

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

¹Association 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

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 known 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.

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.

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)	<u>None</u> . 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	<u>No requirement for public website posting</u> . 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)	<u>No response required</u> . Implementing agency may determine that corrective action <u>is not necessary or required</u> 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 <u>102 months</u> 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 <u>NO requirement that existing ponds and expansions be constructed with a base 5 feet above the aquifer</u> . <u>CCR Ponds currently constructed in a drinking water aquifer can continue to accept waste indefinitely</u> . § 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 <u>within 6 months and close</u> . § 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 background 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

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.

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.

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

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.