

Before and After Kingston: A Coal Ash Litigation Update

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As reported in previous Dinsmore & Shohl Legal Alerts, the December 2008 breach of a coal ash impoundment at the Tennessee Valley Authority's facility in Kingston, Tennessee resulted in the spill of over 5 million cubic yards of coal ash into adjacent waterways and properties. As a consequence, the regulation and storage of coal ash has garnered increased scrutiny by the U.S. Environmental Protection Agency (EPA), activist environmental groups, and those initiating law suits on behalf of persons supposedly harmed by coal ash.

Coal ash is a byproduct of coal combustion and is created when coal is burned to generate energy. Coal ash can be recycled in a variety of products, including concrete, drywall, and asphalt for roads. However, the remainder of the byproduct is often stored in pond-like containment facilities. There are currently over 13,000 of these storage facilities across the country.

The pressure to regulate coal ash mounts. On June 29, 2009, the EPA identified 44 coal combustion residual (CCR) impoundments as having "high hazard potential." Of the 44 identified sites, 18 are located in Ohio, Kentucky, West Virginia, and Pennsylvania.

EPA pledged to issue a notice of proposed rulemaking for coal ash ponds by the end of 2009 but has yet to do so. On Oct. 16, 2009, the agency sent a draft proposal to the White House Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). EPA administrator Lisa Jackson told reporters in February that she hoped her agency would unveil the proposal by April. But, she said, "I can't absolutely lock it in."

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The Tennessee Valley Authority (TVA) has spent \$1.2 Billion dollars in clean up costs; excluding litigation. Further, TVA gave \$43 million dollars to local governments for projects to improve community life that are not related to the spill. TVA also purchased 70 properties around the spill. The clean-up and remediation effort continues.

In the wake of the Kinston spill, over 560 plaintiffs filed 57 lawsuits against the TVA. TVA has offered 150 property owners settlement, 33 of which were declined. One case has been dropped. In late February 2010, plaintiffs in three class action federal lawsuits against the TVA moved to consolidate their cases into one. If the motion is approved the number of cases would decrease from 56 to 54. As of September 2009, the TVA had already paid out \$69 million dollars in settlements.

TVA argued that they were immune from tort actions because they are a government entity. On March 26, 2010, the U.S. District Court for the Eastern District of Tennessee ruled [\[1\]](#) that certain tort claims against TVA can proceed. However, the court also ruled that punitive damages may not be pursued against TVA due to its status as a government entity, and consideration of such damages by a jury is not appropriate.

Before Kingston

Prior to the Kingston spill, litigation related to coal ash was primarily limited to cases where power companies allegedly contaminated community drinking water through dumping and storage of coal ash in unlined dump sites. Environmental lawsuits over disasters can take years to resolve. As part of certain settlements, Defendant power companies established trust funds to cover future, unknown medical problems.

Example cases were brought in Montana and Maryland. A power company in Montana was the defendant in two coal ash related lawsuits, one in 2003 and one in 2007.^[2] The 2003 case settled *after* the Kingston spill for \$25 million dollars. The second suit is still pending. In 2009 a power company in Maryland paid out \$54 million dollars to settle claims against it for allegedly contaminating water with coal ash from one of their dump sites.^[3] The \$54 million dollar settlement far exceeded the \$ 1 million dollar fine the company paid to the state.

After Kingston

Power companies continue to be at risk for increased lawsuits related to the storage and dumping of coal ash. While previous lawsuits focused primarily on claims of contaminated drinking water, lawsuits today allege a myriad of other wrongful conduct, including nuisance, trespass, and negligence. Those lawsuits seek compensatory damages, punitive damages and medical monitoring.

In Alabama, 150 residents came together to bring suit against a landfill company that was taking the coal ash from the Kingston spill. The suit was for damages and to halt any future transfers of coal ash to the site. In January 2010, the landfill company filed bankruptcy to prevent the lawsuit from going forward.

Further, lawsuits are being initiated over the recycled use of coal ash. In Virginia, lawsuits alleging damages in the *billions of dollars*, were filed against a power company alleged to have sold coal ash to a community for use as fill at a golf course.^[4] The golf course opened in 2007. The lawsuits were filed in 2009

Likewise, environmental groups are entering the litigation fray as plaintiffs. In December 2009, multiple environmental groups filed a lawsuit under the Freedom of Information Act to force the EPA to release information regarding over 70 coal waste storage sites across the U. S., including information about storage capacity, inspection results, and past regulatory violations.

In November 2009, environmental groups issued a notice to sue a Maryland power utility and its subsidiaries for violations of the Federal Clean Air Act and various state laws with respect to a local landfill. Two months later, the Maryland Department of the Environment issued a notice of intent to sue the Maryland company for pollution violations related to the disposal of coal combustion by-products.

The intent to sue materialized on April 2, 2010 when The Maryland Department of Environment filed a citizen suit against Mirant Mid-Atlantic and the power company's coal ash management unit, alleging that a landfill used to dispose of coal ash in southern Maryland is leaching pollution into a tributary of the Chesapeake Bay.^[5] The complaint was filed in the U.S. District Court for the District of Maryland.

Facing the Challenges of Coal Ash Head On

Despite the immense pressure from government and environmental agencies, and the new found interest from plaintiffs' lawyers, utilities and others who generate or store coal ash can seek positive outcomes in this rapidly changing legal landscape. Companies must acknowledge the inevitable scrutiny and potential pitfalls of storing coal ash, and proactively seek solutions in advance of a disaster such as that occurring at

Kingston. With the wind blowing in the direction of possible, if not probable, regulatory changes, those companies must ensure they meet the current regulatory standards that govern, and be prepared to implement additional changes that may come in the wake of regulatory revision. All the while, the structural adequacy and integrity of coal ash impoundments must be must be monitored and maintained to prevent the risk of breach. Finally, open and honest communication with the public, including local governments and those near to coal ash storage facilities, will serve the better interests of utilities and others in both the near and short term.

Coal ash is an emerging issue with many attaching risks and liabilities. Understanding the possible dangers and working with and ahead of the government and the public can turn these risks and liabilities into to strengths and positives.

[1] *Mays v. Tennessee Valley Authority*, E.D. Tenn., No. 3:09-cv-6, order 3/26/10.

[2] *Ankney v. PPL Montana*, Mont. 16th Jud. Dist., DV-03-109.

[3] *Queen v. Constellation Power Source Generation Inc.*, Md. Cir. Ct., City of Baltimore, 11/28/07).

[4] *Fentress Families Trust v. Virginia Electric and Power Co.*, Va. Cir. Ct., No. CL09-710 and *Sears v. Virginia Electric and Power Co.*, Va. Cir. Ct., No CL09-912.

[5] (*Maryland v. Mirant Ash Management LLC*, D. Md., docket number not available, 4/2/10)