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What’s Blowin’ in the Wind? The Use of Coal Ash in Landfills and the Power of Local Governments to Stop It

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The Use of Coal Ash in Landfills and the Power of Local Governments to Stop It

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Abstract:
This paper addresses the use of Coal Combustion By-product (AKA coal ash) as approved "fill" product for landfills. Specifically, it addresses the overlap of Federal, State, and Municipal land use laws as these apply to landfills abutting residential areas. Coal Ash has been approved by the Virginia Department of Environmental Quality (DEQ) to use as fill material in landfills. Recently, the Board of Zoning Appeals (BZA) for the County of Henrico, VA, just east of Richmond, VA, rejected a zoning permit to allow East End Resource Recovery (EERR) to import, collect, and store coal ash on site for use as a fill when covering construction waste. The BZA cited violations by EERR, as well as the landfill's proximity to residential areas as reasons for denying the permit. EERR appealed to Circuit Court of VA citing state laws and administrative policies which allow coal ash in landfills. Opponents have cited case studies of the harmful effects of coal ash on residents, as well as state and Federal laws protecting air and water quality as a reason to block the use of coal ash. Questions remain as to the supremacy of zoning regulations, state and Federal environmental laws, and a locality's power to determine its own land use policies. As EERR appeals to state court, my research will attempt to find an answer to what regulations or court actions may give the citizens of Henrico the power to stop coal ash from being dumped in their neighborhoods.
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I. Introduction – Who has the Power to Regulate Coal Ash?

Beginning in 2009, an ominous black mountain began to rise above the trees lining Darbytown Road in the east end of Henrico County, just outside the city limits of Richmond, VA. The source of the mountain came from the East End Landfill. Neighbors of the residential area just across Darbytown Road noticed it grow with a wary eye. Then they noticed on windy days in spring, black ash would swirl from the top. Black flecks began to show up on the cars parked on their street. Complaints of black soot depositing on everything around the landfill prompted county officials to take another look at the old site. In 2010 the new owners of the East End Landfill approached the county to amend its Conditional Use Permit. The new owners wanted to accept coal combustion byproducts for use as fill material in accordance with the state regulations set by the Virginia Department of Environmental Quality. The problem was a mountain of coal ash was already there.

On a bleak, snow-covered Thursday morning in mid-December 2010 the Henrico County Board of Zoning Appeals took up the matter of the amended permit submitted by the new owners of the East End Landfill. Perhaps the proceedings would have been a mere formality for the new owners under normal circumstances, but not this time. Listening to public outrage and citing health concerns, the Board denied the amendment and told the company to get rid of the mountain. Almost a year later, the mountain remains. The company has appealed the decision to the Circuit Court of Virginia, and while the appeal waits, questions remain: Who has the authority to remove the mountain? With federal law unsettled as to the dangers and use of coal ash, does a local municipality in Virginia have the legal authority to deny use of coal ash in a

1Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 44 (December 16, 2010) (See Henrico County website for copies of minutes - http://www.co.henrico.va.us/planning/minutes.html).
2Id. at 16.
3Id. at 65.
landfill within its municipal boundaries? If federal law is unsettled and Virginia law provides insufficient oversight, can a local government determine condition the use of such products under its zoning permit process?

A constant in the debate is whether coal ash is safe for humans. The EPA, state regulators and several private groups have found unsafe levels of toxic minerals and metals in coal ash. Proponents on the other hand, cite the beneficial uses of coal ash and claim levels of toxins found at sites are no higher than those found in any soil sample. Given the unsettled debate on safety concerns and potential for danger, it seems appropriate for citizens of Henrico County to not want coal ash in their back yard. Virginia Courts are weary of overturning the decisions of municipal boards, such as the Henrico County Board of Zoning Appeals. Perhaps the courts best understand local governance is a most basic fundamental right of America – the right self determination. While Virginia is a Dillon Rule state and power of municipalities is granted by the Commonwealth, the guidelines of Virginia, as they relates to coal ash storage, are just that – guidelines. When it comes to local land use, the state relies on the knowledge and expertise of local government to determine what will fly in their own back yard.

II. Background on the East End Landfill

The East End Landfill served as a municipal landfill for decades for the City of Richmond taking in all manner of garbage under fairly loose regulatory oversight. The municipal portion of the landfill was covered and closed over 20 years ago. Following its closure as a municipal dump, it became a private facility which was limited to receiving

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4 Barbara Gottlieb et al., Coal Ash; The toxic threat to our health and environment, A Report from Physicians for Social Responsibility and Earth Justice 16-21 (September 2010).
6 Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 44 (December 16, 2010).
construction debris from sites within a 150 mile radius.\textsuperscript{7} The site was separated into two distinct landfills, owned and managed by two separate companies. County officials stated that few, if any, complaints arose from the two separate owners.\textsuperscript{8}

This changed after new ownership. East End Landfill, LLC (also known as TEEL) acquired the two sites and in 2007 began the process of combining the two separate sites under one state landfill permit.\textsuperscript{9} TEEL claims it received the proper approvals to bring in coal ash to grade and fill certain areas of the landfill site.\textsuperscript{10} Henrico County zoning officials disputed this assumption and stated that they only became aware of the use of coal ash on site after the company began stockpiling it under its state permits.\textsuperscript{11} By 2009, TEEL had renamed itself East End Recovery Resources (EERR) and began rebranding itself as an environmentally friendly recycling and reuse facility.\textsuperscript{12} All the while, the mountain of coal ash rose above the tree line on Darbytown Road and neighbors complained of soot reigning down on the neighborhood each time the wind blew.

These complaints from neighbors began to be reported to the County. Residents were experiencing black soot blowing onto their property and covering their cars, outdoor furniture, plants and grass. Neighbors complained of sour throats, headaches, and trouble breathing. Several also complained regularly of foul smells emulating from the site. One business owner

\textsuperscript{8} Id. at 64-65.
\textsuperscript{9} Id. at 19-20.
\textsuperscript{11} Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 45 (April 28, 2011).
\textsuperscript{12} The parent company name is Waste Associates, doing business as EERR - http://www.wasteassociatesllc.com/. (last visited Dec. 5, 2011). The website of EERR was hacked by environmental activist in September of 2011 and has been down since that time.
nearby called the Fire Marshal one afternoon in spring of 2010 because of the overwhelming amount of coal ash blowing onto his property.13

From June of 2009 to December of 2010, EERR was cited for eight zoning violations from the County.14 These included height violations of the stockpile of coal ash, mud tracking on the road from the volume of trucks going to and from the site, and failing to comply with a notice of violations.15 The number of complaints and violations seemed to demonstrate EERR contempt for the County’s authority to regulate the site under its Conditional Use Permit.

This list does not include violations of its DEQ permit. State violations began around the same time as county citations. Virginia DEQ has fined EERR over $100,000 since 2007.16 In April of 2011, EERR was handed down 12 citations from DEQ including failure to update disclosure statements, failure to properly report amount of solid waste received, failure to comply with proper elevation and grade limits, stockpiling of coal ash, failure to control dust and odors.17

Finally the county began enforcement procedures. On December, 16, 2010 the Henrico County Board of Zoning Appeals denied an amendment to EERR’s Conditional Use Permit. After months of complaints by residents and numerous violations, Henrico County told EERR to remove the mountain of toxic coal ash. EERR quickly appealed the ruling to the Circuit Court of Henrico County, putting forth several arguments as to why Henrico was incorrect in its decision.18 The question remains in the court as to whether Henrico is within its rights to deny EERR from using coal ash in the East End Landfill. Studying the patchwork of federal, state,

13 Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 44 (December 16, 2010).
14 Id.
15 Id.
16 Id. at 45.
17 VA DEQ Notice of Violation No. 04-PRO-601, East End Landfill, Permit No. 524 and Notice of Violation No. 04-PRO-602, Darbytown Road Landfill, Permit No.525.
and local laws as they apply to coal ash regulation, it becomes clear that the question is not easily answered.

III. The Overlap of Federal, State, and Municipal Regulations

In December 2008, the wall of a holding pond filled with coal combustion byproducts broke and released a giant wave of toxic sludge.\textsuperscript{19} It headed downhill from the Tennessee Valley Authority Kingston coal-fired power plant. The rushing sludge snapped trees, collapsed entire buildings, and covered the small nearby town of Harriman, Tennessee. It is estimated that approximately 5.4 million cubic feet of fly ash and water flooded the land adjacent to the plant and ran into the nearby Clinch and Emory Rivers.\textsuperscript{20} After this disaster, the Environmental Protection Agency began to scrutinize storage and containment of coal byproducts. There are few federal regulations for disposing of Coal Combustion Byproduct (CCBs) or maintaining storage sites. The EPA set out to study potential ways to regulate disposal of byproducts, oversee retention ponds, and guarantee another disaster like Kingston does not happen again.\textsuperscript{21}

A. Federal Indecision

Currently, the EPA does not classify CCBs or coal ash as a hazardous material.\textsuperscript{22} It is not handled according to strict regulations of hazardous materials. Following the disaster at Kingston, the EPA sought input from the public, industry leaders, environmental activist, and political leaders to develop new standards for regulating CCBs. Currently, the EPA has put forth

\textsuperscript{20} Id.
\textsuperscript{21} Id. click on “Coal Combustion Residuals – Proposed Rule” (last visited Dec. 5, 2011)
\textsuperscript{22} Id.
two different options for classifying and regulating CCBs, including coal ash. One would reclassify coal ash as a special hazardous material and limit regulatory decisions to federal government oversight. The second option would designate it as non-hazardous waste and offer guidelines for each state to self-regulate the disposal and containment of CCBs. Recently, the House of Representatives attempted to step in and preempt the EPA decision by pushing oversight of CCBs to the states, but the House bill is not expected to pass the Senate or a Presidential veto.

While the EPA has not decided whether to specifically designate CCBs as hazardous materials subject to federal oversight, it and several health organizations do admit that coal ash is hazardous to human health. A 2006 study by the EPA found toxins in coal ash include “arsenic, beryllium, boron, cadmium, chromium, chromium VI, cobalt, lead, manganese, mercury, molybdenum, selenium, strontium, thallium, and vanadium, along with dioxins and PAH compound.” The study also lists 67 cases where Coal Combustion Byproducts have contaminated water. Also according to the EPA there have been 34 coal ash spills over the last ten years. Unlike the large catastrophe in Tennessee, many are not reported outside the immediate area impacted.

25 The distinction seems contradictory, but a material can be hazardous to human health and not be a “hazardous material” designation by the EPA and therefore subject to special handling and disposal. Drywall dust, for instance, is hazardous to humans if inhaled frequently, but drywall is not a “hazardous materials”. The same is true for coal ash, which the EPA has deemed hazardous to humans, but has not placed it on the hazardous waste material list under Subtitle C of the Resource Conservation and Recovery Act. For more information on hazardous designations, see the EPA and VA DEQ websites, http://www.epa.gov/epawaste/nonhaz/index.htm, http://www.deq.state.va.us/waste/wastereg85.html.
Such is the case of Chesapeake, Virginia, where roughly 1.5 million tons of coal ash was used to contour the Battlefield Golf Course, which is now suspected of contaminating groundwater in the area.28 About 200 potable wells lie within 2,000 feet of the outer boundaries of the golf course. City officials began to test groundwater near the site and found high levels of arsenic, lead and other toxics.29 As a result of the heightened scrutiny by the city, Dominion Virginia Power, which supplied the coal ash to the builders of the course, agreed as part of a court settlement to pay up to $6 million to extend city water lines to replace contaminated wells in nearby homes.30

Then there was the landslide in Forward, Pennsylvania which dumped thousands of tons of gray, pudding-like coal ash into a creek raising concerns from the state as to whether the ash is safe for use as a fill material. State testing of Perry Mills Run, the creek that was covered by the landslide, found arsenic levels were 10 times the state limit after the slide.31 The source of the mudslide was from a pile of coal ash that had been dumped near the creek in the 1940s. According to the state, samples from the pile showed arsenic concentrations between 198 parts per million and 268 parts per million.32 Pennsylvania state regulations prohibit any use of coal ash fill in residential areas with more than 12 parts per million of arsenic.33 The disaster forced state officials to confront the reality that dangerous chemicals leached out from the coal ash, however, politicians of the major coal state would not go so far as to admit that modern coal ash policies are unsafe.34

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30 Id.
32 Id.
33 Id.
34 Id.
In conducting the aforementioned survey to contemplate new oversight regulations, the EPA has revealed that there are now over 600 coal ash storage sites in 35 states across the country.\textsuperscript{35} The comprehensive list of coal ash sites shows most are located in Pennsylvania, West Virginia, Kentucky, Tennessee, the Carolinas, Virginia, and Georgia, most of the traditional coal states located along the Appalachian Mountains. But there are even coal ash sites in Los Angeles and western states such as Arizona. The large holding ponds of CCBs are usually located in remote areas next to coal-fired power plants, but the coal ash, as with the case of Henrico, can usually be found in densely populated urban areas.

Proponents and the coal industry cite the many uses of coal ash as a reason not to regulate it as a hazardous material but as a beneficial use material. When it gets wet, coal ash hardens. It is used as a binding agent in cement. It is used as fill in a variety of road and building projects.\textsuperscript{36} It has been use in paints and plastics, in kitchen countertops, vinyl floor coverings, shower stalls, and even mixed with soil to increases crop yields.\textsuperscript{37} Coal byproducts are everywhere. Many state departments of environmental quality even promote the benefits of coal ash reuse.\textsuperscript{38}

B. State Ambivalence to Coal Ash Regulations

Since the federal government has not decided how to regulate, much of the governmental oversight concerning storage and use of coal combustion byproducts seems pieced together at the


state level. The EPA has yet to formalize rules, leaving a patchwork of policies and regulations throughout each state. In Virginia for instance, much of the disposal and usage of coal ash is regulated by the Department of Environmental Quality (DEQ) division of Waste Management.\(^{39}\)

Virginia Code authorizes DEQ to oversee and issue permits for landfills.\(^{40}\) Coal ash and other CCBs are specifically regulated through the Virginia Solid Waste Management Regulations.\(^{41}\) Together, these provisions exempt CCBs from regulation as solid waste and do not classify them as hazardous materials. The regulations allow landfills to accept coal ash as long as the material is being beneficially used as fill, structural fill, or to cover other waste. These state regulations are minimal and favor the coal industry. It gives large coal companies and power companies an easy, inexpensive and unregulated outlet for toxic waste.

As with most states, power service providers have been effectively consolidated to one main private regional energy provider, which in Virginia is Dominion Virginia Power. Dominion is a Fortune 500 company with power service in four states.\(^{42}\) Dominion’s primary source of power comes from plants that are coal-fired.\(^{43}\) It is one of the country’s largest producers of energy from coal, and a big contributor to the 130 million tons of toxic coal ash waste leftover each year in America.\(^{44}\) In 2010 Dominion “reused” 1.3 million tons of coal


\(^{41}\) Va. Admin. Code § 20-85-10 (West 2011), See also [http://www.deq.state.va.us/waste/wastereg85.html](http://www.deq.state.va.us/waste/wastereg85.html).


ash. In 2010, Dominion also spent over $2 Million to lobby the U.S. Senate. That same year it gave another $1.3 Million to 527 political organizations and trade lobbying groups.

Given the political influence Dominion and its coal providers have over states such as Virginia, it is often impossible for state legislators to regulate CCBs. Just recently in the 2011 Virginia General Assembly, State Senator Donald McEachin, whose district includes the site of the East End Landfill, introduced the Landfill Management Act, which proposed stiffer oversight for landfills that accept CCBs. The bill passed the General Assembly with strong bipartisan support, including a unanimous vote in the State Senate. Virginia Governor Bob McDonnell, however, vetoed the bill, stating:

“At a time when federal regulations continue to expand dramatically at the Environmental Protection Agency, we should not be adding overly burdensome regulations and costs that will be passed on to Virginia citizens. The existing authority of the agency [DEQ] is sufficient to properly enforce the law.”

Among some of the largest donors to McDonnell’s 2009 gubernatorial campaign were The Virginia Coal Association and A.T. Massey Coal Company.

With uncertainty lingering at the federal level and inadequate oversight at the state level, if a municipality hopes to prevent the harmful effects of depositing of coal ash in landfills, it

49 Id.
51 Together these two gave $50,000; McDonnell also received money from several other energy companies; See Virginia State Board of Elections, Contribution Report for McDonnell for Governor, Inc., http://www.sbe.virginia.gov/cms/Campaign_Finance_Disclosure/Large_Contribution_Reports/View_Large_Pre-Election_Contributions_Results.asp?RYVal=2009&CIVal=1368&CCVal=&Mo=&Nm=&rN=committee&rA
must do so through zoning regulations. The Virginia General Assembly grants general powers to local municipal governments to control zoning restriction and decisions.\textsuperscript{52} Additionally, Virginia case law has upheld municipalities’ power to grant Conditional Use Permits in order to ensure the most beneficial use of limited land resources while protecting the health and welfare of its residents.\textsuperscript{53} The Virginia Supreme Court also gives broad discretion to local Zoning Boards and has a strong presumption that the actions of such board are valid and “will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare.”\textsuperscript{54} Even if the reasonableness of the zoning ordinance is fairly debatable, the court will not substitute its judgment for that of the legislative body, and the legislation will be sustained.\textsuperscript{55}

It is under this strong presumption of validity that Henrico County correctly denied the permit to EERR after the company improperly stockpiled coal ash which blew uncontrollably onto neighbors’ property and exposed hundreds of residents to the potentially toxic effects of coal ash.

IV. Municipal Power to Stop Coal Ash Use

After the December 2010 decision of the Henrico County Board of Zoning Appeals to deny amendments to the Conditional Use Permit (CUP), the applicants, East End Resource Recovery (EERR) appealed to the Circuit Court of Virginia. EERR complaint contains several claims against the county as a basis for relief. First, EERR states the county violated its due process rights when it improperly posted the public notice of the meeting implying the coal ash

\begin{footnotes}
\item[52] Va. Code Ann. § 15.2-2280 (West, 1997).
\item[53] City Council of Virginia Beach v. Harrell, 236 Va. 99 (1988).
\item[54] Id. at 101.
\end{footnotes}
was to be deposited as waste.\textsuperscript{56} EERR also claims the county violated its equal protections rights by unreasonably singling it out by denying the CUP when other landfill site around the state are permitted to use CCBs as fill.\textsuperscript{57} EERR then states the county has no authority to deny its use of CCBs as fill, since state regulations allow for the beneficial use of coal ash and other CCBs.\textsuperscript{58} To support its claim, EERR points to simple language semantics and relies on a circular argument. It claims that since coal ash is used in other locations around the county, the Board of Zoning Appeals cannot single out the East End Landfill by denying its use of coal ash.\textsuperscript{59}

As stated, land use decisions by municipalities are protected by “a strong presumption of validity.”\textsuperscript{60} Virginia courts have upheld this presumption with surprising rigidity. The Virginia Supreme Court has held that it will not supplant a county’s judgment for its own absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare.\textsuperscript{61} Even if the reasonableness of the enactment is debatable, the court defers to the judgment of the legislature.\textsuperscript{62} Given the facts that EERR has been cited repeatedly and continues to be a poor steward of such hazardous materials, the court may find Henrico was proper and fully within its rights to deny the amendments to EERR’s Conditional Use Permit and stop it from stockpiling coal ash in such a densely populated residential area.

\begin{enumerate}
\item[A. EERR’s Due Process Argument]
\end{enumerate}

\textsuperscript{57} Petition for Writ of Certiorari at 7.
\textsuperscript{58} Petition for Writ of Certiorari at 7.
\textsuperscript{59} Id. at 6.
\textsuperscript{61} City Council of Virginia Beach at 101.
First, EERR claims Henrico County violated its due process by posting an improper notice of the public hearing. EERR cites the language of the public posting by the county which referred to EERR as seeking an amendment to “deposit” coal ash in the East End Landfill. The county was required, by its own rules, to post a description of the public hearing. EERR claims this notice was improper and did not correctly explain that the company was not depositing coal ash, but beneficially using it for fill. EERR seems to argue that if Henrico had posted a proper description in the notice then the public would not have had misplaced anger about the proposed changes prompting board members to deny the permit. The reality is residents, political leaders, and community advocates were not misled by the notice. Opponents showed up at the meeting angry not because of the any part of the public notice but because of the repeated instances of toxic ash blowing onto their property. Members of the zoning board were not prejudiced by the posting or misinformed as EERR argues; they were overwhelmed by public outcry to stop the flagrant and illegal actions of EERR. Board members did not seem concerned with the semantics of the coal ash being “waste” or “fill”; the issue before them was the improper stockpiled mountain and the immediate harm it was causing. Proponents for EERR were given time at the public hearing to present their arguments, answer questions, and even allowed time to counter opponents’ comments. Their due process was not denied.

B. EERR’s Equal Protection Argument

As well, EERR claims the county violated its equal protection rights arguing that “…other landfills in Henrico County are authorized to use non-waste materials, including CCBs,

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63 Petition for Writ of Certiorari at 6.
64 Petition for Writ of Certiorari at 6.
65 Id.
66 Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 65 (December 16, 2010).
in the same manne. Again, EERR is trying to incorrectly frame the argument. If it is true that other sites in Henrico are authorized to use coal ash as fill, those cites would still be accountable to the provisions set forth under a Conditional Use Permit and would not be able to cause imminent harm to neighbors. EERR seems to be claiming that the county has erroneously singled it out and applied the law unequally. The record is replete with evidence of state and local violations by EERR. The landfill was cited over 20 times for state and local violations, including many in 2011. The county had sufficient evidence to label the mountain as harmful and label EERR as a poor neighbor in violation of zoning laws.

The decision of the Board of Zoning Appeals was supported by ample evidence and upheld by proper notice and process. The decision was not arbitrary or unreasonable but fairly and equally presented, debated and decided upon by the Board. Virginia courts have stated that even if the record shows a decision by a municipality can be “fairly debatable,” court should not upend the decision of county simply because one party did not like the outcome of a hotly debated topic.

C. Statutory Authority to Deny Coal Ash Use

EERR claims Henrico does not have the statutory authority to stop if from stockpiling coal ash inside a landfill completely contained within the boundaries of the county. This claim seems to be counter to long established precedence in Virginia.

Virginia is a Dillon Rule state, which simply puts full power over municipalities into the hands of the state authority. Judge Dillon most famously stated, “Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into

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67 Petition for Writ of Certiorari at 7.
69 Petition for Writ of Certiorari at 6.
them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control.”70 Judge Dillon’s ruling was controlling in Iowa, but this concept was quickly adopted by the U.S. Supreme Court just a few years later.71 If taken at face value then EERR argument wins – state policies on coal ash trump local laws and Henrico must concede. But the key to the U.S. Supreme Court ruling is that municipalities do have the power to police their own land and zoning matters, they simply must get permission from the state first. The U.S. Supreme Court noted:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 72

Herein lays the fault in EERR claim. Virginia has expressly granted municipalities the power to regulate zoning concerns. Virginia has given counties like Henrico the power to be flexible with Conditional Use Permits to determine the best use of limited land resources. The state has also given Henrico the power to control and deny land uses which have the potential to cause harm to its residents.73 Virginia statutes specifically allow a municipality to control and remove a “public nuisance” which presents “imminent and immediate” threat to life or property. “Nuisance” includes dangerous or unhealthy substances which have been allowed to accumulate

70 Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa 455, 475 (1868).
72 Merrill at 681.
in any place.\textsuperscript{74} Regardless of the beneficial reuse of coal by-products, regardless of the conflicts of Federal and state law, or even scientific disagreement as to the dangers of coal ash, Henrico has the power to tell EERR to get rid of the coal ash. If county officials document the nuisance of it blowing around, smelling, and causing an unsightly mess, then they have an ultimate trump card to say they don’t want it in their backyard.

Opponents point out that regardless of its intentions to beneficially use the mountain of coal ash, EERR has allowed a dangerous and unhealthy substance to accumulate in such close proximity to residents in the neighborhood.\textsuperscript{75} The pile is located at the front of the landfill. EERR proponents pointed out at the public hearing in December that the landfill is next to industrially zoned areas, but this is only true of the back portion of the landfill.\textsuperscript{76} The front entrance to the landfill is located on Darbytown Road which is also where the coal ash is located. The mountain is directly across the street from residential home. EERR dumped the coal ash at the front of the property allowing it to accumulate near residents. Perhaps EERR could argue there is a minimal impact with surrounding zoning if the coal ash was more towards the back of the property, though it is doubtful given the propensity for the ash to travel in high winds several hundred feet down the road. On April 4, 2011 County officials videotaped high winds pushing black ash from the pile and swirling the toxic materials around the adjacent properties.\textsuperscript{77} EERR’s own lawyer testified before the Board of Zoning Appeals that he can see the soot blowing off the pile from his downtown office over a mile away.\textsuperscript{78} As studies by the EPA and private organizations such as Physicians for Social Responsibility, coal ash contains many

\textsuperscript{74} Va. Code Ann. § 15.2-900 (West, 1997).
\textsuperscript{75} Va. Dept. of Environmental Quality, Piedmont Regional Office, Public Hearing, at 26 (August 2, 2011).
\textsuperscript{76} Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 52 (December 16, 2010).
\textsuperscript{77} Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 52 (April 28, 2011).
\textsuperscript{78} Id. at 50, line 2237.
harmful and poisonous chemicals of arsenic, lead, and hexavalent chromium.\textsuperscript{79} It is the reason state regulations are placed on transporting and holding coal ash. If it is going to be allowed in a landfill, it must be contained and handled appropriately and not allowed to swirl and blow hundreds of yards from its site.

But EERR has not kept the soot from blowing onto the properties of its neighbors. The stockpile has become an imminent and immediate threat to the neighborhood next to the landfill. Due to the public nuisance this accumulated stockpile has caused, Henrico was well within its rights to enforce police powers specifically granted to it by the Commonwealth of Virginia. Henrico was acting within its authority to force EERR to remove the pile.

\textbf{D. Henrico’s Power to Deny EERR’s Conditional Use Permit}

EERR also puts forth the claim that Henrico has no authority to deny it the ability to receive and stockpile coal ash through its Conditional Use Permit. EERR attempts to justify this claim though the language of Henrico Code, Section 17-26 which authorizes use of imperishable items as fill.\textsuperscript{80} But the county is not trying to deny EERR from using imperishable items such as bricks and stone, bricks, tile, sand, gravel, soil, asphalt, concrete products or even coal ash as fill. It is simply trying to enforce proper use of these items in the landfill under the granted Conditional Use Permit.

Virginia courts have routinely upheld municipalities’ power to grant, change, or deny a Conditional Use Permits in order to ensure the most beneficial use of land while protecting the health and welfare of its residents.\textsuperscript{81} The Virginia Supreme Court also gives broad discretion to local Zoning Boards and has a strong presumption that the actions of such board are valid and

\begin{footnotesize}
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\item \textsuperscript{79} Lisa Evans et al., \textit{EPA’s Blind Spot: Hexavalent Chromium in Coal Ash} at 4, Earth Justice, (Feb. 1, 2011).
\item \textsuperscript{80} Petition for Writ of Certiorari at 7 (EERR actually references Sec 17-34 which is the outdated 1995 code).
\item \textsuperscript{81} \textit{City Council of Virginia Beach v. Harrell}, 236 Va. 99 (1988)
\end{itemize}
\end{footnotesize}
“will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals, or general welfare.”\textsuperscript{82} Again, even if the reasonableness of the enactment is fairly debatable, the court will not substitute its judgment for that of the legislative body.\textsuperscript{83}

The Conditional Use Permit UP-025-07 granted to EERR clearly states the land use by the applicant “will not adversely affect the health, safety, or welfare of persons residing or working on the premises or in the neighborhood.”\textsuperscript{84} The permit also requires that the landfill not unreasonably impair the supply of air nor impair the value of the adjacent properties. The language also clearly states the permit is revocable for failure to adhere to the conditions. The record has demonstrated that EERR has repeatedly violated the conditions of the permit. Several residents came forward at the December 16, 2010, Board of Zoning Appeals meeting to testify to the diminished air quality surrounding their homes. The County received numerous complaints of rotten egg smells emitting from the site.\textsuperscript{85} One nearby resident underwent testing by a doctor and found elevated levels of toxins in her bloodstream.\textsuperscript{86} Several residents testified before the public hearing as to the harm the landfill has caused to their property values. These problems did not surface prior to EERR taking control of the landfill and improperly stockpiling coal ash, as County Supervisor Jim Donati stated at the Board of Zoning Appeal’s public hearing in December of 2010.\textsuperscript{87}

\textsuperscript{82} City of Virginia Beach at 101.
\textsuperscript{85} Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 44 (December 16, 2010).
\textsuperscript{86} Va. Dept. of Environmental Quality, Piedmont Regional Office, Public Hearing, at 18 (August 2, 2011).
\textsuperscript{87} Minutes of the Regular Meeting of the Board of Zoning Appeals of Henrico County, at 44 (December 16, 2010).
The County Board of Zoning Appeals relied on evidence brought forth from numerous neighbors, political leaders, and fellow county officials, when it denied EERR’s Conditional Use Permit. EERR has not met its burden of proof that the action by the board was unreasonable, or arbitrary. Quite the contrary, the county put forth overwhelming evidence that the decision was reasonably related to the public health, safety, morals, or general welfare of the residents of eastern Henrico.

E. Henrico’s Zoning Power is Not Absolute Power

Given that municipalities have control over land use through zoning ordinances; can Henrico flex its local power and pass a full ban on coal ash? The quick answer is no. Ironically, the same legal concepts that allow Henrico to stop EERR from stockpiling coal ash as a violation of a Conditional Use Permit, also limit it from banning all coal ash through a local ordinance. As stated, Virginia is a Dillon Rule state and courts have routinely used this rule to uphold local power while still limiting it. The Supreme Court of Virginia has elaborated on this limited power through cases such as one brought against Amelia County. In 1999, Amelia County tried to ban all use of biosolids on farmlands. Biosolids are a form of human waste sewage sludge which is treated and reused on farms. Much like the coal ash pile rising in Henrico, when residents learned of the process of pouring human waste onto farmland, it created quite a stir, prompting Amelia County to enact an outright ban. The Supreme Court of Virginia overturned the ordinance stating that while a municipality may expand on state law and require more than the state requires, it may not “forbid what the legislature has expressly licensed,

89 Id. at 59.
authorized, or required.”

Virginia state courts and Federal courts reaffirmed this position a few years later when Spotsylvania County and Appomattox County tried to ban the use of biosolids. The courts all noted that Virginia had preempted the counties’ bans through the Virginia Code and Virginia Department of Health Biosolid Use Regulations.

Henrico is therefore preempted from a full outright ban of coal ash. As stated, Virginia has specifically authorized and promoted the use of coal ash in landfills. Virginia DEQ regulates coal ash and other CCBs through the Virginia Solid Waste Management Regulations. While Henrico could put additional regulations and guidelines on the use of coal ash, as it has done with EERR’s Conditional Use Permit, it may not ban all coal ash from being used inside the county’s jurisdiction. If the citizens of Henrico wish to stop the coal ash from being trucked into the county, they will have to look to other actions at law.

V. Nuisance Claims as a Gap-Fill for Environmental Regulations

With little enforceable environmental oversight for coal ash, it seems there is not much a municipality can do to ban the dumping of coal ash. As Virginia laws are currently written, a coal ash site must be violating use permits or creating a nuisance before the local government has the power to put a stop to it. Is there no way for citizens to prevent the importation of coal ash into their neighborhoods?

One answer to these questions may be the use of the common law claim of public nuisance. As stated, Virginia has provisions which allow a municipality to tell someone to clean up their act if they are creating a nuisance. But to go a bit further, opponents of coal ash may be able to use the common law action of public nuisance to preemptively ban coal ash, rather than

91 Blanton at 64.
wait for a company such as EERR to violate a Conditional Use Permit or stockpile the coal ash improperly. If the EPA is undecided and Virginia DEQ provides inadequate protections, perhaps opponents can use the courts to stop the importation and stockpiling of coal ash into their neighborhoods.

A. Background on Nuisance Laws

In Virginia, and with most jurisdictions, common law allows both public and private nuisance claims when an alleged harm is done to a property owner’s use and quiet enjoyment of land. Virginia has gone further than the common law and even codified procedures for nuisance claims. Nuisance claims have been based upon dust, smoke, noxious odors, mud, chemicals, air pollution and industrial waste. At common law, it is a bit of a catch all for damage to property. The Virginia Supreme Court has held that a business, even one operating legally, can be liable for private nuisance if it has substantially and unreasonably interfered with neighbors’ use of land and such nuisances include “everything that endangers life or health, or obstructs reasonable and comfortable use of property.” Contrary to the argument put forth by East End Resource Recovery (EERR), Conditional Use Permits and Virginia DEQ permits will not shield a business from a nuisance claim. The Virginia Supreme Court has held such zoning and use permits do not “authorize the maintenance of a nuisance.” Though many of the residents living near the East End Landfill have a strong case to bring private nuisance actions against EERR, the discussion of such private claims are just beyond the scope of this essay.

95 Nash at § 8:3.
97 Petition for Writ of Certiorari at 7.
98 Barnes v. Graham Virginia Quarries, Inc., 204 Va. 414, 417 (1963) (Quarry unsuccessfully argued zoning permit to blast made its business legal and shielded it from liability).
More important to this essay is the ability of Henrico County to use public nuisance claims against EERR to stop it from stockpiling coal ash near the east end neighborhood. On a broader scale, advocates in Virginia may have the power through public nuisance actions to do what current environmental law has failed to do – *ban coal ash*.

**B. Use of Public Nuisance Laws to further Environmental Oversight**

The tort claim of public nuisance differs from private nuisance in that the public claim is focused on substantial and unreasonable interference with a public right or injury to public health, safety, or peace and comfort.\(^9^9\) Local governments have used public nuisance laws to combat a wide range of actions and harms such as chemical waste spills, pollution of waterways, and even as early substitutes for environmental regulations predating many current state and Federal environmental laws.\(^1^0^0\)

The legal idea is that public nuisance laws could have broader ramifications and be used as a gap-fill for environmental laws. Simply put, if a particular environmental law is only focused on preservation or base standard regulations for industry and falls short of protections, then a locality can go further and use public nuisance laws to abate environmental polluters. Legal scholars, such as University of Vermont law professor Mark Latham and his colleagues, have argued for courts to recognize the intersection of environmental law and tort law and use actions such as public nuisance claims as an effective gap-filler without expanding the traditional role of tort law.\(^1^0^1\) Where an environmental law is focused on preservation and monitoring rather than on deterrence and harm caused, courts can rely on the tort law of public nuisance to correct

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a harm caused by waste, spills, or pollution.\textsuperscript{102} One example Latham points to is the Clean Air Act of 1970 (CAA), which is regulatory in nature and establishes, through monitoring, a base level at which air quality is unsafe and hazardous.\textsuperscript{103} Because the CAA is primarily focused on preservation and monitoring, it can theoretically coexist with the tort claim of public nuisance as “two independently operating systems with separate objectives.”\textsuperscript{104} So for instance, the Federal Clean Air Act can monitor the ambient air quality of Henrico as an effort to preserve the health and wellbeing of the residents, while public nuisance actions can stop a business such as EERR from allowing coal ash dust to blow uncontrollably onto neighbors’ properties.

But the theory is put to the test when localities attempt to broaden environmental oversight and try to abate, ban, or hold polluters liable through public nuisance actions. Efforts to use nuisance actions to stop lead polluting and carbon emissions have had mixed results.\textsuperscript{105} In 2006 the State of Rhode Island ordered three former manufacturers of lead paint to abate lead contamination.\textsuperscript{106} While the lower state court initially found the manufacturers liable for creating a public nuisance, the Rhode Island Supreme Court subsequently overruled and held that the State of Rhode Island had failed to allege infringement of a “public right” sufficient to state cause of action for public nuisance and had failed to prove defendants were in control of lead pigment at the time it caused harm.\textsuperscript{107} While the Rhode Island claim failed, public nuisance actions against lead paint manufacturers in Wisconsin and California have survived initial appeals to move forward.\textsuperscript{108}

\textsuperscript{102} Latham at 749.
\textsuperscript{103} Id. at 743.
\textsuperscript{104} Id. at 755.
\textsuperscript{105} Id. at 760.
\textsuperscript{106} R.I. court overturns paint verdict, Associated Press, July 02, 2008, \url{http://www2.timesdispatch.com/news/2008/jul/02-/rtd_2008_07_02_0102-ar-122298/}.
\textsuperscript{108} Latham at 748.
More recently, eight states including California, Connecticut, and Wisconsin filed public nuisance claims in Federal court against five major electric power companies arguing these companies’ emissions “substantially and unreasonably interfered with public rights” and asked the Federal court for a decree setting carbon-dioxide emissions caps for each defendant.\(^\text{109}\) The appeal went before the U.S. Supreme Court in April of 2011, and the court held that the Clean Air Act (CAA) and EPA displaced any federal common law public nuisance action to seek abatement of carbon dioxide emissions from coal fired power plants but left open the possibility of similar public nuisance actions in state courts where the source state has a public nuisance statute.\(^\text{110}\)

So this Supreme Court ruling would seem to bode well for citizens of Henrico and Virginia. Federal common law nuisance claims seem to be out as an environmental enforcement tool. However, the Supreme Court has not stopped state suits from continuing. Courts must simply follow the public nuisance laws of the state from where the source of the nuisance is originating. As stated, Virginia recognizes public nuisance claims and has codified procedures for bringing such actions. While Virginia courts allow citizens to bring private actions against a perceived public nuisance, it seems only a VA Commonwealth’s Attorney (state’s attorney) can bring a public nuisance claim as an environmental enforcement action.\(^\text{111}\) Citizens such as those living next to landfills, however, don’t have to sit idly by and wait for action by the state’s attorney. The Virginia Code may give them the power to instigate a public nuisance action on their own:

“\text{When complaint is made to the circuit court of any county, or the corporation court of any city of this Commonwealth, by five or more citizens of any county, city or town,}\)

\(^{110}\)Id. at 2538-9.
setting forth the existence of a public or common nuisance, the court, or the judge thereof in vacation, shall summon a special grand jury, in the mode provided by law, to the next term of such court, to specially investigate such complaint.”¹¹²

These are high hurdles though and Virginia courts have not been on the forefront of the use of public nuisance claims to buffer environmental laws, preferring more often to address environmental concerns on an individual case-by-case basis through private nuisance claims.¹¹³ But the winds may be changing direction. The Circuit Court of Virginia recently allowed plaintiffs to move forward with their complaint against Dominion and the developers of the previously mentioned Battlefield Golf Course which was built with 1.5 million tons of coal ash and is now suspected of contaminating ground water in Chesapeake.¹¹⁴ The court held the homeowners pled sufficient facts to allow claims for nuisance and negligence to proceed.¹¹⁵ Regardless of the pace of Virginia courts, public sentiment may be building to stop coal ash dumping. Federal courts have left the door open to public nuisance claims and it just seems to be a matter of time before energy companies, coal producers, and waste facilities that store coal ash are held accountable for years of lax oversight.

VI. Conclusion

To date, the appeal by EERR has not been accepted for by the Circuit Court of Virginia. While the company and the county wait for a decision, the bigger question remains as to who has the power to regulate coal ash. As stated, the Federal government has not reached a final ruling on how to regulate coal ash and Coal Combustion Byproducts. The U.S. Environmental

¹¹³ Supra note 94 and 96.
¹¹⁵ Id. at 74.
Protection Agency has put forth two proposals for regulating coal ash, each is a reflection of the two sides of the debate. Proponents of coal ash as a beneficial re-use product want states to have the power to regulate coal ash – deciding on their own whether to label it as a hazardous material. Opponents of coal ash wish to see all CCBs labeled as a hazardous waste material and regulated by better oversight and banned from being dumped in open landfill pits. The indecision by the EPA has drawn criticism from both sides, leaving the states to regulate coal ash by default. Many states, such as Virginia, align with proponents and coal companies to promote the re-use of coal ash. While the EPA has not deemed coal ash a hazardous waste material, plenty of authorities cite the toxic dangers of coal ash.

The problem emerges as municipalities such as Henrico County face the reality of what beneficial re-use may mean to those living right next to a pile of coal ash. Local elected officials must deal with the ire of constituent complaints. It is one thing for states to try to cope with the millions of tons of byproducts from the coal industry; it is quite another to park a mountain of coal next to residential homes.

With over 600 CCB sites around the county, the conflict will continue. Perhaps the best argument municipalities have is their traditional power to determine how land is used within their borders. Regardless of what rights a private company may have, these companies are subject to zoning restrictions. State governments and courts have granted local officials the power to decide the best use for land when citizens must live is such close proximity. Virginia courts are especially rigid when it comes to reviewing municipal zoning decisions. In the end, EERR will have a difficult time overcoming the presumption held by the courts that Henrico’s decision to deny its Conditional Use Permit was within its power. Given the outcry at public
hearings and the potential for harm to neighbors, it is most likely the court will uphold Henrico’s decision to say no to coal ash.

As to the broader view of the problem, while Federal and state laws fail to give adequate oversight, communities only recourse to try to fully ban coal ash from being dumped in open landfills or anywhere near residential homes may lie with the courts. Coal companies may have enough of a hold on politics to stall any new action to regulate coal ash, but the U.S. Supreme Court has left open the route of public nuisance claims against such companies in state courts. This court process will play out slowly, especially in Virginia. Meanwhile the debate over coal will continue. As long as Virginia and other states get a majority of their power from coal fired power plants, someone will have to live next to a pile of coal ash.