U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

April 10, 2015

TO: Members, Committee on Energy and Commerce

FROM: Committee Majority Staff

RE: Committee Markup

The Committee on Energy and Commerce will meet in open markup session on April 14 and 15, 2015, in 2123 Rayburn House Office Building. The Committee will consider the following:

- H.R. ____, Improving Coal Combustion Residuals Regulation Act of 2015;
- H.R. 906, a bill to Modify the Efficiency Standards for Grid-Enabled Water Heaters; and,
- H.R. ____, Data Security and Breach Notification Act of 2015.

On Tuesday, April 14, 2015, the Committee will convene at 5:00 p.m. in 2123 Rayburn for opening statements only. It will reconvene on Wednesday, April 15, 2015, at 10:00 a.m. in 2123 Rayburn.

In keeping with Chairman Upton's announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments by email to Peter.Kielty@mail.house.gov. Any information with respect to the amendment's parliamentary standard (e.g., its germaneness) should be submitted at this time as well.

I. H.R. ____, IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT OF 2015

A. Background

Generally, the management and disposal of waste is regulated by States under provisions of the Solid Waste Disposal Act (RCRA, 42 U.S.C. §6901 et seq.). Subtitle C of RCRA created a hazardous waste management program that, among other provisions, directs the Environmental Protection Agency (EPA) to develop criteria for identifying the characteristics of "hazardous" waste and to develop waste management criteria applicable to such waste. Subtitle D of RCRA established State and local governments as the primary planning, regulating, and implementing entities for the management of solid waste (i.e., household garbage (or municipal solid waste) and non-hazardous industrial solid waste).

The Solid Waste Disposal Act Amendments of 1980 (Public Law 96-482) contained provisions – known as the Bevill Amendments – that prevented EPA from imposing hazardous waste regulatory requirements for fossil fuel combustion (FFC) waste until EPA studied the issue to determine whether regulation of FFC waste under Subtitle C was warranted. In its 1993 and 2000 regulatory determinations, EPA considered the requisite factors and determined that regulation of FFC wastes, generally, and coal combustion residuals (CCR), specifically, was not warranted under Subtitle C.

B. Current Law

On June 21, 2010, EPA promulgated a proposed rule (75 FR 35128) setting out 2 regulatory options for management of CCRs. Under the first proposal, EPA would reverse the 2000 regulatory determination and regulate CCR as a hazardous waste under Subtitle C. Under the second proposal, EPA would continue to follow the findings of the 2000 regulatory determination, and CCR would remain classified as a non-hazardous waste regulated under Subtitle D.

EPA released a pre-publication version of the final rule regulating coal ash on December 19, 2014 (Final Rule).[1] The Final Rule regulates coal ash under Subtitle D and will become effective 6 months from the date of its publication in the Federal Register. While EPA selected the Subtitle D regulatory option for coal ash, the Agency makes clear in the preamble to the Final Rule that it is still in the process of evaluating whether to reverse its Bevill regulatory determination and regulate coal ash under Subtitle C of RCRA.

As with the Proposed Rule, the Final Rule is self-implementing, meaning that it does not require issuance of permits. Rather, owners and operators of facilities regulated by the Final Rule must comply with the requirements without the interaction of a regulatory authority by certifying compliance with the requirements. EPA notes in the preamble to the Final Rule that if a State revises its Solid Waste Management Plan to incorporate the Federal requirements, facilities in compliance with an EPA-approved State solid waste management plan for coal ash that is identical to or more stringent than the Final Rule should be viewed as meeting or exceeding the Federal criteria. However, there is no mechanism to legally incorporate the Federal requirements into State programs. Therefore, even if a State adopts the Final Rule and incorporates the criteria into the State's solid waste management program, the Final Rule remains in place as an independent set of requirements that must be met. Also, the rule is promulgated under Subtitle D. As such, it does not require regulated facilities to obtain permits, does not require the States to adopt and implement the new rules, and cannot be enforced by EPA. The rule's only compliance mechanism is for a State or citizen group to bring a RCRA citizen suit in Federal district court under section 7002 of that statute against a facility that is alleged to be in noncompliance with the new requirements.

C. Summary of Legislation

The bill establishes State permit programs for coal ash, and it incorporates as the

[1] http://www2.epa.gov/coalash/pre-publication-version-coal-combustion-residuals-final-rule

minimum Federal requirements, the technical standards and requirements that EPA developed in the Final Rule as being protective of human health and the environment.

Every State Will Have a Permit Program

The bill authorizes States to adopt and implement coal combustion residuals permit programs that include the minimum requirements set out in the legislation. The bill allows States to choose whether to implement a coal combustion residuals permit program. If a State currently is authorized to implement a permit program under section 3006 or section 4005 of RCRA, the State already will have demonstrated to EPA the ability to implement a permit program under RCRA and will be authorized immediately to implement a coal ash permit program. If a State opts not to implement a permit program, then EPA will implement a program for that State. States would be required to notify EPA within 6 months of enactment whether or not they intend to implement their own coal ash permit program. States would be required to provide EPA details of the laws, regulations, and other features of their permit programs within 2 years from the date of enactment. States may receive up to 12 additional months to complete certification of its permit program to EPA if legislative or rulemaking issues prevent the State from meeting the 2 year deadline.

Every Permit Program Will Contain the Minimum Requirements

The bill requires that every coal ash permit program include all of the minimum requirements laid out in the legislation. States may choose to make their permit programs more protective than the minimum Federal requirements. The bill allows EPA to review State permit programs at any time to ensure that the permit programs meet the minimum statutory requirements. The bill identifies specific considerations for EPA to analyze State permit programs and allows EPA to take over a State permit program that fails to meet the minimum requirements.

The Minimum Requirements for Every Permit Program Will be based on EPA's Requirements in the Final Rule

The legislation in previous Congresses used the Municipal Solid Waste regulations under the Solid Waste Disposal Act as the basis for the minimum requirements for a coal ash permit program. The bill takes into account that the technical requirements set forth by EPA in the Final Rule are protective of human health and the environment and should be the standard for regulating coal ash. The bill incorporates the requirements in the Final Rule and uses them as the baseline for what must be included in every coal ash permit program.

Many of the requirements of the Final Rule are incorporated directly. For example, the design requirements (257.70 and 257.72), post-closure care requirements (257.104), air criteria (257.80), record keeping requirements (257.105), requirements for run-on/run-off controls (257.81), requirements regarding hydrologic and hydraulic capacity requirements (257.82), and requirements for inspections (257.83 and 257.84). The bill also requires that criteria regarding surface water protection and financial assurance be included in coal ash permit programs, and requires financial assurance for maintaining final cover on closed inactive impoundments.

EPA acknowledged in the preamble to the Final Rule that it removed certain flexibility afforded other Subtitle D permit programs regarding groundwater monitoring and corrective action because the Final Rule was self-implementing. The bill authorizes States to incorporate this flexibility into a permit program. The flexibility in the bill is limited to the flexibility that States would have under the Municipal Solid Waste regulations in 40 CFR Part 258.

Every Permit Program will Address Inactive Surface Impoundments

The bill addresses inactive surface impoundments (those that no longer receive coal ash as of the date of enactment, but still contain coal combustion residuals and liquids) in the same manner as the Final Rule. Within 2 months of the date of enactment, the owner or operator of every inactive surface impoundment must notify EPA and the State in which it is located regarding whether it intends to close or be regulated as a structure. If an inactive impoundment fails to close within 3 years from date of enactment, it becomes a structure and immediately will be subject to all of the same requirements as any other regulated structure – even in the absence of a permit. The bill provides for the possibility of a short extension for the closure deadline if it can be demonstrated, based on the factors EPA set out in the Final Rule, that closure cannot be safely completed in 3 years and if there is no immediate threat of release.

Every Permit Program will Require Corrective Action of Releases

The bill requires that all releases undergo corrective action. Releases to groundwater must undertake corrective action according to the provisions of the Final Rule [257.96 through 257.98]. The bill provides the implementing agency with limited discretion to make certain decisions regarding groundwater monitoring and corrective action. The bill also requires that the implementing agency require corrective action for releases other than releases to groundwater, but the bill allows the implementing agency to authorize corrective action in accordance with other applicable State or Federal requirements so long as the corrective action will result in the same level of protection as corrective action under the Final Rule.

Compliance Timeframes are Comparable to the Final Rule

Within 8 months of the date of enactment, the implementing agency shall require that owners and operators comply with the following requirements:

- Air criteria [(c)(2)(F)],
- Surface water requirements [(c)(2)(H)],
- Recordkeeping [(c)(2)(I)],
- Inspections [(c)(2)(M)], and
- Installation of a permanent marker at surface impoundments [257.73(a)(1)].

Not more than 3 years after the date of enactment – even in the absence of a permit – the provisions of the Final Rule will be imposed on all owners and operators of structures and inactive surface impoundments that did not close:

- Groundwater monitoring requirements,
- Run-on and run-off controls,

- Hydrologic and hydraulic capacity requirements, and
- Structural integrity requirements.

Legislation does not Impact the Ability to bring Citizen Suits

The legislation does not alter the ability to bring citizen suits under the Solid Waste Disposal Act. Rather, it will alleviate citizen suits as being the only mechanism for enforcement of the requirements and will prevent technical compliance decisions from being made by the courts.

States Must Provide the Public Access to Information

The bill requires that every State, as part of its permit program, make information available to the public regarding groundwater monitoring data, emergency action plans, fugitive dust control plans, notifications regarding closure (including certifications of closure by a qualified professional engineer), and corrective action remedies. The bill requires that the implementing agency ensure that the information be made available on an internet website. The bill also requires that if the implementing agency exercises the discretionary authority available under the bill, that it make that information publicly available.

D. Modifications to March 20, 2015 Discussion Draft

The legislation contains minor revisions to the March 20, 2015 Discussion Draft, including:

- a clarification that the implementing agency must prepare a response plan for a release from a structure or from an inactive surface impoundment;
- a requirement that the implementing agency ensure that information, required by the legislation to be made publicly available, be made available on the internet;
- a requirement that if the implementing agency exercises any of the discretionary authority granted by the legislation, the implementing agency must make it publicly available; and
- a clarification that releases, other than releases to groundwater, must undergo corrective action, but that the implementing agency may authorize remediation of the release under other applicable State or Federal authority so long as it results in the same level of protection as corrective action under the Final Rule.

II. H.R. 906, A BILL TO MODIFY THE EFFICIENCY STANDARDS FOR GRID-ENABLED WATER HEATERS

A. Legislative History

H.R. 906 was introduced on February 11, 2015, by Rep. Whitfield (R-KY), along with Rep. Welch (D-VT), Rep. Latta (R-OH), Rep. Loebsack (D-IA), Rep. Cramer (R-ND), and Rep. Doyle (D-PA). The Energy and Power Subcommittee held a legislative hearing on March 19, 2015.

B. Section-by-Section

Section 1: Grid-Enabled Water Heaters

Section 1 amends the Energy Policy and Conservation Act (EPCA) to provide additional energy conservation standards applicable to grid-enabled water heaters for use as part of an electric thermal storage or demand response program. Specifically, section 1:

- Requires annual reports from: (1) manufacturers of such water heaters regarding the quantity of the products shipped each year, and (2) utilities and other demand response and thermal storage program operators regarding the quantity of products activated for their programs.

- Requires the Secretary of Energy to publish analyses of data collected from such reports and to establish procedures to prevent product diversion if sales of the products exceed by at least 15 percent the quantity activated for use in the demand response and thermal storage programs annually.

- Maintains the standards and publication procedures established by this Act until the Secretary determines that: (1) such water heaters do not require a separate efficiency requirement, or (2) procedures to prevent product diversion for non-program purposes would not be adequate to prevent such product diversion.

- Requires the Secretary to consider the impact of EPCA electric water heater standards on thermal storage and demand response programs, including on energy savings, electric bills, peak load reduction, electric reliability, integration of renewable resources, and the environment.

- Directs the Secretary to require the water heaters be equipped with communication capability to enable the grid-enabled water heaters to participate in ancillary services programs if the technology is available, practical, and cost-effective.

- Makes it unlawful for any person to:
  - activate an activation lock for a grid-enabled water heater with knowledge that it is not used as part of a demand response program;
  - distribute an activation key for such a water heater with knowledge that it will be used to activate a heater that is not used as part of such program;
  - enable such water heater to operate at its designed specification and capabilities with knowledge that it is not used as part of such program; or
  - knowingly remove or render illegible the label of such water heater.

III. H.R. ____, DATA SECURITY AND BREACH NOTIFICATION ACT OF 2015

A. Background

Consumers face an increasing risk of identity theft and financial fraud created by criminals with varying motivations, but a common goal: to steal personal information for financial gain.

Currently, there are 47 different State laws dealing with data breach notification and 12 State laws governing commercial data security. This patchwork of State laws creates confusion for consumers looking for consistency and predictability in breach notices as well as complex compliance issues for businesses as they secure their systems after a breach. Moreover, this patchwork has not always resulted in better consumer protections and may lead to additional opportunities for cyber criminals to exploit vulnerable individuals with phishing attacks or other schemes because there is no consistent standard for data security or breach notification. Following a breach, consumers must take steps to protect their accounts and their credit by replacing their cards, updating accounts, and monitoring their credit with existing tools. In addition, consumers ultimately bear the costs of the breach through higher fees and prices.

The bill addresses the growing problem of identity theft and payment fraud by requiring covered entities to implement reasonable security measures for the type of personal information that criminals use for identity theft and payment fraud and to notify individuals in the case of a breach of security for such personal information. The draft would establish a single Federal regime enforced by the Federal Trade Commission (FTC) and subject to civil penalties. Additionally, State attorneys general would be authorized to enjoin violations, compel compliance, or seek civil penalties for violations of the Act. The bill is limited in scope to address those categories of information that result in identity theft and payment fraud. The bill neither addresses privacy issues nor preempts existing privacy laws.

B. Section-by-Section

The bill is sponsored by Rep. Blackburn (R-TN) and co-sponsored by Mr. Welch (D-VT).

Section 1. Short Title; Purposes.

This Act may be cited as the "Data Security and Breach Notification Act of 2015." Its purpose is to protect consumers from identity theft, economic loss or economic harm, and financial fraud by establishing uniform national data security and breach notification standards for electronic data in interstate commerce.

Section 2. Requirements for Information Security.

This section requires covered entities to implement and maintain reasonable security measures and practices that are appropriate to the size and complexity of the entity and the nature

and scope of its activities, and to protect and secure electronic personal information against unauthorized access.

Section 3. Notification of Information Security Breach.

Following a breach of security, this section requires a covered entity that uses, accesses, transmits, stores, disposes of, or collects personal information to conduct a reasonable and prompt investigation of the breach to determine whether there is a reasonable risk that the breach has resulted in, or will result in, identity theft, economic loss or economic harm, or financial fraud.

This section requires covered entities to notify individuals affected by, or reasonably believed to have been affected by, the breach of security unless there is no reasonable risk that the breach has resulted in, or will result in identity theft, economic loss or economic harm, or financial fraud. Notice is required within 30 days after the covered entity has taken the necessary measures to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system.

This section requires that any notice to affected individuals about a breach of security must include: 1) a description of the personal information that was, or reasonably believed to be, accessed or acquired by an unauthorized person; 2) the date range or approximate date range of the breach; 3) a telephone number or toll-free number (if the covered entity does not meet the definition of a small business concern or non-profit organization) that an affected individual may use to inquire about the breach; 4) the toll-free contact telephone number and addresses for a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis; and 5) the toll-free telephone number and Internet website for the FTC where individuals can get more information about identity theft.

This section requires covered entities to notify affected individuals of a breach of security promptly after the covered entity has taken the necessary measures to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system. If a covered entity discovers additional individuals to whom notification is required after providing notice under this section, the covered entity shall notify such individuals as expeditiously as possible and without unreasonable delay.

This section requires a covered entity also to notify the FTC and the Secret Service or Federal Bureau of Investigation of a breach of security if more than 10,000 individuals' personal information was, or there is reasonable basis to conclude was, accessed or acquired by an unauthorized person. This section allows Federal, State, or local law enforcement to delay notification to affected individuals if it would impede a civil or criminal investigation.

This section establishes a process by which breached covered entities notify non-breached covered entities requires breached covered entities to notify non-breached covered entities of a breach of security and sets forth the conditions under which they determine who will provide notice to individuals, what the timeframe for the notice is, and what obligations each entity is responsible for.

This section provides certain accommodations for non-profits or where there is limited contact information for an individual. This section requires covered entities to notify a consumer reporting agency of a breach of security affecting more than 10,000 individuals. This section requires a service provider to notify a covered entity if it becomes aware of a breach of security involving electronic data containing personal information and can reasonably identify the sender.

Section 4. Enforcement.

This section establishes that a violation of this Act will be treated as an unfair or deceptive act or practice under the Federal Trade Commission Act and violations will be enforced by the FTC. Any covered entity that violates this Act shall be subject to the penalties and immunities provided in the Federal Trade Commission Act and as extended by this Act to common carriers and non-profit organizations.

This section allows for State attorneys general to bring enforcement actions for violations of either the security or notification requirements of this draft. They may bring civil penalties of up to $11,000 per violation.

This section establishes a maximum civil penalty of $2.5 million in cases filed by a State attorney general. Civil penalties will be annually adjusted for inflation.

This section requires that the covered entity's degree of culpability, history of prior conduct, ability to pay, effect on ability to continue to do business, and any other matters must be taken into account in determining the amount of a civil penalty.

This section provides certain process requirements so that there is not redundant enforcement between State attorneys general and the FTC.

This section provides that nothing in this Act establishes a private cause of action against a person for a violation of this Act.

Section 5. Definitions.

This section provides definitions for the following terms: breach of security, breached covered entity, Commission, consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, covered entity, data in electronic form, encrypted, non-breached covered entity, non-profit organization, personal information, service provider, small business concern, and State.

Section 6. Effect on Other Laws.

This section prevents States from adopting, maintaining, enforcing, or imposing or continuing in effect any law, rule, regulation, standard, or other provision related to the security of data in electronic form or notification following a breach of security with respect to a covered entity.

This section provides that any regulations in sections 201, 202, 222, 338, and 631 of the Communications Act of 1934 that pertain to information security or breach notification practices of covered entities are superseded by this Act.

This section provides that nothing in this subsection otherwise limits the Federal Communications Commission's authority with respect to sections 201, 202, 222, 338, and 631 of the Communications Act of 1934.

This section provides that nothing in this Act should be construed in any way to limit or affect the FTC's authority under any other provision of law.

Section 7. Education and Outreach for Small Businesses.

This section requires the Commission to conduct education and outreach for small business concerns on data security practices and how to prevent hacking and other unauthorized access to, acquisition of, or use of data maintained by such small business concerns.

Section 8. Website on Data Security Best Practices.

This section requires the Commission to establish and maintain a website with non-binding best practices for businesses regarding data security and how to prevent hacking and other unauthorized access to, acquisition of, or use of data maintained by such small businesses.

Section 9. Effective Date.

This Act will take effect one year after the date of enactment of this Act.

IV. STAFF CONTACTS

If you have any questions regarding the markup, please contact Committee staff at (202) 225-2927. For H.R. ____, Improving Coal Combustion Residuals Regulation Act of 2015, please contact David McCarthy or Tina Richards; for H.R. 906, a bill to Modify the Efficiency Standards for Grid-Enabled Water Heaters, please contact Patrick Currier; and for H.R. ____, Data Security and Breach Notification Act of 2015, please contact Paul Nagle or Melissa Froelich.