

## Shareholders Seek Coal Ash Management Controls

Environmental activist shareholder groups flush with victory after the SEC issued long-sought guidance on climate change risk disclosures have a new target—coal-fired power plant companies that manage coal ash in large, unlined surface impoundments. After the massive December 2008 spill of coal ash slurry at a Tennessee Valley Authority coal-fired power plant that resulted in cleanup costs estimated in the multiple million dollars and exposed TVA to potential liability for property damage and toxic tort claims, shareholders began reviewing the SEC filings of large coal combustion power companies for an evaluation of the companies' risks related to coal ash management. The investor groups were not comforted by what they read. Since December 2009, at least five shareholder resolutions have been filed seeking information on companies' efforts to evaluate and mitigate these risks. [Southern Company](#) received a shareholder proposal seeking a report to investors on the company's efforts, "above and beyond current compliance, to reduce environmental and health hazards associated with coal combustion waste, and how those efforts may reduce legal, reputational and other risks to the company's finances and operations." Similar resolutions are also pending at [CMS Energy](#) and [MDU Resources](#). Resolutions were also filed, but subsequently withdrawn, for First Energy (which announced it would be switching to dry storage, only) and Xcel Energy (which increased its disclosure).

BEIJING

CHARLOTTE

CHICAGO

GENEVA

HONG KONG

LONDON

LOS ANGELES

MOSCOW

NEW YORK

NEWARK

PARIS

SAN FRANCISCO

SHANGHAI

WASHINGTON, D.C.

Beyond the financial risks highlighted by the TVA incident, the investor groups focusing on coal ash management risks point to EPA's plans to propose a rule tightening management requirements for coal ash and the rule's potential cost implications. Currently, large impoundments or ponds that are used to store wet coal ash at power plants are regulated by states, typically under their solid waste rules. Congress specifically exempted certain high-volume, low toxicity wastes, including coal ash, from federal regulation under the hazardous waste rules several decades ago pending further study by EPA. EPA's subsequent efforts to impose federal-level regulation on coal ash impoundments have faltered over the years due to inconclusive studies and determined opposition. After the TVA incident, EPA again began to review coal ash management practices and announced in the spring of 2009 that it would issue a set of proposed rules by the end of 2009. EPA's draft proposal, which has yet to be made public, has been the subject of intense lobbying efforts and multiple stakeholder meetings with officials at the Office of Management and Budget. OMB received the draft proposal from EPA last October for the mandatory OMB review, but has yet to clear it for publication. It is now widely expected that a proposal will be issued in April.

EPA's proposal may include a "hybrid" approach, that is, to regulate wet ash as a hazardous waste and dry ash as a non-hazardous solid waste. This concept has met vociferous opposition from those who believe that it is unnecessary and that the stigma related to a hazardous waste designation would have a detrimental effect on the ability to beneficially reuse coal ash. And legitimate concerns have been raised about whether the past use of coal ash in building products, foundations, structural fill/road beds, and concrete, once it is designated as a hazardous waste, would expose the power companies, contractors, state and local governments, and others to toxic tort liability claims. Add to these concerns the significant costs that would be associated with managing such high volumes of by-product material as a hazardous waste, and the recent attention of environmental activist shareholder groups is not surprising. The impact to financial results for many coal-fired power plants of a hazardous waste determination should not be underestimated. Aside from a potential loss of

the substantial reuse market, reported as a \$5 to \$10 billion a year revenue stream to utilities, there would be potentially significant risks associated with selling coal ash to third parties after a hazardous waste designation. Considering cleanup costs alone, for example, TVA has determined that its cleanup could reach \$525 million or higher should EPA issue coal ash disposal rules regulating the waste as hazardous, not to mention the substantial costs to retrofit impoundments or to convert to dry ash only.

Nevertheless, the potentially material risks associated with managing wet coal ash in large, unlined impoundments may no longer be simply a theoretical risk. EPA has conducted inspections of coal ash impoundments and evaluated the potential for harm if the impoundments fail. Most of the units evaluated by EPA were given a “high” or “significant” hazard potential rating. (A “significant” rating means, for example, that economic loss, environmental damage, or damage to the impoundment infrastructure would occur in the event of a breach.) EPA then conducted an engineering assessment of each unit given a high

or significant rating, and prepared reports and recommendations, all of which have been posted on EPA’s dedicated [coal ash management web site](#). Query whether the shareholders’ resolutions and the media attention likely at the upcoming spring meetings will add momentum to and enhance EPA’s expected move toward designating wet ash as a hazardous waste.

Companies currently operating large, unlined coal ash impoundments and those selling coal ash for beneficial reuse should be evaluating all of their management options in anticipation of the EPA rulemaking, shareholder, and environmental group scrutiny, and most importantly, the heightened risk of litigation given the current spotlight on this issue. Internal evaluations should be carefully designed and implemented so that the flow of information is managed in a way to reduce litigation risk and ensure that management has all of the relevant information to make accurate disclosures in public documents and to position the company to avoid unnecessary litigation exposure.

---

If you have any questions regarding any matters discussed in this briefing, please contact any of the Winston & Strawn attorneys listed below or your usual Winston & Strawn contact.

**Charlotte**

Tom Cottingham [tcottingham@winston.com](mailto:tcottingham@winston.com) (704) 350-7745  
Nash Long [nlong@winston.com](mailto:nlong@winston.com) (704) 350-7733

**Chicago**

Eleni Kouimelis [ekouimelis@winston.com](mailto:ekouimelis@winston.com) (312) 558-5133  
Averil M. Edwards [aedwards@winston.com](mailto:aedwards@winston.com) (312) 558-8310

**Washington, D.C.**

Eric Gotting [egotting@winston.com](mailto:egotting@winston.com) (202) 282-5776  
John M. Holloway III [jholloway@winston.com](mailto:jholloway@winston.com) (202) 282-5807  
John Fehrenbach [jfehrenbach@winston.com](mailto:jfehrenbach@winston.com) (202) 282-5925  
Mary E. Wall [mwall@winston.com](mailto:mwall@winston.com) (202) 282-5962  
Elizabeth C. Williamson [ewilliamson@winston.com](mailto:ewilliamson@winston.com) (202) 282-5747  
Linda K. Leibfarth [lleibfarth@winston.com](mailto:lleibfarth@winston.com) (202) 282-5649

---

*These materials have been prepared by Winston & Strawn LLP for informational purposes only. These materials do not constitute legal advice and cannot be relied upon by any taxpayer for the purpose of avoiding penalties imposed under the Internal Revenue Code. Receipt of this information does not create an attorney-client relationship. No reproduction or redistribution without written permission of Winston & Strawn LLP.*