

(S. B. 81)

(No. 40-2017)

(Approved July 4, 2017)

AN ACT

To create the “Ban on the Deposit and Disposal of Coal Ash or Coal Combustion Residuals in Puerto Rico Act”; establish the ban on the deposit and disposal of coal ash or coal combustion residuals as public policy; provide penalties for the deposit, disposal, and storage of coal ash or coal combustion residuals; direct the Environmental Quality Board to promulgate regulations; and for other related purposes.

STATEMENT OF MOTIVES

The Constitution of Puerto Rico sets forth in Section 19 of Article VI that: “It shall be the public policy of the Commonwealth to conserve, develop, and use its natural resources in the most effective manner possible for the general welfare of the community.” Likewise, Act No. 416-2004, as amended, known as the “Environmental Public Policy Act,” states that it is the ongoing policy of the Government of the Commonwealth, including its municipalities, in cooperation with all public and private organizations so interested, to use all practical means and measures, including technical and financial assistance, with the purpose of encouraging and promoting general wellness and ensuring that all natural systems are healthy and able to sustain life in all its forms, as well as social and economic activity, within the framework of a culture of sustainability, in order to create and maintain conditions under which humankind and nature can coexist in productive harmony and to meet the social, the economic, and any other needs that may arise for the present and the future generations of Puerto Ricans.

Consistent with the aforementioned public policy, in Puerto Rico there is an implicit ban on the deposit of residuals from the burning of coal to generate electricity. In 1994, among the first steps taken towards eliminating oil dependence in the generation of electricity, the Electric Power Authority entered into a Power Purchase Agreement with Applied Energy System (hereinafter, AES Puerto Rico). AES Puerto Rico uses coal as fuel to generate electricity. In the Agreement, both parties specifically agreed that coal combustion residuals produced in AES Puerto Rico's facilities, which were not used for beneficial commercial uses, would not be stored for periods longer than 180 days or disposed of anywhere in Puerto Rico. That is to say, once said 180-day term elapses, residuals would be transferred out of our jurisdiction.

In 2014, however, the Government took the first steps to allow the deposit of coal combustion residuals in our jurisdiction. The Electric Power Authority requested a written opinion from the Environmental Protection Agency to allow the deposit of coal combustion residuals in Puerto Rico. In response to said request, on August 14, 2014, EPA issued a written communication concluding that the ban on the deposit of coal combustion residuals was unnecessary. Furthermore, it recommended that the agreement executed between electricity providers be amended to allow for the deposit of the aforementioned residuals.

In 2015, the Electric Power Authority amended the Power Purchase Agreement to allow the disposal and storage of the coal combustion residuals produced in AES Puerto Rico's facilities within the jurisdiction of Puerto Rico. In doing so, the Electric Power Authority lifted the customary ban on the disposal and storage of the coal combustion residuals on the Island.

At present, AES Puerto Rico produces approximately three hundred thousand (300,000) tons per year (TPY) of coal residuals in the form of ash. Recent studies conducted by Vanderbilt University, in Nashville, Tennessee, in conjunction with

EPA, found that the metal components in the ash produced by AES Puerto Rico exceeded the maximum level allowed by the applicable regulations.

In fact, during a Public Hearing held by the Senate of the Seventeenth Legislative Assembly of Puerto Rico, the Chair of the Environmental Quality Board, Weldin Ortiz, clearly stated that ash has no beneficial use; therefore, it is waste. For such reason, he concluded that the use of carbon residuals for any purpose should be expressly banned. Moreover, he added that due to the harmful effects of such material, he would order the removal thereof from all constructions where said ash had been used as an aggregate.

It is worth noting that, in *Municipio de Peñuelas v. Ecosystems, Inc.*, 2016 T.S.P.R. 247, resolved on December 19, 2016, the Supreme Court of Puerto Rico held that use of the ashes produced from the burning of coal is not preempted by the Federal or the State Government.

The Supreme Court's in-depth Opinion stated, firstly, that it is indisputable that a state can duly ban the disposal and use of coal combustion residuals, produced from the generation of electricity, within their territorial limits. The Supreme Court's opinion was based on the fact that on April 17, 2015, EPA promulgated regulations regarding the safe disposal of coal combustion residuals, to wit: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21302 (April 17, 2015) (hereinafter "Final Rule"). As it is stated in the text:

In order to ease implementation, the regulatory requirements for CCR landfills and CCR surface impoundments, EPA strongly encourages the states to adopt at least the federal minimum criteria into their regulations. **EPA recognizes that some states have already adopted requirements that go beyond the**

minimum federal requirements; for example, some states currently impose financial assurance requirements for CCR units, and require a permit for some or all of these units. This rule will not affect these state requirements. **The federal criteria promulgated today are minimum requirements and do not preclude State's from adopting more stringent requirements where they deem to be appropriate.** (Emphasis added). 80 Fed Reg. 21430.

Secondly, the Supreme Court established that that the Environmental Quality Board promulgated the Regulation for the Handling of Non-hazardous Solid Waste, as amended, Regulation No. 5717 of November 14, 1999. However, the Supreme Court stated that no paragraph or section thereof defines what a manufactured aggregate is or in any way establishes how the different types of ashes produced by the burning of coal should be treated in relation thereto. Consequently, the Supreme Court concludes that, to this day, the Environmental Quality Board, the entity empowered to adopt rules and regulations regarding the disposal of solid waste, as well as permits and licenses to create facilities for the recovery, processing, and final disposal of such waste, has not preempted the field regarding the use of aggregates manufactured from coal ash as construction material.

Subsequently, on May 2017, in *AES Puerto Rico, L.P. v Trujillo-Panisse, et. al* (No. 16-2052), the United States Court of Appeals for the First Circuit held that the ordinances adopted by the Municipality of Peñuelas and the Municipality of Humacao banning the deposit and use of coal ash or coal combustion residuals may not be enforced or overseen to the extent they directly conflict with Commonwealth laws as promulgated by the Environmental Quality Board, and thus concluded that the deposit and disposal of coal combustion residuals is preempted by

Commonwealth law, in view of the fact that the Environmental Quality Board had issued permits to AES and to various sanitary landfill systems.

In the exercise of the State's police power, the Legislative Assembly has the authority to adopt measures to preserve the health, safety, and welfare of the people. To such purposes, the Legislative Assembly is empowered to enact statutes to address social and economic issues, as well as emergency situations. Section 19 of the Bill of Rights of the Constitution of Puerto Rico provides that the enumeration of rights in Article II shall not be construed as to restrict "the power of the Legislative Assembly to enact laws for the protection of the life, health, and general welfare of the people." Likewise, Section 18 of the Bill of Rights grants the Legislative Assembly the power to enact laws to deal with grave emergencies that clearly imperil the public health or safety or essential public services.

In the exercise of this constitutional power and faced with the arising concern of some sectors about the potential dangers to the health of Puerto Ricans, it is the responsibility of the Legislative Assembly to impose a clear and specific ban on the deposit and disposal of carbon combustion residuals from the generation of electricity within the jurisdiction of Puerto Rico.

This Legislative Assembly is well aware of the presence of facilities that manufacture cement and produce concrete in Puerto Rico, which for years have used coal combustion residuals produced from different power plants, among other raw materials, to manufacture their products under controlled procedures.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

Section 1.-Title

This Act shall be known as the "Ban on the Deposit and Disposal of Coal Ash or Coal Combustion Residuals in Puerto Rico Act."

Section 2.-Public Policy

Section 19 of Article VI of the Constitution of Puerto Rico provides that it shall be the public policy of the Commonwealth to conserve, develop, and use its natural resources in the most effective manner possible for the general welfare of the community. Likewise, Section 18 of the Bill of Rights empowers the Legislative Assembly to enact laws to deal with grave emergencies that clearly imperil the public health or safety or essential public services.

In the exercise of this constitutional power and in view of the risk posed to the health of Puerto Ricans, this Legislative Assembly has the duty to impose a clear and explicit ban on the deposit and disposal of coal ash or coal combustion residuals in any roads, lands, including landfills, and water bodies within the territory of the Government of Puerto Rico.

For purposes of this Act, coal ash or coal combustion residuals shall mean waste material generated from power plants; including fly ash, bottom ash, boiler slag, and flue gas desulfurization gypsum.

Section 3.- Ban and Clarifications

a) The deposit and disposal of fly ash or coal combustion residuals in any roads, lands, including landfills, sanitary landfills, and water bodies within the territory of the Government of Puerto Rico is hereby banned.

b) Storing coal ash or coal combustion residuals within the territory of Puerto Rico longer than one hundred and eighty (180) days after the generation thereof is hereby banned. The ban and the time period provided herein, which shall not exceed one (1) year, shall not apply to tanks and silos used to store coal ash or coal combustion residuals to be used in the manufacture of cement and/or concrete and for any other beneficial commercial use, as provided by the state and federal regulatory agencies concerned. The Environmental Quality Board shall prescribe

by regulations any specific storage requirements to be met during the time period herein provided, as well exemptions and other rules.

For purposes of this Act, the term “deposit and disposal” shall mean the final disposal of coal ash or coal combustion residuals other than for beneficial commercial uses.

Section 4.- Penalties

Any natural or juridical person that violates any of the bans imposed in this Act shall be guilty of a felony punishable by a fine of not less than twenty-five thousand dollars (\$25,000) for each day the violation continues or by imprisonment for a five (5) year-term, at the discretion of the Court.

Section 5.-Rulemaking Authority

The Environmental Quality Board is hereby empowered and directed to take pertinent actions to adopt regulations as are necessary to fully comply with this Act within ninety (90) days after its approval.

The Environmental Quality Board’s failure to take action in relation to the promulgation of the regulations directed hereunder shall not impair the effectiveness of this Act.

The maximum term of one hundred and eighty (180) day for storing coal ash or coal combustion residuals provided in Section 3(b) of this Act shall begin to run as of the Environmental Quality Board’s approval of the regulations herein directed or within ninety (90) days after the approval of this Act, whichever occurs first.

Section 6.- Severability Clause

If any of the provisions in this Act were held to be unconstitutional, the remaining provisions thereof shall remain in effect.

Section 7.- Effectiveness

This Act shall take effect immediately after its approval.