

## EPA's long-awaited coal ash rule pleases nobody

The “self-implementing” regulation will depend on citizen watchdogs and the courts

Herman K. Trabish | Dec. 28, 2014



The Environmental Protection Agency’s just released final ruling on the handling of coal ash, four years in the making, satisfies none of the stakeholders.

And even the EPA acknowledges its final ruling is not final.

It is “a common sense path forward” and “a smart, very large step,” according to EPA Administrator Gina McCarthy.

The rule creates requirements and standards for the management of coal combustion residuals (CCRs or coal ash) under Subtitle D of the federal Resource Conservation and Recovery Act (RCRA). That subtitle governs solid waste. There is not yet adequate data, the EPA said, to justify managing coal ash under Subtitle C of RCRA, which pertains to hazardous waste.

“Coal ash is a toxic soup of heavy metals,” said NC WARN Energy Expert Nancy LaPlaca. “Pretending it is not hazardous waste is outrageous.”

Because of the way the new rule is written, it “doesn’t prevent more tragic spills like the ones we are still trying to clean up in North Carolina and Tennessee,” according to Earthjustice Senior Counsel Lisa Evans.

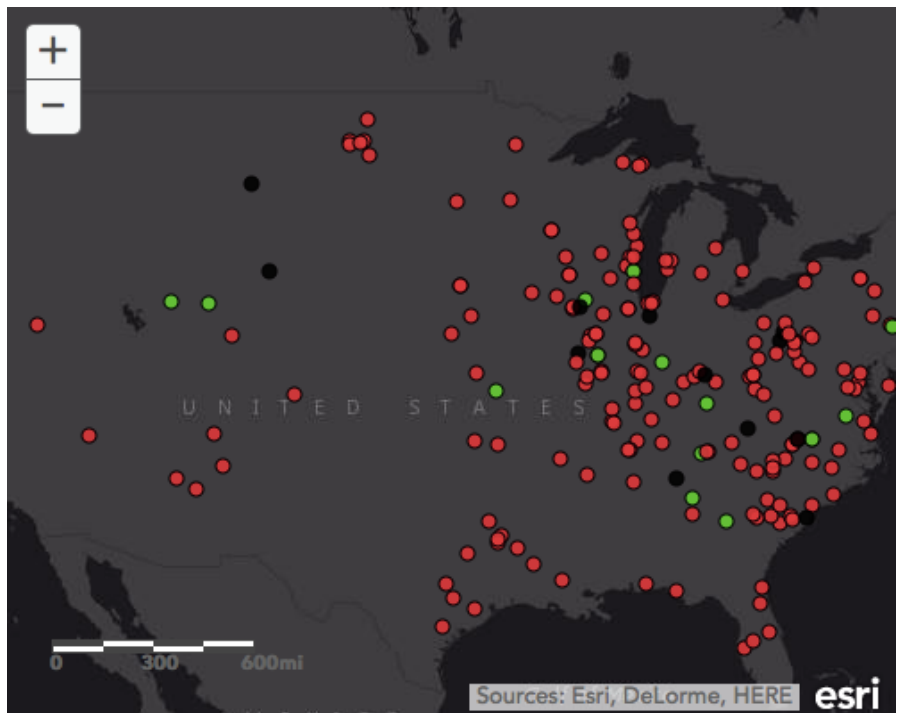
Utilities are “pleased” that the EPA found it did not have adequate information to regulate coal as hazardous waste, explained Schiff, Hardin Partner/Utilities Counsel Josh More. But “EPA is pretty explicit this is not their final determination. They are continuing to evaluate what the appropriate regulatory regime should be for coal ash.” This is an attempt to provide a uniform national system for coal ash regulation, More said. “But it failed because it does not mandate that states implement it. It is a self-implementing program.”

In that sense, it leaves both the utility industry and environmental groups equally dissatisfied.

Utilities would generally have preferred the EPA put in place a state permitting regime with state enforcement powers, More said.

A federal standard with enforcement provisions is what is needed, according to Evans.

**Coal Ash Contaminated Sites and Spills**  
(from EarthJustice, used with permission):  
[Photo]



**The EPA decision: Solid, not hazardous waste**

After 8 public hearings, 450,000 comments, and data and analyses from three solicitations, EPA still requires additional information “on a number of key technical and policy questions that are directly relevant to making a final determination,” explained EPA Press Secretary Liz Purchia.

Because of the missing information, “EPA finds a subtitle D [solid waste] rule is supported by the record and will provide needed federal standards on CCR disposal. EPA does not find that the record, at this time, supports a subtitle C [hazardous waste] regulation.”

Because of its incomplete data, EPA chose to issue a self-implementing provision requiring facilities to comply without any action by a regulatory agency and without any EPA formal implementation or enforcement powers, Purchia added.

If states implement legislation or permitting regulations covering the rules, they would be enforceable under state law, according to Purchia. Otherwise, “enforcement of these requirements will be by citizen suits or by states acting as citizens.”

The final rule is aimed at the leaking of contaminants into ground water, the blowing of contaminants into the air as dust, and the catastrophic failure of coal ash surface impoundments. It applies to electric utility and independent power producer (IPP) on- and off-site landfills and surface impoundments of coal ash as well as some inactive surface impoundments, Purchia explained.

It does not apply to (1) landfills no longer receiving ash, (2) storage at facilities where there is no longer generation, (3) ash not produced by utilities or IPPs, (4) ash not from coal, (5) ash at mines, (6) municipal solid waste landfills storing ash, and (7) encapsulated ash used beneficially.

It also defines the beneficial uses of encapsulated ash, such as in concrete.

The rule establishes recordkeeping and reporting requirements for each facility and requires each to post the designated information to a publicly-accessible website.

“The subtitle D [solid waste] provision provides the same level of environmental protection as a subtitle C [hazardous waste] regulation,” More said. “Industry got subtitle D and is happy with it. Environmental groups are not happy with it

but I think they should be because it provides the same level of protection as subtitle C would because the operating and management requirements and engineering controls are the same.”

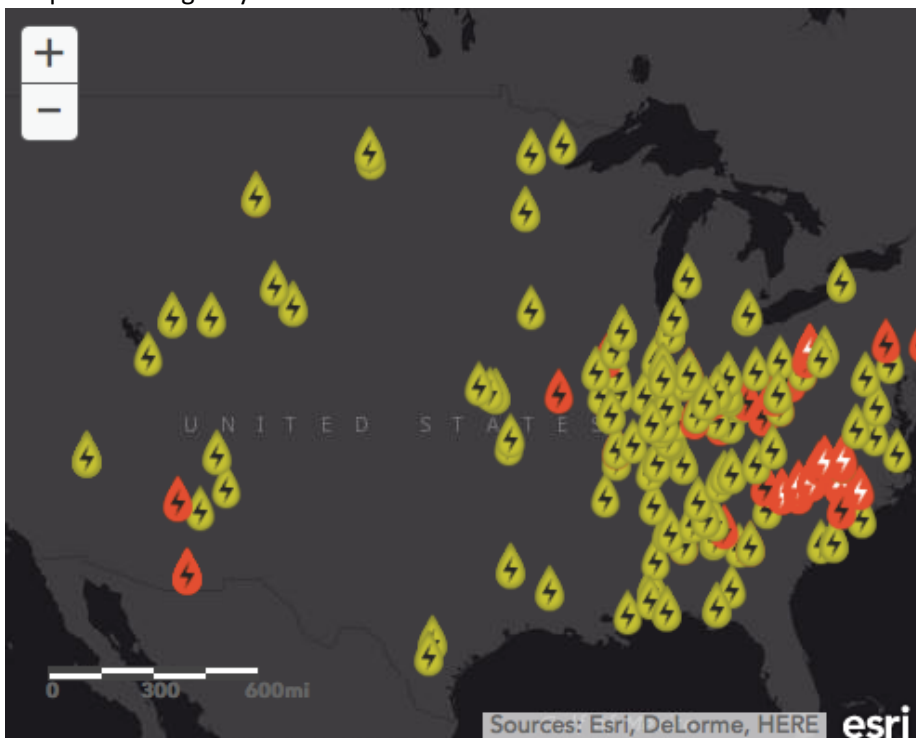
That is a wrong conclusion, Evans responded. “The subtitle C rule would have phased out all wet storage of coal ash, required permits for all existing dumps, established much more stringent requirements for closure, and required post-closure monitoring and cleanup at legacy sites,” she argued. “Under a subtitle D rule, no regulatory authority is required to enforce the requirements — states are not required to adopt the program and the federal government cannot enforce the standards. How are these two at all equal in stringency?”

“The debate focuses on the wrong question,” More insisted. “The real issue is who has authority to regulate this material. That is what the focus should be.”

**High and Significant Hazard Coal Ash Dump Sites (from EarthJustice, used with permission): [Photo]**

#### Legal questions: Who will enforce?

Because the rule sets up no official permitting authority, More said, concerned citizens and citizen groups can review the public data, decide a facility did not comply with the rule, and sue.



“They are providing mechanisms for greater citizen involvement and relying on citizens to enforce environmental regulations and putting in place the mechanisms to effectuate that enforcement,” he acknowledged. “But the courts will interpret how the law should be applied rather than a state regulatory agency. That creates uncertainty.”

Because the rule is self-implementing, it could create a dual regulatory regime for facilities, More added. “Sierra Club could sue in federal court for violation of the RCRA law. NRDC may sue the same utility in state court for violating state laws. It could result in two conflicting opinions or two penalties.”

This will lead to a waste of judicial resources and could result in a challenge to the rule by the utility industry, More said, “because they want regulatory certainty.”

Duke Energy spent \$15 million in the immediate aftermath of the Dan River coal ash spill and has taken on an unlimited obligation for cleaning it up that could take 30 years and reach \$10 billion. It is already “aggressively taking action to improve coal ash management,” it announced in reaction to the rule, and it “will adjust its existing ash management plans, as necessary, to comply with all state and federal regulations.”

“The balancing act we need to strike,” said Duke VP in charge of coal ash John Elnitsky, is between solutions “that consider environmental impact and stakeholder interests.”

The rule “will make states and utility companies vulnerable to new regulatory costs and expensive litigation,” coal supporting Republican Senators said in a joint statement. Because it could cost \$22.8 billion and 64,700 jobs, “it is nothing more than a continuation of the president’s war on fossil fuels and another attack on America’s most abundant, affordable and reliable source of energy: coal.”

“With these common sense standards in place, coal will remain an important part of our national energy mix, but the public will have greater protection,” Purchia responded. “EPA does not project significant retirements of coal plants as a result of this rule.”

“Regulators are finally catching up,” concluded CEO Andrew Behar of shareholder advocates As You Sow. But “the EPA’s new coal ash rules do not solve the coal ash problem.” By delegating enforcement, he said, it “gives state regulators numerous opportunities to avoid strict enforcement.”

It also, everyone interviewed agreed, gives attorneys and advocacy groups numerous opportunities to attend to enforcement.