

EPA ANNOUNCES INCREASED ATTENTION TO REGULATION OF INDUSTRIAL WASTE STORAGE

In what has been described as “[o]ne of the worst environmental disasters in recent memory,” an estimated 1.1 billion gallons of coal ash sludge escaped from a retention pond at the Tennessee Valley Authority’s Kingston Fossil Power Plant in eastern Tennessee. The December 22, 2008 spill was caused by a breach in an earthen containment wall at a pond used for wet storage of coal ash, a byproduct of the combustion of coal in coal-fired power plants. The breach resulted in approximately 300 acres of land being buried in up to nine feet of contaminated sludge. Testing of water samples from the area has shown elevated levels of arsenic, barium, cadmium, chromium, lead, mercury, nickel and thallium. Although TVA officials report that air and drinking water in the area is safe, the investigation is ongoing, and the long-term environmental and health effects of the spill are unknown.

Tom Kilgore, President and CEO of the Tennessee Valley Authority (TVA), has estimated that the cost of cleaning up the spill could reach \$825 million. This estimate does not include the cost of lawsuits filed against the company as a result of the spill or potential fines imposed by environmental agencies. As of January 31, 2009, TVA had already spent \$31 million in cleaning up the site.

Several class action lawsuits have already been filed against the TVA as a result of the spills. The first major suit, *Raymond et al. v. Tennessee Valley Authority et al.* (No. 14214), was filed on December 30, 2008 in the Roane County Circuit Court in Tennessee by the owners and developers of a subdivision near the Kingston plant. The complaint seeks \$15 million in compensatory damages and \$150 million in punitive damages for diminished property values, lost income, possible future health problems, and mental anguish. Other plaintiffs have filed suit in Tennessee federal district court and are seeking class certification. See *Mays v. Tennessee Valley Authority*, No. 09-06 (E.D. Tenn. Jan. 7, 2009) & *Giltane v. Tennessee Valley Authority*, No. 09-14 (E.D. Tenn. Jan. 9, 2009). At least one environmental group, the Southern Alliance for Clean Energy, has notified the TVA of its intention to file suit under the Clean Water Act.

One of the class action suits filed on behalf of property owners damaged by the Kingston facility breach was filed on January 9, 2009 in the United States District Court for the Eastern District of Tennessee. The suit includes claims for negligence, gross negligence, nuisance, trespass, strict liability, inverse condemnation and injunctive relief. See *Blanchard v. Tennessee Valley Authority* (E.D. Tenn. Jan. 9, 2009). The complaint seeks compensatory damages in excess of \$5 million, damages for emotional distress, punitive damages, and an injunction requiring the TVA set up both medical and environmental monitoring programs to assess the extent of the contamination and resulting health effects, relocate class members whose property has been impacted, and take steps to ensure that remaining coal ash ponds at the Kingston plant are secure.

Storage ponds similar to the ones at the TVA facility in Tennessee exist at hundreds of coal plants across the country, including several facilities in Alabama. A release of gypsum slurry from the Widows Creek Fossil Plant, a coal-fired power plant in Stevenson, Alabama, occurred less than three weeks after the Kingston incident and underscored the potential hazards involved in wet storage of industrial waste products. On January 9, 2009, a gypsum storage pond at the Widows Creek facility overflowed spilling thousands of gallons of gypsum and fly ash into the Tennessee River. As with the Kingston spill, the full environmental impact of the release is currently unknown.

The U.S. Environmental Protection Agency (“EPA”) does not currently consider coal ash a hazardous waste, and coal ash storage facilities are not federally regulated. The public recognition of the issues surrounding wet storage of coal ash in the wake of the Kingston incident is expected to lead to greater regulation of these facilities. On January 14, 2009, Chairman of the House Natural Resources Committee, Nick Rahall, introduced a bill that calls for federal regulation of coal ash storage facilities. This legislation, the Coal Ash Reclamation and Environmental Safety Act of 2009, would require the Interior Department to promulgate uniform design and engineering standards for coal ash ponds similar to the standards currently imposed for coal slurry impoundments under the Surface Mining Control and Reclamation Act of 1977. Subsequently, the EPA launched an investigation into existing coal ash storage facilities and has announced its intention to propose regulations for coal ash by the end of 2009. Several states are also revisiting local standards for coal ash storage facilities.

Although the Kingston incident placed the focus specifically on storage of coal combustion products, the long-term result may be an increased awareness of issues surrounding storage of waste products by industries across the board. Numerous manufacturing sectors, including the textile, paper product, chemical, and petroleum industries, utilize surface impoundments for waste storage. Companies in the transportation sector and metal industry also use similar types of impoundments for storage of liquid wastes. Heightened public awareness of waste storage issues coupled with the Obama administration's commitment to a change in environmental policy could lead to increased regulation of waste storage at coal-fired power plants and throughout these other industries. This public scrutiny may also lead to an increase in litigation over the perceived environmental and health issues associated with these storage facilities.

Faced with the potential for increased regulation and litigation, many companies may seek out beneficial uses for their waste products as a cost-effective and potentially profitable alternative to waste storage. Members of the coal industry have formed the Coal Combustion Product Partnership (C²P²) that seeks to use and promote the beneficial uses of coal ash in road and building construction. Similar alliances of members of various industries may become more prevalent as additional federal and state regulations are enacted and the cost of complying with environmental regulations continues to rise. The beneficial reuse of industrial waste products advocated by these partnerships can lead to a win-win situation for member companies by lessening the economic impact of regulatory compliance while providing an alternate source of revenue through the sale of these "waste" products.

Additional Items of Interest:

Lisa Jackson named EPA Administrator – Former head of the New Jersey Department of Environmental Protection, Lisa Jackson, was confirmed as the new Administrator of the United States Environmental Protection Agency in January. In a memo to EPA employees issued shortly after her confirmation, Jackson echoed President Obama's commitment to scientific integrity, the rule of law, and transparency in government.

Effective Date of "Aggregation" Rule stayed until May 18, 2009 – On February 9, 2009, EPA stayed the effective date of a final rule issued under the Clean Air Act New Source Review Program in order to allow new EPA leadership time to evaluate the rule before implementation. The rule, which modified EPA's policy on "aggregation," was published in the Federal Register on January 15, 2009 and will now take effect on May 18, 2009.

Deadline for Compliance with SPCC Amendments is July 1, 2009 – Existing facilities subject to the current Spill Prevention, Control, and Countermeasure (SPCC) Rule must prepare (or amend) and implement an SPCC plan in accordance with the 2006 and 2007 amendments to the SPCC regulations no later than July 1, 2009. Also note that the effective date of the December 5, 2008 amendments to the SPCC Rule has been delayed until January 14, 2010.

D.C. Circuit Orders EPA to Reconsider Standards for Fine Particulates – In February, the United States Court of Appeals for the District of Columbia remanded the National Ambient Air Quality Standards (NAAQS) for fine particulate matter to the EPA for reconsideration. In a per curiam opinion, the court held that EPA's retention of 15 micrograms per cubic meter of air as the standard was not supported by reasoned decision making.

U.S. Requests Emissions Control Area around Nation's Coastline – The U.S. submitted a proposal to the International Maritime Organization for the creation of an emissions control area (ECA) around the U.S. coastline in order to improve air quality. If approved, large ships operating within the ECA will be subject to stricter emission standards including a reduction in both particulate matter and nitrogen oxide emissions.

EPA Proposes Greenhouse Gas Emissions Registry – EPA has taken a step toward regulation of greenhouse gas emissions by announcing that it will establish a nationwide system for reporting greenhouse gas emissions. If approved, the rule will apply to industrial sources that emit 25,000 metric tons or more per year and will require reporting of carbon dioxide, methane, and other greenhouse gases.

*Richard E. Davis
Amber M. Whillock*

ATTORNEY PROFILES

Richard E. Davis is a partner with Starnes & Atchison LLP. Richard's practice is primarily devoted to environmental and chemical exposure litigation. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's practice includes CERCLA, Clean Air, Clean Water, and RCRA litigation; natural resource and property damage claims; and land and water use issues. He also defends personal injury actions based on chemical exposure. Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary, was listed in the 2008 edition of *Alabama Super Lawyers*[®] magazine for Environmental Litigation, and he is active in public service endeavors as well.

Amber M. Whillock is an associate with Starnes & Atchison LLP. Amber's practice is primarily devoted to environmental litigation and regulatory compliance. While attending Cumberland School of Law, Amber was the Executive Editor of the *Cumberland Law Review*, a Thomley Scholarship Recipient, a George M. Stewart Banking Award Recipient and the recipient of numerous Scholar of Merit Awards. Amber was also active in the Phi Alpha Delta Law Fraternity and served as a Judge Abraham Caruthers Legal Research and Writing Teaching Assistant. Amber is currently an associate member of the Environmental Law Institute, and a member of the Birmingham and American Bar Associations.

OFFICE LOCATIONS

Birmingham

Tele: (205) 868 ▪ 6000
100 Brookwood Place
7th Floor
Birmingham, AL 35209

Mobile

Tele: (251) 433 ▪ 6049
RSA-Battle House Tower
11 North Water Street
20th Floor
Mobile, AL 36602

www.starneslaw.com

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