. legislators as having but one focus: the economy. Countless state and local leaders suffering from the current economic recession have successfully lobbied in Washington, D.C. for federal aid.²

However, unlike the constituents being represented by these state and local leaders, the environment does not have a designated representative to lobby for it. Instead of proactive environmental legislation in Washington, it seems as if some sort of environmental disaster must thrust non-trendy issues on to the political scene in order for any progress to be made. That is exactly what has

happened with coal ash. In December 2008, 5.4 million cubic yards of coal ash sludge laced with arsenic and other toxic materials spilled from its Kingston, Tennessee waste pond onto over 300 acres of surrounding land, making it one of America's worst environmental spills.³

HISTORY OF COAL ASH WASTE REGULATION

Coal ash is the often toxic solid waste that is left after burning coal to produce electricity.⁴ Coal ash is generally either stored in a landfill or a waste pond, called a lagoon, like the one in Kingston, Tennessee, where the coal ash is mixed with water.⁵ The lagoons are man-made and "hold a mixture of the noncombustible ingredients of coal and the ash trapped by equipment designed to reduce air pollution from the power plants."⁶

The Environmental Protection Agency (EPA) concluded in 2006 that coal ash waste has "the potential to present danger to human health and the environment," and that storage ponds create a greater risk than landfills in terms of spills and leaks.⁷ In 2007, the EPA determined that mere exposure to coal ash substantially increases one's risk of cancer.⁸ Furthermore, the EPA found that disposal of coal ash in ponds elevates cancer risk if metals from the pond escape into drinking water sources.⁹ However, the EPA has never promulgated any national standards for coal ash waste disposal.¹⁰ Instead, much of the criticism, and therefore federal regulation, of coal has focused on the emissions from the coal-burning smokestacks.¹¹

The amount of coal ash produced has grown to a staggering 130 million tons per year in the United States.¹² This growth is due in part to the federal regulation of air pollutants, so contaminants and waste products that were once released into the air are now captured in coal ash.¹³ Due to both the EPA's and the federal government's failure to regulate this solid waste product, the states have been left with almost total authority to regulate coal ash as they see fit.¹⁴

According to Jeffrey Stant of the Environmental Integrity Project, a group created by former EPA enforcement attorneys, most states have lax regulations and monitoring of the waste sites is done on a voluntary basis by the utilities that own the sites.¹⁵ What this type of state-by-state regulation has led to, some argue, is in essence no regulation.¹⁶ Dr. Thomas A. Burke, an epidemiologist who testified on the health effects of coal ash before Congress in 2008,

said, “Your household garbage is managed much more consistently” than coal ash.¹⁷

OPPOSITION TO FEDERAL REGULATION

After the December 2008 spill, environmentalists claimed that the coal ash spill would become “the Exxon Valdez of the coal industry,” and force the federal government to regulate coal ash waste sites.¹⁸ However, there are opponents to federal legislation. Even after the December 2008 Tennessee spill, Glen Pugh, who manages solid waste for the Tennessee Department of Environment and Conservation and was in charge of the Kingston, Tennessee plant at the time of the spill, said, “I do think our regulations provide for the proper checks and reviews and evaluations. Something happened here that was unexpected.”¹⁹

The utility industry, as well as individual states, have lobbied against federal regulation because they believe that state regulation is working, despite the December 2008 spill.²⁰ Jim Roewer, executive director of the Utility Solid Waste Activities Group, said, “A lot of people are claiming that if coal ash is not regulated as a hazardous waste at the federal level, then it’s not regulated,” a contention he strongly disagrees with.²¹ Furthermore, Roewer noted that there have only been four major spills of this kind in the last 50 years, which, in his opinion, obviates the need for federal intervention.²²

“HAZARDOUS”: A SCIENTIFIC OR POLITICAL TERM?

Most environmental groups perceive state regulation alone as problematic because most states treat coal ash as though it’s not toxic.²³ Eric Schaeffer, also of the Environmental Integrity Project, said, “The prevailing myth is that it’s safe. We have the EPA buying into that for years and really refusing to regulate this material for what it is. . .”²⁴ Schaeffer refers to the fact that despite numerous internal investigations of coal ash, the EPA has never officially designated coal ash as hazardous.²⁵ However, “officially” is the operative word in the preceding statement.

Although the EPA did find that coal ash was not hazardous in its 1988 and 1999 reports to Congress, in 2000 Carol Browner, the then-head Administra-

tor of the EPA and current Assistant to President Obama for Climate and Energy Change, sent a draft determination designating coal ash as hazardous to the Office of Management and Budget for review.²⁶ However, critics argue that the Bush administration simply decided that the cost to the industry, industry employees, and ultimately tax payers, of a hazardous designation was too great.²⁷ Ultimately, the EPA did not designate coal ash as hazardous, but instead “pledged to issue less stringent national standards under a ‘non-hazardous’ designation.”²⁸ However, since 2000, the EPA has not issued new standards, even though more and more research, including its own, suggest that coal ash is more dangerous than it was once thought to be.²⁹

ACTION

With President Obama’s election, and a change in the White House, also came a regime change in the EPA. In her Senate confirmation hearings on January 14, 2009, newly appointed Administrator of the EPA Lisa Jackson pledged to consider regulating how coal ash is stored.³⁰ “[Jackson] assured lawmakers that EPA decisions will be based on science and the law, not politics,” intimating that the Bush administration made environmental decisions based on politics.³¹

The same day that Administrator Jackson testified before the Senate about possible EPA regulation of coal ash, House Natural Resources Committee Chairman Nick J. Rahall introduced legislation requiring federal standards to regulate the engineering of coal ash impoundments.³² Rahall stated, “The American public and our environment simply cannot afford to wait any longer to rein in the hazards posed by the shoddy and irresponsible coal ash disposal practices that currently exist.”³³ Although environmentalists are commending Rep. Rahall for finally taking federal legislative action on coal ash, whether his legislation will actually become law remains to be seen.³⁴

Despite arguments for and against federal regulation, the facts cannot be ignored. There was a major spill in 2008 and it was not the first of its kind.³⁵ Coal ash poses serious risks to the communities exposed to it.³⁶ Legislation has been left to the states, but in the face of what seems like widespread state indifference, either Congress or the EPA needs to regulate.³⁷ Hopefully the question will no longer be whether one of the two will regulate, but rather, which one will act first?

NOTES

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- 3 *Coal Ash Spill Reveals Risks, Lapses in Waste Regulation*, PHYSORG.COM, Jan. 8, 2009, <http://www.physorg.com/print150654399.html>.
- 4 Kristen Lombardi, *Coal Ash: The Hidden History*, PublicIntegrity.org, Jan. 7, 2009, <http://www.publicintegrity.org/blog/entry/1107/>.
- 5 Mark Clayton, *Coal-ash Waste Poses Risk Across the Nation*, CSMonitor.com, Jan. 9, 2009.
- 6 *Toxic Coal Ash*, *supra* note 1.
- 7 *Id.*
- 8 Lombardi, *supra* note 4.
- 9 *Toxic Coal Ash*, *supra* note 1.
- 10 *Id.*
- 11 *Id.*
- 12 Shaila Dewan, *Hundreds of Coal Ash Dumps Lack Regulation*, MichaelMoore.com, Jan. 7, 2009, <http://www.michaelmoore.com/words/latestnews/print.php?id=13002>.
- 13 *Id.*
- 14 *Id.*
- 15 *Coal Ash Spill Reveals Risks, Lapses in Waste Regulation*, PhysOrg.com, Jan. 8, 2009, <http://www.physorg.com/print150654399.html>.
- 16 *Id.*
- 17 Dewan, *supra* note 12.
- 18 Elizabeth Shogren, *Tennessee Spill: The Exxon Valdez of Coal Ash?*, NPR.ORG, Jan. 12, 2009, <http://www.npr.org/templates/story/story.php?Id=98857483>.
- 19 *Id.*
- 20 Clayton, *supra* note 5.
- 21 *Id.*
- 22 Shogren, *supra* note 18.
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 Lombardi, *supra* note 4.
- 27 *Id.*
- 28 *Id.*
- 29 *Id.*
- 30 Dina Cappiello, *Lisa Jackson: Science Will Rule at New EPA*, HUFFINGTONPOST.COM, Jan. 28, 2009, http://www.huffintonpost.com/2009/01/14/lisa-jackson-science-will_n_157861.html.
- 31 *Id.*
- 32 Press Release, House Committee on Natural Resources, Rahall Introduces Legislation to Regulate Coal Ash Disposal (Jan. 14, 2009)(available at http://resourcescommittee.house.gov/index.php?option=com_content&task=view&id=439&Itemid=27).
- 33 *Id.*

34 Pam Sohn, *Coal Ash Legislation Introduced in Congress*, TIMESFREEPRESS.COM, Jan. 14, 2009, <http://timesfreepress.com/news/2009/jan/14/coal-ash-legislation-introduced-congress/?print>.

35 *Toxic Coal Ash*, *supra* note 1.

36 *Id.*

37 *Coal Ash Spill Reveals Risks, Lapses in Waste Regulation*, *supra* note 14.