### 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.

<u>The Subtitle C Option</u>: 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."

<u>The Subtitle D Option</u>: 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.

<u>Shortcomings of Both Options</u>: 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: <u>www.earthjustice.org/coalash</u> and <u>www.environmentalintegrity.org</u> Jeffrey Stant, Environmental Integrity Project: (317) 359-1306 (or Lisa Widawsky: (202) 263-4452) Lisa Evans, Earthjustice: (781) 631-4119 (or Abigail Dillen: 212-791-1881) Lyndsay Moseley, Sierra Club: (202) 548-4581

### 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

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

# $EPA\ COAL\ ASH\ PROPOSED\ RULE:\ SUBTITLE\ C\ AND\ D\ COMPARISON\ CHART$

EARTHJUSTICE, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, SOUTHERN ENVIRONMENTAL LAW CENTER		
Exempts beneficial uses from regulation	Yes – exemption attaches at the point of generation or	Yes- exemption attaches at the point of generation or
entirely?	recovery from a landfill or waste pond	recovery from a landfill or waste pond
Standards applicable to disposal in sand and	Yes. Federally enforceable requirements.	Yes. No federally enforceable requirements*
gravel pits, quarries, and large fill operations as landfills?		
Standards for structural stability of waste	Yes. Federally enforceable requirements.	Yes. No federally enforceable requirements. *
ponds?		
Requirement to report spills to State and	Yes, clear requirement to report if amount of CCR released	Not necessarily, reporting dependent on quantity of particular
federal authorities?	exceeds reportable quantity designated under CERCLA	hazardous constituents
Requirement to report location of past and	Yes, pursuant to Section 103(c) of CERCLA.	No
present disposal sites?		
Applies to coal ash generated by facilities other	No	No
than electric power sector?		
Applies to CCR disposed in mines?	No	No
Costs	\$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)
Effective Date	Timing will vary from state to state, as each authorized state	Six months after final rule is promulgated for most
	must adopt the rule individually-can take $1 - 2$ years or more.	provisions: certain provisions have a later effective date
	Effective in 6 months in Iowa and Alaska (states without	-
	RCRA authorization)	

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\* 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.