

“Third Time’s a Charm!”
Improving the Coal Combustion Residuals Regulation Act of 2015:
A Persistent Proposal to a Longstanding Dispute

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On April 13, 2015, H.R. 1734, a new bill, was introduced in the United States House of Representatives (“House”). H.R. 1734, Improving Coal Combustion Residuals Regulation Act of 2015, “establishes State permit programs for coal ash, and...incorporates as the minimum Federal requirements, the technical standards and requirements that [the Environmental Protection Agency] (“EPA”) developed in [a] Final Rule” released in December 2014 regarding coal combustion residuals.¹ The EPA defines coal combustion residuals, also known as coal ash, “as ‘byproducts of burning coal for

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¹ MEMORANDUM FROM THE ENERGY & COMMERCE COMM. MAJORITY STAFF ON SUBCOMM. MARKUP TO THE MEMBERS OF SUBCOMM. ON ENV’T & THE ECON. (Mar. 20, 2015) [hereinafter *Subcomm. Markup*].

electricity’ and [it] consists of inorganic residues that remain after pulverized coal is burned.”² Regulating coal combustion residuals, especially under the Resource Conservation and Recovery Act (“RCRA”), has been a controversial topic for many years.

In fact, this was not the first or even second time the House had considered the coal combustion residuals issues or regulatory solutions addressed in the bill. Previously, the House passed two similar bills only to have both die in the Senate. In his opening statement for the Subcommittee on Environment and the Economy hearing on March 18th, Congressman Fred Upton reminded the audience of this history by stating, “The draft is designed much like the legislation we nearly enacted in the last Congress.”³ To clarify why he and many others are re-visiting the legislation, he rhetorically asks, “What’s different this time around?” and answers, “Instead of keying the minimum national standards off the old EPA regulations issued for Municipal Solid Waste – with a few tweaks for coal ash – we set the national standard by incorporating EPA’s new coal ash rule that came out last December.”⁴ The Improving Coal Combustion Residuals Regulation Act of 2015 builds upon the “bipartisan, bicameral work from the 112th and

² MEMORANDUM FROM THE ENERGY & COMMERCE COMM. MAJORITY STAFF ON HEARING ENTITLED “H.R. ___, IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT OF 2015” TO THE MEMBERS OF SUBCOMM. ON ENV’T & THE ECON. (Mar. 16, 2015) [hereinafter MEMORANDUM ON HEARING].

³ *Improving Coal Combustion Residuals Reg. Act of 2015: Hearing on H.R. 1734 Before the Subcomm. on Env’t & the Econ. of the H. Comm. on Energy & Com.*, 114th Cong. (2015) <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Hearings/EE/20150318/HHRG-114-IF18-MState-U000031-20150318.pdf>. [hereinafter *Hearing on H.R. 1734*] (opening statement of Rep. Fred Upton, Chairman, H. Comm. on Energy & Commerce).

⁴ *Id.*

113th Congresses to set up a state-based regulatory program to ensure the safe management and disposal of coal ash.”⁵

Part I of this paper will provide more background on the EPA’s Final Rule that was released last December and the history leading up to its enactment, as well as addressing specific aspects of the EPA’s Final Rule. Part II will introduce the proposed legislation, its progress through Congress thus far, and an overview of the bill’s provisions. Part III will examine the varied industry responses that have ensued since the release of the draft legislation, and Part IV will provide an economic analysis of the proposed legislation, as well as the regulatory alternatives.

I. BACKGROUND

The Resource Conservation and Recovery Act of 1976 (“RCRA”), “which amended the Solid Waste Disposal Act,” is “our nation’s primary law governing the disposal of solid and hazardous waste.”⁶ RCRA’s provisions delegate authority to the states to regulate the “management and disposal of waste.”⁷ The Improving Coal Combustion Residuals Regulation Act of 2015 specifically focuses on two RCRA provisions that address waste management, Subtitle C of RCRA on hazardous waste and Subtitle D on solid waste. Subtitle C

⁵ Press Release, Energy & Commerce Committee, Subcommittee to Review Draft Coal Ash Legislation (Mar. 11, 2015), <https://energycommerce.house.gov/news-center/press-releases/subcommittee-review-draft-coal-ash-legislation> [hereinafter March 11th Press Release].

⁶ See History of RCRA, *EPA Wastes* (last visited January 27, 2016), <http://www.epa.gov/aboutepa/epa-history-resource-conservation-and-recovery-act>; See also Resource Conservation and Recovery Act (RCRA), *EPA Laws and Regulations* (March 2, 2016), <http://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act>.

⁷ *Subcomm. Markup, supra* note 1.

created a hazardous waste management program that, among other provisions, directs the EPA to develop criteria for identifying the characteristics of ‘hazardous’ waste and to develop waste management criteria applicable to such waste, [and] 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).⁸

Additionally, Subtitle D on solid waste contains “less stringent storage and disposal requirements” than Subtitle C on hazardous waste would require.⁹

Four years after passing RCRA, Congress enacted the Solid Waste Disposal Act Amendments of 1980, which “contained provisions...that prevented EPA from imposing hazardous waste regulatory requirements for fossil fuel combustion waste until EPA studied the issue to determine whether regulation of fossil fuel combustion waste under Subtitle C was warranted.”¹⁰ These provisions were known as the Bevill Amendments. Fossil fuel combustion wastes as defined by the EPA as “the wastes produced from the burning of fossil fuels [like] coal, oil, [and] natural gas.”¹¹ Coal combustion residuals are one subsection of fossil fuel combustion wastes, which the EPA categorizes as “special waste.”¹² As a result of the Bevill Amendment, the EPA had to analyze the issue and provide a report to Congress in order to determine if the EPA could regulate fossil fuel combustion waste under Subtitle C on hazardous waste.

⁸ *Id.*

⁹ David F. Michelman, *Philadelphia Environmental Lawyer Discusses EPA’s Coal Ash Regulations and Proposed Legislation*, LAWYERS.COM (Mar. 31, 2015), <http://environmental-law.lawyers.com/blogs/archives/32967-philadelphia-environmental-lawyer-discusses-epas-coal-ash-regulations-and-proposed-legislation.html> [hereinafter Michelman, *Philadelphia Environmental Lawyer*].

¹⁰ *Subcomm. Markup, supra* note 1.

¹¹ MEMORANDUM ON HEARING, *supra* note 2.

¹² *Id.*

In 1993 and again in 2000, the EPA followed this procedure and “completed two regulatory determinations” where the “EPA considered the requisite factors and determined that regulation of fossil fuel combustion wastes, generally, and coal combustion residuals, specifically, was not warranted under Subtitle C.”¹³ Ten years after the EPA’s most recent regulatory determination, the issue of managing coal combustion residuals returned to the forefront of the EPA’s priorities, and “on June 21, 2010, EPA promulgated a proposed rule, Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule (“proposed rule”), setting out two regulatory options for management of coal combustion residuals.”¹⁴ The first option consisted of the EPA’s reversal of their own regulatory determination from 2000 in order to warrant the EPA regulating coal combustions residuals under Subtitle C as hazardous waste. The second option was for the EPA to stand by their regulatory determination and its accompanying findings made in 2000 and keep coal combustion residuals under Subtitle D as non-hazardous waste.¹⁵

Four years later, on December 19, 2014, the “EPA released a pre-publication version of the final rule regulating coal ash.”¹⁶ The Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities (“Final Rule”) was published in the *Federal Register* on April 17th and demonstrates that the EPA chose the second option and kept

¹³ *Id.*; *Subcomm. Markup, supra* note 1.

¹⁴ *Subcomm. Markup, supra* note 1 at 1; 75 Fed. Reg. 35,128 (June 21, 2010), <http://www.gpo.gov/fdsys/pkg/FR-2010-06-21/pdf/2010-12286.pdf>.

¹⁵ *Subcomm. Markup, supra* note 1 at 1.

¹⁶ *Id.* at 2.

coal combustion residuals categorized under Subtitle D.¹⁷ However, that decision may not be final. The first regulatory option is still available, as the EPA “makes clear in the preamble to the 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.”¹⁸ EPA’s Final Rule is the first rule to federally regulate coal ash.¹⁹

The Improving Coal Combustion Residuals Regulation Act of 2015 aims to improve upon the EPA’s Final Rule by addressing some of the provisions and attributes that are viewed by some as problematic. For example, the self-implementation of the EPA’s Final Rule, “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.”²⁰ Another issue focuses on the lack of legal mechanism available to achieve some of the Final Rule’s means. The Final Rule preamble indicates 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.”²¹ This is problematic since no mechanism is available to “legally incorporate the Federal requirements into State programs” meaning

¹⁷ *Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (Apr. 17, 2015), <http://www2.epa.gov/coalash/coal-ash-rule>.

¹⁸ *Subcomm. Markup*, *supra* note 1 at 2.

¹⁹ Michelman, *Philadelphia Environmental Lawyer*, *supra* note 9.

²⁰ *Subcomm. Markup*, *supra* note 1 at 2.

²¹ *Id.*

the Final Rule will remain “an independent set of requirements that must be met” even if the criteria of the Final Rule has been integrated into the State’s solid waste management program.²²

Along these same lines, Subtitle D “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,”²³ which essentially makes the Final Rule moot. The inability of the EPA to enforce the rule along with the lack of requirement that States apply the standards and requirements of the new rule leads to one of the most problematic issues, enforcement. The only compliance mechanism within the rule is the ability “for a State or citizen group to bring a RCRA citizen suit in Federal district court under §7002 of that statute against a facility that is alleged to be in noncompliance with the new requirements.”²⁴ Citizen suits as the only enforcement mechanism could “result in an unpredictable array of regulatory interpretations, as judges throughout the country are forced to make technical compliance decisions that better left to a regulatory agency.”²⁵ Other problematic provisions include the “retroactive application of the location or siting restrictions; the requirement that unlined impoundments that exceed a groundwater protection standard close with no opportunity to remedy the problem through corrective action; and that surface impoundments that miss a deadline to assess structural stability must stop operating and close.”²⁶

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Hearing on H.R. 1734, supra* note 3.

²⁶ *Id.*

The Improving Coal Combustion Residuals Regulation Act of 2015 aims to alleviate some of these concerns and issues while putting the EPA's "efforts to good use" by essentially codifying the Final Rule.²⁷ According to a press release from the House Committee on Energy & Commerce, "[i]t would eliminate the implementation issues associated with the final rule and give states the necessary enforcement authority to implement the standards set by EPA."²⁸ Members of the Subcommittee on Environment and the Economy "expressed concern that without the benefit of strong legislation, EPA's rule could produce added uncertainty, litigation, and expense."²⁹ The aim of the Improving Coal Combustion Residuals Regulation Act of 2015 is to prevent those outcomes by providing certainty and enforceability while still achieving the EPA's environmental protection objectives. The proposed legislation "seeks to utilize work done by the EPA to put out a rule that is protective of human health and the environment and to ensure that the requirements are implemented through enforceable permits."³⁰

Both the sponsor the bill, Representative McKinley, and the Chairman of the Subcommittee on Environment and the Economy, Representative Shimkus, are confident that this bill will solve the problems inherent in the Final Rule. Representative McKinley said, "This legislation will bring much-needed certainty to the rules surrounding coal ash. The EPA's regulations offer more confusion and no reassurances that President Obama won't change his mind later."³¹ Representative Shimkus echoed these sentiments, "We

²⁷ *Hearing on H.R. 1734, supra* note 3.

²⁸ March 11th Press Release, *supra* note 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

share the same goal as EPA: to improve protections for health and the environment. But our bill goes a step further than EPA and breathes real-life enforcement authority into the standards. By putting states in charge of implementation, we can achieve the protections we all want and give job-creators the certainty they desperately need.”³² Even the Chairman of the House Committee on Energy & Commerce, the Honorable Fred Upton expressed his parallel view that he is “confident that we have the right policy in place that will get us across the finish line.”³³

II. THE PROPOSED LEGISLATION

The proposed legislation was introduced into the House of Representatives on April 13, 2015. The Official Title of the proposed legislation, H.R. 1734, is “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;” however, the Short Title and the title used for the purposes of this paper is the “Improving Coal Combustion Residuals Regulation Act of 2015.”³⁴ The same day the bill was introduced, it was referred to the House Committee on Energy and Commerce, where two Consideration and Mark-up Sessions were held on the following two days.³⁵ By the end of the day on April 15th, the Energy and Commerce Committee had voted in

³² *Id.*

³³ *Hearing on H.R. 1734, supra* note 3.

³⁴ *All Bill Information (Except Text) for H.R. 1734 – Improving Coal Combustion Residuals Regulation Act of 2015*, LIBRARY OF CONGRESS, H.R. 1734, 114th Cong. (2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/1734/all-info>.

³⁵ *Id.*

favor of the bill by a vote of 32-19.³⁶ The bill's sponsor is Representative David McKinley from West Virginia, and the bill is cosponsored by thirty-six other Congressmen and Congresswomen.

Improving Coal Combustion Residuals Regulation Act of 2015 would “effectively codify” the EPA’s Final Rule by establishing permit programs for coal combustion residuals at the state level and integrating the requirements and technical standards of the Final Rule into the legislation as the minimum requirements in order to protect utilities, the environment, and human health.³⁷ The combination of this proposed legislation with the Final Rule “would allow states to create and enforce their own coal combustion residuals permit programs,” which is “consistent with subtitle D.”³⁸

A. Every State Will Have a Permit Program

This authorization of State coal combustion residuals permit programs is certainly the most prominent aspect of the bill. The permit program will provide “direct enforcement of the requirements in the final rule by a regulatory agency.”³⁹ The permit programs will allow for “state environmental protection authorities...[to] work on a daily basis with the regulated community to make sure the permit programs are on track. This kind of discipline should avoid unnecessary litigation and protect our environment at the

³⁶ *Id.*

³⁷ CONG. BUDGET OFFICE, H.R. 1734 IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT OF 2015 COST ESTIMATE (Apr. 28, 2015), *available at* <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr17341.pdf>.

³⁸ *Id.*

³⁹ Press Release, Energy & Commerce Committee, The Improving Coal Combustion Residuals Regulation Act 2015 (Mar. 24, 2015), *available at* <https://energycommerce.house.gov/news-center/fact-sheets/improving-coal-combustion-residuals-regulation-act-2015> [hereinafter March 24th Press Release].

same time.”⁴⁰ The bill builds in additional flexibility by giving states the choice of whether or not to implement the permit program. The bill also notes that if the State “is currently authorized to implement a permit program under §3006 or §4005 of RCRA, the State will be authorized to immediately implement a coal ash permit program.”⁴¹ If states choose to opt out of the program, then the EPA has the authority to implement a program in its place. This dynamic implementation will avoid the need for regulated entities to comply with two different sets of requirements by eliminating the current “dual regulatory program, . . . [so] [e]ither the state or EPA will be implementing a permit program in every state.”⁴²

Under this bill, the States will have six months following the enactment of the bill to determine whether they will implement their own program or not and to inform the EPA of their decision. Additionally, the “States would be required to provide EPA details of the laws, regulations, and other features of their permit program within 2 years from the date of enactment.”⁴³ This deadline may be extended for up to an additional year if the State’s ability to meet the deadline is halted by “legislative or rulemaking issues” and a request is submitted to the Administrator that “describes the efforts of the State to meet such deadline; demonstrates that the legislative or rulemaking procedures of such State render the State unable [to] meet such deadline; and provides the Administrator with a detailed schedule for completion and submissions of the certification.”⁴⁴

⁴⁰ *Hearing on H.R. 1734, supra* note 3.

⁴¹ *Subcomm. Markup, supra* note 1.

⁴² March 24th Press Release, *supra* note 39.

⁴³ *Subcomm. Markup, supra* note 1.

⁴⁴ *Id.*; H.R. 1734 §4011(b), 114th Cong. (2015).

B. Every Permit Program Will Contain the Minimum Requirements

Every coal combustion residuals permit program is required to incorporate all of the Final Rule minimum requirements. If a State wants more protective measures, it has the ability to implement a more stringent permit program. In order to confirm that all of the State's permit programs are incorporating the minimum requirements, the "EPA will have the ability to review State permit programs at any time."⁴⁵

C. The Minimum Requirements for Every Permit Program will be Based on EPA's Requirements in the Final Rule

In order to protect the environment as well as human health, the bill piggybacks off of the Final Rule by using all of its requirements to create a baseline for the permit programs and a "standard for regulating coal ash."⁴⁶ The first two times that similar legislation was passed in the House, the "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."⁴⁷ This particular change in the proposed legislation is being highlighted as the most appealing attribute of this bill and the alteration that will finally make the bill into a law. As noted in the introduction of this paper, in his opening statement for the Subcommittee on Environment and the Economy hearing on March 18th, Congressman Fred Upton rhetorically asked, "What's different this time around?" and answered, "Instead of keying the minimum national standards off the old EPA regulations issued for Municipal Solid Waste – with a few tweaks for coal

⁴⁵ *Subcomm. Markup, supra* note 1.

⁴⁶ *Id.*

⁴⁷ *Id.*

ash – we set the national standard by incorporating EPA’s new coal ash rule that came out last December.”⁴⁸ Many agree that this specific change to the minimum requirements will lead to a solution. Representative McKinley said, “We can finally solve this problem and protect 316,000 jobs that rely on coal ash by passing this legislation.”⁴⁹

Many of the Final Rule’s requirements are directly included in the bill like “the design requirements, post-closure care requirements, air criteria, record keeping requirements, requirements for run-on/run-off controls, requirements regarding hydrologic and hydraulic capacity requirements, and requirements for inspections.”⁵⁰ Additional requirements are included in the bill for surface water protection and financial assurance criteria. One of which “requires financial assurance for maintaining final cover on closed inactive impoundments.”⁵¹ In the Final Rule preamble, the EPA “removed certain flexibility afforded other Subtitle D permit programs regarding groundwater monitoring and corrective action” due to the self-implementing feature of the bill.⁵² The proposed legislation provides authorization for States to add flexibility to their permit programs that mirrors the “flexibility that States would have under the Municipal Solid Waste regulations in 40 CFR Part 258.”⁵³ This flexibility consists of the ability to evaluate groundwater monitoring and corrective action on a site-specific basis “taking into account risk-based factors.”⁵⁴

⁴⁸ *Hearing on H.R. 1734, supra* note 3.

⁴⁹ March 11th Press Release, *supra* note 5.

⁵⁰ *Subcomm. Markup, supra* note 1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Hearing on H.R. 1734, supra* note 3 (opening statement of Rep. John Shimkus, Chairman, Subcomm. on Env’t & the Econ.).

D. Every Permit Program Will Address Inactive Surface Impoundments

Inactive surface impoundments or “legacy sites” are “those that no longer receive coal ash as of the date of enactment, but still contain coal combustion residuals and liquids.”⁵⁵ This is another area in which the bill takes the same approach as the Final Rule. Owners and operators of inactive surface impoundments have two months after the bill is enacted to inform both their State of location and the EPA if they intend to be regulated as a structure or to close. If three years after the bill’s enactment, the inactive surface impoundment has not closed, “it becomes a structure and will immediately be subject to all of the same requirements as any other regulated structure – even in the absence of a permit.”⁵⁶ These notification requirements also allow for the option of an extension if the owner or operator can demonstrate that the “closure cannot be safely completed in 3 years and if there is no immediate threat of release.”⁵⁷

E. Compliance Timeframes Are Comparable to the Final Rule

The proposed legislation’s set timeframes for owners and operators to come into compliance with the bill’s requirements are comparable to those of the Final Rule. Eight months after the bill is enacted, “the implementing agency shall require that owners and operators comply with the following requirements: air criteria, surface water requirements, recordkeeping, inspections, and installation of a permanent marker at surface impoundments.”⁵⁸ Likewise, “[n]ot more than 3 years after the date of enactment

⁵⁵ *Id.*; *Subcomm. Markup, supra* note 1.

⁵⁶ *Subcomm. Markup, supra* note 1.

⁵⁷ *Id.*

⁵⁸ *Id.*

– 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.”⁵⁹ If the proposed legislation results in any lag in the timeliness of compliance, “we will gain the benefit of having an enforceable permit program.”⁶⁰

F. Proposed Legislation does not Impact the Ability to Bring Citizen Suits

The bill still authorizes citizen suits brought under §7002 of the Solid Waste Disposal Act, but the bill also “alleviate[s] citizen suits as being the only mechanism for enforcement of the requirements and will prevent technical compliance decisions from being made by the courts.”⁶¹

G. States Must Provide the Public Access to Information

The development of the permit programs will eliminate the self-implementing program and therefore, eliminate the requirement that owners and operators make their operating records available to the public via the Internet, as this is “a remnant of a self-implementing program.”⁶² However, an additional requirement of the permit programs does compel the State to provide availability of specific information to the public, specifically regarding “groundwater monitoring data, emergency action plans, fugitive

⁵⁹ *Id.*

⁶⁰ *Hearing on H.R. 1734, supra* note 3.

⁶¹ *Subcomm. Markup, supra* note 1.

⁶² *Hearing on H.R. 1734, supra* note 3 (opening statement of Rep. John Shimkus, Chairman, Subcomm. on Env’t & the Econ.).

dust control plans, notifications regarding closure (including certifications of closure by a qualified professional engineer), and corrective action remedies.”⁶³ The changes to this requirement will “mitigate the risk of lawsuits filed by citizens” that could result from public access to certain information.

III. INDUSTRY RESPONSE

The regulated industries, their affiliated interest groups, and environmental groups have had varied responses to this proposed legislation. Vocal supporters of the bill have included coal burning utilities, the Large Public Power Council, the National Rural Electric Cooperative Association, and even the Chamber of Commerce of the United States. As one might assume, opposition to the bill has been expressed by many national and state-level environmental organizations such as Earthjustice, Friends of the Earth U.S., Greenpeace USA, the Natural Resources Defense Council, Sierra Club, twenty-seven state legislators all of whom represent North Carolina with the exception of Representative Lori Ehrlich of Massachusetts, and several private citizens. These groups have expressed their support or opposition of the bill through several different mediums such as writing letters to Chairman Upton, Chairman Shimkus, and Representative McKinley or issuing a press release expressing their support or opposition of the bill and their rationales for why the bill is or is not the best solution for regulating coal ash.

The National Rural Electric Cooperative Association “represents the nation’s more than 900 private, not-for-profit, consumer-owned electric cooperatives, which

⁶³ *Subcomm. Markup, supra* note 1.

provide service to 42 million people in 47 states.”⁶⁴ Following the Energy & Commerce Committee’s vote in favor of the bill, the CEO of the National Rural Electric Cooperative Association, Jo Ann Emerson, expressed her support of the bill by thanking Chairman Upton and Chairman Shimkus “for leading the effort on a bill that would improve coal ash management...[as well as] minimize litigation while giving states the authority to enforce EPA’s recent non-hazardous coal ash management rules.”⁶⁵ She added, “[e]lectric co-ops believe this bipartisan bill appropriately balances public health, the environment and the economy.”⁶⁶ Another supporter, the Large Public Power Council, “represents 26 of the largest locally owned and operated non-for-profit electric systems in the nation . . . [throughout] 11 states and Puerto Rico . . . [who] [c]ollectively . . . own and operate over 86,000 megawatts of generation.”⁶⁷ The Large Public Power Council expressed their support of the bill, referring to it as an improvement to the EPA’s Final Rule, and applauding the bill for addressing all of the problems inherent in the Final rule while still ensuring protection of the environment and human health. In their letter to Representative McKinley, they specifically praise the codification of coal combustion residuals as non-hazardous waste providing the ability to continuing reusing coal combustion residuals in a beneficial manner citing statistics that “about 40 percent of coal combustion residuals in the United States [are] directed to beneficial reuse (*e.g.*, cement)

⁶⁴ *NRECA Praises Bill Promoting Safe Management of Coal Ash*, NRECA (Apr. 15, 2015), <http://www.nreca.coop/nreca-praises-bill-promoting-safe-management-of-coal-ash/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Letter from John Di Stasio to Rep. David McKinley (Mar. 18, 2015), <http://www.lppc.org/wp-content/uploads/2015/03/Letter-in-support-of-Improving-Coal-Combustion-Residuals-Regulation-Act-of-2015.pdf>.

rather than landfills or impoundments.”⁶⁸ The Chamber of Commerce echoes this sentiment by applauding the bill’s inclusion of “clarification and specific examples of benefit use/reuse of coal combustion residuals.”⁶⁹ The Chamber of Commerce refers to the proposed legislation as finishing “the job that EPA was unable to complete unilaterally,” and praising the bill for representing “a workable and appropriate balance between the implementation of the EPA’s final rule and the need to fairly and rationally address the storage and beneficial reuse of coal combustion residuals.”⁷⁰

In terms of opposition, it seems the citizens, State legislators, and organizations that oppose this bill have taken a unified approach. In one letter to Chairman Upton and Ranking Member Pallone, 290 individuals or entities uniformly expressed their opposition to the bill because they contend that it “threatens health, safety and the environment while relieving owners of coal-fired power plants of their responsibility to safely dispose of toxic coal ash.”⁷¹ The letter expresses support of the EPA’s Final Rule as a “compromise that went to great lengths to address the concerns of industry, recyclers and states by characterizing coal ash as non-hazardous, does not ban the continued operation of coal ash ponds, exempts the beneficial use of coal ash, and establishes generous timeframes for compliance and closure,” and views the bill as increasing potential harm to communities by removing “critical and long-awaited safeguards” and

⁶⁸ *Id.*

⁶⁹ Letter from Bruce Josten, Member of the Committee on Energy and Commerce to Rep. John Shimkus and Rep. Paul Tonko (Mar. 24, 2015). (R. 17.2.3), https://www.uschamber.com/sites/default/files/150324_improvingcoalcombustionresidualsregulationact_shimkus_tonko.pdf.

⁷⁰ *Id.*

⁷¹ Letter from Earthjustice, et. al. to Rep. Fred Upton and Rep. Frank Pallone (Apr. 14, 2015), http://earthjustice.org/sites/default/files/files/OPPOSE-HR1734_CCR-Regulation-Act-of-2015.pdf.

effectively gutting the rule of its “public health protections and [placing] American communities at increased risk of toxic exposure and catastrophic disasters.”⁷² After listing several protections the group thinks the rule either delays, weakens, eliminates, removes, or prohibits, the letter refers to the bill as putting our environment, specifically our irreplaceable water resources, and our nation’s health in grave danger and failing to “guarantee consistent nationwide protection.”⁷³ The group additionally expresses Environmental Justice concerns referring to the disproportionality of coal ash ponds that are located in “the nation’s most vulnerable communities . . . [like] communities of color and low-income neighborhoods.”⁷⁴

Opposition to the bill has also been expressed in the media. An article published on the website ThinkProgress.com describes the hearing on the bill as a debate on “whether to undercut the federal EPA’s rule on disposing of coal ash, a toxic byproduct of burning coal” and noting that this “debate came just a day before the Sierra Club announced a new lawsuit against Dominion Power over coal ash pits leaking into the Elizabeth River.”⁷⁵ The authors of the article specifically dislike the bill’s elimination of the requirement for public data stating it “could limit the public’s ability to monitor water safety, and changes what could be considered illegal pollution.”⁷⁶ The author spoke with one of the Southern Environmental Law Center’s attorneys, Frank Holleman, who told

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Samantha Page, *The House Energy Committee Wants To Undercut The EPA’s Coal Ash Regulations*, THINKPROGRESS.COM (Mar. 19, 2015, 1:12 PM), <http://thinkprogress.org/climate/2015/03/19/3635678/house-says-states-can-take-care-of-coal-ash/>.

⁷⁶ *Id.*

ThinkProgress that the bill “undercuts the citizens’ right to protect themselves and their communities from dangerous disposal of coal ash waste.”⁷⁷

IV. ECONOMIC ANALYSIS

On April 28, 2015, the Congressional Budget Office released a cost estimate on the proposed legislation stating that their estimation of the cost of implementing this bill would be “\$2 million over the 2016-2020 period, subject to the availability of appropriated funds.”⁷⁸ The estimate addresses the bill’s imposition of “an intergovernmental mandate,” which they estimate will have small administrative costs and “fall well below the annual threshold established in the Unfunded Mandates Reform Act for intergovernmental mandates (\$77 million, adjusted annually for inflation).”⁷⁹ The estimate operates under the assumption that “all states with coal-fired power plants (47 states and Puerto Rico) would probably elect to operate their own programs to manage disposal of the waste material . . . [therefore,] this legislation would not provide EPA with the authority to substantially review certifications . . . [meaning] EPA’s workload for this activity would not be significant over the 2016-2020 period.”⁸⁰ In 2020, when the state programs have begun operating, the “EPA would need to review certain state programs for deficiencies . . . [which] CBO estimates . . . would cost, on average, about

⁷⁷ *Id.*

⁷⁸ CONG. BUDGET OFFICE, Cost Estimate: H.R. REP NO. 1734 (2015).

⁷⁹ *Id.*

⁸⁰ *Id.*

\$165,000 and would generally take less than one year to complete . . . [which] would cost \$2 million in 2020.”⁸¹

In terms of benefits, the added certainty the bill provides to the regulated industries will allow them to make investments and business decisions with assurance. The bill’s implementation of a state permit program allows for flexibility and case-by-case determinations to avoid closing sites that could have been corrected and profitable if given individual attention or forcing businesses to operate inefficiently in order to meet the federal standards. Overall, the implementation of the bill appears to have low costs and high benefits.

V. CONCLUSION

Overall, the Improving Coal Combustion Residuals Regulation Act of 2015 addresses many problematic issues inherent in the EPA’s Final Rule they released in December of 2014. Although opposition to the bill endures, the House Committee on Energy & Commerce seems to think this bill will solve those problems, as is apparent by their favorable 32-19 vote. As McKinley stated “prior to the Energy Committee’s consideration of the bill, ‘This bill will bring closure and certainty to an issue that has been unresolved for over 30 years.’ It reflects four years of negotiation and was drafted with input from state environmental and solid waste officials and with consultation with the EPA.”⁸² The bill is the product of a “multi-year and multi-Congress effort to finalize a

⁸¹ *Id.*

⁸² David Beard, Coal ash bill would allow states to regulate disposal, THE DPOST.COM (Apr. 19, 2015, 10:23 PM), <http://thedpost.com/Coal-ash-bill-would-allow-states>.

thoughtful, bipartisan solution for coal ash.”⁸³ Will it pass this time around? Is the third time the charm? Only time will tell.

⁸³ *Hearing on H.R. 1734, supra* note 3 (opening statement of Rep. Fred Upton, Chairman, H. Comm. on Energy & Commerce).