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4 H.R. \_\_\_\_\_, THE IMPROVING COAL COMBUSTION RESIDUALS

5 REGULATION ACT OF 2015

6 WEDNESDAY, MARCH 18, 2015

7 House of Representatives,

8 Subcommittee on Environment and the Economy

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The Subcommittee met, pursuant to call, at 10:17 a.m.,  
12 in Room 2322 of the Rayburn House Office Building, Hon. John  
13 Shimkus [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Shimkus, Harper,  
15 Murphy, Latta, McKinley, Johnson, Bucshon, Flores, Hudson,  
16 Cramer, Tonko, Schrader, Green, McNerney, and Pallone (ex  
17 officio).

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

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|  
28           Mr. {Shimkus.} Oh, my gosh. We are out of control  
29 already. Welcome, everybody. I am going to call the hearing  
30 to order. The subcommittee will come to order, and the Chair  
31 recognizes himself for 5 minutes.

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

36           For my transcribers, can you hear me fine? Okay.

37           A couple months ago we heard from EPA and stakeholders  
38 about the final coal ash rule. We discussed the problems  
39 associated with the implementation, in particular, the fact  
40 that the final rule is self-implementing, meaning there will  
41 be no regulatory oversight and no enforceable permits, the  
42 fact that if States implement permit programs, they will not  
43 operate in lieu of the Federal rule so regulated entities  
44 must comply with two sets of requirements, and the fact that  
45 the only mechanism for enforcement of the final rule is  
46 through citizen suits which would result in an unpredictable  
47 array of regulatory interpretations, as Judges throughout the  
48 country are forced to make technical compliance decisions

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49 that are better left to a regulatory agency. As a result we  
50 heard from almost all of the stakeholders at our January  
51 hearing that a legislative solution is still needed to best  
52 regulate coal ash.

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

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

68 The basics of the discussion draft are simple. The bill  
69 requires that every State have a permit program, and every  
70 permit program will contain minimum requirements based on

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71 EPA's final rule. Every permit program will address inactive  
72 surface impoundments or legacy sites in the same manner as  
73 EPA dealt with them in the final rule. They will have to  
74 decide within 2 months from the date of enactment whether  
75 they will be closed within 3 years from the date of enactment  
76 or whether they will be regulated like any other active  
77 disposal unit. Compliance timeframes are comparable to the  
78 final rule and for any lag we will gain the benefit of having  
79 an enforceable permit program. Furthermore, the discussion  
80 draft does not in any way impact the ability to bring citizen  
81 suits. The draft legislation does not require owners and  
82 operators to post their operating records on the internet  
83 because this is a remnant of a self-implementing program, but  
84 the draft requires States to make information regarding  
85 groundwater monitoring data, structural stability, emergency  
86 action plans, fugitive dust control plans, certifications  
87 regarding closure, and information regarding corrective  
88 action remedies available to the public.

89 We heard from a number of witnesses at our last hearing  
90 that a key problem with the self-implementing final rule was  
91 that EPA was forced to eliminate certain flexibility, in  
92 particular with respect to groundwater monitoring and

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93 corrective action, due to the lack of State oversight.  
94 Because the requirements will be implemented through State  
95 permit programs, the draft legislation allows the  
96 implementing agency on a site-specific basis to provide  
97 flexibility for groundwater monitoring or corrective action  
98 taking into account risk-based factors.

99       At our last hearing we also heard about a few other  
100 provisions in the final rule that were problematic including:  
101 the retroactive application of the location of siting  
102 restrictions, the requirement that unlined impoundments that  
103 exceed a groundwater protection standard close with no  
104 opportunity to remedy the problem through corrective action,  
105 and that surface impoundments that miss a deadline to access  
106 structural stability must stop operating and close. Forced  
107 closure of impoundments with no analysis of whether the  
108 impoundment is, or can be, operated safely may be appropriate  
109 under a self-implementing rule with no regulatory  
110 involvement, but the goal of the draft legislation and the  
111 State permit programs is to ensure that surface impoundments  
112 are operated safely and if they are not, then they will be  
113 corrected or closed.

114       As we work on this draft legislation we acknowledge the

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

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

129 I would like again to thank the Administration for all  
130 of the cooperation we have received on this issue. EPA has  
131 been extremely constructive and helpful during the last  
132 Congress and recently working through the issues with the  
133 final rule and the discussion draft. I would also like to  
134 specifically thank ECOS and ASTSWMO for their continued  
135 participation and invaluable input on the mechanics of  
136 implementation. Last, I would like to express my

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137 appreciation to Mr. McKinley for his longstanding leadership  
138 on this issue as we continue the process of trying to figure  
139 out how to effectively regulate coal ash. As always, we  
140 appreciate all of our witnesses for being here and look  
141 forward to your testimony.

142 [The prepared statement of Mr. Shimkus follows:]

143 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*



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|  
144           Mr. {Shimkus.} With that I yield 5 minutes to the  
145 gentleman from New York, Mr. Tonko.

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

151           In the 35 years since Congress passed the Resource  
152 Conservation and Recovery Act or RCRA, the Environmental  
153 Protection Agency has been studying this issue, and it has  
154 been the subject of intense debate. During this same time  
155 communities and many States have experienced problems from  
156 inadequate handling and disposal of coal ash. It is long  
157 past time to resolve these issues and indeed move forward.

158           Earlier this year we heard from the agency and from  
159 other stakeholders about EPA's final rule on the disposal of  
160 coal ash. This rule has taken many years and is the result  
161 of an extensive public process. The rule represents a  
162 compromise amongst the stakeholders in this issue, and so it  
163 is not surprising that some groups are unhappy with certain  
164 provisions of the rule. But I continue to believe the rule

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165 should move forward. I realize that some of our witnesses  
166 today prefer the approach taken by this draft legislation.  
167 At this point, however, I do not see the need for  
168 legislation. There is a need for consistent, fair, and  
169 rigorous oversight of the rule's implementation. If the rule  
170 does not result in appropriate coal ash disposal or if it  
171 results in conflicts between State and Federal authorities or  
172 it leads to an excess of litigation, it can be revised or  
173 Congress can pass legislation to correct any problems that  
174 are identified.

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

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

185 Again, I thank the witnesses for taking time to appear  
186 before the subcommittee this morning, and with that, Mr.

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187 Chair, I thank you and yield back the remainder of my time.  
188 Is there anyone from the panel that would like to use about 2  
189 minutes I think we have left? Anyone? If not, I yield back  
190 my time.

191 [The prepared statement of Mr. Tonko follows:]

192 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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|  
193 Mr. {Shimkus.} The gentleman yields back his time.

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

196 Mr. {McKinley.} Thank you, Mr. Chairman. As you have  
197 heard for 35 years, for 35 years Congress has been wrestling  
198 with how to handle fly ash. For 35 years. After countless  
199 hearings, meetings, amendments, and legislation in the past,  
200 we come here with a draft piece of legislation, crafted with  
201 the help of the State Environmental and Solid Waste  
202 officials, committee staff, and with the input of the EPA.

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

208 However, what is accepted or what is acceptable is the  
209 legislation before us, this draft piece, ensures that the  
210 States have the flexibility they need to make the program  
211 work and are able to complete it within a reasonable  
212 timeframe. This draft legislation guarantees that every  
213 State must, not may, must have a Coal Ash Permit Program, and

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214 it must contain the minimum Federal standards set out under  
215 the finalized rule.

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

223 I yield back the balance of my time.

224 [The prepared statement of Mr. McKinley follows:]

225 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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|  
226           Mr. {Shimkus.} The gentleman would yield back, but  
227 before he does, I would look to the Republican side to see if  
228 anybody would like to use the remaining time. Seeing none,  
229 even on my colleagues on the Democrat side, seeing none, the  
230 gentleman yields back his time.

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

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

242           Mr. {Pallone.} Thank you, Chairman Shimkus.

243           This is the second hearing this Congress on the  
244 important topic of coal ash. In January this subcommittee  
245 heard from EPA and stakeholders about the agency's new final  
246 rule. After years of debate at the agency and in Congress

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247 over the proper regulation of coal ash, the agency had  
248 reached a verdict. EPA's final rule reflects a tremendous  
249 effort, and it will for the first time provide the framework  
250 for addressing this serious environmental problem. This rule  
251 is the product of a robust public process, including field  
252 hearings and several rounds of public comment, and it  
253 reflects the input of over 450,000 consumers, including  
254 States, industry groups, environmental groups, and individual  
255 concerned citizens.

256 In the end EPA finalized a rule that addressed almost  
257 all the concerns this subcommittee has heard about for years.  
258 Those in the coal ash recycling industry who make things like  
259 concrete and wallboard submitting, substituting coal ash for  
260 virgin material, had sought a non-hazardous rule under  
261 Subtitle D of RCRA, and that is what they got. Those in the  
262 electric utility industry wanted a Subtitle D rule that would  
263 not require them to retrofit their existing impoundments with  
264 liners, and that is what they got. And States wanted a  
265 mechanism to set up their own programs to implement Federal  
266 standards and to have EPA approve them, and that is what they  
267 got. The only stakeholders who really did not get what they  
268 sought in this rule were the environmental and public health

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269 advocates who wanted a stronger Subtitle C rule with the  
270 requirement that the giant unlined pits currently receiving  
271 this dangerous waste to be retrofitted to protect  
272 groundwater.

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

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

288 I do want to say a few words about the specific  
289 legislation that is the subject of today's hearing. This new  
290 proposal retains the problems of past proposals which have



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291 been discussed extensively in this subcommittee. It would  
292 create a new model of delegation to States with a sharply-  
293 curtailed role for EPA. It does not include a legal standard  
294 of protection, a substantive EPA role in reviewing State  
295 programs, or EPA backstop enforcement authority. The new  
296 proposal presents additional concerns as well because  
297 necessary health protections included in EPA's final rule are  
298 left to State discretion or left out entirely. Groundwater  
299 monitoring protection, closure requirements, clean-up  
300 requirements all could be weaker under this bill than under  
301 the final rule. If anything, we should be strengthening the  
302 protections of the final rule and not weakening them.

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

308       Thank you, Mr. Chairman. I yield back.

309       [The prepared statement of Mr. Pallone follows:]

310 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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311           Mr. {Shimkus.} The gentleman yields back his time. Now  
312 the Chair will recognize our panelists one at a time with an  
313 introduction and your opening statement. Your full statement  
314 is submitted for the record.

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

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

|  
325 ^STATEMENT OF DAVID PAYLOR

326 } Mr. {Paylor.} Thank you, Chairman Shimkus, Raking  
327 Member Tonko, and members of the subcommittee. Good morning.  
328 My name is David Paylor. I am the Director of the Virginia  
329 Department of Environmental Quality, and I appreciate the  
330 opportunity to share with you Virginia's views on the draft  
331 bill. I am also representing the Environmental Council of  
332 the States, ECOS, whose members are leaders of the State and  
333 territorial environmental protection agencies.

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

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

357 ECOS has reviewed the draft bill and find that it  
358 positively addresses the concerns. The draft bill leverages  
359 and codifies the extensive technical work in EPA's final

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360 rule. It provides that States may adopt, implement, and  
361 enforce CCR programs. The draft bill would give State  
362 environmental agencies 24 months to certify their programs,  
363 with a potential for an additional 12 months. This would  
364 provide most States with existing CCR programs ample time to  
365 pursue the necessary State legislative and rulemaking  
366 processes. For example, in Virginia, our regulatory process  
367 can take 2 to 3 years.

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

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

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382 groundwater monitoring.

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

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

393           The draft bill includes robust requirements for industry  
394 permit applications, provides for public information  
395 availability, and State access to facilities. The bill  
396 incorporates the new robust technical, siting, financial  
397 assurance, run-on and run-off controls and recordkeeping and  
398 structural integrity requirements. We value the flexibility  
399 the draft bill adds that will allow States to identify  
400 alternative points of compliance for monitoring, alternative  
401 groundwater protection standards, remediation flexibility,  
402 and to allow unlined impoundments to operate for a period of  
403 time providing there are no groundwater threats and the

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404 structural integrity of the berms is maintained.

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

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

416           [The prepared statement of Mr. Paylor follows:]

417 \*\*\*\*\* INSERT A \*\*\*\*\*

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|

418 Mr. {Shimkus.} Thank you very much, sir.

419 Now I would like to introduce Mr. Michael Forbeck,

420 Environmental Program Manager for the Pennsylvania Department

421 of Environmental Bureau of Waste Management, on behalf of the

422 Association of State and Territorial Solid Waste Management

423 Officials, which is the hard to say ASTSWMO.

424 Sir, you are recognized for 5 minutes.



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|  
425 ^STATEMENT OF MICHAEL FORBECK

426 } Mr. {Forbeck.} I am President of the Association of  
427 State and Territorial Solid Waste Management Officials,  
428 ASTSWMO, and I am here today to testify on behalf of ASTSWMO.

429 ASTSWMO is an association representing the waste  
430 management and remediation programs of the 50 States, five  
431 Territories and the District of Columbia. Our membership  
432 includes State program experts with individual responsibility  
433 for the regulation and management of solid and hazardous  
434 wastes.

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

443 We also believe that this discussion draft has addressed  
444 the main concerns that ASTSWMO expressed regarding EPA's

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445 final rule on CCR in our testimony before this subcommittee  
446 on January 22, 2015. While being in full agreement with  
447 issuance of the final rule under Subtitle D of the Resource  
448 Conservation and Recovery Act, ASTSWMO's prior testimony  
449 noted State implementation issues raised by the self-  
450 implementing construct of RCRA Subtitle D, Part 257. The  
451 concerns we voiced are summed up as follows. The rule's  
452 self-implementing requirements will set up the situation of  
453 dual State and Federal regulatory regime, even if the State  
454 requirements meet or exceed national minimums. The use of  
455 EPA-approved State Solid Waste Management Plans as a  
456 mechanism to deal with the issue of dual regulatory authority  
457 will not fully alleviate dual implementation of State and  
458 Federal standards, since the approved Solid Waste Management  
459 Plan would not operate in lieu of the Federal standards. The  
460 ability of States to establish regionally appropriate  
461 standards, as allowed under RCRA Subtitle D, Part 258 for  
462 municipal solid waste landfills, is constrained by the rule's  
463 self-implementing requirements.

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

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467           First, it eliminates dual State and Federal regulatory  
468 authority resulting from the self-implementing construct of  
469 EPA's rule by giving States the authority to adopt and  
470 implement a CCR permit program. Many States already have a  
471 very successful permit program. For States that choose to  
472 adopt and implement the permit program, it assures State  
473 primacy through a single permit program provision that is  
474 enforceable by the State. This results in a clear and  
475 consistent understanding of the permitting and enforcement  
476 roles of the States. We also agree with the additional level  
477 of review by EPA to determine whether State permit programs  
478 are adequate to ensure compliance with the criteria as  
479 described in the discussion draft.

480           Second, by directly giving States the authority to  
481 implement a CCR rule or program, the discussion draft  
482 eliminates the uncertainty of State-only implementation the  
483 Solid Waste Management Plan as the mechanism. The  
484 certification process under the draft legislation could allow  
485 for expedited implementation of the technical requirements.

486           Third, we appreciate that the draft legislation allows  
487 the flexibility for States to have regionally appropriate  
488 State standards for groundwater monitoring and corrective

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489 action.

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

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

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

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511 [The prepared statement of Mr. Forbeck follows:]

512 \*\*\*\*\* INSERT B \*\*\*\*\*

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|

513 Mr. {Shimkus.} Thank you very much.

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

519 Thank you and recognize you for 5 minutes.

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|

520 ^STATEMENT OF JAMES ROEWER

521 } Mr. {Roewer.} Chairman Shimkus, Ranking Member Tonko--

522 excuse me, he left--members of the subcommittee, good

523 morning. I am pleased to present the views of the utility

524 industry; USWAG, APPA, EEI, and NRECA on the ``Improving Coal

525 Combustion Residuals Regulation Act of 2015.''

526 When I testified at the Oversight Hearing before the

527 committee on EPA's CCR, I made clear that while we supported

528 EPA's decision to regulate coal ash as a non-hazardous waste,

529 there were significant flaws in the rule because the rule

530 can't be delegated to the States, it is self-implementing,

531 and regulated facilities must comply with the rules

532 requirements irrespective of whether it is adopted by the

533 States.

534 Since State coal ash regulations cannot operate in lieu

535 of Federal regulations, we must comply with dual and

536 potentially-inconsistent Federal and State regs. This is

537 unlike other Federal environmental regulatory regimes,

538 including EPA's Subtitle C Hazardous Waste Program where

539 Congress views the States as key partners in implementing and

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540 enforcing Federal regulation and expressly authorizes the  
541 States to adopt and implement the Federal regime in lieu of  
542 EPA.

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

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

557         The bill would establish a permit program for  
558 implementation of the regulations issued by EPA, eliminate  
559 the problems associated with the self-implementing nature of  
560 the rule. Under the bill, virtually all aspects of the rule  
561 would be implemented solely through State CCR permit programs



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562 or by EPA if the States do not adequately adopt and implement  
563 the rule. This structure is similar to the manner in which  
564 Congress previously amended RCRA to allow EPA's Subtitle D  
565 municipal solid waste landfill rules to be implemented  
566 through State permit programs.

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

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

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

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

600           EPA dropped from the final rule certain site-specific  
601 risk-based options for applying elements of the regulations  
602 that were in its proposal, reasoning that those risk-based  
603 decisions require regulatory oversight. Thus, State programs  
604 that enable regulators to issue tailored, site-specific,  
605 risk-based options for coal ash management are superseded by

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606 the one-size-fits-all approach in EPA's rule.

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

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

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

627 [The prepared statement of Mr. Roewer follows:]

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628 \*\*\*\*\* INSERT C \*\*\*\*\*

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|

629 Mr. {Shimkus.} Thank you.

630 The Chair now recognizes Lisa Evans, Senior

631 Administrative Counsel, from EarthJustice.

632 You are recognized for 5 minutes. Welcome.

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|

633 ^STATEMENT OF LISA EVANS

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

646 In December, EPA's first-ever coal ash rule finally put  
647 the Nation on the road to safer toxic waste disposal which  
648 will help prevent water pollution, avoid catastrophic spills,  
649 promote cleaner air, and encourage robust public engagement  
650 by communities living near coal ash dumps. Yet the bill  
651 proposed by Representative McKinley would run us off this  
652 road and drag us into a dark and dangerous detour where

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653 almost none of the protections of the new EPA rule would  
654 survive intact.

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

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

666 The following are some examples. First, the bill will  
667 eliminate the guarantee of public access to information  
668 concerning contaminated sites and dangerous dams.  
669 Communities will likely be unable to find out if there are  
670 toxic chemicals in their water, spills in their neighborhood,  
671 or unstable dams above their homes. Second, the bill will  
672 eliminate the rules ban on storing and dumping coal ash  
673 directly in drinking water. Unlike the EPA rule, there is no  
674 ban on operating a coal ash pond directly in an aquifer.

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675 Ponds that are located there now, and there are many, can  
676 continue to dump toxic waste and new dumps can be built on  
677 top of drinking water sources.

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

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



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

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

710           In closing, I want to reiterate that I appreciate the  
711 opportunity to address the subcommittee. However, there are  
712 other voices that must be heard. Last week 143 individuals  
713 and groups personally impacted by coal ash dumping sent a  
714 letter to this subcommittee requesting the opportunity to  
715 speak. The words of those actually harmed by toxic dumping  
716 are sorely missing today. If impacted community members were  
717 here today, citizens from Illinois, West Virginia,  
718 Pennsylvania, and Missouri who live near leaking coal ash

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719 ponds, citizens from North Carolina and Virginia who live  
720 along the Moapa Reservation in Nevada and the Nevada, the  
721 Navajo Reservation in New Mexico whose air is thick with ash,  
722 these citizens and many others would ask this committee not  
723 to throw away this limited coal ash rule for essentially no  
724 rule at all. They would ask the committee not to delay and  
725 not to remove critical health protections for their families  
726 and communities. Today I respectfully echo their plea.

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

729 [The prepared statement of Ms. Evans follows:]

730 \*\*\*\*\* INSERT D \*\*\*\*\*

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|  
731           Mr. {Shimkus.} Thank you very much.

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

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

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

750           Mr. {Paylor.} Yes, I believe that ECOS does support it,  
751 and it is for the reasons that you mentioned, that it takes

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752 the EPA Federal rule, which we believe was a positive step  
753 forward, and addresses some of those additional concerns like  
754 dual oversight and financial assurance.

755 Mr. {Shimkus.} In your opinion does the draft  
756 legislation address the implementation issues associated with  
757 the final rule, including, as you just mentioned, dual  
758 regulation systems and the enforcement only through citizen  
759 suits?

760 Mr. {Paylor.} Yes, I believe it does address those.

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

768 Mr. {Paylor.} I believe that this would create a  
769 uniform standard across the country, and that is one of the  
770 strengths that it provides. Yes.

771 Mr. {Shimkus.} Mr. Forbeck, do you agree with that?

772 Mr. {Forbeck.} Yes, I do. I believe it will give a--it  
773 gives more--it eliminates the confusion that the Solid Waste

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774 Management Plan had provided and would provide a single point  
775 of determining--

776 Mr. {Shimkus.} So ASTSWMO supports this legislation?

777 Mr. {Forbeck.} We do support. We are very pleased that  
778 it incorporates the EPA rule and also added the financial  
779 assurances that we requested and has a single permit.

780 Mr. {Shimkus.} Let me just follow up. Do you read the  
781 legislation as allowing States the ability to pick and choose  
782 which requirements to include in the State Permit Program?

783 Mr. {Forbeck.} No, I do not. There are minimum  
784 standards or permit requirements that the States would--

785 Mr. {Shimkus.} And the minimum of standards as you  
786 evaluate this draft legislation comes from where?

787 Mr. {Forbeck.} From the EPA rule. From the  
788 legislation.

789 Mr. {Shimkus.} So the minimum--I just for the record,  
790 the minimum standards you interpret as coming from where?

791 Mr. {Forbeck.} Well, it comes from the, originally from  
792 the EPA rule as it was incorporated.

793 Mr. {Shimkus.} Great. Thank you. Mr. Roewer, the  
794 legislation incorporates requirements of the final rule as  
795 minimum requirements for State Permit Programs. Many of the

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796 requirements are incorporated directly with no revisions as I  
797 read earlier. There are, however, a few places where the  
798 legislation allows the implementing agency to tailor the  
799 requirements based on onsite specific risk-based decisions,  
800 in particular with respect to groundwater monitoring and  
801 corrective action. Can you explain why this is important?

802 Mr. {Roewer.} Yes. Thank you. EPA recognizes the  
803 legitimacy of tailoring those regulations. There is  
804 extensive discussion of that fact in the preamble but then  
805 backed away from that recognizing there was no Federal or no  
806 regulatory agency oversight of that process. The legislation  
807 would allow the State Regulatory Agencies to tailor the  
808 regulations to address specific, site-specific concerns  
809 associated with coal ash management.

810 Mr. {Shimkus.} What could be different?

811 Mr. {Roewer.} Well, one of the things would be a  
812 groundwater protection standard for instance. EPA would  
813 default to the background of the groundwater protection  
814 standard under their self-implementing rule. Where there is  
815 another State or Federal health-based standard, the State  
816 Regulatory Agency can apply that in lieu, if there is no MCL,  
817 to establish an alternative groundwater protection standard.

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818 Not leaving, EPA couldn't leave that to the owner and  
819 operator. That does need regulatory agency oversight, and  
820 the bill appropriately sets up a mechanism for the States to  
821 take that approach.

822 Mr. {Shimkus.} Great. My time is close to expiring.  
823 Thank you very much, and I recognize Mr. Tonko for 5 minutes.

824 Mr. {Tonko.} Thank you, Mr. Chair.

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

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

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

838 Ms. {Evans.} Thank you, Representative Tonko. The  
839 location standards differ radically from the location

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840 standards in the EPA rule. One of the most important  
841 restrictions is the placement, the prohibition against the  
842 placement of ash within 5 feet of the groundwater table. In  
843 other words, you can't place ash any longer within 5 feet of  
844 a potential drinking water source. The proposed legislation  
845 does not incorporate that location standard. So what you  
846 have is the--you do not have the prohibition of ponds that  
847 are currently located in a drinking water aquifer. They will  
848 not have to close. That is a radical change in the  
849 requirements because we know for sure that there are many  
850 ponds that are currently in contact with a waste, in contact  
851 with a groundwater.

852 The rule also, I mean, the bill also does not  
853 incorporate restrictions for wetlands, for seismic areas, and  
854 for fault areas.

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

861 Ms. Evans, how do the closure requirements of the bill



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862 compare to those in the EPA rule?

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

876 Mr. {Tonko.} And so the requirements under EPA's rule  
877 as indicated will take effect much more quickly than those  
878 under the bill?

879 Ms. {Evans.} Absolutely. Communities are looking  
880 forward to the application of the requirements as early as  
881 September. Many requirements are in effect 6 months from the  
882 date of publication. If that is at the end of this month, we  
883 are going to see relief for contaminated air, contaminated

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884 air quality from dust, we are going to see public information  
885 posted on utility websites, we will see the initiation of  
886 inspection at high and significant hazard ponds on a weekly  
887 basis and a monthly basis. So communities will get immediate  
888 relief from the EPA rule, and under the bill this relief is  
889 going to be delayed at least 2 to 3 years and probably in  
890 most cases much longer.

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

898 Ms. {Evans.} The public disclosure provisions are  
899 critical to EPA's rule, and EPA rule is explicit as to what  
900 has to be posted. The difference in the bill is that there  
901 are general public participation or public notice provisions,  
902 but it gives States discretion on how they require that  
903 information to be made public. Currently information in many  
904 States is made public, but it is at State agencies where  
905 citizens at great difficulty and great expense must request a

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906 file review, often wait a substantial amount of time, and  
907 spend a significant amount of money obtaining that data. So  
908 often this data is in the real world not available to  
909 citizens, but actual groundwater monitoring data, dust  
910 control plans, inspections, assessments of structural  
911 stability, all those would be posted according to the EPA  
912 rule in a publicly-accessible website free of charge to all  
913 communities impacted by the dumpsites in their communities.

914 Mr. {Tonko.} I have exhausted my time, so I yield back.

915 Mr. {Shimkus.} The gentleman yields back time.

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

918 Mr. {Harper.} Thank you, Mr. Chairman. Thanks to each  
919 of you for being here.

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

927 Mr. {Paylor.} We do believe that it would provide a

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928 Federal baseline and then States would also be able to go  
929 beyond that with their own site-specific needs as well.

930 Mr. {Harper.} The bill contains a provision requiring  
931 States to develop plans for coordination among States in the  
932 event of a release that goes across State lines. Why is that  
933 important?

934 Mr. {Paylor.} Well, it is important to Virginians  
935 because we recently this year had an experience where there  
936 was a release in North Carolina. The majority of the stream  
937 impact was in Virginia, and so the ability for States to have  
938 some upfront planning and coordination would just streamline  
939 the process should we have another unfortunate incident like  
940 that.

941 Mr. {Shimkus.} Would the gentleman yield on that?

942 Mr. {Harper.} Yes, I will yield.

943 Mr. {Shimkus.} Is that in the current EPA rule?

944 Mr. {Paylor.} Not to my knowledge.

945 Mr. {Shimkus.} Does anyone know? I don't think it is.

946 Thank you. I yield back.

947 Mr. {Harper.} Thank you, Mr. Chairman.

948 Mr. Paylor, your written testimony notes that the draft  
949 bill includes the new robust technical siting, financial

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950 assurance, run-on and run-off controls, record keeping, and  
951 structural integrity requirements published by EPA in the  
952 final CCR rule and that EPA did a very good job developing  
953 the technical requirements of the final CCR rule. Your  
954 written testimony also states that you value the flexibility  
955 the draft bill adds. Can you explain why the added  
956 flexibility is a good thing?

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

964       Mr. {Harper.} Okay, and your written testimony also  
965 states that the draft legislation provides a Federal  
966 backstop. Would you please explain to us what that means?

967       Mr. {Paylor.} Well, the Federal backstop means that  
968 there is enforcement authority at the Federal level should  
969 the State not meet those standards, and so, therefore, you  
970 have got the State authority but if that fails, the Federal  
971 Government can come in and take action.

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972           Mr. {Harper.} Why is it important that the draft  
973 legislation allows for the pre-approval of a State Permitting  
974 Program?

975           Mr. {Paylor.} Well, a State Permitting Program provides  
976 certainty, it provides the ability to have site-specific  
977 requirements on that particular facility, and it provides  
978 more clear enforceability.

979           Mr. {Harper.} Okay. Thank you very much. Mr. Forbeck,  
980 States have previously demonstrated the ability to implement  
981 permit programs very similar to coal ash. So is EPA approval  
982 necessary before States begin implementing Coal Ash Permit  
983 Programs, and wouldn't EPA program approval unnecessarily  
984 delay implementation of Coal Ash Permit Programs?

985           Mr. {Forbeck.} I think the certification program that  
986 is within this draft would actually expedite implementation  
987 of this, of these requirements of the rule. In States that  
988 have proven programs, proven permit programs can continue  
989 them with CCRs. In Pennsylvania we have a very successful  
990 program which we have done for many, many years.

991           Mr. {Harper.} Thank you, and I yield back the balance  
992 of my time.

993           Mr. {Shimkus.} The gentleman yields back his time.

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

996           Mr. {McNerney.} Thank you, Mr. Chairman. I want to  
997 thank my colleague for his efforts on this issue.

998           I believe I heard two concerns consistently from the  
999 first three witnesses. One of them was that the main  
1000 enforcement mechanism of citizen lawsuits and that that would  
1001 bring uncertainty and so on, and the other one, and I am a  
1002 little confused about this one, is that it would establish  
1003 inconsistent standards across States while at the same time  
1004 giving States flexibility, which seemed to be something that,  
1005 like you are shaking your head there, Mr. Roewer. Did you  
1006 disagree?

1007           Mr. {Roewer.} The inconsistent application of the rule,  
1008 Congressman, is due to the interpretation of the rule by the  
1009 Federal District Court Judges, not inconsistent as per  
1010 application and enforcement by the State Regulatory Agencies.  
1011 At least in my testimony the concern for a potential  
1012 patchwork of interpretation stems from the self-implementing  
1013 citizen suit enforcement structure of EPA's rule, not of the  
1014 legislation. The legislation solves that problem.

1015           Mr. {McNerney.} How does it solve it?

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1016 Mr. {Roewer.} By having the Federal standards  
1017 prescribed in the rule, that are EPA's rule, implemented by  
1018 the State Regulatory Agencies. There is a Federal floor  
1019 under which the States cannot drop.

1020 Mr. {McNerney.} I mean, well, my understanding is that  
1021 there is a lack of a standard of protection in the proposed  
1022 legislation. Would you address that, Ms.--

1023 Mr. {Roewer.} Well, EPA developed--

1024 Mr. {McNerney.} --Evans?

1025 Mr. {Roewer.} Oh, excuse me. I am sorry.

1026 Ms. {Evans.} Yes. This bill, like the other bills  
1027 proposed by Representative McKinley, lacks a protective  
1028 standard of protection, and this is pointed out numerous  
1029 times by CRS. What that means is that there really is no  
1030 Federal floor that Mr. Roewer is describing. States are free  
1031 to interpret the terms that are not defined. They can define  
1032 their own terms, and they can run their programs without  
1033 oversight that has a standard of protection of human health  
1034 and the environment. The standard protection of human health  
1035 and the environment is a watch word of RCRA. It applies in  
1036 all of RCRA's programs except if this bill passes it won't be  
1037 applied to coal ash, and this is a very dangerous omission



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1038 because EPA essentially will have very narrow oversight as to  
1039 be completely ineffective because if an agency can't look at  
1040 a State program and say these programs don't protect human  
1041 health and the environment, therefore, this is a deficient  
1042 program, their oversight will be minimized and essentially  
1043 this is exactly what the bill says.

1044 If I could talk to the dual enforcement because that  
1045 argument is really nonsense. What--under RCRA, the RCRA  
1046 Citizen Suit Provision, either States or citizens, when,  
1047 following a citizen suit are in Federal Court, they are in  
1048 Federal Court if it is a hazardous waste violation, they are  
1049 in Federal Court if it is a municipal solid waste violation.  
1050 So RCRA has always operated like this, that you have Federal  
1051 Courts interpreting State law. So the problem that is raised  
1052 by USWAG and the States is really a problem, that it is  
1053 really something that hasn't been a problem for all the  
1054 decades that RCRA has been, RCRA programs have been in effect  
1055 for decades.

1056 Mr. {McNerney.} So are you concerned about the citizens  
1057 lawsuits being the main enforcement mechanism?

1058 Ms. {Evans.} I am not. Citizen lawsuits include the  
1059 State lawsuits. So it is not, when one says citizen

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1060 lawsuits, what that means is citizens or the States are free  
1061 to enforce, under the EPA rule, are free to enforce the EPA  
1062 rule. States can go in and enforce those provisions as well.  
1063 So any citizen suit that is filed, it is required that there  
1064 be 60-days' notice to the State. If the State wants to be  
1065 the main implementing agency and wants to interpret its own  
1066 regulation and enforce its own regulation, it is 100 percent  
1067 free to do that. A citizen can't slip in with a lawsuit.  
1068 They have to give 60 days, and if the State wants to  
1069 maintain, be the primary enforcing agency and maintain 100  
1070 percent control over the program, a State can bring that  
1071 enforcement action, can enter a consent decree, and there  
1072 will not be a citizen lawsuit by a citizen group.

1073 Mr. {McNerney.} Okay. I don't know if you will have  
1074 enough time to answer this, but one of the things that you  
1075 said concerned me was that citizens wouldn't have the ability  
1076 to determine the quality of the water that might have been  
1077 contaminated, and that, how could the bill prevent that from  
1078 happening?

1079 Ms. {Evans.} Well, the bill doesn't make mandatory  
1080 groundwater monitoring data. SO what that means is a  
1081 community that is on wells next to a coal ash pond or

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1082 landfill would not necessarily under the bill have access to  
1083 the groundwater monitoring data. So they couldn't go on a  
1084 website and find out what are the levels of arsenic,  
1085 chromium, lead.

1086 Mr. {McNerney.} But they could do it themselves? They  
1087 could do the testing themselves or have a laboratory do it if  
1088 it is in the paperwork?

1089 Ms. {Evans.} Well, that is, well, they wouldn't have  
1090 access to the industry wells. They could test their own  
1091 well, but some, but, you know, the purpose of RCRA is to  
1092 prevent harm to health and the environment. So you want to  
1093 find out what is in those industry wells, which might be, you  
1094 know, ``a mile from your drinking water well'' before it gets  
1095 to your well and your family.

1096 Mr. {Shimkus.} The gentleman's time has expired.

1097 Before I move to Mr. Murphy, Ms. Evans, you mentioned  
1098 the CRS report. If you have one on this bill, we would like  
1099 to see it. I think you are referring to previous bills of  
1100 past Congresses. There is no CRS report on this bill right  
1101 now, and there would be public disclosure through the State,  
1102 and I just wanted to--with that I yield 5 minutes to Mr.  
1103 Murphy.

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1104           Mr. {Murphy.} Thank you, Mr. Chairman. I appreciate  
1105 the panel being here. It is a long-term issue we have to  
1106 deal with directly.

1107           I do want to deal with some comments that, Ms. Evans,  
1108 you made and with regard to the bill fails to establish a  
1109 protective standard. I didn't hear from other panelists if  
1110 they agree with that. Mr. Roewer, do you agree with that?

1111           Mr. {Roewer.} The bill takes EPA's 257 regulations,  
1112 their coal ash rule, and builds a CCR Permit Program based on  
1113 those regulations. Those regulations, the 257 regulations,  
1114 are developed by EPA with that, to meet that standard of  
1115 care, so we believe that the bill does provide that Federal  
1116 standard of care in a Federal floor.

1117           Mr. {Murphy.} Mr. Forbeck, do you agree that the bill  
1118 fails to establish a protective standard, or do you disagree?

1119           Mr. {Forbeck.} I disagree. I believe it does establish  
1120 a protective standard.

1121           Mr. {Murphy.} Mr. Paylor?

1122           Mr. {Paylor.} I would agree with those responses as  
1123 well.

1124           Mr. {Murphy.} Thank you. I mean, along those lines I  
1125 look upon it that State legislators and regulators have the

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1126 authority to do some things. Ms. Evans, one of the things  
1127 you are raising question with is it may get in the way of  
1128 people being able to bring up Court cases, interfere with  
1129 that. Am I understanding you correctly there?

1130 Ms. {Evans.} If I understand your question, the State  
1131 and citizens stand in the same legal place in that if an  
1132 industry under the CCR rule is violating any of those  
1133 requirements, it can bring a suit to enforce the EPA rule.  
1134 There is nothing in the EPA rule that would stop States from  
1135 fully adopting, fully enforcing that rule, and as one of, I  
1136 think it was the gentleman from ECOS, has said that States  
1137 are ready to do this within 2 or 3 years.

1138 Mr. {Murphy.} Okay. Mr. Forbeck, so based on your  
1139 experience will this draft legislation being discussed today  
1140 result in a more effective implementation of requirements of  
1141 the final rule than the self-implementing program, and why or  
1142 why not?

1143 Mr. {Forbeck.} I believe as I said in the testimony, it  
1144 would be more effective, one, as a single permit program we  
1145 have the State that will have the jurisdiction and the  
1146 enforcement capabilities of enforcing this rule. In  
1147 addition, the uncertainty of the Solid Waste Management Plan

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1148 as a mechanism for implementation is no longer there. We  
1149 have this permit program that would be in effect and--

1150 Mr. {Murphy.} I mean, Pennsylvania has a very robust  
1151 coal ash program. Am I correct?

1152 Mr. {Forbeck.} That is correct.

1153 Mr. {Murphy.} And would you have to develop any new  
1154 requirements or make changes to existing requirements based  
1155 upon this draft legislation?

1156 Mr. {Forbeck.} We believe it would be very minimum  
1157 requirements that we would have to change. We have been  
1158 regulating coal ash for a number of years. We had liners  
1159 requirements since the early '90s and groundwater  
1160 requirements since the '90s. So I think for Pennsylvania it  
1161 would be--it would not be very long.

1162 Mr. {Murphy.} So let me talk about that issue with the  
1163 liner requirements. I mean, I want to make sure we have  
1164 enough flexibility that as new science is developing, new  
1165 liners, et cetera, that we don't limit anything here. So,  
1166 and I think that is where this bill tries to reflect, but  
1167 would you support the inclusion of a provision to allow more  
1168 latitude in liner design to capture the flexibility of  
1169 science develops, as technology develops than is already

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1170 provided by State law, so long as it is protective of the EPA  
1171 devised standard?

1172 Mr. {Forbeck.} If it is as protective, and right, as  
1173 technology improves--

1174 Mr. {Murphy.} Uh-huh.

1175 Mr. {Forbeck.} --there could be even better methods  
1176 that could be more protective than the liner systems that we  
1177 have now. So we would support that.

1178 Mr. {Murphy.} Ms. Evans, you said something that called  
1179 my attention to. You talked about issues with regard to  
1180 dams. I guess coal ash dams or piles or whatever, and what  
1181 do you consider the risk that this bill does not address with  
1182 regard to dams?

1183 Ms. {Evans.} Well, with regard to dams there are a few.  
1184 One of them is the location restrictions which don't apply to  
1185 dams in wetlands, in fault areas, in seismic areas, and the  
1186 dams that are sitting in the aquifer. Further, it is the  
1187 delay. This rule wouldn't--the requirements would be at the  
1188 earliest in effect 2 to 3 years, and so the inspections of  
1189 high-hazard dams would not occur until 2 or 3 years where it  
1190 would immediately be applicable. And the other thing is, you  
1191 know, we keep talking about whether this bill is the same as

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1192 the EPA rule, and I would urge the committee members to look  
1193 at my testimony and the long list of definitions that can be  
1194 defined by a State without a protective standard and which  
1195 could differ from EPA's definitions, and definitions define  
1196 the applicability, the scope, the stringency of a rule. So  
1197 let us take dams. The--

1198 Mr. {Murphy.} I am out of time here.

1199 Ms. {Evans.} Oh. Can I just say that the States can  
1200 define hazard potential dams differently, well, as they wish  
1201 because that is not a definition in the bill, so they could  
1202 exempt some highly-significant hazard dams from those  
1203 categories, and thereby, those more stringent requirements  
1204 for those more dangerous dams would not be applicable.

1205 Mr. {Murphy.} Thank you.

1206 Mr. {Shimkus.} The gentleman's time has expired.

1207 Mr. {Murphy.} Could I just ask that we could ask for  
1208 the record the other panelists be able to respond to that  
1209 question, too?

1210 Mr. {Shimkus.} Without objection--

1211 Mr. {Murphy.} Thank you.

1212 Mr. {Shimkus.} --so ordered.

1213 The Chair now recognizes the gentleman from Ohio, Mr.



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1214 Latta, for 5 minutes.

1215 Mr. {Latta.} Thank you, Mr. Chairman, and thanks very  
1216 much for our panel for being here. It is very informative as  
1217 always.

1218 If I could go back, Mr. Roewer, if I could ask you  
1219 because the question that Mr. Murphy had just brought up  
1220 pretty much, you know, the basic principle in this bill is  
1221 that we are taking EPA's rule and giving more flexibility to  
1222 States, providing the same protections to the environment and  
1223 particularly the drinking water resources in ways other than  
1224 those narrowly approved by the EPA. And, again, following  
1225 up, Mr. Forbeck just answered Mr. Murphy. Would you support  
1226 the minor changes to the bill that would meet the basic  
1227 principle giving that flexibility to provide the same  
1228 environmental protection if States have regulations to  
1229 provide equivalent protection in different ways?

1230 Mr. {Roewer.} USWAG has always supported regulation by  
1231 the States of coal ash as a non-hazardous waste with a  
1232 performance-based approach, protecting the environment,  
1233 protecting the groundwater resource. So that would be  
1234 consistent with that view as long as it is protective of the  
1235 groundwater resource.

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1236 Mr. {Latta.} Thank you very much.

1237 Mr. Paylor, if I could ask, I saw in your testimony that  
1238 36 States have permitting for the disposal activities with 94  
1239 percent of those requiring groundwater monitoring. Do you  
1240 believe that most States want to implement their own permit  
1241 program rather than have the EPA do it for them?

1242 Mr. {Paylor.} In general States do prefer to have  
1243 oversight. It gives more a more direct connection to the  
1244 facility itself that is being regulated. We support the  
1245 Federal floor that gives consistency across States, and I  
1246 think most States would very much prefer to implement their  
1247 own permitting program.

1248 Mr. {Latta.} Thank you, and Mr. Forbeck, what do you  
1249 see as the role of States in protecting the environment, and  
1250 how does the draft legislation accomplish that goal?

1251 Mr. {Forbeck.} I think the States are the first line of  
1252 defense and the ones that are closer to the issues, and they  
1253 are the ones that should be enforcing the rule, and I think  
1254 the capability of the legislation, proposed legislation will  
1255 allow States to do that.

1256 Mr. {Latta.} Thank you. Mr. Paylor, in your opinion  
1257 will the draft legislation require every State to have a

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1258 permit program that contains the minimum Federal

1259 requirements?

1260 Mr. {Paylor.} It does not require every State to do  
1261 that, however, if the State does not have rules that meet the  
1262 Federal standard or opts out on their own, then the Federal  
1263 Government would step in and enforce those rules.

1264 Mr. {Latta.} If I could just follow up, again, Mr.  
1265 Paylor, in your written testimony you note that the draft  
1266 legislation lays out a 3 to 4-year process for compliance by  
1267 regulated facilities, but you note that the bill recognizes  
1268 implementation realities and still allows for action in  
1269 emergency situations. Could you explain that?

1270 Mr. {Paylor.} Each impoundment is going to have its own  
1271 site-specific concerns and just the logistics of identifying  
1272 what it takes to comply, and implementing that is going to  
1273 take some time, plus it is going to take a couple of years  
1274 for the States to get their rules in place. And so that just  
1275 recognizes the realities of the logistics to need to do that  
1276 and also allows for, if, in fact, you do have an emergency  
1277 situation, you move immediately.

1278 Mr. {Latta.} Okay. Thank you, and Mr. Roewer, I know  
1279 my time is running short here, but the rule requires

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1280 retroactive application of the location restrictions to  
1281 existing surface impoundments. Can you walk me through why  
1282 this is important?

1283 Mr. {Roewer.} We believe it is unfair to apply  
1284 retroactively location restrictions. We can't move these  
1285 impoundments. They are where they are. There are other  
1286 provisions in the legislation that would address the concerns  
1287 that are at the core of those locations restrictions. We  
1288 heard there is no prohibition of putting ash directly into an  
1289 aquifer. The bill contains groundwater protection standards,  
1290 groundwater monitoring requirements. So the goal of the  
1291 location restrictions to keep contaminants out of the aquifer  
1292 are met through other aspects of the legislation, and indeed,  
1293 the inspections, the safety assessments will all address  
1294 those same concerns that are being addressed through the  
1295 location restrictions. Other elements in the bill do that.

1296 Mr. {Latta.} Thank you. Mr. Chairman, my time has  
1297 expired, and I yield back.

1298 Mr. {Shimkus.} The gentleman yields back.

1299 The Chair now recognizes the gentleman from West  
1300 Virginia, Mr. McKinley, the author of the legislation, for 5  
1301 minutes.

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1302           Mr. {McKinley.} Thank you, Mr. Chairman. It is a draft  
1303 legislation, draft piece. We are going to be working with  
1304 this, and we are going to make some other modifications, I am  
1305 sure, to it. It is going to continue to evolve in this  
1306 process. It has to.

1307           But I am just curious, a lot of the comments--well, the  
1308 majority of the comments that have been made to date have all  
1309 been about location, drinking water, and the like. And--but  
1310 we haven't talked about the recycling, and so let us put this  
1311 all in context again.

1312           We generate for the crowd that may or may not understand  
1313 a lot of this issue, we generate about 150 million tons of  
1314 fly ash annually, but we recycle 40 percent of that. So all  
1315 of this last hour and a half or 2 hours we have been talking  
1316 about is the water. What about the recycling provision?  
1317 What are we going to do because the preamble to the rule is  
1318 troubling to me, and it should be troubling to everyone  
1319 because the preamble says this rule defers a final  
1320 determination until additional information is available.  
1321 That means that it could rule back to a C. They are D now.  
1322 It could be a C in the future. It could be 2 weeks from now,  
1323 it could be a year from now or 2 years from now. What we are

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1324 trying to do is codify that provision so that we remove the  
1325 uncertainty for the recyclers. Three-hundred and 16 thousand  
1326 jobs are at risk. If they make that flip that they have  
1327 just--in the rule and because it is an executive rule they  
1328 can do another executive rule or through the EPA rule to say  
1329 that it is a hazardous material, what happens to the  
1330 recyclable material? 316,000 jobs could be at risk. Who is  
1331 going to put in their house if--and remember, the science has  
1332 already been determined it is not a hazardous material. This  
1333 was done in 1993, and the year 2000. It said it is not a  
1334 hazardous material. It wasn't until this Administration said  
1335 I don't care what the science says. I want to treat it as a  
1336 hazardous material, and as a result we got uncertainty. I  
1337 don't think any of us would put drywall in our house or  
1338 concrete in our floors or in our concrete block or in our  
1339 bricks if we thought it was a hazardous material. So,  
1340 therefore, the EPA did their study and came back two times  
1341 and said it is un Hazardous. I am concerned about this  
1342 portion, the 40 percent. Certainly we are concerned about  
1343 the other 60 percent when it goes to a landfill, and we will  
1344 address that, and there is a lot of provisions that have been  
1345 in there, but let us make sure we have some debate here today

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1346 about the 40 percent that we are trying to recycle.

1347 So go back if we could get our panel, is that a concern,  
1348 that they could switch back because they say in the preamble  
1349 they defer a final determination until further information is  
1350 available? Is that a reasonable determination? Does that  
1351 cause certainty?

1352 Mr. Paylor?

1353 Mr. {Paylor.} Thank you. We support beneficial reuse,  
1354 which by definition tells you we think it is a Subtitle D  
1355 material. Whether that creates uncertainty is a great  
1356 question, but the ECOS States have uniformly supported  
1357 beneficial reuse of this material.

1358 Mr. {McKinley.} Mr. Forbeck, do you think it should be  
1359 recycled?

1360 Mr. {Forbeck.} Absolutely and--

1361 Mr. {McKinley.} Would you recycle it if it were  
1362 hazardous material?

1363 Mr. {Forbeck.} It would be a concern if it was a  
1364 hazardous material.

1365 Mr. {McKinley.} Concern.

1366 Mr. {Forbeck.} ASTSWMO has supported the beneficial  
1367 use, and that has been a concern in our past documentation of

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1368 this being labeled as a hazardous waste.

1369 Mr. {McKinley.} Okay. Mr. Roewer? Again, my question  
1370 is is this issue of uncertainty by virtue of them being able  
1371 to switch back to a C from a D?

1372 Mr. {Roewer.} Congressman, the language in the preamble  
1373 is very troubling.

1374 Mr. {McKinley.} Thank you.

1375 Mr. {Roewer.} The legislation would bring regulatory  
1376 certainty in this manner. Congress would be amending the  
1377 statute to establish a permit program to regulate, under  
1378 which the States would be regulating CCRs under Subtitle D,  
1379 the non-hazardous waste title of RCRA. That would provide  
1380 the certainty. EPA certainly could revise those 257 criteria  
1381 in the future, but the regulatory program is within Subtitle  
1382 D non-hazardous waste program. It does bring the certainty  
1383 that the recycling market needs.

1384 Mr. {McKinley.} Okay. Ms. Evans, would you support  
1385 recycling of the fly ash?

1386 Ms. {Evans.} Absolutely. Safe recycling of fly ash--

1387 Mr. {McKinley.} I am sorry. I have had a hard time  
1388 hearing you all day today.

1389 Ms. {Evans.} Oh, I am sorry.



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1390 Mr. {McKinley.} Much better.

1391 Ms. {Evans.} I am sorry about that.

1392 Mr. {McKinley.} Keep it in front of you.

1393 Ms. {Evans.} We do support safe recycling of coal ash,  
1394 and I would say that--

1395 Mr. {McKinley.} Do you think this preamble should be  
1396 tightened up a little bit, to codify, so that it is not set  
1397 up by the Administration or the EPA can just change that at  
1398 their whim?

1399 Ms. {Evans.} Well, I have two responses to that. One  
1400 is that it is impossible to ``flip''. The EPA, if they were  
1401 going to make a change, it is a long process full of public  
1402 participation, proposed rules. You can't see EPA making a  
1403 unilateral decision without your involvement, the involvement  
1404 of industry and public interest groups. So it is impossible  
1405 to flip. Whether EPA could change its mind, which I don't  
1406 think it will in the future, you know, is certainly inherent  
1407 in environmental regulation.

1408 But if we are talking about certainty, what I would  
1409 point to is the gross uncertainty that is created by the  
1410 bill--

1411 Mr. {McKinley.} I am sorry.

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1412 Ms. {Evans.} --to communities because there are--there  
1413 is no Federal floor under the bill for safeguards.

1414 Mr. {McKinley.} Thank you very much.

1415 Mr. {Shimkus.} The gentleman's time has expired.

1416 The Chair now recognizes the gentleman from Indiana, Mr.  
1417 Bucshon, for 5 minutes.

1418 Mr. {Bucshon.} Thank you, Mr. Chairman.

1419 Ms. Evans, do you believe we should burn coal to  
1420 generate electrical power?

1421 Ms. {Evans.} I believe that there are safer sources of  
1422 energy.

1423 Mr. {Bucshon.} That is a yes or no. Yes, you do  
1424 believe we should continue to use coal, or no, you think we  
1425 should just eliminate coal as a source of energy generation.

1426 Ms. {Evans.} Well, I think it is a more nuance  
1427 question. I support the transition to safer and more  
1428 environmentally-friendly sources of energy.

1429 Mr. {Bucshon.} Okay. Fair enough. And do you believe,  
1430 Ms. Evans, that State regulatory agencies, because just  
1431 through the tone of this, it is a Federal versus State issue  
1432 here, that do you believe that State regulatory agencies and  
1433 the citizens in individual States care about the health and

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1434 wellbeing of their citizens at the State level?

1435 Ms. {Evans.} I do. I believe State agencies care on the  
1436 whole.

1437 Mr. {Bucshon.} Yes.

1438 Ms. {Evans.} I think they do, but I think the record of  
1439 State agencies has not been good and--

1440 Mr. {Bucshon.} And the record, in fairness, the record  
1441 of the Federal Government has been better?

1442 Ms. {Evans.} The record of both agencies on coal ash  
1443 has been bad, but what we have seen in terms of--

1444 Mr. {Bucshon.} Not specifically the coal ash, just this  
1445 is a generalized question about State, I mean, it is a  
1446 Federalism issue. Basically the question that I have is a  
1447 State--because the implication that States and their agencies  
1448 and citizens in their States have to have the Federal  
1449 Government tell them specifically what to do or they will  
1450 violate, you know, environmental, they will damage the  
1451 environment, and they won't properly regulate things at the  
1452 State level I think is something that has been implied, which  
1453 I disagree with.

1454 So the question is, you know, as you know, at the State  
1455 level there is legislative pressure, there is citizen

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1456 pressure on the governors, the State legislators, the  
1457 regulators just as there is at the Federal level. So the  
1458 question I have basically is why do you feel that, you know,  
1459 that the Federal regulators would necessarily do a better job  
1460 than people are doing already at the States like Pennsylvania  
1461 has described, for example?

1462 Ms. {Evans.} All right. Well, what we see, and I think  
1463 the proof is in the evidence on the ground, EPA identified  
1464 157 cases of contamination from coal ash sites, sites which  
1465 are wholly under the authority of State agencies. We have  
1466 had three major spills since 2008, two of which were  
1467 horrendous in terms of their damage and their cost, and it is  
1468 lucky that no lives were taken. That record indicates that  
1469 State agencies are not doing their job as far as coal ash is  
1470 concerned.

1471 Mr. {Bucshon.} Why would this be because--

1472 Ms. {Evans.} And then--

1473 Mr. {Bucshon.} Wait. I am reclaiming my time because I  
1474 was a healthcare provider before, you probably don't know  
1475 that, and, you know, there is no system in healthcare, you  
1476 know, that we, when we provide healthcare to patients that is  
1477 perfect and every once in a while if you understand

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1478 statistics, things do occur. So I think the overall  
1479 implication that because there have been some disastrous  
1480 spills, in total agreement with you on that, that that means  
1481 that State regulators are not doing their job I think is an  
1482 unfair assessment and that--so the question is, again,  
1483 compared to this draft legislation, you know, and what the  
1484 EPA has done, why do you think that there are--do you think  
1485 that the Federal Government will be able to eliminate all the  
1486 spills and other problems that you have? Because  
1487 statistically, right, no matter what industry you are in,  
1488 there is nothing that is 100 percent.

1489 Ms. {Evans.} Right, but the damage does indicate that  
1490 on their watch the State agencies have failed. If you  
1491 compare the municipal solid waste arena where the State  
1492 agencies are--have an authorized program that has a Federal  
1493 floor and has a Federal standard of protection, you are not  
1494 seeing the same kind of contaminated groundwater near  
1495 municipal solid waste landfills as you are near coal ash  
1496 sites.

1497 So, yes, when there is a Federally-approved program,  
1498 when it has got specific standards, and when States have to  
1499 be authorized to have standards as stringent as the Federal

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1500 standards--

1501 Mr. {Bucshon.} Okay.

1502 Ms. {Evans.} --that can--

1503 Mr. {Bucshon.} Reclaiming my time, Mr. Roewer, can you  
1504 respond to what she just said?

1505 Mr. {Roewer.} Congressman, I think comparing a  
1506 situation prior to a Federal standard that would be  
1507 implemented through this legislation is inherently unfair.  
1508 If you are comparing previous performance by the State  
1509 regulatory agencies when there isn't a Federal regulation,  
1510 which is what this bill would do, just is not appropriate.

1511 Mr. {Bucshon.} Thank you. I yield back my time, Mr.  
1512 Chairman.

1513 Mr. {Shimkus.} The gentleman yields back his time.

1514 The Chair now recognizes the gentleman from Texas, Mr.  
1515 Flores, for 5 minutes.

1516 Mr. {Flores.} Thank you, Mr. Chairman. I thank the  
1517 panel for joining us today.

1518 Mr. Roewer, the draft legislation treats legacy sites in  
1519 the same way that the EPA did under the final rule, and that  
1520 is that inactive impoundments must either close within 3  
1521 years or become subject to all of the requirements to an

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1522 active disposal unit. In your opinion is 3 years already  
1523 enough time to close a surfaced impoundment?

1524 Mr. {Roewer.} Not in all cases. It is a rather  
1525 complicated process of dewatering the facility to ensure the  
1526 structural integrity of the unit to minimize impacts of  
1527 contaminants to groundwater, to ensure that you can place and  
1528 then place a cap on top of that unit. There may be climate  
1529 and permitting complications that would cause that period to  
1530 be longer. EPA recognized this in their rule when they  
1531 established a 5-year timeframe for closure of impoundments  
1532 with the possibility of extending that.

1533 Mr. {Flores.} Uh-huh. That, you know, building on that  
1534 then the legislation that Mr. McKinley drafted give the  
1535 implementing agency the authority to grant a 2-year  
1536 extension. Why is that extension there, sir? I think you  
1537 already answered that. Sometimes you can't--

1538 Mr. {Roewer.} Absolutely, and, again, I will point to  
1539 the fact that the agency for active impoundments provided for  
1540 a 5-year timeframe with the ability to extend that closure  
1541 time period by up to 10 additional years. The closure  
1542 process for inactive units and active units can be quite  
1543 similar. So we do need additional time.

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1544 Mr. {Flores.} Let us go ahead and drill into that. I  
1545 think you had, you said something to the extent that you  
1546 would have to demonstrate, your agency would have to  
1547 demonstrate why that was needed. Tell me--give me an example  
1548 of the demonstration.

1549 Mr. {Roewer.} Again, it is not a guarantee that we get  
1550 that extension. It is something that the owner and operator  
1551 would have to petition the implementing agency to get. You  
1552 would have to demonstrate that the factors are beyond  
1553 control, the extension would be the same factors in EPA's  
1554 rule to extend the time period; climate, weather, permitting  
1555 conditions, permitting situations that require additional  
1556 time.

1557 Mr. {Flores.} Okay.

1558 Mr. {Roewer.} And you also have to demonstrate that the  
1559 facility you are closing isn't a threat for release or a  
1560 spill.

1561 Mr. {Flores.} Uh-huh. In some cases, I mean, going to  
1562 an inactive facility and starting the process to seal it  
1563 could be more disruptive to the environment than to take your  
1564 time and do it the right way.

1565 Mr. {Roewer.} We certainly need to make sure that the--



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1566 all facilities, whether they are active facilities we are  
1567 capping or active facilities are closed in a safe and  
1568 environmentally-sound manner.

1569 Mr. {Flores.} Okay, and Mr. Forbeck, to follow up on  
1570 that, in your opinion does the draft legislation deal with  
1571 inactive impoundments in the same manner as the final rule?

1572 Mr. {Forbeck.} It does deal with it very similar, but  
1573 it does allow some extensions based on the conditions that  
1574 Mr. Roewer expressed.

1575 Mr. {Flores.} And those are important conditions. I  
1576 mean--

1577 Mr. {Forbeck.} Yes, they are.

1578 Mr. {Flores.} --disrupting an inactive facility  
1579 prematurely without adequate planning could be more harmful  
1580 for the environment. Mr. Forbeck, did the final rule require  
1581 regulated entities to provide financial assurance for  
1582 corrective action, closure, and post-closure of coal ash  
1583 disposal units?

1584 Mr. {Forbeck.} The EPA rule did not.

1585 Mr. {Flores.} Okay, and so doesn't this legislation  
1586 actually go further than the final rule by requiring  
1587 financial assurance not just for active disposal units but

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1588 also for inactive surface impoundments?

1589 Mr. {Forbeck.} Yes, it does, and we feel that is a very  
1590 important component of this--

1591 Mr. {Flores.} Okay.

1592 Mr. {Forbeck.} --legislation.

1593 Mr. {Flores.} Thank you for your--for joining us today.

1594 I yield to any other Republican member the balance of my

1595 time, or I will yield back. Okay. I yield back.

1596 Mr. {Shimkus.} The gentleman yields back.

1597 The Chair now recognizes the Ranking Member of the full  
1598 committee, Mr. Pallone, for 5 minutes.

1599 Mr. {Pallone.} Thank you, Mr. Chairman.

1600 I wanted to first ask Mr. Paylor, you mentioned earlier,  
1601 I wasn't here, I was at the other hearing, but you mentioned  
1602 earlier that citizen suits would be the sole method of  
1603 enforcement under the EPA rule, but EPA strongly encouraged  
1604 States to incorporate the new Federal criteria into their own  
1605 State Solid Waste Management Plans. So do you expect at  
1606 least some States will incorporate the new Federal standards  
1607 into State programs, and if States adopt these requirements,  
1608 do you expect them to enforce the requirements?

1609 Mr. {Paylor.} It is certainly possible that some States

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1610 would adopt those. There would not be a permitting  
1611 mechanism, however, and it would be subject to a one-size-  
1612 fits-all situation. So there might be some spotty  
1613 enforcement by States, but as a whole the one-size-fits-all  
1614 approach to Federal regulation would, in fact, leave citizen  
1615 suits as the primary mechanism.

1616 Mr. {Pallone.} Did you want to comment on that, Ms.  
1617 Evans?

1618 Ms. {Evans.} Well, I think we have--I have read  
1619 testimony from ASTSWMO that indicates that States following  
1620 the EPA rule signing, that States were ready and willing to  
1621 implement those programs within the States, and States  
1622 certainly can implement permit programs. The requirements  
1623 have to be consistent with the EPA rule, but they certainly  
1624 can tailor permits and use their authority to run coal ash  
1625 permit programs subsequent to the EPA rule.

1626 Mr. {Pallone.} All right, and then I want to continue  
1627 with you, Ms. Evans. EPA's final rule published online in  
1628 December set Federal floor standards for the safe disposal of  
1629 coal ash for the first time, and the rule has been decades in  
1630 the making. The final product was a result of a transparent  
1631 public process and input from stakeholders including

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1632 significant input from the groups represented on today's  
1633 panel. The rule advances public health protection and  
1634 protects beneficiary use.

1635 But this bill before us would undermine that Federal  
1636 floor in alarming ways in my opinion by leaving out important  
1637 requirements and allowing States to enforce alternative  
1638 requirements that might be less productive.

1639 So do you agree that this bill would undermine the  
1640 Federal floor established by the final rule?

1641 Ms. {Evans.} This bill absolutely undermines the  
1642 Federal floor and does not, and I have to repeat, does not  
1643 incorporate the standards in EPA's rule. It incorporates  
1644 some of the standards but, again, leaves definitions up to  
1645 the States, which can radically alter the implementation and  
1646 the scope and the stringency of the program.

1647 Mr. {Pallone.} And what are the most important  
1648 requirements that would be left to State discretion?

1649 Ms. {Evans.} Well, you have got, you have eliminated,  
1650 as I have said before, you have eliminated the requirement to  
1651 make public--I am sorry, make data publicly accessible in a  
1652 way that is meaningful for the public. This includes data  
1653 about the quality of their drinking water, the assessment of

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1654 wells, and you also have eliminated the requirement for  
1655 keeping coal ash away from aquifers. You have taken away the  
1656 responsibility, the requirement for States to address spills,  
1657 you have taken away the requirement for industry to address  
1658 releases of hazardous substances. The important  
1659 considerations are almost too numerous to name.

1660 I do want to flag one, though, because it is so  
1661 important after the collapse of the Dan River pond. These  
1662 inactive sites which have not been attended to, you know,  
1663 sometimes for over a decade, that are sitting often close to  
1664 rivers or to sources of drinking water, the requirements that  
1665 pertaining to the closure of inactive sites are not  
1666 equivalent. I am hearing again and again that people think  
1667 that they are, but there are important differences in the  
1668 closure of legacy sites, not only the extension of time in  
1669 which to close them but what regulations apply after 3 years.  
1670 None according to the bill. Everything according to EPA.

1671 And furthermore, utilities can very easily get out of  
1672 all the closure requirements simply by using that old  
1673 abandoned pond for disposal of anything. If you dispose of  
1674 any non-coal ash waste in a legacy pond, it is not subject to  
1675 the closure requirements, and that could be a really

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1676 important and dangerous loophole for the inactive sites.

1677 Mr. {Pallone.} Let me just ask one last question,  
1678 whether in your experience State regulation of coal ash has  
1679 been effective or protective of public health.

1680 Ms. {Evans.} Absolutely not and CRS came to that same  
1681 conclusion when they looked at this. You know, it was EPA's  
1682 conclusion the holes were immense in terms of failure to  
1683 require inspections of high-hazard dams, failure to require  
1684 even monitoring of landfills and ponds, failure to require  
1685 liners for these ponds, and the failure to require these  
1686 basic, basic safeguard for waste disposal is what has  
1687 resulted in the spills and the releases and all the damage  
1688 cases throughout the United States.

1689 Mr. {Shimkus.} The gentleman's time--

1690 Mr. {Pallone.} Thank you. Thank you, Mr. Chairman.

1691 Mr. {Shimkus.} And I would, again, make the point that  
1692 there is no CRS report on this bill. You are talking about  
1693 previous CRS reports and previous Congresses with a different  
1694 implication. So to compare those is not proper.

1695 The Chair recognizes the gentleman from North Carolina,  
1696 Mr. Hudson, for 5 minutes.

1697 Mr. {Hudson.} Thank you, Mr. Chairman, and thank you to

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1698 the panelists for being here today. This is an issue the  
1699 people of North Carolina are following very closely. There  
1700 has been a lot of news reports out of North Carolina dealing  
1701 with coal ash, and it is important that we get this right.

1702 First of all, first and foremost, we got to protect our  
1703 environment, but secondly we have got to get the balance  
1704 right when it comes to certainty of the regulations, and so I  
1705 would like to go back and revisit that issue with Mr. Roewer.

1706 Does the draft legislation provide regulatory certainty  
1707 for your member companies regarding whether EPA can revisit  
1708 the determination in the future and regulate coal ash under  
1709 Subtitle C?

1710 Mr. {Roewer.} The legislation provides certainly by  
1711 establishing that permit program under Subtitle D.

1712 Mr. {Hudson.} Okay, and if an owner, operator misses  
1713 the deadline to complete a safety factor assessment or fails  
1714 to meet the initial safety factor assessment criteria, the  
1715 final rule requires that the impoundment cease receipt of  
1716 coal ash within 6 months and close within 5 years. Can you  
1717 please explain why that is a problem, and does the draft  
1718 legislation address this issue?

1719 Mr. {Roewer.} In some cases the design and

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1720 implementation of an engineering solution to allow a facility  
1721 to meet that safety factor assessment may take longer than  
1722 the 18 months EPA has provided in this rule. We support the  
1723 application of structural integrity criteria to these units.  
1724 We need in some cases additional time. We want to make sure  
1725 these units can continue to operate. We are not asking that  
1726 unsafe units be allowed to continue to operate but that we be  
1727 given time to ensure that these units meet the safety  
1728 factors.

1729 Mr. {Hudson.} I think you have addressed that maybe  
1730 with one of my other colleagues, but what are some of the  
1731 factors that make one situation take longer than another, for  
1732 example?

1733 Mr. {Roewer.} One of the complicating factors is these  
1734 facilities are subject to permits by State regulatory  
1735 agencies, and you got to get the approval from the State  
1736 regulatory agency before you can do any work on that  
1737 facility, and that can be a lengthy process.

1738 Mr. {Hudson.} So in your testimony you need that  
1739 flexibility?

1740 Mr. {Roewer.} Absolutely. The legislation provides  
1741 additional time for us to come into compliance with the



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1742 safety factors, and it is very important the legislation does  
1743 that.

1744 Mr. {Hudson.} All right. Thank you for that.

1745 Mr. Chairman, I would be happy to yield to you if you  
1746 would like to use the rest of this time.

1747 Mr. {Shimkus.} No. I want you to yield back, and we  
1748 will go to Mr. Johnson.

1749 Mr. {Hudson.} All right. Thank you.

1750 Mr. {Shimkus.} The gentleman yields back his time.

1751 The Chair recognizes the gentleman from Ohio, Mr.  
1752 Johnson, for 5 minutes.

1753 Mr. {Johnson.} Thank you, Mr. Chairman, and I thank the  
1754 panel for being here today, too. I associate myself with the  
1755 comments of my colleague from North Carolina. This is an  
1756 issue that the people of the great State of Ohio are  
1757 monitoring very, very closely. We have a tremendous number  
1758 of families that work in the coal industry that are dependent  
1759 upon the coal industry for their livelihoods to support their  
1760 families, and Ohio still gets in excess of 60 percent of its  
1761 energy from coal. So it is a very, very important issue for  
1762 people in my district.

1763 Mr. Forbeck, the draft legislation incorporates the

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1764 definitions from the final rule but allows the States to make  
1765 changes that may be necessary to tailor the requirements to  
1766 the needs of the States but only if the State demonstrates  
1767 that it has a reasonable basis for making the change. In  
1768 your opinion will the States be able to arbitrarily change  
1769 the definitions, and does this minimize the protectiveness of  
1770 a State Permit Program?

1771 Mr. {Forbeck.} No. I do not think the States can  
1772 arbitrarily change the definitions. It says it has to have a  
1773 reasonable basis for those changes. An example under  
1774 Pennsylvania, for example, where coal ash is defined  
1775 differently than what is under the proposed legislation,  
1776 doesn't include flue gas desulphurization sludge, however,  
1777 that FGD and the coal ash is included under our term,  
1778 residual waste. That residual waste is governed in the same  
1779 manner as the coal ash is with the protective standards.

1780 Mr. {Johnson.} So is it important then in your opinion  
1781 that States be able to adjust the definitions if necessary?

1782 Mr. {Forbeck.} In my opinion, yes.

1783 Mr. {Johnson.} Okay. Mr. Forbeck, also, will the draft  
1784 that you have read, the draft legislation, would that require  
1785 States to make information like groundwater monitoring data,

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1786 emergency action plans, fugitive dust control plans, and the  
1787 results of structural stability assessments available to the  
1788 public?

1789 Mr. {Forbeck.} Yes, it will.

1790 Mr. {Johnson.} Okay. We had heard some concerns about  
1791 that. I wanted to clarify that. So all this data is going  
1792 to be made available to the public?

1793 Mr. {Forbeck.} That is correct, sir.

1794 Mr. {Johnson.} Right. In your opinion as an  
1795 experienced State regulator, do you think location  
1796 restrictions should be imposed retroactively?

1797 Mr. {Forbeck.} I think it is important that the  
1798 location restrictions are looked at at all facilities,  
1799 however, there should be availability for corrective action  
1800 and for enclosure if issues do occur. It is not possible, as  
1801 I said, I think, earlier to simply move a facility out from a  
1802 location standard. If there is reason to or there are issues  
1803 that has been, that has come up from these, then maybe that  
1804 is corrective action. If there isn't, which we have seen in  
1805 sites in our region, we have had groundwater monitoring, et  
1806 cetera, around a lot of these impoundments, that they are  
1807 operating safely, even though they might not meet the

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1808 location standards and have been grandfathered.

1809 Mr. {Johnson.} Okay. Thank you.

1810 Mr. Roewer, the draft legislation also treats legacy  
1811 sites in the same way EPA did under the final rule. Inactive  
1812 impoundments must either close within 3 years or become  
1813 subject to all of the requirements applicable to an active  
1814 disposal unit.

1815 In your opinion is 3 years always enough time to safely  
1816 close a surface impoundment?

1817 Mr. {Roewer.} No, it is not. It is a very complicated  
1818 process, and we need to make sure that that closure is  
1819 environmentally sound and safe. It can take longer than 3  
1820 years given the size of the unit, the requirements of  
1821 dewatering it, and then constructing the cap in place.

1822 Mr. {Johnson.} Okay. The draft legislation gives the  
1823 implementing agency the authority to grant an extension of up  
1824 to 2 more years to complete closure. Why is the extension  
1825 necessary? You just--

1826 Mr. {Roewer.} That extension is necessary because we  
1827 can't always get it done within that 3-year time period. We  
1828 want to close these facilities safely, and that extension  
1829 would allow us the time necessary to do that.

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1830           Mr. {Johnson.} Okay, but certainly we are not going to  
1831 do these extensions willy-nilly. What would your members  
1832 have to demonstrate in order to request an extension from the  
1833 implementing agency, and specifically, if you could focus on  
1834 the requirement that your members demonstrate that there is  
1835 no immediate threat of release?

1836           Mr. {Roewer.} The agency--EPA in their rule has  
1837 established the ability to extend the closure process for  
1838 active units, and we would have to show the same reasons  
1839 because of climate, size, et cetera, that we are required  
1840 under the provisions to allow an extension of the closure  
1841 timeframe for active units for inactive units.

1842           In addition, we would have to show that the facility is  
1843 not a threat of immediate release. So we are not talking  
1844 about allowing unsafe facilities to continue to stay there.  
1845 We are asking additional time to safely close these  
1846 facilities.

1847           Mr. {Johnson.} Okay. Thank you very much.

1848           Mr. Chairman, I yield back. Thank you.

1849           Mr. {Shimkus.} The gentleman's time has expired.

1850           Just a reminder, this is a legislative hearing on draft  
1851 legislation, and so as Mr. McKinley said, people who have

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1852 comments or concerns can still address myself, Mr. McKinley,  
1853 and members of this committee as we move forward.

1854           The hearing is recessed until Tuesday, March 24, at 2:00  
1855 p.m. in Room 2123. The witness will be EPA Assistant  
1856 Administrator, Matthew Stanislaus, a good friend of the  
1857 committee who has been here numerous times.

1858           With that I recess this hearing.

1859           [Whereupon, at 11:55 a.m., the subcommittee recessed, to  
1860 reconvene at 2:00 p.m., March 24, 2015.]