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Activists Push Back On Industry Lobbying Against Strict Coal Ash Rules

Environmental groups seeking strict hazardous waste coal ash rules are pushing back against industry lobbying that has succeeded in delaying EPA's plan to regulate the waste, but are conceding they are "going to need help" if they are going to win the strict hazardous waste designation they are seeking when EPA issues its plan later this month.

Over the past few weeks, activists have met with top EPA officials and have launched an effort to challenge the standard-setting organization ASTM International, which took the unprecedented step last month of warning against a hazardous waste classification.

Groups including the Sierra Club, Environmental Integrity Project (EIP) and Earthjustice met Jan. 6 with EPA Administrator Lisa Jackson and agency waste chief Mathy Stanislaus at the agency's request and urged the agency to move forward with a strict hazardous waste regulation under the Resource Conservation & Recovery Act (RCRA).

Environmentalists say EPA officials are on their side but admit they are "going to need help," according to one source. The source adds that the agency is expected to announce its proposal at the end of this month and notes that EPA officials say they are under "extreme pressure from the coal industry to compromise the hazardous classification for a weaker 'hybrid-hazardous' classification that allows dangerous loopholes."

Activists who attended the meeting did not respond to requests for comment, and it is unclear how the suggested hybrid hazardous classification differs from the agency's preferred approach designating discarded ash as hazardous, and subject to strict RCRA waste handling, storage and treatment requirements under subtitle C of the waste law, while designating ash that is beneficially reused in concrete or elsewhere as nonhazardous under subtitle D.

The source says environmentalists are working to "target" Jackson and the White House Office of Management & Budget (OMB) with calls in support of RCRA hazardous waste rules over the next 10 "critical" days.

Environmentalists had also been scheduled to meet with ASTM Jan. 8 in an effort to discourage the organization from what activists call advocacy and return to its role as a neutral testing body, one source said, but the meeting was postponed.

Activists are seeking to counter the [Dec. 22 letter](#) ASTM sent to Jackson warning that if the agency defines coal waste as hazardous the organization would drop its specification recommending its use as a material in concrete due to liability and public perception concerns -- eliminating a key driver for the beneficial reuse of coal ash.

The ASTM letter was seen by many as a game changer in EPA's effort to develop hybrid rules for the ash because it drove home industry arguments that a hazardous classification would impose a stigma on beneficial reuse. Industry officials are also arguing that even if the material could be reused, stricter waste management requirements would be cost prohibitive and could force many power plants to shut down, threatening electricity reliability.

Faulting Industry

However, environmentalists responded in a Dec. 28 letter to Stanislaus that ASTM's stance on potential legal liability stemming from a subtitle C designation is inconsistent because coal ash is already considered a "hazardous substance" under Superfund law. "Legal liability attaching to manufacturers or consumers of concrete made with fly ash need not be driven by the EPA's hazardous waste determination if legitimate beneficial uses are exempted from subtitle C classification," the activists' letter states.

They also argue that ASTM already sets specifications for products containing high levels of hazardous substances, such as the high metals levels contained in Portland cement -- a product for which ASTM has set specifications. "Certainly, ASTM would not recommend that Portland cement be removed as a concrete component, despite the legal liability these hazardous constituents pose to transporters and manufacturers," the activists say.

The groups also charge that the ASTM letter was written by individuals connected to the coal waste reuse industry, calling it an unprecedented departure from ASTM's mission of creating consensus standards.

The two signatories to the ASTM letter, Jenny Hitch and Anthony Fiorato "have significant financial interest in the marketing and reuse of coal ash," the environmentalists' letter says. Hitch is marketing director for Full Circle Solutions, which finds commercial markets for coal combustion products, and works for ISG Resources, America's largest marketer of coal combustion products, the letter says. Fiorato runs a for-profit subsidiary of the Portland Cement Association, which opposes a hazardous RCRA classification.

The activists' lobbying is aimed at shoring up support for long-awaited rules to regulate the ash produced by power plants. Jackson had vowed that the agency would propose the rules by the end of 2009, partly in response to a massive December 2008 coal ash spill in Tennessee.

But on Dec. 17, days before the first anniversary of the spill, EPA announced that it was delaying the proposal due to the “complexity of the analysis” being conducted. Many sources say EPA is redoing the cost-benefit analysis which found no impact of RCRA rules on the beneficial reuse industry.

Although EPA has delayed issuance of the proposal, the agency may have little choice but to seek some hazardous waste designation, as agency lawyers have found that less stringent solid waste rules would be unenforceable at the federal level and create major permitting uncertainty.

An EPA spokeswoman said last week that the agency has no set time frame for issuing the proposal but an environmentalist says activists expect the proposal before the end of the month.

One EIP source says activists are now seeking to strongly rebut the the ASTM letter and what the source calls misleading claims by the Electric Power Research Institute (EPRI), an industry research group, that heavy metals in coal ash are similar to levels of the metals in rock, as well as EPRI’s claims that as many as 400 power plants would be forced to shut down under hazardous RCRA coal waste rules.

The source says the EPRI comparisons of the arsenic levels in coal ash and rock -- contained in a presentation the group gave to OMB in October -- is a “card trick” because it is not done to scale. But when done at scale, it shows that arsenic in coal ash is 1,000 times higher than in rock, the source says.

Additionally, EPRI’s plant shutdown claims are based on assumptions that all coal waste is treated as a high hazard, subject to the strictest waste handling requirements. “It is silly . . . and someone is going to have to write a rebuttal. What a waste of time,” the source says, adding, “It is so primitive, but they are counting on people having 30 seconds to think about this issue,” the source says. However, the claims are “so transparently misleading that . . . if that’s what we’re up against we’ve really got a lot of work to do. . . . [EPA] should look at [EPRI’s] claims and see it for what it is and laugh, basically, not make us write up a rebuttal.”

However, an EPRI source says that the presentation does note that arsenic levels in ash are about 10 times higher than in rock, while noting the overall composition of ash is similar to rock, “I think we always tell a fairly complete story but people don’t always choose to see [it],” the source says.

The EPRI source adds that the report on plant shutdowns is in the midst of internal review and will not be released for a few months.

ASTM could not be reached for comment at press time.

Industry Targets Emanuel

Meanwhile, industry and environmentalist sources say industry groups have taken their concerns about EPA’s planned rule up the chain to President Obama’s Chief of Staff Rahm Emanuel in an effort to win his backing of their effort to convince EPA to propose a RCRA rule without including a hazardous classification as its preferred option.

One industry source expects EPA to issue the proposal soon and says a menu of options without a preference “is about all they can do at this point. They’ve been backed into a corner.”

The source adds industry groups may also seek a meeting with White House energy and environment czar Carol Browner, who so far has not been publicly involved in the issue but may be integral behind the scenes. However, Browner, who served as EPA head under President Clinton, is not expected to back industry’s position, since she supported hazardous waste rules for coal waste in 2000 but was ultimately overruled, sources say. The industry source says a meeting with Browner would be more about “getting in front of her to explain the potential impacts and wearing her down.”

One environmentalist, however, says Browner should be a key player in the White House involvement in the review of the EPA proposal but has been conspicuously absent. “I want to know where she is. . . . I assume she knows quite a lot about this because of her involvement 10 years ago. We are facing similar issues [now]. Industry has the playbook down and I’m hoping we know better this time.” -- *Dawn Reeves*

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