

KIRKLAND ALERT

March 2009

Recent Developments in Environmental Enforcement

Impoundments

This Environmental Alert focuses on recent developments in the regulation of impoundments, and specifically, coal ash waste, that may interest clients and friends of the Kirkland & Ellis LLP Environmental and Energy Groups. The alert focuses primarily on the U.S. Environmental Protection Agency's (EPA) recent issuance of letters to facilities and corporations seeking information related to these impoundments.

TVA's Kingston Power Plant

This EPA activity was prompted by the December 22, 2008 failure of the containment wall at TVA's 1700 MW coal-fired Kingston Plant, located in Kingston, Tennessee, 35 miles west of Knoxville, at the junction of the Emory and Clinch Rivers. An estimated 3.1 million cubic feet of fly ash and water was released on to land adjacent to the plant and into the nearby Clinch and Emory Rivers. The sudden release of water and ash from the plant's retention pond destroyed several homes.

We invite you to contact us with any questions about the matters addressed in this Alert, or for copies of any materials discussed in this Alert.

EPA's March 9, 2009 Letters

EPA's letters issued March 9, 2009 request facilities and corporations to provide information related to impoundments and "diked or bermed management units" that collect coal combustion waste. The letters were issued to more than 50 companies and 150 facilities that have such impoundments. Specifically, the EPA letter seeks basic information on the contents, height, capacity, date of construction or modification, and ownership of each management unit. The letter also seeks information relating to the structural integrity of the units, including the National Inventory of Dams hazard rating, whether the unit was designed by professional engineers or ever visited by regulatory officials, whether the unit has been assessed for "safety (i.e., structural integrity)," any corrective actions taken, and any prior spills or leaks.

Impoundment Safety — A New EPA Regulatory Regime?

The EPA letters focus on an impoundment's structural integrity rather than soil contamination or groundwater issues. This signals a shift in focus. Traditionally, EPA has been concerned with the environmental impacts of impoundments. Thus, in the past, it has routinely inspected facilities with impoundments for compliance with Resource Conservation and Recovery Act (RCRA) hazardous waste requirements, and has also focused on the potential for leaks that resulted in contamination of groundwater.

The new focus on the structural integrity of impoundments is an outgrowth of concerns raised by the TVA Kingston breach. During Administrator Jackson's confirmation, issues related to the structural integrity of

impoundments containing coal wastes were raised and the Administrator pledged to address the issue when confirmed.

EPA has established an aggressive schedule for their review. Recipients of the letter were given only 10 business days to respond, and the Agency has announced a goal of proposing new regulations by the end of the year. EPA's aggressive move to regulate the structural integrity of the coal waste impoundments will require coordination with other state and federal agencies. The structural integrity of dams is not an area on which EPA has focused in the past. The Agency will be hard pressed to quickly evaluate the large volume of technical data related to the structural integrity of these units and then to craft a new regulatory program that operates alongside existing dam safety programs.

Historically, the structural integrity of an impoundment has been regulated under state and federal dam safety programs. These programs were strengthened in the 1970s after a series of fatal dam failures. Thus, many dams are regulated under the Federal Emergency Management Agency (FEMA) dam safety program. Dams related to mining are regulated by the Mine Safety and Health Administration (MSHA) within the Department of Labor (DOL).

Coal Ash — A Hazardous Waste?

How and under which statutory authority EPA will regulate these impoundments is uncertain. One approach supported by environmental groups and some members of Congress would be to treat coal ash as a hazardous waste. In a letter to Lisa Jackson dated March 2, 2009, environmental groups urged EPA to regulate coal combustion waste as a hazardous waste under Subtitle C of RCRA. Shortly thereafter on March 4, Sen. Barbara Boxer (D-CA) and Sen. Thomas Carper (D-DE) introduced Senate Resolution 64 similarly calling on EPA to issue rules regulating coal-combustion waste under RCRA.

Further complicating the issue are efforts on Capitol Hill to have the coal combustion waste impoundments regulated by other agencies. For

example, Rep. Nick Rahall (D-WV) had introduced a bill, H.R. 493, that would have the Department of Interior take the lead in evaluating the nation's fly ash ponds, where coal combustion waste is mixed with water and then settle in a pond, and require Interior to issue federal engineering standards for the construction and continued operation of the ponds. The bill was withdrawn on March 10, the day after EPA issued it letters requesting information regarding impoundments.

If EPA adopts regulations concerning the structural integrity of impoundments it will mark a precedent setting expansion of the Agency's regulatory reach. Presumably, if EPA can regulate the structural integrity of impoundments, other structures utilized by regulated entities could be reached in the future. Similarly if EPA opts to treat coal combustion byproducts as a hazardous waste under RCRA, these facilities could be subject to detailed new storage, treatment, and disposal requirements.

EPA Request Utilizes Section 104(e) of CERCLA

EPA will need to carefully craft any new proposed regulations due to the lack of new statutory authorities relating to the structural safety of impoundments. One indication that EPA will need to think creatively is the authority cited by EPA in the March 9 information requests: Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This is the standard provision cited by EPA to collect information in a Superfund matter where the Agency is seeking Potentially Responsible Parties (PRPs) to clean up a site. While the courts have traditionally upheld the broad authority of the Agency to collect information under this provision, the case law has developed in situations where the Agency is seeking data or information related to traditional environmental concerns.

When responding to a Section 104(e) request it is important that a party ensure their response is complete and accurate. The requirement to submit information in response to a Section 104(e) request does not mean a party must relinquish any claims of privilege or confidentiality. A party should thoroughly

document any privilege claims as well as follow the Agency's procedures for protecting confidential business information (CBI). If an extension of time is needed, the responding party should also ensure that they request additional time promptly and in writing, and document the reasons why such a request is necessary and reasonable.

Impoundments — A New Focus For the Agency

Impoundments have been of continuing interest to EPA because the environmental consequences from improper operation can be severe. In the past, EPA has been concerned with the potential for groundwater contamination and the mismanagement

of hazardous waste introduced into an impoundment. As part of EPA's mineral processing enforcement priority, enforcement actions have been taken that address impoundments and waste piles, including a March 2008 Administrative Order On Consent issued after a retaining wall failed, allowing 54 million gallons of acidic water to enter a bayou and ultimately the Houston Ship Channel.

Given the severe consequences from the TVA Kingston spill, and the public statements made by Administrator Jackson concerning the necessity of preventing future occurrences, it is likely that the Agency will devote additional EPA resources towards regulating impoundments.

Should you have any questions about the matters addressed in this Alert, please contact the following Kirkland & Ellis author or the Kirkland & Ellis attorney you normally contact:

Granta Y. Nakayama
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
granta.nakayama@kirkland.com
+1 (202) 879-5074

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