# Federal and State Coal Ash Regulations

## Overview

There are several federal environmental laws that authorize the Environmental Protection Agency (EPA) to treat eligible federally recognized Indian tribes in a similar manner as a state. This [Treatment as a State](https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas) (TAS) status is often referred to for implementing and managing certain environmental programs. The Clean Air Act (CAA), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA) expressly provide the authority for Indian tribes to play essentially the same role in Indian country that states do within state lands. The basic requirements for applying for TAS are that the tribe must: be federally recognized; have a governing body carrying out substantial governmental duties and powers; have appropriate authority, and be capable of carrying out the functions of the program. The EPA website [describes](https://www.epa.gov/tribal/compliance-enforcement-indian-country) in detail how the federal government enforces laws and regulations in Indian country. This [article](https://elr.info/sites/default/files/articles/23.10579.htm) provides an overview of each environmental law’s provisions for tribal implementation, and this [article](https://www.arnoldporter.com/~/media/files/perspectives/publications/2017/11/environmental-protection-in-indian-country-the-fundamentals.pdf) provides a broader historical background.

The vast majority of the 16 million acre Navajo Nation reservation is [tribal trust land](https://drive.google.com/file/d/15hXTVfe9VR6T527wYu1vPcUk86gmHCpO/view?usp=sharing). This means that although the Navajo tribe owns the land, the land is held by the federal government. A complication to the issue of jurisdiction is that the lease under which a coal plant operates can change this. Different plants have different lease agreements where companies lease the land that the plant is on.

For a century, utilities used the cheapest, easiest and most dangerous method to dispose of their toxic waste- dumping it into unlined basins (often referred to as “ponds” next to the power plants. This has resulted in hundreds of coal plants containing ponds spanning hundreds of acres with millions of tons of liquid toxic waste. This waste is often impounded behind ash or aging soil walls that are all leaking closeby into communities and water bodies.

## Federal Laws

### 2015 Coal Combustion Residual Rule (CCR Rule)

#### Overview

The Environmental Protection Agency (EPA) under Obama published the [Coal Combustion Residual Rule](https://www.epa.gov/coalash/coal-ash-rule#phaseone) (CCR Rule) which became effective on October 17, 2015. This was the first national coal ash regulation intended to prevent future environmental disasters. In 2008 there was a massive Tennessee Valley Authority (TVA) coal ash spill in [Kingston, Tennessee](https://www.southernenvironment.org/news-and-press/news-feed/kingston-coal-ash-disaster-still-reverberates-10-years-later), and in 2014 there was the Dan River coal ash spill in North Carolina, [which cost $295 million to clean up](https://www.sciencedirect.com/science/article/abs/pii/S0269749114004953). In 2010, the EPA first proposed a coal ash rule in the wake of the [TVA spil](https://www.epa.gov/tn/epa-response-kingston-tva-coal-ash-spill)l which was the largest toxic waste spill in U.S. history when one billion gallons of coal ash sludge destroyed 300 acres and dozens of homes.

The CCR Rule established minimal disposal standards that apply to the over 1,000 coal ash dumps in the U.S. The rule includes safeguards addressing toxic dust, structural stability of dams impounding coal ash and design standards to prevent, detect and cleanup toxic leaks from coal ash dumps. The rule also encourages closure within three years of inactive coal ash ponds, such as the Dan River pond that burst in February of 2014, destroying 80 miles of river with toxic sludge. The EPA rule sets standards that are applicable to power plants and dumps in all 50 states.

The rule also puts in place safeguards for large “fill” projects, where dangerous volumes of coal ash are disposed of in the guise of “beneficial” reuse. While the EPA rule exempts legitimate beneficial reuse of coal ash, it also requires those who use quantities of coal ash over 12,400 tons to document that such use will not be harmful to health or the environment.

The EPA also requires contamination of water be reported and cleaned up if coal ash releases occur. The new rule also prohibits the dumping of coal ash within five feet of an aquifer.

The EPA finalized a new rollback in 2020 that will significantly postpone the closure of coal ash ponds. The rule adds exemptions and loopholes that allow utilities to postpone closure of coal ash ponds until as late as 2038. [Part A](https://earthjustice.org/sites/default/files/files/ccr-part-a-rule_oct1320.pdf) of the rollback gives most coal plants at least 4.5 more years to dump toxic waste into their leaking ponds and allows some plants to dump for an additional 9.5 years more than previously allowed under the 2015 rule. [Part B](https://earthjustice.org/sites/default/files/files/part_b_fact_sheet_final_rule_v2.pdf) of the rollback allows the EPA to determine that pits without a plastic and clay liner (or “composite liner”) can remain open if utilities claim that the soil under them is not porous. And a specific list of toxic chemicals are not (yet) polluting groundwater above federal standards. Any utilities attempting to show that their ponds meet the new rule’s criteria can keep their toxic pits open during a potentially very extended assessment process. Part B also contains additional provisions that would dramatically weaken the 2015 rule.

Highlights of the CCR Rule include: the requirement for the first time that coal-fired electric utilities are compelled to publicly report groundwater monitoring data; the preparation of a cleanup up plan, the polluter must select a remedy “as soon as feasible” ([§ 257.97(a)](https://www.law.cornell.edu/cfr/text/40/257.97)); the polluter must initiative clean up within 90 days of remedy selection ([§ 257.98(a)](https://www.law.cornell.edu/cfr/text/40/257.98)); the polluter must complete the cleanup “within a reasonable time” [(§ 257.97(d)](https://www.law.cornell.edu/cfr/text/40/257.97)); and the polluter must take any “interim measures” necessary to reduce leaking contaminants and potential exposures to human or ecological receptors ([§ 257.98(a)(3](https://www.law.cornell.edu/cfr/text/40/257.98))).

In 2016, Congress adopted the Water Infrastructure Improvements for the Nation ([WIIN Act](https://www.epa.gov/dwcapacity/notification-consultation-and-coordination-tribal-allotment-wiin-act-grants)), directing EPA to implement a permit program for coal ash dumps on tribal lands and in states without approval to administer their own coal ash programs. Such [permit program](https://www.epa.gov/sites/production/files/2018-11/documents/waterkeeper_v_wheeler_us_dis_dcd_1.18cv2230_09.26.2018.pdf) “shall… require” each permitted coal ash dump to “achieve compliance” with the substantive protections for coal ash units set out in the 2015 CCR rule and amendments. The [WIIN Act](https://eelp.law.harvard.edu/2017/12/coal-ash-rule/) created, in EPA’s words, “fundamental changes” in CCR regulation. Congress decided to replace the self-implementing scheme of the 2015 CCR Rule, which lacked federal or state administrative oversight and left enforcement solely to citizen suits, with a permitting scheme similar to other environmental programs where regulatory requirements are administered and enforced through permits issued either by states with EPA-approved programs or by EPA in states without approved programs and in tribal lands.

#### Relevant Case Law

In 2018, the Waterkeeper Alliance and partners achieved a legal victory when the U.S. Court of Appeals for the D.C. Circuit ruled that the first-ever federal standards for coal ash dumps were not strong enough to protect communities and the environment from toxic pollution from coal ash. This court ruling meant that EPA is required to go back and strengthen parts of the “Disposal of Coal Combustion Residuals from Electric Utilities” (CCR) rule. The [*Waterkeeper All., Inc. v. EPA*](https://law.justia.com/cases/federal/appellate-courts/cadc/09-1017/09-1017-2017-04-11.html), 399 F.3d 486, 503-04 (D.C. Cir. 2017) case held that the EPA violated the Clean Water Act’s public participation mandate when it promoted a rule denying public review and comment on the nutrient management plan components of certain permits. The U.S. Court of Appeals for the D.C. Circuit found that EPA’s decision to allow companies to continue using unlined pits to store coal ash until pollutants leaked out was insufficiently protective of human health. Additionally, the court found that EPA was wrong to allow coal ash pits that just had clay at the bottom to be considered “lined.” This means that companies will have to stop using and close any unlined and clay-lined coal ash pits.

In 2018, the U.S. Court of Appeals for the D.C. Circuit handed down an opinion that noted that composite lining (a plastic geomembrane and several feet of compacted soil to act as a buffer) “effectively eliminates the risk of groundwater contamination.” In [*Utility Solid Waste Activities Group (USWAG) v. Environmental Protection Agency (EPA)*](https://elr.info/litigation/48/20151/utility-solid-waste-activities-group-v-environmental-protection-agency), Case No. 15-1219 (D.C. Cir. 2018), the EPA identified 735 existing active surface impoundments through the country; of the 504 sites for which the EPA was able to collect liner data, only 17% had composite liners. In *USWAG*, the D.C. Circuit vacated and remanded the provisions of the 2015 CCR rule that permitted unlined impoundments to continue receiving coal ash unless they leak, classified “clay-lined” impoundments as lined, and exempted inactive impoundments at inactive facilities from regulation.

One aspect of the CCR Rule that has been litigated is over the requirement for public participation for coverage determinations for CCR general permits. In [*Conn. Light & Power Co. v. Nuclear Reg. Comm'n*](https://casetext.com/case/conn-light-and-power-co-v-nuc-reg-comn), 673 F.2d 525, 530 (D.C. Cir. 1982), the courts recognized that public participation is a fundamental tool for ensuring that risks are identified and mitigated in rulemaking and permitting. In this case it was determined that, “The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making.”

### Clean Water Act (CWA)

#### Overview

[The Clean Water Act](https://www.epa.gov/laws-regulations/summary-clean-water-act) (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1972.

Under the CWA, EPA has implemented pollution control programs such as setting wastewater standards for industry. The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained. EPA's [National Pollutant Discharge Elimination System (NPDES)](https://www.epa.gov/npdes) permit program controls discharges. Through this, point sources such as industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters. The [Office of Water (OW)](https://www.epa.gov/aboutepa/about-office-water) ensures drinking water is safe, and restores and maintains oceans, watersheds, and their aquatic ecosystems to protect human health, support economic and recreational activities, and provide healthy habitat for fish, plants, and wildlife.

The CWA pertains to coal ash pollution by regulating the discharge of pollutants into water. The Clean Water Act explicitly directs the Agencies to protect “navigable waters.” Regarding coal ash, this law has been much more relevant in the eastern United States where coal plants are often located on or very close to navigable waters, such as rivers. EPA has also signed rules to remove protections from a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. [The Southern Environmental Law Center](https://www.southernenvironment.org/cases-and-projects/protecting-our-clean-water) (SELC) has excellent resources on the details of these cases.

The most relevant and contentious piece of this law as it pertains to the five coal plants on Navajo Nation is the recent discussion on whether or not this law applies to groundwater pollution that leads to a larger body of water. In the case of Four Corners Power Plant (FCPP) and the San Juan Generating Station (SJGS) this legislation could be applicable in determining whether or not the Chaco Wash and Shumway Arroyo, respectively, could discharge pollutants into the San Juan River, a potential navigable body of water.

In April, 2020, the EPA and the Department of the Army published the [Navigable Waters Protection Rule](https://www.epa.gov/nwpr/final-rule-navigable-waters-protection-rule) which finalizes a revised definition of “waters of the United States” under the Clean Water Act. In this, the agencies streamlined the definition so that it includes four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined before.

The EPA [describes the relationship](https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule) between the CCR Rule, RCRA, and the Clean Water Act.

#### Relevant Case Law

In April, 2020 the Supreme Court ruled on the [*County of Maui v. Hawaii Wildlife Fund*](https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf), 140 S. Ct. 1462 (2020) case, which is one of the most significant decisions from the EPA regarding the Clean Water Act in the last ten years which could affect thousands of permit applicants and holders. In that decision, a six-Justice majority rejected the EPA’s legal position and held that the Clean Water Act protects the nation’s waters from pollution that travels from a point source *through groundwater*, when the discharge through groundwater is the functional equivalent of a direct discharge. This decision ruled that that the Clean Water Act “requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.” 140 S. Ct. at 1476.

This case created the “[functional equivalent](https://www.wilmerhale.com/en/insights/client-alerts/20201216-environmental-protection-agency-publishes-draft-guidance--on-applying-supreme-courts-decision-in--county-of-maui-v-hawaii-wildlife-fund)” test intended to help determine if a Clean Water Act permit is needed when pollutants are discharged to groundwater before reaching navigable waters. Under this new test, a discharge is “functionally equivalent” to a direct discharge if it “reaches the same result through roughly similar means.” The draft guidance reiterates threshold conditions that must be satisfied to trigger the need for a Clean Water Act permit and introduces a new factor relevant to the “functional equivalent” test: “the design and performance of the system or facility from which the pollutant is released.”

This case sought to advance the intent of Congress that the Clean Water Act should provide “federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater.”

Lower courts are already beginning to consider the “functional equivalent” test in the wake of this decision. Examples of this are [*Melton Props., LLC v. Ill. Cent. R.R. Co.*](https://casetext.com/case/melton-props-llc-v-ill-cent-rr-1), 2020 U.S. Dist. LEXIS 178553 (N.D. Miss. Sept. 29, 2020) [*United States v. Acquest Transit LLC*](https://law.justia.com/cases/federal/district-courts/new-york/nywdce/1:2009cv00055/72146/348/), 2020 U.S. Dist. LEXIS 97979 (W.D.N.Y. June 4, 2020).

In this decision, the “functional equivalent” test will need to be applied on a case-by-case basis to determine if a National Pollution Discharge Elimination System (NPDES) permit is required. The Court provided a non-exhaustive list of factors to consider in making that determination. The two most important factors, the Court said, are the time and distance that a pollutant travels between the point source and navigable water. Other relevant factors noted by the Court include the following: the nature of the material through which the pollutant travels; the extent to which the pollutant is diluted or chemically changed as it travels; the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; the manner by or area in which the pollutant enters the navigable waters; and the degree to which the pollution (at that point) has maintained its specific identity. 140 S. Ct. at 1476–77.

Here there is a full [case law index](https://nationalaglawcenter.org/aglaw-reporter/case-law-index/clean-water-act/) for cases regarding the Clean Water Act.

### National Environmental Policy Act (NEPA)

#### Overview

The [National Environmental Policy Act](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=980498d1452c367a4cea600cbcc62303&term_occur=999&term_src=Title:40:Chapter:V:Subchapter:A:Part:1500:1500.1) (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. Section 101 of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. In particular, it requires Federal agencies to provide a detailed statement on [proposals](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=8e77dc11198867f54a6035cad8927c75&term_occur=999&term_src=Title:40:Chapter:V:Subchapter:A:Part:1500:1500.1) for major Federal actions significantly [affecting](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=b88a9765565e4af11b8548a596a3ffe5&term_occur=999&term_src=Title:40:Chapter:V:Subchapter:A:Part:1500:1500.1) the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, and the public has been informed regarding the decision-making process. NEPA does not mandate particular results or substantive outcomes. NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action.[[1]](#footnote-0)

“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” [40 C.F.R. § 1500.1(b)](https://www.law.cornell.edu/cfr/text/40/1500.1). This includes, “[u]rban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.” [40 C.F.R. § 1502.16(g)](https://www.law.cornell.edu/cfr/text/40/1502.16).

The Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) are related. If the Biological Opinion under the ESA concludes that an action will likely result in at most a limited take that is incidental to the project, FWS or NMFS prepares an Incidental Take Statement (“ITS”) identifying reasonable and prudent measures that are necessary or appropriate to minimize the impact on species likely to be incidentally affected ([16 U.S.C. § 1536(b)(4)](https://www.govinfo.gov/app/details/USCODE-2011-title16/USCODE-2011-title16-chap35-sec1536)). If the action agency were then to authorize take of protected species by way of incorporating the ITS’s terms and conditions into that authorization, such authorization constitutes “federal action” triggering National Environmental Policy Act (“NEPA”) review.

NEPA regulations impose a duty on OSM to consider “possible conflicts between the proposed action and objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned ([40 C.F.R. § 1502.16(c)](https://www.law.cornell.edu/cfr/text/40/1502.16)).

#### Relevant Case Law

The environmental impact statement required by NEPA must address the impacts to groundwater and surface water quality. Relevant litigation for Coal Ash and NEPA center on NEPA’s requirement to: (1) define the purpose of its action; (2) identify alternatives that might help it achieve that purpose; and (3) describe an accurate environmental baseline against which to evaluate the impacts of the proposed action and its alternatives ([40 C.F.R. §§ 1502](https://www.law.cornell.edu/cfr/text/40/part-1502).13–.16). [*California v. Block*](https://casetext.com/case/state-of-cal-v-block-2), 690 F.2d 753, 761 (9th Cir. 1982), it was found that “The critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not whether the project’s site-specific impact should be evaluated in detail, but when such detailed evaluation should occur.”); id. at 763 (“The promise of site-specific EIS’s [sic] in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development.”).

There has also been extensive [comments](https://www.southernenvironment.org/uploads/words_docs/2016-07-08_SELC_et_al_Comments_on_Ash_Impoundment_Closure_FEIS_Final.pdf) from Sierra Club, Southern Environmental Law Center, and other organizations on the fundamental inadequacy of Tennessee Valley Authority’s (TVA’s) programmatic and site-specific analyses in the [Ash Impoundment Closure](https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews/Closure-of-Coal-Combustion-Residual-Impoundments) EIS.

[*Sierra Club v. U.S. Army Corps of Engineers*](https://scholarship.law.umt.edu/plrlr/vol0/iss6/16/), 803 F.3d 31, 41 (D.C. Cir. 2015) showed the limit of the application of NEPA to a private pipeline constructed largely on private land. While the main issue identified by the District of Columbia Circuit Court was the scope of environmental review required under NEPA, the court also addressed issues dealing with the ESA and the CWA relating to the construction and operation of a pipeline in the Midwest. The court held that under these circumstances, NEPA review was mandated only for those small stretches where it crossed federally managed lands, not for the entire pipeline project.

One issue of NEPA that has been substantially litigated is the way in which related plans, such as Environmental Impact Statements, understate the impacts to threatened and endangered species, which effects if NEPA is triggered.This is particularly relevant to cumulative effects analysis regarding the accumulation of metal and toxins. In [*Neighbors of Cuddy Mountain v. U.S. Forest Service*](https://casetext.com/case/neighbors-of-cuddy-mtn-v-us-forest-serv), 137 F.3d 1372, 1379-80 (9th Cir. 1998), it was ruled that “In accord with NEPA, the Forest Service must "consider" cumulative impacts. In [*Mountaineers v. United States Forest Service*](https://www.biologicaldiversity.org/programs/public_lands/off-road_vehicles/travel-management_planning/pdfs/TMP_appeal_Tusayan_2009.pdf), 445 F.Supp. 1235, 1248 (W.D. Wash. 2006) it was determined that “It is the additive effect of both agency and other actions taken together that constitutes the gravamen of appropriate cumulative impacts analysis under NEPA.”

The [comments on the draft EIS for Four Corners Power Plant and Navajo Mine](https://drive.google.com/file/d/1gS7smQaZocYM9qb1I8c6asidK8ibm20J/view?usp=sharing) note how the Office of Surface and Mining (OSM) has a duty to “[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” ([40 C.F.R. § 1500.1(e)](https://www.law.cornell.edu/cfr/text/40/1500.1)). The comments move on to describe how the DEIS fails to examine obvious alternatives to onsite CCW disposal, noting that the current CCW disposal areas at the FCPP are surrounded by surface waters, including Morgan Lake, Chaco Wash, and the San Juan River. The comments note that the DEIS suggests that the CCW disposal areas at FCPP could adversely impact groundwater and surface water.

### Endangered Species Act (ESA)

#### Overview

Under the Endangered Species Act (ESA), federal agencies must, in consultation with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of designated critical habitat ([16 U.S.C. § 1536(a)(2)](https://www.loc.gov/item/uscode1988-037016035/)). An agency proposing an action must first determine whether the action “may affect” species listed as threatened or endangered under the ESA ([50 C.F.R. § 402.14](https://www.govregs.com/regulations/expand/title50_chapterIV_part402_subpartB_section402.14).).

If the action “may affect” listed species or designated critical habitat, the action agency must pursue either formal or informal consultation. Informal consultation is “an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency. . . designed to assist the [action agency] in determining whether formal consultation . . . is required” ([50 C.F.R. § 402.13(a)](https://www.govinfo.gov/app/details/CFR-1999-title50-vol2/CFR-1999-title50-vol2-sec402-13)). “If during informal consultation it is determined by the [action agency], with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

If an action agency chooses to forego informal consultation or the informal consultation concludes that the proposed action is likely to adversely affect listed species or critical habitat, the agency must participate in “formal consultation” ([50 C.F.R. § 402.14](https://www.govregs.com/regulations/expand/title50_chapterIV_part402_subpartB_section402.14)). Formal consultation entails the formulation of a Biological Opinion (“BiOp”) by either FWS or NMFS. In a BiOp, the FWS or NMFS determines whether the proposed action, taken together with all other relevant impacts on the species – including both those included in the environmental baseline as well as cumulative impacts – is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat ([50 C.F.R. § 402.14](https://www.govregs.com/regulations/expand/title50_chapterIV_part402_subpartB_section402.14).[[2]](#footnote-1)

#### Relevant Case Law

Whether or not an action ‘may affect’ species listed as threatened or endangered under the ESA is low threshold in reality. In [*Nat’l Parks Conservation Ass’n v. Jewell*](https://casetext.com/case/natl-parks-conservation-assn-v-jewell-1), 62 F. Supp. 3d 7, 12-13 (D.D.C. 2014); and also [*Karuk Tribe of Cal. v. U.S. Forest Serv.*](https://casetext.com/case/karuk-tribe-of-cal-v-us-forest-serv), 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) it was determined that “[A]ctions that have any chance of affecting listed species or critical habitat – even if it is later determined that the actions are ‘not likely’ to do so – require at least some consultation under the ESA.”.

[*Sierra Club v. U.S. Army Corps of Engineers*](https://scholarship.law.umt.edu/plrlr/vol0/iss6/16/), 803 F.3d 31, 41 (D.C. Cir. 2015) primarily deals with NEPA,, but it also addresses the ESA in issues relating to the construction and operation of a pipeline in the Midwest. Regarding the ESA process, there was a formal consultation and BioOp which determined that the proposed actions are likely to jeopardize the existence of a listed species or critical habitats, and the FWS did not approve them.

In [*Gerber v. Norton*](https://casetext.com/case/gerber-v-norton), 294 F.3d 173, 177 (D.C. Cir. 2002), it was determined that the Fish and Wildlife Service violated public participation requirements under the Endangered Species Act when it failed to provide a site map of a proposed conservation area during a permit’s public comment period and therefore did not receive, nor take into account, technical critiques calling into question the permit’s legality.

In his [declaration](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Attachments%20By%20ParentFilingId/42E82EEEC8FF5730852582E40073DDEE/$FILE/Exhibit%2014%20Declaration%20of%20Mike%20Eisenfeld.pdf) in the U.S. EPA, Region 9 case of Diné Citizens Against Ruining the Environment, et al. v. U.S. Environmental Protection Agency, Mike Eisenfeld specifically notes his concern that coal ash seepage may adversely impact fish species listed in the ESA that are present in the San Juan river, including the Colorado pikeminnow and razorback sucker. He states that critical habitats have been designated on portions of the San Juan River, including portions of the San Juan River that flow near the Four Corners Power Plant. His testimony mentions a 2009 U.S. Fish and Wildlife Service assessments regarding the impacts of the proposed Desert Rock coal-fired power plant. This assessment found that mercury and selenium being deposited in part from FCPP is being deposited on the land and within the water of the region, jeopardizing the continued existence of and adversely affecting the pikeminnow and sucked and their designated critical habitat in the San Juan River. The [comments on the draft EIS for Four Corners Power Plant and Navajo Mine](https://drive.google.com/file/d/1gS7smQaZocYM9qb1I8c6asidK8ibm20J/view?usp=sharing) has more information on specific vulnerable species (p. 74).

### Resource Conservation and Recovery Act (RCRA)

#### Overview

The 2015 Coal Ash Rule and the Resource Conservation and Recovery Act (RCRA) are related in that the 2015 CCR Rule for the first time brought the disposal of CCR under the purview of the RCRA. RCRA ([42 U.S.C. §6945](https://www.govinfo.gov/content/pkg/USCODE-2014-title42/html/USCODE-2014-title42-chap82-subchapIV-sec6945.htm)) was passed in 1976 and designed to be a scheme for the management of solid and hazardous waste that covers the whole life cycle of waste. Under this, Hazardous waste is addressed in subtitle C of RCRA. Under subtitle C, the EPA directly regulates all stages of production and disposition of hazardous waste and has administrative enforcement power, as well as authority to initiate or recommend civil and criminal actions for violations.

However, subtitle D describes that states are primarily responsible for regulating disposal of non-hazardous wastes in landfills and dumps. Despite recognizing that CCR contains hazardous and toxic constituents, EPA in the Coal Ash Rule elected to regulate CCR under subtitle D, and, [as addressed in previous Coal Ash Rule Updates](https://www.steptoe.com/en/news-publications/the-coal-ash-rule-update-epa-proposes-more-flexibility-for-states-and-companies-report-water-data.html), has vigorously encouraged the states to take a more active role in managing CCR sites.

Subtitle D of RCRA, however, calls on EPA to promulgate criteria distinguishing "sanitary landfills" which are permitted under RCRA, from "open dumps," which are not. The statutory baseline for EPA’s criteria for sanitary landfills is that, at a minimum, they "shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste in such a facility."

In December 2016, Congress adopted the Water Infrastructure Improvements for the Nation Act (“WIIN Act”). The WIIN Act amended RCRA by (a) authorizing EPA to approve state CCR permitting programs that are “at least as protective as” the federal criteria for CCR units under [40 C.F.R. Part 257](https://www.law.cornell.edu/cfr/text/40/part-257/subpart-D); (b) [directing](https://www.law.cornell.edu/uscode/text/42/6945) EPA to implement and administer a CCR permitting program requiring compliance with the federal CCR criteria in any state without an approved program; (c) directing EPA to establish and implement a CCR permit program consistent with the federal CCR criteria on tribal lands; and (d) authorizing EPA to enforce the federal CCR criteria in states without approved programs.[[3]](#footnote-2)

EPA has approved state programs in [Oklahoma](https://www.federalregister.gov/documents/2018/06/28) and [Georgia](https://www.federalregister.gov/documents/2020/01/10/2019-27665/georgia-approval-of-state-coal-combustion-residuals-permit-program). The legality of the Oklahoma decision is being litigated in[*Waterkeeper All. Inc. v. Wheeler*](https://earthjustice.org/sites/default/files/files/RCRA_OK-Enviros-Motion-for-SJ_03-15-19.pdf)1:18-cv-02230-JDB (D.D.C.). However, the EPA has neither established a federal permit program to administer in non-approved states and tribal lands nor has it enforced any provisions of the 2015 CCR Rule, despite numerous violations of that rule already committed by utilities. According to Earthjustice [comments](https://drive.google.com/file/d/1crd2z3_klM090KtKLtDaU7HoihMmrsDE/view) on the EPA docket, the 2020 Permitting Proposal would nominally establish, if and when finalized, a federal permit program, albeit one that falls far short of RCRA’s protectiveness standard and the WIIN Act’s objectives.

#### Relevant Case Law

On August 21, 2018, the US Court of Appeals for the District of Columbia Circuit handed down its long-awaited opinion on the [Utility Solid Waste Activities Group v. Environmental Protection Agency](https://www.law360.com/articles/1075351) (the USWAG case). In the USWAG case, NGOs argued certain aspects of the Coal Ash Rule actually did result in a "reasonable probability of adverse effects" on human health and the environment and, therefore, certain types of CCR impoundments were not "sanitary landfills" subject to the less stringent requirements of subtitle D, but rather "open dumps" that are prohibited under RCRA. The DC Circuit, for the most part, agreed. Highlights of the challenge include whether or not surface impoundments are considered dangerous, as well as the Coal Ash Rule exemptions of “legacy ponds.”

In March 2019, the D.C. Circuit [ruled in the Waterkeeper case](https://earthjustice.org/sites/default/files/files/2019-03-13-ORDER-EPA-Mot-Vol-Remand.pdf) on the 2018 Amendments, which rolled back regulatory oversight and extended deadlines. The court sent the 2018 Amendments back to EPA for revision consistent with the USWAG decision. In short, the court tasked a [notoriously deregulatory administration](https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html) with drafting a coal ash rule stronger than the one promulgated by the Obama EPA. In March 2019, the D.C. Circuit [ruled in the Waterkeeper case](https://earthjustice.org/sites/default/files/files/2019-03-13-ORDER-EPA-Mot-Vol-Remand.pdf) on the 2018 Amendments, which rolled back regulatory oversight and extended deadlines. On December 2, 2019, the Trump Administration [published a new proposal to amend the 2015 Rule](https://www.federalregister.gov/documents/2019/12/02/2019-24927/hazardous-and-solid-waste-management-system-disposal-of-coal-combustion-residuals-from-electric), this time constrained by court instruction (“2019 Proposed Rule”). The question remains as to whether this proposed rule adheres to the USWAG court order.

The [comments on the draft EIS for Four Corners Power Plant and Navajo Mine](https://drive.google.com/file/d/1gS7smQaZocYM9qb1I8c6asidK8ibm20J/view?usp=sharing) note that the Draft Environmental Impact Statement (DEIS) fails to note whether current and past CCW practices violate the “opening dumping” prohibition of RCRA (p. 55). The comments cite that the primary concern of RCRA is that “open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and land.” 42 U.S.C. § 6901(b)(4). The comments claim that the DEIS is deficient for failing to analyze whether activities at the FCPP and Navajo mine have violated this federal law and the remedial measures that must be immediately employed to achieve compliance with the Act. The comments claim that the DEIS also fails to analyze APS’s exposure to civil penalties under RCRA for its 30 years of illegal CCW disposal practices.

The [2020 Comments of Earthjustice and other organizations on the EPA Docket](https://drive.google.com/file/d/1crd2z3_klM090KtKLtDaU7HoihMmrsDE/view?usp=sharing) for the Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Federal CCR Permit Program, the history of RCRA is described along with broader critiques.

### Federal versus Tribal Regulatory Spotlight: Four Corners Power Plant

Using the example of the Four Corners Power Plant (FCPP), one can see the complexities of federal and tribal sovereignty and the corresponding regulatory implications. FCPP is located in large part on Navajo Nation, who owns the land. In the 1950’s, Arizona Public Service (APS) and Southern California Edison (SCE) [leased](http://edgar.secdatabase.com/1979/95012310102502/filing-main.htm) the land from the Navajo Nation for the Four Corners Power Plant. The Tribe’s rights to monitor the operating and land reclamation processes of the Four Corners Power Plant (FCPP) sites were waived when the lease was signed.

In this case, regulatory jurisdiction over this site falls on the federal government. In the case of FCPP, this power plant falls under the jurisdiction of EPA Region 9, and the Navajo Mine is under the jurisdiction of the Office of Surface and Mining (OSM). A full record of decisions and lease amendments for FCPP and Navajo Mine can be found [here](https://www.wrcc.osmre.gov/initiatives/fourCorners/documents/ROD/RecordofDecisionFCPP.pdf).

According to the [comments on the draft EIS for Four Corners Power Plant and Navajo Mine](https://drive.google.com/file/d/1gS7smQaZocYM9qb1I8c6asidK8ibm20J/view?usp=sharing), the DEIS fails to recognize and explain applicable regulations. The DEIS states that under covenant 17 of APS’s lease for the FCPP, the Navajo Nation may not impose tribal regulation on the operation of FCPP.[[4]](#footnote-3) OSM then states that it may not rely on tribal water quality standards or tribally listed endangered species to assess the environmental impacts of the DEIS alternatives.[[5]](#footnote-4) However, the DEIS then contradicts itself by stating “[t]he Navajo Mine and FCPP are located on the Navajo sovereign tribal land; therefore, air emissions and air quality are under the jurisdiction of the Navajo Nation Environmental Protection Agency (“NNEPA”) and overseen by the EPA Region IX in San Francisco.” DEIS at 4.1-1. The DEIS attempts to explain this contradiction by stating: “In 2005, the NNEPA and owners of the FCPP entered into a Voluntary Compliance Agreement that resolves jurisdictional authority dispute and states that the administration and enforcement of the NNEPA permit cannot be more stringent than EPA limits and federal court decisions; thereby, limiting the tribe’s ability to enforce more stringent limits than that established by the EPA.”[[6]](#footnote-5)

## State Regulations

#### New Mexico Environment Department (NMED)

##### National Pollutant Discharge Elimination System (NPDES)

The National Pollutant Discharge Elimination System ([NPDES](https://www.epa.gov/npdes)) permit program addresses water pollution by regulating point sources that discharge. It is related to the national Clean Water Act, in that the EPA authorizes state governments to perform the permitting, administrative and enforcement. This is done through [NMED’s Surface Water Quality Office](https://www.env.nm.gov/surface-water-quality/npdes-permits/).

Congress has determined that NPDES permits may only be issued “for fixed terms not exceeding five years.” ([33 U.S.C. § 1342(b)(1)(B)](https://www.law.cornell.edu/uscode/text/33/1342)). EPA’s permit program “shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder” including the maximum 5-year term. [33 U.S.C. § 1342(a)(3)](https://www.law.cornell.edu/uscode/text/33/1342). The EPA does not have the statutory authority to administratively extend an NPDES permit beyond the statutory 5-year time period.

###### Relevant Case Law

On January 14, 2021, EPA issued guidance that clarifies how the Supreme Court’s County of Maui v. Hawaii Wildlife Fund decision should be [applied under the NPDES permit program](https://www.epa.gov/npdes/releases-point-source-groundwater). This guidance will help clarify when a NPDES permit is necessary under the Clean Water Act. In its decision, the Supreme Court held that a NPDES permit is required for a discharge of pollutants from a point source that reaches “waters of the United States'' after traveling through groundwater if that discharge is the “functional equivalent of a direct discharge from the point source into navigable waters.” EPA’s guidance places the ‘functional equivalent’ analysis into context within the agency’s NPDES permit program. The guidance reiterates the threshold conditions for triggering the requirement for a NPDES permit—an actual discharge of pollutants from a point source to a water of the United States.

##### Water Quality Bureau

The [Water Quality Bureau](https://www.env.nm.gov/gwqb/general-faqs/) within the New Mexico Environment Department (NMED) is responsible for issuing groundwater discharging permits. In relation to coal ash, this is for impoundment units that are discharging to groundwater. Typical situations where a groundwater discharge permit is needed is when there is domestic wastewater discharge of > 5000 gallons per day, from large capacity septic tanks, wastewater treatment plants, sludge and septage disposal, and reclaimed domestic wastewater use. Domestic wastewater discharges of < 5000 gpd are permitted through the NMED [Liquid Waste Program](https://www.env.nm.gov/liquid_waste/).

##### Groundwater Quality Bureau

Within the [Groundwater Quality Bureau](https://www.env.nm.gov/gwqb/general-faqs/), the Mining Environmental Compliance Section (MECS) conducts all of the permitting, spill response, abatement and public participation activities for mining facilities in New Mexico pursuant to the Ground and Surface Water Protection Regulations ([20.6.2](http://www.srca.nm.gov/parts/title20/20.006.0002.html) NMAC) and the Supplemental Permitting Requirements for Copper Mine Facilities ([20.6.7](http://www.srca.nm.gov/parts/title20/20.006.0007.html) NMAC). In addition, the MECS participates in the implementation of the New Mexico Mining Act and Non-Coal Mining Regulations by reviewing and commenting on mine permits and closeout plans, coordinating environmental protection requirements at mine sites with the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department, and providing determinations that environmental standards will be met after closure of New Mexico mining operations.

##### Air Quality Bureau

The Air Quality Bureau within NMED is responsible for enforcing air quality standards of the federal [Clean Air Act](https://www.epa.gov/clean-air-act-overview). The regulatory authority comes from the state’s Environmental Improvement Act, Air Quality Control Act, and the State Implementation Plan (SIP) which is approved by the EPA. The Air Quality Bureau implements this through the Bureau’s programs for: strategic planning to ensure all air quality standards are met and maintained; issuing air quality construction and operating permits; enforcing air quality regulations and permit conditions. Regarding coal ash, this includes emissions from coal units, as well as [fugitive dust](https://www.env.nm.gov/air-quality/fug-dust-tech/) from coal ash.

#### New Mexico Public Regulation Commission (NMPRC)

The [New Mexico Public Regulation Commission](http://www.nmprc.state.nm.us/#gsc.tab=0) (NMPRC) regulates the [utilities](http://www.nmprc.state.nm.us/utilities/index.html), [telecommunications](http://www.nmprc.state.nm.us/utilities/telecommunications.html), and [motor carrier](http://www.nmprc.state.nm.us/transportation/index.html) industries to ensure fair and reasonable rates, and to assure reasonable and adequate services to the public as provided by law. In relation to coal ash waste, this can come up in various ways. This is the primary body that regulates the utilities, and decisions about replacement power, Integrated Resource Plans, energy mixes, financial liability, and plant decommissioning are all decided here. Most recently, the [Energy Transition Act](https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0489.html) (ETA), an omnibus bill that has important implications for the decommissioning, remediation, reclamation and financial liabilities of San Juan Generating Station and Four Corners Power Plant.

#### New Mexico State Legislature

The [New Mexico State legislature](https://www.nmlegis.gov) is the legislative branch of the New Mexico government. It is a bicameral body made up of the New Mexico House of Representatives and New Mexico Senate. The most relevant piece of legislation is Senate Bill 489, the Energy Transition Act (ETA) (see above). Abandonment proceedings (and related decommissioning, reclamation, remediation, etc), are in between the jurisdiction of the state legislature and PRC.

#### Arizona Department of Environmental Quality (ADEQ)

Under the Environmental Quality Act of 1986, the Arizona State Legislature created The Arizona Department of Environmental Quality (ADEQ) in 1987 as the state’s cabinet-level environmental agency. ADEQ is composed of three environmental programs: Air Quality, Water Quality and Waste, with functional units responsible for technical, operational and policy support. Part of their role includes facilitating the rulemaking for exemptions related to RCRA-regulated CCR disposal units from the Aquifer Protection Permit Program. The ADEQ website [lists the permits](https://www.azdeq.gov/permits-needed-coal-mines-and-related-facilities-reserved-sector-h-0) needed for coal mines and related facilities.

The federal CCR Rule requires facilities to send specific notifications to the relevant State Director and/or appropriate Tribal authority. ADEQ receives these notifications for facilities located on non-tribal land in Arizona. ADEQ does not have the authority to implement or require compliance with rule requirements. In order to comply with the CCR rule, power plants may need to make changes to facility design or operation, modify or close existing facilities, or build new facilities. Some of these changes may require power plants to obtain authorization from State regulatory programs. ADEQ processes permit amendment applications as they are received from power plants to ensure that ADEQ regulatory permit requirements are implemented.

A 2018 [analysis](https://docs.google.com/spreadsheets/d/1W_U0tyyigvKo2dPFE-FrV3Hbx1mM-BRBiULqbXp0h3I/edit#gid=0) from Earthjustice shows that the groundwater at Cholla power plant in Arizona exceeds the state and/or federal limits of contamination. The analysis als shows that the Cholla power plant does not comply with the aquifer separation standard compliance. Earthjustice has a one-page [fact sheet](https://earthjustice.org/sites/default/files/files/Arizona_Ash_Fact-Sheet-2015-04.pdf) on coal ash in Arizona that is from 2009 but still helpful.

In 2019, the EPA [repealed](http://azpha.wildapricot.org/EmailTracker/LinkTracker.ashx?linkAndRecipientCode=H228YN0955AxieUREx1AT0cmrNprs7Sb94wie32GoXNw7zGciD7YeRzIznLgfGrLWx9%2bSMoLpud%2f2QAHhGB1ADD6AV5QkI8aHyOh3tNvZzg%3d) and replaced the Existing Source Performance Standard (ESPS) rules (for existing plants) with what they call the [Affordable Clean Energy](http://azpha.wildapricot.org/EmailTracker/LinkTracker.ashx?linkAndRecipientCode=H228YN0955AxieUREx1AT0cmrNprs7Sb94wie32GoXNw7zGciD7YeRzIznLgfGrLWx9%2bSMoLpud%2f2QAHhGB1ADD6AV5QkI8aHyOh3tNvZzg%3d) (ACE) rule- which essentially gives states three years to create their own plans to cut emissions at existing plants mainly by encouraging coal-fired power plants to improve their efficiency. The old carbon standards were eliminated.

#### Arizona Game and Fish Department

The Arizona Game and Fish Department is tangentially related to coal ash regulation in Arizona through its relationship to the federal Endangered Species Act (ESA). This species can be federally listed or the Arizona Game and Fish Department [identifies](https://www.azgfd.com/wildlife/planning/wildlifeguidelines/statusdefinitions/) species to be listed as threatened or endangered. Under the Memorandum of Understanding (MOU), this Department also acts as cooperating agency between the Bureau of Reclamation.

1. <https://www.law.cornell.edu/cfr/text/40/1500.1> [↑](#footnote-ref-0)
2. ESA analysis from the [2020 Comments of Earthjustice and other organizations on the EPA Docket](https://drive.google.com/file/d/1crd2z3_klM090KtKLtDaU7HoihMmrsDE/view?usp=sharing) for the Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Federal CCR Permit Program. [↑](#footnote-ref-1)
3. Analysis paraphrased from [2020 Comments of Earthjustice and other organizations on the EPA Docket](https://drive.google.com/file/d/1crd2z3_klM090KtKLtDaU7HoihMmrsDE/view?usp=sharing) [↑](#footnote-ref-2)
4. DEIS at 4.8-3, 4.5-4 [↑](#footnote-ref-3)
5. *Id.* [↑](#footnote-ref-4)
6. DEIS at 4.1-1, fnt. 1. [↑](#footnote-ref-5)