H.R. _____, THE IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

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WEDNESDAY, MARCH 18, 2015

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

The subcommittee met, pursuant to call, at 10:17 a.m., in room 2322 of the 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, Tonko, Schrader, Green, McNerney, and Pallone (ex officio).

Staff present: Nick Abraham, Legislative Clerk; Charlotte Baker, Deputy Communications Director; Leighton Brown, Press Assistant; David McCarthy, Chief Counsel, Environment and the Economy; Tina Richards, Counsel, Environment; Chris Sarley, Policy Coordinator, Environment and the Economy; Jean Woodrow, Director, Information Technology; Jacqueline Cohen, Democratic Senior Counsel; Caitlin Haberman, Democratic Professional Staff Member; Rick Kessler, Democratic Senior Advisor and Staff Director, Energy and Environment; and Ryan Schmit, Democratic EPA Detailee.

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

Mr. SHIMKUS. Oh, my gosh. We are out of control already. Welcome, everybody. I am going to call the hearing to order. The subcommittee will come to order, and the Chair recognizes himself for 5 minutes.

Welcome, everyone, back as we continue the discussion regarding coal ash. Today we are hearing from our stakeholder panel, and because of some scheduling conflicts, we will convene and hear from the EPA next week.

A couple months ago we heard from EPA and stakeholders about the final coal ash rule. We discussed the problems associated with the implementation, in particular, the fact that the final rule is self-implementing, meaning there will be no regulatory oversight and no enforceable permits, the fact that if states implement permit programs, they will not operate in lieu of the Federal rule so regulated entities must comply with two sets of requirements, and the fact that the only mechanism for enforcement of the final rule is through citizen suits which would result in an unpredictable

array of regulatory interpretations, as Judges throughout the country are forced to make technical compliance decisions that are better left to a regulatory agency. As a result we heard from almost all of the stakeholders at our January hearing that a legislative solution is still needed to best regulate coal ash.

Since our last hearing, we have been working to develop a legislative solution that does two things; one, takes into account all of the hard work EPA put into developing sound technical standards protective of human health and the environment and second, utilize the framework developed in previous legislation requiring states to develop enforceable permit programs that will contain minimum Federal standards.

This brings us here today to discuss the draft legislation we think accomplishes both of those goals. We are keeping the bill as a discussion draft because this is an open process during which we will continue efforts to collaborate with our colleagues in the House and our friends in the Senate, work with EPA on technical assistance, and of course, welcome suggestions from all of you to improve the bill.

The basics of the discussion draft are simple. The bill requires that every state have a permit program, and every permit program will contain minimum requirements based on EPA's final rule. Every permit program will address inactive surface impoundments or legacy sites in the same manner as EPA dealt with them in the final rule. They will have to decide within 2 months from the date of enactment whether they will be closed within 3 years from the date of enactment or whether they will be regulated like any other active disposal unit. Compliance timeframes are comparable to the final rule and for any lag we will gain the benefit of having an enforceable permit program. Furthermore, the discussion draft does not in any way impact the ability to bring citizen suits. The draft legislation does not require owners and operators to post their operating records on the internet because this is a remnant of a self-implementing program, but the draft requires states to make information regarding groundwater monitoring data, structural stability, emergency action plans, fugitive dust control plans, certifications regarding closure, and information regarding corrective action remedies available to the public.

We heard from a number of witnesses at our last hearing that a key problem with the self-implementing final rule was that EPA was forced to eliminate certain flexibility, in particular with respect to groundwater monitoring and corrective action, due to the lack of state oversight. Because the requirements will be implemented through state permit programs, the draft legislation allows the implementing agency on a site-specific basis to provide flexibility for groundwater monitoring or corrective action taking into account risk-based factors.

At our last hearing we also heard about a few other provisions in the final rule that were problematic including: the retroactive application of the location of siting restrictions, the requirement that unlined impoundments that exceed a groundwater protection standard close with no opportunity to remedy the problem through corrective action, and that surface impoundments that miss a deadline to access structural stability must stop operating and close.

Forced closure of impoundments with no analysis of whether the impoundment is, or can be, operated safely may be appropriate under a self-implementing rule with no regulatory involvement, but the goal of the draft legislation and the state permit programs is to ensure that surface impoundments are operated safely and if they are not, then they will be corrected or closed.

As we work on this draft legislation we acknowledge the amount of time and effort that EPA put into drafting a final rule that is fully protective of human health and the environment and because actions speak louder than words, we did this by directly incorporating the exact provisions and the policy of the final rule into the discussion draft. That being said, we still believe that a legislative solution is the best approach to dealing with the regulation of coal ash because of the significant limitations of the rule.

We look forward to hearing from all our witnesses and hope Mr. Stanislaus will be able to provide some helpful comments on the discussion draft next week. In particular, ECOS and ASTSWMO since they will be tasked with creating permit programs that meet the minimum standards criteria set out in the legislation.

I would like again to thank the Administration for all of the cooperation we have received on this issue. EPA has been extremely constructive and helpful during the last Congress and recently working through the issues with the final rule and the discussion draft. I would also like to specifically thank ECOS and ASTSWMO for their continued participation and invaluable input on the mechanics of implementation. Last, I would like to express my appreciation to Mr. McKinley for his longstanding leadership on this issue as we continue the process of trying to figure out how to effectively regulate coal ash. As always, we appreciate all of our witnesses for being here and look forward to your testimony.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

We welcome everyone back as we continue the discussion regarding coal ash. Today we are hearing from our stakeholder panel and because of some scheduling conflicts we will reconvene and hear from EPA next week.

A couple months ago we heard from EPA and stakeholders about the final coal ash rule. We discussed the problems associated with implementation—in particular, the fact that the final rule is self-implementing meaning there will be no regulatory oversight and no enforceable permits, the fact that if states implement permit programs they will not operate in lieu of the federal rule so regulated entities must comply with two sets of requirements, and the fact that the only mechanism for enforcement of the final rule is through citizen suits which would result in an unpredictable array of regulatory interpretations, as judges throughout the country are forced to make technical compliance decisions that are better left to a regulatory agency. As a result we heard from almost all of the stakeholders at our January hearing that a legislative solution is still needed to best regulate coal ash.

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This brings us here today to discuss the draft legislation we think accomplishes both of those goals. We are keeping the bill as a discussion draft because this is an open process during which we will continue efforts to collaborate with our colleagues in the House and our friends in the Senate, work with EPA on technical assistance, and of course welcome suggestions from all of you to improve the bill.

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Mr. SHIMKUS. With that I yield 5 minutes to the gentleman from New York, Mr. Tonko.

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

Mr. TONKO. Thank you, Mr. Chair, and good morning. I thank the members of our witness panel for participating in today's hearing and for offering their thoughts on the discussion draft, the Improving Coal Combustion Residuals Regulation Act.

In the 35 years since Congress passed the Resource Conservation and Recovery Act, or RCRA, the Environmental Protection Agency has been studying this issue, and it has been the subject of intense debate. During this same time communities and many states have

experienced problems from inadequate handling and disposal of coal ash. It is long past time to resolve these issues and indeed move forward.

Earlier this year we heard from the agency and from other stakeholders about EPA's final rule on the disposal of coal ash. This rule has taken many years and is the result of an extensive public process. The rule represents a compromise amongst the stakeholders in this issue, and so it is not surprising that some groups are unhappy with certain provisions of the rule. But I continue to believe the rule should move forward. I realize that some of our witnesses today prefer the approach taken by this draft legislation. At this point, however, I do not see the need for legislation. There is a need for consistent, fair, and rigorous oversight of the rule's implementation. If the rule does not result in appropriate coal ash disposal or if it results in conflicts between state and Federal authorities or it leads to an excess of litigation, it can be revised or Congress can pass legislation to correct any problems that are identified.

At this point any problems with the rule are speculative, but the problems of coal ash disposal across the country are not. Spills, windborne ash, and groundwater contamination have caused serious health and environmental problems and continue to require expensive clean-up efforts. Properties and businesses have been severely damaged. This situation should not be allowed to continue.

The EPA finally has taken appropriate action under the law. We should now monitor the rule's implementation and do that very carefully.

Again, I thank the witnesses for taking time to appear before the subcommittee this morning, and with that, Mr. Chair, I thank you and yield back the remainder of my time. Is there anyone from the panel that would like to use about 2 minutes I think we have left? Anyone? If not, I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes the gentleman from West Virginia, Mr. McKinley, for 5 minutes.

OPENING STATEMENT OF HON. DAVID B. MCKINLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. MCKINLEY. Thank you, Mr. Chairman. As you have heard for 35 years, Congress has been wrestling with how to handle fly ash. For 35 years. After countless hearings, meetings, amendments, and legislation in the past, we come here with a draft piece of legislation, crafted with the help of the state Environmental and Solid Waste officials, committee staff, and with the input of the EPA.

The regulation may have been finalized in December, but it provided no certainty to those 316,000 hardworking Americans who recycle fly ash. This rule did not provide closure on a number of issues. It is simply not acceptable to the status quo.

However, what is accepted or what is acceptable is the legislation before us, this draft piece, ensures that the states have the flexibility they need to make the program work and are able to complete it within a reasonable timeframe. This draft legislation guarantees that every state must, not may, must have a Coal Ash Per-

mit Program, and it must contain the minimum Federal standards set out under the finalized rule.

Bottom line, this legislation provides certainty while the December ruling left the industry still scratching their heads. It would be responsible for this committee to continue to promote and push this draft legislation and work with all the stakeholders and the interest groups around this country to bring closure to this issue and end 35 years of unknown.

I yield back the balance of my time.

Mr. SHIMKUS. The gentleman would yield back, but before he does, I would look to the Republican side to see if anybody would like to use the remaining time. Seeing none, even on my colleagues on the Democrat side, seeing none, the gentleman yields back his time.

I want to make sure that you all can hear out there, not just folks on the panel but the folks who are sitting in the back because usually there are some speakers. The feed is working, but the—I don't think the speakers are working. They are working on it. OK.

So for the panel if you can use your military voice down from the diaphragm, use your military voice down from the diaphragm. Before we go to the panel I have neglected to recognize the ranking member of the full committee. That is a major faux pas. Congressman Pallone from New Jersey is recognized for 5 minutes.

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

Mr. PALLONE. Thank you, Chairman Shimkus.

This is the second hearing this Congress on the important topic of coal ash. In January this subcommittee heard from EPA and stakeholders about the agency's new final rule. After years of debate at the agency and in Congress over the proper regulation of coal ash, the agency had reached a verdict. EPA's final rule reflects a tremendous effort, and it will for the first time provide the framework for addressing this serious environmental problem. This rule is the product of a robust public process, including field hearings and several rounds of public comment, and it reflects the input of over 450,000 consumers, including states, industry groups, environmental groups, and individual concerned citizens.

In the end EPA finalized a rule that addressed almost all the concerns this subcommittee has heard about for years. Those in the coal ash recycling industry who make things like concrete and wallboard submitting, substituting coal ash for virgin material, had sought a non-hazardous rule under Subtitle D of RCRA, and that is what they got. Those in the electric utility industry wanted a Subtitle D rule that would not require them to retrofit their existing impoundments with liners, and that is what they got. And states wanted a mechanism to set up their own programs to implement Federal standards and to have EPA approve them, and that is what they got. The only stakeholders who really did not get what they sought in this rule were the environmental and public health advocates who wanted a stronger Subtitle C rule with the requirement that the giant unlined pits currently receiving this dangerous waste to be retrofitted to protect groundwater.

Other than those calls to strengthen the rule, the reaction to EPA's rule has been positive. The agency testified that they have every confidence in the rule and do not see a need for legislation, and members on both sides of the aisle expressed their support.

So I am surprised that we find ourselves here today considering legislation that would replace that rule before it has taken affect and undermine the robust public process that went into it. I am even more surprised that the stakeholders who are here today expressing support for legislation are the same ones whose concerns have been addressed in the rule. I don't see a need for legislation at this time. Instead I think EPA and the states should be allowed to move forward and implement the final rule subject to this Committee's oversight.

I do want to say a few words about the specific legislation that is the subject of today's hearing. This new proposal retains the problems of past proposals which have been discussed extensively in this subcommittee. It would create a new model of delegation to states with a sharply-curtailed role for EPA. It does not include a legal standard of protection, a substantive EPA role in reviewing state programs, or EPA backstop enforcement authority. The new proposal presents additional concerns as well because necessary health protections included in EPA's final rule are left to state discretion or left out entirely. Groundwater monitoring protection, closure requirements, clean-up requirements all could be weaker under this bill than under the final rule. If anything, we should be strengthening the protections of the final rule and not weakening them.

So I think this legislation is unnecessary and dangerous for public health and the environment. I applaud EPA for their hard work on the coal ash final rule, and I hope the subcommittee can move forward in an oversight role as implementation begins.

Thank you, Mr. Chairman. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. Now the Chair will recognize our panelists one at a time with an introduction and your opening statement. Your full statement is submitted for the record.

So first I would like to welcome and recognize David Paylor, Director of the Virginia Department of Environmental Quality, on behalf of the Environmental Council of the States. Sir, welcome, and you are recognized for 5 minutes.

STATEMENTS OF DAVID PAYLOR, DIRECTOR, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; MICHAEL FORBECK, ENVIRONMENTAL PROGRAM MANAGER, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL, BUREAU OF WASTE MANAGEMENT; JAMES ROEWER, EXECUTIVE DIRECTOR, UTILITIES SOLID WASTE ACTIVITIES GROUP; AND LISA EVANS, SENIOR ADMINISTRATIVE COUNSEL, EARTHJUSTICE

STATEMENT OF DAVID PAYLOR

Mr. PAYLOR. Thank you, Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee. Good morning. My name is David Paylor. I am the Director of the Virginia Department of Environmental Quality, and I appreciate the opportunity to share

with you Virginia's views on the draft bill. I am also representing the Environmental Council of the States, ECOS, whose members are leaders of the state and territorial environmental protection agencies.

Many state regulators have first-hand experience with the devastating results of CCR impoundment failures. Breaches and releases destroy property and contaminate natural resources.

ECOS has worked on the CCR rule issue for many years. ECOS' resolution on CCR regulation was first passed in 2008, and ECOS testified in April, 2013, in support of legislation to amend RCRA to create a defensible and strong CCR program that could be run by the states. After EPA signed a final CCR rule in December, ECOS testified before this subcommittee supporting the final rule's technical requirements but stating that legislation to amend RCRA was still needed for several reasons. The final rule creates a dual Federal and state regulatory system that will be confusing and resource intensive, the final rule's schedules would require states to achieve final Solid Waste Management Plan amendments on an aggressive schedule which could not be met by many states. the final rule's self-implementing approach would make RCRA citizen suits the primary enforcement vehicle for CCRs under The final rule's self-implementing approach would make citizen suits the primary enforcement vehicle, marginalizing the role of state regulation, oversight, and enforcement and thus creating uncertainty for the regulated community.

ECOS has reviewed the draft bill and find that it positively addresses the concerns. The draft bill leverages and codifies the extensive technical work in EPA's final rule. It provides that states may adopt, implement, and enforce CCR programs. The draft bill would give state environmental agencies 24 months to certify their programs, with a potential for an additional 12 months. This would provide most states with existing CCR programs ample time to pursue the necessary state legislative and rulemaking processes. For example, in Virginia, our regulatory process can take 2 to 3 years.

The draft bill provides that the requests for certification to EPA be fully described, that the states fully describe their programs and how they meet Federal requirements. The draft bill importantly provides that state programs can be more stringent or broader in scope. For example, Virginia already has authority under the Waste Management Act to require solid waste permits for the operation of a coal ash management facility, including activities related to post closure and corrective action.

The draft bill contains an important provision that allows states that already have existing programs to begin using it right away. A recent survey of states indicated that 36 states, including Virginia, have permitting programs for disposal activities with 94 percent of those requiring groundwater monitoring.

The draft bill contains an important requirement for states to submit as part of their certifications a plan for coordination among states in the event of a release that crosses state lines. This type of upfront planning is relevant, especially in Virginia, where we recently had a Dan River spill that originated in North Carolina but impacted nearly 50 miles of Virginia waterways.

The Federal bill provides that EPA will operate the CCR Program for a state that cannot demonstrate a sufficient program or declines to do so.

The draft bill includes robust requirements for industry permit applications, provides for public information availability, and state access to facilities. The bill incorporates the new robust technical, siting, financial assurance, run-on and run-off controls and record-keeping and structural integrity requirements. We value the flexibility the draft bill adds that will allow states to identify alternative points of compliance for monitoring, alternative groundwater protection standards, remediation flexibility, and to allow unlined impoundments to operate for a period of time providing there are no groundwater threats and the structural integrity of the berms is maintained.

The draft bill sets out a 3- to 4-year process for compliance. It recognizes implementation realities and still allows action in emergency situations. The legislation supports beneficial uses of coal ash, such as in concrete, road bed fill, wallboard, and other uses. Beneficial reuse of coal ash is consistent with ECOS' longstanding resolution, which is appended to my testimony.

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 prepared statement of Mr. Paylor follows:]

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
Wednesday, March 18, 2015
by
David K. Paylor, Director
Virginia Department of Environmental Quality
and
Past President, Environmental Council of the States

Main Points

1. The draft bill promotes the beneficial reuse of coal combustion residuals (CCR) as non-hazardous waste, consistent with ECOS' longstanding resolution on this subject.

2. The draft bill amends Subtitle D of the Resource Conservation and Recovery Act (RCRA) by allowing the states to implement and enforce the Environmental Protection Agency's (EPA's) coal ash management rule through a state permit program instead of having the rule be self-implementing. This recognizes that the states are in the best position to implement the rule and to regulate CCR units, but also properly empowers the EPA to serve as a backstop and administer the new rule in circumstances where a state decides not to do so or fails to do so properly.

3. The draft bill includes important provisions for multi-state coordination, provides reasonable timeframes for state program amendment to include new requirements, and closes enforcement gaps left by EPA's final rule, while clearly preserving citizen suits.

Chairman Shimkus, Raking Member Tonko, and Members of the Subcommittee, good morning. My name is David Paylor, and I am Director of the Virginia Department of Environmental Quality. I appreciate the opportunity to share with you Virginia's views on the draft bill. 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 a Past President of ECOS and serve as President of ECOS' research division, the Environmental Research Institute of the States.

ECOS' CCR History. Many state regulators like me have first-hand experience with the devastating results of CCR impoundment engineering failures. Breaches and releases devastate people's lives, destroy property, and contaminate natural resources in often irreparable ways.

For this reason, ECOS has worked on the CCR issue for many years. ECOS' resolution on CCR regulation was first passed in 2008 and reaffirmed in 2013. ECOS testified in April 2013 before the Subcommittee on Environment and the Economy in support legislation to amend RCRA to create a defensible and strong CCR program that could be run by states. After EPA signed a final CCR rule in December 2014, ECOS testified before this Subcommittee in January, supporting the final rule's technical requirements but stating that legislation to amend RCRA was still needed to address limitations and weaknesses in the final rule that are result from the statute's current structure. These limitations were that:

- the final rule creates a dual federal and state regulatory system that will be confusing and resource intensive, because EPA is unable under RCRA Subtitle D to delegate the CCR program directly to the states in lieu of the federal program;
- the final rule's schedules would require states to achieve final Solid Waste Management Plan (SWMP) amendment on an aggressive schedule which could not be met by many

states; furthermore, it is unlikely that EPA has the resources to conduct a timely review and approval of state plans; and

- the final rule's self-implementing approach would make RCRA citizen suits the primary enforcement vehicle for CCRs under the final rule, marginalizing the role of state regulation, oversight, and enforcement; thus creating uncertainty for the regulated community and state regulators with respect to how compliance and enforcement activities will be managed.

ECOS has reviewed the draft bill, and find that it positively addresses the concerns identified by ECOS in our January testimony. The draft bill leverages and codifies the extensive technical work in EPA's final rule, which will enhance impoundment structural integrity provisions, promote transparency, and close environmentally degrading facilities.

State CCR Programs. The draft bill provides that states may adopt, implement, and enforce CCR programs, and provides that Governors shall notify EPA of the state's intentions to do so within six months of the bill's enactment. The draft bill would give state environmental agencies like mine 24 months to certify to EPA that our CCR program meets the bill's requirements, with a 12 month extension if needed. This would provide most states with existing CCR programs ample time to pursue the necessary state legislative and rulemaking processes to conform our programs to the new requirements. In Virginia, for example, our regulatory process can take up to two to three years, thus it is important to build in flexible certification deadlines. This is especially true in Virginia, as may be the case in other states, because there are dual authorities and agencies responsible for the operation of surface impoundments. Dam safety requirements fall under the authority of Virginia's Department of

Conservation and Recreation. Therefore Virginia would likely have two concurrent regulatory actions proceeding to enact the new requirements.

The draft bill provides that in their requests for certification to EPA, states would describe their programs for inspection, enforcement, public participation, groundwater monitoring, stability assessment, emergency plans, dust control, closure notifications, and corrective action. The state would also have to describe any definitional differences, demonstrate sufficient statutes and regulations are in place, and maintain appropriate approved RCRA hazardous waste programs.

The draft bill importantly provides that state program can be more stringent or broader in scope, which is important. For example, Virginia already has the authority under the Waste Management Act to require a solid waste permit for the operation of a coal ash management facility, including activities related to post closure and corrective action.

Preapproval of Existing State CCR Programs. The draft bill contains an important provision that allows states that already have an existing program to begin using it right away. This is important because many states already have existing programs, and EPA modeled its final rule on the best of those programs. A recent survey of states by the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) indicated that 36 states, including Virginia, have permitting programs for disposal activities with 94 percent of those requiring groundwater monitoring.

Impacts Beyond State Lines. The draft bill contains an important requirement for states to submit as part of their certifications a plan for coordination among states in the event of a release that crosses state lines. This type of upfront planning is relevant – and would be helpful

in Virginia particularly – where the recent Dan River release in North Carolina impacted nearly 50 miles of Virginia waterways.

Federal Backstop. The draft bill provides that EPA will operate the CCR program for a state that cannot demonstrate a sufficient program or for a state that chooses not to run such a program itself – as well as a process for a state to assume these functions after remedying a deficient program or choosing to begin a program. These provisions should give assurances to the public that states and the federal EPA are both empowered to act.

Industry Requirements. The draft bill includes robust requirements for the industry permit applications, provides for public information availability, and state access to facilities. The bill incorporates the new robust technical, siting, financial assurance, run-on and run-off controls, recordkeeping, and structural integrity requirements published by EPA in the final CCR rule, which will be codified at 40 CFR Part 257. EPA did a very good job developing the technical requirements of the final CCR rule, modeling many of the final requirements on existing effective and stringent state programs. At the same time, we value the flexibility the draft bill adds that will allow states to identify alternative points of compliance for monitoring, alternative groundwater protection standards, remediation flexibility, and to allow unlined impoundments to operate for a period of time providing there are no groundwater threats and the structural integrity of impoundment berms is maintained.

We recognize that the final EPA regulations were "self-implementing," meaning that industry would be expected to move ahead with implementation regardless of any state or federal agency action. The only way the self-implementing rule would be enforced would be through citizen suits, state action, or federal action. The draft bill sets out a three to four year process for compliance by the facilities. While this may seem like unnecessary delay, it recognizes

implementation realities and still allows action in any emergency situations and provides a process for expedited facility closure where necessary.

Coal Ash is Non-Hazardous. The legislation supports beneficial uses of coal ash, such as in concrete, road bed fill, wallboard, and other uses. Beneficial reuse of coal ash is consistent with ECOS' longstanding resolution, appended to my testimony.

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, sir.

Now I would like to introduce Mr. Michael Forbeck, Environmental Program Manager for the Pennsylvania Department of Environmental Bureau of Waste Management, on behalf of the Association of state and Territorial Solid Waste Management Officials, which is the hard to say, ASTSWMO.

Sir, you are recognized for 5 minutes.

STATEMENT OF MICHAEL FORBECK

Mr. FORBECK. I am President of the Association of state and Territorial Solid Waste Management Officials, ASTSWMO, and I am here today to testify on behalf of ASTSWMO.

ASTSWMO is an association representing the waste management and remediation programs of the 50 states, five Territories and the District of Columbia. Our membership includes state program experts with individual responsibility for the regulation and management of solid and hazardous wastes.

Thank you for the opportunity to provide testimony on the discussion draft, "Improving Coal Combustion Residuals Regulation Act of 2015". Overall, ASTSWMO believes the discussion draft has successfully captured the essential parts of the EPA rule on coal combustion residuals management that are germane to the protection of the environment and public health and has modified or added those areas that improve the rule.

We also believe that this discussion draft has addressed the main concerns that ASTSWMO expressed regarding EPA's final rule on CCR in our testimony before this subcommittee on January 22, 2015. While being in full agreement with issuance of the final rule under Subtitle D of the Resource Conservation and Recovery Act, ASTSWMO's prior testimony noted state implementation issues raised by the self-implementing construct of RCRA Subtitle D, Part 257. The concerns we voiced are summed up as follows. The rule's self-implementing requirements will set up the situation of dual state and Federal regulatory regime, even if the state requirements meet or exceed national minimums. The use of EPA-approved state Solid Waste Management Plans as a mechanism to deal with the issue of dual regulatory authority will not fully alleviate dual implementation of state and Federal standards, since the approved Solid Waste Management Plan would not operate in lieu of the Federal standards. The ability of states to establish regionally appropriate standards, as allowed under RCRA Subtitle D, Part 258 for municipal solid waste landfills, is constrained by the rule's self-implementing requirements.

ASTSWMO believes this discussion draft has addressed our main concerns regarding EPA's final rule in the following three ways.

First, it eliminates dual state and Federal regulatory authority resulting from the self-implementing construct of EPA's rule by giving states the authority to adopt and implement a CCR permit program. Many states already have a very successful permit program. For states that choose to adopt and implement the permit program, it assures state primacy through a single permit program provision that is enforceable by the state. This results in a clear and consistent understanding of the permitting and enforcement roles of the states. We also agree with the additional level of review by

EPA to determine whether state permit programs are adequate to ensure compliance with the criteria as described in the discussion draft.

Second, by directly giving states the authority to implement a CCR role or program, the discussion draft eliminates the uncertainty of state-only implementation the Solid Waste Management Plan as the mechanism. The certification process under the draft legislation could allow for expedited implementation of the technical requirements.

Third, we appreciate that the draft legislation allows the flexibility for states to have regionally appropriate state standards for groundwater monitoring and corrective action.

In addition to the draft legislation addressing the concerns expressed in our previous testimony, ASTSWMO is pleased that the legislation requires financial assurance for post-closure care of inactive surface impoundments to ensure long-term compliance with environmental and public health requirements. Financial assurance is an important component in state waste programs, and ASTSWMO has supported the inclusion of financial assurance as a key program element in a final EPA CCR rule under Subtitle D.

We would like to offer to the subcommittee's consideration one modification to the draft legislation at this time. Under the Agency Authority for inspections we ask that the subcommittee consider not limiting an implementing agency's authority to enter a site for purposes of inspection to only "at reasonable times." This could be construed to mean during normal working hours. The timing of inspections should be at the discretion of the state to allow for after-hour inspections.

Thank you again for providing me the opportunity to testify on this draft legislation, and I would be happy to answer any questions.

[The prepared statement of Mr. Forbeck follows:]

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

Hearing
"H.R. ___, Improving Coal Combustion Residuals Regulation Act of 2015."

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy
March 18, 2015

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

Main Points:

- The discussion draft addresses the State implementation issues raised by the self-implementing construct of EPA's final coal combustion residuals rule (CCR) by providing the statutory authority for States to adopt and implement a CCR permit program.
- In giving States authority to implement the technical requirements in EPA's final rule through a CCR permit program, the draft legislation eliminates the situation of dual State and federal regulatory authority.

Good morning Chairman Shimkus, Ranking Member Tonko, 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). I am here today to testify on behalf of ASTSWMO.

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.

Thank you for the opportunity to provide testimony on the discussion draft, "Improving Coal Combustion Residuals Regulation Act of 2015". Overall, ASTSWMO believes the discussion draft has successfully captured the essential parts of the EPA rule on coal combustion residuals (CCR) management that are germane to the protection of the environment and public health, and has modified or added those areas that improve upon the rule.

We also believe that this discussion draft has addressed the main concerns that ASTSWMO expressed regarding EPA's final rule on CCR in our testimony before this Subcommittee on January 22, 2015. While being in full agreement with issuance of the final rule under Subtitle D of the Resource Conservation and Recovery Act (RCRA), ASTSWMO's prior testimony noted State implementation issues raised by the self-implementing construct of RCRA Subtitle D Part 257. The concerns we voiced are summed up as follows:

- The rule's self-implementing requirements will set up the situation of a dual State and federal regulatory regime, in which the owner or operator of a CCR disposal facility would need to fully comply with the self-implementing national minimum standards

and existing State requirements, even if the State requirements meet or exceed the national minimums.

- The use of an EPA-approved State Solid Waste Management Plan (SWMP) as the mechanism to deal with the issue of dual regulatory authority will not fully alleviate dual implementation of State and federal standards, since the approved SWMP would not operate "in lieu of" the federal standards.
- The ability of States to establish regionally appropriate standards, as allowed under RCRA Subtitle D Part 258 for municipal solid waste landfills, is constrained by the rule's self-implementing requirements.

ASTSWMO believes this discussion draft has addressed our main concerns regarding EPA's final rule in the following three ways:

1. First, it eliminates dual State and federal regulatory authority resulting from the self-implementing construct of EPA's rule by giving States the authority to adopt and implement a CCR permit program. Many States already have successful CCR permit programs. For States that choose to adopt and implement the permit program, it assures State primacy through the single permit program provision that is enforceable by the State. This results in a clear and consistent understanding of the permitting and enforcement roles of the States.

   We also agree with the additional level of review by EPA to determine whether State permit programs are adequate to ensure compliance with the criteria as described in the discussion draft.

2. Second, by directly giving States the authority to implement a CCR permit program, the discussion draft eliminates the uncertainty of State-only implementation through the use of the SWMP as the implementation mechanism. The certification process under the draft legislation could allow for expedited implementation of the technical requirements.
3. Third, we appreciate that the draft legislation allows the flexibility for States to have regionally appropriate State standards for groundwater monitoring and corrective action.

In addition to the draft legislation addressing the concerns expressed in our previous testimony, ASTSWMO is pleased that the legislation requires financial assurance for post-closure care of inactive surface impoundments to ensure long term compliance with environmental and public health requirements. Financial assurance is an important component in State waste programs, and ASTSWMO has supported the inclusion of financial assurance as a key program element in a final EPA CCR rule under Subtitle D.

We would like to offer for the Subcommittee's consideration one modification to the draft legislation at this time. Under Agency Authority for inspections (Page 9, line 6), we ask that the Subcommittee consider not limiting an implementing agency's authority to enter a site for purposes of inspection to only "at reasonable times". This could be construed to mean during normal working hours. Provided there are no safety issues, after hours inspections would allow a more thorough compliance check that should be governed by the State authorities needed to inspect a facility. The timing of inspections should be at the discretion of the State.

Thank you again for providing me with the opportunity to testify on this draft legislation. I would be happy to answer any questions.

Mr. SHIMKUS. Thank you very much.

The Chair now recognizes Jim Roewer, the Executive Director of the Utilities Solid Waste Activities Group on behalf of USWAG Edison Electric Institute, National Rural Electric Cooperative Association, and the American Public Power Association.

Thank you and recognize you for 5 minutes.

STATEMENT OF JAMES ROEWER

Mr. ROEWER. Chairman Shimkus, Ranking Member Tonko—excuse me, he left—members of the subcommittee, good morning. I am pleased to present the views of the utility industry; USWAG, APPA, EEI, and NRECA on the "Improving Coal Combustion Residuals Regulation Act of 2015."

When I testified at the Oversight Hearing before the committee on EPA's CCR, I made clear that while we supported EPA's decision to regulate coal ash as a non-hazardous waste, there were significant flaws in the rule because the rule can't be delegated to the states, it is self-implementing, and regulated facilities must comply with the rules requirements irrespective of whether it is adopted by the states.

Since state coal ash regulations cannot operate in lieu of Federal regulations, we must comply with dual and potentially-inconsistent Federal and state regs. This is unlike other Federal environmental regulatory regimes, including EPA's Subtitle C Hazardous Waste Program where Congress views the states as key partners in implementing and enforcing Federal regulation and expressly authorizes the states to adopt and implement the Federal regime in lieu of EPA.

The rule's only compliance mechanism is for a state or citizen group to bring suit in a Federal District Court, so an excess of litigation is guaranteed. Legal disputes regarding compliance can only be determined on a case-by-case basis by different Federal District Courts across the country. Federal Judges will be forced to make complex technical decisions regarding compliance instead of regulatory agencies that have the technical expertise and experience to better address those issues.

Because of these fundamental flaws in the statutory structure under which the rule was issued, legislation amending RCRA is necessary for EPA's rule to be implemented in an effective and practical manner. The discussion draft would do this.

The bill would establish a permit program for implementation of the regulations issued by EPA, eliminate the problems associated with the self-implementing nature of the rule. Under the bill, virtually all aspects of the rule would be implemented solely through state CCR permit programs or by EPA if the states do not adequately adopt and implement the rule. This structure is similar to the manner in which Congress previously amended RCRA to allow EPA's Subtitle D municipal solid waste landfill rules to be implemented through state permit programs.

The bill would also require coal ash permits to include conditions not included in EPA's final rule, including financial assurance requirements and would preserve the ability of the states to regulate more stringently than the Federal rule.

Authorizing the states to implement the rule through permit programs would eliminate the problem of dual and inconsistent Federal and state regulation. Equally important, having EPA's rule implemented by a state Regulatory Agency eliminates the compliance dilemma where our members and the public at large are left to own their devices to determine what is required to come into compliance. The utility industry will be investing huge capital resources to comply with the rule. The bill will provide the regulatory certainty for those investment decisions since compliance will be specified by a regulatory agency and spelled out in a permit.

The bill would establish a rational and efficient enforcement scheme by enabling state Regulatory Agencies to enforce the rules as opposed to having enforcement borne solely on the back of citizen suits as it is under EPA's rule. EPA currently has no role in administering or enforcing its rule. The bill would increase EPA's authority by directing it to review the adequacy of state permit programs, where to implement those programs where the states choose not to, or the state's program is inadequate.

In addition, and importantly, the bill does not limit in any way the ability of a citizen group to bring enforcement actions under RCRA's citizen suit provision. The bill eliminates reliance on Federal District Courts for interpreting and enforcing the rule, avoiding the specter of differing and potentially inconsistent application of the rule between or even within states.

EPA dropped from the final rule certain site-specific, risk-based options for applying elements of the regulations that were in its proposal, reasoning that those risk-based decisions require regulatory oversight. Thus, state programs that enable regulators to issue tailored, site-specific, risk-based options for coal ask management are superseded by the one-size-fits-all approach in EPA's rule.

The bill establishes regulatory agency oversight in implementing the rule, and therefore, appropriately restores the ability of the implementing agency to tailor aspects of the rule to accommodate site-specific factors, consistent with the approach of EPA's proposed rule as well as the Federal Municipal Solid Waste Program.

For example, the proposed rule would have allowed a facility to establish an alternative risk-based groundwater protection standard. EPA removed that option precisely because there was no regulatory oversight or approval regarding the establishment by an owner and operator of that alternative standard. The bill allows the permitting agency to establish, where appropriate, an alternative risk-based groundwater protection standard, the same option provided to permit writers under EPA's municipal solid waste landfill rule.

I thank the subcommittee for the opportunity to present the views of the utility industry on the discussion draft which we believe will allow EPA's new coal ash rule to be implemented in an effective and practical manner. Thank you.

[The prepared statement of Mr. Roewer follows:]

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

LEGISLATIVE HEARING BEFORE THE HOUSE SUBCOMMITTEE ON ENVIRONMENT & THE ECONOMY ON DRAFT "H.R. __, THE IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT of 2015"

March 18, 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], the American Public Power Association (APPA)[2], and the National Rural Electric Cooperative Association ("NRECA")[3] on the discussion draft of the "Improving Coal Combustion Residuals Regulation Act of 2015."

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[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 48 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.

[3] The National Rural Electric Cooperative Association is the national service association of more than 900 not-for-profit rural electric cooperatives and public power districts providing retail electric service to more than 42 million consumers in 47 states and whose retail sales account for approximately 12 percent of total electricity sales in the United States. NRECA's members include consumer-owned local

USWAG is a consortium of EEI, APPA, NRECA, and approximately 130 electric utilities, power producers, utility operating companies and utility service companies located throughout the country. Together, USWAG member companies operate nearly 75% of the total coal-based generating capacity in the United States.

When I testified before this Subcommittee during your January oversight hearing on EPA's final 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), I made clear that we supported EPA's decision to regulate coal ash as non-hazardous waste under Subtitle D of 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.

Importantly, however, while we support EPA's regulation of coal ash as a non-hazardous waste, there are serious flaws in the new coal ash rule because 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. This is unlike most other federal environmental regulatory regimes, including RCRA's Subtitle C hazardous waste program, where Congress views the states as key partners in implementing and enforcing federal regulations and expressly

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distribution systems and the generation and transmission (G&T) cooperatives that supply wholesale power to their distribution cooperative member-owners. Distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable electric service at the lowest reasonable cost.

authorizes the states to adopt and implement the federal regime *in lieu of* EPA. In this case, however, because EPA's 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.

I identified several of the flaws in this self-implementing scheme that will effectively undermine the implementation of the new rule. Among other things, the fact that state coal ash regulations cannot operate in lieu of the federal rule means that coal ash facilities must comply with dual and potentially inconsistent federal and state regulations for the same material. This is especially problematic because EPA has dropped from the final rule site-specific, risk-based options for implementing elements of the coal ash rule that were contained in the proposed rule, reasoning that such risk-based decisions require regulatory oversight. Thus, state coal ash programs that enable regulators to issue tailored, site-specific, risk-based management options for coal ash management are effectively usurped by the one-size-fits all approach in the self-implementing rule.

In addition, the rule's only compliance mechanism is for a state or citizen group to bring suit in federal district court against an alleged non-compliant facility. This means that legal disputes regarding compliance with any aspect of the rule can only be determined on a case-by-case basis by different federal district courts across the country. This requires federal judges to make complex technical decisions regarding compliance under the rule in place of regulatory agencies that have the technical

expertise and experience to better address these issues. This also will produce differing and likely inconsistent decisions regarding the scope and applicability of the federal rule depending on where a citizen suit is brought.

Given these fundamental flaws with the statutory structure under which the final rule was issued, I indicated during my earlier testimony that legislation amending RCRA is necessary for EPA's new coal ash rule to be implemented in an effective and practical manner. The discussion draft would achieve this objective.

First, and foremost, the bill would establish a permit program for implementation of the new coal ash regulations issued by EPA, thus eliminating the problems associated with the self-implementing nature of the current rule. Under the bill, virtually all the aspects of the rule would be implemented solely through state CCR permit programs, or by EPA if the states do not adequately adopt and implement the rule. The bill also would require coal ash permits to include conditions *not* included in EPA's rule – including financial assurance requirements and surface water protection standards – and would preserve the state's ability to regulate more stringently than the federal rule. This statutory structure would be similar to the manner in which Congress previously revised RCRA to allow EPA's Subtitle D municipal solid waste landfill rules to be implemented through state permit programs, or by EPA if states fail to do so, as the bill does.

Authorizing the states to implement the rule through permit programs also would eliminate the problem of dual and inconsistent federal and state regulation of coal ash. Equally important, having EPA's rule implemented by a regulatory body eliminates the compliance dilemma where our members and the public at large are left to own their devices to try to discern what is required to come into compliance. The utility industry will be investing huge capital resources to comply with the rule. The bill will provide regulatory certainty for those investment decisions since compliance will be specified by a regulatory body and spelled out in a permit.

In addition, the bill would bring about a more rational and efficient enforcement scheme. While it does not limit in anyway the ability of citizen groups to bring enforcement actions under RCRA's citizen suit provision against facilities alleged to be in non-compliance with a permit condition, it would augment the rule's enforcement options by enabling the permitting body also to take direct enforcement action against a non-compliant facilities, as opposed to having enforcement responsibility borne solely on the back of citizen suits. In addition, whereas EPA currently has no role in administering and enforcing the CCR rule, the bill would increase EPA's authority by directing it to review the adequacy of state coal ash permit programs and directing EPA to implement the permit program where the states choose not to do so or a state's permit program is inadequate. This approach also eliminates exclusive reliance on federal district courts for interpreting and enforcing the rule, thereby avoiding the

specter of differing and potentially inconsistent application of the rule between the states and even within particular states with multiple federal district courts.

We also appreciate that the bill properly restores the ability of the implementing agency to include site-specific, risk-based management options in permits. EPA included this concept in the proposed Subtitle D CCR rule, but eliminated this approach from the final rule *precisely* because the rule was self-implementing and could not be administered through a permit program. The bill would require regulatory oversight in implementing the rule and therefore appropriately allows the implementing agency to tailor certain aspects of the rule to accommodate site-specific factors, consistent with the approach in EPA's proposed coal ash rule and the federal municipal solid waste landfill program under 40 C.F.R. Part 258.

For example, the proposed coal ash rule would have allowed a facility to establish an alternative risk-based groundwater protection standard instead of defaulting automatically to background levels in circumstances where EPA has not established a maximum contaminant level for the constituent of concern. However, EPA removed that option in the final rule *precisely* because there was no regulatory oversight regarding the establishment by an owner/operator of an alternative, risk-based groundwater protection standard. However, because the bill requires the rule to be implemented through a permit program, it would allow the permitting agency to establish, where appropriate, the use of an alternative risk-based groundwater

protection standard. Indeed, this is precisely the option provided to permit writers under EPA's municipal solid waste landfill rule.

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I would like to thank the Subcommittee for the opportunity to present the views of USWAG, EEI, APPA, and NRECA on the draft CCR legislative discussion draft. We think the legislation is necessary to allow EPA's new coal ash rule to be implemented in an effective and practical manner. I would be glad to answer any questions you have concerning my testimony.

Mr. SHIMKUS. Thank you.

The Chair now recognizes Lisa Evans, Senior Administrative Counsel, from EarthJustice.

You are recognized for 5 minutes. Welcome.

STATEMENT OF LISA EVANS

Ms. EVANS. Thank you very much. Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee, thank you for the opportunity today to discuss the bill offered by Representative McKinley. I am Lisa Evans, Senior Administrative Counsel for EarthJustice. I have had the privilege of testifying previously before this subcommittee concerning the serious harm caused by coal ash to our health, economy, and environment. I have spoken about the hundreds of sites where coal ash has harmed Americans nationwide by poisoning water, air, and threatening the very existence of communities near large coal ash dams. Today we stand at a crossroads.

In December, EPA's first-ever coal ash rule finally put the Nation on the road to safer toxic waste disposal which will help prevent water pollution, avoid catastrophic spills, promote cleaner air, and encourage robust public engagement by communities living near coal ash dumps. Yet the bill proposed by Representative McKinley would run us off this road and drag us into a dark and dangerous detour where almost none of the protections of the new EPA rule would survive intact.

Worst of all, it is a one-way trip that permanently deprives citizens of consistent nation-wide protection from the second largest industrial waste strain in the country. Make no mistake, this bill is an unwarranted and dangerous detour that guts the new EPA rule and permanently removes critical public health safeguards.

Let me be very specific. The requirements in Representative McKinley's bill are not the same, not nearly the same, as the requirements in the EPA rule. Today's bill eliminates many requirements entirely, weakens others, and delays all.

The following are some examples. First, the bill will eliminate the guarantee of public access to information concerning contaminated sites and dangerous dams. Communities will likely be unable to find out if there are toxic chemicals in their water, spills in their neighborhood, or unstable dams above their homes. Second, the bill will eliminate the rules ban on storing and dumping coal ash directly in drinking water. Unlike the EPA rule, there is no ban on operating a coal ash pond directly in an aquifer. Ponds that are located there now, and there are many, can continue to dump toxic waste and new dumps can be built on top of drinking water sources.

Third, the bill will eliminate the rule's national standard for drinking water protection and clean-ups. According to this bill, a state can choose to allow more arsenic, more lead, more mercury, more thallium in the groundwater and not be bound by Federal health standards. Fourth, the bill will eliminate the requirement to quickly close legacy ponds. The bill will likely delay cleanup of legacy sites for years and allow contaminated and abandoned ponds, like the Dan River Dam that burst last February, to escape all safety requirements, including inspections, for up to 7 years.

The bill also contains a loophole that could allow inactive ponds to escape all closure requirements entirely. Fifth, the bill will eliminate the polluter's responsibility to respond and notify the public of toxic spills. Sixth, the bill will eliminate the state's duty to require cleanup of such toxic spills. According to the bill, the utility industry need not cleanup spills if states don't want to require it.

Lastly, the bill will permanently establish an inconsistent patchwork of state programs which need not meet any standard of protection for health and the environment and which will cause uncertainty nationwide.

Undoubtedly this bill will harm the health, economy, and environment of communities near more than 1,000 coal ash dumpsites. Yet last December the EPA bent over backwards to satisfy the concerns of industry, recyclers, and states. It delivered a rule that characterized coal ash as non-hazardous, fails to banned continued use of unlined ponds, exempts beneficial use, establishes extended and flexible timeframes for compliance and closure, and regulates coal ash under the weakest of the three options proposed in 2010.

In closing, I want to reiterate that I appreciate the opportunity to address the subcommittee. However, there are other voices that must be heard. Last week 143 individuals and groups personally impacted by coal ash dumping sent a letter to this subcommittee requesting the opportunity to speak. The words of those actually harmed by toxic dumping are sorely missing today. If impacted community members were here today, citizens from Illinois, West Virginia, Pennsylvania, and Missouri who live near leaking coal ash ponds, citizens from North Carolina and Virginia who live along the Moapa Reservation in Nevada and the Nevada, the Navajo Reservation in New Mexico whose air is thick with ash, these citizens and many others would ask this committee not to throw away this limited coal ash rule for essentially no rule at all. They would ask the committee not to delay and not to remove critical health protections for their families and communities. Today I respectfully echo their plea.

Thank you for your time, and I would be happy to answer any questions.

[The prepared statement of Ms. Evans follows:]

TESTIMONY OF

LISA EVANS

SENIOR ADMINISTRATIVE COUNSEL, EARTHJUSTICE

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

Committee on Energy and Commerce,

U.S. House of Representatives

Hearing on the Discussion Draft of H.R. ____, The Improving Coal Combustion Residuals Regulation Act of 2015

March 18, 2015

Summary of Main Points

The Improving Coal Combustion Residuals Regulation Act of 2015 is an unwarranted and dangerous bill that will:

1. Remove, weaken and delay public health, safety and environmental protections afforded by the EPA's final coal ash rule including elimination of the rule's guarantee of public access to information concerning contaminated sites and dangerous dams, elimination of the rule's ban on storing and dumping coal ash in drinking water; elimination of the rule's national standard for drinking water protection and cleanups; elimination of the requirement to quickly close legacy ponds; elimination of a polluter's responsibility to respond to releases of hazardous substances, and elimination of the state's duty to require cleanup of hazardous releases;
2. Endanger the health, economy and environment of communities near more than 1000 coal ash dumpsites by eliminating these and additional critical protections in the final rule; and
3. Permanently establish an inconsistent patchwork of state programs, which, according to the Congressional Research Service, need not meet any standard of protection for health and the environment and which will engender uncertainty nationwide.

All of this harm and disruption is unjustified in light of the substantial compromises in EPA's final CCR rule. The EPA made significant concessions to address the concerns of industry, recyclers and states, including: (1) characterizing coal ash as non-hazardous; (2) allowing the continued operation of unlined coal ash ponds; (3) exempting the beneficial use of coal ash; (4) establishing extended timeframes for compliance and closure; and (5) regulating coal ash under the weakest of the three options proposed in 2010.

Despite these generous concessions, this bill guts the rule's remaining critical protections in a manner that will cause permanent and wide-ranging harm to our health, environment and economy. The bill will cause delay and reduction of critical safeguards, which in turn will result in expensive spills and damage to health, property and natural resources. The bill is an attack on the safety and certainty established by the EPA Rule, providing significant benefit only to polluters.

Testimony

Chairman Shimkus, Ranking Member Tonko and Members of the Subcommittee, I appreciate the opportunity today to discuss the legislative proposal offered by Rep. David McKinley to address the recent rulemaking by the U.S. Environmental Protection Agency (EPA) concerning coal combustion residuals (CCR). I am Lisa Evans, senior administrative counsel for Earthjustice, a national non-profit public interest law firm dedicated to protecting natural resources and wildlife and to defending the right of all people to a healthy environment.

I have had the privilege of testifying previously before this subcommittee concerning the harm caused by coal ash to our health, environment and economy. The evidence is overwhelming that coal ash, when mismanaged, harms Americans nationwide by poisoning water and air and threatening the very existence of communities near large coal ash dams. Expensive cleanups resulting from spills and widespread leaking of poorly engineered dumps are a great burden on our health and economy that will only increase if safeguards are delayed.

The bill before this subcommittee, "The Improving Coal Combustion Residuals Regulation Act of 2015", will not "improve" the final rule signed by EPA last December. On the contrary, the bill will severely harm American communities, our environment and our economy, and its dangerous and radical provisions are entirely unwarranted, as described below.

I. The Bill Is Unwarranted Because EPA's Final CCR Rule Is Responsive to the Concerns of Industry, States and Recyclers

On December 19, 2014, the EPA finalized the weakest regulatory option proposed by the agency in 2010. At the behest of the electric utility industry, states and recyclers, the EPA specifically adopted numerous recommendations in its final rule, including:

- Regulating coal ash as a non-hazardous solid waste under subtitle D of RCRA;

- Exempting coal ash from regulation when used beneficially;
- Prohibiting EPA enforcement and oversight;
- Encouraging the establishment and authorization of state coal ash programs;
- Allowing the continued use of unlined coal ash ponds for disposal of coal ash and non-coal ash waste and wastewaters; and
- Providing extended timeframes for closure of existing coal ash ponds (including up to 13.5 years for some impoundments).

In fact, following the release of the final rule in December, states, recyclers and the electric utility industry expressed general support and appreciation for the EPA rule. The Association of State and Territories Solid Waste Management Organization (ASTSWMO) stated in their press release that "ASTSWMO is extremely pleased that the CCR rule has been promulgated under RCRA subtitle D."[1] ASTSWMO, in fact, projected optimism concerning the rule's implementation by states.[2]

In light of the significant concessions already made by the EPA, the bill's radical overhaul of the final CCR rule is unnecessary and wholly unwarranted. States are already free to immediately create enforceable coal ash programs that are equivalent to the new rule. In fact, according to ASTSWMO, "Upon adoption under Subtitle D, national CCR standards will be established quickly and nationwide allowing States to continue enforcement under

[1] Association Of State And Territorial Solid Waste Management Officials Press Release On The Coal Combustion

[2] *Id.* ASTSWMO further stated in its press release, "[N]umerous State programs already meet or exceed much of the EPA proposed CCR national standards under 40 CFR part 257." ASTSWMO added:

> ASTSWMO is pleased that EPA has established 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. With this State authorization mechanism, 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.

their State regulations."[3] Instead of allowing the new EPA subtitle D program to take its course, however, this bill will severely delay, disrupt and derail the regulatory scheme, resulting in grave harm to American communities and the economy.

II. The McKinley Bill Will Harm The Health, Environment And Economy Of American Communities by Failing to Incorporate the Safeguards of the EPA Rule

A. The Scope of Harm from Coal Ash Mismanagement

The McKinley bill will weaken, delay and eliminate critical safety and health protections contained in the EPA's new CCR rule and will therefore place American communities in harm's way. The potential for future harm is immense and widespread. According to EPA, the nation's 478 coal-fired electric utility plants operate a total of 1,045 coal ash dumps, including 735 surface impoundments and 310 landfills.[4] Storage of ash in ponds poses the greatest threat, and there are more than 330 high and significant-hazard coal ash dams that would cause loss of life and/or substantial environmental and economic damage if they fail.[5] Three major coal ash disasters, including the largest toxic waste spill in U.S. history, have occurred since 2008. The TVA Kingston dam failure unleashed more than a billion gallons of toxic sludge -- 100 times the quantity of oil spilled by the Exxon Valdez. The spill destroyed a community and cost more than 1 billion dollars to remediate.[6] The most recent disaster was the Dan River Plant spill in North Carolina where 70 miles of river

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[3] *Id.* Emphasis added.
[4] Hazardous And Solid Waste Management System; Disposal Of Coal Combustion Residuals From Electric Utilities, 40 CFR Parts 257 and 261, December 19, 2014, Prepublication version (hereinafter, "Final EPA CCR Rule") *available at* http://www2.epa.gov/sites/production/files/2014-12/documents/ccr_finalrule_prepub.pdf at 20.
[5] *See* http://earthjustice.org/features/map-coal-ash
[6] *See* http://archive.tennessean.com/article/20131222/NEWS21/312220053/Kingston-coal-ash-spill-5-years-1-billion-cleanup-tab-no-regulations-later

in two states were fouled by 139,000 tons of coal ash and wastewater. The damage to the river and aquatic resources is estimated at more than $300 million.[7]

In addition to the immense damage and cost caused by catastrophic failure, the slow release of hazardous chemicals from coal ash dumpsites also harms health and results in costly cleanups. The EPA has identified 157 coal ash ponds and landfills that have contaminated groundwater or surface water.[8] EPA stated, "...this is the largest number of damage cases in the history of the [Resource Conservation and Recovery] program."[9] The EPA admits, moreover, that this tally most certainly underestimates the number of contaminated sites.[10] States and environmental groups have identified over 200 sites in 37 states where coal ash dumping has contaminated water, many of which have not yet been reviewed by the EPA.[11] These cases of documented water contamination are likely only a small percentage of the contaminated sites in the U.S., because most coal ash ponds and many landfills do not conduct monitoring, so water contamination largely goes undetected.

The result of widespread release of toxic contaminants comes at a high cost. Coal ash contains some of the deadliest chemicals know to man, including arsenic, cadmium, chromium, lead, mercury and thallium. Coal ash-contaminated water can harm every major organ in the human body and causes cancer, neurological damage, and other diseases, particularly in children.

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[7] Lemly, Dennis A. "Damage Cost of the Dan River coal ash spill," Environmental Pollution, 197 (2015), 55-61, Dec. 9, 2014, *available at* http://www.sciencedirect.com/science/article/pii/S0269749114004953.
[8] Final EPA CCR Rule at 79 and 558.
[9] *Id.*
[10] EPA stated it "expects that additional damage cases will be discovered in response to the installation of the groundwater monitoring systems required by the final rule." EPA Final CCR Rule at 79.
[11] *See* http://earthjustice.org/features/map-coal-ash.

B. The McKinley Bill Does Not Incorporate Critical Requirements of the EPA CCR Rule

The EPA's final CCR rule was over 30 years in the making. The final rule addresses a multitude of threats, including those posed by poorly engineered and aging dams, leaking dumps, abandoned ponds, blowing dust, and dumpsites located in dangerous areas. The McKinley bill, however, fails to incorporate all the requirements in the EPA rule. The bill picks and chooses from safety standards, eliminating some safeguards entirely and weakening others, losing along the way some of the bill's most important public health protections.

The McKinley bill:

- Eliminates the ban on dumping coal ash directly into drinking water. The EPA rule prohibits continued dumping in coal ash ponds where waste is in contact with, or within five feet, of aquifers (groundwater).[12]

- Eliminates the ban on dumping coal ash in leaking unlined ponds that contaminate groundwater above health standards. The McKinley bill allows utilities to continue to dump coal ash in leaking unlined ponds that are contaminating groundwater above health standards for another 8.5 years after detection, despite violation of health standards. In contrast, the EPA rule requires utilities to cease dumping within six months and begin closure.[13]

- Delays and, in some cases, eliminates the requirement for closure of legacy sites. The bill delays for up to 5 years the closure of inactive, contaminated and abandoned ponds, like the Dan River impoundment. The bill requires these ponds, if they are not closed

[12] 40 C.F.R. § 257.60.
[13] 40 C.F.R. § 257.101(a)(1).

in 5 years, to obtain a permit, but it allows a period of at least 1-2 years prior to permit issuance when absolutely no safety requirements will apply. Therefore the bill allows legacy ponds to sit for a minimum of 6-7 years, before they are subject to closure and safety standards. Furthermore, the bill defines "inactive surface impoundment" to exclude ponds that are being used for non-coal ash waste. Thus if a utility is using legacy ponds for disposal of any material, even surface runoff, the bill does not require closure at all.[14] In contrast, the EPA rule requires closure within three years, after which, if the pond is not closed, all requirements immediately apply.[15] All coal ash legacy ponds on sites that generate electricity are covered by the EPA rule, without exception.[16]

- Eliminates the requirement for owners and operators to respond immediately to spills and makes cleanup discretionary.[17] The EPA rule requires an owner/operator to respond immediately to a hazardous release, alert both the local authorities and the public, and immediately prepare a cleanup plan.[18]

- Eliminates the requirement for electric utilities to publicly disclose information when their coal ash dumps leak and contaminate local drinking water supplies, and when their dams are structurally unstable. In contrast, the EPA rule requires the posting on a publicly accessible website of monitoring data, inspections, notices of hazardous releases, and structural stability assessments.[19]

The table below illustrates some of the significant differences between EPA's CCR rule and the McKinley bill.

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[14] *See* 4011(c)(4).
[15] 40 C.F.R. § 257.100(b)(7).
[16] 40 C.F.R. § 257.100.
[17] 4011(c)(2)(B)(ii)(III).
[18] 40 C.F.R. § 257.90(d).
[19] 40 C.F.R. § 257.107.

Table 1: Comparison Of Key Requirements: EPA CCR Rule and 2015 McKinley Bill

KEY REQUIREMENT	EPA CCR RULE	2015 MCKINLEY BILL
Federal Standard of Protection	The rule ensures "no reasonable probability of adverse effects on health or the environment." RCRA §4004(a)	None. No standard of protection to which the actions of the implementing agency must conform.
Public Disclosure of Information	Rule requires posting (starting within 6 months) of ground-water monitoring data, cleanup plans, inspections, structural stability assessments, etc. on a publicly accessible website.§ 257.107	No requirement for public website posting. Very limited req'ts for public disclosure beyond permit application and permit determinations. § 4011(b)(2)(C)(iii)(I)(dd) § 4011(c)(1)(B)
Response to Spills and Releases from CCR Unit	All releases are subject to immediate cleanup, public notice, and corrective action. § 257.90(d)	No response required. Implementing agency may determine that corrective action is not necessary or required for spills. No public notice of spills required. § 4011(c)(B)(ii)(IV)
Closure Requirement for Unlined ponds that violate health-based groundwater standards	Leaking unlined ponds that violate health-based groundwater protection standards must cease receiving waste within 6 months and close. § 257.101(a)(1)	Leaking unlined ponds may continue to accept waste for 102 months after exceeding health-based groundwater standards, and exceedances of health standards can continue for up to 8.5 years. § 4011(c)(B)(ii)(VI)
Locational Restrictions for Existing CCR Units, including prohibition against placing coal ash in aquifers	Five restrictions apply to existing ponds and lateral expansions. Placement is prohibited: w/in 5 feet of groundwater; in wetlands; in fault areas; in seismic impact zones, in floodplains and in unstable areas. Existing landfills are prohibited from unstable areas. Existing ponds that violate location restrictions must cease dumping within 6 months of effective date of the requirement and close. §§ 257.60 – 257.64	Prohibition only applies to unstable areas requirement and floodplains requirement. There is NO requirement that existing ponds and expansions be constructed with a base 5 feet above the aquifer. CCR Ponds currently constructed in a drinking water aquifer can continue to accept waste indefinitely. § 4011(c)(E)
Closure requirement for ponds that fail to demonstrate factors of safety	Impoundments that fail to demonstrate the minimum fed. safety standards for structural stability must cease accepting waste within 6 months and close. § 257.101	Owner/operator has up to 12 additional months to meet safety factors "if the structure does not pose an immediate threat of release." § 4011(c)(L)(ii)

KEY REQUIREMENT	EPA CCR RULE	2015 MCKINLEY BILL
Closure of inactive surface impoundments at power-producing sites	Inactive ponds must close within 3 years. If pond is not closed w/in 3 years, unit is subject to full set of requirements, incl. groundwater monitoring and cleanup. § 257.101(b)(2), 257.73 (f)(4)	Inactive pond must close within 3-5 years. If owner/operator does not meet 5-year closure deadline, there are NO req'ts that apply to the pond (no structural stability standards, inspections, etc.) for at least 6-7 years. §§ 4011(C)(4), 4011(C)(4)(D)
Groundwater monitoring requirements	Every state will have the same level of protection for drinking water. EPA defines the Groundwater Protection Standard (GWPS) as the MCL or the background level, if there's no MCL. If the back-ground level of a contaminant is higher than its MCL, then the GWPS is the background concentration. § 257.95(h)	State can determine an "alternative" GWPS and can change groundwater monitoring parameters. § 4011(c)(2)(B)(ii)(II) § 4011(c)(2)(B)(ii)(V)

B. The McKinley Bill Delays Critical Requirements of the EPA Rule

1. *Many Safeguards Are Significantly Delayed*

The McKinley bill would also delay the implementation of critical provisions of the EPA rule. Delay in some cases may exceed ten years, because the requirements of the EPA rule are "implemented only through a coal combustion permit program," and the deadline for permit issuance is six to seven years from the date of enactment. *See* § 4011(l)(1)(A). Most safeguards of the EPA rule will not be applicable until issuance of a permit by the implementing authority. The bill requires some safeguard be implemented in 3-4 years, but in most instances, these deadlines are still years after the compliance dates contained in the EPA rule. Consequently, important safety provisions are significantly delayed and public health threatened. The table below compares compliance deadlines for numerous key health and environmental protections.

Table 2: Compliance Deadlines: EPA CCR Rule and 2015 McKinley Bill

KEY REQUIREMENT	EPA RULE COMPLIANCE DATE (after date of publication)	2015 MCKINLEY BILL COMPLIANCE DATE (after date of enactment)
Adopt measures to minimize airborne CCR dust	6 months	3-4 years
Fugitive dust control plan	6 months	3-4 years
Annual fugitive dust control report by owner/operator	14 months and annually thereafter	3-4 years
Inspections of impoundments and landfills (including high and significant hazard dams)	6 months, and weekly and monthly thereafter	3-4 years
Initial annual dam safety inspection	9 months and annually thereafter	3-4 years
Recordkeeping	6 months	3-4 years
Surface impoundment structural stability assessment for federal factors of safety	18 months	3-4 years
Groundwater monitoring	2.5 years	3-4 years
Closure of inactive surface impoundments (legacy ponds)	3 years for closure If no closure after 3 years, all requirements immediately applicable until closure.	3-5 years for closure If no closure after 5 years, NO requirements apply to pond until permit issued at 6-7 years.
Closure of impoundments that do not achieve federal minimum safety standard for structural stability	18 months to demonstrate stability, if demonstration is not made, ponds must cease accepting waste within 6 months.	3-4 years to demonstrate federal safety factor is met. If federal safety factor not achieved, owner/operator has 12 additional months to show compliance.
Prohibition on locating ponds or landfills in unstable areas (e.g., karst)	42 months to demonstrate that pond or landfill located in an unstable area is safe to operate. If safety demonstration cannot be made, unit must close.	At least 6-7 years to make demonstration of safety if located in an unstable area.
Location prohibition for new landfills and ponds in floodplains, wetlands, seismic area, fault zones and unstable areas	6 months for all new units	At least 6-7 years upon permit issuance
Design standards for new ponds and landfills and expansions (composite liners, leachate collection system, etc.)	6 months	At least 6-7 years upon permit issuance

2. The Bill's Delay of Dam Stability Assessments Threatens Public Safety

The rampant failure of the nation's coal ash dams to meet federal "factors of safety" for structural stability should be a wake-up call for Members that no delay in demonstrating stability shall be tolerated. The EPA rule requires all owner/operators to demonstrate within 18 months that "factors of safety" are met. If stability cannot be demonstrated, the utility must cease dumping within six months. The assessment of "factors of safety" is a critical tool used by the Federal Emergency Management Agency (FEMA) and Mine Safety Health Administration to ensure that dams nationwide are structurally sound.[20] According to the McKinley bill, however, this demonstration is not required for 3 years, and if the initial demonstration is not made, the utility has until 4 years from enactment to make the demonstration. During this time the utility may continue to dump unlimited quantities of waste into the impoundment.

The failure of coal ash dams to meet or demonstrate adequate factors of safety is well documented by the EPA. According to the EPA's own assessments of high and significant hazard dams between 2009-2012, many utilities were operating large and dangerous coal ash dams with factors of safety below federal standards or were unable to demonstrate that dams met the factors because of a lack of analyses. Of 174 high or significant hazard surface impoundments assessed at 93 utility sites, the EPA found that 78 percent of the dams (136) had either failed to attain federal standards or utilities had failed to perform the analyses.[21]

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[20] EPA CCR Rule at 285.

[21] High and significant hazard dams rated in "poor" or "fair" condition by EPA were used for this analysis. *See* U.S. EPA, Coal Combustion Impoundment Assessment Report, *available at* http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/surveys2/.

In the years since the EPA conducted these assessments, utilities may have fixed the dams or completed the requisite analyses. The EPA unfortunately has not tracked industry compliance with their 2009-2012 assessments. It is clear, however, that whether or not repairs were made, enough time has elapsed that most dams need to be assessed again immediately. According to FEMA's *Federal Guidelines for Dam Safety*, a formal inspection, including "...a review to determine if the structures (i.e., CCR surface impoundments) meet current accepted design criteria and practices..." should be taken at an interval not to exceed five years.[22]

The bill's delay of 3-4 years to demonstrate compliance with this critical stability standard will mean many of the dams that previously failed to demonstrate an adequate factor of safety might remain out of compliance for an interval far exceeding five years. In light of the large universe of high and significant hazard coal ash dams, 331 in total, this delay ignores the imperative to prevent life threatening disasters.

Similarly, the one-year delay in completing an Emergency Action Plan for high and significant hazard dams could have dire consequences if another failure occurs in the interim. We have seen three major spills since 2008; so another major disaster before 2018 is certainly possible. This Congress must not roll the dice on public safety.

III. The McKinley Bill Cannot Ensure the Safe and Consistent Disposal of Coal Ash in All States Because the Bill Lacks a Federal Protective Standard

In many critical respects, this bill does not differ from previous coal ash bills drafted by Rep. McKinley. Like his earlier House bills, H.R. 2273 and H.R. 2218, this

[22] EPA CCR Rule at 285.

bill cannot guarantee a consistent level of protection nationwide. In two reports and a memorandum issued in December 2012, March 2013 and June 2013, the Congressional Research Service (CRS) concluded unequivocally that the bills were "unique" in their failure to establish a federal protective standard for state programs under RCRA. In its 2012 review of H.R. 2273, the CRS found that the bill "lacked a clear purpose and created uncertainty because it failed to guarantee basic nationwide protections and failed to provide EPA with the authority to write rules, approve state programs and enforce safety requirements."[23] The CRS reiterated this conclusion in 2013 in an expanded report wherein the CRS found again that terms usually defined by regulations were left open for the states to define.[24] If the purpose of the legislation was to close significant gaps in health and safety protections nationwide and ensure certainty and consistent protections in all states, this purpose was not achieved, according to CRS.

These CRS findings are equally applicable to the 2015 coal ash bill. The basic structure is the same as previous House bills, and all share the three core deficiencies; the absence of a protective standard; the uncertainty created by the ability of states to define terms differently and thus establish programs of varying stringency; and the absence of a federal backstop.

A. The Bill Fails To Establish A Protective Standard

There is nothing in this bill that requires CCR permit programs to achieve any specific standard of protection. This is in direct contrast to RCRA state programs for the disposal of municipal solid waste, which are required by statute to meet a national

[23] Congressional Research Service, *H.R. 2273 and S. 3512: Analysis of Proposals to Create a Coal Combustion Residuals Permit Program Under RCRA*, (hereinafter, "CRS Report 2012") (Dec. 5, 2012) at Summary.
[24] Congressional Research Service, *Analysis of Recent Proposals to Amend the Resource Conservation and Recovery Act (RCRA) to Create a Coal Combustion Residuals Permit Program*, (hereinafter "CRS Report 2013") (Mar. 19, 2013).

standard of protection.[25] Consequently, under this unprecedented approach, each state can apply its own standard.[26]

The practical impact of the failure to establish a national protective standard is quite simply that state regulations would not necessarily be required to "protect human health and the environment." Thus, in the absence of a standard, the EPA would have no authority to assert as a "program deficiency" the failure of a state to protect health or the environment. The CRS explains, "The absence of an explicit statement in the bills [H.R. 2273 and H.R. 2218] has implications for how EPA might exercise its authority in the event of absent or deficient state action."[27] The CRS observes that, unlike the federal municipal solid waste permit program, the bill would curtail EPA oversight to an exceptionally narrow range of issues. The CRS writes, "EPA would not be authorized to identify as a deficiency ... the level of protection the program may provide."[28]

B. The Bill Fails To Establish Minimum Federal Standards Because States Have Discretion to Define Key Terms

The legislation fails to establish minimum federal standards for coal ash permit programs because the bill allows individual states to define key terms. Program stringency could thus vary from state to state, depending on how each state defines the missing terms. Consequently this bill will perpetuate the inconsistent patchwork of inadequate state programs that we have today.

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[25] *See* RCRA, Section 4004(a).
[26] CRS came to precisely this conclusion regarding H.R. 2273. *See* 2013 CRS Report, Summary at page 3.
[27] *Id.*
[28] 2012 CRS Report at 25.

Only seven terms are defined in Rep. McKinley's 2015 bill.[29] For all other terms contained in the EPA rule, the bill explicitly allows states to make changes as they see fit, as long as a state provides a "reasonable basis for the changes." § 4011(l)(4)(B)(ii). Many definitions in the EPA rule could be changed by states to create far less stringent state programs. These terms include:[30]

1. *New structure*: Design requirements, like composite liners and siting restrictions, apply only to new landfills and impoundments. The EPA rule defines new units as any unit that first receives CCR or commences construction after the effective date of the rule.[31] States, however, could define "new" units as those that receive waste or begin construction after certification (2-3 years) or at permit issuance (6-7 years) from the date of enactment. This would allow a substantial number of "structures" to avoid the new design standards.

2. *Aquifer*: The EPA rule defines aquifer broadly, including all formations yielding "usable" water. States could narrow this definition to only those formations currently yielding or capable of yielding potable water.

3. *CCR landfill*: The EPA rule includes waste piles and other land areas and excavations in the definition of "landfill." States could define "landfill" to exclude such waste disposal areas, thus significantly restricting program coverage.

4. *CCR surface impoundment*: The EPA's definition of "surface impoundment" is broad and includes all types of surface impoundments, but states could define this term to exclude incised impoundments or impoundments below a certain size, volume capacity or height.

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[29] *See* § 4011(k).
[30] All definitions noted below in the EPA CCR Rule are found at 40 C.F.R. § 257.83.
[31] 40 C.F.R. 257.83.

5. *Disposal*: EPA adopts the broad statutory definition of disposal, but a state definition could be altered to exclude passive leaking.

6. *Construction*: The EPA rule provides a very specific definition of "construction" to ensure that new waste units cannot escape the requirements for enhanced safeguards that apply only to new units. The EPA's definition states that a unit "has commenced construction if the owner or operator has obtained the federal, state, and local approvals or permits necessary to begin physical construction and a continuous on-site, physical construction program had begun." States may chose to employ a much more expansive definition of "construction" (e.g. require only the submission of a permit application) and therefore allow units to qualify as "existing units" and escape stringent safeguards.

7. *Groundwater:* The EPA rule defines groundwater as simply "water below the land surface in a zone of saturation." States may, however, choose to limit the definition of groundwater to potable water or water containing less than a specific quantity of total dissolved solids.

7. *Hazard potential classifications*: The EPA rule adopts the hazard potential classifications used by the National Inventory of Dams. States may choose to alter these definitions and reduce the number of high and significant hazard dams by adding a size or volume threshold. Since certain safety requirements attach to high and significant hazard dams in the EPA rule, restricting the universe of dams defined as such would reduce health and safety protections in those states.

Thus the ability of states to define critical terms will likely lead to inconsistency and continued gaps in protection nationwide. Under the bill's provisions, the EPA will be

without meaningful oversight to cure the gaps, because the EPA cannot hold state programs to a standard of protection.

C. The Bill Lacks Federal Backstop Authority for Enforcement

The bill severely limits the authority of the EPA to take enforcement action in a state that is implementing a permit program. The bill authorizes the EPA to give "enforcement assistance" only upon the request of a lead state implementing agency.[32] Further, the EPA's authority is limited to providing only "the enforcement assistance requested."[33] The bill also specifically prohibits "concurrent enforcement" by the EPA when a state is implementing a CCR permit program.[34]

D. The EPA's Authority To Find Deficiencies In State Programs Is Also Severely Limited.

Under the bill, EPA is extremely constrained in its ability to find deficiencies in permit programs. First, when determining whether a state enforcement program is "deficient," EPA can only consider: (1) the state's failure to act on violations of permits "as identified by the State;" and (2) repeated failure by the state to inspect or otherwise determine compliance according the process described in its certification.[35] Under both factors, the state's discretion limits EPA's inquiry. For example, if there were violations that are not identified as violations by a state, a state's failure to enforce those violations would not be a deficiency. Similarly, if a state did not conduct a sufficient number of compliance inspections in order to determine the presence of violations, the EPA can only judge the state on its self-described inspection program. There is no independent protective standard. Thus

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[32] § 4011(i)(1)(C).
[33] *Id.*
[34] § 4011(i)(1)(D).
[35] § 4011(d)(4)(C) (i) and (ii).

even if a state's enforcement program is not protecting human health or the environment, EPA is powerless to act.

Conclusion

In summary, the Improving Coal Combustion Residuals Act of 2015 cannot and will not protect American communities. The bill will eliminate, weaken and delay protections established in the EPA's final CCR rule. Thus the bill cannot ensure the protection of the nation's water resources, nor can it guarantee the safety and security of communities located near coal ash dams. After decades of dangerous disposal of billions of tons of coal ash, it is abhorrent that today's bill proposes further delay of critical safety measures that have finally been put in place by the EPA. In light of drinking water already poisoned with cancer-causing chemicals, it is unconscionable to consider a bill that allows polluters to continue to dump in leaking pits for years to come. Lastly, in the wake of the largest toxic waste spill in U.S. history, it is reckless and irrational to support a bill that delays the inspection and assessment of hundreds of dams and delays the closure of dangerous and abandoned ones. The bill before the subcommittee is unwarranted and its weakening of EPA's CCR rule will harm the health and safety of Americans nationwide.

* * * * *

There are many additional significant deficiencies in the bill not covered in the above testimony. I would be happy to elaborate on these failings or answer any questions from the Subcommittee concerning my testimony. Thank you for the opportunity to submit these comments.

Mr. SHIMKUS. Thank you very much.

I now recognize myself for the first round of questioning, and I would just like to start, the intent was to take the rule and codify it, and I think that is what we have been able to do. It makes it easier to comply with and understandable when it does create consistency across the country, and that was the intent. We specifically took EPA language in the rule on, the exact language on design requirements, post-closure, air criteria, record keeping, run-off, run-on and run-off controls, hydrologic and hydrologic capacity requirements, and inspections. Those are aspects that we took the exact language in the rule.

So, I just appreciate the work that we have done to try to move in a direction where we are working with the EPA, take their rule, and make it stronger, and that is really the position of the majority of the subcommittee.

Mr. Paylor, does ECOS support the approach taken in this draft legislation?

Mr. PAYLOR. Yes, I believe that ECOS does support it, and it is for the reasons that you mentioned, that it takes the EPA Federal rule, which we believe was a positive step forward, and addresses some of those additional concerns like dual oversight and financial assurance.

Mr. SHIMKUS. In your opinion does the draft legislation address the implementation issues associated with the final rule, including, as you just mentioned, dual regulation systems and the enforcement only through citizen suits?

Mr. PAYLOR. Yes, I believe it does address those.

Mr. SHIMKUS. And that is part of the debate on this legislation. The way the rule comes out is the only way you really can get enforcement is through the Courts, and every Federal District Court around this country, which are in the hundreds, could then enforce a different standard than what a national standard or a standard working through the states. Is that your understanding, Mr. Paylor?

Mr. PAYLOR. I believe that this would create a uniform standard across the country, and that is one of the strengths that it provides. Yes.

Mr. SHIMKUS. Mr. Forbeck, do you agree with that?

Mr. FORBECK. Yes, I do. I believe it eliminates the confusion that the Solid Waste Management Plan had provided and would provide a single point of determining——

Mr. SHIMKUS. So ASTSWMO supports this legislation?

Mr. FORBECK. We do support. We are very pleased that it incorporates the EPA rule and also added the financial assurances that we requested and has a single permit.

Mr. SHIMKUS. Let me just follow up. Do you read the legislation as allowing states the ability to pick and choose which requirements to include in the state Permit Program?

Mr. FORBECK. No, I do not. There are minimum standards or permit requirements that the states would——

Mr. SHIMKUS. And the minimum of standards as you evaluate this draft legislation comes from where?

Mr. FORBECK. From the EPA rule. From the legislation.

Mr. SHIMKUS. So just for the record, the minimum standards you interpret as coming from where?

Mr. FORBECK. Well, it comes from the, originally from the EPA rule as it was incorporated.

Mr. SHIMKUS. Great. Thank you. Mr. Roewer, the legislation incorporates requirements of the final rule as minimum requirements for state Permit Programs. Many of the requirements are incorporated directly with no revisions as I read earlier. There are, however, a few places where the legislation allows the implementing agency to tailor the requirements based on onsite specific risk-based decisions, in particular with respect to groundwater monitoring and corrective action. Can you explain why this is important?

Mr. ROEWER. Yes. Thank you. EPA recognizes the legitimacy of tailoring those regulations. There is extensive discussion of that fact in the preamble but then backed away from that recognizing there was no Federal or no regulatory agency oversight of that process. The legislation would allow the state Regulatory Agencies to tailor the regulations to address site-specific concerns associated with coal ash management.

Mr. SHIMKUS. What could be different?

Mr. ROEWER. Well, one of the things would be a groundwater protection standard for instance. EPA would default to the background of the groundwater protection standard under their self-implementing rule. Where there is another state or Federal health-based standard, the state Regulatory Agency can apply that in lieu, if there is no MCL, to establish an alternative groundwater protection standard. Not leaving, EPA couldn't leave that to the owner and operator. That does need regulatory agency oversight, and the bill appropriately sets up a mechanism for the states to take that approach.

Mr. SHIMKUS. Great. My time is close to expiring. Thank you very much, and I recognize Mr. Tonko for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair.

For far too long communities have been subject to the serious risks associated with inadequate coal ash disposal. Coal ash releases have polluted our air and water supplies, and structural failures have devastated communities and resulted in very expensive and very complicated clean-up efforts.

EPA's final rule will go a long way, I believe, to address these concerns. This bill up here is to reverse this course, eliminating some of EPA's minimum requirements and weakening or delaying others.

Ms. Evans, how did the bill's location requirements measure up to those in the final rule, and if they are not the same, why is that difference important?

Ms. EVANS. Thank you, Representative Tonko. The location standards differ radically from the location standards in the EPA rule. One of the most important restrictions is the placement, the prohibition against the placement of ash within 5 feet of the groundwater table. In other words, you can't place ash any longer within 5 feet of a potential drinking water source. The proposed legislation does not incorporate that location standard. So what you have is—you do not have the prohibition of ponds that are cur-

rently located in a drinking water aquifer. They will not have to close. That is a radical change in the requirements because we know for sure that there are many ponds that are currently in contact with a groundwater.

The bill also does not incorporate restrictions for wetlands, for seismic areas, and for fault areas.

Mr. TONKO. Thank you, and the bill differs from the EPA rule's closure requirements for disposal units that don't meet important criteria like liner designs, structural integrity, or location restrictions. The bill keeps these facilities open, allowing deficient structures to continue to receive waste for years.

Ms. Evans, how do the closure requirements of the bill compare to those in the EPA rule?

Ms. EVANS. The closure requirements in the bill are much more lenient and will allow ponds that are contaminating groundwater to continue to operate and continue to accept waste for 8.5 years in the case of an unlined surface impoundment. And this, of course, endangers those communities near those impoundments that are reliant on drinking groundwater. EPA has identified unlined ponds as being the most dangerous way to dispose of waste, and when you allow unlined ponds that are leaking above a health standard into groundwater to continue to operate for 8.5 years, that certainly is not the same requirements as you had in the EPA rule. The EPA rule would require the ponds to cease accepting waste within 6 months and close.

Mr. TONKO. And so the requirements under EPA's rule as indicated will take effect much more quickly than those under the bill?

Ms. EVANS. Absolutely. Communities are looking forward to the application of the requirements as early as September. Many requirements are in effect 6 months from the date of publication. If that is at the end of this month, we are going to see relief for contaminated air quality from dust, we are going to see public information posted on utility Web sites, we will see the initiation of inspection at high and significant hazard ponds on a weekly basis and a monthly basis. So communities will get immediate relief from the EPA rule, and under the bill this relief is going to be delayed at least 2 to 3 years and probably in most cases much longer.

Mr. TONKO. And the requirement that, as you indicate, facilities can post operational and compliance data on a publicly-available internet site without exception, this both incentivizes industry compliance up front and empowers local citizens with information they need to keep an eye on what is happening in their communities. How important are these public disclosure provisions in EPA's rule?

Ms. EVANS. The public disclosure provisions are critical to EPA's rule, and EPA rule is explicit as to what has to be posted. The difference in the bill is that there are general public participation or public notice provisions, but it gives states discretion on how they require that information to be made public. Currently information in many states is made public, but it is at state agencies where citizens at great difficulty and great expense must request a file review, often wait a substantial amount of time, and spend a significant amount of money obtaining that data. So often this data is in the real world not available to citizens, but actual groundwater

monitoring data, dust control plans, inspections, assessments of structural stability, all those would be posted according to the EPA rule in a publicly-accessible Web site free of charge to all communities impacted by the dumpsites in their communities.

Mr. TONKO. I have exhausted my time, so I yield back.

Mr. SHIMKUS. The gentleman yields back time.

The Chair now recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman. Thanks to each of you for being here.

Mr. Paylor, the draft legislation directly incorporates the technical requirements in EPA's final coal ash rule and establishes a baseline for coal ash management across the country. Do you believe that the minimum requirements set forth in the legislation will ensure that states develop effective and environmentally-protected permit programs for coal ash management, and if so, why?

Mr. PAYLOR. We do believe that it would provide a Federal baseline and then states would also be able to go beyond that with their own site-specific needs as well.

Mr. HARPER. The bill contains a provision requiring states to develop plans for coordination among states in the event of a release that goes across state lines. Why is that important?

Mr. PAYLOR. Well, it is important to Virginians because we recently this year had an experience where there was a release in North Carolina. The majority of the stream impact was in Virginia, and so the ability for states to have some upfront planning and coordination would just streamline the process should we have another unfortunate incident like that.

Mr. SHIMKUS. Would the gentleman yield on that?

Mr. HARPER. Yes, I will yield.

Mr. SHIMKUS. Is that in the current EPA rule?

Mr. PAYLOR. Not to my knowledge.

Mr. SHIMKUS. Does anyone know? I don't think it is. Thank you. I yield back.

Mr. HARPER. Thank you, Mr. Chairman.

Mr. Paylor, your written testimony notes that the draft bill includes the new robust technical siting, financial assurance, run-on and run-off controls, record keeping, and structural integrity requirements published by EPA in the final CCR rule and that EPA did a very good job developing the technical requirements of the final CCR rule. Your written testimony also states that you value the flexibility the draft bill adds. Can you explain why the added flexibility is a good thing?

Mr. PAYLOR. The added flexibility is important primarily because of being able to deal with site-specific issues, especially when you are looking at groundwater contamination, issues of groundwater flow, and nearby receptors and everything are very important, allows you to tailor your response to the site rather than a one-size-fits-all approach.

Mr. HARPER. OK, and your written testimony also states that the draft legislation provides a Federal backstop. Would you please explain to us what that means?

Mr. PAYLOR. Well, the Federal backstop means that there is enforcement authority at the Federal level should the state not meet

those standards, and so, therefore, you have got the state authority but if that fails, the Federal Government can come in and take action.

Mr. HARPER. Why is it important that the draft legislation allows for the pre-approval of a state Permitting Program?

Mr. PAYLOR. Well, a state Permitting Program provides certainty, it provides the ability to have site-specific requirements on that particular facility, and it provides more clear enforceability.

Mr. HARPER. OK. Thank you very much. Mr. Forbeck, states have previously demonstrated the ability to implement permit programs very similar to coal ash. So is EPA approval necessary before states begin implementing Coal Ash Permit Programs, and wouldn't EPA program approval unnecessarily delay implementation of Coal Ash Permit Programs?

Mr. FORBECK. I think the certification program that is within this draft would actually expedite implementation of these requirements of the rule. In states that have proven programs, proven permit programs can continue them with CCRs. In Pennsylvania we have a very successful program which we have done for many, many years.

Mr. HARPER. Thank you, and I yield back the balance of my time.

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. I want to thank my colleague for his efforts on this issue.

I believe I heard two concerns consistently from the first three witnesses. One of them was that the main enforcement mechanism of citizen lawsuits and that that would bring uncertainty and so on, and the other one, and I am a little confused about this one, is that it would establish inconsistent standards across states while at the same time giving states flexibility, which seemed to be something that, like you are shaking your head there, Mr. Roewer. Did you disagree?

Mr. ROEWER. The inconsistent application of the rule, Congressman, is due to the interpretation of the rule by the Federal District Court Judges, not inconsistent as per application and enforcement by the state Regulatory Agencies. At least in my testimony the concern for a potential patchwork of interpretation stems from the self-implementing citizen suit enforcement structure of EPA's rule, not of the legislation. The legislation solves that problem.

Mr. MCNERNEY. How does it solve it?

Mr. ROEWER. By having the Federal standards prescribed in the rule, that are EPA's rule, implemented by the state Regulatory Agencies. There is a Federal floor under which the states cannot drop.

Mr. MCNERNEY. Well, my understanding is that there is a lack of a standard of protection in the proposed legislation. Would you address that, Ms. Evans?

Ms. EVANS. Yes. This bill, like the other bills proposed by Representative McKinley, lacks a protective standard of protection, and this is pointed out numerous times by CRS. What that means is that there really is no Federal floor that Mr. Roewer is describing. States are free to interpret the terms that are not defined. They

can define their own terms, and they can run their programs without oversight that has a standard of protection of human health and the environment. The standard protection of human health and the environment is a watch word of RCRA. It applies in all of RCRA's programs except if this bill passes it won't be applied to coal ash, and this is a very dangerous omission because EPA essentially will have very narrow oversight as to be completely ineffective because if an agency can't look at a state program and say these programs don't protect human health and the environment, therefore, this is a deficient program, their oversight will be minimized and essentially this is exactly what the bill says.

If I could talk to the dual enforcement because that argument is really nonsense. Under RCRA, the RCRA Citizen Suit Provision, either states or citizens, when, following a citizen suit are in Federal Court, they are in Federal Court if it is a hazardous waste violation, they are in Federal Court if it is a municipal solid waste violation. So RCRA has always operated like this, that you have Federal Courts interpreting state law. So the problem that is raised by USWAG and the states is really a problem, that it is really something that hasn't been a problem for all the decades that RCRA has been, RCRA programs have been in effect for decades.

Mr. MCNERNEY. So are you concerned about the citizens lawsuits being the main enforcement mechanism?

Ms. EVANS. I am not. Citizen lawsuits include the state lawsuits. So it is not, when one says citizen lawsuits, what that means is citizens or the states are free to enforce, under the EPA rule, are free to enforce the EPA rule. States can go in and enforce those provisions as well. So any citizen suit that is filed, it is required that there be 60 days' notice to the state. If the state wants to be the main implementing agency and wants to interpret its own regulation and enforce its own regulation, it is 100 percent free to do that. A citizen can't slip in with a lawsuit. They have to give 60 days, and if the state wants to maintain, be the primary enforcing agency and maintain 100 percent control over the program, a state can bring that enforcement action, can enter a consent decree, and there will not be a citizen lawsuit by a citizen group.

Mr. MCNERNEY. OK. I don't know if you will have enough time to answer this, but one of the things that you said concerned me was that citizens wouldn't have the ability to determine the quality of the water that might have been contaminated, and that, how could the bill prevent that from happening?

Ms. EVANS. Well, the bill doesn't make mandatory groundwater monitoring data. So what that means is a community that is on wells next to a coal ash pond or landfill would not necessarily under the bill have access to the groundwater monitoring data. So they couldn't go on a Web site and find out what are the levels of arsenic, chromium, lead.

Mr. MCNERNEY. But they could do it themselves? They could do the testing themselves or have a laboratory do it if it is in the paperwork?

Ms. EVANS. Well, that is, well, they wouldn't have access to the industry wells. They could test their own well, but some, the purpose of RCRA is to prevent harm to health and the environment. So you want to find out what is in those industry wells, which

might be "a mile from your drinking water well" before it gets to your well and your family.

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

Before I move to Mr. Murphy, Ms. Evans, you mentioned the CRS report. If you have one on this bill, we would like to see it. I think you are referring to previous bills of past Congresses. There is no CRS report on this bill right now, and there would be public disclosure through the state, and with that I yield 5 minutes to Mr. Murphy.

Mr. MURPHY. Thank you, Mr. Chairman. I appreciate the panel being here. It is a long-term issue we have to deal with directly.

I do want to deal with some comments that, Ms. Evans, you made and with regard to the bill fails to establish a protective standard. I didn't hear from other panelists if they agree with that. Mr. Roewer, do you agree with that?

Mr. ROEWER. The bill takes EPA's 257 regulations, their coal ash rule, and builds a CCR Permit Program based on those regulations. Those regulations, the 257 regulations, are developed by EPA with that, to meet that standard of care, so we believe that the bill does provide that Federal standard of care in a Federal floor.

Mr. MURPHY. Mr. Forbeck, do you agree that the bill fails to establish a protective standard, or do you disagree?

Mr. FORBECK. I disagree. I believe it does establish a protective standard.

Mr. MURPHY. Mr. Paylor?

Mr. PAYLOR. I would agree with those responses as well.

Mr. MURPHY. Thank you. I mean, along those lines I look upon it that state legislators and regulators have the authority to do some things. Ms. Evans, one of the things you are raising question with is it may get in the way of people being able to bring up Court cases, interfere with that. Am I understanding you correctly there?

Ms. EVANS. If I understand your question, the state and citizens stand in the same legal place in that if an industry under the CCR rule is violating any of those requirements, it can bring a suit to enforce the EPA rule. There is nothing in the EPA rule that would stop states from fully adopting, fully enforcing that rule, and as one of, I think it was the gentleman from ECOS, has said that states are ready to do this within 2 or 3 years.

Mr. MURPHY. OK. Mr. Forbeck, so based on your experience will this draft legislation being discussed today result in a more effective implementation of requirements of the final rule than the self-implementing program, and why or why not?

Mr. FORBECK. I believe as I said in the testimony, it would be more effective, one, as a single permit program we have the state that will have the jurisdiction and the enforcement capabilities of enforcing this rule. In addition, the uncertainty of the Solid Waste Management Plan as a mechanism for implementation is no longer there. We have this permit program that would be in effect and——

Mr. MURPHY. Pennsylvania has a very robust coal ash program. Am I correct?

Mr. FORBECK. That is correct.

Mr. MURPHY. And would you have to develop any new requirements or make changes to existing requirements based upon this draft legislation?

Mr. FORBECK. We believe it would be very minimum requirements that we would have to change. We have been regulating coal ash for a number of years. We had liners requirements since the early '90s and groundwater requirements since the '90s. So I think for Pennsylvania it would not be very long.

Mr. MURPHY. So let me talk about that issue with the liner requirements. I want to make sure we have enough flexibility that as new science is developing, new liners, et cetera, that we don't limit anything here. So, and I think that is where this bill tries to reflect, but would you support the inclusion of a provision to allow more latitude in liner design to capture the flexibility of science develops, as technology develops than is already provided by state law, so long as it is protective of the EPA devised standard?

Mr. FORBECK. If it is as protective, and right, as technology improves——

Mr. MURPHY. Yes.

Mr. FORBECK [continuing]. There could be even better methods that could be more protective than the liner systems that we have now. So we would support that.

Mr. MURPHY. Ms. Evans, you said something that called my attention to. You talked about issues with regard to dams. I guess coal ash dams or piles or whatever, and what do you consider the risk that this bill does not address with regard to dams?

Ms. EVANS. Well, with regard to dams there are a few. One of them is the location restrictions which don't apply to dams in wetlands, in fault areas, in seismic areas, and the dams that are sitting in the aquifer. Further, it is the delay. This rule wouldn't—the requirements would be at the earliest in effect 2 to 3 years, and so the inspections of high-hazard dams would not occur until 2 or 3 years where it would immediately be applicable. And the other thing is, we keep talking about whether this bill is the same as the EPA rule, and I would urge the committee members to look at my testimony and the long list of definitions that can be defined by a state without a protective standard and which could differ from EPA's definitions, and definitions define the applicability, the scope, the stringency of a rule. So let us take dams. The——

Mr. MURPHY. I am out of time here.

Ms. EVANS. Oh. Can I just say that the states can define hazard potential dams differently, well, as they wish because that is not a definition in the bill, so they could exempt some highly-significant hazard dams from those categories, and thereby, those more stringent requirements for those more dangerous dams would not be applicable.

Mr. MURPHY. Thank you.

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

Mr. MURPHY. Could I just ask that we could ask for the record the other panelists be able to respond to that question, too?

Mr. SHIMKUS. Without objection——

Mr. MURPHY. Thank you.

Mr. SHIMKUS [continuing]. So ordered.

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

Mr. LATTA. Thank you, Mr. Chairman, and thanks very much for our panel for being here. It is very informative as always.

If I could go back, Mr. Roewer, if I could ask you because the question that Mr. Murphy had just brought up pretty much, the basic principle in this bill is that we are taking EPA's rule and giving more flexibility to states, providing the same protections to the environment and particularly the drinking water resources in ways other than those narrowly approved by the EPA. And, again, following up, Mr. Forbeck just answered Mr. Murphy. Would you support the minor changes to the bill that would meet the basic principle giving that flexibility to provide the same environmental protection if states have regulations to provide equivalent protection in different ways?

Mr. ROEWER. USWAG has always supported regulation by the states of coal ash as a non-hazardous waste with a performance-based approach, protecting the environment, protecting the groundwater resource. So that would be consistent with that view as long as it is protective of the groundwater resource.

Mr. LATTA. Thank you very much.

Mr. Paylor, if I could ask, I saw in your testimony that 36 states have permitting for the disposal activities with 94 percent of those requiring groundwater monitoring. Do you believe that most states want to implement their own permit program rather than have the EPA do it for them?

Mr. PAYLOR. In general, states do prefer to have oversight. It gives more a more direct connection to the facility itself that is being regulated. We support the Federal floor that gives consistency across states, and I think most states would very much prefer to implement their own permitting program.

Mr. LATTA. Thank you, and Mr. Forbeck, what do you see as the role of states in protecting the environment, and how does the draft legislation accomplish that goal?

Mr. FORBECK. I think the states are the first line of defense and the ones that are closer to the issues, and they are the ones that should be enforcing the rule, and I think the capability of the proposed legislation will allow states to do that.

Mr. LATTA. Thank you. Mr. Paylor, in your opinion will the draft legislation require every state to have a permit program that contains the minimum Federal requirements?

Mr. PAYLOR. It does not require every state to do that, however, if the state does not have rules that meet the Federal standard or opts out on their own, then the Federal Government would step in and enforce those rules.

Mr. LATTA. If I could just follow up, again, Mr. Paylor, in your written testimony you note that the draft legislation lays out a 3- to 4-year process for compliance by regulated facilities, but you note that the bill recognizes implementation realities and still allows for action in emergency situations. Could you explain that?

Mr. PAYLOR. Each impoundment is going to have its own site-specific concerns and just the logistics of identifying what it takes to comply, and implementing that is going to take some time, plus it is going to take a couple of years for the states to get their rules

in place. And so that just recognizes the realities of the logistics to need to do that and also allows for, if, in fact, you do have an emergency situation, you move immediately.

Mr. LATTA. OK. Thank you, and Mr. Roewer, I know my time is running short here, but the rule requires retroactive application of the location restrictions to existing surface impoundments. Can you walk me through why this is important?

Mr. ROEWER. We believe it is unfair to apply retroactively location restrictions. We can't move these impoundments. They are where they are. There are other provisions in the legislation that would address the concerns that are at the core of those location restrictions. We heard there is no prohibition of putting ash directly into an aquifer. The bill contains groundwater protection standards, groundwater monitoring requirements. So the goal of the location restrictions to keep contaminants out of the aquifer are met through other aspects of the legislation, and indeed, the inspections, the safety assessments will all address those same concerns that are being addressed through the location restrictions. Other elements in the bill do that.

Mr. LATTA. Thank you. Mr. Chairman, my time has expired, and I yield back.

Mr. SHIMKUS. The gentleman yields back.

The Chair now recognizes the gentleman from West Virginia, Mr. McKinley, the author of the legislation, for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman. It is a draft legislation, draft piece. We are going to be working with this, and we are going to make some other modifications, I am sure, to it. It is going to continue to evolve in this process. It has to.

But I am just curious, a lot of the comments—well, the majority of the comments that have been made to date have all been about location, drinking water, and the like. But we haven't talked about the recycling, and so let us put this all in context again.

For the crowd that may or may not understand a lot of this issue, we generate about 150 million tons of fly ash annually, but we recycle 40 percent of that. So all of this last hour-and-a-half or 2 hours we have been talking about is the water. What about the recycling provision? What are we going to do, because the preamble to the rule is troubling to me, and it should be troubling to everyone because the preamble says this rule defers a final determination until additional information is available. That means that it could rule back to a C. They are D now. It could be a C in the future. It could be 2 weeks from now, it could be a year from now or 2 years from now. What we are trying to do is codify that provision so that we remove the uncertainty for the recyclers. Three-hundred and 16 thousand jobs are at risk. If they make that flip that they have just—in the rule and because it is an executive rule they can do another executive rule or through the EPA rule to say that it is a hazardous material, what happens to the recyclable material? 316,000 jobs could be at risk. Who is going to put in their house if—and remember, the science has already been determined it is not a hazardous material. This was done in 1993, and the year 2000. It said it is not a hazardous material. It wasn't until this Administration said I don't care what the science says, I want to treat it as a hazardous material, and as a result we got uncertainty. I

don't think any of us would put drywall in our house or concrete in our floors or in our concrete block or in our bricks if we thought it was a hazardous material. So, therefore, the EPA did their study and came back two times and said it is unhazardous. I am concerned about this portion, the 40 percent. Certainly we are concerned about the other 60 percent when it goes to a landfill, and we will address that, and there is a lot of provisions that have been in there, but let us make sure we have some debate here today about the 40 percent that we are trying to recycle.

So go back if we could get our panel, is that a concern, that they could switch back because they say in the preamble they defer a final determination until further information is available? Is that a reasonable determination? Does that cause certainty?

Mr. Paylor?

Mr. PAYLOR. Thank you. We support beneficial reuse, which by definition tells you we think it is a Subtitle D material. Whether that creates uncertainty is a great question, but the ECOS states have uniformly supported beneficial reuse of this material.

Mr. MCKINLEY. Mr. Forbeck, do you think it should be recycled?

Mr. FORBECK. Absolutely and——

Mr. MCKINLEY. Would you recycle it if it were hazardous material?

Mr. FORBECK. It would be a concern if it was a hazardous material.

Mr. MCKINLEY. Concern.

Mr. FORBECK. ASTSWMO has supported the beneficial use, and that has been a concern in our past documentation of this being labeled as a hazardous waste.

Mr. MCKINLEY. OK. Mr. Roewer? Again, my question is is this issue of uncertainty by virtue of them being able to switch back to a C from a D?

Mr. ROEWER. Congressman, the language in the preamble is very troubling.

Mr. MCKINLEY. Thank you.

Mr. ROEWER. The legislation would bring regulatory certainty in this manner. Congress would be amending the statute to establish a permit program to regulate, under which the states would be regulating CCRs under Subtitle D, the non-hazardous waste title of RCRA. That would provide the certainty. EPA certainly could revise those 257 criteria in the future, but the regulatory program is within Subtitle D non-hazardous waste program. It does bring the certainty that the recycling market needs.

Mr. MCKINLEY. OK. Ms. Evans, would you support recycling of the fly ash?

Ms. EVANS. Absolutely. Safe recycling of fly ash——

Mr. MCKINLEY. I am sorry. I have had a hard time hearing you all day today.

Ms. EVANS. Oh, I am sorry.

Mr. MCKINLEY. Much better.

Ms. EVANS. I am sorry about that.

Mr. MCKINLEY. Keep it in front of you.

Ms. EVANS. We do support safe recycling of coal ash, and I would say that——

Mr. MCKINLEY. Do you think this preamble should be tightened up a little bit, to codify, so that it is not set up by the Administration or the EPA can just change that at their whim?

Ms. EVANS. Well, I have two responses to that. One is that it is impossible to "flip". The EPA, if they were going to make a change, it is a long process full of public participation, proposed rules. You can't see EPA making a unilateral decision without your involvement, the involvement of industry and public interest groups. So it is impossible to flip. Whether EPA could change its mind, which I don't think it will in the future, you know, is certainly inherent in environmental regulation.

But if we are talking about certainty, what I would point to is the gross uncertainty that is created by the bill——

Mr. MCKINLEY. I am sorry.

Ms. EVANS [continuing]. To communities because there is no Federal floor under the bill for safeguards.

Mr. MCKINLEY. Thank you very much.

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

The Chair now recognizes the gentleman from Indiana, Mr. Bucshon, for 5 minutes.

Mr. BUCSHON. Thank you, Mr. Chairman.

Ms. Evans, do you believe we should burn coal to generate electrical power?

Ms. EVANS. I believe that there are safer sources of energy.

Mr. BUCSHON. That is a yes or no. Yes, you do believe we should continue to use coal, or no, you think we should just eliminate coal as a source of energy generation.

Ms. EVANS. Well, I think it is a more nuance question. I support the transition to safer and more environmentally-friendly sources of energy.

Mr. BUCSHON. OK. Fair enough. And do you believe, Ms. Evans, that state regulatory agencies, because just through the tone of this, it is a Federal versus state issue here, that do you believe that state regulatory agencies and the citizens in individual states care about the health and wellbeing of their citizens at the state level?

Ms. EVANS. I do. I believe state agencies care on the whole.

Mr. BUCSHON. Yes.

Ms. EVANS. I think they do, but I think the record of state agencies has not been good and——

Mr. BUCSHON. And the record, in fairness, the record of the Federal Government has been better?

Ms. EVANS. The record of both agencies on coal ash has been bad, but what we have seen in terms of——

Mr. BUCSHON. Not specifically the coal ash, just this is a generalized question about state, I mean, it is a Federalism issue. Basically the question that I have is a state—because the implication that states and their agencies and citizens in their states have to have the Federal Government tell them specifically what to do or they will violate, they will damage the environment, and they won't properly regulate things at the state level I think is something that has been implied, which I disagree with.

So the question is, as you know, at the state level there is legislative pressure, there is citizen pressure on the governors, the state legislators, the regulators just as there is at the Federal level. So

the question I have basically is why do you feel that, you know, that the Federal regulators would necessarily do a better job than people are doing already at the states like Pennsylvania has described, for example?

Ms. EVANS. All right. Well, what we see, and I think the proof is in the evidence on the ground, EPA identified 157 cases of contamination from coal ash sites, sites which are wholly under the authority of state agencies. We have had three major spills since 2008, two of which were horrendous in terms of their damage and their cost, and it is lucky that no lives were taken. That record indicates that state agencies are not doing their job as far as coal ash is concerned.

Mr. BUCSHON. Why would this be because——

Ms. EVANS. And then——

Mr. BUCSHON. Wait. I am reclaiming my time because I was a healthcare provider before, you probably don't know that, and there is no system in healthcare that we, when we provide healthcare to patients that is perfect and every once in a while if you understand statistics, things do occur. So I think the overall implication that because there have been some disastrous spills, in total agreement with you on that, that that means that state regulators are not doing their job I think is an unfair assessment and that—so the question is, again, compared to this draft legislation, and what the EPA has done, do you think that the Federal Government will be able to eliminate all the spills and other problems that you have? Because statistically, right, no matter what industry you are in, there is nothing that is 100 percent.

Ms. EVANS. Right, but the damage does indicate that on their watch the state agencies have failed. If you compare the municipal solid waste arena where the state agencies have an authorized program that has a Federal floor and has a Federal standard of protection, you are not seeing the same kind of contaminated groundwater near municipal solid waste landfills as you are near coal ash sites.

So, yes, when there is a Federally-approved program, when it has got specific standards, and when states have to be authorized to have standards as stringent as the Federal standards——

Mr. BUCSHON. OK.

Ms. EVANS [continuing]. That can——

Mr. BUCSHON. Reclaiming my time, Mr. Roewer, can you respond to what she just said?

Mr. ROEWER. Congressman, I think comparing a situation prior to a Federal standard that would be implemented through this legislation is inherently unfair. If you are comparing previous performance by the state regulatory agencies when there isn't a Federal regulation, which is what this bill would do, just is not appropriate.

Mr. BUCSHON. Thank you. I yield back my time, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time.

The Chair now recognizes the gentleman from Texas, Mr. Flores, for 5 minutes.

Mr. FLORES. Thank you, Mr. Chairman. I thank the panel for joining us today.

Mr. Roewer, the draft legislation treats legacy sites in the same way that the EPA did under the final rule, and that is that inactive impoundments must either close within 3 years or become subject to all of the requirements to an active disposal unit. In your opinion is 3 years already enough time to close a surfaced impoundment?

Mr. ROEWER. Not in all cases. It is a rather complicated process of dewatering the facility to ensure the structural integrity of the unit to minimize impacts of contaminants to groundwater, to ensure that you can place and then place a cap on top of that unit. There may be climate and permitting complications that would cause that period to be longer. EPA recognized this in their rule when they established a 5-year timeframe for closure of impoundments with the possibility of extending that.

Mr. FLORES. Yes. That building on that then the legislation that Mr. McKinley drafted give the implementing agency the authority to grant a 2-year extension. Why is that extension there, sir? I think you already answered that. Sometimes you can't——

Mr. ROEWER. Absolutely, and, again, I will point to the fact that the agency for active impoundments provided for a 5-year timeframe with the ability to extend that closure time period by up to 10 additional years. The closure process for inactive units and active units can be quite similar. So we do need additional time.

Mr. FLORES. Let us go ahead and drill into that. I think you had, you said something to the extent that you would have to demonstrate, your agency would have to demonstrate why that was needed. Give me an example of the demonstration.

Mr. ROEWER. Again, it is not a guarantee that we get that extension. It is something that the owner and operator would have to petition the implementing agency to get. You would have to demonstrate that the factors are beyond control, the extension would be the same factors in EPA's rule to extend the time period: climate, weather, permitting conditions, permitting situations that require additional time.

Mr. FLORES. OK.

Mr. ROEWER. And you also have to demonstrate that the facility you are closing isn't a threat for release or a spill.

Mr. FLORES. Yes. In some cases, I mean, going to an inactive facility and starting the process to seal it could be more disruptive to the environment than to take your time and do it the right way.

Mr. ROEWER. We certainly need to make sure that all facilities, whether they are active facilities we are capping or active facilities are closed in a safe and environmentally-sound manner.

Mr. FLORES. OK, and Mr. Forbeck, to follow up on that, in your opinion does the draft legislation deal with inactive impoundments in the same manner as the final rule?

Mr. FORBECK. It does deal with it very similar, but it does allow some extensions based on the conditions that Mr. Roewer expressed.

Mr. FLORES. And those are important conditions. I mean——

Mr. FORBECK. Yes, they are.

Mr. FLORES [continuing]. Disrupting an inactive facility prematurely without adequate planning could be more harmful for the environment. Mr. Forbeck, did the final rule require regulated enti-

ties to provide financial assurance for corrective action, closure, and post-closure of coal ash disposal units?

Mr. FORBECK. The EPA rule did not.

Mr. FLORES. OK, and so doesn't this legislation actually go further than the final rule by requiring financial assurance not just for active disposal units but also for inactive surface impoundments?

Mr. FORBECK. Yes, it does, and we feel that is a very important component of this——

Mr. FLORES. OK.

Mr. FORBECK [continuing]. Legislation.

Mr. FLORES. Thank you for joining us today. I yield to any other Republican member the balance of my time, or I will yield back. OK. I 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.

I wanted to first ask Mr. Paylor, you mentioned earlier, I wasn't here, I was at the other hearing, but you mentioned earlier that citizen suits would be the sole method of enforcement under the EPA rule, but EPA strongly encouraged states to incorporate the new Federal criteria into their own state Solid Waste Management Plans. So do you expect at least some states will incorporate the new Federal standards into state programs, and if states adopt these requirements, do you expect them to enforce the requirements?

Mr. PAYLOR. It is certainly possible that some states would adopt those. There would not be a permitting mechanism, however, and it would be subject to a one-size-fits-all situation. So there might be some spotty enforcement by states, but as a whole the one-size-fits-all approach to Federal regulation would, in fact, leave citizen suits as the primary mechanism.

Mr. PALLONE. Did you want to comment on that, Ms. Evans?

Ms. EVANS. Well, I have read testimony from ASTSWMO that indicates that states following the EPA rule signing, that states were ready and willing to implement those programs within the states, and states certainly can implement permit programs. The requirements have to be consistent with the EPA rule, but they certainly can tailor permits and use their authority to run coal ash permit programs subsequent to the EPA rule.

Mr. PALLONE. All right, and then I want to continue with you, Ms. Evans. EPA's final rule published online in December set Federal floor standards for the safe disposal of coal ash for the first time, and the rule has been decades in the making. The final product was a result of a transparent public process and input from stakeholders including significant input from the groups represented on today's panel. The rule advances public health protection and protects beneficiary use.

But this bill before us would undermine that Federal floor in alarming ways in my opinion by leaving out important requirements and allowing states to enforce alternative requirements that might be less productive.

So do you agree that this bill would undermine the Federal floor established by the final rule?

Ms. EVANS. This bill absolutely undermines the Federal floor and does not, and I have to repeat, does not incorporate the standards in EPA's rule. It incorporates some of the standards but, again, leaves definitions up to the states, which can radically alter the implementation and the scope and the stringency of the program.

Mr. PALLONE. And what are the most important requirements that would be left to state discretion?

Ms. EVANS. Well, you have eliminated, as I have said before, you have eliminated the requirement to make data publicly accessible in a way that is meaningful for the public. This includes data about the quality of their drinking water, the assessment of wells, and you also have eliminated the requirement for keeping coal ash away from aquifers. You have taken away the responsibility, the requirement for states to address spills, you have taken away the requirement for industry to address releases of hazardous substances. The important considerations are almost too numerous to name.

I do want to flag one, though, because it is so important after the collapse of the Dan River pond. These inactive sites which have not been attended to sometimes for over a decade, that are sitting often close to rivers or to sources of drinking water, the requirements that pertaining to the closure of inactive sites are not equivalent. I am hearing again and again that people think that they are, but there are important differences in the closure of legacy sites, not only the extension of time in which to close them but what regulations apply after 3 years. None according to the bill. Everything according to EPA.

And furthermore, utilities can very easily get out of all the closure requirements simply by using that old abandoned pond for disposal of anything. If you dispose of any non-coal ash waste in a legacy pond, it is not subject to the closure requirements, and that could be a really important and dangerous loophole for the inactive sites.

Mr. PALLONE. Let me just ask one last question, whether in your experience state regulation of coal ash has been effective or protective of public health.

Ms. EVANS. Absolutely not and CRS came to that same conclusion when they looked at this. It was EPA's conclusion the holes were immense in terms of failure to require inspections of high-hazard dams, failure to require even monitoring of landfills and ponds, failure to require liners for these ponds, and the failure to require these basic, basic safeguard for waste disposal is what has resulted in the spills and the releases and all the damage cases throughout the United states.

Mr. SHIMKUS. The gentleman's time——

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

Mr. SHIMKUS. And I would, again, make the point that there is no CRS report on this bill. You are talking about previous CRS reports and previous Congresses with a different implication. So to compare those is not proper.

The Chair recognizes the gentleman from North Carolina, Mr. Hudson, for 5 minutes.

Mr. HUDSON. Thank you, Mr. Chairman, and thank you to the panelists for being here today. This is an issue the people of North Carolina are following very closely. There has been a lot of news reports out of North Carolina dealing with coal ash, and it is important that we get this right.

First of all, first and foremost, we've got to protect our environment, but secondly we have got to get the balance right when it comes to certainty of the regulations, and so I would like to go back and revisit that issue with Mr. Roewer.

Does the draft legislation provide regulatory certainty for your member companies regarding whether EPA can revisit the determination in the future and regulate coal ash under Subtitle C?

Mr. ROEWER. The legislation provides certainly by establishing that permit program under Subtitle D.

Mr. HUDSON. OK, and if an owner, operator misses the deadline to complete a safety factor assessment or fails to meet the initial safety factor assessment criteria, the final rule requires that the impoundment cease receipt of coal ash within 6 months and close within 5 years. Can you please explain why that is a problem, and does the draft legislation address this issue?

Mr. ROEWER. In some cases the design and implementation of an engineering solution to allow a facility to meet that safety factor assessment may take longer than the 18 months EPA has provided in this rule. We support the application of structural integrity criteria to these units. We need in some cases additional time. We want to make sure these units can continue to operate. We are not asking that unsafe units be allowed to continue to operate but that we be given time to ensure that these units meet the safety factors.

Mr. HUDSON. I think you have addressed that maybe with one of my other colleagues, but what are some of the factors that make one situation take longer than another, for example?

Mr. ROEWER. One of the complicating factors is these facilities are subject to permits by state regulatory agencies, and you got to get the approval from the state regulatory agency before you can do any work on that facility, and that can be a lengthy process.

Mr. HUDSON. So in your testimony you need that flexibility?

Mr. ROEWER. Absolutely. The legislation provides additional time for us to come into compliance with the safety factors, and it is very important the legislation does that.

Mr. HUDSON. All right. Thank you for that.

Mr. Chairman, I would be happy to yield to you if you would like to use the rest of this time.

Mr. SHIMKUS. No. I want you to yield back, and we will go to Mr. Johnson.

Mr. HUDSON. All right. Thank you.

Mr. SHIMKUS. The gentleman yields back his time.

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

Mr. JOHNSON. Thank you, Mr. Chairman, and I thank the panel for being here today, too. I associate myself with the comments of my colleague from North Carolina. This is an issue that the people of the great state of Ohio are monitoring very, very closely. We have a tremendous number of families that work in the coal industry that are dependent upon the coal industry for their livelihoods

to support their families, and Ohio still gets in excess of 60 percent of its energy from coal. So it is a very, very important issue for people in my district.

Mr. Forbeck, the draft legislation incorporates the definitions from the final rule but allows the states to make changes that may be necessary to tailor the requirements to the needs of the states but only if the state demonstrates that it has a reasonable basis for making the change. In your opinion will the states be able to arbitrarily change the definitions, and does this minimize the protectiveness of a state Permit Program?

Mr. FORBECK. No. I do not think the states can arbitrarily change the definitions. It says it has to have a reasonable basis for those changes. An example under Pennsylvania, for example, where coal ash is defined differently than what is under the proposed legislation, doesn't include flue gas desulphurization sludge, however, that FGD and the coal ash is included under our term, residual waste. That residual waste is governed in the same manner as the coal ash is with the protective standards.

Mr. JOHNSON. So is it important then in your opinion that states be able to adjust the definitions if necessary?

Mr. FORBECK. In my opinion, yes.

Mr. JOHNSON. OK. Mr. Forbeck, also, will the draft that you have read, the draft legislation, would that require states to make information like groundwater monitoring data, emergency action plans, fugitive dust control plans, and the results of structural stability assessments available to the public?

Mr. FORBECK. Yes, it will.

Mr. JOHNSON. OK. We had heard some concerns about that. I wanted to clarify that. So all this data is going to be made available to the public?

Mr. FORBECK. That is correct, sir.

Mr. JOHNSON. Right. In your opinion as an experienced state regulator, do you think location restrictions should be imposed retroactively?

Mr. FORBECK. I think it is important that the location restrictions are looked at at all facilities, however, there should be availability for corrective action and for enclosure if issues do occur. It is not possible, as I said, I think, earlier to simply move a facility out from a location standard. If there is reason to or there are issues that has been, that has come up from these, then maybe that is corrective action. If there isn't, which we have seen in sites in our region, we have had groundwater monitoring, et cetera, around a lot of these impoundments, that they are operating safely, even though they might not meet the location standards and have been grandfathered.

Mr. JOHNSON. OK. Thank you.

Mr. Roewer, the draft legislation also treats legacy sites in the same way EPA did under the final rule. Inactive impoundments must either close within 3 years or become subject to all of the requirements applicable to an active disposal unit.

In your opinion is 3 years always enough time to safely close a surface impoundment?

Mr. ROEWER. No, it is not. It is a very complicated process, and we need to make sure that that closure is environmentally sound

and safe. It can take longer than 3 years given the size of the unit, the requirements of dewatering it, and then constructing the cap in place.

Mr. JOHNSON. OK. The draft legislation gives the implementing agency the authority to grant an extension of up to 2 more years to complete closure. Why is the extension necessary? You just——

Mr. ROEWER. That extension is necessary because we can't always get it done within that 3-year time period. We want to close these facilities safely, and that extension would allow us the time necessary to do that.

Mr. JOHNSON. OK, but certainly we are not going to do these extensions willy-nilly. What would your members have to demonstrate in order to request an extension from the implementing agency, and specifically, if you could focus on the requirement that your members demonstrate that there is no immediate threat of release?

Mr. ROEWER. The EPA in their rule has established the ability to extend the closure process for active units, and we would have to show the same reasons because of climate, size, et cetera, that we are required under the provisions to allow an extension of the closure timeframe for active units for inactive units.

In addition, we would have to show that the facility is not a threat of immediate release. So we are not talking about allowing unsafe facilities to continue to stay there. We are asking additional time to safely close these facilities.

Mr. JOHNSON. OK. Thank you very much.

Mr. Chairman, I yield back. Thank you.

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

Just a reminder, this is a legislative hearing on draft legislation, and so as Mr. McKinley said, people who have comments or concerns can still address myself, Mr. McKinley, and members of this committee as we move forward.

The hearing is recessed until Tuesday, March 24, at 2:00 p.m. in Room 2123. The witness will be EPA Assistant Administrator, Matthew Stanislaus, a good friend of the committee who has been here numerous times.

With that I recess this hearing.

[Whereupon, at 11:55 a.m., the subcommittee recessed, to reconvene at 2:00 p.m., March 24, 2015.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Today's hearing continues our multi-year and multi-Congress effort to finalize a thoughtful, bipartisan solution for coal ash. This has been a collaborative effort every step of the way, and I commend Mr. Shimkus and Mr. McKinley for their leadership. With this discussion draft I am confident that we have the right policy in place that will get us across the finish line.

The draft is designed much like the legislation we nearly enacted in the last Congress:

- It appropriately treats coal ash as though it's a non-hazardous waste.
- It includes minimum federal standards for managing the post-combustion materials.
- And it allows states to develop permit programs that will implement the minimum standards.

What's different this time around? Instead of keying the minimum national standards off the old EPA regulations issued for Municipal Solid Waste—with a few

tweaks for coal ash—we set the national standard by incorporating EPA's new coal ash rule that came out last December.

We acknowledge all of EPA's work to develop sound technical requirements for regulating coal ash in a way that protects human health and the environment and we put the agency's efforts to good use. We allow the states—the natural choice to carry out permit programs—to implement the standards from the final rule through enforceable permits. This commonsense approach alleviates the implementation issues with the final rule and means state environmental protection authorities, some of whom are here for this hearing, will work on a daily basis with the regulated community to make sure the permit programs are on track. This kind of discipline should avoid unnecessary litigation and protect our environment at the same time.

I appreciate the testimony of our witnesses, especially those who will be on the front line when this bill becomes law: the state officials and the regulated community. This bill is good for states like Michigan that rely on coal for electricity. This bill is good for jobs. Let's continue the momentum and get this bill moving through committee and the House, and through the Senate, so that the president can sign it into law and the issue will be settled once and for all.

H.R. ————, THE IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT OF 2015, DAY 2

WEDNESDAY, MARCH 24, 2015

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

The subcommittee met, pursuant to call, at 2:34 p.m., in room 2123 of the 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, and Tonko.

Staff present: Nick Abraham, Legislative Clerk; Charlotte Baker, Deputy Communications Director; David McCarthy, Chief Counsel, Environment and the Economy; Tina Richards, Counsel, Environment and the Economy; Chris Sarley, Policy Coordinator, Environment and the Economy; Jacqueline Cohen, Democratic Senior Counsel; Michael Goo, Democratic Senior Counsel, Energy and Environment; Caitlin Haberman, Democratic Professional Staff Member; Rick Kessler, Democratic Senior Advisor and Staff Director, Energy and Environment; and Ryan Schmit, Democratic EPA Detailee.

Mr. SHIMKUS. We want to call the hearing back to order and welcome the Undersecretary Mathy Stanislaus from the EPA to testify on the coal ash bill. And my colleagues are here, and some will come back. We just came from votes.

Just for information, Mathy has to leave at 3:30, so we will try to expedite this as much as possible. And with that, your full statement is submitted for the record. You have 5 minutes, and welcome.

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

Mr. STANISLAUS. OK. Thank you. Good afternoon Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee. I am Mathy Stanislaus, Assistant Administrator for the Office of Solid Waste and Emergency Response. Thank you for the opportunity to testify on EPA's efforts on coal ash residuals as well as the subcommittee's discussion draft. I was also looking for a frequent witness card after I am done here today.

Mr. SHIMKUS. We will see how your testimony goes.

Mr. STANISLAUS. So as you all know, on December 19, the EPA Administrator signed the coal ash rule. The rule establishes the first-ever nationally applicable minimum criteria for the safe disposal of coal combustion residuals in landfills and surface impoundments. The agency is pleased that there continues to be wide agreement on the importance of ensuring the safe disposal of coal ash residuals. As noted in my testimony before the subcommittee on January 22 of this year, EPA believes that the agency's rulemaking appropriately addresses the risks posed by the mismanagement of coal ash residual disposal. The EPA believes that the coal ash 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 provides states and local communities the information they need to fully engage in the rule's implementation, thereby helping to ensure that facilities safely manage and dispose of coal ash residuals. To address the risk posed by mismanagement of coal ash residuals, the rule requires utilities to conduct groundwater monitoring, installing liners for new surface impoundments and landfills, control fugitive dust, and properly close surface impoundments and landfills no longer receiving coal ash.

The CCR rule is designed to provide electric utilities and independent power producers generating coal ash with a practical approach for addressing the issue of coal ash disposal and has established varying implementation timelines for the technical requirements that take into account, among other things, 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. We are committed to working closely with our state partners on rule implementation, and as a major component of this, we are encouraging states to revise their Solid Waste Management Plans and submit the revisions to the EPA for approval.

Just last week I briefed state commissioners on the rule's implementation process, and we agreed to continue to work together on expediting a streamlined process for developing and improving states' solid waste management plans. EPA has been working extensively with stakeholders before the rule and subsequently, and just recently we had a webinar in which 800 participants participated in discussing the rule.

EPA expects that the states will use the solid waste management planning process to help align state programs with the EPA rule and revise the state Solid Waste Management Plans to demonstrate how the state intends to regulate coal ash landfills and surface impoundments. We believe states will have sufficient time to prepare the solid waste management plans for approval. We believe we built in adequate time, up to 18 months, to revise the Solid Waste Management Plans before key provisions of the rule take effect. The agency expects that the solid waste management plan process can accommodate state program variability as states demonstrate regulatory requirements that are equivalent or more stringent than the requirements in the EPA rule. Most importantly, states' concerns of having state oversight and permit pro-

gram that is aligned with the coal ash rule will be achieved with an approved solid waste management plan, and utilities will have a single point of compliance.

EPA is currently reviewing the subcommittee's draft, and we remain open to providing technical comments to the committee. We believe that legislation should provide for a national uniform minimum standard that is protective of public health and the environment as we have set forth in the rule, and we appreciate the provisions of the discussion draft that incorporates components of the EPA's CCR rule.

However, the coal ash rule contains very specific detail regarding elements of transparency, prevention, and response, these elements were developed by reviewing extensive information from utilities, states, and citizens, augmented by in-the-field inspections of coal ash impoundments. The rule provides specific timelines that reflect the balance of immediately addressing risk to communities as soon as possible such as structural integrity to prevent catastrophic failure and ongoing risk to drinking water, while providing a reasonable amount of time for utilities to take actions given the variability of circumstance of CCR units. These components include a requirement that facility compliance data and information be posted on the internet for public access, criteria for addressing coal ash unit closure, comprehensive structural stability requirements, and requirements for all releases. Now we believe these are critically important components for a protective national program for coal ash disposal.

With that, Mr. Chairman, 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 THE ECONOMY
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
March 24, 2015

Good afternoon 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 about the management of Coal Combustion Residuals (CCRs) and the Subcommittee's Discussion Draft "Improving Coal Combustion Residuals Regulation Act of 2015."

Introduction

On December 19, 2014, EPA Administrator Gina McCarthy signed the final CCR (coal ash) rule, "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities." This rule establishes the first ever nationally applicable minimum criteria providing for the safe disposal of coal combustion residuals in landfills and surface impoundments.

Coal combustion residuals are byproducts of the combustion of coal at power plants, and 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 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. 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.

EPA Rulemaking

The agency is pleased that there continues to be wide agreement on the importance of ensuring the safe disposal of CCRs. As noted in my testimony before the Subcommittee on January 22 of this year, the EPA believes that the agency's rulemaking appropriately addresses the risks posed by mismanaged CCR disposal. The CCR 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. 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 manage and 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 CCR rule is 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. The rule also sets out recordkeeping and reporting requirements, including requirements to post information on a publicly available website to ensure transparency. We are committed to working closely with our state partners on rule implementation and, as a major component of this, we are encouraging states to revise their Solid Waste Management Plans (SWMPs) and submit the revisions to the EPA for approval. The EPA has been working with stakeholders on rule implementation issues and conducted a webinar in February of this year with nearly 800 participants to discuss implementation of the rule.

The EPA expects that states will use the SWMP process to help align state programs with the EPA rule, and will revise their SWMPs to demonstrate 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 rule's minimum national criteria and can highlight those areas where the state regulations meet or are more stringent than the federal minimum criteria. States are expected to have sufficient time, at least 18 months, to revise their SWMPs before key provisions of the rule take effect. The agency expects that the SWMP process can accommodate state program variability as states demonstrate their regulatory requirements are equivalent or more stringent than the requirements in the EPA rule.

The Discussion Draft

The EPA is currently reviewing the Subcommittee's discussion draft, "Improving Coal Combustion Residuals Regulation Act of 2015." The agency is open to providing technical assistance to the Subcommittee on its legislative efforts to manage the proper disposal of CCRs.

We believe that legislation should provide for a nationally uniform minimum standard that is protective of public health and the environment. We appreciate the provisions of the discussion draft that incorporate some of the components of the EPA's CCR rule. However, some additional essential elements of transparency, prevention and response that are included in the EPA's rule are critical for establishing a framework to help ensure the proper management of CCR disposal. These components include a requirement that facility compliance data and information to be posted on the internet for public access, criteria to address when a CCR unit would need to close, comprehensive structural integrity requirements, and a requirement that any releases from a CCR unit be cleaned up. We believe that these are important components for a protective CCR disposal program.

Conclusion

The EPA's final rule established nationally applicable minimum criteria for the safe disposal of coal combustion residuals in landfills and surface impoundments. The final rule 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 utilities on implementation of the rule to help protect public health and the environment. A legislative effort to establish a framework to help ensure the proper management of CCR disposal should also consider elements of prevention, response, and publicly available information/transparency.

Mr. SHIMKUS. Thank you very much. I would like to recognize myself for the first 5 minutes, and Mr. Stanislaus, I would like to walk you through some of the specific provisions in the legislation and compare them to the final rule. We are going to try the yes or no because of our time comparing the rule to the language of the bill. So if we can get to a yes and no on some of these first ones, we would appreciate it.

Do you agree the bill requires states to use the exact design requirements as in 257.70 and 257.72?

Mr. STANISLAUS. Well, I know you want yes and no answers, but I think the best way to kind of address those specific detailed questions is to——

Mr. SHIMKUS. But the real question is——

Mr. STANISLAUS. Yes.

Mr. SHIMKUS [continuing]. Did we take the language from the reg——

Mr. STANISLAUS. Yes.

Mr. SHIMKUS [continuing]. And place that in the language of the bill?

Mr. STANISLAUS. Well, I guess I will have to get back to you on that.

Mr. SHIMKUS. Yes, I think you know the answer. It does.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. Do you agree that the bill requires the states to incorporate the groundwater monitoring and corrective action provisions in 257.90 to 257.98?

Mr. STANISLAUS. Yes, I believe the draft does contain those kind of requirements as I said in my testimony. Some of the details having set forth in the rule is where we would like to work with you.

Mr. SHIMKUS. Do you agree that the bill has a deadline of no more than 36 months for the installation of groundwater monitoring?

Mr. STANISLAUS. Again——

Mr. SHIMKUS. It does.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. Does the final rule require installation of groundwater monitoring within 30 months of the effective date?

Mr. STANISLAUS. Are you talking about the draft or the rule?

Mr. SHIMKUS. You are testifying on the bill.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. We are comparing the bill's language to the rule.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. Which we looked at very closely.

Mr. STANISLAUS. OK. Well, again, in terms of a direct comparison, we can get back to you on that, so——

Mr. SHIMKUS. OK. We believe it does.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. Do you agree the bill includes all the same constituents identified by EPA as being of concern for coal ash?

Mr. STANISLAUS. Again, I believe it does, but we will have to do a direct comparison.

Mr. SHIMKUS. Yes.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. Do you agree the bill requires states to include the post-closure requirements in 257.104? I am just going to keep reading these.

Mr. STANISLAUS. OK.

Mr. SHIMKUS. OK. So the answer that we are trying to get to is, and there may be when we go through the markup, there may be some issues of debate, but our intent was as much as we could grabbing the regulation language and putting it in the bill.

Mr. STANISLAUS. Yes.

Mr. SHIMKUS. And this line of questioning is to confirm that.

Mr. STANISLAUS. Yes.

Mr. SHIMKUS. Do you agree that the bill requires the states to include the exact air criteria in 257.80? You probably don't know. We think it does. Does the final rule require financial assurance? Does our draft bill include financial—does the final rule, excuse me, your rule, does it include financial assurance?

Mr. STANISLAUS. The coal ash rule does not include financial assurance, but it does not foreclose existing states who have financial assurance for adding that to their administration of coal ash disposal.

Mr. SHIMKUS. OK. But so you are testifying that the final rule doesn't but they could, based upon state action?

Mr. STANISLAUS. Yes, states can, in fact——

Mr. SHIMKUS. Right. OK.

Mr. STANISLAUS [continuing]. Add that, yes.

Mr. SHIMKUS. Do you agree that the bill requires states to include surface water requirements as part of a permit program?

Mr. STANISLAUS. You are talking about the draft?

Mr. SHIMKUS. I am on the same line of questioning——

Mr. STANISLAUS. OK.

Mr. SHIMKUS [continuing]. Is the regulation comparing it to the draft. So the question is do you agree that the bill, the draft bill, requires states to include surface water requirements as part of a permit program?

Mr. STANISLAUS. Again, we would be more than willing to compare it back to——

Mr. SHIMKUS. I think what we will do, we will just submit——

Mr. STANISLAUS. Sure.

Mr. SHIMKUS [continuing]. These questions for the record, although we are going to be—as we mentioned before the hearing, a bill moves through the process. We will have a subcommittee mark. Through that process, if you can confirm or deny these questions, then we go to Full Committee mark, then we go to the floor. So there are other times for this process to move forward. But we think we have drafted the bill to, for the most part, address the regulatory issues that you have. Our intent was to, as I said in the earlier part of the hearing 2 days ago, is to be helpful, codifying versus what we are concerned about is litigation, citizen suits and different rules throughout the Federal District Court jurisdictions and then giving states the permitting authority with federal standards and to comply. So I will submit these questions, and if you can as quickly as possible, respond to those. I didn't get to the other ones, but my time is expired. And I will yield to Mr. Tonko for 5 minutes.

Mr. TONKO. Thank you, Chair Shimkus, and welcome to Administrator Stanislaus. We can all agree that coal ash can pose serious risks when not disposed of properly. Now for the first time we have minimum federal requirements that set a floor of public health and environmental protections. But we are still hearing from our majority that a bill is needed, that this rule somehow falls short.

Mr. Stanislaus, do you believe there are gaps in EPA's final rule?

Mr. STANISLAUS. Well, we believe that the rule comprehensively addressed the risk that we have identified from a technical perspective, and we also believe that the alignment of the federal rule with state requirements can occur through the state solid waste management planning process.

Mr. TONKO. And does the rule address the major risks of improper coal ash disposal?

Mr. STANISLAUS. Yes.

Mr. TONKO. And do you think there are problems in the rule that need to be addressed?

Mr. STANISLAUS. We believe that we have addressed all the rest identified by EPA and by all the stakeholders, and in fact, in last week's testimony, I think the state witnesses had noted that the rule reflects the best practices of the states.

Mr. TONKO. And you know, we have heard from some stakeholders last week, even after all of this, that the rule does not include enough discretion for states to tailor requirements to specific sites. In response, this bill gives states significant leeway to apply alternative groundwater protection standards, clean-up requirements, and more. But this leeway undermines the federal floor or the national minimal criteria that EPA sets in the final rule.

So my question to you, do you think it is important to have a federal floor of protections for coal ash disposal?

Mr. STANISLAUS. Well absolutely. What we have done is establish a clear federal floor around the major risks but also provided some tailored requirements to accommodate site-specific flexibility as well as timelines to accommodate the variants of the size of facilities.

Mr. TONKO. Thank you. And we have also heard some concerns about enforcement, that it might rely exclusively on citizen suits or that we may see issues of dual enforcement. So do you have confidence that enforcement of the final rule through citizen suits or states that have adopted requirements into their existing plans will be effective?

Mr. STANISLAUS. Well, we have confidence that the states going through the state solid waste management planning process would align the state requirements with the federal requirements and not result in dual requirements. And therefore, in any citizen suit as courts have done in looking at other kind of citizen suits under RCRA would provide substantial weight to EPA's approval of the state's solid waste management plan.

Mr. TONKO. And lastly, we have heard from some that the final rule does not provide enough certainty to the recycling industry because EPA could, at some time in the future, go through another lengthy public process to regulate coal ash as hazardous. By that measure, nothing that we do is certain because regulations and

statutes can always be revised. Mr. Stanislaus, does EPA's final rule label coal ash as hazardous?

Mr. STANISLAUS. No.

Mr. TONKO. Does the final rule prevent beneficial reuse?

Mr. STANISLAUS. No.

Mr. TONKO. Does EPA have any plans at this time to label coal ash as hazardous or restrict beneficial reuse?

Mr. STANISLAUS. No.

Mr. TONKO. I thank the chair for calling this hearing and the witness for his testimony. Based on this testimony, I do not see a need for legislation at this time, and I see serious risks in this particular proposal at a point I believe the public interest would be best served by allowing the EPA rule to move forward. The state-based approach on coal ash disposal has been in effect for over 30 years and has resulted in too many failures.

So EPA's proposal deserves I believe a fair test to see if it results in better protection for the American people from the risks of coal ash. And with that, I will yield back to the chair.

Mr. SHIMKUS. The gentleman yields back his time. Just a note that I appreciate your yes and no answer to my colleague but no ability to do yes or no to me.

So I will now recognize my colleague, Mr. Murphy, for 5 minutes.

Mr. MURPHY. Thank you. I am over here. Good to see you. Now, does this legislation create enforceable permit programs for coal ash?

Mr. STANISLAUS. In my understanding, there is a permit program in there.

Mr. MURPHY. OK. You have read the bill?

Mr. STANISLAUS. Yes.

Mr. MURPHY. OK. So you are aware on pages 10 through 18 the bill text sets out the minimum requirements for states' coal ash permit programs. Are those direct references to the requirements in Part 257 of the EPA's final rule?

Mr. STANISLAUS. Yes, I do believe there are references to EPA's final rule, and as I noted in my opening statement, I think that there has been a lot of incorporation of the elements of the EPA's final rule. I do think the specificity that we laid out in the coal ash rule regarding the major risks are critical enhancements that are necessary to provide the kind of protections against catastrophic failure among other kinds of risk.

Mr. MURPHY. And doesn't the bill then also require state permit programs to use the requirements in the final rule as the minimum requirements of coal ash permit programs?

Mr. STANISLAUS. I am sorry. Could you say that again?

Mr. MURPHY. The bill requires the state permit programs to use the requirements in the final rule as the minimum requirements of coal ash permits?

Mr. STANISLAUS. Minimum requirements? Yes, I don't really have that in front of me.

Mr. MURPHY. OK. We will get back to that.

Mr. STANISLAUS. OK.

Mr. MURPHY. I believe it directly incorporates the minimum requirements set forth in your December final rule, but let us know. In the fact sheet that accompanied the December 20, 2014, final

rule, your agency says, "EPA has no formal role in implementation of the rule. EPA does not issue permits nor can EPA enforce the requirements of the rule." In order to ensure that the EPA's coal combustion residual standards are met, doesn't it make more sense to enact a statutory guarantee that these standards would be adhered to rather than placing reliance on this rule's self-implementing mechanism?

Mr. STANISLAUS. Well yes, we have been really clear that the rule is self-implementing, but we believe, you know, based on all the comments we have heard from the states that the states want to enforce it through their programs. The states have that ability right now and that the alignment between state programs and the coal ash rule can occur through EPA's approval of the state's solid waste management plan.

Mr. MURPHY. When you refer to that states can enforce that, isn't that also referring though to lawsuits states and individuals can bring up as far as a means of enforcing the federal standards?

Mr. STANISLAUS. No. I want to separate the two. So with respect to aligning with state permit programs and enforcing it through the state authority, they can do that by integrating the coal ash rule into their program and then by submitting a solid waste management plan for EPA's approval separately, the states or citizens can enforce the self-implementing requirements through a suit.

Mr. MURPHY. Right, but won't enforcement through citizens' suits as called for in the final rule result in this extreme variety of interpretations and a patchwork of compliance and enforcement decisions as made by federal courts and not the EPA, not elected Members of Congress, not EPA and Congress working together? I am very concerned about that. Are you concerned as well that that basically means we are going to punt our authority here by relying on the courts for enforcement which includes interpretation? It is not just making someone do that which they are supposed to be doing, but whenever you go to the courts, you are also dealing with interpretation issues. Does that concern you?

Mr. STANISLAUS. Well, precisely because of that concern we have heard from utilities, we have heard from the states that very issue. That is the reason why we identified this opportunity to align state programs using the state's solid waste management planning process. And we have heard from utilities and states, and we agree that there should be a single point of compliance and that——

Mr. MURPHY. And what is that point of compliance? Would that point of compliance be the permit process itself or letting the states go through the enforcement and challenging in courts and individuals challenging courts? Wouldn't the permit process be the best place so you have interpretation and enforcement by the very agency that is working with Congress on this?

Mr. STANISLAUS. Oh, yes, and we would agree and we think that states utilizing the solid waste management planning process would enable that to occur.

Mr. MURPHY. So we want to make sure that the legislation really enables that to occur. I appreciate that. That is very important. And I yield back the balance of my time. Thank you.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTA. Well, thank you very much, Mr. Chairman, and thanks so much for being here again with us. I really appreciate it. Let me ask if I could, what do you see as the role of states in protecting the environment? Kind of a general question, but do you see as the overall role of states out there in protecting the environment?

Mr. STANISLAUS. What do I see the states——

Mr. LATTA. Yes. Right.

Mr. STANISLAUS. Well, the states are very much a co-regulator, in fact they have led responsibility for overseeing and enforcing environmental requirements. That is found within the Resource Conservation Recovery Act and probably many of our other environmental statutes. So we very much believe the states are on the front lines and should have primacy over that.

Mr. LATTA. Because, as you just said, the states are on the front line that especially when the states, they know their own backyards much better. And so you think that the states should be out there on the front and should be maybe the first line of defense out there instead of the Federal Government?

Mr. STANISLAUS. Yes, I mean, I don't disagree with that statement, and we spent a lot of time in the rule recognizing that fact and to accommodate the states to the greatest extent that we can. And even during the development of the rule, we have spent extensive time analyzing the states' rules and figuring out how we can best align the federal rule with state requirements and with the states taking the lead.

Mr. LATTA. Let me follow up on that then. Do you believe that most states want to implement their own regulatory or permit program rather than have the U.S. EPA do it? Do you think——

Mr. STANISLAUS. Well, yes. I think the states in fact want to move forward on either enhancing their permit program, a new permit program for the coal ash rules, and in my conversations with the states is that we want to move forward taking advantage of the requirements in the rule to do that.

Mr. LATTA. Well, when we are looking at that, then would more states be inclined to want to do it themselves or have the U.S. EPA do it, to have their own permitting process?

Mr. STANISLAUS. I am not sure I have that information in front of me. I would say that states generally want to administer a permit program for coal ash disposal management.

Mr. LATTA. OK. Let me just follow up again. Given all the uncertainty that the EPA's rule has given states in the industry, the fact that many states already have permit programs and the fact that the EPA has previously determined that coal ash is not a hazardous waste, wouldn't it be more prudent now to provide that full authority to the states to be able to do that on their permitting?

Mr. STANISLAUS. Well, I actually believe that we have done that in the rule that we finalized. We finalized as minimum technical requirements and the ability of states with the existing authority to incorporate that within their existing permitting program and for EPA to approve that, to align those requirements with the state requirements which would, we believe, substantially help states and utilities in any challenges, any court challenges.

Mr. LATTA. OK. Let me ask this then. Also, looking at your testimony, you say that we have talked about this in the past in the committee, approximately 40 percent of all the CCR generated in 2012 was beneficially used. Do you believe that this bill that we are talking about today would ensure that continued beneficial use of that CCR?

Mr. STANISLAUS. Yes. I am not sure that I have analyzed it from a beneficial-use perspective. I mean, I think both, I think the rule and the legislation, is focused on the disposal, so I believe both will accommodate beneficial reuse of coal ash.

Mr. LATTA. OK. Well, thank you very much, and Mr. Chairman, I yield back the balance of my time.

Mr. SHIMKUS. The gentleman yields back the balance of his time. The chair now recognizes the gentleman from West Virginia, Mr. McKinley, who is the author of much of this bill, for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman, and welcome again to our committee and your help on this. If I can get to three questions, I would like to handle it that way. I am still somewhat troubled by the preamble, about the possibility of a slip, that there could be some consideration as a result of that. I am still getting phone calls about this and primarily from state highway commissions around the country that they are concerned that their use of cinders for providing traction on our highways that they have used historically may be not permitted.

Do you have a sense of where the EPA would come down on whether cinders, the bottom ash, could be used on highways for safety?

Mr. STANISLAUS. Yes. So with respect to any issue with respect to regulation, I think we are very clear in the rule that all beneficial use would not be subject to the rules on disposal. Separate from that, we have established a methodology for safe use of encapsulated use and we are now working on a methodology for the safe use of unencapsulated use. That deals with the risk——

Mr. MCKINLEY. So where——

Mr. STANISLAUS [continuing]. Side of disposal.

Mr. MCKINLEY [continuing]. Do you think the EPA may come down on that issue? Because some of the states, during this past winter because of this controversy that has been stirred up by certain people, they are afraid to use cinders. As a result, we have had increased accident rate in some areas.

So can you share? Do you think that they would rule that as being a beneficial use or are they going to—how would you finish that sentence?

Mr. STANISLAUS. Well, we are in the midst of evaluating the unencapsulated use. All I can say is that the encapsulated use——

Mr. MCKINLEY. This wouldn't be encapsulated, obviously, not the cinders spread on the highway.

Mr. STANISLAUS. Yes. Yes. So to draw the analogy to the methodology, unencapsulated use, what it would do is to lay out the kind of techniques and applications so that it can be safely recycled. It would not be getting involved in whether that is subject to regulation at all.

Mr. MCKINLEY. OK. I think we are going to have to have more conversation about that.

Mr. STANISLAUS. OK.

Mr. MCKINLEY. I am still not clear on that. So again, your testimony said that—in critiquing the legislation, the criteria to address when a CCR unit would need to close should be included. Can you explain what you mean by that?

Mr. STANISLAUS. Sure. So we spent a lot of time in the particular circumstance and timeline for closure of impoundment. So there can be times where a unit has to close for structural stability purposes, and so we lay out a series of requirements for structural stability, for inspection, looking at safety factors, if they don't pass safety factors, the ability to engineer around and fix those safety factors. Another circumstance where there could be impact of groundwater, where it is an unlined impoundment. So we spent a lot of time both in the rule text and in the preamble articulating how to do the analysis, under what circumstance it would have to close and the particular methods of closure and timeline of closure.

Mr. MCKINLEY. Very good. I would really like to spend more time back in that first because that issue of spreading salt we know is doing damage. Any of us that know from engineering that we are going to destroy our roads and bridges by use of salt. So I hope that your ultimate decision will be that we can continue using cinders on our highways.

Mr. STANISLAUS. And as a follow——

Mr. MCKINLEY. Especially given the vegetation, the flora and fauna that we are killing along the highways because of the salt runoff. So there are some issues with that, and we can have more conversation. But in the timeframe, one last question. You talked about you wanted comprehensive structural integrity requirements you thought were—maybe we need to amplify that a little bit more in the bill. But the language in the bill is from the rule over the structural integrity requirements. The only thing was just a slight modification for utilities. What is not included? What is causing you consternation over this?

Mr. STANISLAUS. Yes, I think let us have our staff get together on that. I mean, one of the issues I think we flagged was the timing addressing the structural integrity problems. We didn't think that was identical to what we have laid out in the rule. All right. So what our rule says is do these inspections, do these assessments. Have a professional evaluate it. If there are problems with it, fix it, but if you can't fix it, then you're going to have to close because of the real consequence of a catastrophic failure.

Mr. MCKINLEY. I would agree. I yield back the balance of my time. Thank you.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. I appreciate that. Mr. Stanislaus, there are a number of places in the preamble where the EPA indicated that certain provisions of the rule would have been written differently if the final rule was not self-implementing and if there was state oversight. So let us look at some specific issues.

If the requirements were implemented with state regulatory oversight through permits, would the EPA have allowed alternative groundwater protection standards to be established?

Mr. STANISLAUS. I guess I am not sure. What we included in the rule was the various technical considerations for evaluating——

Mr. JOHNSON. Well, it says right in the preamble yes. I mean, you do know your rule, right?

Mr. STANISLAUS. Yes.

Mr. JOHNSON. OK. So it says that it——

Mr. STANISLAUS. Yes.

Mr. JOHNSON [continuing]. Would. So would it also allow for alternative points of compliance to be established?

Mr. STANISLAUS. If there was a permit program?

Mr. JOHNSON. Yes.

Mr. STANISLAUS. Yes, let me get back to you. I don't know at this moment.

Mr. JOHNSON. Would it allow a determination that compliance with corrective action requirements cannot be reasonably achieved with concurrently available methods, with currently available methods?

Mr. STANISLAUS. I believe that is currently in the rule.

Mr. JOHNSON. OK. Would it allow a determination that remediation of a release is not necessary?

Mr. STANISLAUS. If there was a permit program

Mr. JOHNSON. Yes. The preamble to the rule says that there are provisions in the rule that would have been written differently if the final rule was not self-implementing and if there was a state oversight. So if the requirements were implemented with state regulatory oversight through permits, would the rule have allowed a determination that remediation of a release is not necessary?

Mr. STANISLAUS. I guess I am not sure. If there was a release resulting in exceedance, be it a state permit program or minimum federal requirements, I think that would both require addressing that release.

Mr. JOHNSON. All right. Well, let us move on. The groundwater monitoring and corrective action provisions in the proposed and final rule are based on the municipal solid waste regulations in part 258. Would you disagree that the flexibility afforded states in making regulatory decisions under part 258 would also be appropriate for a state to incorporate as part of a coal ash permit program?

Mr. STANISLAUS. Well, I mean——

Mr. JOHNSON. Why would they be different?

Mr. STANISLAUS. I am sorry?

Mr. JOHNSON. Why would they be different?

Mr. STANISLAUS. Well, I mean, I think——

Mr. JOHNSON. If they are both based on part 258?

Mr. STANISLAUS. Yes.

Mr. JOHNSON. Why would they be different?

Mr. STANISLAUS. Well, yes, you know the rule, it does borrow from the provision that you noted.

Mr. JOHNSON. Yes. So the question is would it also be appropriate then under Part 258 for a state to incorporate as part of a coal ash permit program?

Mr. STANISLAUS. Well, I guess what I would say is the rule provides specific requirements regarding groundwater that we think

should be followed, and we believe states should adopt those groundwater requirements in the state programs to be protected.

Mr. JOHNSON. Mr. Stanislaus, we would like to compare how the final rule addresses inactive surface impoundments with how the legislation addresses them. So doesn't the bill require that inactive impoundments notify EPA and the state within two months of enactment regarding whether they intend to close? You have read the bill, right?

Mr. STANISLAUS. Yes. Yes. Yes, I am not sure of the time period in front of me but——

Mr. JOHNSON. OK. Well, it does. Do you know what the rule requires?

Mr. STANISLAUS. Yes. The rule permits subjects' inactive units that don't close within 3 years of the effective date to do the requirements of the rule. Within those 3 years, a unit can dewater and close.

Mr. JOHNSON. Doesn't the bill require that an inactive impoundment close within 3 years or 5 years or become subject to all of the requirements of a permit program?

Mr. STANISLAUS. Yes. I believe that is the case.

Mr. JOHNSON. OK. What does the rule require?

Mr. STANISLAUS. Again, the rule requires the 3-year timeframe.

Mr. JOHNSON. OK.

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

Mr. JOHNSON. Mr. Chairman, I yield back.

Mr. SHIMKUS. The chair recognizes the gentleman from Texas, Mr. Flores, for 5 minutes.

Mr. FLORES. Thank you, Mr. Chairman. Mr. Stanislaus, quick question for you. Once the file rule is effective, what will the EPA's role be with respect to enforcing the requirements in the rule?

Mr. STANISLAUS. The rule again is self-implementing so it would be enforced either by the states or citizens.

Mr. FLORES. Means the EPA has no role in enforcement essentially, right?

Mr. STANISLAUS. Well, with the exception of an imminent and substantial endangerment where we reserve that opportunity.

Mr. FLORES. In the legislation on the other hand that we are proposing gives the EPA a continuing oversight rule to ensure that the state permit programs meet the minimum federal requirements, and it allows the EPA to implement a permit program if the states decide not to. And the EPA could take over a state permit program if the state fails to correct the deficiencies. Doesn't the EPA have a more substantial role with respect to the regulation of coal ash and with the legislation than it does under the rule that you proposed?

Mr. STANISLAUS. Yes, actually we are not sure because I think we have questions about——

Mr. FLORES. It does. I don't think this has been asked already. When does the EPA plan to publish the final rule in the Federal Register?

Mr. STANISLAUS. Well, it has been sent to the Federal Register Office, so expect it very shortly.

Mr. FLORES. OK. What changes are you proposing from the initial rule?

Mr. STANISLAUS. There are no real changes. It is technical corrections.

Mr. FLORES. OK. So no substantive changes?

Mr. STANISLAUS. No substantive.

Mr. FLORES. No substantive changes?

Mr. STANISLAUS. No.

Mr. FLORES. OK. Will there be a document that describes all the changes between the December 19 publication and—the pre-publication and the version in the Federal Register?

Mr. STANISLAUS. Yes, let me get back to you on that.

Mr. FLORES. OK. Does the EPA have the legal authority to publish the rule in the Federal Register that varies from the December 19 prepublication version?

Mr. STANISLAUS. Sure. I mean, the standard process, I mean, basically is a cleaning up of the rule.

Mr. FLORES. And that is based on your representation that there are no substantive changes?

Mr. STANISLAUS. That is right.

Mr. FLORES. OK. This is more a rhetorical question. You don't have to answer, but isn't it preferable that the EPA issue rules based on statutory guidance from Congress instead of doing it on its own? I mean, this hearing was about the legislation we are proposing, and you have said you read it. But yet, many of the questions that have been asked by members, it doesn't feel like you have had your arms around it. So I would say that it makes more sense I think for the EPA to have statutory authority to do something than do it on its own and not have it work as well as it could. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from North Carolina, Mr. Hudson, for 5 minutes.

Mr. HUDSON. Thank you, Mr. Chairman, and thank you, sir, for being here with us today. Mr. Stanislaus, on the first day of our hearing last week from one of our witnesses, we heard a lot of distrust of the states and their ability to implement permit programs that are protective of human health and the environment. Do you believe the states would develop coal ash permit programs that did not protect human health and the environment?

Mr. STANISLAUS. Well, I have a large degree of confidence that the states will—and we are working with them—the states will develop a coal ash disposal program in alignment with the rule, yes.

Mr. HUDSON. So do you agree the states have an established standard of protection that they are required to meet and establish environmental statutes and regulations?

Mr. STANISLAUS. Well, I think that is the goal to have states incorporate the minimum federal requirements set forth in the coal ash rule.

Mr. HUDSON. OK. The agency in proposing that the location restrictions apply retroactively to existing service impoundments acknowledge that this would force a majority of those impoundments to close. Do you have an estimate of how many we would be talking about would close and what the potential impacts would be on grid reliability?

Mr. STANISLAUS. I don't have an estimate in front of me. I can get that to you. But I don't believe that a majority would close because of location requirements. Now, we built in, per information that we received from utilities and states, the ability to examine these particular location requirements and conduct retrofits to continue operation. But I can provide to you the estimate that we have.

Mr. HUDSON. I would appreciate that because I think it is important, and we have heard a lot of concern about the fact that it can be retroactively applied but we are looking at a significant amount of closure. And again, that has really raised a lot of concern in my mind about the grid reliability and what the impact on that will be.

In your written testimony you state that the requirement that facility compliance data and information be posted on the internet for public access is critical to establishing a framework to help ensure proper management of CCR disposal. Why is it critical that regulated agencies directly post compliance data instead of the states posting the information or otherwise making the information publically available as is required by our legislation?

Mr. STANISLAUS. Well, I mean, we believe that the public posting of critical data in terms of, for example, how a utility is or is not exceeding groundwater protection standards, how a utility is moving forward on corrective action helps, the community living next to a facility to understand how a utility is addressing the coal ash impoundments.

Mr. HUDSON. Well, sure, but our legislation expressly requires that states make information such as groundwater monitoring data, structural stability assessments, fugitive dust control plans, emergency action plans, and corrective action remedies be made available to the public. Why is this not an acceptable alternative to having the facilities directly post this information? It is going to be out there for the public consumption.

Mr. STANISLAUS. Yes, I think having—whether this talks about the utilities or the states, I think they are both adequate enough so, yes.

Mr. HUDSON. Right. Thank you, Mr. Chairman. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman. Thank you for being here, and I wanted to just let you know a few things in case you didn't get a chance to look at it when we had this beginning of the hearing last week on the 18th. I just wanted to point out some testimony from a couple of the witnesses that were here. David Paylor, who is with the Virginia DEQ and Past-President of ECOS, he said in his testimony that the draft bill amended Subtitle D of RCRA by allowing the states to implement and enforce the EPA's coal ash management rule through a state permit program instead of having the rule be self-implementing. He said this recognizes that the states are in the best position to implement the rule and to regulate CCR units but also properly empowers the EPA to serve as a backstop and administrate the new rule and circumstances where a state decides not to do so or fails to do so properly. Fur-

ther, he pointed out that ECOS testified before this subcommittee in January, supporting the final rules' technical requirements but stating that legislation to amend RCRA was still needed to address limitations in weaknesses in the final rule. Further ECOS has reviewed the draft bill and finds that it positively addresses the concerns identified by ECOS in our January testimony. The draft bill leverages and codifies the extensive technical work in EPA's final rule.

So I could go on with what he said, but I also want to point out Michael Forbeck who is on behalf of the Association of state and Territorial Solid Waste Management Officials. And their testimony was pretty clear that the discussion draft has addressed the main concerns that they have expressed regarding EPA's final rule on CCR, and they believe that this discussion draft addresses the main concerns that they have in that this is necessary. And they are pleased that the legislation requires financial assurance for post-closure care of inactive surface impoundments and I could go on and on.

But this is something we believe is necessary. And I have got a few questions as I follow up. The legislation allows states to use their discretion to establish alternative groundwater protection standards, alternative points of compliance, and determine that corrective action is not necessary or technically feasible. But the bill limits the discretion to what the state could do under the municipal solid waste regulations in Part 258. Do you feel that this significantly weakens the protections in the final rule?

Mr. STANISLAUS. Well, I guess our view is that the level of detail to ensure equivalency between what we put in the coal ash rule and what is contained in the bill, we are not sure it has the same level of equivalency.

Mr. HARPER. OK. Did EPA promulgate the final rule to be protective of human health in the environment?

Mr. STANISLAUS. Yes.

Mr. HARPER. Why is a general standard of protection necessary in the bill to ensure that states develop permit programs that are protective of human health and the environment?

Mr. STANISLAUS. Well, we established very specific requirements based on the risk to groundwater, the risk of catastrophic failure. So we believe that level of specificity is necessary to ensure an adequate level of protection.

Mr. HARPER. Some of the environmental groups are saying that EPA finalized the weakest regulatory option. Do you agree that the final rule contains weak regulatory standards?

Mr. STANISLAUS. No.

Mr. HARPER. The agency in proposing that the location restrictions apply retroactively to existing surface impoundments acknowledged that this would force the majority of these impoundments to close. Do you have an estimate of how many will close and what the potential impacts will be on grid reliability?

Mr. STANISLAUS. Sure. Yes. I can get back to you with those numbers.

Mr. HARPER. OK. We really would——

Mr. STANISLAUS. Sure.

Mr. HARPER [continuing]. Like to see that.

Mr. STANISLAUS. OK.

Mr. HARPER. And do you know if those estimates exist? Are they already part of your file? Do you already have that and you just have to get it to us or does it have to be compiled?

Mr. STANISLAUS. Yes, we have analyzed it. We can get you information on that. I mean, just to be clear, because of the concern that you raised, you know, the location requirements permit one, the analysis of those various requirements but also the ability to implement engineering solutions to provide the necessary safety net——

Mr. HARPER. Thank you for being willing to provide that.

Mr. STANISLAUS. OK.

Mr. HARPER. We look forward to seeing that. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. Last but not least, the gentleman from North Dakota, Mr. Cramer, for 5 minutes.

Mr. CRAMER. Yes. Thank you, Mr. Chairman, and thank you as well. I am just going to—I want to maybe focus in just a little more on one topic, and I know Mr. Johnson raised it a little bit ago. But I felt like we left it a little early. And just as a background, I am a former state regulator. I was in the Public Service Commission, and we, in North Dakota, had the surface mining, the SMCRA rules, and carried them out as a state on behalf of the Federal Government as well as our own reclamation rules. And realizing that coal ash is RCRA and solid waste, and what I am struggling with, and I am hoping you can help me, is if a state opens up its solid waste regulations as you suggest and if they adopt, you know, these rules, your rules, they then become part of their—258 rules, they then become part of their enforcement regime. But as I understand it, that is not the end of it. In other words, they still have the EPA rule over here, and the state doesn't enforce in lieu of the federal rule. Is that right? And I have to tell you, if that is right, that is concerning to me because it seems if I was the state regulator that I used to be, that would be problematic for me. That would be confusing I think certainly to the stakeholders, and I think it would be confusing to the regulators with regard to who has got enforcement over what.

I pose it in that statement in hopes that you can help clarify it for me.

Mr. STANISLAUS. Sure. Because of this concern that the states can't act in lieu of EPA in the way that other programs can is the reason why we believe the state's solid waste management planning process would allow that alignment. So once a state submits a plan to us that demonstrates that the minimum federal requirements are contained in a state program, ideally a permit program, EPA would then approve that and I believe the major concern that we heard from the states and utilities was a court could view this as different requirements between the states and the coal ash rule. And we do believe that should there be litigation around that, that our experience has been, it is going to provide substantial weight of EPA's conclusion that a state program is consistent with the federal rule. Does that answer your question?

Mr. CRAMER. I think it does, but it doesn't alleviate my concern because with your court example, wouldn't it be easier if we just

had the states permitting as part of the enforcement mechanism rather than have a court, what I think you are talking about, a court sort of recognize that the state adopted this and therefore they will consider that as part of this citizen suit enforcement mechanism that I think is the highlight of the rule, which I think is quite problematic. Obviously, I mean, it is pretty clear by the legislation and certainly by the majority that that is a fairly major concern for us.

So yes, I think I understand your answer. I just am not sure that I can agree with it as a conclusion. With that, I have nothing further, but I would yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time. I have four letters to ask unanimous consent to submit into the record. One references the opposition to the draft, and it is signed by a lot of organizations from all over the country. So people can check the record for that. Another one, another letter requests for the subcommittee to convene a hearing to address this and concerns, and it is signed by a lot of citizens from across the country. And people can find out who they are if we accept this into the record.

We also have a letter by the Chamber of Commerce in support of the legislation and a letter from the Portland Cement in support of the legislation.

Without objection, I would like to submit these to the record. Without objection, so ordered.

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

Mr. SHIMKUS. We want to thank you for testifying for us as part of the process of looking at the bill. We look forward to some responses to the many questions that members put forth, and with that, this hearing is adjourned.

[Whereupon, at 3:27 p.m., the subcommittee was adjourned.]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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March 24, 2015

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Paul Tonko
Ranking Member
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Shimkus and Ranking Member Tonko:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, strongly supports the "Improving Coal Combustion Residuals Regulation Act of 2015," which would serve as an important tool to build upon and improve the final rule on coal combustion residuals that was issued in December 2014 by the Environmental Protection Agency (EPA). This needed draft legislation, which was crafted with the help of state environmental and solid waste officials, committee staff, and with input from the EPA, addresses the implementation issues associated with the EPA's final rule and provides states with the enforcement authority they need in order to implement the standards established by the EPA.

This draft legislation introduced by Rep. David McKinley would amend Subtitle D of the Solid Waste Disposal Act (42 U.S.C. 6941 *et seq.*) and takes into account the significant effort that the EPA undertook to develop sound technical standards protective of human health and the environment while also borrowing from previous legislative proposals that would have required states to develop enforceable coal combustion residual permit programs that would administer minimum federal standards. States would retain the ability, however, to make their permitting programs more rigorous than the standards set forth in the EPA's final rule. As such, the draft legislation would update the Solid Waste Disposal Act to include as a baseline the requirements set forth in the EPA's final rule while also ensuring that there would be direct enforcement of the EPA's requirements by a regulatory agency through a formal permitting program.

The draft legislation would also require that criteria regarding surface water protection and financial assurance be a part of formal coal ash permit programs and would require financial assurance for maintaining the applicable EPA-approved safety standards at closed inactive impoundments. Further, if an inactive impoundment is not formally closed within three years, such impoundment would be deemed a structure that is thereby required to go through the established permit process. The draft legislation would provide relief, however, if complete

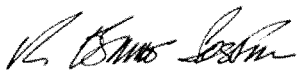
closure can be demonstrated as infeasible consistent with the factors EPA established for obtaining an extension on closure under its December 2014 final rule.

The draft legislation also would fully incorporate the groundwater monitoring and corrective action provisions of the EPA's final rule, but provide flexibility to implementing agencies to tailor aspects of these rules on a case-by-case basis depending on site-specific and risk-based factors. The draft legislation's establishment of either state or federal oversight of a formal permitting program would make possible the agency discretion that is otherwise afforded to a state under the Municipal Solid Waste Regulations. Further, the draft legislation provides clarification and specific examples of beneficial use/reuse of coal combustion residuals.

The Improving Coal Combustion Residuals Regulation Act of 2015 would finish the job that EPA was unable to complete unilaterally. Through its establishment of a formal state or federal permitting program, many of the flexibilities otherwise available through the Municipal Solid Waste Regulations would be applied to coal ash permit programs while ensuring that the EPA's final baseline technical requirements are soundly enforced. This draft legislation also would not impact the ability to bring citizen enforcement suits under the Resource Conservation and Recovery Act, but rightly alleviates such suits as being the only mechanism to enforce the application of the EPA's final coal combustion residual standards. Thus, this legislation represents a workable and appropriate balance between the implementation of the EPA's final rule and the need to fairly and rationally address the storage and beneficial reuse of coal combustion residuals.

The Chamber strongly supports the Improving Coal Combustion Residuals Regulation Act of 2015 and applauds the subcommittee for its leadership on this important issue.

Sincerely,



Bruce Josten

cc: Members of the Committee on Energy and Commerce

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March 18, 2015

The Honorable John Shimkus
Chairman, Environment and the Economy Subcommittee
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Shimkus:

The Portland Cement Association (PCA) appreciates your leadership in promoting policies that balance environmental stewardship and a healthy economy. PCA represents 27 U.S. cement companies operating 82 manufacturing plants in 35 states. Collectively, these companies account for approximately 80% of domestic cement-making capacity, with distribution centers in all 50 states.

America's cement manufacturers comply with a broad spectrum of federal and state environmental rules. These companies also work diligently to recycle unused materials in their production processes and products. The use of Coal Combustion Residuals (CCR, or "coal ash"), which are generated by coal-fired power plants to generate electricity, is a leading example of this practice.

CCRs are used in concrete production and as a raw material by cement manufacturers. Taken together, this accounts for more than 10% of the 130.7 million tons of coal ash generated in the country every year. The discussion draft "Improving Coal Combustion Residuals Regulation Act of 2015," incorporates key provisions that will help ensure that the roughly 15 million tons of coal ash recycled annually in cement and concrete will continue. This is good for the environment and the economy.

We look forward to working with you and the members of the Committee to move this important legislation forward. If you have any questions or need more information, please contact me.

Sincerely yours,

James G. Toscas
President and Chief Executive Officer

Copy: Members, Committee on Energy and Commerce

March 6, 2015, *updated March 17, 2015*

The Honorable John Shimkus
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Re: Request for the Subcommittee to Convene a Hearing to Address Citizen Concerns Regarding Coal Ash Pollution and "EPA's 2014 Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities"

Dear Chairman Shimkus and Ranking Member Tonko:

We understand that your Committee may be considering a bill to revise or replace the ash disposal regulations recently announced by the U.S. Environmental Protection Agency. We are writing to respectfully request that your Committee schedule a hearing that will give communities affected by coal ash pollution the opportunity to talk about the kind of safeguards we need before you move forward with any legislation.

EPA's final rule was less than we had hoped for, but provides at least some of the standards that we are now counting on. We cannot afford to lose that certainty, or take even more time getting these protections in place. Our families and our neighbors are the ones exposed to wind-blown fly ash, ground water contamination, the pollution of our creeks and wetlands, and spills that close waterways, damage property, and threaten loss of life. Our homes have lost value in some cases, which means the tax base that supports our schools and roads is also at risk. Our townships cannot afford to be stuck with leaking dumpsites or pay the bill for cleaning them up. We can tell you what it is like trying to get our state agencies to respond to our requests for help. All of us want the polluters who created this problem to clean it up, and to start now.

You have already heard presentations from power companies and their lobbyists, state agencies and EPA, and several environmental organizations. We are asking now that you make time for the people who have the most to lose if the new EPA rule is slowed down or made weaker. And we think what we have to share is worth a public hearing, which doesn't seem like much to ask.

Thank you for considering our request, and we look forward to your reply.

Respectfully submitted,

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March 17, 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: Opposition to discussion draft of "H.R.___, the Improving Coal Combustion Residuals Regulation Act of 2015"

Dear Chairman Shimkus and Ranking Member Tonko:

The undersigned 122 public interest groups, private and concerned citizens, strongly oppose the discussion draft of "H.R.___,Improving Coal Combustion Residuals Regulation Act of 2015" which threatens health, safety and the environment while relieving owners of coal-fired power plants of their responsibility to safely dispose of toxic coal ash. This proposal greatly increases the potential for harm to communities in the United States and its territories by amending the Resource Conservation and Recovery Act (RCRA), to remove critical and long-awaited safeguards established by the U.S. Environmental Protection Agency (EPA) on December 19, 2014 in their final coal ash rule.

The EPA's first-ever coal ash rule was a compromise that went to great lengths to address the concerns of industry, recyclers and states by characterizing coal ash as non-hazardous, does not ban the continued operation of coal ash ponds, exempts the beneficial use of coal ash, and establishes generous timeframes for compliance and closure. Despite these generous concessions, the discussion draft further guts the new EPA rule of public health protections and places American communities at increased risk of toxic exposure and catastrophic disasters in the following ways:

The "Improving Coal Combustion Residuals Regulation Act of 2015" will:

- **DELAY** the rule's new health and safety protections- potentially for up to 10 years;
- **WEAKEN** the rule's mandate to close inactive (contaminated and abandoned) ponds by extending the deadline for closure, allowing these legacy ponds to operate without safeguards for at least 6 years;

- **ELIMINATE** the rule's guarantee of public access to information and public participation;
- **ELIMINATE** the rule's ban on storing and dumping coal ash in drinking water;
- **REMOVE** the rule's national standard for drinking water protection and cleanup of coal ash-contaminated sites;
- **REMOVE** the rule's national minimum standard for protection of health and the environment and allow state programs to eliminate critical safety requirements;
- **PROHIBIT** effective federal oversight of state programs; and
- **PROHIBIT** EPA enforcement of state program requirements unless invited by a state.

In summary, we oppose the "Improving Coal Combustion Residuals Regulation Act of 2015" discussion draft because it places the health of our communities and environment in great danger and fails to guarantee consistent nationwide protection. The proposal would particularly harm the nation's most vulnerable communities, since coal ash ponds are disproportionately located in communities of color and low-income neighborhoods. Relief from coal ash dumping is long overdue:

- Three major coal ash disasters have occurred since 2008 (including the largest toxic waste spill in our nation's history);
- U.S. utilities operate more than 300 high and significant-hazard earthen coal ash dams that can significantly harm communities and their environment if they fail;
- More than 200 coal ash sites have already contaminated water in 37 states, and
- Communities across the nation are threatened by toxic dust from coal ash dumpsites.

The EPA's 2014 coal ash rule will help provide immediate protection to our most vulnerable communities and our irreplaceable water resources. Congress must refrain from causing irreparable harm by denying and delaying such protection, and consequently we respectfully request that you oppose the "Improving Coal Combustion Residuals Regulation Act of 2015.

Respectfully submitted,

National
Alliance of Nurses for Healthy Environments
American Rivers
Center for Biological Diversity
Clean Water Action
Defenders of Wildlife
Earthjustice
Environment America
Environmental Integrity Project
Friends of the Earth U.S.
Greenpeace USA
League of Conservation Voters
National Association for the Advancement of Colored People (NAACP)

Natural Resources Defense Council (NRDC)
Physicians for Social Responsibility (PSR)
Public Citizen
Sierra Club
WE ACT for Environmental Justice

Alaska
Alaska Community Action on Toxics
Resurrection Bay Conservation Alliance

Alabama
Alabama Environmental Council
Alabama Rivers Alliance
Black Warrior Riverkeeper
Cahaba Riverkeeper
Esther Calhoun, Black Belt Citizens Fighting for Health and Justice

Arizona
Barbara H. Warren. MD, MPH

California
As You Sow
KyotoUSA
Label GMOs
Our Children's Earth Foundation

Colorado
Diné Citizens Against Ruining our Environment

Florida
Florida Wildlife Federation

Georgia
Altamaha Riverkeeper
Fall-line Alliance for a Clean Environment (FACE)
GreenLaw

Illinois
Canton Area Citizens for Environmental Issues, Canton Lake and Its Watershed
Citizens Against Longwall Mining
Committee on the Middle Fork Vermilion River
Prairie Rivers Network

Indiana
People in Need for Environmental Safety
Hoosier Environmental Council

Kentucky
Cumberland Chapter Sierra Club
Kentucky Environmental Foundation
Kentuckians For The Commonwealth

Louisiana
Gulf Coast Center for Law & Policy

Maryland
Henry S. Cole & Associates, Environmental Inc.
Rachel Carson Council

Michigan
Lone Tree Council

Missouri
Elizabeth Schmidt, Impacted Citizen
Labadie Environmental Organization (LEO)
Midwest Coalition for Responsible Investment

Montana
Montana Environmental Information Center
Northern Plains Resource Council
Western Organization of Resource Councils

North Carolina
Appalachian Voices
Catawba Riverkeeper
Clean Air Carolina
Clean Water for North Carolina
Elizabeth Burton, Private Citizen
Environment North Carolina
French Broad Riverkeeper
Greenpeace Charlotte
Greenpeace - North Carolina Chapter
MountainTrue
New River Conservancy
NC Interfaith Power & Light
North Carolina Conservation Network

North Carolina League of Conservation Voters
Richard Fireman, MD, Impacted Citizen
River Guardian Foundation
Southern Environmental Law Center
Western North Carolina Chapter, Physicians for Social Responsibility
Yadkin Riverkeeper, Inc.

New Mexico
Amigos Bravos
New Mexico Environmental Law Center
Western Environmental Law Center
WildEarth Guardians

Nevada
Moapa Band of Paiutes

New York
Academy Heights Neighborhood
Allyson Kestler, Impacted Citizen
Cath Kestler, Impacted Citizen
Concerned Residents of Portland, NY + People Like Us (Crop Plus)
Linda Warner, Private Citizen
Robert C Kestler, Impacted Citizen
Sarah Kestler, Impacted Citizen
The Educational Foundation of America
The Marable Group, LLC
Waterkeeper Alliance

Ohio
Christopher James Cuic, Impacted Citizen
Concerned Citizens of Lake Twp./Uniontown IEL Superfund Site
Concerned Citizens of Medina County
Communities United for Responsible Energy
Leann Ramirez, Impacted Citizen
Mary Ellen Berger, Private Citizen

Oregon
Southern Oregon Climate Action Now

Pennsylvania
Andrew Liebhold, Private Citizen
Center for Coalfield Justice
Clean Air Council

Delaware Riverkeeper Network
Gary Conniff, Impacted Citizen
George W. Hawes, RA, Impacted Citizen
Judith Rock, Private Citizen
Kathy Gadinski LPT, Impacted Citizen
Mountain Watershed Assocation
PennEnvironment
Residents Against the Power Plant (RAPP)
Robert Gadinski, P.G., Impacted Citizen
William D. Lockwood, Private Citizen

Puerto Rico
Comite Dialogo Ambiental, Inc.

Tennessee
Southern Alliance For Clean Energy

Texas
Bastrop County Environmental Network

South Carolina
South Carolina Coastal Conservation League
Upstate Forever
Winyah Rivers Foundation

Utah
HEAL Utah

Virginia
Concerned Citizens of Giles County, Impacted Citizens
James River Association
Mary Jane Reyes, Private citizen
Virginia Conservation Network

Wisconsin
Clean Wisconsin

West Virginia
Ohio Valley Environmental Coalition
West Virginia Highlands Conservancy

Wyoming
Powder River Basin Resource Council