

## EPA COAL ASH PROPOSED RULE: SUMMARY

Rather than selecting a preferred option, EPA “co-proposes” two options for regulation, one under Subtitle C of the Resource Conservation and Recovery Act (RCRA) and the other under Subtitle D. The Subtitle C option would effectively regulate coal ash as hazardous waste with the associated safeguards for storage, handling, transport and disposal. In contrast, the Subtitle D option would not establish any uniform, federally enforceable standards, leaving us with the same patchwork of inadequate state regulations that have failed us up until now. The bottom line is that the Subtitle C option is overwhelmingly more protective of human health and the environment, as shown in the comparison table and explained below.

The Subtitle C Option: Under this option, coal ash is classified as a “special waste” subject to hazardous waste management standards, meaning that EPA would maintain the authority to **federally enforce** all applicable requirements and to conduct inspections. It would require all states to set equivalent (or more stringent) standards for generation, storage, transportation and disposal of coal ash; require every disposal facility to obtain a permit; require the phase-out of waste ponds; and require operators to post financial assurances to ensure effective clean-up in the event of contamination. It would also impose dam safety requirements. Essentially, coal ash would be regulated as a hazardous waste despite its classification as a “special waste” — a concession to industry concerns about “stigma.”

The Subtitle D Option: This option would continue to classify coal ash as solid waste. It proposes many of the same safeguards that are contained in the Subtitle C option, but these safeguards are only “suggested guidelines” for states. States would **not** have to enact equivalent standards, and EPA would have no authority to enforce either the guidelines or the state standards (if enacted). The option does not allow EPA to issue permits or require that states issue permits. The standards in the Subtitle D option only cover coal ash disposal and do not address the generation, storage or transport of ash. Under this option there is no requirement for financial assurance. According to EPA, the Subtitle D option has the advantage of being cheaper to implement than the Subtitle C option, but as the agency itself concedes, that is because it expects **lower compliance** with Subtitle D standards.

Shortcomings of Both Options: The Subtitle C proposal is an enormous improvement over the current lack of federal standards, but it is not perfect, and it shares many flaws with the Subtitle D proposal. For one, both proposals completely exempt so-called “beneficial uses” from any regulation under RCRA. This is a problem because the definition of “beneficial use” proposed in both options is vague and leaves open the possibility that dangerous “uses” such as agricultural “soil amendments” and use of ash as an anti-skid agent on roads would qualify as beneficial. Neither proposal regulates the placement of ash in mines or “mine-filling,” a practice that is known to be contaminating water supplies across the country. (However, EPA’s Subtitle C proposal would provide a strong justification for the Department of Interior to establish adequate regulations for minefills in the future.) Furthermore, both proposals decline to regulate the 3 to 6 million tons of coal ash generated annually by non-utilities.

### Why It Is Crucial to Persuade EPA to Adopt the C Option:

(1) We Need Mandatory State Regulations and Federal Enforcement Authority: **Most importantly**, the Subtitle C proposal establishes **requirements** that **must** be met. In contrast, despite the Subtitle D proposal’s inclusion of many of the same standards, these standards are legally nothing more than “**suggested guidelines**” that states **may, or may not**, choose to follow.

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What this means is that under Subtitle D, the guidelines will be “self implementing.” If a state chooses not to adopt them, the only means of enforcement will be through citizen suits, which are complex and prohibitively expensive for most citizens or non-profit groups to undertake. For example, to enforce clean-up requirements at a contaminated site, a citizen would be required to interpret highly technical monitoring reports with the help of an expert. It is wholly untenable to expect that Subtitle D requirements for the second largest industrial waste stream in America could be effectively enforced by citizens.

In sum, EPA’s Subtitle D option would leave **citizens** to face off against an industry that has every incentive to avoid the expense of safe coal ash disposal, a notorious track record of causing extensive and enduring environmental damage, and virtually unlimited resources to outspend citizens to defend against enforcement actions. This approach abrogates EPA’s fundamental responsibility under RCRA to prevent “imminent and substantial endangerment to health or the environment.”

(2) Absence of Mandatory Permits: EPA cannot require that states issue solid waste permits under the Subtitle D Option. **Permits are the prime enforcement tool of state and federal regulatory agencies and are the only mechanism for meaningful public involvement** in the siting and operation of disposal facilities. Furthermore, requiring facilities to comply with standard permit requirements would allow agencies, with citizen involvement, to **prevent pollution** before it occurs, rather than undertaking expensive clean-ups after major damage has occurred. Currently, almost a third of the coal ash generated in the United States is not subject to disposal permits. It is critical that federal regulations correct this deficiency.

### The Challenge Ahead

It will take a tremendous collective effort to get the Subtitle C coal ash regulations that we desperately need. Industry, elected officials, and state and federal agencies voiced tremendous opposition to the Subtitle C proposal. Under pressure from OMB and the White House (which met with industry but refused a meeting with the environmental community) and in response to adverse comments from other federal agencies, EPA added the Subtitle D proposal to its package. However, we know that EPA would prefer to finalize effective coal ash regulations. It is up to us to push the agencies and the White House toward the right solution. We have an historic chance to protect our streams and drinking water and create a level playing field between coal-fired power and cleaner energy alternatives by regulating coal combustion wastes responsibly. To do it, however, will require a nationwide grassroots effort and a huge public outcry to compel the Obama administration and EPA to move forward with the Subtitle C regulation. We must change the political dynamic in Washington. Right now, the power industry is calling the shots. Decision-makers need to hear from the tens of thousands of citizens across the country demanding common sense safeguards that can only be assured under a Subtitle C regulation.

For more information: [www.earthjustice.org/coalash](http://www.earthjustice.org/coalash) and [www.environmentalintegrity.org](http://www.environmentalintegrity.org)

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**EPA COAL ASH PROPOSED RULE: SUBTITLE C AND D COMPARISON CHART**

EARTHJUSTICE, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, SOUTHERN ENVIRONMENTAL LAW CENTER

|  | <b>SUBTITLE C</b>   | <b>SUBTITLE D</b>   |
|--|---|---|
| <b>Would States be required to adopt and implement EPA’s regulations?</b>                          | Yes – State programs would have to adopt and implement rules no less stringent than EPA regulations   | No – Subtitle D only allows EPA to offer “suggested guidelines”; State programs would not be required to adopt or implement EPA’s “requirements”  |
| <b>Characterization of coal ash</b>  | Special Waste (subject to most safeguards applicable to hazardous waste)  | Solid Waste   |
| <b>Cradle to grave regulation of coal ash?</b>   | Yes – requirements for generation, storage, transport, management, and disposal   | No – guidelines only apply to disposal  |
| <b>Federal Enforcement?</b>  | Yes (also citizen and State enforcement)  | No (only citizen suits; States can act as citizens)   |
| <b>Consistent, minimum national standards for storage, transportation and disposal of CCRs?</b>    | Yes   | No  |
| <b>Would permits be required?</b>  | Yes (Federal requirement for permit issuance by States).Public participation requirements apply.  | No  |
| <b>Corrective Action Required?</b>   | Yes, to be monitored by authorized States and EPA. Requires characterization and potential cleanup of all releases from active and closed landfills and ponds facility-wide.  | “Self-implementing” standards only.*  |
| <b>Would financial assurance be required?</b>  | Yes, funds sufficient to close facilities, conduct cleanup and compensate for injury to third parties required.   | No  |
| <b>Generator requirements</b>  | Requirement to provide notification to state or EPA   | No  |
| <b>Requirements apply to storage and management?</b>   | Yes, requirements for containers, tanks and containment buildings; preparedness and prevention standards; contingency plan and emergency procedures; recordkeeping, and reporting requirements  | No  |
| <b>Requirements apply to transportation?</b>   | Yes, manifests and cover requirements for transport   | No  |
| <b>Basic Standards for New Landfills</b>   | Location restrictions; liners; run-on and run-off controls; groundwater monitoring; leachate collection systems, fugitive dust controls; financial assurance; corrective action, including facility-wide corrective action; closure of units; post-closure care, operating permit | Location restrictions; liners, run-on and run-off controls; groundwater monitoring; leachate collection systems, fugitive dust controls; corrective action, including facility-wide corrective action; closure of units, and post-closure care.* (NO financial assurance, NO operating permits, NOT federally enforceable.) |
| <b>Obligations applicable to Surface Impoundments (waste ponds) built before rule is finalized</b> | Remove solids and meet land disposal restrictions; retrofit with a composite liner within 5 years of effective date or close the unit. Would effectively phase out use of existing waste ponds. Federally enforceable.  | Remove solids and retrofit with a composite liner or cease receiving CCRs within 5 years of effective date and close the unit. Not federally enforceable.*  |
| <b>Obligations applicable to Surface Impoundments (waste ponds) built after rule is finalized</b>  | Must meet Land Disposal Restrictions and liner requirements. Would effectively phase out use of new waste ponds. Federally enforceable.   | Must install composite liners; No Land Disposal Restrictions, so phase out of waste ponds is not necessarily contemplated. Not federally enforceable.*  |
| <b>Landfills built before rule is finalized</b>  | No liner requirements, but groundwater monitoring. Federally enforceable requirements.  | No liner requirements, but groundwater monitoring. No federally enforceable requirements.*  |
| <b>Landfills built after rule is finalized</b>   | Liner requirements and groundwater monitoring. Federally enforceable requirements.  | Liner requirements and groundwater monitoring. No federally enforceable requirements.*  |
| <b>Closure and post-closure care</b>   | Yes; monitored by States and EPA  | “Self-implementing” standards only*   |
| <b>Authorizes federal inspections?</b>   | Yes   | No  |

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|--|--|---|
| <b>Exempts beneficial uses from regulation entirely?</b>   | Yes – exemption attaches at the point of generation or recovery from a landfill or waste pond  | Yes– exemption attaches at the point of generation or recovery from a landfill or waste pond                              |
| <b>Standards applicable to disposal in sand and gravel pits, quarries, and large fill operations as landfills?</b> | Yes. Federally enforceable requirements.   | Yes. No federally enforceable requirements*   |
| <b>Standards for structural stability of waste ponds?</b>  | Yes. Federally enforceable requirements.   | Yes. No federally enforceable requirements. *   |
| <b>Requirement to report spills to State and federal authorities?</b>  | Yes, clear requirement to report if amount of CCR released exceeds reportable quantity designated under CERCLA   | Not necessarily, reporting dependent on quantity of particular hazardous constituents                                     |
| <b>Requirement to report location of past and present disposal sites?</b>  | Yes, pursuant to Section 103(c) of CERCLA.   | No  |
| <b>Applies to coal ash generated by facilities other than electric power sector?</b>                               | No   | No  |
| <b>Applies to CCR disposed in mines?</b>   | No   | No  |
| <b>Costs</b>   | \$1.4 billion annually; \$20.3 billion in total  | \$587 million annually; \$8 billion in total (EPA states that lower costs are due primarily to lower expected compliance) |
| <b>Effective Date</b>  | Timing will vary from state to state, as each authorized state must adopt the rule individually-can take 1 – 2 years or more. Effective in 6 months in Iowa and Alaska (states without RCRA authorization) | Six months after final rule is promulgated for most provisions: certain provisions have a later effective date            |

\* Subtitle D provisions are only “requirements” as they apply to an individual facility seeking to avoid classification as an “open dump.” Noncompliance with Subtitle D could, at best, give rise to liability for operation of an “open dump” in violation of RCRA but only in the context of a citizen suit. These provisions impose no requirements on States. EPA cannot require states to adopt or implement these provisions, nor can EPA enforce against noncompliant facilities.