

September 20, 2010

Investors Call for Federal Regulation of Coal Ash

by Robert Kropp

Investor coalition urges the Environmental Protection Agency to label coal ash as a hazardous waste and subject companies to federal regulations.

SocialFunds.com -- In December 2008, a dam breach at a Tennessee Valley Authority (TVA) coal ash pond released 1.1 billion gallons of coal ash sludge over more than 300 acres in eastern Tennessee. "TVA was in compliance with state regulations before the ash pond failure," a coalition of investors wrote to the Environmental Protection Agency (EPA) recently, "But now faces an estimated \$1.2 billion in spill-related costs, as well as expenses associated with over 50 lawsuits that have been subsequently filed."

The investor coalition, coordinated by Green Century Capital Management and **As You Sow**, wrote in support of proposed rules that would give the Agency authority to regulate coal ash. The public comment letter was signed by 22 institutional investors representing over \$240 billion in assets under management.

In May, when the EPA announced its plans to regulate coal ash, Administrator Lisa Jackson said, "The time has come for common-sense national protections to ensure the safe disposal of coal ash. We're proposing strong steps to address the serious risk of groundwater contamination and threats to drinking water and we're also putting in place stronger safeguards against structural failures of coal ash impoundments."

"It's not just the possibility of another TVA spill that presents risks to companies that store or dispose of coal ash," Emily Stone, Shareholder Advocate at Green Century, said. "There is documented evidence of coal ash contamination from leaching or spillage at over 67 different sites in the US."

SocialFunds.com spoke with Stone about the options proposed by the EPA, and why investors support the Subtitle C option, which provides for federal regulations.

"Coal ash is viewed as a material and important issue by a diverse group of investors," Stone said. "There's not a lot of disclosure in the industry, which is one reason why we support Subtitle C regulations for coal ash. Also, the financial assurance requirement will help shareholders understand more about the risks associated with coal ash. It would certainly improve transparency."

"The proposed regulations under Subtitle C would be federally enforceable under the Resource Conservation and Recovery Act (RCRA)," Stone continued. "Subtitle C regulations would require all companies to use best practice. It would close down coal ash ponds, require post-closure care of those ponds, and require financial assurance for utilities."

RCRA gives the EPA the authority to control hazardous waste, including "the generation, transportation, treatment, storage, and disposal of hazardous waste," according to the Agency.

According to Greenwire, the Agency had originally proposed that coal ash be labeled as hazardous waste, without another option. However, the proposal "was changed at the White House to give equal standing to an alternative favored by the coal industry and coal-burning electric utilities." The alternative would label coal ash as non-hazardous, and leave enforcement to state regulations.

Stone said, "In the Subtitle D options, the state rules would stay in place, and the EPA could only promote guidelines. All enforcement would have to be done by citizen lawsuits."

"We're finding that the industry is pretty much consistently opposed to the Subtitle C regulations," she observed.

Earlier this year, Green Century and As You Sow coordinated a shareowner proposal campaign addressing coal ash that led to the filing of resolutions with five companies. Three of the resolutions went to a vote at annual general meetings, and the results were unprecedented for first-time votes. Two of the resolutions—at MDU Resources and CNS Energy—received more than 40% of shareowner support.

"We were able to withdraw resolutions from First Energy and Xcel," Stone said. "First Energy agreed to stop pumping coal ash into one of the largest ash ponds in the country. They're in the process of figuring out a dry landfill, which can of course pose environmental risk as well. We're a little concerned, and may ending filing another resolution there."

"Xcel agreed to significantly improve disclosure, including disclosure on the best practices the company was using at its ash storage facilities," Stone continued.

Urging the EPA "to improve the current standard of coal ash management to create a consistent national requirement that will help reduce potential value loss and allow investors to better assess this sector's risk profile," the investor letter stated that federally enforced regulations would reduce environmental risk and benefit investors. Regulations would require companies to use best practices for the management of coal ash, and help prevent ash pond failures.

"According to the EPA's Regulatory Impact Analysis (RIA) regarding the proposed rules, regulating coal ash under Subtitle C saves an estimated \$5.3 to \$16.7 billion in" cleanup costs, the letter stated, and "saves significant additional costs related to litigation, contamination of surface water and human health risks."

As Stone pointed out, the financial assurance requirement included in the proposed regulations are of especial importance to investors. The letter stated, "We believe it is critical that utilities be required to assure shareholders and the public that they are financially prepared to manage the costs associated with a catastrophic coal ash spill or other ash-related events that could require significant clean up costs. Without financial assurance, shareholders have no way of assessing which companies in the sector represent a more secure investment."

In August, the EPA extended the public comment period from September 20 to November 19, 2010, and continues to hold public hearings on the proposed regulations.