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MARKUP OF H.R. _____, IMPROVING COAL COMBUSTION

RESIDUALS REGULATION ACT OF 2015

TUESDAY, MARCH 24, 2015

House of Representatives,

Subcommittee on Environment and the Economy,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 5:05 p.m., in Room 2123, Rayburn House Office Building, Hon. John Shimkus, [chairman of the subcommittee] presiding.

Present: Representatives Shimkus, Latta, Upton (ex officio), Tonko, Green, and Pallone (ex officio).

Staff Present: Nick Abraham, Legislative Clerk; Karen Christian, General Counsel; Howard Kirby, Legislative Clerk; Peter Kielty, Deputy General Counsel; David McCarthy, Chief Counsel, Environmental/Economy; Paul Nagle, Chief Counsel, CMT; Tina Richards,

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Counsel, Environment; Chris Sarley, Policy Coordinator, Environment & Economy; Macey Sevcik, Press Assistant; Jessica Wilkerson, Legislative Clerk; Jen Berenholz, Minority Chief Clerk; Jeff Carroll, Minority Staff Director; Jacqueline Cohen, Minority Senior Counsel; Tim Robinson, Minority Chief Counsel; and Ryan Schmit, Minority EPA Detailee.

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Mr. Shimkus. The committee will come to order.

And the chair recognizes himself for an opening statement.

In December of last year EPA put out its final rule for coal combustion residuals. In January we heard from the States and the utilities about some of the problems with the implementation of the final rule, in particular, the fact that the rule is self-implementing. The only mechanism for oversight and enforcement is citizen suits. And state permit programs do not operate in lieu of the final rule.

To address those concerns, we went back to the drawing board to find a solution that creates enforceable state permits, but also takes into account the sound technical standards the EPA established for coal ash in the final rule.

The result of that effort was a discussion draft that will ensure every State has a coal ash permit program containing minimum Federal standards that incorporate the requirements from EPA's final rule.

We continue to work on a bipartisan basis with our colleagues in the House and our friends in the Senate. Last week we heard from the States and utilities, and today we heard from EPA about the discussion draft. We also received technical assistance from EPA, which they offered again today.

The bill we will vote on this week reflects careful consideration of the comments and concerns we heard from stakeholders and EPA regarding the discussion draft. The bill requires every State to have a permit program, and every permit program will contain minimum

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requirements based on the EPA's final rule.

Permit programs will address inactive surface impoundments in essentially the same manner as EPA dealt with them in the final rule in that they will have to be closed within 3 years or 5 years from the date of enactment or they will be regulated like an active disposal unit.

We heard concerns that timing was not clear regarding when inactive surface impoundments that failed to meet the closure deadline would have to comply with all permit program requirements.

The bill we will vote on tomorrow clarifies all of the permit program requirements will apply to inactive surface impoundments the day after they fail to complete closure by the deadline.

The compliance timeframes in the discussion draft are comparable to the deadlines in the final rule, but concern was expressed at the hearing that there were certain requirements in the final rule that would take effect on a significantly shorter timeframe than under the legislation.

The bill we will vote on changes the deadlines for certain requirements and requires owners and operators to prepare fugitive dust control plans, begin conducting structural stability inspections, comply with the requirements for surface water protection and recordkeeping, and install a permanent marker on all surface impoundments within 8 months from the date of enactment, which makes compliance with these requirements directly in line with the timeframes

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for compliance under the final rule.

The bill expressly protects the ability to bring citizen suits by creating enforceable permits. It eliminates citizen suits as the only mechanism for enforcement of EPA's requirements for coal ash.

The bill requires States to make information regarding groundwater monitoring corrective action remedies and structural stability, as well as the emergency action plans, fugitive dust control plans, and certifications regarding closure available to the public.

States must also make final permit determinations publicly available and make all documents for permit determinations not only available to the public, but also provide an opportunity for review and comment.

Because the requirements in the final rule will be implemented through state permit programs, the bill allows the implementing agency to provide certain flexibility that takes into account site-specific risk-based factors.

We heard at the hearing that there is no standard of protection in this bill and that States can't or won't do the right thing with respect to regulating the disposal and reuse of coal ash. We heard, by allowing States to incorporate the same flexibility they employ in other RCRA permit programs, that we are weakening the requirements of the final rule.

The fact is, however, that EPA relies on the States for the implementation and enforcement of RCRA. And we heard from the

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Environmental Council of the States and the Association of State and Territorial Solid Waste Management Officials at our hearing States welcome the new minimum Federal requirements and are up to the task of regulating coal ash.

This is a good bill. EPA developed technical requirements for coal ash that are protective of human health and the environment. This bill utilizes those requirements and makes them part of an enforceable permit. I urge my colleagues to vote yes.

[The prepared statement of Mr. Shimkus follows:]

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

Mr. Tonko. Thank you, Mr. Chair.

I realize that a number of our colleagues have worked on the issue of coal ash disposal for a number of years. The attention to this issue is warranted by the fact that coal ash is one of the largest industrial waste streams produced in our country, and the attention is needed because of the significant damage to communities, to personal property, to businesses, individuals, and the environment caused by spills from coal ash disposal facilities that were poorly designed and poorly maintained.

For many years the Environmental Protection Agency had not acted to address the many issues raised by stakeholders and there was ongoing uncertainty about the status of coal ash and just how the Agency might proceed to regulate it.

That was then, and this is now. The situation changed with the publication of EPA's final rule on the disposal of coal ash last December. While each of us might prefer some different approach to the one taken by the Agency, the rule is a positive step that provides certainty to the regulated community and reassurance to the communities near coal ash facilities.

EPA is to be commended for its extensive process of public engagement on this issue. The Agency sorted through over 450,000 public comments submitted during the public comment period on the rule

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and held eight public hearings in communities across our country.

EPA's rule is responsive to industry concerns that classifying coal ash as hazardous waste would harm coal ash recycling efforts that utilize coal ash in new materials and new products, and it is responsive to the concerns of public health and environmental advocates.

For the first time we have Federal standards for coal ash disposal sites that will set a floor, a floor of protection for all communities. With this rule, States and utilities can begin to address deficiencies in disposal operations. Communities will have access to information about coal ash disposal facilities in their areas, and operators of these facilities will be held accountable for damage caused by improper waste handling.

Ultimately, the only real test of whether this rule takes the correct approach or not is by implementing it. The bill before us claims to mimic the protections offered by EPA's final rule, but that claim is in serious doubt.

The claims made about the rule that it may lead to dual enforcement or excessive lawsuits may prove to be true or prove to be not true. The rule may not provide sufficient protection for public health and the environment. At this point, that is all speculation.

If there are problems with this rule, Congress certainly retains the right to legislate a solution to any problem that unfolds. But legislating at this point, especially through a bill that does not provide uniform standards for all disposal facilities, comprehensive

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monitoring and transparency in facility operations, is premature. Changes in regulation or in law take a long time, and hitting the restart button now will only lead to continued uncertainty and continued risk. We have had far too much of those already.

I do not think we should reject the Agency's effort out of hand. This rule rests on the extensive public engagement and negotiation process and years of work invested by the interested parties and the Agency. The rule should move forward. We should give this approach an opportunity to work and respect the time and the effort of all the stakeholders who participated in this process.

The Improving Coal Combustion Residuals Regulation Act is premature, and we do not need legislation that simply codifies the current state-based system that has not worked. At this point I cannot support this bill.

And, with that, Mr. Chair, I yield back.

[The prepared statement of Mr. Tonko follows:]

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Mr. Shimkus. The gentleman yields back his time.

The chair now recognizes the gentleman from Ohio, Mr. Latta, for 3 minutes.

Mr. Latta. Well, thank you, Mr. Chairman. And thanks for holding this meeting today for opening statements.

I am pleased that we are going to be marking up the Combustion Residuals Regulation Act of 2015. This important bill will provide greater clarity and confidence on coal ash regulation and disposal.

Under the EPA's final coal ash rule, States and owner/operators have expressed concern about two sets of requirements, self-limitation and enforcement being through citizen suits most likely leading to different regulatory interpretations and potential for further Federal regulation.

In States like Ohio, coal provides just under 70 percent of net electricity generation. The EPA has previously completed two regulatory determinations that coal ash is not warranted under Subtitle C as hazardous.

Given this and the numerous regulations being placed on the coal and energy industries, I believe it is imperative that coal ash is regulated in a safe manner and that it provides clarity and greater confidence so we can continue to ensure our national energy growth and affordable energy for all Americans. The Improving Coal Combustion Residuals Regulation Act of 2015 achieves these goals.

Furthermore, witnesses have testified before this subcommittee

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about States being in the best position to implement permit programs for their respective States, and I am pleased that the legislation takes this important approach.

I urge my colleagues to support the bill.

And, Mr. Chairman, I yield back. Thank you very much.

[The prepared statement of Mr. Latta follows:]

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Mr. Shimkus. Gentleman yields back his time.

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

Mr. Pallone. Thank you, Mr. Chairman.

This subcommittee has now held 3 days of hearings this Congress on the important topic of coal ash, including a hearing with EPA just this afternoon. Unsafe disposal of coal ash presents serious risk to human health and the environment, and this subcommittee should continue to hold hearings to understand these risks.

In January, the subcommittee heard from EPA and stakeholders about the Agency's new final rule. After years of debate at the Agency and in Congress over the proper regulation of coal ash, the Agency had reached a verdict.

EPA's final rule reflects the tremendous effort, and it will for the first time provide the framework for addressing this serious environmental problem. This rule is the product of a robust public process, including field hearings and several rounds of public comment. It reflects the input of over 450,000 commentators, including States, industry groups, environmental groups, and individual concerned citizens.

In the end, the EPA finalized a rule that addressed almost all of the concerns this subcommittee has heard about for years. Those in the coal ash recycling industry who make things like concrete and wallboard, substituting coal ash for virgin material, had sought a

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non-hazardous rule under Subtitle D of RCRA, and that is what they got. Those in the electric utility industry wanted a Subtitle D rule that would not require them to retrofit their existing impoundments with liners, and that is what they got. States wanted a mechanism to set up their own programs to implement Federal standards and to have EPA approve them, and that is what they got.

The only stakeholders who really did not get what they sought in this rule were the environmental and public health advocates who wanted a stronger Subtitle C rule with a requirement that the giant unlined pits currently receiving this dangerous waste be retrofitted to protect groundwater.

The testimony at the hearing last week and earlier today reflected those truths. That testimony also raised serious concerns about this bill and the ways it would undermine public health protections. But still we find ourselves just 3 hours later marking up the legislation.

This new proposal retains the problems of past proposals which have been discussed extensively in this subcommittee. Previous CRS reports on those proposals are still relevant simply because the problems cited have not been addressed in the new bill before us.

This bill would create a new model of delegation of States with a sharply curtailed role for EPA. It does not include a legal standard protection, a substantive EPA role in reviewing state programs or EPA backstop enforcement authority.

The bill also falls short in terms of the technical requirements

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for coal ash disposal because necessary health protections included in the EPA's final rule are left to state discretion or left out entirely.

Groundwater monitoring and protection, closure requirements, cleanup requirements, all could be weaker under this bill than under the final rule. If anything, we should be strengthening the protections in the final rule, not weakening them.

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

I yield back, Mr. Chairman.

[The prepared statement of Mr. Pallone follows:]

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Mr. Shimkus. Gentleman yields back his time.

Chair now recognizes the gentleman from Texas, Mr. Green, for 3 minutes.

Mr. Green. Thank you, Chairman Shimkus and Ranking Member Tonko. Thank you for holding today's markup on the Improving Coal Combustion Residuals Regulation Act.

Our subcommittee has looked at this issue of coal ash for the past several Congresses, and I have long argued that the coal ash needs to be regulated under Subtitle D of the Resource Conservation Recovery Act, RCRA, which would ensure that the recycling of coal ash continues without disruption.

The beneficial reuse of coal ash is responsible for tens of thousands of jobs throughout the country and helping our economy and our environment. I supported bipartisan legislation in previous Congresses that would ensure that coal ash be regulated under Subtitle D, and I am happy to see that the EPA, through its rigorous multi-year rulemaking process, agreed that coal ash should be regulated as a nonhazardous waste.

I do have some concerns with the final rule. And I respect the views of EPA who testified earlier today on this matter, but I believe that a state-based permit program would be the best way to go forward. State-based permitting would be more sensitive to the unique conditions found in the individual States and avoid the final rule's citizen suit-only enforcement mechanism. With a state-permitting program,

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the authorizing agency would be empowered and enforce and have an immediate impact on the health and safety of the citizens it is charged to protect.

I will support the bill during our subcommittee markup for these reasons, as well as the importance of moving the process forward. However, I do have some reservations with the draft. Stakeholders have testified that the draft would weaken health and safety protections contained in the final rule, include public disclosure requirements.

Before this legislation is considered before the full committee, these concerns need to be addressed. And I hope my friends in the majority will be open to working with me and like-minded colleagues in making this effort truly bipartisan.

Again, thank you, Mr. Chairman and ranking member. And I yield back the balance of my time.

[The prepared statement of Mr. Green follows:]

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Mr. Shimkus. Gentleman yields back the balance of his time.

Chair reminds members that, pursuant to the committee rules, all members' openings statements will be made part of the record.

Are their further opening statements?

Seeing none, the chair calls up the committee print and asks the clerk to report.

The Clerk. Discussion draft. To amend Subtitle D of the Solid Waste Disposal Act to encourage recovery and beneficial use of coal combustion residuals and establish requirements for the proper management and disposal of coal combustion residuals that are protective of human health and the environment.

Mr. Shimkus. Without objection, the first reading of the bill is dispensed with and the bill will be open for amendment at any point. So ordered.

[The information follows:]

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Mr. Shimkus. For the information of members, we are now on the committee print that the subcommittee will reconvene at 9:30 tomorrow morning. And I remind members that the chair will give priority recognition to amendments offered on a bipartisan basis.

I look forward to seeing you all tomorrow.

Without objection, this subcommittee stands in recess.

[Whereupon, at 5:23 p.m., the subcommittee was adjourned.]