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EPA'S 2014 FINAL RULE: DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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EPA'S 2014 FINAL RULE: DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES

THURSDAY, JANUARY 22, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in room 2123, Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee), presiding.

Members present: Representatives Shimkus, Harper, Murphy, Latta, McKinley, Johnson, Bucshon, Flores, Hudson, Cramer, Upton (ex officio), Tonko, Schrader, Green, Doyle, McNerney, Cárdenas, and Pallone (ex officio).

Staff present: Nick Abraham, Legislative Clerk; Charlotte Baker, Deputy Communications Director; Sean Bonyun, Communications Director; Leighton Brown, Press Assistant; Jerry Couri, Senior Environmental Policy Advisor; Brad Grantz, Policy Coordinator, Oversight and Investigations; Charles Ingebretson, Chief Counsel, Oversight and Investigations; Dave McCarthy, Chief Counsel, Environment and the Economy; Tina Richards, Counsel, Environment; Chris Sarley, Policy Coordinator, Environment and the Economy; Jean Woodrow, Director of Information Technology; Joe Banez, Democratic Policy Analyst; Jeff Carroll, Democratic Staff Director; Jacqueline Cohen, Democratic Senior Counsel; Tiffany Guarascio, Democratic Deputy Staff Director and Chief Health Advisor; Ryan Schmidt, Democratic EPA Detailee.

Mr. SHIMKUS. We want to call the hearing to order.

And I would like to recognize myself for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

We welcome each of our witnesses and appreciate your willingness to be here today to talk about the final coal ash rule released by EPA in December.

We are eager to hear from the administration. We hope Mr. Stanislaus will be able to provide some clarification about the implementation of the final rule and, also, answer some questions and address some concerns.

We will hear from a number of stakeholders regarding their initial impressions of the final rule and any concerns they may have,

and we will also discuss the final rule in comparison to the legislation we considered through this committee to the floor of the House the last couple of Congresses.

First, I would like to commend the EPA for getting the final rule out in time to meet the court-ordered deadline. Weighing in at over 700 pages, I am sure that that was no small undertaking.

I would also like to acknowledge that, in finalizing the rule, the Agency faced a genuine dilemma, create an enforceable permit program for coal ash under subtitle C and designate coal ash as a hazardous waste or promulgate self-implementing standards for managing coal ash as nonhazardous waste under subtitle D.

I am pleased to note that EPA chose to regulate coal ash under subtitle D, which will help ensure that coal ash continues to be beneficially reused like this.

However, because of the way subtitle D is currently drafted, EPA did not have the authority it needed to create a permit program for coal ash.

Instead, the final rule lays out an entirely self-implementing program that will be enforced through citizen suits and will unavoidably lead to an unpredictable array of regulatory interpretations as judges throughout the country are forced to make extremely technical compliance decisions that would be better left to a regulatory agency.

The final rule also sets up a dual regulatory program. EPA strongly encourages—and I quote—"for States to incorporate the requirements into their solid waste management plan."

However, as currently drafted, RCRA does not allow State coal ash programs to operate in lieu of the Federal requirements in the final rule, meaning, even if States adopt the Federal requirements or requirements that are more stringent, the Federal requirements remain in place and utilities must comply with both the State and Federal requirements.

There are some other provisions in the rule that are potentially troublesome and that we hope to discuss today, including the retroactive application of location or siting restrictions and the requirements that unlined impoundments that exceed a groundwater protection standard close with no opportunity to remedy the problem through corrective action.

Last, but not least, EPA has removed the flexibility of the correction action program as it exists for other programs under subtitle D. It is understandable that the Agency may feel the need to tighten certain restrictions because the rule is self-implementing.

However, by removing flexibility regarding the boundary which compliance must be demonstrated and flexibility to determine the appropriate cleanup levels and eliminating cost as a factor that can be considered in completing corrective action, the final rule jeopardizes the future of risk-based cleanup decisions at coal ash disposal units.

The removal of this flexibility also creates uncertainty with respect to ongoing cleanups at coal ash disposal facilities.

While we acknowledge the amount of time and effort EPA put into drafting the final rule, because of the significant limitations of the rule, we still believe that a legislative solution might be required that would set minimum Federal standards and allow

States to develop enforceable permit programs to implement the standards, which we think could still be the best approach in dealing with coal ash.

I can assure you that we intend to be thoughtful with respect to the requirements in the final rule and how they differ from the legislation that we moved through this committee and the House during the last Congress, and we will update the legislation as necessary.

As Mr. Stanislaus pointed out when he spoke with us last time, there are some important issues that our previous bills did not address, in particular, regulation of inactive impoundments. We will address these units as we move forward.

I would like to thank the administration for all the cooperation we have received to date on this issue. EPA has been constructive and helpful both with our legislative efforts during the last Congress and recently as we worked through the issues with the final rule. We appreciate all our witnesses for being here.

I would also thank Mr. McKinley, who has been a driving force behind moving this legislation and for his continued leadership on this issue.

And I would like to express my appreciation for fellow committee Members for sticking with us as we continue to push forward to ensure that effective regulation of coal ash.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

We welcome each of our witnesses and appreciate your willingness to be here today to talk about the final coal ash rule released by EPA in December. We are eager to hear from the administration and we hope that Mr. Stanislaus will be able to provide some clarification about the implementation of the final rule and also answer some questions and address some concerns. We will hear from a number of stakeholders regarding their initial impressions of the final rule and any concerns they may have and we will also discuss the final rule in comparison to the legislation considered by the committee in the last two Congresses.

First, I would like to commend EPA for getting the final rule out in time to meet the court-ordered deadline—weighing in at over 700 pages, I am sure that was no small undertaking. I would also like to acknowledge that in finalizing the rule the Agency faced a genuine dilemma: create an enforceable permit program for coal ash under Subtitle C and designate coal ash as a hazardous waste, or promulgate selfimplementing standards for managing coal ash as a non-hazardous waste under Subtitle D. I am pleased to note that EPA chose to regulate coal ash under Subtitle D which will help ensure that coal ash continues to be beneficially reused. However, because of the way Subtitle D is currently drafted, EPA did not have the authority it needed to create a permit program for coal ash. Instead, the final rule lays out an entirely self-implementing program that will be enforced through citizen suits and will unavoidably lead to an unpredictable array of regulatory interpretations, as judges throughout the country are forced to make extremely technical compliance decisions that would be better left to a regulatory agency.

The final rule also sets up a dual regulatory program. EPA "strongly encourages" the States to incorporate the requirements into their solid waste management plans. However, as currently drafted, RCRA does not allow State coal ash programs to operate in lieu of the Federal requirements in the final rule. Meaning, even if States adopt the Federal requirements or requirements that are more stringent, the Federal requirements remain in place and utilities must comply with both the State and Federal requirements.

There are some other provisions in the final rule that are potentially troublesome and that we hope to discuss today, including the retroactive application of location or siting restrictions and the requirement that unlined impoundments that exceed a groundwater protection standard close with no opportunity to remedy the problem through corrective action.

Last but not least, EPA has removed the flexibility of the corrective action program as it exists for other programs under Subtitle D. It is understandable that the Agency may feel the need to tighten certain restrictions because the rule is self-implementing. However, by removing flexibility regarding the boundary within which compliance must be demonstrated and flexibility to determine the appropriate cleanup levels, and eliminating cost as a factor that can be considered in completing corrective action—the final rule jeopardizes the future of risk-based cleanup decisions at coal ash disposal units. The removal of this flexibility also creates uncertainty with respect to ongoing cleanups at coal ash disposal facilities.

While we acknowledge the amount of time and effort EPA put into drafting the final rule, because of the significant limitations of the rule we still believe that a legislative solution that sets out minimum Federal requirements and allows the States to develop enforceable permit programs to implement the standards, is the best approach to dealing with the regulation of coal ash. I can assure you that we intend to be thoughtful with respect to the requirements in the final rule and how they differ from the legislation that we moved through this committee and the House during the last Congress and we will update the legislation as necessary. As Mr. Stanislaus pointed out when he spoke with us last time, there are some important issues that our previous bills did not address—in particular, regulation of inactive impoundments—we will address these units as we move forward.

I would like to thank the administration for all of the cooperation we have received to date on this issue. EPA has been constructive and helpful both with our legislative efforts during the last Congress and recently as we work through the issues with the final rule. We appreciate all of our witnesses for being here, I would like to thank Mr. McKinley for his continued leadership on this issue, and I would like to express my appreciation to my fellow committee members for sticking with us as we continue to push forward to ensure the effective regulation of coal ash.

Mr. SHIMKUS. With that, I yield back my time.

And I recognize Mr. Tonko, the ranking member of the subcommittee, for 5 minutes.

OPENING STATEMENT OF HON. PAUL TONKO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. TONKO. Thank you, Chair Shimkus.

And on the outset, let me just indicate how pleased I am to be able to work as ranking member on this subcommittee with you. I appreciate the fact that our respective parties have asked us to lead the efforts with what I think is very important work that comes under the overview of this subcommittee.

So I believe we will have a very productive session, and I look forward to it. So congratulations on your continued leadership.

Good morning. And, again, thank you, Chair Shimkus, for holding this hearing on the Environmental Protection Agency's final rule to establish minimum national standards for the disposal of coal ash.

Over the years, communities have been subjected to risks due to air and water pollution associated with inadequate management of coal ash disposal. Spills resulting from coal ash impoundment failures have polluted water supplies, destroyed private and public properties, and resulted in lengthy and expensive cleanup efforts. I am certain that the residents of these unfortunate communities feel this rule is long overdue.

EPA is to be commended for its extensive process of public engagements on this issue. The Agency sorted through over 450,000 public statements submitted during the public comment period on the rule and held eight public hearings in communities across our country.

EPA's rule is responsive to industry concerns that classifying coal ash as hazardous waste would harm coal ash recycling efforts that

utilize coal ash in new materials and new products, and it is responsive to the concerns of public health and environmental advocates because, for the first time, we have Federal standards for coal ash disposal sites that will set a floor of protection for all communities.

Of course, the rule from either vantage point is not perfect. Given the disparate opinions on what would constitute appropriate Federal regulation of coal ash disposal, that is not too surprising.

The rule has quieted the debate on this issue somewhat. But, of course, there are still differing opinions about how coal ash should be classified and regulated, and we will hear some of these opinions here today.

I would have preferred to see a stronger regulation, given the substantial risks and tremendous damage and cost of recent spills, especially the one experienced in Tennessee in 2008. But with this rule in place, States and utilities can begin to address deficiencies in disposal operations. Communities will gain access to information about coal ash disposal facilities and have a benchmark from which to compare performance against expectations.

Now that the rule is final, the work of implementation begins. Ultimately, that is the only real test of whether this rule takes the correct approach or not, and it will take some time to evaluate whether its implementation will achieve the goals of safe management of coal ash disposal. I believe it is this subcommittee's job to continue in its oversight of this issue and others going forward.

We will have witnesses today who will advocate for changes to this regulation or to the underlying law, and I think that either approach is premature. I would observe that changes in regulation or in law do indeed take a long time and hitting the restart button now would only lead to continued uncertainty and risk. We have had far too much of those already.

This rule was years in the making. And, as I said earlier, I would have preferred to see a stronger regulation, but I am not willing to second-guess an approach that has yet to be implemented or evaluated and one that rests on the extensive public engagement and negotiating process and years of work invested by the interested parties and the Agency. This rule should move forward. We should give this approach an opportunity to work and monitor it closely to evaluate its effectiveness.

So let's get on with it. As we go forward, we will see how well this approach works. We certainly retain all options for action if it does not.

I thank all of our witnesses for appearing today and for their invaluable contributions to the public process that moved this rule forward.

Again, I thank our chair, Chair Shimkus, for calling this important hearing. I look forward to working with you on this issue and the other issues in this jurisdiction of our subcommittee as we begin our work in this 114th Congress.

And, with that, I yield back.

[The prepared statement of Mr. Tonko follows:]

PREPARED STATEMENT OF HON. PAUL TONKO

Good morning and thank you, Chairman Shimkus for holding this hearing on the Environmental Protection Agency's final rule to establish minimum national standards for the disposal of coal ash.

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Mr. SHIMKUS. I want to thank my colleague for his kind words.

And now I would like to yield 5 minutes to the chairman of the full committee, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman.

Today our multiyear quest to solve the coal ash issue continues in this new Congress. And I want to particularly thank all of our

witnesses for appearing today and welcome back a frequent guest, EPA Assistant Administrator Stanislaus.

You have worked, clearly, long and hard on coal ash and have always engaged with us very constructively, and we appreciate that.

Navigating this issue is a tough job and, in our view, much more difficult by gaps in current law. Most of us can agree that coal ash does not warrant regulation as a hazardous material, and I am glad that EPA agrees. But there is no authority in the law that allows for a State-based permitting program for nonhazardous waste.

When the Federal court set a December 2014 deadline for EPA to publish a final rule for coal ash, we looked at the legal constraints and questioned whether EPA's rule would be the last word on the subject.

We, along with some of the witnesses who we will hear from today, are still asking the same thing, and we are left even with more questions: If we don't legislate, how will EPA's rule be implemented and enforced? Will there be a dual program in each State, one Federal and one State-based? Can we expect a dramatic increase in citizen suits?

The current regulatory path contains risks for all sides and could lead to even greater uncertainty and expense. Mr. McKinley's bipartisan bill in the last Congress went a long way towards solving the challenges with coal ash management. The legislation recognized that States like Michigan were already running successful disposal programs, and it allowed States to continue to use their localized regulatory expertise.

I appreciated EPA's input in our legislative process. The Agency acknowledged some of the advantages of our legislation and asked for some changes, many of which we made to the bill. Our goal is to get the job done right, and we are willing to discuss further changes to the legislation to ensure that we have a workable solution in place.

We want to continue working with Members in both bodies, in both parties, to achieve the best overall outcome. We will continue to work with our stakeholders, the States, the utilities, co-ops, coal ash recyclers, and other advocates.

Our goals are threefold: Put the right protections in place; put coal ash generators and users straightforward standards and procedures to follow; and grant States the authority that they need to implement and enforce Federal standards while taking into account distinct local conditions.

Mr. Chairman, with all of the innovative ideas and continued refinement that has gone into legislation over the last couple years, I welcome the opportunity to once again listen to stakeholders as we chart a path forward.

PREPARED STATEMENT OF HON. FRED UPTON

Today, our multiyear quest to solve the coal ash issue continues in this new Congress.

I want to thank all of our witnesses for appearing today and welcome back a frequent guest, EPAAssistant Administrator Stanislaus. Mathy, you have worked long and hard on coal ash and have always engaged with us very constructively. Navigating this issue is a tough job, and in our view, made more difficult by gaps in current law.

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Mr. Chairman, with all of the innovative ideas and continued refinement that has gone into legislation over the last 4 years, I welcome the opportunity to once again listen to stakeholders as we chart the path forward. I look forward to the testimony and to our members' questions.

Mr. UPTON. I yield the balance of my time to Mr. McKinley.

Mr. MCKINLEY. Thank you, Mr. Chairman.

Job creators detest uncertainty. And let's make one thing clear: This proposed regulation does not provide certainty. Now, in the spirit of the Super Bowl upcoming, let me explain with an analogy.

If a quarterback knew what defense was going to be put up against him, he knew with certainty what defense, he would logarithmically likely be able to move the ball down the field much more easily if he knew with certainty what he faces. And this is what applies to this regulation. It provides no certainty to the business community.

Let me give you three examples. And you have already heard our two chairmen talk about that. But let me reinforce it again. The rule results in potentially conflicting Federal and State requirements. Federal judges in neighboring jurisdictions could make contradictory decisions regarding compliance.

But more damaging is on page 18 of the rule. It says—and I quote—"This rule defers a final determination until additional information is available." That is not acceptable. How many times must there be a final determination that coal ash is not hazardous and be handled in a different way?

In the 112th and the 113th Congresses, the House passed legislation codifying the conclusions that were rendered in the 1993 and 2000 reports offered by the EPA. We are trying to develop certainty, certainty not just to the business community, but to the health of the people we are trying to protect.

In fact, Mr. Stanislaus—and I thank you very much because we have had a very good working relationship—you said in 2013 that the legislation that we passed was something that you could work with. That is what we want to keep working with. We want to keep that relationship going to come up with certainty how that could go.

So the bottom line, unfortunately, is we have a regulation that doesn't provide certainty. It would be wise for the committee to once again pass the legislation that we have done over the last 2 years and bring closure to this issue. Thank you.

And I yield back my time.

Mr. SHIMKUS. The gentleman's time expired.

The Chair now recognizes the ranking member of the full committee, Mr. Pallone, for 5 minutes. It was nice saying that. So welcome.

OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman.

I also wanted to start by congratulating my colleague from New York, Mr. Tonko, on continuing his role as ranking member of this important subcommittee.

And I think I can speak for all the Members on our side of the aisle when I say that we appreciate your expertise and leadership on environmental issues, Paul.

Let me just turn to the topic today. I would like to commend the EPA for finalizing national criteria for coal ash disposal. These criteria will for the first time provide the framework for addressing this serious environmental problem.

Unsafe disposal of coal ash poses serious threats to human health and the environment. The three primary risks are groundwater contamination, fugitive dust, and catastrophic failure of wet impoundments. And I am happy to say that each of these risks is addressed in the EPA's new rule.

EPA first determined that national disposal criteria were needed for coal ash in the year 2000. That was 15 years ago now. And the need for this rule has only become clearer.

We now have 157 documented cases of damage to human health in the environment from unsafe coal ash disposal. It is possible that, with the monitoring required under this rule, that number will only go up because more contamination will be detected.

This rule is the product of a robust public process, including field hearings and several rounds of public comment. It reflects the input of over 450,000 commenters, including States, industry groups, environmental groups, and individual concerned citizens, and it addresses many of the concerns that this subcommittee has heard in past hearings.

By proceeding under subtitle D, EPA addressed concerns about stigma raised by industry. By laying out a framework for States to incorporate the regulations into existing programs, EPA addressed State concerns. And by requiring public reporting of monitoring data and addressing some legacy sites, EPA addressed many concerns raised by environmental advocates.

We will hear today that not everyone is satisfied with the rule. Certainly many in the environmental community argue that only a subtitle C rule would protect human health. And it is possible that the self-implementing nature of the rule could lead to inconsistent compliance.

But, as a whole, the rule is an important step forward. The rule will offer important protections for human health in the environment, including many important protections that were not part of past legislative proposals.

Now, as we look ahead in this subcommittee, I think the publication of this final rule changes our role. We are no longer called upon to set national criteria and statute because those criteria have been set through a robust transparent process.

Instead, we will have to monitor compliance and conduct oversight of the rule's novel implementation structure, and I hope we can conduct that oversight in a bipartisan manner.

Again, I applaud EPA for their hard work and look forward to the testimony.

And I would yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time.

And I want to thank my colleagues again.

Now I would like to recognize Mathy Stanislaus from the EPA.

Thank you for coming. I think you heard from a lot of Members of—you know, this is one issue we really appreciate the work that we have done together, and we look forward to working with you more.

You are recognized for 5 minutes.

STATEMENT OF HON. MATHY STANISLAUS, ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY

Mr. STANISLAUS. Good morning, Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee.

I am Mathy Stanislaus, U.S. EPA Assistant Administrator for the Office of Solid Waste and Emergency Response. And I and my staff have had the privilege of working the last 5 ½ years to actually get it right in terms of putting a rule in place that is protective and address the risks that we have identified.

On December 19, as Members know, EPA finalized the coal ash rule. This rule established the first ever national rule for the safe disposal of coal combustion residuals in landfill and surface impoundments.

The 2008 catastrophic failure of the CCR impoundment at Tennessee Valley's Kingston facility, EPA's risk assessment, and the 157 cases in which CCR mismanagement has caused damage to human health and the environment clearly demonstrate that improper management of coal ash poses an unacceptable risk to human health and the environment.

We believe this groundbreaking rule is a culmination of extensive studies on the effects of coal ash on the environment and public health. The rule establishes technical requirements for landfills and surface impoundments under subtitle D of the Resource Conservation and Recovery Act.

In developing this final rule, EPA carefully evaluated more than 450,000 comments, testimony from eight public hearings, supplemented by three separate public comments on data, which is the foundation of the rule. The rule is a strong, effective approach that provides critical protection to communities across the Nation by helping to protect our water, land, and air.

The rule protects groundwater by requiring utilities to conduct groundwater monitoring, immediately cleaning up contaminated groundwater, closing unlined impoundments that are contaminating groundwater, and requiring the installation of liners for new surface impoundments and landfills.

It protects communities against catastrophic failure of impoundments by requiring specific design criteria, inspections and engineering testing, and to retrofit or close impoundments that fail testing. It protects communities from CCR dust by requiring an air control plan.

Further, the rule provides States and communities the information they need to fully engage in the rule's implementation. The rule requires utilities to post information on all aspects of its compliance with the rule on publicly available Web sites to help ensure States and the public have access to information to monitor utilities' compliance with the rule.

The rule has been designed to provide electric utilities and independent power producers generating coal ash with a practical approach for safe coal ash disposal and has established reasonable implementation timelines for this to occur.

We strongly recognize the important role that our State partners play in implementation and ensuring compliance with environmental regulations. EPA is committed to working closely with our State partners on rule implementation.

And as a major component of this rule, States can align their programs with the Federal rule by utilizing the solid waste management plan in process and submit revisions limited to incorporating the coal ash Federal requirements for EPA for approval.

The solid waste management plan can demonstrate how the State program has incorporated the rule's minimum criteria utilizing State permit or other processes and can highlight those areas where State regulations want to be more stringent or otherwise go beyond the Federal minimum criteria.

EPA will be working with the States to develop a template for a streamlined process for developing and approving a solid waste management plan. Of course, the final rule does not preclude a State from adopting more stringent requirements, should it choose to do so.

I should note that States will have adequate time to develop the solid waste management plan and seek EPA's approval and conduct the necessary public process because the major elements of the rule is at least 18 months from today.

Further, the rule supports the sound beneficial use of coal ash. The final rule does not change the current Bevill exemption nor regulate coal ash that are beneficially used. The rule distinguishes between beneficial use and disposal to provide certainty to the regulated community and to users of coal ash.

We have separately established methodology for coal ash users to analyze their products, and we have, in fact, applied that methodology to demonstrate that in concrete and wallboard—that we have confirmed its continued use.

I will close by noting that we believe this is a tremendous milestone to protect communities and the environment in which we live and work, and EPA is committed to working with our State partners, local communities, and utilities on the implementation. And I look forward to your questions.

[The prepared statement of Mr. Stanislaus follows:]

TESTIMONY OF MATHY STANISLAUS
ASSISTANT ADMINISTRATOR
OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENT AND ECONOMY

COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
January 22, 2015

Good morning Chairman Shimkus, Ranking Member Tonko, and members of the Subcommittee, I am Mathy Stanislaus, Assistant Administrator for the U.S. Environmental Protection Agency's Office of Solid Waste and Emergency Response. Thank you for the opportunity to testify today on the EPA's final rule that regulates the disposal of coal combustion residuals or CCR.

Introduction

On December 19, the EPA Administrator Gina McCarthy signed the final CCR or coal ash rule. This rule establishes the first ever nationally applicable minimum criteria providing for the safe disposal of coal combustion residuals in landfills and surface impoundments. The 2008 catastrophic failure of a CCR impoundment at the Tennessee Valley Authority's (TVA's) Kingston facility, the EPA's risk assessment, and the 157 cases in which CCR mismanagement has caused damage to human health and the environment clearly demonstrate that improper management of CCRs poses an unacceptable risk to human health and the environment. During the public comment period, the EPA heard from communities across the country about the health

and environmental risks posed by mismanaged CCR impoundments associated with groundwater contamination, fugitive dust, and structural failure.

Coal combustion residuals (CCR – also commonly known as coal ash) are by products of the combustion of coal at power plants. CCR includes fly ash, bottom ash, boiler slag, and flue gas desulfurization (FGD) materials. CCR contain contaminants such as mercury, cadmium, and arsenic which, are associated with cancer and other serious health effects. When improperly managed, CCR can leak into the groundwater, blow into the air as dust, and be released to the surface water and to the land in the event of a catastrophic failure.

CCR is one of the largest industrial waste streams generated in the United States. In 2012, more than 470 coal-fired electric utilities burned over 800 million tons of coal, generating approximately 110 million tons of CCR in 47 states and Puerto Rico. CCR may be generated wet or dry; after it is generated, some CCR is dewatered while other CCR is mixed with water to facilitate transport (i.e., sluiced). CCR can be sent off-site for disposal or beneficial use or disposed in on-site landfills or surface impoundments. In 2012, approximately 40 percent of the CCR generated was beneficially used, with the remaining 60 percent disposed in surface impoundments and landfills. Of that 60 percent, approximately 80 percent was disposed in on-site disposal units. CCR disposal currently occurs at more than 310 active on-site landfills, and at more than 735 active on-site surface impoundments. These disposal units are very large, with landfills averaging more than 120 acres in size with an average depth of over 40 feet (roughly a four story building) and surface impoundments averaging more than 50 acres in size with an

average depth of 20 feet. To put this in perspective, a unit of 50 acres equals approximately 38 football fields.

The final rule is a strong, effective approach that provides critical protections to communities across the nation by helping to protect our water, land, and air. Further, the rule provides states and local communities the information they need to fully engage in the rule's implementation, thereby helping to ensure that facilities safely dispose of CCR. To address the risks posed by mismanagement of CCRs, the rule requires utilities to conduct groundwater monitoring, install liners for new surface impoundments and landfills, control fugitive dust and properly close surface impoundments and landfills no longer receiving CCRs.

The rule has been designed to provide electric utilities and independent power producers generating CCR with a practical approach for addressing the issue of CCR disposal and has established varying implementation timelines for the technical requirements that take into account, among other things, other upcoming regulatory actions affecting electric utilities and site specific practical realities. This rule also sets out recordkeeping and reporting requirements, including requirements to post information on a publicly available web site to ensure transparency. Finally, the EPA is committed to working closely with our state partners on rule implementation and, as a major component of this, is encouraging states to revise their Solid Waste Management Plans and submit the revisions to the EPA for approval. As stated previously, the CCR rule establishes a comprehensive regulatory program governing the disposal of CCR. As such, it has elements of prevention, response, and public information/transparency.

Components of the Rule

The final rule establishes a comprehensive set of requirements for the disposal of CCR in landfills and surface impoundments. This groundbreaking rule is the culmination of extensive study on the effects of CCR on the environment and public health. The rule establishes technical requirements for landfills and surface impoundments under subtitle D of the Resource Conservation and Recovery Act, the nation's primary law for regulating solid waste. In developing this final rule, the EPA carefully evaluated more than 450,000 comments on the proposed rule, testimony from eight public hearings, and information gathered from three notices soliciting comment on new data and analyses. Provisions of the final rule include:

Structural Integrity Requirements

To prevent the damage associated with structural failures of CCR surface impoundments, the rule establishes structural integrity design criteria and requires that owners and operators periodically conduct a number of structural integrity related assessments. Examples of these include conducting: (1) routine structural stability assessments; (2) routine safety factor assessments to document that the unit achieves minimum engineering factors of safety; (3) routine hazard potential classification assessments to assess the damage that would occur if there was a failure of the CCR surface impoundment; (4) weekly inspections of the CCR unit; and (5) monthly monitoring of unit instrumentation. In addition, those surface impoundments with High or Significant Hazard Potential classification (that is those units where a failure would result in loss of human life or significant damage to infrastructure) must develop a written emergency action plan which details the actions that will be taken to protect communities in the event there is an issue with the structural or operational safety of the unit.

Groundwater Protection and Location Restrictions

In order to protect groundwater, the rule establishes a number of requirements both to prevent future contamination, to detect potential contamination as early as possible, and to remedy contamination that has occurred. The prevention provisions include the requirement for all new units to have a composite liner to help prevent contaminants from leaching into the groundwater. In addition, the rule establishes five location restrictions to help ensure that landfills and surface impoundments are appropriately sited. These include requirements related to placement above the uppermost aquifer, and restrictions on the placement in wetlands, in fault areas, in seismic impact zones and in unstable areas. Owners or operators must demonstrate that their existing landfills or surface impoundments meet these restrictions currently, through engineering enhancements, or established alternatives as set forth in the rule or they must close the unit. New units must be built in compliance with the requirements.

To detect contamination as early as possible, the rule requires the owner or operator of a CCR unit to install a system of monitoring wells and specify procedures for sampling these wells and for analyzing the data to detect the presence of hazardous constituents. In those cases where hazardous constituents are in the groundwater above groundwater protection standards, the owner or operator must begin the corrective action process to clean up the contamination caused by the unit. If the unit causing the contamination is an unlined surface impoundment, it must begin the closure process.

Operating Criteria

The rule also sets out operating criteria to address the day-to-day operations of CCR units and establish requirements to prevent public health and environmental impacts from the units. These include: (1) air criteria, requiring that controls be established to prevent CCR from becoming airborne at a facility. These requirements are designed to address the pollution caused by windblown dust from CCR units; (2) run-on and run-off controls to minimize the amount of water entering the unit and thus prevent erosion, water discharges and the creation of landfill leachate, and to help protect against releases to surface waters.

Closure Requirements

Further, the rule establishes criteria to help ensure the long term safety of units that are ceasing operation and requires all units to close in accordance with specified standards and to monitor and maintain the units for a period of time after closure, including maintaining groundwater monitoring and corrective action. The rule establishes specified timeframes for both beginning and completing the closure process and enables owners/operators to obtain extensions due to circumstances beyond the facility's control; where there is no alternative disposal capacity; or where the facility is permanently closing the coal fired boiler in the near future.

As a general matter, the rule allows existing units to continue to operate until the end of their useful lives or until a business decision is made to cease operating that unit. However, there are three circumstances where the CCR rule will require a unit to begin the closure process. First, when a unit fails to meet technical criteria that is, if the CCR unit cannot meet the location criteria or the engineering demonstrations that the unit can still operate safely even though it

does not meet the location restrictions; second, where an unlined CCR surface impoundment is found to contaminate groundwater in excess of a groundwater protection standard; and third, where a CCR surface impoundment cannot demonstrate that it meets the minimum factors of safety regarding structural integrity of the CCR unit.

Inactive Units

The final rule also addresses surface impoundments that have ceased receiving waste by the effective date of the rule (inactive units). Those units that have water and contain CCRs pose the same risk as active units of structural failure and groundwater contamination. The final rule thus applies to these units. However, the final rule allows for a practical alternative for these units- if they complete closure (dewater, stabilize, and install a final cover) within three years of the publication of this rule, then they are not subject to any additional requirements under the rule.

Notification and Public Disclosure

A fundamental principle of the CCR rule is that it helps ensure transparency and provides citizens and states with the information they need to fully engage in the implementation of the rule. For example, the rule requires owners or operators of CCR units to record compliance with these requirements in the facility's operating record. In addition, the facility must notify the state of decisions and maintain a publicly available website of compliance information. Some examples of the information that must be maintained and made publicly available are annual groundwater monitoring results, corrective action reports, fugitive dust control plans and closure completion notifications.

State Programs

The EPA recognizes the important role that our state partners play in implementation and in ensuring compliance with environmental regulations, particularly in complex situations such as cleaning up contaminated drinking water sources. Based upon extensive comments by states, the agency identified the Solid Waste Management Plan (SWMP) process as the way to help align state programs with the EPA rule. The agency expects that states will use this process and will revise their SWMPs to demonstrate how CCRs will be regulated in their states. The SWMP is the mechanism where a state will be able to outline, as part of their overall solid waste program, how the state intends to regulate CCR landfills and surface impoundments. In other words, the plan can demonstrate how the state program has incorporated the minimum national criteria and can highlight those areas where the state regulations are more stringent or otherwise go beyond the federal minimum criteria.

For example, the plan can describe the actions the state will take to oversee CCR disposal units, particularly those units undergoing closure or corrective action, and how the state intends to review or use the notices and other information pertaining to the units that the facility owners will be providing to the state. In addition, states can specify in its SWMP any review and approval process the state will use in dealing with disposal units - including the use of permitting. The EPA made clear in the rule preamble that the revision to SWMPs is limited to CCRs. Moreover, we will be working with the states to develop a template for a streamlined process for developing and approving SWMPs.

Citizens also perform a critical role in the development of SWMPs. Revisions of SWMPs should be subject to a public participation process. This process will provide the public and communities near CCR landfills and surface impoundments with an opportunity to participate in the decision making about how CCRs are managed in their State.

The EPA's view is that facilities adhering to the requirements of a state program that are identical to or more stringent than the federal regulations and that are part of an approved SWMP would also be adhering to the EPA rule. The agency thus anticipates that a facility that complies with State requirements in an approved SWMP will be able to use such information as evidence in a citizen suit brought to enforce the federal criteria. The EPA believes that in any action to enforce the federal criteria, a court will accord substantial weight to the fact that a facility is operating in accord with state requirements promulgated in accordance with an EPA approved SWMP. Moreover, in any suit to enforce the EPAs' rule, the agency expects that a state's process and record developed by the state in preparing its SWMP and demonstration on how it addressed public comments will similarly be accorded substantial weight by courts. For these reasons, while states are not required to adopt the EPA's rules into their regulations, to develop a permitting program, or to submit a program to the EPA for approval, the agency expects states will avail themselves of the SWMP to help align state programs with the CCR rule.

The EPA is strongly encouraging states to adopt at least the federal minimum criteria into the regulations. The agency recognizes that some states have already adopted requirements that go beyond the minimum federal requirements. This rule will not affect those state requirements. Moreover, the final rule does not preclude a state from adopting more stringent requirements. In

addition, states will be active partners in overseeing the regulation of CCR landfills and CCR surface impoundments through a number of provisions in the CCR rule to help ensure that states have the information necessary to undertake this role. The final rule requires owners or operators of regulated CCR units to notify the state of actions taken to comply with the requirements of the rule. The timing of actions required by owners or operators to comply with the rule's requirements varies depending on the action. For instance, record-keeping and public web posting of utility compliance with rule requirements are 6 months after Federal Register publication, while unit design criteria requirements are 18 months after publication of the rule. Owners or operators will be required to maintain a publicly accessible website that will document the facility's compliance with the requirements of the rule and states will be able to access this site to monitor facility activities. Based on this information, states will be able to determine whether a utility is in compliance with the federal minimum criteria and can take appropriate action.

Beneficial Use

The rule supports environmentally sound beneficial use of CCR. As noted earlier, approximately 40 percent of the CCR generated in 2012 was beneficially used. Beneficial use of CCR can produce positive environmental, economic, and performance benefits such as reduced use of virgin resources, lower greenhouse gas emissions, reduced cost of CCR disposal, and improved strength and durability of materials. The final rule does not regulate CCRs that are beneficially used, but provides a definition of beneficial use to distinguish between beneficial use and disposal to provide certainty to the regulated community and to the users of CCR. To help support the appropriate beneficial use of CCRs, last year the EPA issued a methodology for

evaluating encapsulated beneficial uses of CCRs. This methodology supports beneficial use decisions by allowing the user to determine whether releases from an encapsulated beneficial use of coal ash is comparable to or lower than those from analogous products made without coal ash, or are at or below relevant regulatory and health-based benchmarks, during use.

Conclusion

The EPA's final rule, that for the first time establishes nationally applicable minimum criteria for the safe disposal of coal combustion residuals in landfills and surface impoundments, represents a milestone that will help protect our communities and the environment in which we live and work. The EPA is committed to working closely with our state partners, local communities, and the utilities on implementation of the rule to help achieve the benefits that this rule will provide.

Mr. SHIMKUS. Thank you very much.

Now I would like to recognize myself for 5 minutes for an opening round of questions.

So, again, numerous times we appreciate your good effort and good work, and we look forward to working with you. But just to get some clarification—and we have got your partner sitting behind you who will be also working within their States.

Under the final rule, no permits will be issued. Isn't that correct?

Mr. STANISLAUS. Well, what we have identified, utilizing the solid waste management planning program, is the States can build a permitting program and submit that to EPA to be approved.

Mr. SHIMKUS. They can. But there is no requirement to. There is no permitting process in the new rule.

Mr. STANISLAUS. That is true. But once the solid waste management plan is approved, there will be a singular point of compliance.

So utilities can then implement through the State program, and we have made clear in the preamble that compliance will demonstrate compliance with the Federal——

Mr. SHIMKUS. And you understand why we are asking that, because the legislation we moved last cycle said Federal standards, State implementation, permitting process where there is certainty. And I think it goes to Mr. McKinley's point.

Isn't it true that States are not required to adopt or implement the requirements?

Mr. STANISLAUS. Well, clearly they are not required. But the States have clearly called on us to figure out ways of aligning the Federal requirements with the State program.

That is why we have established a solid waste management plan and program, so States can, in fact, integrate the minimum Federal requirements that we have established within their State program, and seek EPA's approval of that. And so that will establish the alignment from our perspective.

Mr. SHIMKUS. And neither EPA nor the States can directly enforce requirements in the final rule. Isn't that correct?

Mr. STANISLAUS. That is correct. So we believe, again, utilizing the State solid waste management plan, the States can then go forward and implement these requirements once a State solid waste management plan is approved, or independently States and citizens can implement requirements of the rule.

Mr. SHIMKUS. Yes. And the only enforcement mechanism under the recently reduced rule is through citizen suits and more litigation. Is that correct?

Mr. STANISLAUS. Well, we actually believe, again, that the State solid waste management plan, when approved, will not result in excessive litigation. There will be litigation to enforce in those circumstances where States and others are deemed not to be compliant.

Mr. SHIMKUS. You are more optimistic than I am. I can guarantee you that.

Even if States adopt the Federal rule, utilities will have to comply with the State requirements and the Federal rule. Is that correct?

Mr. STANISLAUS. Well, the rule is directly applicable to utilities. But, again, getting back to State solid waste management plan,

there is an opportunity for the States, as the States have sought, to align and integrate the Federal minimum requirements into their program and seek EPA's approval for that.

Mr. SHIMKUS. But you understand the concern in this line of questioning is it is kind of vague: "They can" or "They might," "We kind of hope they do." There is an expectation that they probably will, but there is really not a lot of clarity.

And then the other concern is, if you are relying on citizen suits—or citizen suits will come. Right? There is no doubt that they will come.

And if they are regionally directed, then you could have multiple standards throughout the country which aren't the same, based upon the litigation and the rulings in these different courts.

Isn't that a concern?

Mr. STANISLAUS. Well, actually, we don't anticipate that. The rule is pretty specific in establishing minimum Federal requirements for protection of groundwater, for preventing catastrophic failure, for addressing dust.

And so if you move forward in implementing that and the States can integrate that within their State program and EPA approves the State solid waste management plan, we think that there is going to be national consistency.

Mr. SHIMKUS. You are more optimistic than I am. And you mentioned the preamble, so I am going to kind of address it.

If a regulated facility complies with a State requirement that is more stringent and, therefore, is not the same as the requirement in the final rule, will the regulated entity also have to comply with the Federal requirement?

Mr. STANISLAUS. So I just want to clarify. So if a State adopts more stringent—adds to the Federal requirement——

Mr. SHIMKUS. Correct.

Mr. STANISLAUS [continuing]. Then gets an approval from EPA through a State solid waste management plan, the utilities will then have to comply with fully the State requirements.

And so that will demonstrate compliance with the Federal requirements and, also, additional requirement that the State chooses to add.

Mr. SHIMKUS. Yes. And I think we are going to hear testimony in the next panel that they don't believe that that is true, that there will be a two-fold process, the Federal Government and the State EPA. And that is one of the concerns that we have with the rule. So good people can agree to disagree.

And I now would like to recognize the ranking member of the subcommittee, Mr. Tonko, for 5 minutes.

Mr. TONKO. Thank you.

Mr. Stanislaus, good morning, and thank you for joining us.

Unsafe disposal of coal ash poses serious threats to human health and to our environment. That is why I am pleased that EPA has finally set national criteria for State disposal of coal ash. For the first time utilities and States have clear requirements to indeed follow.

As I stated earlier, I would have preferred a stronger rule. Public health and environmental advocates have indicated that they have

preferred a stronger rule. I tend to agree. But I do believe the rule includes some important safeguards.

I appreciate you being here to testify. And I would like to go over some of the most important protections offered by the rule with you.

To ensure that disposal sites are not located in dangerous areas, the rule puts in place five restrictions. And I would like to give you my read of those restrictions and see if I am interpreting them correctly.

Structures generally will not be allowed close to aquifers and wetlands within fault areas and seismic impact zones and in unstable areas. Is that indeed correct?

Mr. STANISLAUS. Well, that is correct. So they are going to have do an analysis with respect to those location requirements and demonstrate whether they can safely operate and putting engineering measures to prevent any impacts.

Mr. TONKO. OK. Thank you.

And previous legislative proposals we have seen would have included only two of these five restrictions and included a smaller aquifer buffer. I appreciate that the final rule includes these protective requirements.

Next. To protect air quality, the new final rule will require facilities to develop dust control plans and prevent blowing by wetting or covering the dust or erecting wind barriers. Is that indeed correct?

Mr. STANISLAUS. That is correct.

Mr. TONKO. Thank you.

To detect groundwater contamination, the rule includes requirements for at least one upgradient well and three downgradient wells. Is that correct?

Mr. STANISLAUS. Yes.

Mr. TONKO. Why did the Agency find it important to specify a minimum number of wells?

Mr. STANISLAUS. Well, this is standard protocol to make sure that we fully understand the direction and potential impact to groundwater.

Mr. TONKO. OK. Lastly, I would like to turn to the public disclosure requirements in this rule.

The rule establishes a national floor for what information will be made publicly available and for how that will be done. Utilities will have to maintain pages on their Web sites that document their compliance with a wide range of the criteria in the rule, including location, design, and groundwater monitoring. Is that correct?

Mr. STANISLAUS. That is correct.

Mr. TONKO. These disclosure provisions in the rule will be essential to ensuring compliance and promoting transparency for communities. Although a subtitle C rule might have offered more protection and more direct enforcement, this rule will protect human health in the environment and goes beyond past bills.

I do want to commend EPA for finalizing this rule and for the Agency's conduct of the extensive public engagement in the course of this development.

And, with that, I thank you for appearing here this morning.

And I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

Just a notification to my colleagues: The votes have been called. We have about 10 minutes before a lot of us need to get there.

That means I think we can get 5 minutes on each side and then we will recess and have folks come back to finish this panel.

So the Chair now recognizes the vice chair of the subcommittee, Mr. Harper, for 5 minutes. And congratulations on your elevation.

Mr. HARPER. Thank you, Mr. Chairman.

Mr. Stanislaus, in light of the fact that the final rule requires the cleanup level to be set at either the MCL or the background level, if a State chooses to incorporate risk-based decisionmaking into the coal ash permit programs that establish an alternative groundwater protection standard, would EPA be able to approve the State plan as being as stringent or more stringent than the final rule?

Mr. STANISLAUS. So let me break it down into a couple of subcomponents. So we have integrated the same standard framework as a Superfund cleanup. So we begin with protecting groundwater in all cases.

However, in selecting the cleanup remedy, you can look at the particular circumstance that is involved in the cleanup. So, in the same way that we provide all those on-the-ground factors, that can be brought to bear in these decisions.

With respect to an approval of a cleanup plan, again, in the EPA's approval of a solid waste management plan, the States can choose to enable the State's approval of the cleanup plan. So I think there is that ability for States to do that.

Mr. SHIMKUS. Mr.—you just finished.

Mr. HARPER. Let me just ask this: If a State determines that there is no human receptor for the groundwater and that a cleanup standard above the MCL or background is appropriate, would that meet the minimum requirements of the rule?

Mr. STANISLAUS. Let me get back to you on that.

Mr. HARPER. OK. If you will let us know.

Mr. STANISLAUS. Sure.

Mr. HARPER. I will just yield back.

Mr. SHIMKUS. The gentleman yields back.

The Chair now recognizes the ranking member of the full committee, Mr. Pallone, for 5 minutes.

Mr. PALLONE. Thank you, Mr. Chairman.

There is no question that coal ash can pose serious risk when not disposed of properly. Many people in this room have spent the better part of a decade working on this issue, and I commend EPA for finalizing this rule.

I wanted to ask Mr. Stanislaus: Do you have the confidence that this final rule is protective of public health and the environment? And, in your view, are there gaps in the protections under this rule that would need to be filled by legislation?

Mr. STANISLAUS. I believe the rule is very strong and very protective of the risks that we have identified.

Mr. PALLONE. And in terms of any gaps that would need to be filled by legislation?

Mr. STANISLAUS. No. We don't believe that there are gaps. We believe all the risks and all the information contained in the reg

can be put in place, all of the rigorous technical standards to provide the necessary protections.

Mr. PALLONE. Well, what about beneficial reuse? Will this rule restrict beneficial reuse in any way to stigmatize coal ash?

Mr. STANISLAUS. We don't believe it will. We provided real clarity with respect to beneficial use, and that beneficial use is not subject to the rule.

Mr. PALLONE. But, still, I expect we are going to hear from the second panel that legislation is needed to remove EPA's authority to regulate coal ash under subtitle C in the future.

What factors might lead EPA to someday regulate coal ash under subtitle C?

Mr. STANISLAUS. Well, to be clear, we had proposed an approach under D and C, and we have made a decision under D. So the C proposal is no longer on the table. So like any other rule, in the future, we—you know, it will go through the same public notice and comment to evaluate future considerations.

However, I would note that we have strong confidence that, between the national criteria—strong national criteria and the utilization of the State solid waste management planning program and EPA's approval of that, that we believe, moving forward, that we will have the protections that are necessary to protect communities, and we are moving forward and working with the States on implementation.

Mr. PALLONE. I mean, I think it is safe to say, if coal ash does not become more toxic and implementation of subtitle D is effective, EPA would have no reason to pursue a subtitle C rule.

But if it turns out that ash does become more toxic and we find that States and utilities are not doing enough under the subtitle D rule to protect human health—if that turned out to be the case, would it be important for EPA to be able to pursue subtitle C regulation, in your opinion?

Mr. STANISLAUS. Well, again, our focus right now—we have reviewed and evaluated data and comments by all stakeholders, and we believe we have put in place a rigorous rule to offer the protection to communities around the country.

So we are moving forward in implementation, working with States, working with public stakeholders, working with utilities, to provide the protection. So we are not looking at further rulemaking at this moment.

Mr. PALLONE. No. I understand that.

But I am just saying, you know, because of those who advocate that you shouldn't be able to pursue subtitle C regulation or to eliminate that option, if it turns out that the ash is becoming more toxic and that the States and utilities aren't doing enough under subtitle D, do you think it would be important for EPA to continue to be able to pursue subtitle C regulation in that eventuality?

Mr. STANISLAUS. Well, you know, like every other rule, you know, we will look at implementation of this rule and see what issues are unaddressed in the future.

Mr. PALLONE. So you don't want to comment on the possibility of pursuing subtitle C regulation and whether that is important?

Mr. STANISLAUS. Not at the moment.

Mr. PALLONE. Not at this time.

All right. Thank you so much.

I yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time.

I think we will recess now and come back immediately after the vote. There should be two votes. You all have time to stretch and get a cup of coffee. But most of us will come back promptly after the second vote.

So this hearing is now recessed.

[Recess.]

Mr. SHIMKUS. I am going to call the hearing back to order.

And I think the next order of business is recognizing the gentleman from West Virginia for 5 minutes for his round of questions.

Mr. MCKINLEY. Thank you, Mr. Chairman.

Thank you, again, for your appearing. And, again, as I said in my opening remarks, I appreciate the working relationship we have had with you.

Just a couple, maybe four quick questions, three or four quick questions, two of which, Mr. Stanislaus, might be just "yes" or "no."

But the first one is, do you personally think that coal ash is a hazardous material?

Mr. STANISLAUS. Well, we——

Mr. MCKINLEY. "Yes" or "no"?

Mr. STANISLAUS [continuing]. Have identified the various risks associated with coal-ash mismanagement, and we put in place the technical requirements to be protective against those risks. And we have identified the various constituents in coal ash and the way that we should establish, for example, a liner and groundwater program to be protective.

Mr. MCKINLEY. Just in and of itself as a material, whether it is in concrete, drywall, or liners——

Mr. STANISLAUS. Well——

Mr. MCKINLEY. Let me go from there. Would the legislation we passed over the last two Congresses, in the 112th and 113th, would that have created certainty within the recyclers and the utility industry?

Mr. STANISLAUS. Well, you know——

Mr. MCKINLEY. You don't think it would?

Mr. STANISLAUS. Well, what I can say is, with respect to the rule, we think it provides the kind of certainty——

Mr. MCKINLEY. Well, no, I am not talking about the rule. I am talking about the bill that we have. Because, again, Mr. Stanislaus, we are all about certainty. I come from the business world. We need to have certainty. And that legislation was trying to get that. Unfortunately, I believe, I know it was a reasonable effort, but it doesn't create certainty.

So my last question might be that this proposed rule provides us no assurance that coal ash will not be regulated as a hazardous waste in the future, so could you explain the Agency's justification for leaving that door open and almost deliberately causing uncertainty on this issue? Can you explain why they kept the door open instead of closing it so that we could advance?

Mr. STANISLAUS. Yes, I actually think that we provide tremendous certainty in the final rule and we explain in numerous situations.

For example, in beneficial use, I think we make very clear that beneficial use is not subject to the rule, that the existing Bevill protections continue to remain. And we think that, coupled with other actions that we have taken, will foster not only the stabilization but increased use of beneficial use.

Mr. MCKINLEY. Well, how do you deal with that, that—and on page 18 it says, "This rule defers"—defers, postpones—"a final determination until additional information is available." I just wonder how——

Mr. STANISLAUS. Yes.

Mr. MCKINLEY. That is like the door is wide open. Because sometime someone is going to make another determination that could be based on other information. So I don't agree with you that there is certainty at all in this legislation. I think it was well-intended. It helps us resolve the differences between C and D, but it still doesn't give us a view of tomorrow.

Mr. STANISLAUS. Well——

Mr. MCKINLEY. So if we are going to move the ball down the field, I have to find out, how do we shut the door?

Mr. STANISLAUS. Well, actually, in my opinion, I don't think we left the door wide open. I think we have been very clear, as between the two proposals that we had put for public comment, one is a C approach and the other a D approach. We went with the D approach.

The language that you are referring to then goes on to say that we didn't have full and complete information in a couple areas. One big area was how States would move forward with their programs.

We believe very strongly that the combination of a clear, consistent Federal set of criteria, coupled with the solid waste management planning program and EPA's approval of that, will provide comfort and certainty with respect to those issues. So we actually don't think that the door is open.

Mr. MCKINLEY. I guess like you said earlier, we are just going to have to agree to disagree on that, because I think it is clear from a business perspective, when have that language that something can happen in the future, that the next administration could come in with a different attitude towards it than you personally have had, it makes it uncertain. So we need to just close that. So let's continue working together on that and see if we can't close the door on that.

Mr. STANISLAUS. Yes. And we can——

Mr. MCKINLEY. So I yield back the balance of my time.

Mr. STANISLAUS. I will reaffirm my and EPA's commitment to continue to work with you and this committee on technical assistance.

But we also made clear in the preamble that we would not do anything without any—we think we have done a good job and have provided protections. But any future changes, like any rule, is going to be subject to a future process. You know, it would have to require another proposal, another notice and comment.

Mr. SHIMKUS. The gentleman's time has expired.

The Chair now recognizes the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thank you, Mr. Chairman. And I want to thank you for convening this hearing on this final rule.

Many of my constituents were concerned by the proposed rule on coal-ash disposal because of concerns that it might limit beneficial reuse on the one hand or fail to protect the public health on the other. But I am generally pleased with this rule. EPA has protected beneficial reuse and put in criteria that will ensure safe disposal.

Mr. Stanislaus, I would like to ask you just a few questions.

The final rule prevents or restricts—does EPA's new final rule prevent or restrict beneficial reuse of coal in any way?

Mr. STANISLAUS. No. Beneficial use is fully protected and not subject to the rule.

Mr. DOYLE. In fact, coal ash that is beneficially reused won't be subject to the disposal requirement in the rule; is that right?

Mr. STANISLAUS. That is correct.

Mr. DOYLE. And, in fact, according to the final rule, 52 million tons of coal ash are beneficially reused annually. Can you tell us about some of the environmental benefits of recycling coal ash instead of sending it to a landfill or wet impoundments?

Mr. STANISLAUS. Sure. I mean, saved energy costs, reducing greenhouse gases, and reducing impacts to the environment, as well as the tremendous economic benefits of replacing virgin material with coal ash.

Mr. DOYLE. Thank you.

I want to move on to what we have been hearing a lot of discussion about. You are going to hear a lot about this self-implementing requirement for this rule, and I wanted to give you the opportunity—and I know you have talked a little bit about it already—on this concern that we are creating a dual regulatory regime, potentially requiring owners and operators to adhere to two sets of standards.

What does it mean when—so the EPA will approve these State plans, and you say that they will be approved as long as they demonstrate Federal compliance. What does that mean? You know, what does that terminology mean?

Mr. STANISLAUS. Yes, sure. What States would have to do is to integrate the Federal criteria into the State program.

Mr. DOYLE. So you are saying that any State plan that EPA would approve would have within its plan the Federal requirements. So there is no way that any State would be out of compliance with the Federal requirement if you have approved their plan, because that will be, at the very minimum, what their plan has to adopt, and then they can do something over and above that?

Mr. STANISLAUS. Well, that is right. And so, from a utility compliance perspective, once that approval happens, the States would have to comply with a single set of information, have comfort that EPA has approved and made very clear in the preamble that if a utility follows a State program that is subject to EPA's approval, EPA will deem that compliance with the Federal criteria.

Mr. DOYLE. So what you are saying, in effect, that if a State adopts that plan and the utility implements it, that there is no way they can be out of compliance with the Federal statute. They could be out of compliance with the State one if it has extra provisions within it.

Mr. STANISLAUS. That is correct.

Mr. DOYLE. But you feel that addresses that concern about the dual regulation?

Mr. STANISLAUS. We do.

Mr. DOYLE. OK.

That is all the questions I have, Mr. Chairman. Thanks.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes, it looks like the gentleman from North Dakota, Mr. Cramer, for 5 minutes.

Mr. CRAMER. Thank you, Mr. Chairman.

And thank you for being here and for your good work on the rule.

I just have one area—I am going to continue on this line of exploring a little bit on the self-implementing piece, because I spent a number of years on the North Dakota Public Service Commission, carried the coal reclamation portfolio. And the one thing that I heard a lot, especially in—whatever the case might have been, but whenever we were challenged in court—and we were plenty of times, and we always prevailed as a commission, not because our lawyers were superior or anything like that—although we had good lawyers, don't get me wrong—but because the courts in highly technical matters just always defer to the experts, to the administrative agency.

And so this self-implementing thing just makes me a little nervous. And if it makes me a little nervous as a former regulator, I can only imagine how nervous it makes the industry. And it just seems to me that we could tighten it up and provide the certainty that everybody is talking about without compromising in any way, really, the protections that we are trying to accomplish and, in fact, I think, you know, should be to the benefit of everybody on all sides.

Am I wrong there? Is there a better reason to do it this way, to do the self-implementing?

Mr. STANISLAUS. Well, I don't disagree with your overall view, that courts will provide substantial weight to the technical judgment of States and Federal Government. So, you know, precisely for the reasons that you raise is the reason why we are tying these minimum Federal requirements to an EPA approval of a State program, because we believe very strongly that the courts will look at that and provide substantial weight to the technical judgment of a combination of the States and EPA.

Mr. CRAMER. Sure. I understand all that, and I think that is noble. That is why I am just saying, can't we just go to the next step and tie it down so that we are not relying on self-implementation and then the discretion of multiple jurisdictions and multiple courts, when we have the experts in what seems to be pretty relative agreement for this place, and, you know, and then just tie it down? I think you would get a lot of support.

But that is really all I have. And I, again, appreciate the hard work.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes the gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman. Thanks for holding the hearing.

Mr. Stanislaus, how many tons of coal ash are produced in a year in this country?

Mr. STANISLAUS. How many tons? I don't have that number right——

Mr. MCNERNEY. Any idea what fraction of that is used in beneficial ways, you know, for construction or road grade material or so on?

Mr. STANISLAUS. I don't off the top of my head. I believe about 30 percent, but I can get back to you on the actual numbers.

Mr. MCNERNEY. Is there more opportunity for beneficial use of coal ash?

Mr. STANISLAUS. Oh, absolutely. Absolutely.

Mr. MCNERNEY. How would that happen? What would it take for more beneficial uses to come about?

Mr. STANISLAUS. Well, you know, I think probably Tom Adams would probably be a better witness to ask that. But I think, clearly, when we have discussed with the reuse manufacturers, you know, providing the certainty that I think will be provided will be a first step into expanding the beneficial use of coal ash.

Mr. MCNERNEY. So that is a part of the rule that has been promulgated.

Mr. STANISLAUS. That is right. That is right.

Mr. MCNERNEY. OK.

I am a little concerned about citizen lawsuits with regard to the rule or the potential legislation that might come out of this issue. How quickly do you think that we will start to see improvements in the safety of coal-ash disposal sites as a result of the rule that has been promulgated?

Mr. STANISLAUS. Well, I think we will begin immediately. So the rule takes effect in basically 6 months from publication, which should be in about a month or so.

So there are early obligations, like making sure you have a dust-control plan in place, make sure you begin the inspections. I think you will see some early improvement. A lot of these are things that were already done by some of the leading utilities anyway, so I think that is going to be more of a standardization around the country.

And then, as time progresses, roughly in about 18 months, some of the more structural issues would be addressed, those things that potentially contaminate groundwater, potentially have an impact on structural stability would be addressed.

Mr. MCNERNEY. Do you expect the robust transparency provisions to incentivize compliance?

Mr. STANISLAUS. Oh, absolutely. And I think all the studies show that the more disclosure of data and compliance in a very deep and granular way, I think it is an incentive for compliance, and also it enables citizens adjacent to these facilities and the States to monitor compliance.

Mr. MCNERNEY. Do you think that the citizens and the States are going to buy the disclosures that the disposal agencies are going to be putting out on their Web sites? Do you think people are going to buy it, or do you think that they are going to revert to lawsuits to satisfy their concerns?

Mr. STANISLAUS. Well, I think that one of the reasons that we put in this public disclosure was to respond to citizens' requests of having detailed information. For example, groundwater data and how the groundwater data compares with whether it is or is not exceeding protector new standards. So I do think that it is going to add substantial value to compliance and oversight by citizens.

Mr. MCNERNEY. So there is enough teeth, then, in your opinion, in the compliance requirements that people will take satisfaction that they are actually doing what they are saying?

Mr. STANISLAUS. We do. We do.

Mr. MCNERNEY. The last question: Is there a concern that if the committee passed a bill that was signed into law, it would stifle the beneficial use of coal ash or the safe disposal of coal ash? Do you think that passing a law would stifle what is going to take place as a result of the rule?

Mr. STANISLAUS. Well, you know, I really cannot answer that question today in a vacuum. What I can say is that, you know, we strongly believe the rule provides the protection as well as the certainty—protection for communities next to impoundments as well as certainty to the beneficial use market.

So, you know, I really can't provide an opinion as to what the effect of any legislation would be regarding certainty at this moment.

Mr. MCNERNEY. OK.

I will yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time.

Before I yield to Mr. Flores, I want to ask unanimous consent that a letter written today by the U.S. Green Building Council be submitted for the record. Is there objection?

Hearing none, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. SHIMKUS. Now I would like to recognize Congressman Flores from Texas for 5 minutes.

Mr. FLORES. Thank you, Mr. Chairman.

And, Mr. Stanislaus, thank you for joining us today.

I want to give you a quote in the answer to the question about having multiple opinions of judges determine how the enforcement is carried out. You said, "We don't anticipate any issues in that regard."

I will tell you, from a real-world perspective, any time that you don't have the right type of rulemaking, you will have that instability, if you will, in the real world in terms of the enforcement process. And not only could you have it among the States, you could have it within a State, because you have multiple district judges that will make their own technical opinion. So I urge you to keep that under consideration as you move forward.

This gets into the law, if you will, and that is, in terms of legacy sites, walk us through how the EPA believes that it has the authority to regulate legacy sites. And, in particular, I would need the specific reference to RCRA, if that is what you are relying upon to make the rules.

Mr. STANISLAUS. Sure. So, clearly, we have set forth in the rule that inactive sites at an active power plant and active units at a power plant have the same exact risk. You know, this has coal ash, with all of its constituents of coal ash; it has water. And under

those conditions, it poses the identical risk of structural failure and impacting communities, leaching into groundwater.

So we believe, because of those circumstances, that RCRA provides us the ability and authority and can mandate that kind of protection, because they are identical units but for it is not actively being used for disposing of coal ash.

Mr. FLORES. OK.

Let's take that to the next step, when you are talking about those particular impoundments. When you proposed the application of location restrictions to existing surface impoundments, the EPA acknowledged that these location restrictions would force a majority of the current impoundments to close.

And so do you have an estimate of how many will close? And moving further upstream from those closures, what sort of reliability issues could be imposed on our grid?

Mr. STANISLAUS. Yes. Well, I don't have that estimate. I can get you that information. I believe it is contained in the preamble, but I can get you that information.

But just to be clear, you know, the final rule provides location requirements, but it does not begin with closure. It begins with examining all the location criteria—proximity to wetlands, proximity to groundwater aquifers. Then a utility will have to determine whether or not they are in compliance with that. Then they will have to determine, can they put in engineering solutions to provide those kind of protections. So it would not automatically trigger closure.

But I can get you that data.

Mr. FLORES. OK. I think that would be important, because I think in your rule you acknowledge that it will cause a majority of these to close, and I think that creates an issue in terms of reliability.

Mr. STANISLAUS. Yes. I will look at that. I am not sure that is correct, but I will check that and get back to you.

Mr. FLORES. OK.

And then, to the extent that an operator grants itself an extension, what do you think the impact will be in terms of citizen lawsuits and let's just say the instability or the lack of clarity that that causes for an operator?

Mr. STANISLAUS. Well, because we have gone out, we have visited numerous coal-ash impoundments around the country, we have reviewed information from utilities about the different dimensions of impoundments, because some are going to be more challenging to close than others—in other words, we do put in place in a very specific way those circumstances where they can enable themselves of extensions.

So we think the rule itself provides that ability to extend, when circumstance justifies that. And that would be coupled with, obviously, the utility disclosing those circumstances. But we believe, once you follow that, there will not be a violation of the Federal rule.

Mr. FLORES. OK. And, therefore, no citizen litigation would follow, then. Is that——

Mr. STANISLAUS. Yes. We don't believe there would be a basis for citizen suits in that circumstance.

Mr. FLORES. OK.

Mr. Chairman, thank you. I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes the gentleman from Ohio, Mr. Latta, who was actually very involved in pushing this legislation through in the last couple Congresses.

Mr. LATTA. Well, thank you very much, Mr. Chairman.

And, Mr. Administrator, thanks very much for being with us today.

If I could just go back, I know that there has been a lot of discussion already on the beneficial use of coal ash, and I know we have had different panels in here over the last couple years talking about it. One of the things I know that you had mentioned a little bit earlier, because when you said in your testimony that approximately 40 percent of CCR generated in 2012 was beneficially used—but, again, in the testimony that we have heard, you know, we have States out there that are saying, boy, if the EPA would ever change its mind, we are going to require buildings to have things ripped out or something like that, so you got school districts saying, we don't want to use material that might in the future have some kind of EPA coming back and saying that it could be hazardous.

When you use the term "certainty" that you have mentioned, what is the certainty that the EPA can give to folks out there that there is not going to be a change? Because, again, if it is road material or it is block material—but it is that material that is actually being used inside of a building that a lot of folks are worried about, school districts are worried about.

So how do you define "certainty"? And how do we make sure that the folks out there have that certainty of mind that the EPA is not going to change in a couple years what they are defining as a hazardous or nonhazardous material?

Mr. STANISLAUS. Sure. Thank you.

You know, so, even before the finalization of the rule, because of this issue of certainty and risk and the comments that we received from the beneficial-use industry, we first began by developing a methodology to evaluate the continued use of beneficial use. We used that methodology and applied it to encapsulated uses, and we confirmed that concrete and wallboard, the largest two uses of beneficial, can continue to move forward. So we believe that provided a significant certainty. And I know Tom Adams can speak for himself later on the panel.

Secondly, you know, we also heard that this cloud—some advocates have noted that the cloud of uncertainty of not finalizing the rule continues to create some uncertainty. And we believe our decision to go with the D proposal as opposed to the C proposal provides a second set of certainty. And, you know, so the C proposal is no longer on the table.

So we actually believe that we provided substantial certainty to the market. And I will let Tom talk more about that.

Mr. LATTA. You know, when you talk about the methodology, how do you go about that? Who is at the EPA? Who is sitting down at the table to really come up with the methodology to come forward with that standard or what that should be set at?

Mr. STANISLAUS. So, you know, we have engaged particularly the beneficial users in the development of the methodology. So this is a methodology to be used by users, by manufacturers, or by States to confirm that a product that uses coal ash as opposed to a product that doesn't use coal ash are comparable, and so, therefore, it can be safely used to replace virgin products.

So, you know, we think that the methodology has been well-received in the marketplace and our application of the methodology to these specific uses like concrete and wallboard has been well-received.

Mr. LATTA. OK. Thank you.

Mr. Chairman, in the interest of the second panel, I am going to yield back balance of my time.

Mr. SHIMKUS. And I thank you for that.

The Chair now recognizes the other gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. JOHNSON OF OHIO. Thank you, Mr. Chairman.

And thank you, Mr. Director, for being here with us this morning.

I want to get a clarification on something you said earlier. So the State program does not operate in lieu of the Federal program, correct?

Mr. STANISLAUS. That is correct.

Mr. JOHNSON OF OHIO. OK. So if the State program does not operate in lieu of the Federal rule, then both sets of requirements are still enforceable, correct?

Mr. STANISLAUS. Well, that is precisely because we have heard those comments during our public comment process about the possibility of precisely that. That is why we strongly believe that there is a vehicle to integrate the Federal requirements into a State program and have EPA approve that State program to have that alignment occur.

Mr. JOHNSON OF OHIO. OK.

So, for corrective action, the final rule requires that if a constituent of concern is detected above a statistically significant level that the groundwater protection standard must be set at either the maximum containment level or at the background concentration, whereas the proposed rule, like the municipal solid waste program, would have allowed the owner/operator to establish an alternative groundwater protection standard based on site-specific conditions.

So how does the EPA anticipate that this will impact ongoing corrective action at coal-ash disposal units in States that utilize risk-based decisionmaking?

Mr. STANISLAUS. Well, we believe the risk-based decisionmaking that is core to a cleanup determination will continue. Now, what we have done in the rule is we brought the various factors that are used in the Superfund program to do exactly what you noted, to consider those site-specific factors.

So we always begin with protecting groundwater, protecting the highest use of groundwater. But then, when you go and look at the specific cleanup remedy that fits a particular situation, you evaluate the various technical factors in determining the cleanup that is most appropriate to achieve a cleanup that is protective.

Mr. JOHNSON OF OHIO. So that ability to establish an alternative groundwater protection standard based on site-specific conditions, that would still be there, in your view?

Mr. STANISLAUS. Yes. So what a utility would do is then look at the various factors, no different than a Superfund cleanup, and establish the cleanup option that best fits. Now—so I will just leave it at that. Yes.

Mr. JOHNSON OF OHIO. OK.

Going down to closure, if the owner or operator puts forth a realistic closure plan and indicates that the facility needs more than the required amount of time to close in a safe and appropriate manner, technically, the plan doesn't meet the deadline.

Is the owner or operator out of compliance with the final rule in that case? And at what point is the owner/operator subject to lawsuit, when it puts out the plan with the longer closure date or when it actually doesn't meet the 5-year deadline?

So you have an owner/operator that says, it is going to take me longer than the rule allows to do it properly. What happens?

Mr. STANISLAUS. Yes. We have received numerous comments precisely on that topic.

We believe the 5 years is adequate for many of the units, but there are going to be some units, because of their size, because of particular geology, that are going to require some additional time.

So, in the rule, we built in that opportunity if a utility can demonstrate that those conditions exist. And we articulate various timelines, so they can avail themselves of those additional timelines set forth in the rule.

Mr. JOHNSON OF OHIO. OK.

Mr. Chairman, so we can get to the second panel, I yield back, as well.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes a new member of the subcommittee, Mr. Cárdenas from California, for 5 minutes.

Mr. CÁRDENAS. Thank you very much, Mr. Chairman. And thank you so much for having this hearing.

Mr. Stanislaus, I would just like to ask you your—do you have a technical background?

Mr. STANISLAUS. I do.

Mr. CÁRDENAS. What would that be?

Mr. STANISLAUS. I am a chemical engineer, before I became a lawyer, so——

Mr. CÁRDENAS. Oh, OK. And they don't cancel out. I think they go well together.

Well, thank you very much. I appreciate that. Because I think that when we are talking about EPA and we are talking about regulations, especially when it comes to things like coal ash, I think that there is some science that goes into those decisions, correct?

Mr. STANISLAUS. That is right.

Mr. CÁRDENAS. And evaluation and understanding. And then even beyond science per se, it also goes into probabilities and cause-and-effects and things of that nature, correct?

Mr. STANISLAUS. That is right.

Mr. CÁRDENAS. OK. Well, I am glad to know that you have that engineering background. I won't speak of your law degree, but at

least engineering background. I am not a lawyer, but I am an engineer, so I appreciate that.

Now, when it comes to EPA's new rule which will set national criteria for the location, design, and maintenance of the ponds and protecting all of the communities that live with this potential risk, first of all, I would like to applaud the EPA for moving forward, but also this effort is important, especially because—has it been determined or evaluated by the EPA as to who most likely is affected by this activity and these ponds?

Is it more affluent communities? More low-income communities? Is there a disproportionate effect when it comes to communities that are affected?

Mr. STANISLAUS. Yes. I am not sure we have done a specific demographic analysis. Clearly, the communities that are adjacent to these facilities could potentially be impacted by a catastrophic failure for contaminated drinking water.

Mr. CÁRDENAS. OK. Well, I know that in the Los Angeles Basin, if you just look at the geographic area and if you look at income demographics, there definitely is a skewing of one side of town has a lot more activity where this might take place and the other side of town, which might be more affluent, doesn't have near any of this kind of activity, but at the same time maybe none of that activity, for zoning purposes and activity permits and things of that nature. So I am just reflecting on what goes on in the L.A. Basin, and even with coal ash, by the way, specifically, not just coal ash but other elements, as well.

So one of my questions to you, Mr. Stanislaus, is, can you describe some of the ways this rule will make coal-ash ponds safer for vulnerable communities surrounding them?

Mr. STANISLAUS. Sure. It begins with trying to prevent a catastrophic failure. And, as we know, the TVA incident occurred, essentially destroyed a community, caused about $1.3 billion of impact, you know. So it contains a rigorous set of requirements to prevent those kinds of things—regular inspections, structural evaluation, engineering evaluation. And based on that evaluation, impoundments will either have to enhance the structural stability or, if they cannot, they would have to close that facility.

With respect to preventing groundwater—it begins with putting in place a comprehensive program of groundwater monitoring and, if groundwater monitoring exceeds protective standards, immediately moving forward on cleaning up the groundwater. And in situations where an online impoundment exceeds the groundwater protection standards, then they would have to close.

So those are some of the elements. And, also, the other big issue is dust. We have heard from many communities about coal-ash dust. So we have put in place a comprehensive program to control coal-ash dust from migrating into communities.

Mr. CÁRDENAS. OK.

Now, the EPA, when you make this rule, how do you come about it? Too many people, in my opinion, whether elected or not, in this country keep thinking that anytime you have regulations they are just trying to hurt business. I mean, what kind of effort goes into making sure that you strike some kind of balance and understanding of what is going on in the real world and what should

happen to create the public safety requirements that we should—should we have standards in the United States of America?

Mr. STANISLAUS. Sure. I mean, I can begin with kind of listening to and evaluating all the comments that we receive from everyone—you know, clearly, the communities impacted. But, clearly, we have to have an implementable rule. And so we looked at the pragmatic issues of how can it be implemented in a realistic way that considered the on-the-ground circumstance of size of the unit.

So we think it is a protective rule and a rule that is pragmatic and considers the on-the-ground construction issues.

Mr. CÁRDENAS. So you are not just going into this blindly without understanding and appreciating what is going on in the real world and the day-to-day effects of a particular industry?

Mr. STANISLAUS. That is right. It is very much data-driven and scientific-driven and reflecting the comments we have heard from all stakeholders.

Mr. CÁRDENAS. OK. So commerce is something that is taken into account, as to the flow and effects of commerce, when these decisions and/or these processes are discussed?

Mr. STANISLAUS. Oh, sure. You know, we want to make sure that—again, the challenge of closure and the relative size of that and also kind of avoiding, you know, the billion-dollar consequence of these catastrophic failures. So all of that goes into our consideration.

Mr. CÁRDENAS. Uh-huh.

I know there are more examples outside the United States of incidents, catastrophic incidents, more than in the United States, so far, as your data and research shows?

Mr. STANISLAUS. Ours is based purely on the U.S. information, so I don't know the answer to that question.

Mr. CÁRDENAS. Well, what I would like to recommend—I don't think it is beyond your purview to at least understand what is going on in the rest of the world, because, especially since the world is getting smaller with all of this international commerce, I think it is important for us to understand, as Americans, how having regulations here that don't happen in other parts of the world, how people are affected when they don't have that. I think that, as Americans, we are kind of spoiled by what we don't see and the regulations that do, in fact, protect us.

And a point of personal privilege. I would like to correct myself, Mr. Chair. We don't have coal ash in the L.A. Basin or in California, but I was thinking about the piles of petroleum coke that we have in the L.A. Basin. So I apologize, and I wanted to correct myself.

Thank you so much, Mr. Chair. I yield back.

Mr. SHIMKUS. You are more than welcome. It is great to have you on the subcommittee. And we could provide you some coal ash, if you would like some, in the L.A. Basin on some railcars. How about that?

So we want to thank you for coming. Again, great work. We will listen to the second panel and see what—I would expect that we would try to maybe look at some of these tweaks that you have heard about today.

And, with that, we will dismiss you and we will empanel the second panel. So thank you very much for coming.

So, as our second panel is being seated, just for the sake of time, I am going to—I have done this numerous times, and I always mess up. So I think I will just do the introduction of each person right before they give the 5-minute opening statement.

Our panelists all know that their full statement is submitted for the record. And just based on time, and we don't know when the votes are, we won't be mean about the 5 minutes, but we would like for you to adhere to that as best as possible.

So, with that, I am going to turn to the second panel and, first, Mr. Thomas Easterly, who is the commissioner of the Indiana Department of Environmental Management.

We are very happy to have you here. And, sir, you are recognized for 5 minutes.

STATEMENTS OF THOMAS EASTERLY, COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; MICHAEL G. FORBECK, ENVIRONMENTAL PROGRAM MANAGER, BUREAU OF WASTE MANAGEMENT, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; LISA D. JOHNSON, CHIEF EXECUTIVE OFFICER AND GENERAL MANAGER, SEMINOLE ELECTRIC COOPERATIVE, INC.; THOMAS H. ADAMS, EXECUTIVE DIRECTOR, AMERICAN COAL ASH ASSOCIATION; JAMES R. ROEWER, EXECUTIVE DIRECTOR, UTILITIES SOLID WASTE ACTIVITIES GROUP; ERIC SCHAEFFER, DIRECTOR, ENVIRONMENTAL INTEGRITY PROJECT; AND FRANK HOLLEMAN, SENIOR ATTORNEY, SOUTHERN ENVIRONMENTAL LAW CENTER

STATEMENT OF THOMAS EASTERLY

Mr. EASTERLY. Thank you, Chairman Shimkus and Ranking Member Tonko and members of the subcommittee.

Good morning. My name is Thomas Easterly, and I am the commissioner of the Indiana Department of Environmental Management, also known as IDEM, and I bring you greetings from Governor Pence of Indiana also. And we appreciate the opportunity to share Indiana's views on the EPA's final coal combustion residuals rule, which we call "CCR" on occasion.

I am also representing the Environmental Council of the States, which we call "ECOS," whose members are the leaders of the State and territorial environmental protection agencies.

ECOS has worked on the CCR issue for many years, and our resolution on CCR regulation was first passed in 2008 and has been reaffirmed as recently as 2013. While EPA's final rule responds to some of the concerns outlined in ECOS's resolution, other longtime State concerns remain unaddressed.

As an initial point, I express agreement with EPA's finding that coal ash is not a hazardous waste and that coal ash can be safely and beneficially reused. EPA's use of RCRA Subtitle D for coal ash is consistent with ECOS's resolutions.

As a longtime regulator, I have observed firsthand the tragic adverse environmental and human health impacts of CCR surface impoundment failures. These structural engineering failures dev-

astate people's lives, destroy property, and contaminate natural resources. The EPA's self-implementing rule contains robust national structural integrity provisions which should result in a meaningful reduction in CCR impoundment failures in the future.

The rule also creates a consistent national set of requirements, many of which are already in place in various States, to prevent adverse environmental impacts to our water and air. Units unable to meet the new criteria will have to close. So they will be solving the problem.

Most important to IDEM and other States is that EPA's final rule explicitly recognizes the major role State regulatory agencies currently have and should continue to maintain in overseeing CCR. However, by finalizing a self-implementing rule that can only be enforced through citizen supervisions of RCRA, the role of State regulation, oversight, and enforcement will be significantly marginalized.

EPA envisions that the key State role in this program will be maintained by States amending their solid waste management plans to incorporate the new Federal requirements. EPA expects that, once approved by EPA, the amended plans will receive deference by the courts and citizens.

While the requirements of the rule are self-implementing for the regulated units, the rule schedules and requires States to achieve final solid waste management plan amendment, with EPA approval, on a schedule which cannot be met by many States, including Indiana.

In order to ensure transparency, Indiana's laws require my agency, IDEM, to have four public notices, with associated comment periods, for new regulatory action. This public process normally takes at least 18 months, yet some of the self-implementing deadlines in this regulation are as short as 6 months, making it impossible for Indiana to have regulations in place to implement those portions of the rule.

Yet, after the State plan is amended and approved by EPA, the new CCR rules will remain independently enforceable through RCRA citizen suits in Federal district courts. EPA does not have the legal authority under RCRA Subtitle D to delegate the new rules to the States.

I would now like to address the need for a legislative amendment to RCRA on CCR issues.

ECOS testified before this committee in April 2013 in support of the bipartisan efforts in the House and Senate to create a Federal program that allows States to regulate coal-ash management and disposal under a set of Federal standards created directly by Congress and implemented by the States.

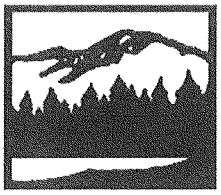
Legislation still would be beneficial in several ways to achieving this goal. First, legislation could codify EPA's determination that coal ash is nonhazardous and get the going-back-and-forth concern done forever. Second, State programs simply cannot operate in place of the Federal program without legislation. Third, legislation can add certainty to the process of EPA approving State solid waste management plans by making clear the criteria EPA would apply to determine whether a State program meets the Federal

CCR standards. And, fourth, legislation could enhance and clarify enforcement of CCR requirements.

Mr. Chairman, Mr. Ranking Member, and members of the subcommittee, I thank you for the opportunity to present my views and those of ECOS to you today, and I am happy to answer any questions.

[The statement of Mr. Easterly follows:]





E C O S

Testimony
"EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
Thursday, January 22, 2015
by
Thomas Easterly, Commissioner
Indiana Department of Environmental Management
and
Executive Committee Member, Environmental Council of the States

Main Points

1. States support the U.S. Environmental Protection Agency's (EPA's) regulation of coal combustion residuals (CCR) as non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA).

2. States support the final rule's recognition that states are in the best position to regulate CCR units. However, because EPA is unable under RCRA Subtitle D to delegate the CCR program directly to the states in lieu of the federal program, we believe the final rule poses both implementation and enforcement problems for states.

3. Provisions of the final rule would be enhanced, clarified, and made more permanent through federal legislation. The Environmental Council of the States (ECOS) previously testified in support of CCR legislation.

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee -

Representative Bucshon of Indiana - good morning. My name is Thomas Easterly, and I am

Commissioner of the Indiana Department of Environmental Management, also known as IDEM. I bring you greetings from Governor Pence of Indiana, and appreciate the opportunity to share Indiana's views on EPA's final coal combustion residuals (CCR) rule. I am also representing the Environmental Council of the States (ECOS), whose members are the leaders of the state and territorial environmental protection agencies. I am the Region 5 Representative to ECOS' Executive Committee. ECOS has worked on the CCR issue for many years. ECOS' resolution on CCR regulation was first passed in 2008 and reaffirmed in 2013. EPA's final rule responds to some of the concerns outlined in ECOS' resolution. However, as I will discuss today, other long time state concerns remain unaddressed.

Coal Ash is Non-Hazardous. As an initial point, I express agreement with EPA's finding that coal ash is not a hazardous waste, and that coal ash can be safely and beneficially reused. The final rule's promulgation of regulations under RCRA Subtitle D, rather than RCRA Subtitle C, is consistent with multiple studies of coal ash conducted under different Administrations. EPA's determination to regulate coal ash as a solid waste ensures that important coal ash reuses will continue, such as in concrete, road bed fill, wallboard, and other uses. EPA's use of RCRA Subtitle D for coal ash is consistent with ECOS' resolution.

Advancing Structural Integrity and Reducing Environmental Risks. As a long time regulator, I have observed firsthand the tragic adverse environmental and human impacts of CCR surface impoundment failures. These engineering failures devastate people's lives, destroy property, and contaminate natural resources in often irreparable ways. Subsequent inspection and enforcement often reveal that the impoundment failure could have been prevented with more robust investigation and higher standards and requirements. EPA's self-implementing final rule outlines robust national structural integrity provisions, as well as hazard and safety assessment

requirements. As facilities carry out the final rule's requirements, combined with the oversight, support, and input of states, the federal government, and citizens, our nation should experience a meaningful reduction in CCR impoundment failures in the future.

The final rule creates a comprehensive and consistent national set of requirements, many of which are already in place in various states, to protect groundwater, ensure the structural stability of surface impoundments, advance groundwater monitoring and corrective action programs, prevent inappropriate unit siting, and ensure proper liners for CCR disposal units. The final rule also focuses on reducing the environmental impacts of the day-to-day operations of CCR units by establishing air criteria, erosion controls, leachate management, and run-off and run-on requirements. New documentation requirements for CCR owners and operators will provide additional sources of information about these units to states and the public and will enhance transparency. Units unable to meet the new technical criteria, unlined units contaminating groundwater, or units unable to meet minimum structural integrity and safety requirements will have to close.

Key Role of States in CCR Oversight and Enforcement. Most important to IDEM and other states is that EPA's final rule explicitly recognizes the major role state regulatory agencies currently have, and will continue to maintain, in overseeing CCR. EPA's final rule Fact Sheet states:

- "EPA recognizes that some states have already adopted requirements that go beyond the minimum federal requirements."
- "The final regulations require owners or operators of regulated CCR units to notify the state of actions taken to comply with the requirements of this rule."
- And, "EPA will work closely with states on implementation issues."

However, the reality of how the rule will be implemented yields a very different outcome. By finalizing a self-implementing rule that can only be enforced through the citizen suit provisions of RCRA, ECOS is concerned citizen suits will become the primary enforcement vehicle for CCRs under the final rule. As a result, the role of state regulation, oversight, and enforcement will be significantly marginalized.

EPA envisions that the key state role in this program will be maintained by states amending their Solid Waste Management Plans (SWMPs) through a public process to incorporate the new federal requirements. The amended plans will provide an easily accessible roadmap to how CCRs will be regulated in a state. I expect the amended plans to be robust, as it would make no sense for states to go through the time consuming and resource intensive process of amending their plans to be less stringent than the federal requirements, particularly given that many states have preexisting more stringent requirements. EPA expects that once approved by EPA, the amended plans will receive deference by courts and citizens. While the requirements of the rule are self-implementing for the regulated units, the rule's schedules would require states to achieve final SWMP amendment on an aggressive schedule which cannot be met by many states - including Indiana. In order to ensure transparency, Indiana's laws require my agency - IDEM - to have four public notices with associated comment periods for a new regulatory action. This public process normally takes at least eighteen months, yet some of the self-implementing deadlines in this regulation are as short as six months - making it impossible for Indiana to have regulations in place to implement those portions of the rule.

And here is where a prime concern remains. After the state plan is amended and approved by EPA, no matter how diligent the state's subsequent oversight and enforcement may be, the new CCR rules will remain independently enforceable through RCRA citizen suits in

federal district courts. EPA does not have the legal authority under RCRA Subtitle D to delegate the new rules to the states, as acknowledged in the Agency's fact sheet - "EPA has no formal role in implementation of the rule. EPA does not issue permits, nor can EPA enforce the requirements of the rule."

The Potential Role of Federal Legislation. I would like to address the role of legislative amendment of RCRA on CCR issues, now that the final rule is out and states have had time to reflect on implementation and on the relationship between the new federal rules and existing state CCR rules. ECOS testified before this Committee in April 2013 in support of the bi-partisan efforts in the House and Senate to create a federal program that allows states to regulate coal ash management and disposal under a set of federal standards created directly by Congress and implemented by the states. Legislation still could be beneficial in several ways to achieving this goal.

First, legislation could codify EPA's determination that coal ash is non-hazardous, as opposed to it being reviewed every three years under current law. This would stabilize beneficial reuse markets across the nation by removing the possibility of coal ash being regulated as hazardous waste at some future point.

Second, state programs cannot operate in place of the federal program without legislation. EPA's Questions and Answers (Q & As) on the final rule acknowledge the current statutory limitation, stating "EPA approval of a SWMP revision does not mean that the State program operates "in lieu of" the federal program, as EPA has no authority under the statute to make such a determination." Legislation can set forth the elements of a federal CCR management program and provide clear statutory authority for EPA to delegate the criteria to states to adopt, implement, and enforce. This clarity would be valuable in the era of constrained resources in

which we operate at all levels of government, as well as would reduce the risk of citizen suits for regulated unit owners and operators or of challenges to EPA's approval of state plans.

Third, legislation can add certainty to the process of EPA approving state SWMPs by making clear the criteria EPA would apply to determine whether a state program meets the federal CCR standards. Legislation could provide a route for EPA oversight of delegated programs to ensure their effectiveness and quality, and for EPA to take the program back if a state cannot come into alignment - placing the CCR program on par with other delegated environmental programs.

Fourth, legislation could enhance and clarify enforcement of CCR requirements. EPA's Q & As state that currently "enforcement of these requirements will be by citizen suits (or by States acting as citizens). States may also incorporate the federal requirements into state law – whether through revisions to existing legislation or regulation, or through incorporating them into any permits issued to CCR facilities – and where they do so, such laws or requirements are enforced by the state." Once the provisions are adopted as regulations by the various states, they can be directly enforced by the states using existing processes that include both injunctive relief and the imposition of civil and criminal penalties. As a regulator I am fully conscious of, and I appreciate, the role of citizens in advancing environmental program – sometimes through litigation. However, I am concerned that a new federal regulatory program that from the outset will rely on citizen suits for enforcement will be costly, consume limited judicial resources, waste state resources, and reduce certainty. A more effective and fair approach would be through state inspection and enforcement of a delegated federal program. Citizens would still retain the right to bring suit in the absence of effective state action, to seek EPA withdrawal of a state program, and to pursue other approaches.

Conclusion. Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee, I thank you for the opportunity to present my views, and those of ECOS, to you today. I am happy to answer any questions.

Appendix

ECOS

Resolution Number 08-14
Approved September 22, 2008
Branson, Missouri
Revised March 23, 2010
Sausalito, California
Revised March 5, 2013
Scottsdale, Arizona

THE REGULATION OF COAL COMBUSTION RESIDUALS

WHEREAS, the 1980 Bevill Amendment to the Resource Conservation and Recovery Act (RCRA) requires the U.S. Environmental Protection Agency (U.S. EPA) to "conduct a detailed and comprehensive study and submit a report" to U.S. Congress on the "adverse effects on human health and the environment, if any, of the disposal and utilization" of fly ash, bottom ash, slag, flue gas emission control wastes, and other byproducts from the combustion of coal and other fossil fuels and "to consider actions of state and other federal agencies with a view to avoiding duplication of effort;" and

WHEREAS, U.S. EPA conducted the comprehensive study required by the Bevill Amendment and reported its findings to U.S. Congress on March 8, 1988 and on March 31, 1999, and in both reports recommended that coal combustion residuals (CCR) not be regulated as hazardous waste under RCRA Subtitle C; and

WHEREAS, on August 9, 1993, U.S. EPA published a regulatory determination that regulation of the four large volume coal combustion wastes (fly ash, bottom ash, boiler slag, and flue gas emission control waste) as hazardous waste under RCRA Subtitle C is "unwarranted;" and

WHEREAS, on May 22, 2000, U.S. EPA published a final regulatory determination that fossil fuel combustion wastes, including coal combustion wastes, "do not warrant regulation [as hazardous waste] under Subtitle C of RCRA," and that "the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes;" and

WHEREAS, U.S. EPA is under no statutory obligation to promulgate federal regulations applicable to CCR disposal following the regulatory determination that hazardous waste regulation of CCR disposal is not warranted, and throughout the entire Bevill regulatory process, CCR disposal has remained a state regulatory responsibility and the states have developed and implemented regulatory programs tailored to the wide-ranging circumstances of CCR management throughout the country; and

WHEREAS, in 2005, U.S. EPA and the U.S. Department of Energy published a study of CCR disposal facilities constructed or expanded since 1994 and evolving state regulatory programs that found: state CCR regulatory requirements have become more stringent in recent years, the vast majority of new and expanded CCR disposal facilities have state-of-the-art environmental controls, and deviations from state regulatory requirements were being granted only on the basis of sound technical criteria; and
WHEREAS, in June 2010, U.S. EPA issued proposed rules for the management of CCR under both RCRA Subtitle C (hazardous waste) and RCRA Subtitle D (solid waste) laws, and these proposed rules have yet to be finalized; and

WHEREAS, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) conducted surveys of states in 2009 and 2010, which indicated that of the 42 states that responded which

have disposal of CCR, 36 of those states have permitting programs for disposal activity, with 94% of those requiring groundwater monitoring. In addition, all 42 states have the authority to require remediation, should it be necessary, and the majority of these state regulations are under general solid waste and general industrial waste regulations; and

WHEREAS, the states have demonstrated a continued commitment to ensuring proper management of CCR and several states have announced proposals for revising and upgrading their state CCR regulatory programs; and

WHEREAS, some states and utilities have cooperatively demonstrated numerous beneficial uses of CCR, such as additives in cement, soil amendments, geotechnical fill, and use in drywall.

NOW, THEREFORE BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Agrees with U.S. EPA's repeated assessments in 1988, 1993, 1999, 2000, and 2005 that CCR disposal does not warrant regulation as hazardous wastes under RCRA Subtitle C;

Agrees with U.S. EPA's finding in the 2005 study previously cited that "the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes" and believes that states should continue to be the principal regulatory authority for regulating CCR as they are best suited to develop and implement CCR regulatory programs tailored to specific climate and geological conditions designed to protect human health and the environment;

Supports safe, beneficial reuse of CCR, including for geotechnical and civil engineering purposes;

Believes that the adoption and implementation of a federal CCR regulatory program would create an additional level of oversight that is not warranted, duplicate existing state regulatory programs, and require additional resources to revise or amend existing state programs to conform to new federal regulatory programs and to seek U.S. EPA program approval;

Believes that if U.S. EPA promulgates a federal regulatory program for state CCR waste management programs, the regulations must be developed under RCRA Subtitle D rather than RCRA Subtitle C;
Believes that designating CCR a hazardous waste under RCRA Subtitle C could create stigma and liability concerns that could impact the beneficial use of CCR; and

Therefore calls upon U.S. EPA to conclude that additional federal CCR regulations would be duplicative of most state programs, are unnecessary, and should not be adopted, but if adopted must be developed under RCRA Subtitle D rather than RCRA Subtitle C, and in addition, urges U.S. EPA to make a timely decision, and calls upon U.S. EPA to begin a collaborative dialogue with the states to develop and promote a national framework for beneficial use of CCR including use principles and guidelines, and to accelerate the development of markets for this material.

Mr. SHIMKUS. Thank you very much.

And I failed to do it and will do it with Mr. Forbeck, but I would also mention that you are representing the Environmental Council of the States. And they have been very helpful in the process. We look forward to working with you.

And now I want to recognize for 5 minutes Mr. Michael Forbeck, Environmental Program Manager from the Pennsylvania Department of Environmental Protection, Bureau of Waste Management, and on behalf of ASTSWMO.

So you are recognized for 5 minutes.

STATEMENT OF MICHAEL G. FORBECK

Mr. FORBECK. Good morning, Chairman Shimkus and Ranking Member Tonko and members of the subcommittee. My name is Michael Forbeck, and I am president of the Association of State and Territorial Solid Waste Management Officials, ASTSWMO, and I am here on behalf of ASTSWMO to testify.

ASTSWMO's association represents the waste management remediation programs of 50 States, 5 territories, and the District of Columbia. Our membership includes State program experts with the individual responsibility for the regulation and management of solid and hazardous waste.

Thank you for the opportunity to provide testimony on the EPA final rule on disposal of coal combustion residuals from electric utilities. The rulemaking has been of longstanding importance to ASTSWMO. We were very pleased to see and are in full agreement with EPA's promulgation of the final rule under Subtitle D of the Resource Conservation and Recovery Act.

The focus of my testimony is on the issue of dual State and Federal regulatory authority we see as the result of the final rule's self-implementing construct. We are not offering testimony on specific technical requirements in the rule, as groups with ASTSWMO are looking at these as well as beneficial-use components, and we will have additional input on the specific provisions at a later time.

EPA has issued the rule under Subtitle D, part 257, which is self-implementing. The RCRA statutory basis for part 258, however, governing municipal solid waste landfills includes requirements for States to develop and implement a permit program to incorporate the Federal criteria and for EPA to determine whether those permit programs are adequate to ensure compliance with the criteria.

In ASTSWMO's comments to EPA regarding the 2010 proposed rule, we pointed out that self-implementing standards would set up a dual State and Federal regulatory regime for owners and operators that would be problematic for the effective implementation of the requirements of the CCR facilities. ASTSWMO recommended that a final rule under part 257 include explicit language that EPA views compliance with a State program that meets or exceeds the Federal minimum criteria as compliance with that Federal criteria.

We appreciate EPA hearing our concerns about dual State and Federal regulatory authority and their efforts, working within the bounds of their statutory authorities, to provide a mechanism through the State solid waste management plans to address our

concerns. However, we see difficulties with the State plan mechanism, which are as follows:

One is timing. In order for States to adopt these minimum standards by amending their solid waste management plans, thereby avoiding dual regulatory authority in theory, the process would have to be completed within 6 months of the date of publication of the final rule in the Federal Register. This is insufficient time, since the potential lengthy public participation process involved in the submission of State plans under 40 CFR, part 256, could preclude a timely approval even if it went smoothly. So there would still be dual State and Federal implementation for a time period past 6 months.

Solid waste management plans also fall short on full State implementation because, even after passage and approval of the plans, as stated in the preamble of the rule, EPA approval of a State solid waste management plan does not mean that the State program operates in lieu of the Federal program. Thus, the plans would not fully alleviate dual implementation of State and Federal standards.

In the preamble, the EPA states that a facility that operates in accordance with an approved solid waste management plan will be able to beneficially use that fact in a citizen suit brought to enforce the Federal criteria. This is subjective and speculative, as no one with absolute certainty can predict a court's decision. Further, citizen suits filed in different jurisdictions can result in individual courts interpreting the plan and rule differently, thus rendering different decisions that lead to inconsistent implementation of the rule.

There is also a concern that more sections of the solid waste management plan than the narrow reopening of the plan to incorporate CCR rule would be reviewed by EPA and potentially require additional revisions to the State plans that may be beyond the scope of CCRs.

ASTSWMO believes that legislation such as H.R. 2218 that was passed by the House in the last Congress would provide for the certainty of State primacy in implementation through State permit programs for CCR, enforceable by the State, and provide a clearer and consistent understanding of the permitting and enforcement rules of the State. State permit programs for CCR would have the additional benefit of allowing flexibility for States to have regionally appropriate State standards.

In conclusion, we appreciate EPA's decision to regulate CCRs under Subtitle D and providing a mechanism within the confines of part 257 for implementation of the rule by the States. However, the revision of the solid waste management plan does not fully eliminate dual implementation of CCR regulatory programs. ASTSWMO looks forward to working closely with the EPA and Congress regarding the CCR rule implementation.

Thank you again for the opportunity to provide this testimony, and I will be here for questions.

[The statement of Mr. Forbeck follows:]



ASTSWMO, providing pathways to our Nation's environmental stewardship since 1974

Hearing

"EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
January 22, 2015

Testimony of
Michael G. Forbeck, P.E., President
On behalf of the
Association of State and Territorial Solid Waste Management Officials

Main Points:

- ASTSWMO is in full agreement with the final EPA rule being promulgated under RCRA Subtitle D.
- ASTSWMO has concerns with State solid waste management plans as the mechanism for dealing with the issue of dual State and federal regulatory authority.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an association representing the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State program experts with individual responsibility for the regulation and management of solid and hazardous wastes.

ASTSWMO appreciates the opportunity to provide testimony on the final coal combustion residuals (CCR) rule promulgated by the U.S. Environmental Protection Agency (EPA) on December 19, 2014. The rulemaking has been of longstanding importance to the Association. We are pleased that EPA promulgated the final rule under Subtitle D of the Resource Conservation and Recovery Act (RCRA). The Subtitle D regulatory option is one that ASTSWMO has advocated since the inception of the rulemaking, in comments to EPA and in testimony before this Subcommittee in April 2011. States have been implementing and enforcing requirements for the management of CCRs under non-hazardous waste regulatory programs in the absence of federal regulations. The Subtitle D approach taken in the final federal rule supports the approach of State programs.

The focus of ASTSWMO's testimony is on State implementation issues stemming from the self-implementing construct of the final rule. Groups within the Association are looking at other technical requirements and beneficial use components and will have additional input in the near future.

As EPA explains in the preamble, due to its existing statutory authority under RCRA to establish federal minimum criteria for coal combustion residuals, EPA has issued the rule under 40 CFR Part 257, which is self-implementing. By self-implementing, owners/operators of

facilities can comply with the federal minimum criteria "without the need to interact with a regulatory authority", as EPA notes in the preamble.[1] In this way, EPA's authority under Part 257 is unlike the RCRA statutory basis for the 40 CFR Part 258 Criteria governing municipal solid waste landfills, which includes a requirement for States to develop and implement a permit program to incorporate the federal criteria, and for EPA to determine whether those permit programs are adequate to ensure compliance with the criteria. EPA can enforce the federal criteria in States where EPA has determined the State permit program to be inadequate. As EPA indicates in the preamble to the final CCR rule, the regulatory structure that is established through the statutory authority for State permit programs for the Part 258 Criteria, while less detailed than State authorization for RCRA Subtitle C, "is equally predicated on mandated implementation by a State regulatory authority of the federal requirements, rather than the potential coexistence of two separate regulatory systems."[2]

In ASTSWMO's comments to EPA regarding the Part 257 Subtitle D option proposed in 2010, we indicated our understanding that an owner or operator of a CCR disposal facility will need to fully comply with both the self-implementing national minimum CCR disposal standards and existing State requirements, even if State requirements meet or exceed the self-implementing national minimums. We pointed out that absent some type of EPA recognition of State programs that adopt the federal standards, owners/operators will be confronted with a dual State and federal regulatory regime that would be problematic for the effective implementation of requirements for CCR facilities.

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[1] Pre-publication copy of the EPA 2014 Final Rule, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, page 29.
[2] Ibid, page 106.

ASTSWMO further recommended that, if the final Subtitle D approach is promulgated under the Part 257 Criteria as proposed, EPA should establish a mechanism by which the agency acknowledges that a State permit program that meets or exceeds the federal minimum CCR standards has primary authority to directly administer the federal Subtitle D rule. We encouraged EPA to include in such a final Subtitle D rule explicit rule language that EPA views compliance with a State program that meets or exceeds the federal minimum criteria as compliance with the federal criteria, and that the self-implementing federal criteria would only apply in the absence of such a State CCR program.

We appreciate EPA's efforts, working within the confines of Part 257, to provide a mechanism through the State solid waste management plans (SWMP) to address our concerns about dual regulatory authority. However, we see difficulties with the State plan mechanism, which are:

- Timing. In order for States to adopt these minimum standards by amending their solid waste management plans, thereby avoiding dual regulatory authority in theory, the process would have to be completed within six months of the date of publication of the final rule in the Federal Register. This is an insufficient amount of time. There is a potential lengthy public participation process involved in the submission of State plans under 40 CFR Part 256 that means that the plans would not only have to be amended to incorporate the federal criteria, but that public notice procedures for a public hearing would need to be implemented and the public hearing held. It would be difficult to accomplish all of these steps within a six-month timeframe even if all

went smoothly, so there would still be dual State and federal implementation for a time past six months.

- SWMPs fall short on full State implementation because even after passage and approval of the plans, as stated in the preamble of the rule, "EPA approval of a State SWMP does not mean that the state program operates 'in lieu of' the federal program as EPA does not have the authority to make such a determination."[3] Thus, the plans would not fully alleviate dual implementation of State and federal standards.
- In the preamble, EPA states that a facility that operates in accord with an approved SWMP will be able to beneficially use that fact in a citizen suit brought to enforce the federal criteria[4]. This is subjective and speculative as no one with absolute certainty can predict a court decision. Further, citizen suits filed in different jurisdictions could result in individual courts interpreting the plan and rule differently, thus rendering different decisions that lead to inconsistent implementation of the rule.
- There is also a concern that more sections of a SWMP than the narrow reopening of the plan to incorporate the CCR rule may be reviewed by EPA and potentially require additional revisions to State plans that may be beyond the scope of CCR.

ASTSWMO believes that legislation such as H.R. 2218 that was passed by the House in the last Congress would provide for the certainty of State primacy in implementation through State permit programs for CCR enforceable by the State. State permit programs for CCR would

[3] Ibid, page 470.
[4] Ibid, page 470.

have the additional benefit of allowing flexibility for States to have regionally appropriate State standards, in the same way that EPA-approved State municipal solid waste (MSW) landfill permit programs are able to implement alternative site-specific designs, since the State CCR permit program would take the place of the self-implementing federal standards. It is unclear whether EPA is providing this flexibility by allowing for the incorporation into State SWMPs of "alternative requirements that are at least as protective of public health and the environment" instead of the direct incorporation and implementation of the federal minimum criteria.[5]

In conclusion, we appreciate EPA's decision to regulate CCRs under Subtitle D, and providing a mechanism within the confines of 40 CFR Part 257 for implementation of the rule by the States. However, revision of the SWMP does not fully eliminate dual implementation of CCR regulatory programs. Legislation would provide for the certainty of State primacy in implementation through State permit programs for CCR enforceable by the State, and provide a clearer and consistent understanding of the permitting and enforcement roles of the States. ASTSWMO looks forward to working closely with EPA regarding implementation of any CCR rule.

[5] Ibid, page 471.

Mr. SHIMKUS. Thank you very much.

Next, we would like to recognize Ms. Lisa Johnson, chief executive officer and general manager of Seminole Electric Cooperative, Incorporated.

And just for your information, I have a lot of cooperatives in my district, and we appreciate the work you all do.

STATEMENT OF LISA D. JOHNSON

Ms. JOHNSON. Thank you, Mr. Chairman. And good afternoon. My name is Lisa Johnson, and I am the CEO and general manager at Seminole Electric Cooperative, headquartered in Tampa, Florida.

Seminole is one of the largest not-for-profit generation and transmission cooperatives in the country. Seminole is owned by nine not-for-profit consumer-owned electric cooperatives, and, collectively, we provide safe, reliable, competitively priced electricity to more than 1 million consumers and businesses in parts of 42 Florida counties.

On behalf of Seminole and the National Rural Electric Cooperative Association, I would like to thank you for your time this morning as I present our testimony on this important issue.

Seminole would like to acknowledge that we support the Environmental Protection Agency's decision to designate coal combustion residuals, or CCRs, as nonhazardous. The EPA's approach, supported by data from its own investigations, balances the need to protect public health and the environment without creating an undue burden on affected facilities.

Even with a nonhazardous final rule, we are seeking your support to provide additional legislative certainty.

Seminole owns and operates Seminole Generating Station, or SGS, a 1,300-megawatt coal-fired power plant in Putnam County, Florida, employing nearly 300 hardworking, skilled Floridians. SGS has more than $530 million of environmental control equipment, making it one of the cleanest coal-based power plants in the U.S.

Seminole generates approximately 800,000 tons of CCRs per year. However, Seminole recycles more than two-thirds or roughly 530,000 tons per year of our CCRs to produce wallboard, cement, and concrete block.

At SGS, one CCR material is converted into synthetic gypsum and sold to Continental Building Products. Continental is a wallboard production facility specifically constructed in 2000 to utilize the synthetic gypsum from SGS.

Since 2000, more than 7 million tons of this CCR material have been converted into wallboard—wallboard used to build homes and businesses throughout Florida and the country.

Seminole also recycles all of the facility's bottom ash to manufacture cement and stronger, lighter concrete block. If not used beneficially, these byproducts would have been placed in a landfill.

In 2009, Seminole received a sustainable leadership award from the Council for Sustainable Florida for our beneficial reuse of CCRs. And SGS was named one of the top six coal plants in the world by Power Magazine for our recycling practices and environmental accomplishments.

One of Seminole's most important goals is to operate our power plants in a safe, environmentally responsible manner and in full compliance with all permits issued by the Florida Department of Environmental Protection and the EPA, bringing us to one of our concerns with the new rule.

While EPA will now regulate CCRs as nonhazardous, the rule is self-implementing, which means facilities covered by the rule must comply with the Federal rule regardless of adoption by the State. For example, should Florida adopt the EPA's final rule, the Federal rule also remains in place, creating dueling regulatory regimes.

As a self-implementing final rule, the typical method for a State or citizen group to check compliance at a facility that may or may not be adhering to the rule is to file suit against the facility. This could result in frivolous and costly legal disputes in Federal district courts, where the resulting interpretations and penalties could vary significantly. For not-for-profit electric cooperatives, this is especially troublesome, as any costs incurred must be passed on to the consumer-owners at the end of the line.

We ask that you eliminate the legal double-jeopardy aspect of this rule if a State fully adopts the EPA's new final rule.

The next major concern we have with the rule is the complete lack of certainty that CCRs will continue to be regulated as nonhazardous. For Seminole, this is extremely problematic, as a major component of SGS design is based on our environmental control systems and our recycling practices. Should EPA decide to regulate CCRs as hazardous at a later time, Seminole would be forced to dispose of CCRs, turning a beneficially used product into an expensive landfilled waste stream, driving up the cost of electricity for our cooperative consumers.

On numerous occasions, the EPA has determined that CCRs are not hazardous, and there are no new findings to justify a change in EPA's determination. We ask that you end the continuous reevaluation process and confirm that CCRs are and will continue to be regulated as nonhazardous.

For Seminole and other affected facilities, we are seeking regulatory certainty so that we can continue to provide safe, reliable, and affordable electricity while fully complying with all applicable rules, regulations, and laws.

On behalf of Seminole and NRECA, I thank you for the opportunity to meet with you today and share our views on this very important rule.

[The statement of Ms. Johnson follows:]



Comments of
Seminole Electric Cooperative, Inc.

Presented by Lisa D. Johnson

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
Hearing on "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"

January 22, 2015



Summary of Testimony

Seminole Electric Cooperative (Seminole) is one of the largest, not-for-profit generation and transmission cooperatives in the country. Seminole is owned by nine, not-for-profit, consumer-owned Member electric cooperatives. Collectively, we provide safe, reliable, competitively-priced electricity to more than 1 million consumers and businesses in parts of 42 Florida counties.

Seminole would like to acknowledge that we support the U.S. Environmental Protection Agency's (EPA) decision to designate coal combustion residuals, or CCRs, as non-hazardous. The EPA's approach, supported by data from its own investigations, appropriately balances the need to protect public health and the environment without creating an undue burden on affected facilities.

Even with a non-hazardous final rule, however, we are seeking your support to provide legislative certainty to secure the non-hazardous designation and to establish an orderly process for state authorities to implement federal criteria through state permits.

Self-implementing – While the EPA will now regulate CCRs as a non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA), Subtitle D is self-implementing, which means facilities covered by the rule, including Seminole's coal plant, must comply *with the Federal rule regardless* of whether or not the state adopts the rule.

As a self-implementing final rule under Subtitle D, the typical method for a state or citizen group to check compliance at a facility, that *may or may not* be adhering to the rule, is to file suit against the facility. For utilities, such lawsuits could result in frivolous and costly legal disputes in federal district courts where the resulting interpretations and penalties could vary significantly.

Seminole's goal is to comply with both state and federal permits, but we need clarification and certainty on this issue to ensure consistent implementation and compliance.

Non-hazardous designation – The next major concern we have with the rule is the complete lack of certainty that CCRs will continue to be regulated as non-hazardous.

On numerous occasions, the EPA has determined that CCRs are not hazardous - and there are no new findings to justify a change in EPA's determination.

Regulating CCRs as a hazardous waste is not warranted and would effectively eliminate beneficial reuse and recycling of these materials, negatively affecting the cost of electricity. We ask that you end the continuous reevaluation process and confirm once and for all that CCRs are, and will continue to be, regulated as non-hazardous waste.

Seminole Electric Cooperative Testimony

Background

Seminole Electric Cooperative, Inc. (Seminole) is one of the largest, not-for-profit generation and transmission cooperatives in the country. Seminole is owned by nine, not-for-profit, consumer-owned Member electric cooperatives. Collectively, we provide safe, reliable, competitively-priced electricity to more than 1 million consumers and businesses in parts of 42 Florida counties.

Seminole's primary resources include the Seminole Generating Station (SGS) in northeast Florida and the Richard J. Midulla Generating Station (MGS) in south central Florida. Seminole works to maintain a balanced and diversified generation portfolio that includes owned generation, as well as capacity and energy provided through purchased power agreements with other utilities, independent power producers, and government entities (municipals and counties). Seminole also receives power from renewable energy facilities, including waste-to-energy, and landfill gas-to-energy, and a biomass facility*. The diversity in Seminole's generation mix reduces exposure to changing market conditions, helping keep rates competitive.

Introduction

First, Seminole would like to acknowledge that we support the U.S. Environmental Protection Agency's (EPA) decision to designate coal combustion residuals, or CCRs, as non-hazardous. The EPA's approach, supported by data from its own investigations, appropriately balances the need to protect public health and the environment without creating an undue burden on affected facilities.

Even with a non-hazardous final rule, however, we are seeking your support to provide legislative certainty to secure the non-hazardous designation and to establish an orderly process for state authorities to implement federal criteria through state permits.

CCRs are materials produced when coal is burned to generate electricity. In Seminole's case, CCRs consist primarily of three distinct yet different byproducts: fly ash, bottom ash, and flue gas desulfurization (FGD) material.

Seminole and CCRs

Seminole owns and operates SGS – a 1,300-megawatt coal-fired power plant in Putnam County, FL, employing nearly 300 hard-working, skilled Floridians. SGS generates approximately 800,000 tons of CCRs per year. However, Seminole recycles more than two-thirds, or roughly 550,000 tons, per year of our CCRs to produce wallboard, cement, and concrete block.

At SGS, the FGD material from an environmental control system is converted into synthetic gypsum and sold to Continental Building Products (Continental). Continental is a wallboard production facility specifically constructed in 2000 to utilize the synthetic gypsum from SGS. Since 2000, more than 7 million tons of FGD materials have been converted into wallboard – wallboard used to build homes and businesses throughout Florida and across the country. Seminole also recycles all of the facility's bottom ash to manufacture cement and stronger, lighter concrete block. If not reused beneficially, these byproducts would have been placed in a landfill.

In 2009, Seminole received a Sustainable Leadership Award from the Council for

Sustainable Florida for our beneficial reuse of CCRs, and SGS was named one of the top six coal plants in the world by *Power Magazine* for our recycling practices and environmental accomplishments.

One of Seminole's most important goals is to make certain our power plants are operated in a safe, environmentally-responsible manner and in full compliance with all permits issued by the Florida Department of Environmental Protection (FDEP) and the EPA, bringing us to one of our concerns with the new rule.

Legislative Opportunities

Self-implementing – While the EPA will now regulate CCRs as a non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA), Subtitle D is self-implementing, which means facilities covered by the rule, including Seminole's coal plant, must comply *with the Federal rule regardless* of whether or not the state adopts the rule. For example, should the State of Florida adopt the EPA's final rule, the federal rule also remains in place as a separate, independent rule that must still be met – undoubtedly creating dueling regulatory regimes, not to mention, unnecessary confusion.

As a self-implementing final rule under Subtitle D, the typical method for a state or citizen group to check compliance at a facility, that *may or may not* be adhering to the rule, is to file suit against the facility. For utilities, such lawsuits could result in frivolous and costly legal disputes in federal district courts where the resulting interpretations and penalties could vary significantly. For not-for-profit electric cooperatives, this is especially troublesome, as any costs incurred must be passed on to the consumer-owners at the end of the line.

Seminole's goal is to comply with both state and federal permits, but we need clarification and certainty on this issue to ensure consistent implementation and compliance. We ask that you eliminate the legal "double jeopardy" aspect of this rule, if a state fully adopts the EPA's new final rule.

Non-hazardous designation – The next major concern we have with the rule is the complete lack of certainty that CCRs will continue to be regulated as non-hazardous. For Seminole, this is extremely problematic as a major component of the plant design at SGS is based on our environmental control systems and recycling practices – not to mention Continental's wallboard facility, which was constructed next door to SGS to maximize efficiencies in the production of wallboard.

Should the EPA decide to regulate CCRs as hazardous under RCRA Subtitle C at a later time, the wallboard facility's operation in rural Putnam County, FL, would be impacted adversely, as would the 100 employees that depend on Continental, and in turn, Seminole for work. Additionally, Seminole would be forced to dispose of CCRs as a hazardous waste – turning a beneficially used product into an expensive, landfilled waste stream, driving up the cost of electricity for our not-for-profit cooperative consumers.

On numerous occasions, the EPA has determined that CCRs are not hazardous - and there are no new findings to justify a change in EPA's determination. Regulating CCRs as a hazardous waste is not warranted and would effectively eliminate beneficial reuse and recycling of these materials, negatively affecting the cost of electricity. We ask that you end the continuous reevaluation process and

confirm once and for all that CCRs are, and will continue to be, regulated as non-hazardous waste.

Conclusion

Electric utilities face an ensuing battle when it comes to the onslaught of regulations targeting fossil fuel-fired power plants, especially those that burn coal and natural gas. Since 2008, the EPA has been proposing and finalizing new regulations aimed at electric utilities at a greater rate than ever before experienced.

Seminole has been making the right investment in environmental controls for years - considerably reducing air emissions, recycling our CCR byproducts, and minimizing landfill disposal. In total, Seminole's coal-based generating units at SGS have more than $530 million of environmental control equipment - making them some of the cleanest coal-based power plants in the U.S.

For Seminole and other affected facilities, we are seeking regulatory certainty, especially related to this rule, so we can continue to provide safe, reliable and affordable electricity, while fully complying with all applicable rules, regulations and laws.

On behalf of Seminole and NRECA, thank you for providing the opportunity to share our views and discuss this very important rule.

[*] Seminole sells a portion of the renewable energy credits associated with its renewable generation to third parties. The third parties can use the credits to meet mandatory or voluntary renewable requirements.

Mr. SHIMKUS. Thank you very much.

Now I would like to turn to Mr. Thomas Adams, executive director of American Coal Ash Association.

You are recognized for 5 minutes, sir.

STATEMENT OF THOMAS H. ADAMS

Mr. ADAMS. Mr. Chairman, my name is Thomas Adams. I am the executive director of the American Coal Ash Association. I would like to thank you for the opportunity to come and speak to you and the subcommittee today about one of America's greatest recycling success stories and how that continued success depends on regulatory certainty.

The ACAA was established almost 50 years ago to advance the beneficial use of coal combustion products in ways that are environmentally responsible, technically sound, commercially competitive, and supportive of a sustainable global community.

We are not a large trade association. We are not based in Washington, DC. We are headquartered in Farmington Hills, Michigan, and have a staff of two full-time employees. We rely on volunteer members to accomplish our work, which is mostly technical.

I would like to emphasize that, while we have some of the largest utilities in the country as members, most of our members are small businesses, comprised of people who have dedicated their entire career to the cause of beneficial use and improving our environment. It is these small businesses that were hurt most by the regulatory uncertainty EPA created in 2009 when it suggested the possibility of "hazardous waste" designation for coal-ash management.

There are many good reasons to view coal ash as a resource rather than a waste. Using it conserves natural resources, saves energy, and significantly reduces greenhouse gas emissions from the manufacturing of products that it replaces.

In many cases, products manufactured with coal ash perform better than products made without it. For example, the American Road and Transportation Builders Association determined that the use of coal ash in concrete roads and bridges saves departments of transportation across the country over $5 billion per year.

It is important to remember in this conversation that coal ash has never qualified as hazardous waste based on its toxicity. It does contain trace amounts of metals, and those metals are found at similar levels in soils and hundreds of household items. An ACAA study released in 2012 analyzed data from the U.S. Geological Survey which showed that concentration of metals and coal ash, with very few exceptions, are below environmental screening levels for residential soils and are similar to the concentrations found in common dirt. Despite a drumbeat of publicity by anti-coal environmental groups, coal ash is no more toxic than the manufactured materials it replaces.

Unfortunately, this discussion has had real-world negative consequences for the beneficial use of coal ash. When EPA began discussing a potential "hazardous waste" designation for coal ash in 2009, the Agency cast a cloud over beneficial use that caused coal-ash users across the Nation to decrease beneficial-use activities. The volume of coal ash used since 2008 has declined every year since that year.

The decline of beneficial use stands in stark contrast to the previous decade's trend, when in the year 2000 the recycling volume was 32.1 million tons at the time when the EPA issued its final regulatory determination that the regulation of coal-ash management as hazardous waste was not warranted. Over the next 8 years, with EPA encouragement, coal-ash beneficial use skyrocketed to 60.6 million tons and almost a 100 percent increase in the use. According to the most recently released data from 2013, 51.4 million tons of CCPs were beneficially used, down from 51.9 million in 2012 and well below the 2008 peak.

The great irony of this lengthy debate over coal-ash disposal regulations is that the debate caused more ash to be disposed. If the past 5 years had simply remained equal to 2008's utilization, we would have seen 26.4 million tons less coal ash put into landfills and impoundments.

The ACAA appreciates EPA's final decision to regulate coal ash as nonhazardous. We believe this decision puts science ahead of politics and clears the way for the beneficial use of coal ash to begin growing again, thereby keeping millions of tons out of landfills and ponds in the first place.

We are also painfully aware, however, that EPA has made final decisions before, only to reverse course in the future. A hazardous-versus-nonhazardous debate occurred prior to the Agency's 2000 final determination, which 8 years later turned out to be not so final.

Additionally, the final rule's preamble states that the rule defers final double regulatory determination with respect to CCR that is disposed in landfills and CCR surface impoundments until additional information is available on a number of key technical and policy questions. Apparently, 34 years of study, 2 reports to Congress, 2 formal regulatory determinations, and a final rule issued after a 6-year rulemaking process may not be enough for EPA to make a truly final final determination.

Bills previously passed by the House would resolve these issues permanently. The bills would put enforcement responsibility authority in the hands of professional State environmental regulators and expand EPA's authority to step in if States don't do the job. ACAA supports this approach as better public policy.

We would like to thank you, Mr. Chairman, for this committee's diligence in addressing this issue. We believe it is important to keep beneficial use at the forefront of U.S. coal management policy. The best solution to disposal problems is not to dispose.

[The prepared statement of Mr. Adams follows:]

ACAA

Statement of Thomas H. Adams, Executive Director, American Coal Ash Association

House Energy & Commerce Subcommittee on Environment and the Economy
January 22, 2015

Mr. Chairman, my name is Thomas Adams. I am the Executive Director of the American Coal Ash Association (ACAA). I would like to thank you for the opportunity to speak to you and the committee about one of America's greatest recycling success stories and how that success depends on regulatory certainty.

About ACAA

ACAA was established almost 50 years ago, in 1968, as a trade organization devoted to beneficially using the materials created when coal is burned to produce electricity. Our members comprise the world's foremost experts on coal ash (fly ash and bottom ash), and boiler slag, flue gas desulfurization gypsum or "synthetic" gypsum, and other "FGD" materials captured by emissions controls. While other organizations focus on disposal issues, ACAA's mission is to advance the management and use of coal combustion products (CCPs) in ways that are: environmentally responsible; technically sound; commercially competitive; and supportive of a sustainable global community.

ACAA is not a large Washington DC trade organization. We are headquartered in Farmington Hills, Michigan, and have only two full-time employees. We rely on our volunteer members to pursue an agenda that is mostly technical. For instance, to develop formal comments on EPA's Proposed Rule for regulating coal ash disposal, our members devoted more than 14,000 volunteer hours to reading, analyzing, and drafting our response. ACAA's membership is comprised of a diverse array of stakeholders, including academic professors and scientists, scientists within businesses associated with CCPs, former regulators, consultants, engineers, cement companies, coal ash marketers, CCP technology companies, international representatives within the CCP industry and utility representatives.

I would like to emphasize that many of ACAA's members are small businesses comprised of people who have dedicated entire careers to the cause of beneficial use and improving our environment. It is these small businesses that were hurt most by the regulatory uncertainty EPA created in 2009 when it suggested the possibility of an unwarranted "hazardous waste" designation for coal ash when it is disposed.

About Coal Ash Beneficial Use

Coal remains the largest fuel source for generating electricity in America and produces large volumes of coal ash — the generic term for several solid materials left over from the combustion process.

There are many good reasons to view coal ash as a resource, rather than a waste. Using it conserves natural resources, saves energy and significantly reduces greenhouse gas emissions from the manufacturing of products that are replaced. The benefits of using coal ash rather than disposing it are measured in the millions of tons annually – millions of tons of decreased landfill utilization, decreased natural resources production and decreased greenhouse gas emissions from manufacturing the materials coal ash replaces.

In many cases, products made with coal ash perform better than products made without it. For instance, coal ash makes concrete stronger and more durable. The American Road and Transportation Builders Association estimates use of coal fly ash in concrete roads and bridges saves highway builders more than $5 billion per year.

Other major beneficial uses include synthetic gypsum utilized in wallboard and agricultural applications; boiler slag used for blasting grit and roofing granules; and fly ash and bottom ash used in a variety of geotechnical applications.

Our highways and bridges last longer because of beneficially used coal ash. Our fields are more productive and shed fewer pollutants because of beneficially used synthetic gypsum. These are all benefits worth protecting.

About Coal Ash Regulatory History

The 1980 Bevill Amendment to the Resource Conservation and Recovery Act (RCRA) instructed the U.S. Environmental Protection Agency (EPA) to "conduct a detailed and comprehensive study and submit a report" to Congress on the "adverse effects on human health and the environment, if any, of the disposal and utilization" of coal ash. In two Reports to Congress (1988 and 1999) EPA recommended that coal ash should not be regulated as a hazardous waste. A 1993 EPA Regulatory Determination found regulation as a hazardous waste "unwarranted." A 2000 EPA Final Regulatory Determination concluded coal ash materials "do not warrant regulation [as hazardous waste]" and that "the regulatory infrastructure is generally in place at the state level to ensure adequate management of these wastes."

Responding to the failure of a Tennessee coal ash disposal facility in December 2008, the EPA re-opened the coal ash regulatory debate proposed options for regulating coal ash disposal in proposed rules issued in June 2010. One of those options called for regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA), which is the section that covers "hazardous waste." The proposal quickly became controversial. More than 450,000 public comments were received. Environmental Non-Governmental Organizations (ENGOs) and a handful of companies that compete with recycled coal ash favored the Subtitle C "hazardous waste" regulatory approach. A large and diverse body of organizations opposed it – including every federal agency (other than EPA) that reviewed the proposal; state environmental regulators, departments of transportation, public service commissions, governors and mayors; utilities; ash recyclers; ash users and building materials standard setting organizations; labor unions; and more.

Given the controversy, the EPA rulemaking effort bogged down. Eventually, the Agency was sued by ENGOs and two of ACAA's marketing members to force a deadline to conclude the rulemaking. On December 19, 2014 – nearly six years after the Tennessee incident that triggered the rulemaking effort – EPA met its court directed deadline and correctly announced a Final Rule under the "non-hazardous" Subtitle D section of RCRA.

Under the Final Rule, coal ash beneficial use continues to be exempt from regulation. But as history shows, being exempt from regulation does not exempt coal ash from market impacts of disposal regulation.

About Coal Ash Material Characteristics

It is important to remember that coal ash has never qualified as a hazardous waste based on its toxicity. It contains trace amounts of metals. Those metals are found at levels similar to the levels in soils and hundreds of items around your home. An ACAA study released in June 2012 analyzed recent U.S. Government information to show that concentrations of metals in coal ash, with few exceptions, are below environmental screening levels for residential soils and are similar in concentration to common dirt. Despite a drumbeat of publicity by anti-coal environmental groups, coal ash is no more "toxic" than the manufactured materials it replaces.

It's also important to remember that during the recent EPA rulemaking on coal ash disposal, the Agency's proposed landfill engineering specifications were essentially the same under both the "hazardous" and "non-hazardous" proposals. EPA's "hazardous waste" approach was not, therefore, "more stringent" from an engineering standpoint. The main difference between the "hazardous" and "non-hazardous" approaches boiled down to enforcement authority – direct federal enforcement with a "hazardous" designation versus citizen suit enforcement with the "non-hazardous" designation. This protracted debate was never about engineering or the nature of the material. It was mainly an argument over who gets to enforce the rules.

Disposal Regulations Affect Beneficial Use

Unfortunately, this argument had real world negative consequences for the beneficial use of coal ash. When EPA began discussing a potential "hazardous waste" designation for coal ash in 2009, the Agency cast a cloud over beneficial use that caused coal ash users across the nation to decrease beneficial use activities. Simply put, people did not want to undertake the potential liabilities or risks of using a material that could be considered "hazardous waste" on the property of the people who produced it. People resisted committing capital to expand beneficial use capabilities in light of the regulatory uncertainty.

Beginning in 2009, beneficial use markets were affected negatively in at least three ways:

- Consumers of coal combustion products began to remove the materials from their specifications because of uncertainty regarding the safety of the material or because of concern over potential legal liability from using it. For instance, the Los Angeles Unified School District prohibited the use of coal fly ash in its concrete "until the EPA confirms fly ash to be a non-hazardous toxic waste." It is important to remember that it doesn't matter whether health or legal liability concerns are scientifically or legally justified.

What matters is that people do not want to take the risks created by the potential "hazardous" designation and they can choose not to use the coal combustion products to avoid those risks. It takes time and money to defend even unjustified lawsuits.

- Manufacturers of products that compete with beneficially used coal ash began fanning the flames by citing the potential EPA "hazardous waste" designation. This occurred in markets for blasting grit, brick manufacturing, lightweight aggregate production, and concrete block manufacturing. One particularly egregious magazine advertisement featured a skull and crossbones for an illustration.

- Commercial liability insurance policies that contain exclusions for companies using products that contain fly ash began to appear. Examples of this disturbing development – as well as more examples of the other forms of stigma mentioned above – were collected and made available by an organization that is separate from ACAA (Citizens for Recycling First) at this website: http://www.recyclingfirst.org/pdfs.php?cat=9

Supporters of the "hazardous waste" designation said that recycling rates would increase under a "hazardous waste" designation, citing the experience of a handful of other industrial byproducts. The materials cited by EPA include electric arc furnace dust, electroplating wastewater sludge, chat from lead and zinc mining, used oil, spent etchants and spent solvents. The problem is that none of those materials are anything like coal ash. Most of them actually qualify as a hazardous waste based on their toxicity. (Coal ash does not.) Almost all of them are reprocessed prior to recycling. (Coal ash is not.) Most of them get recycled in industrial processes, often by the same companies that produced the materials in the first place. (Coal ash is distributed for recycling by thousands of other companies in tens of thousands of public and residential locations all over the country.) Many of them are produced and recycled very small quantities. (Coal ash recycling is measured in the millions of tons.)

Effects of the Most Recent Regulatory Uncertainty

Coal ash beneficial use stalled after 2008 as EPA reopened its coal ash regulatory agenda. Volume utilization coal ash has been lower than 2008 in every year since.

The decline in beneficial use volumes stands in stark contrast to the previous decade's trend. In 2000, when the recycling volume was 32.1 million tons, the EPA issued its Final Regulatory Determination that regulation of ash as a 'hazardous waste' was not warranted. Over the next eight years, EPA also began actively promoting the beneficial use of coal ash and the recycling volume soared to 60.6 million tons.

According to ACAA's most recently released "Production and Use Survey," 51.4 million tons of Coal Combustion Products were beneficially used in 2013 – down from 51.9 million tons in 2012 and well below the 2008 peak. In the closely watched category of fly ash used in concrete, utilization increased only slightly to 12.3 million tons, up by 577,705 tons over 2012, but still below 12.6 million tons in 2008.

The greatest irony of the lengthy debate over coal ash disposal regulations is that the debate caused more ash to be disposed. If the past five years had simply remained equal with 2008's utilization, we would have seen 26.4 million tons less coal ash deposited in landfills and impoundments.

Analysis of historic production and use data reaffirms that the recent decline in coal ash recycling is largely attributable to regulatory uncertainty and not general economic trends. During five recessionary periods since 1973, fly ash utilization out-performed overall concrete production in all but the most recent economic downturn. The current fly ash market continues to be depressed, even as ready mixed concrete volumes began to increase as early as 2010. In previous economic downturns, we actually saw fly ash utilization increase as concrete producers sought less expensive materials in an effort to reduce costs. That did not happen in our most recent economic downturn as regulatory uncertainty trumped economic incentives.

Factors like cost of disposal have little to do with whether coal ash gets beneficially used. Coal ash disposal costs did not change much between the 1990s and 2000s. What caused the dramatic growth of beneficial use in the 2000s was regulatory certainty that encouraged people to invest in recycling rather than disposal and a supportive EPA that actively encouraged beneficial use.

Permanent Regulatory Solutions are Needed

ACAA appreciates EPA's final decision to regulate coal ash as a "non-hazardous" material. We believe this decision puts science ahead of politics and clears the way for beneficial use of ash to begin growing again – thereby keeping ash out of landfills and disposal ponds in the first place.

We are also painfully aware, however, that EPA has made final decisions before only to reverse course in the future. A "hazardous vs. non-hazardous" debate occurred prior to the Agency's 2000 Final Regulatory Determination – which eight years later turned out to be not so final. Additionally, the Final Rule's preamble states that: "This rule defers a final Bevill Regulatory Determination with respect to CCR that is disposed in CCR landfills and CCR surface impoundments until additional information is available on a number of key technical and policy questions." Apparently 34 years of study, two reports to Congress, two formal regulatory determinations, and a Final Rule issued after a six-year rule making process may not be enough for EPA to make a truly final, Final Decision.

It may be time to recognize that there's a reason coal ash regulation remains controversial even after decades of study and regulatory activity. RCRA as currently configured may not be well suited to regulating a material characterized by very low toxicity but huge volumes. Specifically, the citizen suit enforcement mechanism available to EPA under the existing RCRA Subtitle D has been criticized by both sides of the debate.

Bills previously passed by the House would resolve these issues permanently. The bills would put enforcement responsibility and authority in the hands of professional state environmental regulators and expand EPA's authority to step in if states don't do the job.

ACAA is on record by formal resolution supporting coal ash disposal regulation. ACAA has also supported and will continue to support actions by Congress to create a more effective regulatory structure than EPA can create with its existing toolbox.

Thank you, Mr. Chairman, for this committee's diligence in addressing this issue. And thank you for inviting ACAA to testify today. It's important to keep beneficial use at the forefront of U.S. coal ash management policy. The best solution to coal ash disposal problems is to quit throwing it away.

Respectfully submitted,

[redacted]

Thomas H. Adams
Executive Director
American Coal Ash Association

[redacted]

Mr. SHIMKUS. Thank you very much.

The Chair now recognizes Mr. James Roewer, executive director of Utilities Solid Waste Activities Group, on behalf of the Edison Electric Institute.

Welcome, sir. You have got 5 minutes.

STATEMENT OF JAMES R. ROEWER

Mr. ROEWER. Good morning, Chairman Shimkus, Ranking Member Tonko, members of the committee. I am Jim Roewer, executive director of the Utility Solid Waste Activities Group, or USWAG. I am pleased to present this statement on beside of USWAG, the Edison Electric Institute, and the American Public Power Association.

We support EPA's decision to regulate coal ash as a nonhazardous waste, a decision which is consistent with the rulemaking record and with the EPA's previous regulatory determinations that coal ash does not warrant regulation as a hazardous waste.

Our longstanding position is that EPA should develop a regulatory program for coal ash patterned after the Federal regulations in place for municipal solid waste landfills. They would include design standards, location restrictions, dust controls, groundwater monitoring and corrective action, as well as structural stability controls for coal ash surface impoundments.

However, while we support EPA's regulation of coal ash as a nonhazardous waste, there are serious flaws in the new rule due to statutory limitations. The problem is that RCRA's subtitle D program does not authorize the implementation of Federal rules through State permit programs, nor does it allow EPA enforcement of those rules. The only exceptions are the provisions under which EPA issued municipal solid waste landfill rules, which are enforceable through State permit programs with backup EPA enforcement authority.

USWAG urged EPA to use that authority in issuing this rule, but EPA determined it could not. We are therefore left with a rule that cannot be delegated to States and in which EPA has no enforcement role. Because the rule cannot be delegated to the States, it is self-implementing. And relegated new facilities must comply with the rules requirement irrespective of whether it is adopted by the States. Even if adopted by a State, the Federal rule remains in place as an independent set of criteria that must be met. EPA is clear on this point. It cannot, this rule—the State program cannot operate in lieu of a Federal program. This will result in dual and potentially inconsistent Federal and State requirements. Most troubling, we are hearing that some States might not even attempt to adopt the new rule, which will guarantee new regulation.

In addition, the rule's only compliance mechanism is for a State or citizen group to bring a RCRA citizen suit in Federal district court. In fact, we believe this is the only Federal environmental law that is implemented in that and enforced in that way. This means legal disputes regarding compliance with any aspect of the rule will be determined on a case-by-case basis by different Federal district courts around the country.

Federal judges will be making complex technical decisions regarding regulatory compliance, instead of allowing these issues to

be resolved by regulatory agencies that have the technical expertise and experience necessary to answer such questions. This is likely to produce differing and inconsistent decisions regarding the scope and applicability of the rule, depending on where a citizen suit is brought, and will undermine the uniform application of the rule. This is not a sound strategy for implementing a complex Federal environmental program that has such significant implications for the power generation industry.

Because the rule is self-implementing, EPA dropped risk-based options for implementing elements of the groundwater monitoring program and for conducting cleanups, reasoning that such risk-based decisions require regulatory oversight. As a result, the Federal rule effectively overrides existing State risk-based regulatory programs for coal ash that have been proven protective of human health and the environment.

Some of our members are in the middle of implementing long-term site specific closures or cleanups for coal ash facilities. We are concerned that the Federal rule's lack of recognition of State risk-based closure or cleanup programs may effectively negate these efforts.

The rule also regulates inactive impoundments, impoundments no longer receiving coal ash but which contain water and have not closed. We fully appreciate such inactive sites may pose risks and steps should be taken to address those risks. However, we do not believe the EPA has the authority to subject past disposal practices to regulations for active—designed for active units, as the agency has done in this rule.

Congress has authorized EPA to address risk from past disposal under Superfund and by issuing site-specific remedial orders if past disposal poses an imminent and substantial endangerment. If EPA wants additional authority, we believe the statute must be amended to grant EPA such authority.

Finally, the rule does not provide the desired certainty that coal ash will not be regulated as a hazardous waste. EPA makes clear that it will, at some point in the future, issue a now regulatory determination regarding whether coal ash warrants hazardous waste regulation. While EPA has for now settled on the nonhazardous waste option, the Agency leaves the door open to revising the rules and regulating coal ash as a hazardous waste. This raises serious concerns.

Companies across the country will be investing huge resources to come into compliance with the new rule, even as EPA contemplates establishing a whole new regulatory program that could effectively negate these huge capital expenditures. We need regulatory certainty regarding the status of coal ash under RCRA. This rule does not provide that.

I would like to thank the opportunity—I would like to thank the subcommittee for the opportunity to present these views and would be happy to answer any questions.

[The prepared statement of Mr. Roewer follows:]

TESTIMONY OF JAMES R. ROEWER
FOR THE UTILITY SOLID WASTE ACTIVITIES GROUP, THE EDISON ELECTRIC INSTITUTE, AND THE AMERICAN PUBLIC POWER ASSOCIATION

OVERSIGHT HEARING BEFORE THE HOUSE SUBCOMMITTEE ON ENVIRONMENT & THE ECONOMY ON EPA's RULE ADDRESSING COAL COMBUSTION RESIDUALS, "HAZARDOUS AND SOLID WASTE MANAGEMENT SYSTEM; DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES"

January 22, 2015

Good morning. My name is James R. Roewer. I am the Executive Director of the Utility Solid Waste Activities Group (USWAG), and I am pleased to present this statement on behalf of USWAG, the Edison Electric Institute (EEI)[1] and the American Public Power Association (APPA)[2] regarding the Environmental Protection Agency's (EPA's) rule regulating the residuals from the combustion of coal by electric utilities and independent power producers, "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities" (CCR Rule).

[1] The Edison Electric Institute is the association that represents U.S. investor-owned electric companies, with international affiliates and industry associates worldwide. EEI's U.S. utility company members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly employ more than 500,000 workers. With more than $90 billion in annual capital expenditures, the electric power industry is also responsible for millions of jobs outside of our direct operations. Reliable, affordable, and sustainable electricity powers the economy and enhances the lives of all Americans.

[2] The American Public Power Association is the national service organization representing the interests of more than 2,000 municipal and other state- and locally-owned, not-for-profit electric utilities throughout the United States (all but Hawaii). Collectively, public power utilities deliver electricity to one of every seven electricity consumers (approximately 47 million people), serving some of the nation's largest cities. However, the vast majority of APPA's members serve communities with populations of 10,000 people or less. Overall, public power utilities' primary purpose is to provide reliable, efficient service to local customers at the lowest possible cost, consistent with good environmental stewardship. Public power utilities are locally created governmental institutions that address a basic community need: they operate on a not-for-profit basis to provide an essential public service, reliably and efficiently, at a reasonable price.

USWAG is a consortium of EEI, APPA, the National Rural Electric Cooperative Association (NRECA), and approximately 130 electric utilities, power producers, utility operating companies, and utility service companies located throughout the country. EEI is the national association of U.S. investor-owned electric utilities, international affiliates, and industry associates worldwide. APPA is the national association of publicly-owned electric utilities. NRECA is the national association of rural electric cooperatives, many of which are small businesses. Together, USWAG member companies operate nearly 75 percent of the total coal-based generating capacity in the United States.

We support EPA's decision to regulate CCRs, including coal ash, as non-hazardous waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA). That decision is consistent with the rulemaking record and EPA's previous regulatory determinations that coal ash does *not* warrant regulation as a hazardous waste. Indeed, USWAG's long-standing position has been that EPA *should* develop a regulatory program for coal ash patterned after the federal regulations in place for municipal solid waste landfills, which include unit design standards, location restrictions, dust controls, groundwater monitoring and corrective action, as well as structural stability controls for coal ash surface impoundments.

Importantly, however, while we support EPA's regulation of coal ash as a non-hazardous waste, there are serious flaws in the new rule due to statutory limitations. The problem is that RCRA's Subtitle D program generally does not authorize the implementation of federal Subtitle D rules through state permit programs; nor does it allow for enforcement of Subtitle D rules by EPA. The only exception is the Subtitle D provisions under which EPA issued the municipal solid waste landfill rules, which are

enforceable through state permit programs, with backup EPA enforcement authority. USWAG urged EPA to use this authority in issuing the final coal ash rule under RCRA § 4010(c), but the Agency determined that it could not. Therefore, we are left with a coal ash rule issued under the general Subtitle D provisions that cannot be delegated to the states and which EPA cannot enforce.

Because the rule *cannot* be delegated to the states, it is self-implementing, meaning that regulated facilities must comply with the rule's requirements irrespective of whether it is adopted by the states. Even if adopted by a state, the federal rule remains in place as an independent set of federal criteria that must be met. This results in dual, and potentially inconsistent, federal and state regulatory requirements for coal ash. And, most troubling, we are hearing that some states may not even attempt to adopt the new coal ash rules, which will guarantee the problem of dual federal and state regulation of coal ash.

Further, the rule's only compliance mechanism is for a state or citizen group to bring a RCRA citizen suit in federal district court against an alleged non-compliant facility. This means that legal disputes regarding compliance with any aspect of the rule will be determined on a case-by-case basis by different federal district courts across the country. The result is that federal judges will be making complex technical decisions regarding how to comply with the coal ash rule, instead of allowing these questions to be resolved by regulatory agencies that have the technical expertise and experience to answer such questions.

For example, any disputes regarding whether a company has installed the proper number of groundwater monitoring wells in the correct locations to determine up-gradient and down-gradient groundwater quality – a highly technical and site-specific issue critical to the rule's groundwater monitoring program – will have to be decided in drawn-out litigation by a federal judge, instead of by state regulators who have both the technical experience and localized knowledge to make such determinations through state-issued permits. We do not believe substituting federal judges for state environmental regulators is a sound strategy for implementing a federal environmental program of such broad scope and complexity.

In addition, this process will produce differing and likely inconsistent decisions regarding the scope and applicability of the federal rule, depending on where a citizen suit is brought, and will undermine the uniform application of the rule. For example, a federal court in one state may decide that a company's closure of an impoundment in that state meets the rule's performance standard, while a federal court in a neighboring state may decide that the company's use of the same closure design for an impoundment in that state does not meet the rule's performance standards. This will not provide the regulatory certainty that companies need to implement the rule in a compliant and cost-effective manner.

In addition, because the final rule is self-implementing, EPA has dropped the risk-based options for implementing elements of the groundwater monitoring program and for conducting cleanups, reasoning that such risk-based decisions require regulatory oversight. As a result, the federal rule will effectively override existing state

risk-based regulatory programs for coal ash that have proven protective of human health and the environment. This is extremely problematic. The federal rule's lack of recognition of state risk-based closure and/or cleanup programs will effectively negate these state-based efforts.

For example, I am aware of several USWAG members currently in the middle of well thought-out and complex risk-based, state-approved coal ash remediation programs tailored by the state to fit the site-specific characteristics of the facility. These state-approved programs will be usurped by the one-size-fits all, inflexible corrective action requirement in the final rule, effectively removing state regulators from exercising any technical discretion to address a CCR site in a manner that departs from the federal rule. This is directly attributable to the self-implementing nature of the final rule, which does not allow for delegation of the program to the states.

The rule also regulates inactive impoundments, namely impoundments that are no longer receiving coal ash on the effective date of the rule, but which still contain water and have not been closed. We fully appreciate that such inactive sites may pose risks and that steps should be taken to address such risks. However, we have a disagreement with EPA as to the Agency's legal authority under RCRA to regulate inactive sites under the rule. RCRA does not give EPA the authority to subject sites no longer receiving wastes to regulations designed for active units. Rather, Congress authorized EPA to address the risks from past disposal practices under Superfund and through the issuance of site-specific remedial orders if a past disposal practice poses an imminent and substantial endangerment to health or the environment. If EPA wants

authority to establish a regulatory program that would apply across-the-board to all past disposal practices – to supplement its authority to issue site-specific orders to address the risks from inactive sites – we believe the statute must be amended to grant EPA such authority.

Finally, the rule does not provide the desired certainty that coal ash will *not* be regulated as a hazardous waste. EPA makes clear that it will, at some point in the future, issue a new regulatory determination regarding whether coal ash warrants hazardous waste regulation. Therefore, while EPA has, for the meantime, settled on the Subtitle D non-hazardous waste option, the Agency explicitly leaves the door open to revising the rules and regulating coal ash under RCRA's Subtitle C hazardous waste program. This also raises serious concerns.

Companies across the country will be investing huge resources to amend their operations to come into compliance with the new Subtitle D rules. Yet, because of the way the rule is written, EPA could come back at some point in the future and issue a whole new regulatory program under RCRA's Subtitle C hazardous waste program that could effectively negate the huge capital expenditures being incurred now to comply with this rule. Utilities need regulatory certainty regarding the status of coal ash under RCRA; this rule does not provide that.

* * * * *

I would like to thank the Subcommittee for the opportunity to present the views of USWAG, EEI and APPA on EPA's CCR Rule. I would be glad to answer any questions you have concerning my testimony.

Mr. SHIMKUS. Thank you very much.

The Chair now recognizes Mr. Schaeffer, director of Environmental Integrity Projects.

Sir, you are recognized for 5 minutes.

STATEMENT OF ERIC SCHAEFFER

Mr. SCHAEFFER. Thank you, Mr. Chairman, and members of the committee. Thank you for the opportunity to testify. I am Eric Schaeffer, director of the Environmental Integrity Project. We work with citizens who live and work around coal ash sites. And as certainty seems to be the theme for the hearing, I would like the speak to what certainty might mean to those good people, some of whom have been living with this problem for a very long time.

First, I really don't think the folks in these communities care whether you call it hazardous or whether you call it peanut butter. They want coal ash out of their groundwater. They don't want it in their lungs, and they would rather not have 39 million tons of it dumped in their river as Duke Energy did to the good people of North Carolina less than a year ago. We hear that those kinds of problems are things of the past; they aren't going to happen again. I will return to that, but, obviously, they did happen.

So really the question is whether EPA's rule or anything Congress does gives people most affected by coal ash pollution the kind of certainty they are looking for. I just want to point out that this issue has been bumped around for about 30 years. In that time, a lot of these disposal sites, which are nothing more than holes in the ground, have deteriorated. The cost of responding to spills and the resulting contamination from just six companies now exceeds $10 billion. That is based on Securities and Exchange Commission disclosures. That number is going to climb, whatever happens; 30 years of no regulation, a bill comes with that, and that bill is coming due.

Touching briefly on the rule, like everybody here, we like some parts, we don't like others, not too unusual for an EPA outcome. The siting and structural stability requirements could be helpful and could prevent the kind of catastrophic spills we have seen. Monitoring requirements are a good start, especially if the data is put online and you don't have to pay hundreds of dollars to obtain it, which you do in many States today.

I do have to say, though, it has some big loopholes. There is no cleanup standard for boron. That is one of the most pervasive pollutants, and it is found at levels far above health standards at many coal ash sites.

Also, it is important to understand nobody is going to get wind burn complying with the deadlines in EPA's rule, some of which stretch literally from here to eternity. This is not a fast-paced set of standards, and I encourage you to look at those deadlines.

Before moving forward, I would respectfully ask that you consider two things, two actions. First, I think you should invite Duke Energy to appear before this subcommittee to talk about the spill that happened less than a year ago because it is important to get an understanding of the problem before turning to a solution. You can then, with that information, decide whether EPA has addressed the problem.

Here is what Duke said in 2009: We are confident, based on our ongoing monitoring, maintenance, and inspections, that each of our ash basins has the structural integrity necessary to protect the environment.

So if you called in Duke Energy, you could ask them about Dan River—because the statement was made about Dan River—so what the heck happened? Is it going to happen again? Are you certain it is not going to happen again, and how are you certain?

North Carolina passed a law in the wake of that spill that requires shutdown of active ash impoundments at active plants in less than 4 years, a lot faster than EPA requires. Duke Energy supported that bill. You might ask them why they supported it and why those requirements wouldn't apply in a place like Indiana where Duke also has plants. That is certainty. They have to close by date certain. Couldn't be clearer.

I would also hope that you consider giving citizens who were affected by the coal ash pollution a chance to speak to you directly without interpreters, without lobbyists. I would gladly give my seat up so you could hear from them. I am sure Jim would do the same thing. You can hear from them directly about what it has been like and ask them what kind of certainty they are looking for.

I think you will hear they would the certainty that leaking dumps will be closed and cleaned up sometime in their lifetime. I think you will hear that many of them have been waiting a long time. I think they will want the certainty they won't get stuck with the bill for that cleanup. They would like the certainty that their ash pond is not going to collapse and fall on top of them and dump ash into the river. I think they would like the certainty they can bring their own legal action if the State doesn't do anything. I think you will hear that, but let them tell you directly.

I will just say, in closing, the citizens have worked on these issues for a long time. They really do deserve to be heard from. I hope you will give them that chance.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Schaeffer follows:]

Testimony of Eric Schaeffer
Director, Environmental Integrity Project

Before the House Subcommittee on Environment and the Economy
Regarding EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities

January 22, 2015

Thank you for inviting me to testify at today's hearing on EPA's final standards for the regulation of coal ash disposal sites. My name is Eric Schaeffer, and I am Director of the Environmental Integrity Project, a nonprofit organization dedicated to more effective enforcement of our environmental laws. Working with other nonprofits, we obtained much of the groundwater monitoring data from state files that the Environmental Protection Agency reviewed when developing this rule.

My testimony can be summarized as follows:

- The record developed since EPA's rule was proposed nearly five years ago confirms that leaking coal ash sites have contaminated groundwater at many locations, and that unstable or poorly maintained ash ponds can lead to catastrophic spills like the one from Duke's Dan River plant less than a year ago. The Agency has confirmed that at least 157 coal ash ponds or landfills have contaminated groundwater or otherwise increased the risk of harm to health or the environment. In EPA's words, "...this is the largest number of damage cases in the history of the [Resource Conservation and Recovery] program."

- The cost of cleaning up spills and leaking dumpsites has already snowballed, with six companies reporting liabilities that exceed $10 billion. That will continue to happen if federal standards are not effective in containing this pollution and keeping the problem from getting worse.

- Congress should examine the problem that EPA's new rule attempts to address before deciding whether the Agency has found the right solutions. That means taking a hard look at the evidence that has been gathered, analyzed, and placed in the record over the past six years. But it should also mean taking the time to hear from people most affected when coal ash pollutes their groundwater or is disgorged into a local river.

I would be glad to answer specific questions about EPA's new rule if time permits. It includes some useful features, such as standards for siting and maintaining the safety of impoundments, minimum monitoring requirements and a welcome emphasis on public disclosure of data about the condition of coal ash sites. At the same time, it leaves significant gaps in the safety net that ought to be repaired. These include the failure to require cleanup whenever boron or manganese exceeds health based standards, since these pollutants are frequently found in concentrations far above health-based standards in groundwater or surface water near coal ash sites. Some of the "deadlines" in the rule, which allow up to 15 years to complete closure of coal ash impoundments larger than 40 acres, mean that people next to these sites will have to live with this contamination for a very long time.

The Subcommittee may want to compare the extended deadlines in EPA's final rule to the requirements of the law that North Carolina enacted in August of 2014. That statute, which had Duke Energy's support, puts ash ponds on a much faster track for closure and cleanup than EPA's new standard.

The Agency has confirmed that at least 157 coal ash landfills or surface impoundments have contaminated groundwater or surface water with one or more pollutants at levels that exceed federal health or water quality based standards, or otherwise significantly increased actual or potential harm to human health of the environment. In EPA's words, "this is the largest number of damage cases in the history of the [Resource Conservation and Recovery Act] program." The Agency adds that additional sites are likely to be contaminated that have not yet been identified due to lack of monitoring data.

The groundwater affected by these sites is not safe to drink, and may not be for many years. At some of these sites, contaminated plumes discharge directly to creeks or rivers, threatening harm to fish or wildlife. Unless we are willing to treat these aquifers and our nation's waterways as private sewers – rather than a natural resource that should be available for future generations to enjoy – this polluted groundwater will have to be cleaned up one way or another.

At other sites, ash or sludge has dropped through sinkholes that open up underneath landfills or ponds built on top of unstable karst formations. For example, TVA discovered in 2010 that waste was draining through a sinkhole near the southern edge of a brand new sludge disposal area, causing dramatically elevated selenium concentrations in underlying groundwater (up to 412 ug/L, almost ten times higher than the maximum contaminant level (MCL) of 50 ug/L), and ultimately discharging to the Clinch River. TVA dewatered the area in January 2011 and discovered additional sinkholes.

EPA's consulting engineers determined that a dam break at more than 40% of coal ash impoundments would either result in probable loss of human life (at sites with a "high hazard" rating) or widespread environmental and economic losses (significant hazard sites). The collapse of one of Duke Energy's ash impoundments less than a year ago dumped 39 million tons of coal ash and 27 million tons of contaminated wastewater into the Dan River in North Carolina. That spill came after Duke Energy assured EPA – in a letter dated October 5, 2009 – that: "We are confident, based on our ongoing monitoring, maintenance, and inspections that each of our ash basins has the structural integrity necessary to protect the public and the environment."

EPA's review also confirmed that too many states lack the authority to require power companies to take reasonable steps to keep coal ash contaminants out of the environment. The Agency determined that some states have no regulations at all for coal ash or scrubber sludge, while others exempt disposal of these wastes from most of the requirements that apply to other waste sites. Several states that

generate some of the largest volumes of coal ash do not even require monitoring of some of the most persistent and dangerous contaminants at disposal sites. And those laws that are on the books mean nothing unless they are enforced. At a number of polluted sites, states moved to enforce their own rules only *after* they were notified that frustrated local citizens intended to file their own lawsuit if the state failed to act. While waiting for EPA to get this final rule to the finish line, the cost of responding to spills and leaks at coal ash sites has continued to climb. Just six companies reported on their quarterly or annual disclosures to the Securities and Exchange Commission in 2014 that they expect to spend more than $10 billion to clean up spills or contaminated groundwater and to switch to safer dry disposal methods. These SEC disclosures come from TVA, Duke Energy, First Energy, Santee Cooper, NRG and Exelon, and the liabilities they report are unrelated to EPA's rulemaking. Rather, they reflect the cost of responding to spills that made front page news, to enforcement actions, and in Duke Energy's case, to state legislation adopted in the wake of the Dan River catastrophe.

These costs will only grow if EPA's rule cannot be implemented in time and keep groundwater contamination from spreading or reduce the chances of another expensive accident. Without federal action to guide cleanup within a reasonable time, these sites will rapidly lose their economic value and so will nearby residential or commercial properties in the pathway of that pollution. Nobody wants to buy contaminated groundwater or a dam that is unstable and unsafe.

Before deciding on a course of action, I would respectfully request that this Subcommittee hold hearings to investigate what caused the failure at Duke's Dan River facility, and why the company's confidence in its own self-policing proved to be unfounded. I would also urge the Subcommittee to hear from some of the people who live near these damaged coal ash sites, and let them tell you about the impact that has had on their quality of life and the value of their homes, and share their experience trying to get EPA, state agencies, or companies to respond to their complaints over many years.

Their concerns are real. Hundreds of these witnesses turned out and told their stories at the hearings EPA held on its proposed rule in Washington and in the field. I am not sure how many of them have ever appeared before this Subcommittee, but hope you will take the time to hear their voices.

Thank you again for the opportunity to testify.

The Price of Coal Ash Mismanagement
Cost of Spill Response, Ash Pond Cleanup & Switch to Dry Disposal As Disclosed to the Securites & Exchange Commission

Company	Total Cost (Millions)	Cost Category	Itemized Cost ($Millions)	Cost Description	Source
Duke Energy	3877 to 4102	Dan River Spill	20	Duke Energy Carolinas has incurred approx. $20M to date in repairs and remediation expenses related to the Feb. 2, 2014 Dan River Spill. While this includes the cost of remediation work identified by EPA (completed July 2014), it does not include an estimate of expenses related to future regulatory directives, natural resource damages, pending and future litigation, and long-term environmental impact costs. There is also an ongoing grand jury investigation related to the spill and all fourteen of the North Carolina facilities with ash basins, but no estimate has been made with respect to potential liabilities.	Duke Energy Corp., Quarterly Report (Form 10-Q), at 49-50, 52 (Sept. 30, 2014)
		Closure & disposal costs related to NC Coal Ash Act	3432	Following passage of the 2014 North Carolina Coal Ash Management Act, Duke also recorded Asset Retirement Obligations (AROs) for coal ash ponds in North and South Carolina, valued at $2026M and $1406M respectively. The ARO amount is based on estimated ash basin closure costs for each of Duke's 32 ash basins located at 14 plants in North Carolina, and an ash basin at a plant in South Carolina. The Act requires Duke to close ash impoundments at Asheville, Sutton, Riverbend, and Dan River stations by Aug. 1, 2019.	Duke Energy Corp., Quarterly Report (Form 10-Q), at 56 (Sept. 30, 2014)
		Conversion to Dry Ash Handling	425 to 650	The Act further requires conversion to dry ash handling at active plants not retired by Dec. 31, 2018, and requires conversion to dry bottom ash handling at active plants by Dec. 31, 2019, or retirement of active plants. Total costs to comply with requirements of the Act to convert todry fly ash and dry bottom ash (not including AROs recorded as of 2014) are estimated between $425M and $650M.	Duke Energy Corp., Quarterly Report (Form 10-Q), at 120 (Sept. 30, 2014)
		Groundwater Contamination/ CWA Claims	unknown	Both citizen groups and the State of North Carolina have filed suit against Duke Energy Carolinas and Duke Energy in state court, alleging groundwater violations and violations of the CWA which occurred at various facilities prior to the Dan River spill. No estimate has been made regarding liabilities from these actions. There are also five cases currently pending in NC federal courts, contending that the state enforcement actions do not adequately address the issues raised in the NOIs related to the Riverbed, Sutton, Cape Fear, H.F. Lee, and Buck plants. Duke has not quantified potential liabilities related to these claims.	Duke Energy Corp., Quarterly Report (Form 10-Q), at 51-52 (Sept. 30, 2014)
Tenessee Valley Authority (TVA)	2661 to 3161	Kingston Ash Spill	1121	In September of 2009 environmental cleanup costs associated with the 2008 Kingston Spill were estimated to total $1.1B, to be amortized over 15 years. $1.1B has been spent on cleanup activities through Sept. 30, 2014, and remaining liability is estimated at $21M. These costs and estimates do not include penalties, other than those collected by TDEC in June 2010, natural resource damage claims, future lawsuits and claims, or future environmental impact costs.	Tennessee Valley Authority, Annual Report (Form 10-K), at 101, 141 (Sept. 30, 2014)
		Kingston Ash Spill Civil Penalty	12	In 2010, TVA paid a $10M penalty to TDEC related to the Kingston Ash Spill, and committed to undertake environmental projects valued at $2M to make up the total penalty amount.	Tennessee Valley Authority, Annual Report (Form 10-K), at 101 (Sept. 30, 2014)
		Kingston Ash Spill Private Claims	28	TVA also deposited $28M with the federal court in the Eastern District of Tennessee in exchange for a global settlement of private claims related to the Kingston Ash Spill.	Tennessee Valley Authority, Annual Report (Form 10-K), at 141 (Sept. 30, 2014)
		Conversion to Dry Ash Handling	1500 to 2000	TVA expects to spend an additional $1.5B to $2B to convert its wet coal ash and gypsum facilities to dry storage collection facilities.	Tennessee Valley Authority, Annual Report (Form 10-K), at 34 (Sept. 30, 2014)

Santee Cooper/ South Carolina Public Service Authority	359.8	Asset Retirement Obligation	359.8	In 2013, South Carolina Public Service Authority ("Authority") recorded an Asset Retirement Obligation of $359.8M pertaining to ash ponds	Santee Cooper, Revenue Obligations (Series 2014), at I-24 (Oct. 17, 2014)
		Retirement & Pond Closure	unknown	In November 2013 two lawsuits by environmental groups pertaining to the Grainger Ash Pond were settled. The plaintiffs had sought injunctive relief, civil penalties, and costs and attorneys fees, though the ultimate settlement "did not require the Authority to make any payments to the litigants." The company reports that it is in the process of retiring units at Grainger and Jeffries generating stations, and intends to "properly close the ash ponds by excavation and beneficial use of the ash." While no cost estimate is provided, the $359.8M ARO reported above presumably includes a portion of this cost.	Santee Cooper, Revenue Obligations (Series 2014), at 42, 44, I-24 (Oct. 17, 2014)
First Energy	397.8	Closure & Groundwater Monitoring	397	In December 2012, a modified Consent Decree between PA DEP and FG (subsidiary of First Energy) was entered requiring FG to discontinue disposal at LBR, conduct monitoring studies, and submit a closure plan for the LBR CCB impoundment by Dec. 31, 2016. The closure plan was estimated to cost $234M in environmental and post closure costs. In response to a notice of deficiency from PA DEP, FG increased its ARO for LBR by $163M in 2013. The final closure plan requires complete closure within a 12-year period, and bonding for 45 years of closure and post-closure activities, but does not require active dewatering of the CCBs. It does require a groundwater assessment for arsenic and abatement if certain conditions are met.	First Energy, Quarterly Report (Form 10-Q), at 47 (Sept. 30, 2014)
		Civil Penalty	0.8	The CD imposed an $800,000 civil penalty.	First Energy, Quarterly Report (Form 10-Q), at 47 (Sept. 30, 2014)
		Liability Related to Reuse of Coal Ash	unknown	In January 2013 the Bruce Mansfield Plant announced a plan for beneficial use of CCBs for mine reclamation in LaBelle, Pennsylvania. This plan is subject to a citizen suit alleging violations of RCRA's beneficial reuse rule with respect to coal ash.	First Energy, Quarterly Report (Form 10-Q), at 47 (Sept. 30, 2014)
		Private Damage Claims	unknown	Approximately 61 individuals have filed lawsuits in federal court alleging property damage, bodily injury, and emotional distress related to the LBR CCB impoundment. First Energy has made no estimate of possible liability related to these claims.	First Energy, Quarterly Report (Form 10-Q), at 47 (Sept. 30, 2014)
NRG/GenOn	49.5	Pond Closure	47	MDE has sued GenOn over violations of the CWA and Maryland's Water Pollution Control Law occurring at three facilities: Faulkner, Brandywine, and Westland. In April 2013 MDE and GenOn entered into a Consent Decree (CD) settling violations at all three facilities. The CD required installation of synthetic caps on closed cells at all three facilities, for which $47M has been reserved.	Genon Energy, Inc., Annual Report (Form 10-K), at 125-26 (Dec. 31, 2013)
		Civil Penalty	2.5	The CD also imposed a $1.9M civil penalty for past violations, and a $0.6M penalty for prospective violations while GenOn implements the settlement.	Genon Energy, Inc., Annual Report (Form 10-K), at 125-26 (Dec. 31, 2013)
		Site Remediation	unknown	The CD also requires remediation of the sites, for which no estimate is available yet.	Genon Energy, Inc., Annual Report (Form 10-K), at 125-26 (Dec. 31, 2013)
Exelon Corporation	41	Remediation & Penalty Liability from Constellation Merger	35	A 2007 CD between Constellation and MDE settled claims related to groundwater contamination at a third party facility licensed to accept fly ash. The CD required remediation of groundwater contamination, replacement of drinking water supplies in the vicinity of the site, monitoring of groundwater, and payment of a $1M penalty. Exelon merged with Constellation around 2012 and assumed its liabilities. In 2013, Exelon reported that prior to the merger with Constellation, the latter had actually recorded liabilities of approx. $30M to comply with the MDE CD with an additional $3M recognized through purchase accounting. In 2013, the company increased its reserve by $2M based on updated estimate of future remediation costs.	Constellation Energy Group, Annual Report (Form 10-K), at 137 (Dec. 31, 2011) Exelon Corporation, Annual Report (Form 10-K), at 391 (Dec. 31, 2012) Exelon Corporation, Annual Report (Form 10-K), at 398, 404 (Dec. 31, 2013)
		Site Remediation & Pond Closure	6	Rossville Ash Site (owned by Constellation) was entered into the Maryland Voluntary Cleanup Program in 2010 and is currently going through the process to remediate the site and receive closure from MDE. Exelon estimates the cost to close the site to be approx. $6M.	Exelon Corporation, Annual Report (Form 10-K), at 398, 404 (Dec. 31, 2013)
		Private Groundwater Contamination Claims	unknown	A private party has also asserted groundwater contamination claims relating to the Maryland fly ash disposal site, for which the company has not offered an estimate of liability.	Exelon Corporation, Annual Report (Form 10-K), at 391 (Dec. 31, 2012)

Mr. SHIMKUS. Thank you very much.

You all have done a great job. We have gotten through the opening statements.

Last but not least, Mr. Holleman, senior attorney for the Southern Environmental Law Center.

Sir, welcome, and you have 5 minutes.

STATEMENT OF FRANK HOLLEMAN

Mr. HOLLEMAN. Well, thank you, Mr. Chairman and Mr. Tonko and other members of the committee for the opportunity to be here.

My name is Frank Holleman, and I live in Greenville, South Carolina. I am at the Southern Environmental Law Center, and we work with local citizens in the South concerned about their natural resources. A committee like this in Washington usually hears from representatives of Government agencies and trade associations. Today, I want to convey to you all the concerns of local people who want to see their communities prosper and their local rivers protected.

Let's look for a minute what we are facing in the Southeast. The utilities have dug unlined pits in wetlands and right beside our drinking water resources. They have put millions of tons of industrial waste containing toxics, like arsenic and lead, into these unlined pits, and they have filled them full of water. These millions of wet tons of waste are contained only by earthen dikes that leak. The toxic substances in this industrial waste leach into the groundwater, which then flows into the rivers and towards neighborhoods. This situation is made worse because most of these pits are decades old and their infrastructure is rotting.

We have had two catastrophic failures from this coal ash storage in the south, by TVA at Kingston, Tennessee, and by Duke Energy in the Dan River in North Carolina and Virginia. One local water system is being forced to abandon public drinking water wells. Fish have been killed in the hundreds of thousands. Property values of nearby landowners have been affected, and groundwater has been contaminated with substances like arsenic.

My main point is this today, that Congress should not take away from the—should not take away the rights of the local communities to protect themselves from this dangerous coal ash storage. The Congress should not leave the future of these people to Government bureaucracies alone. The citizen's right to enforce a new EPA rule is essential. Now what we have seen in the Southeast is clear: The State agencies have not effectively enforced the law against these politically powerful entities. Let me give you examples.

In South Carolina, where I spent virtually all of my life, it has been clear for years that unlined coal ash storage by our three utilities violate antipollution laws, yet no Government agency has taken action to force a cleanup. Local organizations instead enforce the law with the result today that all three utilities in our State are cleaning up every water-filled riverfront coal ash lagoon they operate in the State. And they are creating jobs. They are promoting recycling. And one of our utilities calls these cleanups a win-win for all concerned.

In North Carolina, nothing was happening to force Duke Energy, which has a statewide monopoly to clean up its coal ash lagoons.

Local community organizations, not the State, had to take the initiative to enforce clean water laws. For the first time, North Carolina was forced to take action and confirmed under oath that Duke Energy is violating State or Federal clean water laws or both everywhere it stores coal ash in the State and, under oath, that this polluting storage is a serious threat to the public health, safety, and welfare.

Now a Federal criminal grand jury is investigating both Duke Energy and the State environmental agency. And as a result, Duke has pledged to clean up 4 of its 14 sites and to look at all the rest.

In Tennessee, TVA continues, after Kingston, to store coal ash in unlined polluting pits. Local citizens groups enforce the Clean Water Act and only in response to that pressure, the State of Tennessee has now confirmed, under oath, that TVA has been and is violating Tennessee environmental laws by its coal ash storage on the Cumberland River near Nashville.

In the South, we have seen that the people must have the power to protect themselves and to enforce the law. The citizen's right to enforce a new EPA rule is a principal reason to have hope that these minimum Federal criteria will play a role in cleaning up a legacy of dangerous coal ash storage in our Southeast. Thank you.

[The prepared statement of Mr. Holleman follows:]

THE IMPORTANCE OF CITIZEN ENFORCEMENT TO PROTECT COMMUNITIES AND CLEAN WATER FROM COAL ASH

Testimony of Frank Holleman, Senior Attorney at the Southern Environmental Law Center

U.S. House Subcommittee on the Environment and the Economy

January 22, 2015

Summary

EPA's new coal ash rule does not by itself solve the problem of primitive coal ash storage by our public utilities. It sets some minimum national criteria. These criteria supplement a number of other federal, state, and local laws that apply to coal ash storage. But even these minimum criteria – like the other laws that apply to coal ash storage – will not work unless citizens have the right to enforce them. We have seen, over and over again, that state agencies will not effectively enforce laws designed to protect communities from the risks and pollution stemming from coal ash storage sites owned by public utilities.

In the Southeast, public utilities have long been violating state and federal laws in how they store coal ash. Yet state agencies, though they have known of the legal violations, have not taken effective action to require clean ups of these dangerous and polluting sites. The results have been continued pollution, dangers to communities, and, at Duke Energy's Dan River facility, a catastrophic failure. Citizen law enforcement has obtained clean ups of coal ash pollution where state agencies had not taken action and has forced state agencies to confirm, under oath, that public utilities have been violating the law in how they store coal ash. For the new EPA rule to serve the public purposes for which it was intended, the public – and not just state government bureaucracies -- must have the authority to protect themselves through citizen enforcement suits.

THE IMPORTANCE OF CITIZEN ENFORCEMENT TO PROTECT COMMUNITIES AND CLEAN WATER FROM COAL ASH

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Here is the proposal: We have millions of tons of industrial waste containing toxic substances, including arsenic, lead, chromium, selenium, and mercury. We propose to dig unlined pits next to major rivers and drinking water reservoirs. We will dump the industrial waste into these pits and fill them full of water. These millions of wet tons will be held back from the rivers and the drinking water reservoirs only by earthen dikes that leak into the rivers and reservoirs. The toxic substances in this industrial waste will leach into the groundwater, which flows into the rivers and reservoirs, and in other directions.

Sounds like a good idea? That is exactly what the major public utilities are doing on almost every major river system across the Southeast, and in other areas of the country. In fact, what the utilities are doing is worse, because their unlined leaking coal ash storage lagoons are in most instances decades old, and their infrastructure, which was primitive to begin with, is aging. What is even more striking is that we are tolerating this method of storage by publicly-established monopolies with tremendous resources and great engineering capacity to employ safer and less polluting alternatives.

It should come as no surprise that these lagoons have failures and that there have been catastrophic failures – in the Southeast at TVA's facility in Kingston, Tennessee, and at Duke Energy's facility on the Dan River near the North Carolina-Virginia border. It does not take a prophet to predict that other catastrophic failures will happen, it does not take a rocket scientist

to determine that a storage system like this will pollute, and it does not take a legal scholar to figure out that something about this is illegal. And any concerned citizen can see that this is no way for industrial waste to be stored in his or her community in the 21st century.

Yet, what we have seen across the Southeast is that even though the utilities are breaking existing law in how they store coal ash and even though the coal ash is polluting groundwater and rivers with coal ash contamination and even though there is the risk of catastrophic failure, the utilities and the state agencies that regulate them have not taken effective action to clean up antiquated coal ash storage and to protect local communities and clean water. We have obtained substantial clean ups and convinced utilities they must change their coal ash storage practices -- but only when citizens have had the right to take the future of their communities into their own hands, to bring their own enforcement actions, and to thereby force the state agencies and the utilities to face up to the harm that unlined riverside coal ash storage is doing to local neighborhoods, natural resources, and the utilities themselves.

It is important to emphasize that in the cases we have brought, neither we nor the local community groups we represent have been suing in order to recover money. Over the more than three years we have been working on citizen enforcement actions, we and the groups we represent have settled cases and have not sought or received money in any of those settlements. The goal of this citizen law enforcement is to protect rivers and communities and to clean up coal ash pollution. While provision for recovery of attorney's fees and litigation expenses is an important part of an effective citizens suit provision, we have not petitioned for attorney's fees and we have not received any.

Here are examples of what citizen enforcement actions have accomplished in the Southeast when the state agencies and utilities did not act.

A. South Carolina

For years the utilities in South Carolina have been contaminating groundwater at their coal ash lagoons with substances like arsenic. There is groundwater testing information going back decades showing groundwater contamination at these sites. And these sites leak into nearby waterways. The South Carolina Department of Health and Environmental Control (DHEC) has in the past notified the utilities in writing that they were violating the law through their coal ash pollution. But DHEC did not take direct action to force a cleanup of the lagoons or the groundwater pollution.

Using the citizen's right to enforce clean water and anti-pollution laws, we represented local conservation organizations and brought suit against both SCE&G and Santee Cooper (two of the three South Carolina utilities) to force cleanup of unlined coal ash lagoons on the Catawba-Wateree River near Columbia and the Waccamaw River at Conway near the coast. In both instances, the courts rejected motions to dismiss filed by the utilities. *Catawba Riverkeeper Foundation, Inc. v. SCE&G*, 2012 WL 1963606 (May 31, 2012; *Winyah Rivers Foundation, Inc. v. S.C. Public Service Authority (Santee Cooper)*, C.A. No. 2012-CP-26-4462 (Horry County Court of Common Pleas) (Dec. 17, 2012).

After prevailing on the motions to dismiss, we entered into settlements with both utilities requiring them to excavate the ash from these unlined river-front pits to safe, dry, lined storage away from the rivers or to appropriately recycle it. In the case of SCE&G, we reached the settlement 8 months after filing suit; we settled with Santee Cooper 17 months after filing suit. Both utilities have committed themselves to clean up all the other unlined coal ash lagoons in their systems.

The Santee Cooper experience is instructive. For a year, Santee Cooper fought our litigation and proposed to leave its coal ash in a swamp in the middle of Conway, South Carolina. On behalf of local citizen groups, we brought actions under state and federal anti-pollution laws. At a public hearing, local

citizens from all walks of life spoke out in favor of cleaning up the ash. The Conway Mayor and City Council adopted a resolution urging Santee Cooper to move the ash. After more than a year of litigation, we entered into a settlement agreement with Santee Cooper for removal of the ash from Conway to safe lined storage or recycling. At the same time, Santee Cooper announced it would clean up every lagoon in its system.

"Santee Cooper describes this change of course as a win-win for the utility and the community:

> Kierspe [a Santee Cooper official] says in addition to the obvious benefit of getting rid of what is currently a toxic byproduct, 'It's a win for the economy, we have several businesses investing as much as $40 million creating jobs for the economy, and it's a win for customers because it's financially the right thing to do and it eliminates a long-term potential problem with the ponds.'

Channel 2 News (Charleston, SC) March 10, 2014.

The removal of the ash from these old lagoons is eliminating a continuing source of pollution and also creating jobs and investment in the community, while protecting the reputations of areas of the Low County that depend upon tourism for significant parts of their economies.

Duke Energy (the third South Carolina utility) owns the remaining set of water-filled lagoons on a South Carolina river, the Saluda River near Anderson and Greenville, South Carolina. After several months of negotiations, in December of 2014 Duke Energy agreed to remove the ash from its lagoons and other storage sites on the Saluda River to dry lined storage away from the River. Earlier in September, we negotiated a settlement with Duke Energy for removal of ash from old storage sites at the facility by agreeing to refrain from bringing suit while Duke Energy considered its options for the full site, and thereafter reached agreement with Duke Energy to clean up all the ash. The ability of citizens groups to bring suit – as they had in S.C. against other utilities and as they had against Duke Energy in N.C. (see

below) – gave local citizens the ability to come to the table to negotiate a solution that works for all concerned.

Thus, through straightforward citizen enforcement of existing anti-pollution laws, we were able to obtain commitments from all three South Carolina utilities to clean up all their riverfront water-filled coal ash lagoons in the state – something the state law enforcement authorities for years had not been willing to do.

B. **North Carolina**

Duke Energy stores coal ash in unlined riverfront pits across North Carolina. Through groundwater testing over several years, it had been established that there was groundwater contamination at many Duke Energy coal ash sites, and inspections showed Duke Energy sites were illegally leaking into rivers and drinking water sources.

Yet, North Carolina's Department of Environment and Natural Resources (DENR) had never taken action against Duke Energy for the cleanup of groundwater contamination and other pollution from these lagoons. Duke Energy insisted upon the status quo – operating unlined coal ash lagoons on the banks of rivers, including the storage of 2.5 million tons of coal ash in earthen lagoons overlooking the drinking water reservoir for 800,000 people in and around Charlotte. Conservationists urged DENR to take action, but no direct enforcement occurred.

In 2013 on behalf of local riverkeepers and other citizen organizations, we issued Notices of Intent to Sue Duke Energy under the federal Clean Water Act for violations of its permits by coal ash pollution at three of its coal-fired plants in North Carolina. In response to our notices (and to block our enforcement actions, see below), DENR for the first time brought enforcement actions against Duke Energy for pollution of rivers and groundwater from its leaking coal ash lagoons. DENR confirmed in pleadings filed under oath that Duke Energy was violating state groundwater laws or the federal Clean Water Act or both at every site where Duke Energy stores

coal ash in North Carolina. Further, it stated, again under oath, that Duke Energy's illegal coal ash pollution "poses a serious danger to the health, safety, and welfare of the people of the State of North Carolina and serious harm to the water resources of the State." *E.g.*, *State of N.C. ex rel. N.C. DENR v. Duke Energy Carolinas, LLC*, 13 cvs 11032 (filed August 6, 2013) at ¶ 204.

In the ensuing months, our Clean Water Act litigation continued; Duke Energy's Dan River coal ash storage lagoons failed, spewing 39,000 tons of coal ash and 24 million gallons of coal ash polluted water into the Dan River; the Associated Press published an expose of the joint efforts of Duke Energy and DENR to frustrate our law enforcement efforts; and a federal criminal grand jury issued subpoenas to Duke Energy and DENR concerning their coal ash practices across the state. In response, in the spring of 2014 Duke Energy announced it would clean up four of its fourteen coal ash storage sites in the state (the three for which we issued Clean Water Act Notices and the Dan River spill site) and would evaluate the remaining ones for cleanup. Later in 2014, the North Carolina legislature passed a statute that requires the cleanup of the same four sites – the four that Duke Energy has committed to clean up – and evaluation of the rest.

Again, as in South Carolina, private citizen enforcement has led to clean ups that government law enforcement had never sought. The four sites slated for cleanup are three locations where direct citizen law enforcement action was taken, and the site of the Dan River spill. Through intervention in the pending DENR enforcement suits and filing of federal Clean Water Act suits, we are representing local citizen groups seeking cleanup of the remaining 10 sites – thereby assuring that local communities have a seat at the table when decisions are made.

C. **Tennessee**

TVA was responsible for the disastrous coal ash spill at Kingston, Tennessee, which dumped over 1 billion gallons of coal ash materials across the Tennessee landscape and has cost TVA over $1 billion. Yet, TVA continues to store coal ash in unlined pits and resists calls to clean up its unlined riverfront coal ash storage.

At its Gallatin Plant on the Cumberland River near Nashville, TVA stores coal ash in unlined pits near the River and has a history of groundwater contamination at the site. Yet, the Tennessee environmental agency (TDEC) had not taken enforcement action against TVA for a cleanup. TVA insisted it has complied with all laws and has refused to move the ash to safe, dry, lined storage.

Representing local citizen groups, we recently send a Notice of Intent under the federal Clean Water Act, setting out TVA's violations of its National Pollution Discharge Elimination System permit at Gallatin. For the first time, in response to our citizen notice, TDEC has filed an enforcement action against TVA for its violations of law in how it stores coal ash at Gallatin.

In this action, which is filed under oath, Tennessee confirms and sets out that TVA indeed is violating and has for years violated Tennessee anti-pollution and clean water laws. According to the verified complaint, TVA is discharging and has been discharging solid waste into Tennessee's groundwater and around the Gallatin Plant, has illegally discharged coal ash pollution into waters, and has violated its NPDES permit. The state agency also sets out, under oath, that the public interest required that action be taken.

These violations did not occur just recently. They had been ongoing for an extended period of time. Yet, the state agency never brought an enforcement action until local citizens exercised their right of citizen law enforcement.

D. **Virginia**

Virginia has had a similar experience, and local groups have had to take law enforcement into their own hands in that state as well. Recently, we have represented local citizens groups in Virginia who are seeking a cleanup of Dominion Power's coal ash storage sites at the Chesapeake Energy Center and at Possum Point. Both notices point out serious issues with coal ash storage at those sites. In both instances, the state agency had not taken action to require a cleanup at those sites, and the Virginia agency has received budget cuts that reduce its ability to take on projects like these.

CONCLUSION

The record is absolutely clear. Without the citizen right to enforce the law, local communities cannot count on state agencies to effectively protect them from illegal, polluting, and dangerous coal ash storage. One significant aspect of EPA's new coal ash rule is that citizens have the power to enforce it. Local citizens must have the ability to enforce this rule if it is going to be effective. State agencies have been reluctant to take action for violations of pre-existing laws, and, in one instance, a federal grand jury is investigating the actions of a state agency with respect to coal ash. If this new rule is going to help local communities to be safe, to protect their economies, and to reduce coal ash pollution of water supplies, citizens must have the right and ability to protect themselves and enforce this rule.

Mr. SHIMKUS. Thank you, sir.

I will now recognize myself for 5 minutes for the first round of questioning.

The first question is for Ms. Johnson.

How would your company make compliance decisions if the Florida Department of Environmental Protection sets requirements that are not exactly the same even if they are more stringent than the final rule?

Ms. JOHNSON. Thank you, Mr. Chairman.

It would be a challenge. Clearly, we would have to comply with both sets of rules and whatever the requirements would be. If one was more stringent than the other, we would look to comply with the stringent rule, except in this case, we would know that there would be the potential of having both regulatory regimes competing with each other for our compliance, not to mention the fact that I think that makes us vulnerable as an operator of a facility to third-party lawsuits that may question which actual regulation is the leading one. So it would be very challenging.

Mr. SHIMKUS. And for Mr. Roewer, in the final rule, because it is quote/unquote "self-implementing," EPA eliminated much of the flexibility of corrective action program as exists under all subtitle D programs. Could you please walk us through what flexibilities were eliminated and what that would mean for closure and corrective action?

Mr. ROEWER. Thank you. There are a few instances where the Agency is contemplating a different approach to allow for a potentially risk-based decision to establish a point of compliance, to establish an alternative groundwater protection standard.

For unlined units to even engage in corrective action and not have to shut down summarily, the Agency recognized that the regulatory oversight from a regulatory agency wouldn't be there under a self-implementing rule—regulatory oversight to ensure that that risk-based decisionmaking is appropriately applied—and backed away from that. And instead we are faced with this self-implementing rule. So they take away a lot of the tools that State regulatory agencies have in prescribing cleanups, in prescribing corrective actions.

Mr. SHIMKUS. Yes, and go back and briefly explain this risk-based decisionmaking, what it is, and how it may be incorporated into a State coal ash program.

Mr. ROEWER. Well, a State could take into account whether there is a receptor downgrading it from the facility. You are seeing a release, but is it in fact presenting a risk to human health and the environment? And they can take that into account when they are making a decision about whether corrective action is needed or what type of correction action—corrective measures must be implemented by the utility.

Mr. SHIMKUS. In your opinion, would EPA be able to approve a State program that incorporated any of the flexibility for corrective action, including a risk-based decisionmaking process?

Mr. ROEWER. The rule is rather clear about what you have to achieve in corrective action. You must meet that standard. If you don't meet that standard, you can, so I would have to answer no. I couldn't see how EPA could say that a State program that incor-

porates that sort of risk-based decisionmaking is the equivalent of the Federal rule.

Mr. SHIMKUS. Thank you.

Mr. Forbeck, as an experienced State regulator yourself, I presume you have spoken with your counterparts in other States. Can you share your initial thoughts on the final rule, in particular the implementation?

Mr. FORBECK. Well, as I testified, we have a real issue with the implementation because we feel it still would be a dual process. And it would be very confusing for the States. They have to decide whether or not, one, they are going to even open up their solid waste management plan, and even if they do, will that really even alleviate the dual regulatory regime? We do not think it will.

Mr. SHIMKUS. And who testified in their opening statement—because we have a big panel—about the 6 months required under the EPA?

Mr. FORBECK. That was ours.

Mr. SHIMKUS. That was yours.

Mr. FORBECK. Right.

Mr. SHIMKUS. And then some States might take 18 months to do their solid waste plan based upon the laws in the States about hearings and notifications and the like.

Mr. FORBECK. That is correct. The issue is it is not just a simple fix, that we open the plan and it is approved. It is a public participation process, which is fine, but that will take some extra time.

Mr. SHIMKUS. And, finally, my last question is for Mr. Easterly. Your written testimony states that the opening and approval of a State solid waste management plan must be completed on an aggressive schedule that Indiana cannot meet. Can you explain why that is and whether you expect that would be a problem other States might have as well? And tell Governor Pence "hi" for us.

Mr. EASTERLY. OK. Yes, other States will have that problem. Some States may or may not have the right authority. Some States, the rules have to go through the legislature before they can actually go into effect.

In my State, I have to publish a first notice with a 30-day comment period that I am going to do a rule; a second notice with the words of the rule in it with another 30-day comment period. Then I have to publish a notice of a hearing in front of the environmental rules board for preliminary adoption; then one for final adoption. Then the attorney general gets days to review it, the Governor gets days to review it, and the secretary of state publishes it. And it takes 18 months.

Mr. SHIMKUS. And I thought we were bad.

So now the Chair recognizes the gentleman from New York, Mr. Tonko, for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair.

And welcome, everyone. Unsafe disposal of coal ash poses very serious risks to human health and to the environment. A number of damage cases cited by EPA in the final rule is more than ample proof that current regulation isn't working for many communities.

In 2009, this subcommittee held a hearing on damage from coal ash disposal. We heard from victims who lost their homes, their businesses, and their health to coal ash contamination. In the time

since that hearing, problems have continued. Hopefully, the implementation of this rule will reduce these events and their costs going forward.

For today, I would like to focus on a recent high-profile damage case and what it can teach us about compliance and about enforcement.

Mr. Holleman, can you tell us a little bit about the Dan River spill?

Mr. HOLLEMAN. Yes, Mr. Tonko. It has been a real tragedy, and how it happened illustrates how State enforcement and utility oversight by itself has not worked. And let me tell you why I say that.

The basic cause is the Dan River site is an old site. Like virtually everyone in North Carolina, you have these old pits. And somebody, in the course of constructing that site, had the bright idea of putting a storm water pipe under one of these coal ash lagoons. Back in the 1980s, Duke had received in its own files—and the State had this—a dam safety report warning them about this problem of having a corrugated metal pipe under a coal ash lagoon. And in subsequent reports, there were constant references to be sure you check this pipe, be sure you check this pipe, be sure you watch what is coming out of this pipe.

Well, instead, this old site, which, unfortunately, was built right on the banks of the Dan River, which is true of all these—most all these facilities, they are right on the banks of rivers, right upstream from a drinking water source—that pipe on Super Bowl Sunday, a year ago, broke, corroded, finally gave way and spewed coal ash and also 24 million gallons of coal ash polluted water into the Dan River.

Subsequently, Duke has said it has done all it can do, and it has removed less than 10 percent of the ash in that river, thereby declaring defeat. In other words, once one of these spills occur, they cannot clean it up.

Now, why were we even in a position that this should happen? Because we were engaging in the foolhardy practice of storing this industrial waste in a riverside lagoon, filled with water, held back by earth that leaked—earthen dikes that leaked with rotting infrastructure. Had that ash, as is happening in South Carolina today as we speak, had that ash instead been stored in a dry state, in a lined landfill like we require for simple municipal garbage, away from the river, this would never have happened.

In other words, these sites are engineered or not engineered to be as dangerous as possible. The shocking thing is, the Dan River site is the smallest coal ash site that Duke has in the State of North Carolina. In that sense, in some odd way, we were fortunate.

Mr. TONKO. Thank you. We have heard from other witnesses on your panel that States are best positioned to enforce coal ash disposal requirements. Do you think States have proven their ability to effectively enforce coal ash rules?

Mr. HOLLEMAN. Well, just take the Dan River for example. The State had never required a cleanup. In fact, believe it or not, 6 months before the spill, in response to a notice a citizen sent, the State was forced to file a lawsuit. Six months beforehand, it stated in writing in a public must filing under oath that Duke was vio-

lating State and Federal clean water laws at that site and that if those things were not corrected, it was a serious threat to public health, safety, and welfare. And not one thing was done in the ensuing 6 months to get the ash moved out of that site. That is one illustration.

Mr. TONKO. Mr. Schaeffer, do you agree with that assessment?

Mr. SCHAEFFER. I do. We have had similar experiences in Pennsylvania. To take an example, the citizens around the Little Blue Run impoundment felt like they couldn't get the time of day——

Mr. SHIMKUS. Turn the microphone on, please.

Mr. SCHAEFFER. They felt like they weren't getting a response from the State and response to their repeated complaints. We filed notice of intent on their behalf to bring a suit. The State turned around, decided the site presented an imminent and substantial endangerment, required its closure and required, we think, a pretty aggressive cleanup and the State did credit citizens for getting that resolved.

Mr. TONKO. Thank you.

Mr. SHIMKUS. The gentleman's time is expired.

The Chair now recognizes Mr. Harper from Mississippi.

Mr. HARPER. Thank you, Mr. Chairman.

I am going to yield my time to the gentleman from West Virginia, Mr. McKinley.

Mr. MCKINLEY. Thank you, Mr. Harper.

I appreciate that. A whole host of subjects here with this panel that we have before us, and one of them, one of the issues that has been dear to us in the panhandle of West Virginia has been the Little Blue Run. We have done—Mr. Schaeffer, despite your comments, we had that, we had the Havens here. We have had people that have experienced that. We want to hear that. We want to make sure that we are sensitive to that. So this panel, this committee had done that and maybe should continue to do that even more, but they were here to testify about what the situations were like, and I thought it was a very moving testimony from their part.

But Little Blue Run is now under your group, Mr. Holleman, I guess the Environmental Integrity Project, or—that is yours? OK. You put out a report that was called, "In Harm's Way: Lack of Federal Coal Ash Regulations Endanger Americans and Their Environment," and that was given to the Pennsylvania because they are the ones primarily responsible for the Little Blue Run. And they did a very exhaustive study because they want to respond.

You know, these allegations of people, these threats going on, they came back and they said, based on the review of the information in this report for this particular facility, DEP of Pennsylvania concludes that the allegations regarding groundwater and surface water contamination are unfounded.

So I want us to be careful that we can come here and make these—you testify to these. There are adequate responses, and there are recourses for it and DEP looked into it. I have pursued this because I think it is said, we need to be careful about that.

I have been in touch with Pennsylvania about their—how they monitored Little Blue, and West Virginia as well, and we see that they levied fines. They have indeed done what they said they were going to do, and that was to enforce the law and the requirements

with it. So I think that it appears to me from their reports and their letters and their correspondence, they are trying to be good stewards of the environment. And they are enforcing that.

So I am just—so I am curious. We passed legislation in the 112th, 113th that dealt with the existing and future impoundments. Lined, unlined, addressing those issues, we included in that language, because I have heard you say it several times here, about siting restrictions or in that language but didn't your group oppose the bill? Either one of you.

Mr. SCHAEFFER. We certainly did and would continue to do that. The siting restrictions in that legislation we don't think were comparable to the rule the EPA adopted.

Mr. MCKINLEY. If I can recover my time. The reason that I raise these issues to you is that——

Mr. SCHAEFFER. I could answer your question if I could get that——

Mr. MCKINLEY. If I could recover my time, please, on it.

Mr. SCHAEFFER. OK.

Mr. MCKINLEY. Is that if we don't pass the legislation, then we stay the way we have been since the 1960s, and that hasn't worked. That is what has caused a lot of these issues. We are trying to find a way to get a resolution, and we are trying to find a solution. Here is a bill. If we have to tweak it or so, but to defeat it, as they did over in the Senate, that wasn't productive. We had a bill. We are going to do it again this year, and we are going to see it, and I hope that people have some concerns about it work with us because we have got to reach certainty.

I heard all the testimony. We have got to find a way to close the door so the people that are making the investment in their respective facilities know that tomorrow they will be able to continue to operate. So it is very important that we pass the legislation to close up these loopholes, close up so many issues that have defined us and made it a negative.

So, with that, I thank you for your testimony. I hope that you will continue to work with us, all of you, the entire panel as we perfect this, if we need to go even further with it. So, with that, I yield back the balance of my time.

Mr. SHIMKUS. The gentleman yields back his time.

Without objection, I ask unanimous consent to allow Mr. Schaeffer to respond for a minute to——

Mr. SCHAEFFER. Thank you.

Mr. SHIMKUS. We kind of abide by rules.

Mr. McKinley gets another 5 more minutes, so we are going to let you interject here before he goes next again.

Mr. SCHAEFFER. I very much appreciate that, Mr. Chairman. I will be quick.

It really is useful to compare what Pennsylvania said in its complaint in 2012 about the condition of that site to what they told EPA the condition of that site was during the rulemaking process. It is really kind of different. You will see very different statements. You will the State saying the sites leaked. You will see them saying that the company has—their practice has presented imminent and substantial danger to the environment. You don't see any of that coming through in the testimony to EPA.

The enforcement action the State took—and I just don't want this point to get lost—came after the citizens filed a notice of their intent to sue the company for those violations, not before. It came after. Now, Pennsylvania, if they would like to tell you they were going to do it anyway, I would be happy to hear that. That is great, but we didn't get that feeling.

Mr. SHIMKUS. Yes,fortunately, you have got 17 seconds left.

We will allow Mr. Forbeck from the great State, the Commonwealth of Pennsylvania, to respond.

Mr. FORBECK. Yes. Actually, I am very family with the Little Blue Run. This is for me—for Pennsylvania. I actually signed the consent decree going through the procedures to close this facility.

We actually had been looking at that site long before the suit was filed. And if anything, that is what is the beauty of the system that we have in place is that we have groundwater monitoring; we have air monitoring; we have all these factors that are in place that we are constantly looking at a facility. We are constantly looking at the compliance of that, and, therefore, it is a moving target. At one point, it may be one thing; at another in the future, it may be another. But we have those monitoring points in place that can tell that.

So, yes, we actually had started enforcement procedures before that, and because of this and the issues that we found, we are—they are actually closing the largest coal combustion impoundment in the United States in an environmentally safe manner.

Mr. SHIMKUS. Thank you very much.

Now, because of the magic of our rules, the Chair recognize the gentleman from West Virginia.

Are you done?

Mr. MCKINLEY. I am done. Thank you.

Mr. SHIMKUS. OK. Thank you.

The Chair now recognizes the gentleman from North Dakota, Mr. Cramer for 5 minutes.

Mr. CRAMER. Thank you, Mr. Chairman.

And thank you all of the panelists. I just want to—I want to get to one very specific point. To me, it is obvious that the patchwork, the inconsistency potential, the uncertainty that would be created by self-implementation and enforcement by courts, that is a problem. That is a problem for me on lots of fronts. But I would like at least the two regulators to speak to the issue.

If we were to tighten that up, put State primacy in place, as it is in so many areas like this, and codify, you know, codify the language in the EPA and certainly the definition of nonhazardous, do the citizens of your States or any of our States lose their ability to appeal, to attend the hearings, to complain? I mean, it is sort of like we are talking about either citizens have rights or the bureaucracy has rights and the two can't go hand in hand because, as a former regulator myself, frankly, we heard more from citizens in these hearings than we heard from any other person. To me, the local and State level is where you get more citizen interaction, not less, so could you—somebody elaborate on that for me, and then if there is time left, I certainly would welcome you as well to comment on that.

Mr. FORBECK. As far as ASTSWMO and our members, we feel—we are all in favor of minimum Federal standards. We feel that the codification of it and the certainty of it is the key point that was missing in all this. No, we do not think that citizens will lose their ability to have public forum or further appealing of decisions. No, we feel that will continue.

Mr. EASTERLY. And the thing that would help by having a Federal law—and certainly the EPA rules will help—is that there are a number of States, luckily not including my own, where it is not allowed to have a more stringent than the regulation in the Federal Government, so having this Federal rule and then having a law that says "you must do this," I think, will help a lot so that those States will have this program implemented at the State level.

And you are right, at the State level, we have people on the ground, in the field for the citizens to talk to, and they certainly can come, in our case, to Indianapolis, and they have legislators out there, and they do have a lot of input.

Mr. CRAMER. So, Mr. Schaeffer and Mr. Holleman, same question, because it is a concern to me——

Mr. HOLLEMAN. Right.

Mr. CRAMER [continuing]. Frankly, what you raise. I just want to ensure that what we are doing would not in any way negate citizens access.

Mr. HOLLEMAN. It is a good—is my microphone on? It is a good question, but we are really talking about two entirely different things. Citizens have a right—have the right under Federal and State statutes to comment on, to be present at hearings, as you saw as a State commissioner, in determining whether a permit is put in place or what regulation is adopted. That is true. That is not what we are talking about.

We are talking about once your commission, or in our State environmental commissions, put in place a permit or regulation and then the utility violates it. After the public has had input, they just violate it; they don't comply. And then the State agency, for whatever reason, which we have seen repeatedly, refuses to enforce the very permits, laws, and regulations that had been produced through this public comment period. So it makes it pointless.

You go comment. You go through this process, which is important, as you say, but then the very State government that put this in place refuses to enforce what the citizens participated in creating.

In fact, in our State, our public service commission, which held hearings on this topic, one of the commissioners expressed shock that Duke had not yet moved its ash from one of the sites that was present there and was not complying with the permit and regs that our State regulatory agency put in place.

Mr. CRAMER. So did this shocked commissioner have any opportunity to do something about it? In other words——

Mr. HOLLEMAN. No, he did not.

Mr. CRAMER [continuing]. We have State legislators, I assume they are elected. Governors are elected. In the case of North Dakota, the public service commission is elected. So I am just seeing that these things, including enforcement, being closer to the people,

seems to me to be better for the people than removing it from the people.

Mr. HOLLEMAN. Well, no, it is in the hands of the people. The people who are taking this enforcement action are local community people going to their local State or local Federal courthouse. These are people that live next door to you and me. These are people in the community. They have to be to even bring this suit.

Mr. CRAMER. I don't see this law—or this principle being—violating that——

Mr. HOLLEMAN. As long as you all don't fool with or mess with the citizen's right to sue under RCRA, we still have that right to sue. And the citizens have the right to go forward and see that the law is enforced, but if you were to affect that, you are taking rights away from the people and saying they belong only to a bureaucracy which may or may not act for political——

Mr. SHIMKUS. And the gentleman's time is expired.

I just want to assure people that there is no discussion even in the last bill of alleviating or taking the citizen's right to sue out of RCRA, so you could rest comfortably in that.

Votes are being called. We still have one Member who wants to ask some questions, so the Chair will——

Mr. LATTA. Well——

Mr. SHIMKUS [continuing]. Recognize Mr. Latta for 5 minutes.

Mr. LATTA. I will be brief, but, again, thanks for the panel and your patience, especially when we have a different series of votes today.

If I could just kind of go down the line real quickly with a few of you. You know, there has been some discredited discussion here today as to the implementation, the uncertainty as to certain things that have to be done. I am just kind of curious, starting with Mr. Easterly. How much input did you have with the EPA when they were implementing the rule?

Mr. EASTERLY. They are not implementing yet, but when they——

Mr. LATTA. I am sorry. When they were formulating.

Mr. EASTERLY. We sent in comments. Certainly, at ECOS, we had a number of discussions with them of what we would like to see. And some of it is in, and some of it is not.

Mr. LATTA. OK. When you say "some of it is in and some of it is not," what percentage would that be? Just kind of ballpark.

Mr. EASTERLY. Well, we would like to have subtitle D. We, along with other people, are disappointed at the way it is being implemented.

Mr. LATTA. OK.

Mr. FORBECK. Well, at ASTSWMO, we shared very similar feelings. We were involved heavily with the correspondence and comments to EPA about the rule, and as was just said, we do appreciate B and D. It is the implementation under the solid waste management plan that was our concern. It does not have certainty that we wanted to see.

Mr. LATTA. OK. Just switching gears real quick. The question again that I had asked the administrator before he finished up his testimony today, on the certainty, especially on the beneficial use, Ms. Johnson, especially you in your testimony, especially with the

company that is really located near you to make the board, do you think there is certainty out there right now, and do you think that there could be changes in the future from the EPA?

Ms. JOHNSON. I believe, based on what EPA has stated, that they clearly have the opportunity to revisit their determination on nonhazardous versus hazardous for CCRs, and that creates uncertainty. And I will tell you, in my experience, that for the beneficial use community, for our plant that provides a significant portion of our CCRs to the beneficial use community, that uncertainty is a problem, and a later designation or determination of hazardous is going to put that beneficial use process at risk.

Mr. LATTA. Mr. Adams.

Mr. ADAMS. I think in terms of the effect on the market so far, it is too early to tell if there has been a positive effect. We have heard many comments that people are happy that EPA has gone with subtitle D, but it is troubling to have that language in the preamble that they may want to go back and revisit the Bevill exemption. Again, they said it in 1993; they said it in the year 2000; they now said it again that coal ash didn't warrant hazardous waste management. But then they come back and say, well, we might need to revisit again. We need action by Congress to put an end to that chain of events.

Mr. LATTA. Mr. Easterly, how about you on the whole issue of the beneficial use and the certainty?

Mr. EASTERLY. I personally don't think it is certain when you say that you are going to reopen it. In history, EPA has changed, for example, the maximum contaminant levels in drinking water, which since the hazardous waste leachate test is 100 times that standard, suddenly makes something that used to be nonhazardous into hazardous. And I think that can change at any time in the future, and all businesses have to asses that risk and what could happen to them.

Mr. LATTA. And just a little off topic, Mr. Easterly—because I border Indiana, I have about halfway down—what is Indiana's percentage of coal for your electricity?

Mr. EASTERLY. It is going down, but I think it is still over 85 percent. It might be over 90.

Mr. LATTA. I remember it used to be around 90 percent in Ohio, especially in my area, it is around 73 percent.

And, with that, Mr. Chairman, in the interest of time, I yield back.

Mr. SHIMKUS. I thank the gentleman.

And before I adjourn, I need to ask unanimous consent to accept a letter by the Prairie River Network, located in Champaign, Illinois, and accompanying attachments from local communities and resolutions.

Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. SHIMKUS. And I want to thank you all for coming. Great hearing. Look forward to working with you as we move forward, and this hearing is adjourned.

[Whereupon, at 12:54 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

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David Gottfried
Michael Italiano
S. Richard Fedrizzi

22 January 2015

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Energy & Commerce Committee
United States House of Representatives

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Energy & Commerce Committee
United States House of Representatives

Subject: Hearing on "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"

Dear Hon. Shimkus and Hon. Tonko,

The U.S. Green Building Council (USGBC) is a nonprofit organization with more than 12,000 member companies and organizations, and 76 chapters. USGBC first established the Leadership in Energy and Environmental Design (LEED©) rating system in 1998. The LEED system is intended as a leadership standard, and plays a critical role in advancing U.S. building technology, from the supply chain through operations. Over the past 15 years, leaders in both the private and public sectors have voluntarily decided to use LEED to help ensure better building performance across energy, water and other environmental indicators. Today, 88 of the Fortune 100 are using LEED, along with more than 30 states, 400 localities, and federal agencies.

LEED encourages leadership practices in building construction and operations. Relevant here, LEED awards credits for qualifying use of recycled content building materials. LEED's credits thus encourage concrete made with recycled fly ash as a substitute for Portland cement. LEED also encourages building-scale and materials-scale life cycle impact reduction. Here, we note that the use of fly ash rather than Portland cement has a significant life cycle benefit in reducing carbon emissions, by avoiding the large energy input needed to manufacture Portland cement.

An issue has been raised about whether EPA's final rule on disposal of coal combustion could inadvertently have a negative impact on current beneficial uses of these materials, by imparting a stigma. We wish the Subcommittee to be aware that from the vantage point of the USGBC, our intent is to continue to support beneficial use of fly ash where appropriate as determined by our committee process and in alignment with EPA regulations as to allowed beneficial uses. We support EPA's rule and support beneficial

use of fly ash as a supplementary cementitious material and replacement for Portland cement. We encourage companies to ensure that all conditions are being met for fly ash to qualify for beneficial reuse, so that there are no improper uses of these materials. We also encourage companies to follow best practices for storage of fly ash prior to beneficial reuse.

In sum, the use of coal ash in concrete, an encapsulated use, has a significant life cycle benefit in reducing carbon emissions. The recycled material credit in LEED v2009 will continue to recognize fly ash as recycled material in encapsulated uses, primarily concrete. As our latest version of the rating system, LEED v4, is implemented in the coming years, recycled fly ash in concrete will fall under the credit for raw materials sourcing, and may also be rewarded under new credits for building life cycle assessment and environmental product declarations. We believe the continued award of LEED credits for this recycled material, in alignment with EPA regulations as to allowed beneficial uses, will provide market assurance.

Please feel free to call me at [redacted] if you have any questions.

Sincerely,

Elizabeth R. Beardsley, P.E.
Senior Policy Counsel

prairieriversnetwork

PRAIRIE RIVERS NETWORK
1902 Fox Drive, Suite G
Champaign, Illinois 61820
217 / 344-2371
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January 22, 2015

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515-6115

Re: Subcommittee Hearing, "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities."

Dear Chairman Shimkus and Ranking Member Tonko:

I am writing concerning the hearing to be held by the Subcommittee on Environment and the Economy on January 22, 2015, entitled "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities."

We have previously shared with you our grave concerns regarding the health and safety of Illinois communities and the risks posed to the State's waterways by dangerous coal ash disposal. For your convenience, I have attached our letter of August 2014, signed by 18 Illinois organizations, which requests a hearing in your subcommittee on the threats posed by coal ash. (Attachment 1 to this letter).

In light of Thursday's hearing, I would also like to share with you the following resolutions passed by the Vermilion County Board, Soil & Water Conservation District, Vermilion County Conservation District, and Vermilion County Conservation Foundation, and the Lake Vermilion Water Quality Coalition (Attachments 2-6). Each resolution passed unanimously, supported with the intent of illustrating broad community concern for local resources that stand to be damaged by ongoing coal ash pollution and a potential catastrophic breach in Illinois' 15th District.

The growing list of damage cases from improperly disposed coal combustion waste has illustrated that unchecked and poorly monitored disposal is an issue worthy of national concern.

In Illinois, the problem is particularly severe. Illinois is home to over 90 coal ash pits, many sited in places that are unsuitable and dangerous for the disposal of toxic waste. Fifty-six ash pits were built over groundwater recharge areas, 62 over shallow aquifers, and 9 were constructed over wetlands. In 2009, the Illinois EPA investigated 22 of the 24 coal-fired power plant sites in Illinois and found groundwater contamination from coal ash pollution at all 22 sites.

Coal ash contains heavy metals like mercury, arsenic, selenium, chromium and cadmium which can cause cancer and brain damage in humans and are harmful to fish and wildlife. Illinois citizens and businesses that rely on the state's water supplies are now facing risks from unstable dams precariously holding back thousands of tons of coal ash waste. In fact, after a series of structural integrity assessments of 38 Illinois coal ash pits, the EPA rated 16 in the state in "poor" condition.

The risks presented by improper coal ash disposal in Illinois' are incontrovertible, and communities across the state have worked to communicate these concerns – for the sake of human health, aquatic life, and their livelihoods.

We urge you to consider these concerns, and we request that your committee refrain from advancing any legislation that weakens the final EPA rule. Such legislation would increase the risk to health and the environment from coal ash in Illinois and throughout the nation.

Respectfully,



Glynnis Collins
Executive Director

Attachment 1. Letter to Chairman Shimkus Re: Request for House Subcommittee Hearing on Coal Ash Ponds
Attachment 2. Vermilion County Board Resolution
Attachment 3. Vermilion County Soil & Water Conservation District Resolution
Attachment 4. Vermilion County Conservation District Resolution
Attachment 5. Vermilion County Conservation Foundation Resolution
Attachment 6. Lake Vermilion Water Quality Coalition Resolution

prairieriversnetwork

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August 4, 2014

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Re: Request for House Subcommittee Hearing on Coal Ash Ponds

Dear Chairman Shimkus:

The undersigned 18 Illinois groups are writing to express significant concern about the severe threat to public safety, health and the environment posed by impoundments containing toxic coal ash. Six months ago an earthen dam impounding more than a million tons of coal ash failed at Duke Energy's Dan River plant in North Carolina, resulting in 140 thousand tons of coal ash and wastewater fouling the Dan River. Toxic coal ash contaminated the water and sediment of the Dan River for 70 miles, and despite a cleanup deemed "complete" by Duke Energy, 94 percent of the coal ash still resides in the river. We believe that unsafe coal ash ponds are similarly an imminent and significant threat in Illinois. Therefore we request that the Subcommittee on Environment and the Economy hold a hearing as soon as possible to ensure that the U.S. Environmental Protection Agency is doing everything possible to effectively address this threat to American communities nationwide.

The threat from coal ash ponds is indeed a national problem; the EPA has found that there are more than a thousand ponds at coal-fired power plants throughout the United States. Nevertheless, the problem is particularly severe in your home state. Illinois is home to 24 coal-fired power plants, many of which were built adjacent to rivers or over groundwater aquifers in order to meet their enormous water needs. As a result, 91 coal ash disposal ponds were built in places that are unsuitable and dangerous for the disposal of toxic waste. Fifty-six ash ponds were built over groundwater recharge areas, 62 over shallow aquifers, and 9 were constructed over wetlands.

These 91 coal ash ponds contain hundreds of millions of tons of toxic coal ash, the waste left over from burning coal, which contains arsenic, chromium, lead, mercury, and a range of harmful heavy metals and hazardous pollutants. When these pollutants enter our drinking water, rivers and streams they harm human health, aquatic life and our economy.

Almost all of the coal ash ponds in Illinois are unlined, allowing toxic contaminants to seep into the water systems below. Recent state-required groundwater monitoring has confirmed that coal ash dumps are leaking at every site in the state. To make matters worse, these dumps keep growing as Illinois coal plants produce 4.4 million tons of ash each year. Illinois also serves as a dumping ground for coal ash from at least six other states, in part because of our weak ash disposal rules.

While many of these coal ash pits present threats of slow but inevitable discharge into water systems, several hold the potential for catastrophic failure. For example, the retired Dynegy Vermilion Power Station hosts three waste dumps in the floodplain of the Middle Fork of the Vermilion River. Two of the pits were built without liners and have begun to contaminate adjacent groundwater. The banks of the impoundment are also vulnerable to flooding and erosion of the river, threatening to unleash 3 million cubic yards of coal ash downstream.

In fact, in a series of structural integrity assessments of 38 Illinois coal ash impoundments, the EPA rated 16 of the 38 dams impounding coal ash in "poor" condition. Some risk the erosional forces of nearby rivers. Others were built over mine voids, where subsidence could compromise stability. Perhaps of greatest concern, several major facilities with poor ratings lie upstream of community drinking water supplies. When contaminants like arsenic, mercury, lead, cadmium, and chromium enter drinking water, they can cause substantial damage to the nervous system and other organs.

Illinois communities like Marion, Joliet, Venice, Oakwood, Havana, Alton, Powerton, Hennepin, Hutsonville, Coffeen, Wood River, and Canton not only face substantial dangers to human health and environmental stability, but economic damage as well. It is estimated that the Dan River spill in North Carolina caused at least $70 million in damage to fish, wildlife and the local economy. The Duke Energy spill that devastated the Dan River involved an ash pit storing 155 million gallons of waste. Pits several times this size are scattered across Illinois – including the Dynegy Vermilion plant located in your home district. For many, it is not a question of "if" storage pits will fail, but "when." This is an issue our regulators and legislators can no long afford to ignore.

In sum, the nation faces an imminent hazard from coal ash ponds, both active and retired, across the nation. We believe it is your responsibility to ensure that your constituents and the nation are safe from preventable coal ash disasters. We believe a subcommittee hearing is essential for the purposes of learning how the EPA will address the imminent threat posed by coal ash impoundments, for questioning why Duke Energy did not perform a complete cleanup, and for hearing from affected communities how these dangerous ponds harm their health, environment and the economic well-being.

Thank you in advance for consideration of this critical request. We look forward to your response.

Respectfully,

Prairie Rivers Network
Faith in Place
Illinois Chapter Sierra Club
Illinois Environmental Council

Eco-Justice Collaborative
Central Illinois Healthy Community Alliance
Global Warming Solutions Group of Central Illinois
Peoria Families Against Toxic Waste
University of Illinois Beyond Coal
Justice for Rocky Branch
Shawnee Hills and Hollers
Citizens Against Ruining the Environment
Canton Area Citizens for Environmental Issues
Stand Up to Coal
Central Illinois Chapter of the Interfaith Alliance
Shawnee Group Sierra Club
Prairie Group Sierra Club
Citizens Against Longwall Mining

IIC-1

Resolution

Re: Fly Ash Issue In Vermilion County

WHEREAS, the County of Vermilion recognizes coal as a legitimate energy resource and that it has played a large part in the economic development of this and other counties; and

WHEREAS, it has nonetheless been found through more current research that the byproducts of coal use, particularly fly ash, has the potential for causing current and future damage to important resources of Vermilion County such as the Middle Fork River; and

WHEREAS, such concerns may not have been known at the time the fly ash was so placed and when it's placement was allowed under current State law; and

WHEREAS, the river system is used for wildlife viewing, hiking, paddling, angling, hunting and photography, providing enjoyment and economic value and business use; and

WHEREAS, the County of Vermilion is concerned that the plan for dealing with the fly ash currently on site and elsewhere may not resolve the future needs, both business and recreational, and concerns of citizens, particularly given the experience of Vermilion County with fly ash issues in the past; and

WHEREAS, the Illinois Pollution Control Board now has the authority to act upon current information and concerns and establish best practices for dealing with fly ash now and into the future. Vermilion County strongly supports effective rules for the benefit of its citizens.

BE IT THEREFORE RESOLVED THAT the County of Vermilion encourages and requests that any plan for the disposal of fly ash, particularly along and in water areas, be based upon the best scientific practices that will answer current and future citizen and business concerns for the vitality of the Middle Fork tourist area as well as the concerns of residents who may live close to or in areas affected by such fly ash and that any such rule address the water safety needs of residents and that the producers of fly ash bear the cost of removal or protection.

11C-2

Page 2: Fly Ash Issue In Vermilion County

PRESENTED, APPROVED, AND RESOLVED by the County Board of Vermilion County, Illinois at its May 13, 2014, A.D. meeting.

Dated this 13th day of May, 2014 A.D.

AYE ___ NAY___ ABSENT ____

_____
Vermilion County Board Chairman

ATTEST: _____
Clerk of the County Board

_____
Approved to Form: State's Attorney

Res: _____

Rick Kentner
Chairman

Neil Andrews
Vice Chairman

Robert Mathis
Secretary/Treasurer

Dwight Bohlen
Director

Chris Elliott
Director

Don Dice
Associate Director

Kevin Green
Associate Director

John Maudlin
Associate Director

May 8, 2014

Re: Coal Ash Resolution

To Whom It May Concern,

We, the board of directors of the Vermilion County Soil & Water Conservation District do support the proposal of removing coal ash from the three Dynegy Midwest Generation storage pits at the Vermilion facility. We also support the relocation of the contaminants to a lined dry waste management unit.

We believe capping the ponds is only a temporary measure and our concern is the long term effects of the coal ash seeping into the Middle Fork River.

We propose that a comprehensive plan be created for the responsible closure and clean-up of the Vermilion facility and that the financial burden be placed upon Dynegy Midwest Generation, L.L.C. and not upon the taxpayers of Vermilion County.

Our mission statement states our task as the board of directors for the Vermilion County Soil & Water Conservation District is to provide for the conservation of the soil, soil resources, water and water resources of the county; to provide for the control and prevention of soil erosion; to provide for the prevention of air and water pollution and to provide for the prevention of erosion, floodwater and sediment damages. Our responsibility is to protect our natural resources of Vermilion County.

The boards of directors is requesting that the Illinois Environmental Protection Agency and Illinois Department of Natural Resources do not approve a closure plan for the Dynegy Midwest Generation Vermilion facility that does not sufficiently address concerns of stability and pollution of groundwater and surface water.

Sincerely,

[redacted]

Richard W. Kentner
Chairman of the Board

1905-A U.S. Route 150 Danville, Illinois 61832-5396 Phone: (217) 442-8511 Fax: (217) 442-6998

Vermilion County Conservation District
Headquarters, Kennekuk County Park
Danville, Illinois

Resolution 14-1

Concerns of the Coal Ash Storage Pits Bordering the Middle Fork National Scenic River in Vermilion County

WHEREAS, the Vermilion County Conservation District maintains a border with the Middle Fork National Scenic River, the only such river designation in Illinois, and thus is concerned over the potential of pollution by coal fly ash in the Middle Fork National Scenic River; and

WHEREAS, the coal fly ash is present in storage pits at the Dynegy Midwest Generation, L.L.C. Vermilion facility, that has been closed since 2011 and that risks of pollution remain because of lack of structural integrity; and

WHEREAS, the river system is used for wildlife observation, canoeing, kayaking, floating, fishing, hiking, horseback riding, hunting, picnicking, nature photography and other nature-related enjoyment; and

WHEREAS, the river system supports a diverse range of threatened and endangered species, where twenty-four species are officially identified as state and federally threatened or endangered such as the blue breast darter, northern slippershell mussel, creek heelsplitter mussel, and the recently re-located northern riffleshell and clubshell mussels from the Allegheny River in Pennsylvania, chosen because of the requirement of high water quality found in this river; and

WHEREAS, the Illinois Environmental Protection Agency has proposed rules to the Illinois Pollution Control Board to address coal ash issues at power plant sites to establish criteria, requirements, and standards for preventive response or corrective action as deemed necessary to protect river quality; and

WHEREAS, the mission statement of the Vermilion County Conservation District is "to assure our people permanent access to their outdoor heritage", thus the District strongly supports rules for the benefit of its citizens.

BE IT THEREFORE RESOLVED THAT the Vermilion County Conservation District requests that the Illinois Pollution Control Board should consider implementation of rules that will provide greater protection of water resources threatened by coal ash disposal; and

BE IT FURTHER RESOLVED that the Illinois Environmental Protection Agency and the Illinois Department of Natural Resources do not approve a closure plan of the Dynegy Midwest Generation Vermilion facility until the concerns of the potential pollution of groundwater and surface water are addressed.

Adopted this 21st day of May, 2014.

ATTEST:

[redacted]

Perry A. Jaynes
Secretary
Vermilion County Conservation District

[redacted]

Brett K. Little
President
Vermilion County Conservation District

Vermilion County Conservation Foundation
Forest Glen Preserve
Westville, Illinois

Resolution

Concerns of the Coal Ash Storage Pits Bordering the Middle Fork National Scenic River in Vermilion County.

WHEREAS, the Vermilion County Conservation Foundation supports conservation efforts in Vermilion County, and the Middle Fork National Scenic River lies within the boundary of Vermilion County; and

WHEREAS, the coal fly ash occurs in storage pits at the Dynegy Midwest Generation, L.L.C. Vermilion Facility, which has been non-operational since 2011 and that these storage pits lack structural integrity which causes great risk of polluting the Middle Fork National Scenic River: and

WHEREAS, this river system supports a diverse population of flora and fauna which were major considerations to receive this national scenic river designation; and

WHEREAS, the Environmental Protection Agency has propose rules to the Illinois Pollution Control Board to address coal ash issues at power plant sites to establish criteria, requirements, and standards for preventative response or corrective action as deemed necessary to protect river quality.

BE IT THEREFORE RESOLVED THAT the Vermilion County Conservation Foundation requests that the Illinois Pollution Control Board should consider implementation of rules that will provide great protection of water resources threatened by coal ash disposal; and

BE IT FURTHER RESOLVED that the Illinois Environmental Protection Agency and the Illinois Department of Natural Resources do not approve a closure plan of the Dynegy Midwest Generation Vermilion facility until the concerns of the potential pollution of groundwater and surface water are addressed.

Adopted this 13th day of June, 2014.

ATTEST:

Cheryl Vergin
Secretary
Vermilion County Conservation
Foundation

Gordon Thoennes
Chairman
Vermilion County Conservation
Foundation

Lake Vermilion Water Quality Coalition
Farm Bureau
1905 A US Rt. 150
Danville, IL 61832

Resolution 14-1

Concerns of the Coal Ash Storage Pits Bordering the Middle Fork National Scenic River in Vermilion County.

WHEREAS, the Lake Vermilion Water Quality Coalition was established as an education committee made up of local government organizations, corporations, and private individuals, who have a vested interest in water quality in Vermilion County; and

WHEREAS, the North Fork, Salt Fork, and the Middle Fork National Scenic River are tributaries of the Vermilion River and are essential to the area's water supply and recreational opportunities. And, the river system is used for wildlife observation, canoeing, kayaking, floating, fishing, hiking, horseback riding, hunting, picnicking, nature photography, and other nature related enjoyment; and

WHEREAS, the coal fly ash is present in storage pits at the Dynegy Midwest Generation, L.L.C. Vermilion facility, that has been closed since 2011 and that risks of pollution remain because of lack of structural integrity; and

WHEREAS, the Illinois Environmental Protection Agency has proposed rules to the Illinois Pollution Control Board to address coal ash issues at power plant sites to establish criteria, requirements, and standards for preventive response or corrective action as deemed necessary to protect river quality.

BE IT THEREFORE RESOLVED that the Lake Vermilion Water Quality Coalition requests that the Illinois Pollution Control Board should consider implementation of rules that will provide greater protection of water resources threatened by coal ash disposal; and

BE IT FURTHER RESOLVED that the Illinois Environmental Protection Agency and the Illinois Department of Natural Resources do not approve a closure plan of the Dynegy Midwest Generation Vermilion facility until the concerns of the potential pollution of groundwater and surface water are addressed.

Adopted this 28th day of August, 2014.

ATTEST [redacted]

Jon Felix
Secretary
Lake Vermilion Water Quality Coalition

[redacted]

Ken Konsis
President
Lake Vermilion Water Quality Coalition



American
Forest & Paper
Association

Statement

House Committee on Energy and Commerce
Subcommittee on Environment and the Economy

EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities
January 22, 2015

Introduction

The American Forest & Paper Association (AF&PA) is pleased to submit this written statement to the House Energy and Commerce Committee concerning the regulation of coal combustion residuals (CCRs) under the Resource Conservation and Recovery Act (RCRA).

The American Forest & Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 5 percent of the total U.S. manufacturing GDP. Industry companies produce about $175 billion in products annually and employ nearly 900,000 men and women, exceeding employment levels in the automotive, chemicals and plastics industries. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

According to the Energy Information Administration, the pulp and paper industry uses approximately one percent of the coal burned in the United States to generate electricity and steam. As a result, we are greatly interested in the management of CCRs.

Non-Hazardous Waste Management

AF&PA strongly supported the decisions EPA made in both 1993 and 2000 that CCRs should be regulated under Subtitle D – the nonhazardous waste provisions – of RCRA, and AF&PA submitted comments to EPA supporting the same approach to CCR management during the public comment period on the current rule signed by Administrator McCarthy on December 19, 2014. The pulp and paper industry was pleased to see that EPA retained that management approach in the rule.

Focus on the Electric Utility Sector

EPA also explicitly acknowledged in its new regulations that CCR from the manufacturing sector should not be included in its new rulemaking. EPA recognized

that 95 percent of all coal used in the U.S. – and thus the generation of coal combustion residuals -- is by the electric utilities. By regulating only the residuals from the electric utilities, EPA was addressing the overwhelming bulk of CCRs. AF&PA strongly supports that decision.

Aside from the relatively small percentage of CCRs generated by the pulp and paper industry, our management of coal ash differs from that of the electric utilities. For example:

- Pulp and paper mill CCR management units differ from those in the electric utility sector. No mill employs any surface impoundment for permanent storage of ash in wet form – which is the cause of many of the challenges faced by management of electric utility CCRs.
- Pulp and paper mill CCR management units are significantly smaller than those in the utility sector. The largest units at pulp and paper mills are less than one tenth the size of those at electric utilities.
- Most pulp and paper mills burn a wide variety of fuels in addition to coal. As a result, those mills co-manage coal ash with residuals generated from other fuels, particularly biomass.

It is, therefore, appropriate for any legislation developed regarding coal combustion residuals to focus similarly on the electric utility sector.

Reuse of CCRs

A number of AF&PA members manufacture the paper that covers wall board used in construction of homes and other buildings. We have been very supportive of the reuse of CCRs as part of the inner layer of these products. One of our concerns with EPA's initial proposed regulation of CCRs was that if they were considered hazardous waste, the reuse of CCRs in gypsum board would be significantly reduced – if not eliminated – because of the perceived risk of placing a "hazardous" material in a product used in homes and offices. Based on its analysis of data and other information in the record, EPA ultimately recognized this problem and has generally addressed it with the current regulation of CCRs as non-hazardous materials.

AF&PA believes that reuse and recycling of CCRs should continue to be an important part of management of these materials. Any legislation that may be developed should continue to encourage the reuse and recycling of CCRs as their optimal use.

Conclusion

AF&PA continues to support appropriate regulation of the management of CCRs. Any regulation or legislation should recognize that these materials do not warrant regulation as hazardous wastes; focus on the largest generators, and should encourage reuse and recycling.

For more information, please contact Elizabeth Bartheld, Vice President of Government Affairs, 202-463-2599

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

February 13, 2015

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Assistant Administrator Stanislaus:

Thank you for appearing before the Subcommittee on Environment and the Economy on Thursday, January 22, 2015, to testify at the hearing entitled "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

Also attached are Member requests made during the hearing. The format of your responses to these requests should follow the same format as your responses to the additional questions for the record.

To facilitate the printing of the hearing record, please respond to these questions and requests with a transmittal letter by the close of business on Monday, March 2, 2015. Your responses should be mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Nick.Abraham@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment and the Economy

Attachments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 11 2015

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable John Shimkus
Chairman
Subcommittee on Environment and Economy
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Subcommittee's Questions for the Record following the January 22, 2015, hearing entitled "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities."

I hope this information is helpful to you and the members of the Subcommittee. If you have further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

[redacted]

Laura Vaught
Associate Administrator

Enclosures

U.S. Environmental Protection Agency
Responses to Questions for the Record
from the
House Energy and Commerce Committee
Subcommittee on Environment and the Economy Hearing
January 22, 2015

The Honorable John Shimkus

1. **According to the preamble of the final rule, EPA is "strongly encouraging" States to incorporate the requirements in the final rule by opening up their solid waste management plans.**

   a. **How many States has EPA talked to about opening/revising their Solid Waste Management Plan to incorporate the final rule?**

   Answer: The EPA does not have definitive information on the number of states that will or will not revise their solid waste management plans (SWMPs). The EPA is reaching out to all of the states with facilities that handle coal ash and has established a working group with states to address SWMPs and rule implementation. We are working through both our regional network and through collaboration with the Association of State and Territorial Solid Waste Management Officials (ASTSWMO). During our early discussions, states have told the EPA a variety of things:

   - Some states have indicated that they do plan to revise their SWMPs to incorporate CCR requirements;
   - Some have indicated that they intend to discuss revising their SWMPs with stakeholders (e.g., the power generation industry) and their public service commissions; They will use information from these discussions to help inform their decision;
   - Some states have indicated that they do not intend to develop new or revised SWMPs. This is because they do not have enough facilities to make revising their SWMPs worth the investment or the state does not have an existing SWMP.

   i. **How many States have indicated willingness to revise their plans to incorporate the final rule?**

   ii. **If States have indicated they are not willing to open and revise their solid waste management plans, please provide details regarding why they are unwilling to revise the plans.**

   b. **Please explain, in detail, the process EPA plans to follow regarding opening and approving State Solid Waste Management Plans to include coal ash, including:**

   i. **How long does EPA anticipate it will take to approve State plans?**

   Answer: The EPA's CFR Part 256 regulations state that the EPA has six months from the time of the submittal of the revised plan to either approve or disapprove SWMPs.

ii. **Please describe in detail the process that will be followed for approving the State plans**

Answer: The EPA has been working to develop materials and an efficient process (consistent with the requirements of the CFR Part 256 regulations) for the review/approval of state plans. The agency has developed a checklist of relevant sections of 40 CFR 256 (Guidelines for the Development & Implementation of State Solid Waste Management Plans) that states will be able to consult.

The EPA will review the state's plan to determine how it intends to regulate CCR facilities in the state. The EPA has also developed a checklist of the technical requirements included in the CCR final rule that will be available for the states to consult in developing their revised plans. In order to approve a revised state SWMP, the EPA must, among other things, determine that the state plan provides enforceable regulatory requirements for the closing or upgrading of CCR disposal facilities that constitute open dumps. If the state SWMP incorporates the federal requirements verbatim, it will be straightforward to approve. If the state requirements for CCR facilities are different from the federal regulations, the EPA will compare them and determine if the alternative requirements are at least as protective of public health and the environment as the federal minimum requirements.

iii. **Does EPA intend to delegate the authority to approve the revisions to the State plans the Regional offices?**

Answer: The EPA regional offices currently have the authority to approve the revisions to the State Solid Waste Management Plans in consultation with EPA headquarters to help ensure national consistency.

c. **Many States will need statutory or regulatory changes in order to open the solid waste management plans to incorporate the final rule. How does EPA anticipate that States will be able to incorporate the requirements in time to meet the six month effective date of the final rule?**

Answer: The EPA does not necessarily expect the revised plans to be submitted by states before the effective date, which is six months after publication, however, the technical requirements of the rule that facilities must meet varying timelines that are not dependent on state submittal of a revised SWMP. For example, the groundwater monitoring requirements must be met within two years of the effective date. In addition, the EPA's current regulations do not preclude a state from submitting a SWMP for conditional approval based on anticipated regulatory or statutory revisions.

2. **The preamble to the final rule states that once "EPA has approved a solid waste management plan that incorporates or goes beyond the minimum federal requirements, EPA expects that facilities will operate in compliance with that plan and the underlying State regulations." However, isn't it true that because the State programs do not operate in lieu of the Federal requirements, that the Federal requirements remain independently enforceable through citizen suits?**

a. **Because State programs do not operate in lieu of the Federal rule, if the State**

comply with both the State rules and the Federal requirements or risk being subject to a citizen suit?

Answer: Once an SWMP is approved, compliance with the state program would be considered as compliance with the federal CCR rule criteria. In addition, we note that RCRA section 7002 requires a citizen group to provide 60 days notification to the EPA and the state prior to filing a suit to enforce the requirements of the CCR rule. States can take a number of actions in response to this notification, including (a) intervening in the suit or (b) filing their own action to enforce compliance with the rule, which would preempt the citizen's action.

3. **The final rule requires that if a constituent of concern is detected above a statistically significant level, that the groundwater protection standard must be set at either the Maximum Contaminant Level or at the background concentration. Whereas, the proposed rule, like the municipal solid waste program, would have allowed the owner or operator to establish an alternative groundwater protection standard based on site-specific conditions.**

   a. **Has EPA considered whether this will impact future and on-going corrective action at coal ash disposal units in States that utilize risk-based decision making?**

   Answer: If the Safe Drinking Water Act Maximum Containment Level (MCL) or background-based cleanup levels are lower than a risk-based level the state has used, the federal regulations would require that the corrective action include treating the groundwater to a level lower than the risk-based level. If, however, the MCL or background-based cleanup levels in the federal rules are higher than a risk-based level the state has used, the state regulations would require that the corrective action achieve a level lower than the federal levels. In some cases, it is possible that the corrective action provisions in the final rule would require a more rigorous treatment than required under state law, and in other cases, less rigorous treatment than required under state law. The potential number of these scenarios occurring at corrective actions related to coal ash disposal units is unknown.

   b. **What would be the impact of the final rule on risk-based decision making – in particular, the ability of States to set either an alternative point of compliance or alternate groundwater protection standards?**

   Answer: We do not have any information as to how often, to what degree, and under what circumstances alternative points of compliance and groundwater protection standards might be preferred or used by the states.

4. **Please provide the specific legal authority and arguments that EPA believes support the regulation of inactive surface impoundments under Subtitle D.**

   Answer: The final rule discusses in depth the specific legal authority on which the EPA is relying to support the regulation of inactive CCR surface impoundments under subtitle D of RCRA. See 80 FR 21342-21347 (Enclosure).

5. **Surface impoundments that are required to close under the final rule are allowed an extension and may continue to operate if there is no on or off-site disposal capacity *for the coal ash*. Please explain whether EPA also considered the need for alternative disposal capacity for wastewater and why or why not.**

Answer: In the EPA rule, existing CCR surface impoundments are required to close if the unit: (1) is unlined and has exceeded a groundwater protection standard; (2) has failed to meet the applicable location criteria; or (3) has failed to satisfy structural integrity requirements (i.e., attainment of a factor of safety). In the final rule, the EPA acknowledged that facilities subject to closure, may be faced with a decision to either violate the closure requirements of the rule by continuing to place CCR in a unit that is required to close, or stop generating power because there is no place to dispose of the resulting waste. Concluding that neither of these scenarios were desirable, the EPA developed a process for allowing alternative closure timeframes in two narrow circumstances, the first where the owner or operator can certify that CCR must continue to be managed in the unit due to the absence of both on-site and off-site alternative disposal capacity, and the second where the owner or operator of a facility certifies that the facility will cease operation of the coal-fired boilers no later than the dates specified in the rule, but lacks alternative disposal capacity in the interim.

The EPA acknowledged that while it may be possible to find off-site disposal capacity for the dry ash, it may not be feasible to transport to off-site disposal facilities wet generated or sluiced CCR (a combination of water and CCR). Furthermore, the agency also realized that this could be a substantial issue for facilities managing wet CCR because facilities cannot immediately convert to dry handling systems.

The EPA did not consider the need for alternative disposal capacity for wastewater not associated with wet generated or sluiced CCR as part of the CCR rule. As defined in the rule, CCR surface impoundments do not include units generally referred to as cooling water ponds, process water ponds, wastewater treatment ponds, storm water holding ponds, or aeration ponds. These units are not designed to hold an accumulation of CCR, and do not generally contain significant amounts of CCR. Treatment, storage, or disposal of accumulated CCR also does not occur in these units. Such units are not covered by this rule.

However, if a situation arises where multiple waste streams are co-managed in a CCR surface impoundment and there is a possibility that the CCR unit may be required to close, there are several steps owners or operators should consider taking. First, each facility should evaluate all of its waste streams and determine where they are being managed to determine the most appropriate path to compliance. Second, if a facility knows that it has an unlined CCR surface impoundment that may be "leaking", it needs to immediately begin planning for or investigating capacity for all of the waste streams being managed in that CCR unit.

6. **The owner or operator of an impoundment that must close under the final rule has the opportunity to grant itself an extension of the deadline if it can demonstrate that it does not have sufficient on or off-side disposal capacity.**

   a. **How far off-site does the facility have to look for alternative disposal capacity?**

Answer: The rule requires the owner or operator to document a claim that no alternative

capacity is available and the claim must be based on the real absence of an alternative and not justified based on the costs or inconvenience of alternative disposal capacity. Furthermore, the preamble goes on to state that, "If any additional capacity is identified, the owner or operator must arrange to use it as soon as it is feasible."

b. Please explain in detail what EPA intends owners and operators to do with respect to demonstrating whether there is available off-site disposal capacity.

Answer: The CCR rule does not specify how owners or operators must demonstrate whether available off-site disposal capacity exists. The rule does, however, specify that the claim must be based on the genuine absence of alternative capacity and not justified based on the costs or inconvenience of alternative disposal capacity. Furthermore, the preamble goes on to state that, "If any additional capacity is identified, the owner or operator must arrange to use it as soon as it is feasible. If disposal capacity is secured either on- or off-site, the rule does not require the owner or operator to document the availability of this alternative capacity or to document the transfer of CCR to these facilities."

c. Has EPA assessed the risks of additional truck traffic on the road that will be required to move the coal ash to an off-site disposal facility?

Answer: No, the EPA did not assess these risks because the agency does not have information regarding how much additional off-site disposal might happen as a result of this regulatory provision.

7. **In the final rule, EPA provides a new definition of what constitutes "beneficial use" which provides that a user of CCR must demonstrate that environmental releases are comparable to analogous products for an un-encapsulated use of CCR involving placement on the land of 12,400 tons or more in non-roadway applications. Please explain in detail the basis for using 12,400 tons as a threshold.**

Answer: The EPA discusses its rationale for selecting the 12,400 tons at length in the preamble to the final rule; this can be found at pages 173-180 of the pre-publication version of the final rule on EPA's website. In summary, the 12,400 ton threshold corresponds to the smallest size landfill in the agency's database of landfills used in the risk assessment for the final rule (Plant 8752 at 280,830 cubic feet or 12,357 tons assuming a conversion of 88 pounds/cubic feet). As explained on page 180 of the preamble, the EPA selected this threshold as a trigger for requiring an affirmative demonstration by the user that there will be no releases of concern as a result of the land application, because the available information, including the 2014 risk assessment, demonstrates that at these volumes the potential risks are of such significance to warrant regulation. Based on this evidence, the burden then shifts to the potential user to demonstrate that these potential risks do not exist at the particular site or have been adequately mitigated.

8. **Does the 12,400 ton-threshold requirement for beneficial use apply to coal ash which is destined for an encapsulated use, for example in concrete. Specifically,**

a. Does the 12,400 ton-threshold apply to piles of coal ash that are awaiting re-use?

b. Does the 12,400 ton-threshold apply on a facility-wide basis?

Answer: The 12,400 ton-threshold does not apply to encapsulated beneficial uses such as concrete. The 12,400 ton-threshold applies only to the fourth criterion in the definition of beneficial use of CCR. This criterion only applies to CCR that will be placed on the land and beneficially used in an unencapsulated, non-roadway use. This threshold is a cumulative amount for an unencapsulated, non-roadway beneficial use in a single location. This provision does not authorize CCR disposal facilities to store CCR in piles on-site, even if the CCR may ultimately be transferred off-site for beneficial use.

The Honorable Frank Pallone, Jr.

Under the Bevill Amendment, EPA has been required to consider specific factors in determining whether to regulate coal ash under Subtitle C of RCRA: (1) the source and volumes of material generated per year; (2) present disposal and utilization practices; (3) potential danger, if any, to human health and the environment from the disposal and reuse of such materials; (4) documented cases in which danger to human health or the environment from surface runoff or leachate has been proved; (5) alternatives to current disposal methods; (6) the costs of such alternatives; (7) the impact of those alternatives on the use of coal and other natural resources; and (8) the current and potential utilization of such materials.[1]

1. **EPA revisited these eight study factors in the coal ash final rule. Please describe the process EPA went through to gather this information and what EPA found.**

   Answer: In the proposed rule, the EPA re-examined the eight Bevill study factors in section 8002(n) of RCRA, and solicited comment on its analysis. As discussed in both the proposed and final rules, the key elements (i.e., factors) of the analysis were EPA's risk assessment, the assessment of state programs and the EPA's compilation of CCR damage cases. In response to the proposed rule, the agency received significant comments on the various elements of the analysis and consequently published several Notices of Data Availability (NODAs) presenting new data and possible revisions to the analysis.

   However, as discussed at length in the preamble to the final rule, critical information necessary to a final Regulatory Determination is still lacking on a number of key technical and policy questions. This includes information needed to quantify the risks of CCR disposal, and the potential impacts of recent agency regulations on the chemical composition of CCR. The agency also needs further information on the adequacy of the state programs.

   In the absence of this information, the EPA is unable to reach a conclusion on the issue that is central to a Bevill Determination: whether the risks presented by management of CCR waste

[1] 42 U.S.C. § 6982(n)

streams can only be adequately mitigated through regulation under RCRA subtitle C. Therefore, the EPA deferred a final Regulatory Determination for these wastes.

2. **What factors weighed most heavily on EPA's decision?**

The final rule identified technical uncertainties that cannot be resolved, including the extent to which risks are managed sufficiently under the final rule.

Answer: Of the eight statutory Bevill study factors assessed, three weighed the most heavily in the agency's decision to defer a final Regulatory Determination: (1) the extent of the risks posed by mismanagement of CCR; (2) the adequacy of state programs to ensure proper management of CCR; and (3) the extent and nature of damage cases.

3. **What information will EPA gather over the next several years to resolve these technical uncertainties?**

Answer: Over the next several years, electric utilities will be moving forward in the implementation of this rule as well as the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (the ELG rule) and the Carbon Pollution Emission guidelines for Existing Stationary Sources: Electric Utility Generating Units Clean Power Plan) rules.

Until these regulatory requirements are implemented, it is premature to define a path forward for resolving the technical uncertainties identified in the final rule. A reasonable course, however, would be to follow the groundwater monitoring data and other information being posted to companies' websites to see what facilities, CCR landfills, and CCR surface impoundments continue operating, whether liners are leaking, what concentrations of contaminants we are observing. Any information that the EPA gathers in the future will be announced to the public and offered for public comment.

4. **How will the experience of states implementing the new final rule inform EPA's future analysis?**

The final rule also identified the possibility that concentrations of hazardous contaminants in coal ash may rise in the near future.

Answer: The EPA recognizes the critical role that our state partners play in the implementation and ensuring compliance with the regulations, and the agency expects that states will be active partners in overseeing the regulation of CCR landfills and CCR surface impoundments. Any future analysis will account for the states' implementation of the final rule, including any revisions to state programs adopted in response to the final rule. In this regard, the EPA is strongly encouraging states to adopt these federal minimum criteria into their regulations and revise their solid waste management plans (SWMPs) to incorporate these revised federal requirements.

For those states that choose to submit revised SWMPs, the EPA will review and approve those revised SWMPs, provided they demonstrate that the minimum federal requirements

have been met. The EPA expects that the information developed as part of this process will help the agency better understand the full extent of a state's regulatory authority over the disposal of CCR and the manner in which states will implement this oversight.

The final rule also identified the possibility that concentrations of hazardous contaminants in coal ash may rise in the near future.

5. Why might that happen? What actions might be necessary if that happens?

Answer: In the final rule, the EPA specifically noted that there were uncertainties regarding the evolving characterization and composition of CCR due to electric utility upgrades and retrofits of multi-pollutant control technologies and raised concern that these advances in human health and environmental protection could present new or otherwise unforeseen changes in CCR. Therefore, if the agency determines at some future time that significant changes have occurred in the characterization or composition of CCR as a result of these increased air pollution control efforts, the EPA will then make a determination on how state programs are addressing those risks and whether additional risk analyses are warranted. This determination may be strongly influenced by the monitoring of facility groundwater data to determine if the controls the agency has put in place as a result of this rule are providing the necessary environmental protections. Any action that the agency may consider in the future will be announced to the public and offered for public comment.

Attachment 2—Member Requests for the Record

During the hearing, Members asked you to provide additional information for the record, and you indicated that you would provide that information. For your convenience, descriptions of the requested information are provided below.

The Honorable Gregg Harper

1. **If a State determines that there is no human receptor for the groundwater and that a cleanup standard above the MCL or background is appropriate, would that meet the minimum requirements of the rule?**

   Answer: The rule requires that the groundwater protection standard (either the MCL or the background level, whichever is higher) must be met by the chosen corrective action remedy.

The Honorable Bill Flores

1. **When you proposed the application of location restrictions to existing surface impoundments, the EPA acknowledged that these location restrictions would force a majority of the current impoundments to close.**

   a. **Do you have an estimate of how many will close?**

   Answer: The EPA's final CCR rule contains five new location restrictions that apply to new and existing waste management units (landfills and surface impoundments). These restrictions include: (1) disposal within 5 feet of the water table, (2) disposal in wetlands, (3) disposal in unstable areas, including karst areas, (4) disposal near active fault zones, and (5) disposal in seismic impact zones. In addition, current subtitle D regulation (40 CFR 257.3-1) already restricts facilities that dispose of wastes in floodplains.

   For fault areas, seismic impact zones, and unstable areas (using karst areas as a proxy) the EPA's Regulatory Impact Analysis (RIA) projected that 51 of the 1045 waste management units would be subject to the location restrictions resulting in an estimated 26 waste management units closing and safely relocating off-site. The remaining waste management units are expected to make certifications either that they are not subject to these three location restrictions or that their continued operation in these areas is protective.

   The EPA did not have sufficient data to evaluate the number of waste management units subject to the restrictions against disposal units located within 5 feet of the water table or in wetlands. However, in contrast to the proposed rule, the final rule allows facilities to certify that a waste management unit meets an alternate performance standard, even if it cannot meet the requirement in the proposed rule to demonstrate that it is 5 feet above the water table. Similarly, the EPA notes that under the wetlands criterion, facilities have the option of purchasing offsets instead of closing existing units. For this reason, the EPA does not believe that many (if any) facilities will close their waste management units in response to the location restriction for wetlands.

b. Moving further upstream from those closures, what sort of reliability issues could be imposed on the electric grid?

Answer: Electricity market impacts presented in Appendix X of the RIA were conducted using the Integrated Planning Model (IPM) and include the location restriction costs of the rule as discussed above. The results of this analysis show that there will be negligible impacts to the electric market.

from the MSWLF unit to the groundwater (*i.e.*, as would be the case if CCR was disposed in the MSWLF unit). In determining alternative parameters, the Director shall consider, among other things: (1) The types, quantities, and concentrations in wastes managed at the MSWLF unit; (2) the mobility, stability, and persistence of waste constituents or their reaction products in the unsaturated zone beneath the MSWLF unit; and (3) the detectability of indicator parameters, waste constituents, and reaction products in the groundwater. In situations where the MSWLF unit is receiving CCR for disposal and/or daily cover, EPA expects the controlled management of CCR in these units. Specifically, EPA expects State Directors to utilize the provisions in § 258.54(a)(2) to revise the detection monitoring constituents to include those constituents being promulgated in this rule under § 257.90. These detection monitoring constituents or inorganic indicator parameters are: boron, calcium, chloride, fluoride, pH, sulfate and total dissolved solids (TDS). These inorganic indicator parameters are known to be leading indicators of releases of contaminants associated with CCR and the Agency strongly recommends that State Directors add these constituents to the list of indicator parameters to be monitored during detection monitoring of groundwater if and when a MSWLF decides to accept CCR.

The Agency has concluded that CCR can readily be handled in permitted MSWLFs provided that they are evaluated for waste compatibility and placement as required under the part 258 requirements. Furthermore, consistent with the recordkeeping requirements in § 258.29, the Agency further expects State Directors to encourage MSWLF units receiving CCR after the effective date of this rule to do so pursuant to a "CCR acceptance plan" that is maintained in the facility operating record. This plan would assure that the MSWLF facility is aware of the physical and chemical characteristics of the waste received (*i.e.*, CCR) and handles it with the additional precautions necessary to avoid dust, maintain structural integrity, and avoid compromising the gas and leachate collection systems of the landfill so that human health and the environment are protected. While the Agency sees no need to impose duplicative requirements for MSWLFs that receive CCR for disposal or daily cover; development of these acceptance plans as well as a revised list of groundwater detection monitoring constituents will help ensure that CCR is being managed in the most protective manner consistent with the Part 258 requirements.

5. Inactive CCR Surface Impoundments

The final rule also applies to "inactive" CCR surface impoundments at any active electric utilities or independent power producers, regardless of the fuel currently being used to produce electricity; *i.e.*, surface impoundments at any active electric utility or independent power producer that have ceased receiving CCR or otherwise actively managing CCR. While it is true that EPA exempted inactive units from the part 258 requirements in 1990, the original subtitle D regulations at 40 CFR part 257 (which are currently applicable to CCR wastes) applied to "all solid waste disposal facilities and practices" except for eleven specifically enumerated exemptions (none of which are relevant). 40 CFR 257.1(c). See also, 40 CFR 257.1(a)(1)–(2). And as discussed in greater detail below, subtitle D of RCRA does not limit EPA's authority to active units—that is, units that receive or otherwise manage wastes after the effective date of the regulations. EPA has documented several damage cases that have occurred due to inactive CCR surface impoundments, including the release of CCR and wastewater from an inactive CCR surface impoundment into the Dan River which occurred since publication of the CCR proposed rule. As discussed in the proposal, the risks associated with inactive CCR surface impoundments do not differ significantly from the risks associated with active CCR surface impoundments; much of the risk from these units is driven by the hydraulic head imposed by impounded units. These conditions remain present in both active and inactive units, which continue to impound liquid along with CCR. For all these reasons, the Agency has concluded that inactive CCR surface impoundments require regulatory oversight.

The sole exception is for "inactive" CCR surface impoundments that have completed dewatering and capping operations (in accordance with the capping requirements finalized in this rule) within three years of the publication of this rule. EPA considers these units to be analogous to inactive CCR landfills, which are not subject to the final rule. As noted, EPA's risk assessment shows that the highest risks are associated with CCR surface impoundments due to the hydraulic head imposed by impounded water. Dewatered CCR surface impoundments will no longer be subjected to hydraulic head so the risk of releases, including the risk that the unit will leach into the groundwater, would be no greater than those from CCR landfills. Similarly, the requirements of this rule do not apply to inactive CCR landfills—which are CCR landfills that do not accept waste after the effective date of the regulations. The Agency is not aware of any damage cases associated with inactive CCR landfills, and as noted, the risks of release from such units are significantly lower than CCR surface impoundments or active CCR landfills. In the absence of this type of evidence, and consistent with the proposal, the Agency has decided not to cover these units in this final rule.

Under both the subtitle C and subtitle D options, EPA proposed to regulate "inactive" CCR surface impoundments that had not completed closure prior to the effective date of the rule. EPA proposed that if any inactive CCR surface impoundment had not met the interim status closure requirements (*i.e.*, dewatered and capped) by the effective date of the rule, the unit would be subject to all of the requirements applicable to CCR surface impoundments. Under the subtitle C option, those requirements would have included compliance with the interim status and permitting regulations. Under subtitle D, such units would have been required to comply with all of the criteria applicable to CCR surface impoundments that continued to receive wastes, including groundwater monitoring, corrective action, and closure.

EPA acknowledged that this represented a departure from the Agency's long-standing implementation of the regulatory program under subtitle C. While the statutory definition of "disposal" has been broadly interpreted to include passive leaking, historically EPA has construed the definition of "disposal" more narrowly for the purposes of implementing the subtitle C regulatory requirements. For examples see 43 FR 58984 (Dec. 18, 1978); and 45 FR 33074 (May 1980). Although in some situations, post-placement management has been considered to be disposal triggering RCRA subtitle C regulatory requirements, *e.g.*, dredging of impoundments or management of leachate, EPA has generally interpreted the statute to require a permit only if a facility treats, stores, or actively disposes of the waste after the effective date of its designation as a hazardous waste. EPA explained that relying on a broader interpretation was appropriate in this instance given that the

substantial risks associated with currently operating CCR surface impoundments, *i.e.*, the potential for leachate and other releases to contaminate groundwater and the potential for catastrophic releases from structural failures, were not measurably different than the risks associated with "inactive" CCR surface impoundments that continued to impound liquid, even though the facility had ceased to place additional wastes in the unit. EPA noted as well that the risks are primarily driven by the older existing units, which are generally unlined.

In the section of the preamble discussing the subtitle D option, EPA did not expressly highlight the application of the rule to inactive CCR surface impoundments, but generally explained that EPA's approach to developing the proposed subtitle D requirements for surface impoundments (which are not addressed by the part 258 regulations that served as the model for the proposed landfill requirements) was to seek to be consistent with the technical requirements developed under the subtitle C option. (See 75 FR 35193.) ("In addition, EPA considered that many of the technical requirements that EPA developed to specifically address the risks from the disposal of CCR as part of the subtitle C alternative would be equally justified under a RCRA subtitle D regime . . . The factual record—*i.e.*, the risk analysis and the damage cases—supporting such requirements is the same, irrespective of the statutory authority under which the Agency is operating . . . Thus several of the provisions EPA is proposing under RCRA subtitle D either correspond to the provisions EPA is proposing to establish for RCRA subtitle C requirement. These provisions include the following regulatory provisions specific to CCR that EPA is proposing to establish: *Scope and applicability (i.e., who will be subject to the rule criteria/ requirements*) . . .") (emphasis added).

EPA received numerous comments on this aspect of the proposal. On the whole, the comments were focused on EPA's legal authority under subtitle C to regulate inactive and closed units, as well as inactive and closed facilities. One group of commenters, however, specifically criticized the proposed subtitle D regulation on the grounds that it failed to address the risks from inactive CCR surface impoundments. The majority of commenters, however, argued that RCRA does not authorize EPA to regulate inactive or closed surface impoundments. These commenters focused on two primary arguments: first, that RCRA's definition of "disposal" cannot be interpreted to include "passive migration" based on the plain language of the statute, and second, that such an interpretation conflicted with court decisions in several circuits, holding that under CERCLA "disposal" does not include passive leaking or the migration of contaminants.

In support of their first argument, commenters argued that the plain language of RCRA demonstrates that the requirements are "prospective in nature" and thus cannot be interpreted to apply to past activities, *i.e.*, the past disposals in inactive CCR units. They also argued that the absence of the word "leaching" from the definition of "disposal" clearly indicates that Congress did not intend to cover passive leaking or migration from CCR units. The commenters also selectively quoted portions of past EPA statements, claiming that these demonstrated that EPA had conclusively interpreted RCRA to preclude jurisdiction over inactive units and facilities. In particular, they pointed to EPA's decision in 1980 not to require permits for closed or inactive facilities.

Commenters cited several cases to support their second claim. These include *Carson Harbor Vill.* v. *Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001); *United States* v. *150 Acres of Land*, 204 F.3d 698, 706 (2000); *ABB Industrial Systems* v. *Prime Technology*, 120 F.3d 351, 358 (2d Cir. 1997); *United States* v. *CMDG Realty Co.*, 96 F.3d 706, 711 (3rd Cir. 1996); *Joslyn Mfg. Co.* v. *Koppers Co.*, 40 F.3d 750, 762 (5th Cir. 1994); *Delaney* v. *Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999); *see also Interfaith Cmty. Org.* v. *Honey-Well Intl Inc.*, 263 F. Supp. 2d 796, 846 n.10 (D.N.J. 2003). The commenters acknowledged that these cases were all decided under CERCLA, but claim that the cases are all equally dispositive with respect to RCRA's definition of disposal because CERCLA specifically incorporates by reference RCRA's statutory definition of disposal.

As an initial matter, it is important to correct certain misunderstandings contained throughout a number of the comments. First, EPA did propose to include inactive units under the subtitle D alternative. EPA clearly signaled its intent to cover the same universe of units and facilities covered under the subtitle C proposal. EPA did not include a corresponding discussion in its explanation of the subtitle D alternative because application of the criteria to inactive units did not represent such a significant departure from EPA's past practice or interpretation. As discussed in more detail below, the original subtitle D regulations applied to all existing disposal units. See 40 CFR 257.1(a)(1)–(2), (c) and 43 FR 4942–4943, 4944.

Second, several commenters criticized EPA's purported proposal to cover both "closed" and "inactive" surface impoundments, using the terms interchangeably. These same commenters also refer to both "inactive facilities" and "inactive units." These are all different concepts, and EPA clearly distinguished between them.

EPA proposed to regulate only "inactive" surface impoundments that had not completed closure of the surface impoundment before the effective date. "Inactive" surface impoundments are those that contain both CCR and water, but no longer receive additional wastes. By contrast, a "closed" surface impoundment would no longer contain water, although it may continue to contain CCR (or other wastes), and would be capped or otherwise maintained. There is little difference between the potential risks of an active and inactive surface impoundment; both can leak into groundwater, and both are subject to structural failures that release the wastes into the environment, including catastrophic failures leading to massive releases that threaten both human health and the environment. This is clearly demonstrated by the recent spill in the Dan River in North Carolina, which occurred as the result of a structural failure at an inactive surface impoundment. Similarly, as demonstrated by the discovery of additional damage cases upon the recent installation of groundwater monitoring systems at existing CCR surface impoundments in Michigan and Illinois, many existing CCR surface impoundments are currently leaking, albeit currently undetected. These are the risks the disposal rule specifically seeks to address, and there is no logical basis for distinguishing between units that present the same risks.

EPA did not propose to require "closed" surface impoundments to "reclose." Nor did EPA intend, as the same commenters claim, that "literally hundreds of previously closed . . . surface impoundments—many of which were properly closed decades ago under state solid waste programs, have changed owners, and now have structures built on top of them—would be considered active CCR units." Accordingly, the final rule does not impose any requirements on any CCR surface impoundments that have in fact "closed" before the rule's effective date—*i.e.*, those that no longer contain water and can no longer impound liquid.

Further, EPA never proposed that the rule would apply to inactive facilities. The proposal was clear that the regulations would apply to active facilities—*i.e.*, those that continue to generate electricity for distribution to the public, and those that continue to manage CCR. Consistent with that proposal, the final rule applies only to inactive surface impoundments at active electric utilities, *i.e.*, facilities that are actively generating electricity irrespective of the fuel used.

Finally, some comments focused on issues that were specific to the plain language of subtitle C provisions. While most of the issues the commenters raised relate equally to EPA's authority under both subtitles C and D, because the final rule establishes standards under subtitle D of RCRA, EPA has not addressed comments that are purely relevant or applicable to the extent of EPA's authority under subtitle C.

a. Plain Language of RCRA and EPA's Past Interpretations

Under both subtitle C and subtitle D, EPA's authority to regulate "inactive" units primarily stems from the agency's authority to regulate "disposal." The term is defined once in RCRA and applies to both subtitles C and D. Moreover, the definition explicitly includes "leaking" and "placing of any solid waste . . . into or on any land so that such [waste] or any constituent thereof may enter the environment . . . or be discharged into any waters, including groundwaters." 42 U.S.C. 6903(3).

Commenters focused on the past statements that EPA cited in the proposal in acknowledging that the Agency was proposing to revise its interpretation for this rulemaking. In general, the comments misconstrue the significance of these past statements. The cited passages merely explain that the *permitting requirements* in subtitle C were written to be "prospective in nature" and as a consequence, EPA has chosen to interpret "disposal" more narrowly *in that context.* Thus EPA's historic interpretation under subtitle C was not based on an interpretation that the plain language of RCRA's definition of "disposal" precluded reaching inactive units, but on a determination that a narrower interpretation would be reasonable in light of specific language in sections 3004 and 3005, and the practical consequences of applying *these* requirements to inactive facilities.[40]

None of EPA's past statements included any interpretation that "leaking" does not include leaking from an inactive disposal unit, or that the statutory definition of "disposal" cannot be interpreted to apply to the current consequences of past disposals. To the contrary, EPA was clear in the original 1978 proposed hazardous waste regulations that leaking from inactive disposal units constitutes "disposal" under RCRA.

Neither RCRA nor its legislative history discusses whether section 3004 standards for owners and operators of hazardous waste treatment, storage, or disposal facilities apply or were intended to apply to inactive facilities, *i.e.*, those facilities which have ceased receiving, treating, storing, and disposing of wastes prior to the effective date of the subtitle C regulations. "*This is an important issue, however, because some, and perhaps most, inactive facilities may still be "disposing of waste" within the meaning of that term in Section 1004(3) of RCRA.* 'Disposal' includes: the discharge, dumping, spilling, leaking, . . . of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters. *Many inactive facilities may well be leaking solid or hazardous waste into groundwater and thus be "disposing" under RCRA.*" 43 FR 58984 (emphasis added).

Note as well that EPA declined to impose requirements on "inactive *facilities*" not "inactive *units* at active facilities," which are the entities covered in this final CCR rule. Further, the complications discussed in 1978 were specific to inactive or closed facilities: the concern that the present owner of the land on which an inactive site was located might have no connection (other than present ownership of the land) with the prior disposal activities. Id. These considerations are not relevant to inactive CCR surface impoundments at active electric utilities.

EPA further clarified this position in the 1980 final hazardous waste rule, explaining that, while the Agency did not generally intend to regulate those portions of facilities that had closed before the effective date, there were exceptions to this, and that in individual cases, inactive portions of a facility—or in other words, inactive units, might be regulated.

> [O]wners and operators which continue to operate after the effective date of the regulations must ensure that portions of facilities closed before the effective date of these rules do not interfere with the monitoring or control of active portions. This requirement regulates the facility which operates under the RCRA regulations, although it may require the owner or operator before he receives a permit, or, as a permit condition, to take certain measures on portions of his facility closed before the effective date of these regulations.
>
> 45 FR 33068. (See also 45 FR 33170.)

In other words, EPA was clear that its jurisdiction under RCRA extended to these portions of the facility but that the Agency had made a policy choice not to exert its regulatory jurisdiction as a general matter over inactive facilities, choosing instead to rely on section 7003 and CERCLA to address the risks and require clean-up of these sites. EPA has adopted a substantially similar approach here, requiring the current owner or operator of an active facility to address the risks associated with an inactive portion of the facility that could potentially interfere with the monitoring or control of the actively operating portion of the facility through leaking contaminants or other releases.

Similarly, in the 1980 final rules, EPA expressly declined to revise the regulatory definition of disposal to exclude accidental or unintentional releases. EPA noted that "[r]egardless of whether a discharge of hazardous waste is intentional or not, the human health and environmental effects are the same. Thus intentional and unintentional discharges are included in the definition of 'disposal.' " (See 45 FR 33068.) While EPA revised other provisions to clarify that a permit would not be required for accidental discharges, EPA was clear that such activities are properly considered to be "disposal."

By contrast, EPA's past implementation of subtitle D, following from the legislative history and the statutory language, consistently applied regulatory requirements equally to all facilities, without distinguishing between active and inactive or new and existing facilities.

Congress was clear that subtitle D was intended to specifically address the problem of abandoned leaking "open dumps" scattered across the country, "where frequently the use of the site for waste disposal is neither authorized nor supervised." H. Rep. No. 94–1491, p 37, 94th Cong., 2d Sess (1976). For example, the report described the consequences when "the City of Texarcana Arkansas/Texas, abandoned its six open dumps, in 1968" to support the need to require open dumps to upgrade or close.

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[40] It is also clear that certain subtitle C requirements in fact do apply to inactive units, for example, section 3004(u) requires facilities to clean up releases from inactive units located on the facility site.

Similarly, in describing the need for the legislation, the House report stated:

> Disposal of solid wastes, including hazardous wastes, can have adverse environmental impacts in several ways. The following paragraphs discuss five different types of such impacts.
>
> (i) Perhaps the most pernicious effect is the contamination of groundwater by leachate from land disposal of waste. About half of the U.S. domestic water supply is from underground water, and thus is potentially subject to contamination. Such contamination is particularly vexing because often it is discovered after the damage is done and because the contamination is very long lasting. Thus leachate from a landfill or dump may not show up for years, *maybe not even until after the landfill is closed.*

Id. at 89 (emphasis added).

Consequently, subtitle D of RCRA provides clear authority to address inactive or abandoned disposal sites. The relevant provisions of RCRA subtitle D do not distinguish between "active" and "inactive" disposal units. Nor do any of the relevant provisions tie jurisdiction to the receipt or disposal of waste after a specific date.

RCRA section 1004(14) defines an "open dump" as "*any* facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section [4004] of this chapter and which is not a facility for disposal of hazardous waste." 42 U.S.C. 6903(14) (emphasis added). Section 4004(a) delegates broad authority to EPA to determine the facilities that will be considered "open dumps," without any requirement that the units or facilities be in operation. "[T]he Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified open dumps within the meaning of this chapter." 42 U.S.C. 6944(a). Section 4005(a), which is titled, "Closing or upgrading of existing open dumps," is also not limited in scope: "Upon promulgation of criteria under [1008(a)(3)] of this title, *any* solid waste management practice of disposal of solid waste or hazardous waste which constitutes the open dumping of solid or hazardous waste is prohibited, . . ." 42 U.S.C. 6945(a) (emphasis added). See also, section 4003(a)(3), requiring state plans to provide for the closing or upgrading of "*all existing* open dumps"). 42 U.S.C. 6943(a)(3) (emphasis added).

Consistent with the statutory provisions, EPA's current subtitle D regulations at 40 CFR part 257 apply to "all solid waste disposal facilities and practices" whether active or inactive, and did not differentiate between new and existing facilities.[41] 40 CFR 257.1(c). See also, 40 CFR 257.1(a)(1)–(2). EPA was clear in both the proposed and final rules that the rules applied to all existing facilities: "These criteria for the classification of disposal facilities apply to all "solid waste" and "disposal" facilities, which are defined in the Act [in] (section 1004)." 43 FR 4942–4943, 4944. The final rule was equally clear: "These criteria apply to the full range of facilities and practices for "disposal" of "solid waste," as those terms are defined in the Act." 44 FR 53440. (See also 44 FR 53438.) The final rule describes eight categories of materials or activities that are excluded; inactive facilities or units are not among them. This stands in stark contrast to the hazardous waste regulations, which, as discussed, specifically exempted inactive facilities from the permitting and associated regulatory requirements.

b. Case Law on the Definition of Disposal

EPA also disagrees with the commenters' second claim that regulating inactive surface impoundments would be inconsistent with case law in six circuits. The commenters are correct that some courts have held that the subsequent passive migration of contamination left on-site is insufficient to support liability against a *third party* that merely owned the property *under CERCLA*. But the commenters misconstrue this case law and fundamentally overstate its significance to the issue at hand. Of greater significance, however, is that federal courts have almost universally reached different conclusions under RCRA, holding that the statutory definition of disposal does include the passive migration of contamination from previously disposed of wastes.

As an initial matter, the issue decided by the courts in the cited CERCLA cases was narrower than the commenters allege; these cases generally focused on whether current or past owners of land contaminated by the activities of *other owners* were liable for passive migration that occurred during their ownership of the land. This is very different than the situation at hand, in which regulatory requirements are being imposed to address the existing and future contamination caused by the past and current activities of the current owner.

In addition, these decisions were largely predicated on language that is unique to CERCLA, rather than on a definitive reading of RCRA's definition of disposal. *See, e.g., United States* v. *CMDG Realty Co.*, supra at 712–717. For example, in *CMDG Realty*, the court found that passive migration was not disposal because Congress had clearly distinguished between "releases," and "disposal," defining the two terms differently and imposing liability on different parties for the two activities. Id. *Accord, Carson Harbor Village, supra*, at 880–885; *ABB Industrial Systems* v. *Prime Technology*, supra at 358.

Moreover, even under CERCLA courts have not universally reached the same conclusions on whether "passive migration" can be considered "disposal." *See, e.g., Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 844–46 (4th Cir. 1992) (concluding that because the definition of disposal includes "leaking," prior owners are liable if they acquired a site with leaking barrels or underground storage tanks even though the prior owner's actions are purely passive); *ABB Industrial Systems*, Id., n.3 (expressly declining to decide whether passive migration could ever be considered "disposal").

But in any event, courts have consistently interpreted RCRA to apply to passive migration. Two cases under RCRA are the most directly analogous to the current situation as they address the extent of EPA's authority to regulate based on the statutory definition of "disposal": *In re Consolidated Land Disposal Regulation Litigation*, 938 F.2d 1386 (D.C. Cir. 1991), and *United States* v. *Power Engineering Co.*, 10 F. Supp. 2d 1145 (D. Colo. 1998), *aff'd* 191 F.3d 1224 (10th Cir. 1999). In both cases, the court considered whether EPA could impose or enforce regulatory requirements to address passive migration under the interpretation that this constituted "disposal" under RCRA. And in both cases the court agreed that RCRA's definition encompassed such activities.

The issue in *Consolidated Land Disposal* was whether EPA could require closed hazardous waste facilities to obtain a "post-closure" permit. 938 F.2d at 1388–1389. EPA had relied on the definition of disposal to support the regulation, concluding that a facility "at which hazardous wastes have been disposed by placement in or on the land" remains subject to both permitting and regulation because "such hazardous wastes or constituents may continue 'leaking' or 'may enter the environment or be emitted . . . or discharged . . .'" into the environment." Id. Similar to the commenters' current arguments, the petitioners argued that under § 3005, a permit can only be required for "on-

[41] The regulations establish eleven specifically enumerated exemptions, none of which are relevant to the units at issue.

going activities"—the treatment, storage, or disposal of waste at such facilities—not for the facility itself post-closure. The petitioners argued that linguistically, "disposal . . . is not a continuing activity but occurs anew each time waste is placed into or on land." The D.C. Circuit summarily rejected the petitioners' interpretation, holding that this "may be one way in which the word is used in ordinary language, but is not necessarily how it is used in the statute; the equation of "disposal" with "leaking," which is a continuous phenomenon rather than a discrete event, is enough to blunt the sting of the petitioners' point." Id. This case is essentially dispositive of the issue, given the similarities between the requirement for a post-closure permit and the final requirements applicable to inactive CCR surface impoundments. Electric utilities retain ownership and control over these existing CCR units, just as hazardous waste facilities retain ownership and control over the closed units subject to post-closure permitting. In both situations, EPA requirements are designed to address both the existing and future risks of further "releases" or "leaking" from these units—*i.e.*, further disposal, as that term is defined in section 1004.

Similarly, in *Power Engineering* the court considered whether under section 3008 of RCRA, EPA could bring an action to compel the operator of a metal refinishing plant to comply with the state's RCRA regulations relating to financial assurance.[42] 10 F. Supp.2d at 1159. The defendants argued that since they were not currently disposing of waste, they were operating in compliance with state regulations and were exempt from financial assurance requirements. The court disagreed. It held that the use of the word "leaking" in the definition of "disposal" indicated that the leaching of hazardous waste into the groundwater constitutes the continuing disposal of hazardous waste. Id. at 1159–60 ("Because the definition of "disposal" includes the word "leaking," disposal occurs not only when a solid waste or a hazardous waste is first deposited onto ground or into water, but also when such wastes migrate from their initial disposal location.").

Courts in several circuits have also considered whether the passive migration of previously dumped waste constitutes a current or ongoing violation of RCRA, *i.e.*, illegal "disposal," under the citizen suit provisions of section 7002(a)(1)(A). Most have concluded that it does. *See, Scarlett & Associates* v. *Briarcliff Center Partners*, 2009 WL 3151089 (N.D. Ga 2009) (deciding to "follow the majority rule" and holding that "the continued presence of migrating waste constitutes a continuing violation under the RCRA"); *Marrero Hernandez* v. *Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 283 (D.P.R. 2009) (holding that unremedied, migrating contamination is not a wholly past violation); *Cameron* v. *Peach County, GA*, No. 5:02–CV–41–1 (CAR), 2004 WL 5520003 (M.D. Ga. 2004) (holding that the continued presence of illegal contamination that remains remedial constitutes a continuing violation, even though the acts of unlawful disposal occurred in the past); *California* v. *M&P Investments*, 308 F. Supp. 2d 1137, 1146–1147 (E.D. CA 2003) (Allowing RCRA 7002 claim of continuing violation to proceed on evidence that wastes "continue to exist unremediated" as a result of improper discharge that had ceased over 20 years prior to filing of suit); *Aurora National Bank* v. *TriStar Marketing*, 990 F. Supp. 1020, 1025 (N.D. Ill. 1998) ("Although subsection (a)(1)(A) does not permit a citizen suit for wholly past violations of the statute, the continued presence of illegally dumped materials generally constitutes a 'continuing violation' of the RCRA, which is cognizable under § 6972(a)(1)(A)."') (internal citation omitted); *City of Toledo* v. *Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656 (N.D. Ohio 1993) ("'[T]he disposal of wastes can constitute a continuing violation so long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up and the environmental effects remain remediable."'); *Gache* v. *Town of Harrison*, 813 F. Supp. 1037, 1041–42 (S.D.N.Y. 1993) ("The environmental harms do not stem from the act of dumping when waste materials slide off the dump truck but rather after they land and begin to seep into the ground, contaminating soil and water. So long as wastes remain in the landfill threatening to leach into the surrounding soil and water, a continuing violation sure may exist."'); *Acme Printing Ink Co.* v. *Menard, Inc.*, 812 F. Supp. 1498, 1512 (E.D. Wisc. 1992) ("RCRA includes in its broad definition of 'disposal' the continuous leaking of hazardous substances. . . . Accordingly, leaking of hazardous substances may constitute a continuous or intermittent violation of RCRA."'); *Fallowfield Dev. Corp.* v. *Strunk*, No. 89–8644, 1990 WL 52745 (E.D. Pa. 1990) ("If a person disposes of hazardous waste on a parcel of property, the hazardous waste remains in that property insidiously infecting the soil and groundwater aquifers. In other words, the violation continues until the proper disposal procedures are put into effect or the hazardous waste is cleaned up."'). It is particularly notable that these cases were all decided under subsection (A); in contrast to subsection (B), section 7002(a)(1)(A) does not include any reference to liability for past actions or for prior owners. *Compare*, 42 U.S.C. 6972(a)(1)(A) and (B). In reaching their holdings, therefore, the courts necessarily relied [solely] on the reach of the statutory definition of "disposal," which is at the heart of EPA's authority to regulate inactive CCR surface impoundments.

Courts have also addressed the limits of RCRA's definition of "disposal" is in the context of an EPA action under RCRA section 7003. Section 7003 authorizes EPA to obtain injunctive relief for actions, including disposal that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6973(a). Several courts have evaluated whether an inactive disposal site, where no affirmative acts of disposal are occurring, constitute an "imminent and substantial endangerment" under this provision. Once again, most courts accept a definition of disposal that encompasses leaking or contaminant migration from previously discarded wastes. *See United States* v. *Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd United States* v. *Price*, 688 F.2d 204 (3rd Cir. 1982) ("There is no doubt, however, that [section 7003] authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment.") *citing* S. Rep. No. 96–848, 96th Cong., 2d Sess., at 11 (1980); H. R. Rep. 96–1016 (Part I), 96th Cong., 2nd Sess., at 21 reprinted in [1980] U.S. Code Cong. & Ad. News, 6119, 6124; *United States* v. *Waste Indus.*, 734 F.2d 159 (4th Cir. 1984) (Rejecting district court interpretation that disposal only includes "active human conduct" based on the inclusion of "leaking" in the definition of disposal, and interpreting the "movement of the waste after it has been placed in a state of repose [to be] encompassed in the broad definition of disposal"'); *United States* v. *Diamond Shamrock Corp.*, 12 Envtl. L. Rep. 20819, 20821 (N.D. Ohio May 29, 1981) (noting that "a disposal clearly requires no active human conduct"'); *United States* v. *Conservation Chemical Co.*,

[42] Under RCRA's financial assurance regulations, owners and operators of hazardous waste facilities must document that they have sufficient resources to close their facilities and pay third-party claims that may arise.

619 F. Supp. 162, 200 (D. Mo. 1985) ("'disposal' occurs. . .when [wastes] migrate from their initial location"). See also S. Rep. 98–284, p 58 (98th Cong. 1st Sess.) ("The Environmental Protection Agency and the Department of Justice have used the equitable authority and [sic] granted in section 7003 to seek court orders directing those persons whose past or present acts have contributed to or are contributing to the existence of an imminent and substantial endangerment to abate such conditions. This has been an intended use of the section 7003 since 1976. . . . An [sic] evidenced by the definition of 'disposal' in section 1004(3), which includes the leaking of hazardous wastes, section 7003 has always provided the authority to require the abatement of present conditions of endangerment resulting from past disposal practices, whether intentional or unintentional.").

While EPA continues to maintain that the statutory definition of disposal does in fact authorize regulation of inactive CCR surface impoundments, this is not the sole basis for that authority. Under section 1008(a)(3), EPA is authorized to establish criteria governing solid waste management, which includes the "storage" of solid waste. 42 U.S.C. 6904(28) and 6908(a)(3). RCRA's definition of "storage" is limited to hazardous waste; under subtitle D, therefore, the definition Congress intended was the dictionary definition, which incontrovertibly covers the activities associated with continuing to maintain CCR in inactive surface impoundments. For example, Merriam Webster defines "storage" as "the state of being kept in a place when not being used" and "the act of putting something that is not being used in a place where it is available, where it can be kept safely, etc."

Finally, consistent with the proposed rule and the final Regulatory Determination in Unit IV.B of this document, the final rule does not apply to CCR that is beneficially used.

6. Beneficial Use

The proposed rule generally distinguished between the disposal of CCR and the beneficial use of CCR. Disposal activities would be subject to regulation under one of two alternative regulatory schemes. But under either alternative, beneficial use would remain Bevill exempt and would not be subject to regulation. The proposal identified specific criteria that would be used to distinguish between legitimate beneficial uses of CCR and the disposal of CCR. These criteria were largely drawn from the approach contained in the May 2000 Bevill Regulatory Determination. The criteria were:

—The material used must provide a functional benefit. For example, CCR in concrete increases the durability of concrete—and is more effective in combating degradation from salt water; synthetic gypsum serves exactly the same function in wallboard as mined gypsum, and meets all commercial specifications; CCR as a soil amendment adjusts the pH of soil to promote plant growth.

—The material substitutes for the use of a virgin material, conserving natural resources that would otherwise need to be obtained through practices, such as extraction. For example, the use of FGD gypsum in the manufacture of wallboard (drywall) decreases the need to mine natural gypsum, thereby conserving the natural resource and conserving energy that otherwise would be needed to mine natural gypsum; the use of fly ash in lieu of Portland cement reduces the need for cement. CCR used in road bed replace quarried aggregate or other industrial materials.

—Where relevant product specifications or regulatory standards are available, the materials meet those specifications, and where such specifications or standards have not been established, they are not being used in excess quantities. For example, when CCR is used as a commercial product, the amount of CCR used is controlled by product specifications, or the demands of the user. Fly ash used as a stabilized base course in highway construction is part of many engineering considerations, such as the ASTM C 593 test for compaction, the ASTM D 560 freezing and thawing test, and a seven day compressive strength above 2760 kPa (400 psi). If excessive volumes of CCR are used—*i.e.*, greater than were necessary for a specific project,—that could be grounds for a determination that the use is not beneficial, but rather is being disposed of. 75 FR 35162–35163.

EPA explained that in the case of agricultural uses, CCR would be expected to meet appropriate standards, constituent levels, prescribed total loads, application rates, etc. EPA has developed specific standards governing agricultural application of biosolids. While the management scenarios differ between biosludge application and the use of CCR as soil amendments, EPA stated that the Agency would consider application of CCR for agriculture uses not to be a legitimate beneficial use if they occurred at constituent levels or loading rates greater than EPA's biosolids regulations allow. (75 FR 35162–35163, June 21, 2010)

EPA proposed to codify these criteria in the term, "beneficial use of coal combustion products (CCPs)." This definition stated that the beneficial use of CCPs was the use of CCPs that provides a functional benefit; replaces the use of an alternative material, conserving natural resources that would otherwise need to be obtained through practices such as extraction; and meets relevant product specifications and regulatory standards (where these are available). CCPs that are used in excess quantities (*e.g.*, the field-applications of FGD gypsum in amounts that exceed scientifically-supported quantities required for enhancing soil properties and/or crop yields), placed as fill in sand and gravel pits, or used in large scale fill projects, such as restructuring the landscape, are excluded from this definition. (75 FR 35129–35130, June 21, 2010).

Commenters generally supported the criteria in the proposal but raised concern that the criteria lacked specificity; some commenters stated that the criteria were those that states already considered in doing their beneficial use determination. Commenters also suggested the use of a "no toxics" provision and others suggested that the criteria include a requirement that "environmental benefits" be achieved. A more general comment raised by several commenters was that the proposed criteria failed to establish any standard that ensured protection of human health and the environment. Finally, one commenter raised concern that EPA's approach to beneficial use, and particularly to large scale fill operations, inappropriately assumed that these operations constituted the disposal of solid waste, which, the commenter claimed was inconsistent with a series of judicial decisions.

There are generally three critical issues in determining whether a material is regulated under RCRA subtitle D: whether the material is a "solid waste," whether the activity constitutes "disposal," and whether regulation of the disposal is warranted. Although there can be some overlap between these issues in that the same facts may be relevant to each of them, understanding the distinction between them is critical to understanding the final approach to the beneficial use of CCR adopted in this rulemaking.

In order to be subject to RCRA, the material must be a solid waste. The statute defines a solid waste as "any garbage, refuse . . . and other discarded material. . . ." 42 U.S.C. 6903(27). As EPA noted in the proposed rule, for some beneficial uses, CCR is a raw

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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

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February 13, 2015

Mr. James Roewer
Executive Director
Utilities Solid Waste Activities Group (USWAG)
On behalf of
USWAG, Edison Electric Institute, and
American Public Power Association
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Roewer:

Thank you for appearing before the Subcommittee on Environment and the Economy on Thursday, January 22, 2015, to testify at the hearing entitled "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions and with a transmittal letter by the close of business on Monday, March 2, 2015. Your responses should be mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Nick.Abraham@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment and the Economy

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March 2, 2015

Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Chairman Shimkus:

On behalf of the Utility Solid Waste Activities Group ("USWAG"), I appreciate the opportunity to respond to your letter of February 13, 2015, setting forth additional questions from the hearing of the Subcommittee on Environment and the Economy on Thursday, January 22, 2015, regarding "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities." Attached please find the responses to your questions. Please contact me with any questions.

Sincerely,

[redacted]

Jim Roewer
Executive Director

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment and the Economy

Nick Abraham, Legislative Clerk, Committee on Energy and Commerce

For Submission to the Record:
Responses of Jim Roewer, the Utility Solid Waste Activities Group, to the Supplemental Questions of Chairman Shimkus from the Hearing of the Subcommittee on Environment and the Economy on "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"(January 22, 2015)

1. EPA in the final rule expressly leaves open the possibility of regulating coal ash as a hazardous waste under Subtitle C in the future. Can you explain whether EPA has the authority to re-open the Bevill Regulatory Determination and explain why leaving the decision open is problematic for your member companies?

1. Congress did not give EPA the authority to conduct multiple regulatory determinations. The statute sets forth specific procedures and timelines for EPA to determine whether coal combustion residuals ("CCR") warrant regulation as hazardous waste under RCRA Subtitle C. EPA has met its obligations under the statute by determining that CCR does not warrant hazardous waste regulation. The statute simply does not authorize the Agency to conduct another determination utilizing different procedures and/or deadlines, as it contemplated doing in the proposed CCR rule.
Utilities will be investing considerable resources to comply with the Subtitle D rule. If EPA were to regulate CCR as a hazardous waste at some point in the future (assuming it could), the substantial investments that utilities have incurred to develop systems to meet the Subtitle D criteria would be largely lost. In addition, the continued specter of potential hazardous waste regulation for CCR perpetuates uncertainty in the CCR beneficial use market, frustrating emerging CCR beneficial use markets and investments in CCR beneficial use technologies. CCR legislation passed by the House in the last two Congresses would eliminate the concerns with EPA potentially revisiting its determination that CCR does not warrant hazardous waste regulation.

2. Does the final rule provide a sufficient length of time for closure of disposal units that are required to be closed?

2. The fact that EPA provides for the ability to extend the five year closure deadline for surface impoundments and the six month closure deadline for landfills is acknowledgement that there is not a one-size-fits-all framework for closing CCR units and that some sites will not be able to close under the deadlines established in the rule. Nonetheless, while extensions are technically available, they are limited to a maximum of 10 additional years for surface impoundments and two years for landfills. There is no guarantee that these extensions will provide adequate time for the safe closure of all large or complex sites. Extensions also can be challenged in RCRA citizen suits by groups that seek to rush the closure of sites when such accelerated closures could actually undermine the environmentally sound closure of a CCR unit. The method and schedule for closure is most appropriately established in site-specific closure plans overseen by a state regulatory agency. This construct is what the CCR legislation passed by the House in the last two Congresses would have established.

a. With respect to the closure of inactive impoundments in order to not be subject to all of the regulatory requirements that apply to active disposal units, these inactive units must be closed within 3 years and that closure must include dewatering, stabilization, and installation of a final cover. In your opinion, is 3 years enough time?

a. Three years is not enough time to properly dewater and cap many of these facilities. EPA itself recognizes that the three year closure timeframe for inactive impoundments to close and be excluded from further regulation will not be practical for many large impoundments (*i.e.*, those over 40 acres). *See* Pre-Pub. Rule at 389. For active impoundments, EPA established a default closure timeframe of five years. But in doing so, the Agency provided a mechanism for extending the closure time period, recognizing extensions of up to 10 years may be necessary. The time period for inactive units to close and be excluded from further regulation should be the same amount of time provided for active units, including the possibility of extending the deadlines for circumstances beyond the owner/operators' control.

3. What are the key problems associated with the final rule being enforced solely through the use of citizen suits?

3. Our biggest concern with the citizen suit enforcement mechanism established in the rule is the fact that there will almost certainly be a patchwork of regulatory interpretations regarding compliance with the rule issued by different federal District Courts. This will result in different interpretations of the same regulatory requirements between, and even within, states, and undermine the ability of utilities to make consistent compliance determinations for their facilities.

a. Your written testimony noted that federal judges will be making complex technical compliance decisions that are better left to state regulators. Can you provide us with any examples of that and explain why it is a problem?

a. Examples include whether a groundwater monitoring system is adequate, including evaluating a qualified professional engineer's certification that a facility's background and downgradient groundwater monitoring wells have been properly located to meet the rule's groundwater performance standard. In addition, federal District Court judges will have to evaluate the adequacy/accuracy of highly technical and complex certifications regarding whether a facility has met the applicable location restrictions and certifications and demonstrations regarding when an impoundment meets the rule's structural integrity requirements, including the dam safety factors. Federal judges also will be called on to decide disputes regarding whether an owner/operator has selected the appropriate corrective action remedy, the adequacy of a facility's certification for an extended closure timeframe and, in cases where an owner/operator seeks to use the alternative closure process, whether the owner/operator has properly determined that no on- or off-site disposal capacity is available. These are highly technical, site-specific decisions best left to environmental professionals and state regulatory agencies.

Here too, CCR legislation passed by the House in the last two Congresses would eliminate the concerns with a self-implementing regulatory regime by placing enforcement responsibility with the CCR controls directly on the implementing agency, which would be either the state or EPA if the state does not implement the federal criteria.

4. Your written testimony stated that EPA does not have the legal authority under RCRA to regulate inactive sites and that RCRA does not give EPA authority to subject sites no longer receiving wastes to regulations designed for active units. Would you please provide a detailed explanation of why EPA does not have the requisite authority to regulate inactive

units?

4. EPA's legal theory for regulating inactive sites is based on the notion that the act of passive migration from units no longer receiving wastes constitutes active disposal under the statute. As we detailed in our comments, numerous federal courts have squarely rejected this theory. This position also is inconsistent with RCRA's statutory text, which specifically provides that the risks from past disposal practices are to be addressed through RCRA's imminent and substantial endangerment provision (in addition to EPA's response authority under the Comprehensive Environmental Response Compensation and Liability Act, or Superfund), and not by subjecting inactive sites to regulatory programs designed for operating units. Notwithstanding EPA's pronouncements to the contrary, this is the first instance under RCRA where the Agency has attempted to impose a regulatory regime on inactive sites no longer receiving wastes.

5. Please explain the impact of the final rule on the use of risk-based decision making.

5. Because this is a self-implementing rule, the Agency has eliminated the ability of an owner/operator to deviate in *any* manner from the rule's groundwater monitoring and corrective action requirements, thus eliminating any risk-based decisions by owner/operators in implementing and/or undertaking the rule's groundwater monitoring and corrective action requirements that in any way depart from the text of the final rule. EPA explains that it has removed this flexibility in the final rule because, in the Agency's view, without the oversight of a state regulatory body, there is the possibility of "abuse" of any self-implementing risk-based decisions that deviate from the rule's requirements. *See e.g.*, Pre-Pub. Rule at 347-348. Curiously, EPA expressly included such risk-based flexibility in the Subtitle D proposal, when the Agency was fully aware at that time that any final Subtitle D rule would be self-implementing.

In any event, as the result of the elimination of any risk-based decision making, the rule does not allow for risk-based decision making, including, for example, in (1) establishing alternative points of compliance and alternative groundwater protection standards, (2) determining alternative corrective action remedies, or (3) determining whether corrective action is even necessary. The Subtitle D rules for municipal solid waste landfills (MSWLFs) expressly allow for such risk-based decision making, recognizing that there is not a one-size-fits-all standard for remediating a site.

Equally important, the lack of risk-based flexibility in the rule effectively overrides existing state regulatory programs that make use of risk-based decision making to ensure the appropriate and protective management of CCR. For example, if a state determines, on a site-specific basis, that a particular CCR unit undertaking corrective action does not have to meet the groundwater protection standard for an Appendix IV constituent at the edge of the unit boundary, the owner/operator would still have to meet that standard to comply with the federal rule. *See* 40 C.F.R. § 257.98(c)(1). Thus, the state's site-specific corrective action remedy is effectively nullified.

CCR legislation passed by the House in the last two Congresses would preserve these important site-specific risk-based options by requiring that there be a regulatory body – either the state or EPA – directly implementing the CCR requirements. In this way, the implementing agency

could exercise its sound discretion in determining, based on site-specific factors, whether a risk-based alternative to a specified criterion is preferable, while also being protective of human health and the environment.

6. Because State permit programs will not operate in lieu of the Federal rule, please explain the problems that will cause for your member companies with respect to compliance.

6. Even if the states were to adopt the federal rule, those state programs cannot and would not operate in lieu of the federal rules. This is a point made clear by EPA at several points in the rule's preamble. *See* Pre-Pub. Rule at 107 & 470. Therefore, even if the states do adopt the federal CCR rules into their respective state solid waste management program, utilities must still comply with both the state regulatory requirements and the federal rules, with the state rules enforced by state courts and the identical federal rules enforced by federal courts. This creates the very real likelihood of conflicting state/federal court interpretations regarding identical state/federal rules

Moreover, if the state CCR rule differs from the federal rule, utilities would be in an untenable position of having to comply with two sets of different rules for the same material. Utilities would also be faced with the dilemma of interpreting the federal CCR rule on their own, rather than in consultation with an implementing regulatory authority, with a federal District Court being the ultimate arbiter in legal disputes regarding whether compliance has been met. CCR legislation passed by the House in the last two Congresses would expressly eliminate the concerns with dual regulation of CCR by placing responsibility for administration and enforcement of the CCR requirements in the hands of one regulatory body – either the state or EPA if a state does not adopt and implement the federal criteria.

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