

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

March 24, 2015

To: Members of the Subcommittee on Environment and the Economy

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015.”

On Tuesday, March 24, 2015, at 5:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Environment and the Economy will convene for opening statements in connection with its markup of H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015.” The Subcommittee will adjourn after opening statements and reconvene on Wednesday, March 25, 2015 at 9:30 a.m. in room 2123 of the Rayburn House Office Building for consideration of amendments.

I. SUMMARY OF THE LEGISLATION AND RECENT CHANGES

The version of the Improving Coal Combustion Residuals Regulation Act to be considered at markup has been amended slightly from the version considered at the legislative hearing held on March 18th and March 24th. The changes fail to address some major points discussed at the legislative hearing, as summarized below.

A. The Discussion Draft Still Fails to Require That Every Permit Program Contain the Minimum Requirements Specified In the Bill.

The newest version of the discussion draft would still grant states significant discretion to change those requirements, or to enforce “alternative” requirements in their place. The following are key examples:

- **Groundwater Protection Standards.** The Environmental Protection Agency (EPA) Final Rule establishes minimum requirements for groundwater monitoring

and groundwater protection in all states.¹ The discussion draft, in contrast, gives states discretion to choose lower groundwater protection standards and weaken monitoring requirements by altering monitoring parameters and choosing alternative points of compliance away from the disposal boundary.² The new version makes no changes to these requirements.

- **Cleanup Requirements.** Where the Final Rule requires all releases and groundwater contamination to be addressed,³ the bill allows states to decide that groundwater contamination and other pollution need not be cleaned up.⁴ The only limits on this state discretion are borrowed from municipal solid waste regulation.⁵ The new version changes these requirements but increases discretion rather than limiting it – where the previous version required states to determine whether to apply cleanup criteria to releases of pollutants, the new language allows them to determine the extent to which criteria will apply.⁶
- **Scope of Requirements.** Unlike the Final Rule, the discussion draft gives States broad discretion to redefine major terms, including terms that set the scope of permit requirements. For example, states have discretion to define “landfills” to exclude waste piles, to define “surface impoundments” to exclude impoundments below a certain size, and “aquifer” to exclude aquifers not currently serving as drinking water sources.⁷ All of these definitions have the potential to exempt structures that would be covered by minimum requirements in some states from coverage in others. The new version does not change this discretion.

B. The Minimum Requirements in the Discussion Draft Still Fall Short of Those That Are in EPA’s Final Rule.

¹ U.S. Environmental Protection Agency, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities*, Prepublication Version of Final Rule (Dec. 19, 2014) (online at www2.epa.gov/coalash/pre-publication-version-coal-combustion-residuals-final-rule). Note: official version is forthcoming in a Federal Register publication, which will appear in Docket No. EPA-HQ-RCRA-2009-0640, at 671-691 (Hereinafter, *EPA Final Rule*).

² H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(2)(B)(ii)(I) and (II).

³ *EPA Final Rule*, at 691-698.

⁴ H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(2)(B)(ii)(III) and (IV).

⁵ *Id.*

⁶ *Id.*, at Subsection (c)(2)(B)(IV).

⁷ *Id.*, at Subsection (m); *EPA Final Rule*, at 613-625.

The requirements laid out in the most recent version of the discussion draft still fall short in significant ways of the requirements that are set forth in the Final Rule. In addition to the weakening alternatives discussed above, the following protective requirements in the Final Rule are not required by the discussion draft:

- **Location Restrictions.** The EPA rule prohibits or restricts coal ash disposal structures (1) less than 5 feet above the upper limit of the uppermost aquifer, (2) in wetlands, (3) in fault areas, (4) in seismic impact zones, and (5) unstable areas.⁸ The bill would place restrictions on only one of these five dangerous locations: unstable areas.⁹ The new version of the discussion draft includes language allowing states to apply other location criteria at their discretion, but such discretionary authority was already available and does not constitute a minimum requirement.¹⁰
- **Liner Requirements for Existing Surface Impoundments.** The EPA rule requires existing wet surface impoundments to be lined, and lays out design criteria for acceptable liners.¹¹ The bill would let individual states disregard this requirement, and allow unlined or insufficiently lined surface impoundments to continue to receive waste.¹² This requirement is still missing from the discussion draft.
- **Closure Requirements for Deficient Structures.** For surface impoundments that fail to meet EPA’s standards, the rule requires that they cease receiving waste within 6 months and close. This includes, for example, those that (1) are unlined and violate groundwater protection standards, (2) fail to meet location restrictions, or (3) fail to meet minimum structural stability requirements.¹³ The draft lacks such closure requirements for deficient structures, and would permit continued operations for years or even indefinitely.¹⁴ These requirements are still missing from the discussion draft.

C. The Draft Still Fails to Address Inactive Coal Ash Disposal Sites In the Same Manner as EPA’s Final Rule.

⁸ *EPA Final Rule*, at 625-634.

⁹ H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(2)(E).

¹⁰ *Id.*

¹¹ *EPA Final Rule*, at 637-638.

¹² H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (l)(5).

¹³ *EPA Final Rule*, at 698-722.

¹⁴ H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(2)(C).

The EPA rule treats inactive coal ash surface impoundments the same as existing coal ash impoundments still receiving ash, unless and until they complete the closure process.¹⁵ This means that until closure is completed, which must be done within three years, inactive impoundments must meet protective requirements. In contrast, the discussion draft provides extensions of that three year closure deadline to five years, and allows owners and operators of inactive impoundments to escape all requirements for that time period by notifying the implementing agency of their intent to close. In other words, an inactive impoundment will not be treated the same as an existing impoundment for what could be a significant period of time before closure is completed. If an owner or operator that has notified the implementing agency of that intent fails to close in that timeframe, there are no penalties. Such a facility would then enter the permitting process with no set deadline for compliance.¹⁶ Although these requirements have been revised in the latest version of the discussion draft, the impact is unchanged.¹⁷

D. Compliance Timeframes Under the Draft Would Still Be Slower than under EPA’s Final Rule.

The EPA requires coal ash sites to quickly come into compliance with the rule’s standards. Several requirements go into effect in six months, including air criteria, inspection requirements, and recordkeeping requirements.¹⁸ The new version of the discussion draft would require compliance with those requirements in eight months.¹⁹ However, the EPA rule requires compliance with significant additional requirements including design criteria, structural integrity criteria, and closure and post-closure care within 18 months, whereas the discussion draft would still not require compliance with those requirements for 3-4 years. Under the draft, full compliance would still not be required until permits are issued – potentially 6-7 years after legislation is enacted.²⁰

E. The Discussion Draft Will Still Impact the Ability to Bring Citizen Suits.

Under the Resource Conservation and Recovery Act (RCRA), the main federal statute governing solid and hazardous waste disposal, citizen suits are available to enforce “any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective

¹⁵ *EPA Final Rule*, at 699.

¹⁶ H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(4).

¹⁷ *Id.*, at Subsection (c)(4)(D)(ii).

¹⁸ U.S. Environmental Protection Agency, *Frequent Questions on Coal Ash Rule, Question 30* (Dec. 19, 2014) (online at www2.epa.gov/coalash/frequent-questions-coal-ash-rule).

¹⁹ H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(3)(B)(i).

²⁰ *Id.*, at Subsection (c)(3).

pursuant to” the statute.²¹ The Final Rule includes specific requirements, imposed on facility owners and operators. As a result, these requirements will be enforceable through citizen suits against those owners and operators.

The discussion draft, in contrast, imposes requirements on agencies implementing permit programs while refraining from applying them to owners and operators.²² Citizen suits to enforce the requirements of the bill would therefore only be available against implementing agencies, not owners and operators. In addition, subsection (l) of the discussion draft states that the Final Rule “shall be implemented only through a coal combustion residuals permit program under” the draft. The meaning of the word “implemented” in this context is not clear, but this limitation could be interpreted as a bar on enforcement of the final rule except through permit programs. Such an interpretation would bar citizen suits against owners and operators of facilities. The latest version of the discussion draft does not change this approach.

F. The Discussion Draft Will Still Weaken Requirements for Public Access to Information.

The EPA rule requires that companies make a substantial amount of operations and compliance data, including specific monitoring data, publicly available on an internet site, without exception for information that a company may consider confidential.²³ The bill removes many of the specific posting requirements, creates exceptions for information that is claimed to be confidential, and gives discretion to states and facilities to decide how and what information is shared publicly.²⁴ The latest version of the discussion draft does not change these requirements.

II. ADDITIONAL INFORMATION ON THE MAJORITY DISCUSSION DRAFT

The permit program created by the majority discussion draft deviates significantly from state delegation under RCRA and other environmental laws, as in past proposals. Although the technical specifications included in the discussion draft have changed slightly from past proposals, the structure of the permit program is unchanged. Due to this, a significant report by the Congressional Research Service (CRS) on the design of this permit program released in the 112th Congress and expanded in the 113th remains relevant.²⁵ According to that report:

²¹ Resource Conservation and Recovery Act § 7002(a).

²² See, e.g. H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(2) – “The Implementing Agency shall apply the following criteria.”

²³ *EPA Final Rule*, for a full discussion of the treatment of requirement to post information that may be considered confidential, see 129.

²⁴ H.R. ____, the “Improving Coal Combustion Residuals Regulation Act of 2015,” Subsection (c)(1)(B) and (l)(5).

²⁵ Congressional Research Service, *Analysis of Recent Proposals to Amend the Resources Conservation and Recovery Act to Create a Coal Combustion Residuals Permit Program* (Mar. 19, 2013) (online at democrats.energycommerce.house.gov/sites/default/files/documents/CRS-Analysis-Recent-Proposals-to-RCRA-2013-3-19.pdf).

- Unlike programs delegated to states under other environmental statutes and state delegation under RCRA for both hazardous and municipal waste, past proposals did not hold state programs to a standard of protection,²⁶ which is “the performance standards to be achieved by compliance with regulations.” This is unchanged in the latest version of the discussion draft.
- Unlike other delegated environmental programs, past proposals removed rulemaking authority from EPA and set technical criteria in statute.²⁷ The latest version of the majority discussion draft retains this feature. If additional disposal criteria are found to be necessary, statutory revisions would be needed.
- Past proposals limited EPA review of state programs significantly in comparison to the Agency’s review of other state permit programs under RCRA, and prevented all substantive review of state programs until programs are already developed and implemented.²⁸ This continues to be true of the majority discussion draft.
- Past proposals did not include federal backstop enforcement authority, defined by CRS as “explicit authority provided to EPA to enforce standards at individual facilities in a state authorized by EPA to implement and enforce federal standards.”²⁹ Such authority is also missing from the latest version of the majority discussion draft.

²⁶ *Id.*, at 4, 8.

²⁷ *Id.*, at 41.

²⁸ *Id.*, at 33.

²⁹ *Id.*, at 9.