

FAQ TALKING POINTS

Regarding the EPA proposed Fly Ash Designation

Q. Is coal fly ash currently regulated?

A. Coal fly ash is an industrial by-product and, therefore, the disposal of coal ash is regulated under the Resource Conservation and Recovery Act (RCRA). According to the US Environmental Protection Agency's (EPA) website, "RCRA gives EPA the authority to control hazardous waste from the 'cradle-to-grave.' This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also sets forth a framework for the management of non-hazardous solid wastes."

Since RCRA covers so many different types of materials – both hazardous and non-hazardous, it is divided into many different sections; each section focuses on only the wastes that meet the criteria of that section. Therefore, the specific regulations and regulatory authority responsible for enforcement of the regulations depends on the characteristics of the material and under which section of the law it falls.

Q. How is coal ash currently regulated?

A. Because coal ash is currently considered non-hazardous, it is regulated under "Subtitle D" of RCRA, which governs regulation of municipal and industrial wastes. Therefore, the US EPA does not have regulatory authority over coal ash; rather, each individual state's environmental regulatory agency determines how coal ash will be disposed.

Q. Why is coal ash considered a non-hazardous material?

A. Over the last 30+ years, the EPA has reviewed their position on coal ash at least twice previously – as recently as 1999. On May 22, 2000 the EPA published its most recent "final" Regulatory Determination on Wastes from Fossil Fuels in which the Agency concluded (again) that coal ashes are not hazardous and, therefore, "do not warrant regulation under Subtitle C of RCRA," which governs the regulation of hazardous wastes.

EPA went on to state that it did "not want to place any unnecessary barriers on the beneficial uses of these wastes, because they conserve natural resources, reduce disposal costs and reduce the total amount of waste destined for disposal."

Q. Why does the EPA want to change the way coal ash is regulated?

A. In December 2008, a retention dike failed at a coal ash disposal facility in Tennessee, causing a massive ash spill. Citing this spill, the new EPA Administrator told Congress she would propose new regulations for how coal ash is disposed. In May 2010, the agency published **two different** regulatory approaches for public review and comment.

Q. What is EPA proposing?

A. EPA is asking for comments on both ways of regulating coal ash disposal under RCRA. One approach is under "Subtitle C," which governs regulation of hazardous wastes. The other is under "Subtitle D," which governs regulation of municipal and industrial wastes.

The EPA is only proposing to regulate *disposal* of coal ash. EPA is not proposing to regulate the use of coal fly ash in concrete and other encapsulated uses. Regardless of the approach, beneficial use will remain exempt from regulation.

Q. Is fly ash hazardous?

A. Fly ash, in and of itself, is **not hazardous** and its toxicity characteristics do not qualify as a hazardous waste. In fact, the toxicity characteristics of fly ash are similar to that of soils, stone, sand and other materials used in the production of concrete, such as portland cement.

Q. Then why does one of EPA's approaches classify it as hazardous when it is disposed?

A. EPA wants to place all coal combustion residuals, including fly ash, that are produced by coal-fired electric generating plants under Subtitle C so that they will have **federal enforcement** authority over the disposal rules. Regulation under Subtitle D is enforced by the states. Since each state can tailor coal ash regulations to their specific concerns, EPA thinks that the regulations may lack uniformity. Therefore, regulating fly ash under Subtitle C will give the EPA federal enforcement authority and allow the EPA to develop and enforce uniform disposal rules.

Q. Why does this matter to fly ash users?

A. Even though EPA wants to exempt the beneficial use of fly ash from regulation, many people feel that labeling it “hazardous” when it’s disposed will create a negative “stigma” and make the material unattractive for use in the marketplace. In addition it is possible that users will have additional requirements for handling wasted material and potentially other additional handling requirements for activities outside of strictly using fly ash.

Q. Who supports labeling fly ash as hazardous?

A. Anti-coal environmental activist groups are the main advocates for the Subtitle C approach. Almost everyone else – including dozens of local, state and federal agencies and elected officials, as well as trade associations, ash users, and professional societies – have already voiced opposition to any “hazardous” designation.

Q. When will all of this be resolved?

A. After EPA’s public comment period ends later in the summer of 2010, the agency will have to respond to the comments and draft a Proposed Final Rule. That rule would then have to be reviewed by other agencies of the federal government and go through another public comment period before the rule could be enacted. Litigation over a final rule could further delay the process. Enactment of any rule is likely years in the future and EPA is under no legal obligation to act at all.

Q. What can fly ash users do to help?

A. Fly ash users can play a pivotal role during the 2010 public comment period by writing to EPA in opposition to any “hazardous” designation for fly ash. Participation in public comment is the most vital thing that fly ash users can do today to avoid Subtitle C designation.

Comments should be identified by Docket ID No. EPA-HQ-RCRA-2009-0640 and submitted to EPA by September 20, 2010 in one of the following ways:

Web Site: <http://www.regulations.gov>, follow on-line instructions for submitting comments.

E-mail: Comments may be sent by electronic mail (e-mail) to rcra-docket@epa.gov, Attention Docket ID No. EPA-HQ-RCRA-2009-0640.

Note: In contrast to EPA’s electronic public docket, EPA’s e-mail system is not an “anonymous access” system. If you send an e-mail comment directly to the Docket without going through EPA’s electronic public docket, EPA’s e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA’s e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA’s electronic public docket.

Fax: Comments may be faxed to 202-566-0272; Attention Docket ID No. EPA-HQ-RCRA-2009-0640.

Mail: Deliver **two** copies of your comments to:

Hazardous Waste Management System; Identification and Listing of Special Wastes;
Disposal of Coal Combustion Residuals from Electric Utilities Docket,
Attention Docket ID No., EPA-HQ-RCRA-2009-0640,
Environmental Protection Agency,
Mailcode: 5305T,
1200 Pennsylvania Ave., NW,
Washington, DC 20460.

Hand Delivery: Deliver **two** copies of your comments to:

Hazardous Waste Management System; Identification and Listing of Special Wastes;
Disposal of Coal Combustion Residuals From Electric Utilities Docket,
Attention Docket ID No., EPA-HQ-RCRA-2009-0640, EPA/DC,
EPA West,
Room 3334,
1301 Constitution Ave., NW.,
Washington, DC 20460.

Such deliveries are only accepted during the Docket’s normal hours of operation, and special arrangements should be made for deliveries of boxed information.