Strategy

Ex. 5 - Deliberative

Ex. 5 - Deliberative AES previously informed us that Agremax was produced only in Puerto Rico and Alabama, and we seek confirmation of our understanding that AES has provided for landfill disposal of its coal ash at its other facilities, in order to underscore its mismanagement of coal ash in Puerto Rico.

Ex. 5 - Deliberative

[1] A September 2012 notice of intent to sue under RCRA 7002 by the environmental group Public Justice stated that AES obtained dismissal of a product liability claim regarding Agremax in the Dominican Republic, on the basis that it was not a product.

Ex. 5 - Deliberative

[3] EQB has sanctioned the sale of Agremax as a product, without establishing any engineering controls for its use. Ex. 5 - Deliberative

Ex. 5 - Deliberative

[4] At an estimated cost of roughly $26 million over the remaining 30 year lifetime of the facility. EQB Chairman Nieves estimates this would result in a 0.5 cent per kilowatt hour increase in electricity rates, based on the $66 million annual electricity fees collected by the facility.

[5] The proposed rule solicits comment on whether EPA should require persons to use a leaching assessment tool (such as the EPA Industrial Waste Management Evaluation Model) in conjunction with LEAF analysis to aid prospective beneficial users in calculating potential release rates.

Ex. 5 - Deliberative

Basis Considerations

Proposed Rule Management Scenarios
Independent of site-specific conditions affecting leaching and contaminant release and fate, both the RCRA C and D management scenarios in the proposed rule require lined management units for coal ash, with no option for unlined disposal[8]. The proposed rule also reiterated EPA's determination that, with regard to "…situations where large quantities of [coal combustion residues] have been used indiscriminately as unencapsulated general fill….the Agency does not consider this a beneficial use….but rather considers it waste management." Ex. 5 - Deliberative

Ex. 5 - Deliberative

TCLP Applicability and LEAF Method Status
The EQB resolutions allowing Agremax to be sold as a product are based on characterization of Agremax by AES using the Toxicity Characteristic Leaching Procedure (TCLP) and the EPA Synthetic Precipitation Leaching Procedure (SPLP). EQB concluded that, when analyzed by these methods, Agremax does not exceed the regulatory standards for hazardous waste. However, EPA stated in the proposed rule that "…TCLP…is not a good predictor of the mobility of metals in coal combustion residuals under a variety of different conditions," and that "…recent research and damage cases indicate that [SPLP and TCLP] may under-predict risks from dry disposal.."

In response to concerns raised by the National Academy of Science, the EPA Science Advisory Board, and others over the use of single point pH tests such as TCLP and SPLP for evaluating the leaching potential of coal combustion residuals in the environment, EPA has developed four LEAF methods. The four LEAF methods have passed inter-laboratory validation and, pending

[6] The proposed rule states, with respect to the regulatory approach to the Subtitle D option for coal ash management, that "…the primary source was…part 258…which provide[s] a comprehensive framework for all aspects of disposal in land-based units such as CCR landfills,..," and that "…the engineered structures regulated under part 258 are very similar to those found at CCR disposal facilities…"

[7] The proposed rule states, with respect to coal combustion residuals, that "…several non-cancer health effects…" from "…particulate matter inhalation due to dry handling..," and that "…without fugitive dust controls there could be exceedences of the National Ambient Air Quality Standards for fine particulate matter in the air at residences near coal combustion residuals landfills…"

[8] The proposed rule states, with respect the Subtitle D option liner requirement, that the "…damage cases and EPA's quantitative groundwater risk assessment clearly show the need for effective liners..," and that "…EPA is proposing to require the same liner and leachate collection and removal systems…being proposed under the RCRA Subtitle C co-proposal. The technical justification for these requirements is equally applicable…regardless of the statutory authority…"

the publication of a Notice of Data Availability in the Federal Register and subsequent evaluation and potential incorporation of any public comment, will be submitted for posting as new methods on the website for EPA's Test Methods for Evaluating Solid Waste, Document SW-846.

In August 2012, a motion for summary judgment was filed by several environmental groups citing EPA's failure to review and revise the TCLP (i.e., in response to the EPA science advisory board recommendation) as a violation of RCRA 2002.

RCRA Statutory Language

"…disposal of solid waste…on the land without careful planning and management can present a danger to human health and the environment…" (6901(b)(2) Congressional findings)

"…open dumping is particularly harmful to health…" (6901(b)(4) Congressional findings)

"…requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health…" (6902(a)(3) Objectives and national policy)

The term "disposal" means "the…dumping…or placing of any solid waste…into or on any land…so that such solid waste…or any constituent thereof may enter the environment…" (6903(3) Definitions)

The term "open dump" means "any facility or site where solid waste is disposed of which is not a sanitary landfill…and which is not a facility for disposal of hazardous waste." (6903)(14) Definitions)

"…open dumping of solid waste…is prohibited…" (6945(a) Section 4005 Open Dumping Prohibition)

Recent Enforcement Actions

AES Corp. - September 2012 RCRA 7002 ninety-day notice of intent to sue AES by a citizens group, citing imminent and substantial endangerment from Agremax use in Puerto Rico.

FirstEnergy Generation Corp. - Following a May 2012 civil lawsuit by citizens groups, a July 2012 Pennsylvania Department of Environmental Protection proposed consent decree would resolve a civil lawsuit under RCRA and Pennsylvania law by requiring closure of a coal ash surface impoundment , ground water monitoring, and other injunctive relief.

South Carolina Electric and Gas - August 2012 settlement of a lawsuit brought by the Southern Environmental Law Center requiring removal of ash ponds, compliant landfill storage, and other injunctive relief.