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RPTR KERR

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

THURSDAY, JANUARY 22, 2015

House of Representatives,

Subcommittee on Environment and the Economy,

Committee on Energy and Commerce,

Washington, D.C.

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

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

Staff Present: Nick Abraham, Legislative Clerk; Charlotte

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Baker, Deputy Communications Director; Sean Bonyun, Communications Director; Leighton Brown, Press Assistant; Jerry Couri, Senior Environmental Policy Advisor; Brad Grantz, Policy Coordinator, O&I; Charles Ingebretson, Chief Counsel, O&I; David McCarthy, Chief Counsel, Environment/Economy; Tina Richards, Counsel, Environment; Chris Sarley, Policy Coordinator, Environment & Economy; Jean Woodrow, Director, Information Technology; Joe Banez, Minority Policy Analyst; Jeff Carroll, Minority Staff Director; Jacqueline Cohen, Minority Senior Counsel; Tiffany Guarascio, Minority Deputy Staff Director and Chief Health Advisor; Ryan Schmidt, Minority EPA Detailee.

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

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

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

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

We will hear from a number of stakeholders regarding their initial impressions of the final rule and any concerns they may have, and we will also discuss the final rule in comparison to the legislation we considered through this committee to the floor of the House the last couple of Congresses.

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

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

managing coal ash as nonhazardous waste under subtitle D.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

With that, I yield back my time.

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[The prepared statement of Mr. Shimkus follows:]

******** COMMITTEE INSERT ********

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

Mr. Tonko. Thank you, Chair Shimkus.

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

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

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

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

EPA is to be commended for its extensive process of public engagements on this issue. The Agency sorted through over 450,000

public statements submitted during the public comment period on the rule and held eight public hearings in communities across our country.

EPA's rule is responsive to industry concerns that classifying coal ash as hazardous waste would harm coal ash recycling efforts that utilize coal ash in new materials and new products, and it is responsive to the concerns of public health and environmental advocates because, for the first time, we have federal standards for coal ash disposal sites that will set a floor of protection for all communities.

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

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

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

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

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

This rule was years in the making. And, as I said earlier, I would have preferred to see a stronger regulation, but I am not willing to second-guess an approach that has yet to be implemented or evaluated.

And once that rests on the extensive public engagement and negotiating process and years of work invested by the interested parties and the Agency, this rule should move forward. We should give this approach an opportunity to work and monitor it closely to evaluate its effectiveness.

So let's get on with it. As we go forward, we will see how well this approach works. We certainly retain all options for action if

it does not.

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

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

And, with that, I yield back.

[The prepared statement of Mr. Tonko follows:]

******** COMMITTEE INSERT ********

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

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

The Chairman. Thank you, Mr. Chairman.

Today our multi-year quest to solve the coal ash issue continues in this new Congress. And I want to particularly thank all of our witnesses for appearing today and welcome back a frequent guest, EPA Assistant Administrator Stanislaus.

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

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

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

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

and one state-based? Can we expect a dramatic increase in citizen suits?

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

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

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

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

conditions.

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

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

Mr. McKinley. Thank you, Mr. Chairman.

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

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

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

But more damaging is on page 18 of the rule. It says -- and I quote -- "This rule defers a final determination until additional

information is available." That is not acceptable. How many times must there be a final determination that coal ash is not hazardous and be handled in a different way?

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

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

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

And I yield back my time.

Mr. Shimkus. The gentleman's time expired.

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

Mr. Pallone. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

Now, as we look ahead in this subcommittee, I think the

publication of this final rule changes our role. We are no longer called upon to set national criteria and statute because those criteria have been set through a robust transparent process.

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

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

And I would yield back, Mr. Chairman.

Mr. Shimkus. The gentleman yields back his time.

And I want to thank my colleagues again.

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

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

You are recognized for 5 minutes.

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

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

I am Mathy Stanislaus, U.S. EPA Assistant Administrator for the Office of Solid Waste and Emergency Response. And I and my staff have had the privilege of working the last 5 1/2 years to actually get it right in terms of putting a rule in place that is protective and address the risks that we have identified.

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

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

We believe this groundbreaking rule is a culmination of extensive studies on the effects of coal ash on the environment and public health.

The rule establishes technical requirements for landfills and surface impoundments under subtitle D of the Resource Conservation and Recovery Act.

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

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

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

Further, the rule provides States and communities the information they need to fully engage in the rule's implementation. The rule requires utilities to post information on all aspects of its compliance

with the rule on publicly available Web sites to help ensure States and the public have access to information to monitor utilities' compliance with the rule.

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

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

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

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

EPA will be working with the States to develop a template for a streamlined process for developing and approving a solid waste

management plan. Of course, the final rule does not preclude a State from adopting more stringent requirements, should it choose to do so.

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

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

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

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

[The prepared statement of Mr. Stanislaus follows:]

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Mr. Shimkus. Thank you very much.

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

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

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

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

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

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

So utilities can then implement through the state program, and we have been made clear in the preamble that compliance will demonstrate compliance with the federal --

Mr. Shimkus. And you understand why we are asking that, because the legislation we moved last cycle said federal standards, state

implementation, permitting process where there is certainty. And I think it goes to Mr. McKinley's point.

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

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

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

Mr. Shimkus. Okay. Neither EPA nor the States can directly enforce requirements in the final rule. Isn't that correct?

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

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

Mr. Stanislaus. Well, we actually believe, again, that the state solid waste management plan, when approved, will not result in excessive litigation. There will be litigation to enforce in those circumstance where States and others deem not to have -- not to be compliance.

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

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

Mr. Stanislaus. Well, the rule is directly applicable to utilities. But, again, getting back to state solid waste management plan, there is an opportunity for the States, as the States have sought, to align and integrate the federal minimum requirements into their program and seek EPA's approval for that.

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

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

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

Isn't that a concern?

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

And so we don't think -- so if you move forward in implementing that and the States can integrate that within their state program and EPA approves the state solid waste management plan, we think that there is going to be federal consist -- I am sorry -- national consistency.

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

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

Mr. Stanislaus. So I just want to clarify. So if a state adopts more stringent, adds to the federal requirement --

Mr. Shimkus. Correct.

Mr. Stanislaus. -- then gets an approval from EPA through a state

solid waste management plan, the utilities will then have to comply with fully the state requirements.

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

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

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

Mr. Tonko. Thank you.

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

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

As I stated earlier, I would have preferred a stronger rule. Public health and environmental advocates have indicated that they have preferred a stronger rule. I tend to agree. But I do believe the rule includes some important safeguards.

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

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

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

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

Mr. Tonko. Okay. Thank you.

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

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

correct?

Mr. Stanislaus. That is correct.

Mr. Tonko. Thank you.

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

Mr. Stanislaus. Yes.

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

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

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

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

Mr. Stanislaus. That is correct.

Mr. Tonko. These disclosure provisions in the rule will be essential to ensuring compliance and promoting transparency for

communities. Although a subtitle C rule might have offered more protection and more direct enforcement, this rule will protect human health in the environment and goes beyond past bills.

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

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

And I yield back.

Mr. Shimkus. The gentleman yields back his time.

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

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

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

Mr. Harper. Thank you, Mr. Chairman.

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

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

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

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

Mr. Shimkus. Mr. -- you just finished.

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

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

Mr. Harper. Okay. If you will let us know.

Mr. Stanislaus. Sure.

Mr. Harper. I will just yield back.

Mr. Shimkus. The gentleman yields back.

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

Mr. Pallone. Thank you, Mr. Chairman.

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

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

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

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

Mr. Stanislaus. No. We don't believe that there are gaps. We believe all the risks and all the information contained in the reg can be put in place, all of the rigorous technical standards to provide the necessary protections.

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

Mr. Stanislaus. We don't believe it will. We provided real

clarity with respect to beneficial use, and that beneficial use is not subject to the rule.

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

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

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

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

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

But if it turns out that ash does become more toxic and we find

that States and utilities are not doing enough under the subtitle D rule to protect human health -- if that turned out to be the case, would it be important for EPA to be able to pursue subtitle C regulation, in your opinion?

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

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

Mr. Pallone. No. I understand that.

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

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

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

Mr. Stanislaus. Not at the moment.

Mr. Pallone. Not at this time.

All right. Thank you so much.

I yield back, Mr. Chairman.

Mr. Shimkus. The gentleman yields back his time.

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

So this hearing is now recessed.

[Recess.]

RPTR MCCONNELL

EDTR HOFSTAD

[12:11 p.m.]

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

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

Mr. McKinley. Thank you, Mr. Chairman.

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

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

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

Mr. Stanislaus. Well, we --

Mr. McKinley. "Yes" or "no"?

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

protective.

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

Mr. Stanislaus. Well --

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

Mr. Stanislaus. Well, you know --

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

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

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

So my last question might be that this proposed rule provides us no assurance that coal ash will not be regulated as a hazardous waste in the future, so could you explain the Agency's justification for leaving that door open and almost deliberately causing uncertainty on

this issue? Can you explain why they kept the door open instead of closing it so that we could advance?

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

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

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

Mr. Stanislaus. Yeah.

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

Mr. Stanislaus. Well --

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

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

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

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

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

Mr. Stanislaus. Yeah. And we can --

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

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

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

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

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

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

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

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

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

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

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

Mr. Stanislaus. That is correct.

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

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

Mr. Doyle. Thank you.

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

What does it mean when -- so the EPA will approve these State

plans, and you say that they will be approved as long as they demonstrate Federal compliance. What does that mean? You know, what does that terminology mean?

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

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

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

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

Mr. Stanislaus. That is correct.

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

Mr. Stanislaus. We do.

Mr. Doyle. Okay.

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

Mr. Shimkus. The gentleman yields back his time.

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

Mr. Cramer. Thank you, Mr. Chairman.

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

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

And so this self-implementing thing just makes me a little

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

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

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

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

get a lot of support.

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

Mr. Shimkus. The gentleman yields back his time.

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

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

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

Mr. Stanislaus. How many tons? I don't have that number right --

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

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

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

Mr. Stanislaus. Oh, absolutely. Absolutely.

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

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

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

Mr. Stanislaus. That is right. That is right.

Mr. McNerney. Okay.

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

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

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

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

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

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

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

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

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

Mr. Stanislaus. We do. We do.

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

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

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

Mr. McNerney. Okay.

I will yield back, Mr. Chairman.

Mr. Shimkus. The gentleman yields back his time.

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

Hearing none, so ordered.

[The information follows:]

******** COMMITTEE INSERT ********

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

Mr. Flores. Thank you, Mr. Chairman.

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

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

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

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

Mr. Stanislaus. Sure. So, clearly, you know, we have set forth in the rule that inactive sites at an active power plant and active

units at a power plant have the same exact risk. You know, this has coal ash, with all of its constituents of coal ash; it has water. And under those conditions, it poses the identical risk of structural failure and impacting communities, leaching into groundwater.

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

Mr. Flores. Okay.

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

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

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

But just to be clear, you know, the final rule provides location requirements, but it does not begin with closure. It begins with

examining all the location criteria -- proximity to wetlands, proximity to groundwater aquifers. Then a utility will have to determine whether or not they are in compliance with that. Then they will have to determine, can they put in engineering solutions to provide those kind of protections. So it would not automatically trigger closure.

But I can get that you data.

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

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

Mr. Flores. Okay.

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

Mr. Stanislaus. Well, because we have gone out, we have visited numerous coal-ash impoundments around the country, we have reviewed information from utilities about the different dimensions of impoundments, because some are going to be more challenging to close than others -- in other words, we do put in place in a very specific

way those circumstances where they can enable themselves of extensions.

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

Mr. Flores. Okay. And, therefore, no citizen litigation would follow, then. Is that --

Mr. Stanislaus. Yeah. We don't believe there would be a basis for citizens in that circumstance.

Mr. Flores. Okay.

Mr. Chairman, thank you. I yield back.

Mr. Shimkus. The gentleman yields back his time.

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

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

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

If I could just go back, I know that there has been a lot of discussion already on the beneficial use of coal ash, and I know we have had different panels in here over the last couple years talking about it. One of the things I know that you had mentioned a little

bit earlier, because when you said in your testimony that approximately 40 percent of CCR generated in 2012 was beneficially used -- but, again, in the testimony that we have heard, you know, we have States out there that are saying, boy, if the EPA would ever change its mind, we are going to require buildings to have things ripped out or something like that, so you got school districts saying, we don't want to use material that might in the future have some kind of EPA coming back and saying that it could be hazardous.

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

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

Mr. Stanislaus. Sure. Thank you.

You know, so, even before the finalization of the rule, because of this issue of certainty and risk and the comments that we received from the beneficial-use industry, we first began by developing a

methodology to evaluate the continued use of beneficial use. We used that methodology and applied it to encapsulated uses, and we confirmed that concrete and wallboard, the largest two uses of beneficial, can continue to move forward. So we believe that provided a significant certainty. And I know Tom Adams can speak for himself later on the panel.

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

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

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

Mr. Stanislaus. So, you know, we have engaged particularly the beneficial users in the development of the methodology. So this is a methodology to be used by users, by manufacturers, or by States to confirm that a product that uses coal ash as opposed to a product that

doesn't use coal ash are comparable, and so, therefore, it can be safely used to replace virgin products.

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

Mr. Latta. Okay. Thank you.

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

Mr. Shimkus. And I thank you for that.

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

Mr. Johnson of Ohio. Thank you, Mr. Chairman.

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

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

Mr. Stanislaus. That is correct.

Mr. Johnson of Ohio. Okay. So if the State program does not operate in lieu of the Federal rule, then both sets of requirements are still enforceable, correct?

Mr. Stanislaus. Well, that is precisely because we have heard those comments during our public comment process about the possibility

of precisely that. That is why we strongly believe that there is a vehicle to integrate the Federal requirements into a State program and have EPA approve that State program to have that alignment occur.

Mr. Johnson of Ohio. Okay.

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

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

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

So we always begin with protecting groundwater, protecting the highest use of groundwater. But then, when you go and look at the specific cleanup remedy that fits a particular situation, you evaluate

the various technical factors in determining the cleanup that is most appropriate to achieve a cleanup that is protective.

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

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

Mr. Johnson of Ohio. Okay.

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

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

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

Mr. Stanislaus. Yeah. We have received numerous comments precisely on that topic.

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

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

Mr. Johnson of Ohio. Okay.

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

Mr. Shimkus. The gentleman yields back his time.

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

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

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

Mr. Stanislaus. I do.

Mr. Cardenas. What would that be?

Mr. Stanislaus. I am a chemical engineer, before I became a lawyer, so --

Mr. Cardenas. Oh, okay. And they don't cancel out. I think

they go well together.

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

Mr. Stanislaus. That is right.

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

Mr. Stanislaus. That is right.

Mr. Cardenas. Okay. Well, I am glad to know that you have that engineering background. I won't speak of your law degree, but at least engineering background. I am not a lawyer, but I am an engineer, so I appreciate that.

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

Is it more affluent communities? More low-income communities?

Is there a disproportionate effect when it comes to communities that are affected?

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

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

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

Mr. Stanislaus. Sure. It begins with trying to prevent a catastrophic failure. And, as we know, the TVA incident occurred, essentially destroyed a community, caused about $1.3 billion of impact, you know. So it contains a rigorous set of requirements to prevent

those kinds of things -- regular inspections, structural evaluation, engineering evaluation. And based on that evaluation, impoundments will either have to enhance the structural stability or, if they cannot, they would have to close that facility.

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

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

Mr. Cardenas. Okay.

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

States of America?

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

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

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

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

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

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

consideration.

Mr. Cardenas. Uh-huh.

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THOMAS EASTERLY

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

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

I am also representing the Environmental Council of the States,

which we call "ECOS," whose members are the leaders of the State and territorial environmental protection agencies.

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

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

As a longtime regulator, I have observed firsthand the tragic adverse environmental and human health impacts of CCR surface impoundment failures. These structural engineering failures devastate people's lives, destroy property, and contaminate natural resources. The EPA's self-implementing rule contains robust national structural integrity provisions which should result in a meaningful reduction in CCR impoundment failures in the future.

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

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

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

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

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

the rule.

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

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

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

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

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

[The statement of Mr. Easterly follows:]

******** INSERT 2-1 ********

Mr. Shimkus. Thank you very much.

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

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

So you are recognized for 5 minutes.

STATEMENT OF MICHAEL FORBECK

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

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

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

The focus of my testimony is on the issue of dual State and Federal regulatory authority we see as the result of the final rule's self-implementing construct. We are not offering testimony on

specific technical requirements in the rule, as groups with ASTSWMO are looking at these as well as beneficial-use components, and we will have additional input on the specific provisions at a later time.

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

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

We appreciate EPA hearing our concerns about dual State and Federal regulatory authority and their efforts, working within the bounds of their statutory authorities, to provide a mechanism through the State solid waste management plans to address our concerns. However, we see difficulties with the State plan mechanism, which are

as follows:

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

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

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

interpreting the plan and rule differently, thus rendering different decisions that lead to inconsistent implementation of the rule.

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

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

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

Thank you again for the opportunity to provide this testimony,

and I will be here for questions.

[The statement of Mr. Forbeck follows:]

******** INSERT 2-2 ********

Mr. Shimkus. Thank you very much.

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

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

STATEMENT OF LISA JOHNSON

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

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

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

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

Even with a nonhazardous final rule, we are seeking your support

to provide additional legislative certainty.

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

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

At SGS, one CCR material is converted into synthetic gypsum and sold to Continental Building Products. Continental is a wallboard production facility specifically constructed in 2000 to utilize the synthetic gypsum from SGS. Since 2000, more than 7 million tons of this CCR material have been converted into wallboard -- wallboard used to build homes and businesses throughout Florida and the country.

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

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

accomplishments.

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

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

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

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

The next major concern we have with the rule is the complete lack

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

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

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

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

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

[The statement of Ms. Johnson follows:]

******** INSERT 2-3 ********

Mr. Shimkus. Thank you very much.

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

You are recognized for 5 minutes, sir.

STATEMENT OF THOMAS ADAMS

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

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

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

I would like to emphasize that, while we have some of the largest utilities in the country as members, most of our members are small

businesses, comprised of people who have dedicated their entire career to the cause of beneficial use and improving our environment. It is these small businesses that were hurt most by the regulatory uncertainty EPA created in 2009 when it suggested the possibility of "hazardous waste" designation for coal-ash management.

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

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

It is important to remember in this conversation that coal ash has never qualified as hazardous waste based on its toxicity. It does contain trace amounts of metals, and those metals are found at similar levels in soils and hundreds of household items. An ACAA study released in 2012 analyzed data from the U.S. Geological Survey which showed that concentration of metals and coal ash, with very few exceptions, are below environmental screening levels for residential soils and are similar to the concentrations found in common dirt.

Despite a drumbeat of publicity by anti-coal environmental groups, coal ash is no more toxic than the manufactured materials it replaces.

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

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

The great irony of this lengthy debate over coal-ash disposal regulations is that the debate caused more ash to be disposed. If the past 5 years had simply remained equal to 2008's utilization, we would

have seen 26.4 million tons less coal ash put into landfills and impoundments.

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

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

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

Bills previously passed by the House would resolve these issues permanently. The bills would put enforcement responsibility

authority in the hands of professional State environmental regulators and expand EPA's authority to step in if States don't do the job. ACAA supports this approach as better public policy.

RPTR KERR

EDTR SECKMAN

[12:10 p.m.]

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

Mr. Shimkus. Thank you very much.

[The prepared statement of Mr. Adams follows:]

******** INSERT 3-1 ********

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

Welcome, sir. You have got 5 minutes.

STATEMENT OF JAMES ROEWER

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

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

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

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

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

In addition, the rule's only compliance mechanism is for a State

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

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

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

environment.

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

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

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

Finally, the rule does not provide the desired certainty that coal ash will not be regulated as a hazardous waste. EPA makes clear that it will, at some point in the future, issue a now regulatory determination regarding whether coal ash warrants hazardous waste

regulation. While EPA has for now settled on the nonhazardous waste option, the agency leaves the door open to revising the rules and regulating coal ash as a hazardous waste. This raises serious concerns.

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

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

Mr. Shimkus. Thank you very much.

[The prepared statement of Mr. Roewer follows:]

******** INSERT 3-2 ********

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

Sir, you are recognized for 5 minutes.

Mr. Schaeffer. Thank you, Mr. Chairman, and members of the committee.

Mr. Shimkus. And I think you should hit the button that is on your mike.

STATEMENT OF ERIC SCHAEFFER

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

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

of the past; they aren't going to happen again. I will return to that, but, obviously, they did happen.

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

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

I do have to say, though, it has some big loopholes. There is no cleanup standard for boron. That is one of the most pervasive

pollutants, and it is found at levels far above health standards at many coal ash sites.

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

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

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

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

North Carolina passed a law in the wake of that spill that requires shutdown of active ash impoundments at active plants in less than

4 years, a lot faster than EPA requires. Duke Energy supported that bill. You might ask them why they supported it and why those requirements wouldn't apply in a place like Indiana where Duke also has plants. That is certainty. They have to close by date certain. Couldn't be clearer.

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

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

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

hope you will give them that chance.

Thank you, Mr. Chairman.

Mr. Shimkus. Thank you very much.

[The prepared statement of Mr. Schaeffer follows:]

******** INSERT 3-3 ********

Mr. Shimkus. And last -- and you all have done a great job. We have gotten through the opening statements.

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

Sir, welcome, and you have 5 minutes.

Mr. Holleman. Thank you, Mr. Chairman.

And thank you, Mr. Tonko and other members --

Mr. Shimkus. And I think check the --

Mr. Holleman. How about that? Does that work?

Mr. Shimkus. I think so.

STATEMENT OF FRANK HOLLEMAN

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

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

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

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

My main point is this today, that Congress should not take away from the -- should not take away the rights of the local communities to protect themselves from this dangerous coal ash storage. The Congress should not leave the future of these people to government bureaucracies alone. The citizen's right to enforce a new EPA rule

is essential. Now what we have seen in the Southeast is clear: The State agencies have not effectively enforced the law against these politically powerful entities. Let me give you examples.

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

In North Carolina, nothing was happening to force Duke Energy, which has a statewide monopoly to clean up its coal ash lagoons. Local community organizations, not the State, had to take the initiative to enforce clean water laws. For the first time, North Carolina was forced to take action and confirmed under oath that Duke Energy is violating State or Federal clean water laws or both everywhere it stores coal ash in the State and, under oath, that this polluting storage is a serious threat to the public health, safety, and welfare.

Now a Federal criminal grand jury is investigating both Duke Energy and the State environmental agency. And as a result, Duke has

pledged to clean up 4 of its 14 sites and to look at all the rest.

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

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

Mr. Shimkus. Thank you, sir.

[The prepared statement of Mr. Holleman follows:]

******** INSERT 3-4 ********

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

The first question is for Ms. Johnson.

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

Ms. Johnson. Thank you, Mr. Chairman.

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

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

Mr. Roewer. Thank you. There are a few instances where the

agency is contemplating a different approach to allow for a potentially risk-based decision to establish a point of compliance, to establish an alternative groundwater protection standard.

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

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

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

Mr. Shimkus. In your opinion, would EPA be able to approve a

State program that incorporated any of the flexibility for corrective action, including a risk-based decisionmaking process?

Mr. Roewer. The rule is rather clear about what you have to achieve in corrective action. You must meet that standard. If you don't meet that standard, you can, so I would have to answer no. I couldn't see how EPA could say that a State program that incorporates that sort of risk-based decisionmaking is the equivalent of the Federal rule.

Mr. Shimkus. Thank you.

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

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

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

Mr. Forbeck. That was ours.

Mr. Shimkus. That was yours.

Mr. Forbeck. Right.

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

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

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

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

In my State, I have to publish a first notice with a 30-day comment period that I am going to do a rule; a second notice with the words

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

Mr. Shimkus. And I thought we were bad.

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

Mr. Tonko. Thank you, Mr. Chair.

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

In 2009, this subcommittee held a hearing on damage from coal ash disposal. We heard from victims who lost their homes, their businesses, and their health to coal ash contamination. In the time since that hearing, problems have continued. Hopefully, the implementation of this rule will reduce these events and their costs going forward.

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

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

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

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

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

Subsequently, Duke has said it has done all it can do, and it has

removed less than 10 percent of the ash in that river, thereby declaring defeat. In other words, once one of these spills occur, they cannot clean it up.

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

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

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

Mr. Holleman. Well, just take the Dan River for example. The State had never required a cleanup. In fact, believe it or not, 6 months before the spill, in response to a notice a citizen sent, the

State was forced to file a lawsuit. Six months beforehand, it stated in writing in a public must filing under oath that Duke was violating State and Federal clean water laws at that site and that if those things were not corrected, it was a serious threat to public health, safety, and welfare. And not one thing was done in the ensuing 6 months to get the ash moved out of that site. That is one illustration.

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

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

Mr. Shimkus. Turn the microphone on, please.

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

Mr. Tonko. Thank you.

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

The chair now recognizes Mr. Harper from Mississippi.

Mr. Harper. Thank you, Mr. Chairman.

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

Mr. McKinley. Thank you, Mr. Harper.

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

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

You know, these allegations of people, these threats going on, they came back and they said, based on the review of the information

in this report for this particular facility, DEP of Pennsylvania concludes that the allegations regarding groundwater and surface water contamination are unfounded.

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

I have been in touch with Pennsylvania about their -- how they monitored Little Blue, and West Virginia as well, and we see that they levied fines. They have indeed done what they said they were going to do, and that was to enforce the law and the requirements with it. So I think that it appears to me from their reports and their letters and their correspondence, they are trying to be good stewards of the environment. And they are enforcing that.

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

Mr. Schaeffer. We certainly did and would continue to do that. The siting restrictions in that legislation we don't think were

comparable to the rule the EPA adopted.

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

Mr. Schaeffer. I could answer your question if I could get that --

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

Mr. Schaeffer. Okay.

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

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

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

Mr. Shimkus. The gentleman yields back his time.

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

Mr. Schaeffer. Thank you.

Mr. Shimkus. We kind of abide by rules.

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

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

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

The enforcement action the State took -- and I just don't want

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

Mr. Shimkus. Yeah, fortunately, you have got 17 seconds left.

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

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

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

So, yes, we actually had started enforcement procedures before that, and because of this and the issues that we found, we are -- they are actually closing the largest coal combustion impoundment in the

United States in an environmentally safe manner.

Mr. Shimkus. Thank you very much.

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

Are you done?

Mr. McKinley. I am done. Thank you.

Mr. Shimkus. Okay. Thank you.

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

Mr. Cramer. Thank you, Mr. Chairman.

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

If we were to tighten that up, put State primacy in place, as it is in so many areas like this, and codify, you know, codify the language in the EPA and certainly the definition of nonhazardous, do the citizens of your States or any of our States lose their ability to appeal, to attend the hearings, to complain? I mean, it is sort of like we are talking about either citizens have rights or the bureaucracy has rights

and the two can't go hand in hand because, as a former regulator myself, frankly, we heard more from citizens in these hearings than we heard from any other person. To me, the local and State level is where you get more citizen interaction, not less, so could you - somebody elaborate on that for me, and then if there is time left, I certainly would welcome you as well to comment on that.

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

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

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

there, and they do have a lot of input.

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

Mr. Holleman. Right.

Mr. Cramer. -- frankly, what you raise. I just want to ensure that what we are doing would not in any way negate citizens access.

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

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

You go comment. You go through this process, which is important, as you say, but then the very State government that put this in place

refuses to enforce what the citizens participated in creating.

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

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

Mr. Holleman. No, he did not.

Mr. Cramer. -- we have State legislators, I assume they are elected. Governors are elected. In the case of North Dakota, the public service commission is elected. So I am just seeing that these things, including enforcement, being closer to the people, seems to me to be better for the people than removing it from the people.

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

Mr. Cramer. I don't see this law -- or this principle being -- violating that --

Mr. Holleman. As long as you all don't fool with or mess with

the citizen's right to sue under RCRA, we still have that right to sue. And the citizens have the right to go forward and see that the law is enforced, but if you were to affect that, you are taking rights away from the people and saying they belong only to a bureaucracy which may or may not act for political --

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

I just want to assure people that there is no discussion even in the last bill of alleviating or taking the citizen's right to sue out of RCRA, so you could rest comfortably in that.

Votes are being called. We still have one Member who wants to ask some questions, so the chair will --

Mr. Latta. Well --

Mr. Shimkus. -- recognize Mr. Latta for 5 minutes.

Mr. Latta. I will be brief, but, again, thanks for the panel and your patience, especially when we have a different series of votes today.

If I could just kind of go down the line real quickly with a few of you. You know, there has been some discredited discussion here today as to the implementation, the uncertainty as to certain things that have to be done. I am just kind of curious, starting with Mr. Easterly. How much input did you have with the EPA when they were implementing the rule?

Mr. Easterly. They are not implementing yet, but when they --

Mr. Latta. I am sorry. When they were formulating.

Mr. Easterly. We sent in comments. Certainly, at ECOS, we had a number of discussions with them of what we would like to see. And some of it is in, and some of it is not.

Mr. Latta. Okay. When you say "some of it is in and some of it is not," what percentage would that be? Just kind of ballpark.

Mr. Easterly. Well, we would like to have subtitle D. We, along with other people, are disappointed at the way it is being implemented.

Mr. Latta. Okay.

Mr. Forbeck.

Mr. Forbeck. Well, at ASTSWMO, we shared very similar feelings. We were involved heavily with the correspondence and comments to EPA about the rule, and as was just said, we do appreciate B and D. It is the implementation under the solid waste management plan that was our concern. It does not have certainty that we wanted to see.

Mr. Latta. Okay. Just switching gears real quick. The question again that I had asked the administrator before he finished up his testimony today, on the certainty, especially on the beneficial use, Ms. Johnson, especially you in your testimony, especially with the company that is really located near you to make the board, do you think there is certainty out there right now, and do you think that

there could be changes in the future from the EPA?

Ms. Johnson. I believe, based on what EPA has stated, that they clearly have the opportunity to revisit their determination on nonhazardous versus hazardous for CCRs, and that creates uncertainty. And I will tell you, in my experience, that for the beneficial use community, for our plant that provides a significant portion of our CCRs to the beneficial use community, that uncertainty is a problem, and a later designation or determination of hazardous is going to put that beneficial use process at risk.

Mr. Latta. Mr. Adams.

Mr. Adams. I think in terms of the effect on the market so far, it is too early to tell if there has been a positive effect. We have heard many comments that people are happy that EPA has gone with subtitle D, but it is troubling to have that language in the preamble that they may want to go back and revisit the Bevill exemption. Again, they said it in 1993; they said it in the year 2000; they now said it again that coal ash didn't warrant hazardous waste management. But then they come back and say, well, we might need to revisit again. We need action by Congress to put an end to that chain of events.

Mr. Latta. Mr. Easterly, how about you on the whole issue of the beneficial use and the certainty?

Mr. Easterly. I personally don't think it is certain when you

say that you are going to reopen it. In history, EPA has changed, for example, the maximum contaminant levels in drinking water, which since the hazardous waste leachate test is 100 times that standard, suddenly makes something that used to be nonhazardous into hazardous. And I think that can change at any time in the future, and all businesses have to asses that risk and what could happen to them.

Mr. Latta. And just a little off topic, Mr. Easterly -- because I border Indiana; I have about halfway down -- what is Indiana's percentage of coal for your electricity?

Mr. Easterly. It has going down, but I think it is still over 85 percent. It might be over 90.

Mr. Latta. I remember it used to be around 90 percent in Ohio, especially in my area, it is around 73 percent.

And, with that, Mr. Chairman, in the interest of time, I yield back.

Mr. Shimkus. I thank the gentleman.

And before I adjourn, I need to ask unanimous consent to accept a letter by the Prairie River Network, located in Champaign, Illinois, and accompanying attachments from local communities and resolutions.

Without objection, so ordered.

[The information follows:]

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

******** COMMITTEE INSERT ********

Mr. Shimkus. And I want to thank you all for coming. Great hearing. Look forward to working with you as we move forward, and this hearing is adjourned.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]