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EPA To Regulate Coal Ash Disposal For 1st Time

By **Elaine Meyer**

Law360, New York (May 04, 2010) -- The U.S. Environmental Protection Agency on Tuesday proposed for the first time regulating waste from coal-fired plants at a federal level and put forth two options on how it could be regulated.

The EPA asked for public comment on a 563-page rule that proposes regulating the combustion waste either under the more stringent Subtitle C or more lenient Subtitle D of the Resource Conservation and Recovery Act.

Environmental groups had urged the EPA to categorize coal ash as a hazardous waste, which the agency appeared to have ruled out.

The public comment period is expected to last for 90 days, at which point the EPA will finalize the rule.

Coal ash is a byproduct of coal from power plants that is disposed of either in liquid form in surface impoundments or in dry form in landfills, which is considered safer by environmentalists. It contains cancer-linked chemicals such as mercury, cadmium and arsenic.

Regulation of the disposal process became a national issue in 2008, after an impoundment holding coal ash in Kingston, Tenn., broke, causing a massive spill that moved into nearby land and water.

The spill, which caused significant environmental damage and displaced residents, cost millions of dollars to clean up.

The EPA's proposal will require stronger structural integrity of coal ash impoundments — such as liners and groundwater monitoring — to prevent accidents like the Kingston spill.

Coal ash that is recycled for use in products such as concrete, cement and wallboard would be protected from regulation under the Bevill exemption, because there is no risk for unsafe exposure, the EPA said.

Environmental lawyers said the EPA's decision, though not conclusive, is good news for businesses that deal with coal ash disposal.

"We're relieved that the agency was sensible enough to put out a proposal that invites comment on all sides of the issue instead of prejudging the outcome by listing the material as hazardous," said Lisa Jaeger, an attorney for Bracewell & Giuliani LLP, who represents a trade association of boiler owners that has been closely following the regulations.

What was especially a relief was the decision by the EPA to classify the recycled use of coal ash as a beneficial use, attorneys said. "A very significant proportion of coal ash is beneficially reused," said Bill Penny of Stites & Harbison PLLC.

While the EPA did take a more lenient posture than some expected, the regulatory regime proposed under Subtitle C would be significantly stricter than that proposed under Subtitle D, attorneys said.

Federal regulators would be a lot more involved under the Subtitle C approach, which could require permitting and more record-keeping requirements, according to Jeffrey Dehner of Hartman Simons & Wood LLP.

Subtitle D, on the other hand, would be more of a "performance-based" approach where companies would be told what to accomplish but not how to get there, Dehner said.

For operators of impoundments, the cost under Subtitle C could run to an estimated \$20 million per year versus \$8 million per year under the latter, according to Penny. The Subtitle C route would also take much longer to implement, he said.

Not everyone was pleased with the EPA's decision, especially because it appears to rule out classification of coal ash as a hazardous waste.

That option should have at least been put forth for public comment, said Bill Snape, a practitioner in residence at American University Washington College of Law and senior counsel at the Center for Biological Diversity.

Although the Subtitle C option is a "sound" approach, the Subtitle D measure "would treat coal ash less stringently than household garbage," Snape said.

Although the EPA's review process had garnered some media attention because it appeared to have been prolonged by meetings between the Office of Personnel Management and environmental and industry groups, lawyers emphasized that this rulemaking is a complicated process spurred in this case by an unprecedented event.

"Some things are not solvable in a limited snap time frame," said Steve Moon of Rogers Townsend & Thomas PC.

And though the EPA's decision to offer two competing approaches for comment may have appeared unusual, according to Larry Demase of Reed Smith LLP, it was not surprising.

"This is typical of EPA and its environmental regulations. They will throw out some things they are thinking about doing and ask the public to comment on it," he said.

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