

Coal Ash Regulations: EPA Speaks--Sort of...

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On Tuesday May 4, 2010, EPA started the process of federal regulation over the disposal and storage of coal combustion residuals, commonly referred to as coal ash. Coal ash has been largely exempt from federal regulation, leaving oversight to individual states. The December 2008 breach of a coal ash storage facility and the subsequent massive spill in Kingston, Tennessee brought coal ash storage and disposal national attention. On one side, many people and environmental groups are calling for action from the federal government. Conversely, many people are worried about additional oversight and duplicative regulatory controls in an area where state law exists. Many of the arguments against federal regulation concern the continued ability to recycle coal ash waste. Coal ash is used in concrete, cement, roadways, and other materials. Both sides of the debate argue in the context of the possible re-classification of coal ash as a hazardous waste.

Solid Waste is federally regulated under the Resource Conservation and Recovery Act¹ (RCRA), which gives EPA the authority to control all aspects of hazardous waste. Subtitle C governs the generation, transportation, treatment, storage, and disposal of *hazardous* waste. Subtitle D sets forth a framework for the management of *non-hazardous* solid wastes. Subtitle D leaves the majority of regulation to each individual state.

Coal ash has been exempt from federal regulation since the inception of the "Bevill Exclusion." In October 1980, RCRA was amended by adding section 3001(b)(3)(A)(ii), to exclude "solid waste from the extraction, beneficiation, and processing of ores and minerals" from regulation as hazardous waste under Subtitle C of RCRA. This exclusion held pending completion of a study and a Report to Congress, required by section 8002 (f) and (p), and pending a determination by the EPA Administrator either to promulgate regulations under Subtitle C or to declare such regulations unwarranted.

In 1993 and 2000, EPA published regulatory determinations stating that coal ash waste does not warrant regulation under Subtitle C and should remain excluded from the definition of hazardous waste. However, in 2000, EPA determined that national non-hazardous waste regulations under RCRA Subtitle D were needed for coal combustion wastes disposed in surface impoundments and landfills and used as fill in surface or underground mines (minefill). EPA further determined that beneficial uses of these wastes, other than for minefilling, pose no significant risk and no additional national regulations are needed.

Since 2000, EPA has continued to conduct research and receive comments in regards to proper regulation of coal ash disposal and use. After Kingston, EPA promised to release a proposal for regulation by the beginning of 2010. On May 4, 2010, EPA finally broke its silence. However, instead of releasing a final proposal, EPA Administrator Lisa Jackson requested feedback. Two options were broadly laid out and EPA is seeking public opinion and guidance on each. EPA will hold hearings and seek public comment for 90 days, but there is no time table for a final decision.

Both proposals released by EPA would still regulate coal ash waste under RCRA. Under the first proposal, EPA would reverse its August 1993 and May 2000 Bevill Regulatory Determinations regarding coal ash waste

and list these residuals as special wastes subject to regulation under subtitle C of RCRA, when they are destined for disposal in landfills or surface impoundments. An EPA e-mail sent after Jackson's comments said the agency was creating a "special waste" classification within the hazardous waste regulations, "to help remove the stigma that some believe attaches when a waste is called hazardous."

Under the second proposal, EPA would leave the Beville determination in place and regulate disposal of such materials under subtitle D of RCRA by issuing national minimum criteria. The Subtitle C option creates federal oversight; the Subtitle D option leaves enforcement to the states and citizen lawsuits. Under both alternatives EPA is proposing to establish dam safety requirements to address the structural integrity of surface impoundments to prevent catastrophic releases.

Regulation under Subtitle C would normally classify a substance or material as hazardous and would lead to stricter rules and federal enforcement. Many people were concerned that if coal ash waste was re-classified as hazardous and regulated under Subtitle C, any beneficial use of coal ash would be severely hindered. EPA appears to be looking for a way around this main concern. Under the proposal that regulates coal ash waste under Subtitle C, coal ash would be classified as a "special waste" and could still be used in "beneficial" ways.

Since the Kingston spill, one side has been advocating for a hazardous classification and regulation under Subtitle C, while the other side argued to leave the non-hazardous classification in place, continue to utilize and explore beneficial uses, and let states regulate to their specific needs. After EPA's May 4, 2010 announcement, the debate remains largely the same. The only thing EPA has clarified is that no matter the action taken, coal ash will continue to be recycled and apparently will not be classified as hazardous. EPA explained in its own summary of the proposed rules that regulation under Subtitle C would reverse the 1993 and 2000 classification exemptions, but would not change the 2000 Regulatory Determination for beneficially used coal ash waste. However, EPA is clarifying this determination and seeking comment on potential refinements for certain beneficial uses.

Both approaches focus on the storage facilities and only apply to the disposal of coal ash from electric generating units. EPA will require composite liners and groundwater monitoring at new dry ash landfills, while existing surface impoundments will have to be retrofitted with liners. Under the Subtitle C option, wet ash storage facilities would specifically be phased out and EPA thinks the new safety requirements under Subtitle D would also lead to the phase out of wet ash containers.²

EPA specifically mentioned Kingston, Tennessee and how the new regulations are being put in place to avoid accidents like the spill in December 2008. EPA administrator Lisa Jackson commented that she hopes the proposals will begin a national dialogue about coal ash regulation and disposal. It appears EPA wants safety without hindering beneficial use or too much regulation. Either way, both sides of the debate still have questions and time to advocate their position.

More information about the EPA's proposed regulation can be found [here](#).

[Click here](#) for the EPA's unofficial pre-publication copy of the proposed rule for public reference. This document has not been published in the Federal Register and is not an official version of the final rule. The official rule will be available here as soon as it is published by the Federal Register Office.

[Click here](#) to view a chart comparing the key differences between the EPA's Subtitle C and Subtitle D options.

(1) 42 U.S.C. §6901 et seq. (1976).

(2) While Subtitle D would require coal ash ponds to be retrofitted with a composite liner, it would not "phase out" coal ash ponds. To continue to use the wet ash pond, a company would have to remove all the

materials, put the lining in, and then return the wet coal ash to the impoundment. If pond owners elect not to line the existing ponds, Subtitle D requires the owner to discontinue usage of the coal ash pond and implement closure of the pond within five years.