

**ECONOMIC OPPORTUNITIES FROM LAND CLEANUP
PROGRAMS AND LEGISLATIVE HEARING ON
S. 1479, BROWNFIELDS UTILIZATION, INVEST-
MENT, AND LOCAL DEVELOPMENT ACT OF
2015, S. 2446, IMPROVING COAL COMBUSTION
RESIDUALS REGULATION ACT OF 2016 AND
DISCUSSION DRAFT OF GOOD SAMARITAN
CLEANUP OF ORPHAN MINES ACT OF 2016**

**HEARING
BEFORE THE
COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ONE HUNDRED FOURTEENTH CONGRESS**

SECOND SESSION

MARCH 2, 2016

Printed for the use of the Committee on Environment and Public Works



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ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

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WEDNESDAY, MARCH 2, 2016

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10:32 a.m. in room 406, Dirksen Senate Office Building, Hon. James Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Boxer, Barrasso, Capito, Crapo, Wicker, Fischer, Rounds, Cardin and Markey.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. OK, our meeting will come to order. What we are going to do today is, Barbara and I will each give our opening statement, then we will hear from the Senators who are sponsors of the legislation that we are going to be looking at today, any comments that they want to make so that they can then get up and leave if they so desire.

In my years as chairman and ranking member of this Environment and Public Works Committee, I have worked to promote common sense solutions to clean up the environment, while also promoting economic development and jobs in our States and local communities. The topic of today's hearing will examine three pieces of bipartisan legislation that fit this description and address long-standing priorities of mine.

The first bill on the agenda is S. 1479, the Brownfields Utilization, Investment, and Local Development Act, known as the BUILD Act. The original brownfields law was enacted in 2002 to address liability concerns and to provide grant money to clean up abandoned and contaminated properties. The brownfields program is a conservative program. EPA estimates that for every \$1 of Federal

grant money awarded, almost \$18 in additional funding is leveraged from local and private sources.

This reauthorization draws from our experience and will make an already successful brownfields program even better for small rural communities and urban areas alike. An earlier version passed out of the committee in the 113th Congress on a voice vote. This bill was introduced last summer by Senator Markey and myself, along with Ranking Members Boxer, Rounds, Crapo, and Booker as original cosponsors. You can't get more bipartisan than that.

Although the BUILD Act was recently added by voice vote as an amendment to the Senate energy bill, it is unclear just what is going to happen to that bill, so we are going to go ahead and move as a standalone bill.

The second bill is a discussion draft of Good Samaritan legislation released in January by Senator Gardner and Senator Bennet, both from Colorado. There are hundreds of thousands of abandoned mine sites across the Country, many of which date back to the 1800's. Local watershed groups and other Good Samaritans want to clean up these sites but are afraid of taking on Superfund and Clean Water Act liability.

It is interesting that modern environmental laws are hindering the restoration of these waterways. This was certainly never the intent. Good Samaritan legislation is not a rollback of these laws or a violation of the polluter pays principle, as some suggest. Opponents of the Good Samaritan legislation also argue the EPA simply needs more money to do these cleanups. As the recent blowout at Gold King Mine caused by the EPA shows, that is not the answer.

In 2006, when I was chairman of the EPW Committee, we held an oversight hearing on this problem and approved a bill based in part on bipartisan legislation by Senators Allard and Salazar that would have addressed liability concerns through the State Good Samaritan permitting programs. I am encouraged that the current Senators from Colorado are trying to find a common ground as well.

As a veteran of the earlier efforts, I think it is important that we not allow the perfect to be the enemy of the good. Good Samaritan legislation should encourage cleanups in a responsible way, but not impose unnecessary burdens that would deter anyone from stepping forward. Good Samaritans are, like brownfields, redevelopers; they did not cause the environmental problems they are trying to address, so it is appropriate to protect them from environmental liability when they are trying to improve the environment and create economic opportunity.

The third and final bill on the agenda is S. 2446, the Improving Coal Combustion Residuals Regulation Act, which is sponsored by Senators Hoeven and Manchin. EPA has extensively studied the safety of coal ash, which is a critical ingredient in concrete used for roads and bridges.

In a final rule issued in December 2014, EPA correctly determined that coal ash should be regarded as a non-hazardous waste under RCRA. However, as the EPW Committee heard at a June 2015 oversight hearing, EPA has limited authority under RCRA and there are significant concerns by States and regulatory entities

with how that rule would be implemented, so we are attempting to correct that problem.

[The prepared statement of Senator Inhofe follows:]

Statement of Senator James M. Inhofe

Hearing on “Economic Opportunities from Land Cleanup Programs and a
Legislative Hearing on S. 1479, Brownfields Utilization, Investment, and Local
Development Act of 2015, S. 2446, Improving Coal Combustion Residuals
Regulation Act of 2016, and Discussion Draft of Good Samaritan Cleanup of
Orphan Mines Act of 2016.”

U.S. Senate Committee on Environment and Public Works

9:30 AM, Wednesday, March 2, 2016

In my years as Chairman and Ranking Member of the Environment and Public Works Committee, I have worked to promote common-sense solutions to clean up the environment while also promoting economic development and jobs in our states and local communities. The topic of today’s hearing will examine three pieces of bipartisan legislation that fit this description and address long-standing priorities of mine.

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Congress on a voice vote. This bill was introduced last summer by Senator Markey and myself, along with Ranking Member Boxer and Senators Rounds, Crapo, and Booker as original co-sponsors. You cannot get more bipartisan than that. Although the BUILD Act was recently added by voice vote as an amendment to the Senate energy bill, it is unclear what will happen with that legislation, so I think it is important that we keep this moving as stand-alone legislation.

The second bill is a discussion draft of Good Samaritan legislation released in January by Senator Gardner and Senator Bennet from Colorado. There are hundreds of thousands of abandoned mine sites across the country, many of which date back to the 1800s. Local watershed groups and other Good Samaritans want to clean up these sites but are afraid of taking on Superfund and Clean Water Act liability. It is interesting that modern environmental laws are hindering the restoration of these waterways. This was certainly never the intent. Good Samaritan legislation is not a roll-back of these laws or a violation of the polluter pays principal, as some suggest. Opponents of Good Sam legislation also argue that EPA simply needs more money to do these cleanups. As the recent blowout at the Gold King mine caused by EPA shows, that is not the answer.

In 2006, when I was the Chairman, the EPW Committee held an oversight hearing on this problem and approved a bill based in part on bipartisan legislation by Senators Allard and Salazar that would have addressed liability concerns through state Good Samaritan permitting programs. I am encouraged that the current Senators from Colorado are trying to find common ground. As a veteran of the earlier efforts, I think it is important that we not allow the perfect to be the enemy of the good. Good Samaritan legislation should encourage cleanups in a responsible way but not impose unnecessary burdens that would deter anyone from

stepping forward. Good Samaritans are like brownfields redevelopers. They did not cause the environmental problems they are trying to address, so it is appropriate to protect them from environmental liability when they are trying to improve the environment and create economic opportunity.

The third and final bill on the agenda is S. 2446, the Improving Coal Combustion Residuals Regulation Act of 2016, which is sponsored by Senators Hoeven and Manchin. EPA has extensively studied the safety of coal ash, which is a critical ingredient in concrete used for roads and bridges. In a final rule issued in December 2014, EPA correctly determined that coal ash should be regulated as a nonhazardous waste under the Resource Conservation and Recovery Act. However, as the EPW Committee heard at a June 2015 oversight hearing, EPA has limited authority under RCRA and there are significant concerns by states and regulated entities with how that rule would be implemented. This bill would amend RCRA to authorize states to establish permitting programs for the disposal of coal ash, subject to EPA approval and oversight. The cooperative federalism approach in this legislation is how most of our environmental programs operate and addresses the main concern raised by the Administration about earlier legislation that passed the House.

This hearing was originally scheduled for the end of January, but we had to postpone it due to the blizzard. I appreciate our panel of witnesses for their patience in rescheduling this hearing and for making themselves available today.

Senator Boxer.

**OPENING STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thank you, my friend.

Today the Committee will be discussing three bills, a brownfields bill, a coal ash bill, and a Good Samaritan bill. I believe the brownfields bill is certainly ready to move forward, I believe the coal ash bill weakens protections and should not move forward, and I believe we can work together to get that Good Samaritan bill into a very good place, and I am really excited about doing that.

The BUILD Act, which is the reauthorization of EPA's brownfields program, is so important because here we have these polluted sites, they are certainly not Superfund sites; they can be cleaned up "pretty easily" and then those acres can remain in productive use. Very important for our communities, and I am excited to say that we are in full agreement on that one.

The second bill, S. 2446, would significantly weaken the protections in EPA's recently finalized coal ash rule. The new rule contains important protections for communities near coal ash disposal sites, and we are going to get our hands on a photo just to remind us of what happens to communities. This one was in Tennessee, where the coal ash just slid right into the waterways and destroyed communities. So I don't want to see us weaken the coal ash rule.

Coal ash is dangerous. It contains many toxins such as mercury, arsenic, and lead. When you hear the words mercury, arsenic, and lead, you know that these are cancer-causing elements and toxins, and they harm particularly children. Coal ash is often stored in impoundments that are unlined; they are located adjacent to rivers and lakes, where the toxics leach into the groundwater and surface water. So in Kingston, Tennessee and in the Dan River in North Carolina, these impoundments could fail, spreading toxic waste through communities and waterways.

We always look at what is happening in Flint to underscore the importance of being wise about these things. We have heard disturbing reports of children poisoned by contaminated drinking water, so Congress should be doing more to protect the American people from polluted water, not less. And this is the Environment Committee. It is so important to remember this is the community that has that sacred responsibility to protect our people from lead, from arsenic, from other poisons.

So I think it is disappointing but, frankly, not surprising given the differences the chairman and I have on the issue of the environment, that this Committee is actually considering a bill that would in fact overturn this rule, amend this rule; and I believe we should implement the rule quickly so we can cleanup millions of tons of coal ash around the Country.

So the third bill is a discussion draft proposed by our Colorado Senators Bennet and Gardner. I am very pleased to see them here, my friends. It would encourage Good Samaritan cleanups of abandoned hardrock mines. The bill would allow individuals who are not responsible for the contamination at a mine site to conduct a voluntary cleanup of an abandoned mine and be shielded from liability under the Clean Water Act and Superfund.

Abandoned hardrock mines pose a serious threat to the waterways that people use for recreation and that provide drinking water, again, to our children, to our families. Mine waste frequently contains high levels of those heavy metals, including, again, mercury, lead and arsenic.

So I want to encourage these cleanups, but what we learned from the failed EPA cleanup, where a long-term contractor in the private sector hired by the EPA caused a major and terrible leak, we know about that, we have had testimony about that, from an abandoned mine. So we know these are difficult to clean up.

But I do think, even though it does raise other issues, we don't want the polluter to get off the hook, that is No. 1. So we want to make sure whatever bill we pass doesn't get the original polluter off the hook if there is a way to get into a polluter's pockets who caused the problem. We know cleanup costs could be as high as \$50 billion, so that is why it is great if we can come up with a Good Samaritan plan here that works out that doesn't put taxpayers on the hook.

I do comment the Colorado Senators and I am working with both of them, and I hope before we get to the markup we will have an agreement.

In closing, I will show you this photo of that coal ash spill. You can see that coal ash just contaminating the whole area. And this is what happened to people because of the coal ash spill. We can't fool around with this, folks, these are real problems, especially in the south of our Country, where we have so much of this coal ash just stored in unlined containers. Crazy. We can't have it.

So we have work to do, but I am ever optimistic, Mr. Chairman. Senator INHOFE. Yes. You have come to the right place.

Gentlemen, if it is all right with you, we will go ahead and start with Colorado in the hopes that Senator Manchin will be here so you can do that all right, is that all right? All right, Senator Gardner.

OPENING STATEMENT OF HON. CORY GARDNER, U.S. SENATOR FROM THE STATE OF COLORADO

Senator GARDNER. Thank you, Mr. Chairman, and thank you, Ranking Member Boxer, for your words of encouragement on this legislation, and thanks to all of you for holding this hearing today on the Good Samaritan Cleanup of Orphan Mines Act of 2016.

Senator Bennet and I, along with Congressman Scott Tipton from Colorado, have been working for years together on this issue. The mine was located in Scott Tipton's congressional district, which is on the western slope of Colorado, which is the location of many abandoned hardrock mines with acid mine drainage.

We have also received a significant amount of stakeholder feedback, and I think that is what is remarkable about this draft discussion, the ability to hear back from the Colorado Governor, our attorney general's office, and many of the private sector and public-private partners that have been participants in this discussion is truly appreciated. Our goal is to introduce a bill that works on the ground for our State and constituents and better the environment.

So, Mr. Chairman, I do appreciate the chance to make a statement here and to talk about what we can do to get this not just talked about in the future, but enacted into law.

Last fall, this Committee, and I am grateful for your actions, had an oversight hearing to examine the spill that took place at the Gold King Mine in Southwest Colorado. A bipartisan group of colleagues and I testified then on the impact the spill had on our constituencies, including Senator Heinrich from New Mexico.

We are all still feeling the effects of the spill, including lost property, lost economic opportunity, lost business opportunity, and monitoring the EPA's reimbursement process. In fact, just 2 weeks ago I was meeting with council members of the Mountain Ute and the Southern Ute Tribes to discuss the Good Samaritan legislation and the impact that this bill had on their livelihoods and their properties.

Today I come before the Committee to advocate the need to move forward with this legislation that would allow Good Samaritans like the mining industry, State agencies, local governments, nonprofits, and other groups and organizations the ability to clean up the environment and improve water quality conditions in and around abandoned mines.

The Government Accountability Office estimates that more than 160,000 abandoned hardrock mines exist in the United States today, and at least 33,000, 33,000 of these mines pose environmental or safety concerns. We have hundreds, if not thousands, of them in Colorado. One of the immediate actions we can do in Congress to address abandoned mines is to pass Good Samaritan legislation. It is a concept that has been around for decades, with nearly every stakeholder over time advocating and remaining true to their opinions on the concept. I respect all stakeholder positions, but it is time that we take a small step toward facilitating cleanup to prove that this idea will actually work.

And when the legislation sunsets in 10 years, I fully support a comprehensive review of what concepts worked and what could be done better in terms of the Good Samaritan cleanup. If we can move this bill forward now, we will have the knowledge and the facts necessary to make the Good Samaritan program even stronger in the future.

The Gold King Mine spill, as terrible as it was, helped shine a light on the need for remediation of abandoned hardrock mines. As the situation currently stands regarding cleanup of abandoned mines, there aren't enough Federal or State resources to properly remediate these mines. During the Gold King Mine remediation, the Federal Government also demonstrated a lack of expertise in the remediation process. Further, while the EPA has guidance on the remediation of mines by Good Samaritans, this guidance has done little to incentivize Good Samaritans to enter these sites and to begin the cleanup.

There are willing and able Good Samaritans that wish to address safety concerns and improve water quality at abandoned mines, as you will hear this morning, you will hear from Trout Unlimited. But the fear of incurring liability for meeting all Federal standards during cleanup is too great, and these sites continue polluting the environment and our waters as we wait and debate.

There has been broad bipartisan support for passing Good Samaritan legislation in the past. Mr. Chairman, under your leadership, the Committee, as you stated, in 2006, reported out a bipartisan bill from Colorado Senators Ken Salazar and Wayne Allard. Ten years later my Democratic colleague, Senator Bennet, and I are advocating for the same type of approach of Good Samaritan. The time has come for Congress to move forward with this legislation to get this done for Colorado and any other State or Tribe that wishes to participate in a Good Samaritan program. We must improve the environmental and safety issues related to these abandoned mines.

The draft legislation before the Committee is designed to allow Good Samaritans the opportunity to apply for a permit under a State or Indian Tribe program or EPA's program to assist in the environmental cleanup of abandoned mines. The State or Indian Tribe or the EPA, as the permitting agency that approves or denies the Good Samaritan permit, monitors the cleanup for the duration of the permit. The approved permit allows the Good Samaritan to improve the environment and water quality while receiving limited liability relief from only those provisions necessary under the Acts, the Clean Water Act and Comprehensive Environmental Response Compensation and Liability Act of 1980.

A criticism of the past bills was that liability relief was too broad. So we have tailored this bill to only include those provisions that we believe are necessary to facilitate the cleanup. This draft holds Good Samaritans liable if they fail to comply with the terms of the Act, but it provides an exemption if the failure results in only minor impacts.

The draft includes that any action done by a Good Samaritan must improve the environment and improve the water quality standards to the maximum extent practical under the circumstances. In a final note, the draft sunsets in 10 years, giving us a chance to make sure that the process worked.

Mr. Chairman, I have a letter from Colorado Governor John Hickenlooper expressing support for the bipartisan effort we have undertaken in the Colorado delegation, and I would respectfully request that the letter be included as part of my testimony for today's hearing, along with Colorado Senate Joint Memorial 16, which is a resolution from our State legislature in support of this legislation.

Senator INHOFE. Without objection.

[The referenced information was not received at time of print.]



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March 2, 2016

The Honorable James M. Inhofe, Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Chairman Inhofe,

The Interstate Mining Compact Commission and the National Association of Abandoned Mine Land Programs submit the attached statement for the record of the Committee's March 2 hearing entitled "Economic Opportunities from Land Cleanup Programs and a Legislative Hearing on 3 Measures." The statement focuses in particular on the discussion draft of the "Good Samaritan Cleanup of Orphan Mines Act of 2016." Thank you for the opportunity to submit this statement and for the Committee's continuing efforts to establish much-needed liability protection for Good Samaritans engaged in treatment of abandoned mine land discharges.

Sincerely,

Gregory E. Conrad
Executive Director

Attachments

cc. The Honorable Barbara Boxer, Ranking Member
Senate Committee on Environment and Public Works
456 Dirksen Senate Office Bldg.
Washington, DC 20510

"Serving the States for Over 40 Years"

**Gregory E. Conrad
Executive Director, Interstate Mining Compact Commission**

On Behalf of

The Interstate Mining Compact Commission

And

The National Association of Abandoned Mine Land Programs

Before the

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

**Economic Opportunities from Land Cleanup Programs and a Legislative
Hearing on 3 Measures**

March 2, 2016

**Statement of Interstate Mining Compact Commission
and National Association of Abandoned Mine Land Programs re.
The Good Samaritan Cleanup of Orphan Mines Act of 2016**

Introduction

We appreciate the opportunity to submit this statement and share our views and concerns regarding this very important initiative. This statement will address the issue of abandoned mine lands and the potential for a Good Samaritan program to encourage the remediation of abandoned mine sites, in particular through the program laid out in the discussion draft of the “Good Samaritan Cleanup of Orphan Mines Act of 2016” developed by Senators Gardiner and Bennett. This topic is of great interest and importance to the states and Tribes represented by the Interstate Mining Compact Commission (IMCC) and National Association of Abandoned Mine Land Programs (NAAMLPP). This statement will focus on the nature and extent of AML problems throughout the country, the potential benefit of a Good Samaritan program, the model and success of the Pennsylvania Good Samaritan program, certain provisions which should be included in any potential Good Samaritan legislation, and the potential for the discussion draft before the committee today to address these issues.

IMCC and NAAMLPP are multi-state governmental organizations that together represent over 30 mineral-producing states and Indian tribes, each of which implements programs that regulate the environmental impacts of both coal and hardrock mining and that reclaim abandoned coal and hardrock mine sites. Many of these programs earned delegations of authority from the federal government to implement national environmental laws such as the Surface Mining Control and Reclamation Act (SMCRA) and the Clean Water Act.

There are myriad reasons why a federal Good Samaritan program is needed, but the most important is to remove the potential for incurring liability under federal environmental protection statutes such as the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). These liabilities deter motivated, well-intentioned volunteers from undertaking projects to clean up or improve abandoned sites, thereby prolonging the harm to the environment and to the health and welfare of our citizens. These prohibitive circumstances also have economic impacts that are felt nationwide. In addition, the universe of abandoned mine lands is so large and the existing governmental resources so limited that without the assistance of Good Samaritan volunteers, it will be impossible to reclaim all of these lands and clean up all of the abandoned mine discharge (AMD) impaired waters. The provisions of the Good Samaritan Cleanup of Orphan Mines Act of 2016 show considerable promise in establishing an effective federal Good Samaritan program. There are however certain provisions which require additional attention, in order to ensure that the efforts of potential Good Samaritans are not discouraged by impracticably extensive permitting and financial capability requirements. This will in turn ensure the program achieves the maximum benefit possible for the remediation of lands and waters affected by abandoned mines.

The Abandoned Mine Land Problem

Over the past 40 years, following the passage of comprehensive national environmental laws, the states and Indian tribes have taken the lead in fashioning and implementing effective programs for the regulation of mining and its impacts, including the cleanup of inactive and abandoned mine lands and the restoration of mine drainage impacted waterways.

Nationally, coal and hardrock abandoned mines continue to have significant adverse effects on the environment. Environmental impacts that occur at AML sites include subsidence, surface and ground water contamination, erosion, uncontrolled sedimentation, chemical releases, and acid mine/acid rock drainage. Safety hazards associated with abandoned mines often result in injuries and even deaths each year. Abandoned and inactive mines, resulting from mining activities that occurred over the past 150 years prior to the implementation of present day regulations and controls, are scattered throughout the United States. The sites are located on private property, state owned land, and federal public lands.

We commend you, and your colleagues, Mr. Chairman, for your continuing efforts in pursuing Good Samaritan protections under the Clean Water Act and CERCLA for those interested in treating abandoned mine water discharges. Despite the extraordinary dedication of those involved in the AML arena, there remains a substantial amount of work to be done. This is due primarily to insufficient funding, not a lack of will by the states, tribes and others. The states and tribes – often together with our federal agency partners as well as local watershed groups – have made notable progress in addressing the issue. But our efforts need a substantial boost and the potential Good Samaritan solution before the Subcommittee today will propel us toward accomplishing this goal. A Good Samaritan program will allow us to engage the knowledge and passion available in local watershed groups coupled with private sources of funding to accomplish much more reclamation and watershed restoration. This effort would be undertaken with little or no additional cost to the government, simply by protecting these groups from unreasonable and prohibitive liability.

Hardrock AML sites continue to pose an especially difficult problem, largely due to the lack of a federal hardrock AML program such as is in place for coal AML remediation under the federal Surface Mining Control and Reclamation Act (SMCRA). Over the years, several studies have been undertaken in an attempt to quantify the total hardrock AML cleanup need. Despite these efforts, there is currently no comprehensive, fully accurate on-the-ground national inventory of the hardrock AML problem. Estimating the costs of reclaiming hardrock abandoned mines is difficult for a variety of reasons, one of which being the time-consuming and expensive nature of inventorying work. The cost of remediating environmental problems such as ground water and surface water contamination, acid mine/acid rock drainage or windblown contaminants are even more difficult to estimate. Despite the lack of a complete inventory, a significant amount of the hardrock AML sites have been identified and inventoried. The results of that effort demonstrate that nationally there are large numbers of significant safety and environmental problems associated with inactive and abandoned hardrock mines and that cumulative remediation costs are very large.

What becomes obvious in any attempt to characterize the hardrock AML problem is that it is pervasive and significant. Although inventory efforts are helpful in attempting to put numbers on the

problem, in almost every case, the states and tribes are intimately familiar with the highest priority problems within their borders. The states are therefore well positioned to direct limited reclamation dollars to best protect public health and safety and the environment.

Today, state and tribal agencies are working on hardrock abandoned mine problems through a variety of state and federal funding sources. Various federal agencies, including the U.S. Environmental Protection Agency, the Bureau of Land Management, the National Park Service, the U.S. Forest Service, and the U.S. Army Corps of Engineers have provided some funding for hardrock mine remediation projects. These state/federal partnerships have been instrumental in assisting the states and tribes with their hardrock AML work. As states and tribes take on a larger role in hardrock AML cleanups in the future, they will continue to involve their federal partners. Unfortunately, most of these existing federal grants are project specific and do not provide consistent funding.

For states and tribes with coal mining, the most consistent source of AML funding has been the Title IV grants authorized under SMCRA. While the vast majority of this funding is used to address coal AML and AMD problems, *Section 409 of SMCRA allows states and tribes to use these grants at high priority non-coal AML sites*. The funding is generally limited to safeguarding hazards to public safety (e.g., closing mine openings) at hardrock sites. The small amount of money that SMCRA states have been able to spend on physical safety hazards at hardrock sites appears to be making a difference.

A federal Good Samaritan program also holds immense potential benefit for remediation of abandoned coal mines, in particular where they affect surface and groundwater resources. The AML program under Title IV of SMCRA is making great progress with coal AML, but these funds are limited and therefore tend to be focused on immediate health and safety problems. SMCRA requires that sites posing immediate dangers to human health and safety must be designated as higher priority. It is therefore difficult to direct meaningful AML funds to water treatment problems.

As states and tribes work to address the remaining inventory of abandoned coal and hardrock mine sites, we are increasingly concerned about the escalating costs of addressing those problems that continue to go unreclaimed due to insufficient funding. Unaddressed sites often worsen over time, thus increasing reclamation costs. Inflation without concurrent increases in funding further increases these costs. The longer the reclamation is postponed, the less reclamation will be accomplished. In addition, the states and tribes are finding new, higher priority problems each year, especially as many of our urban areas encroach upon what were formerly rural abandoned mine sites. New sites also continually appear due to the effects of time and weather, especially in the case of mine subsidence. This underscores the need for constant vigilance to protect our citizens and their environment, and the importance of Good Samaritan relief before the Subcommittee today.

We believe that the enactment of Good Samaritan legislation will be immensely helpful to the States' and Tribes' ongoing efforts to remediate the vast quantities of AML sites remaining, and those continuing to manifest. We have seen the results from this type of approach in states such as Pennsylvania, which enacted its own Good Samaritan law to provide protections and immunities related to state clean water requirements for those groups and individuals who were not legally responsible but who voluntarily undertook the reclamation of abandoned mine lands or abatement of mine drainage. However, under the Pennsylvania Good Samaritan program, these groups are still exposed to potential

liability under the federal Clean Water Act for their good deeds, which is having a chilling effect on watershed cleanup efforts.

Pennsylvania's Experience

The experience of Pennsylvania has demonstrated there are countless opportunities for Good Samaritans to clean up abandoned mine land and restore AMD impaired streams. Pennsylvania's citizen, watershed, and environmental groups have long been working to address the problems in their geographical areas. When Pennsylvania officials tried to leverage the state's limited resources to accomplish more reclamation by working with these groups, we met significant resistance regarding sites that had existing pollutional mine drainage. Many groups would not reclaim sites that these discharges because by re-affecting the site, they could be held liable under state and federal law to permanently treat the discharge. They could incur this liability even though they had not created the discharge and even if their reclamation improved the overall quality of the discharge. With the advances made in science, technology, and our understanding of mine drainage, the Pennsylvania Department of Environmental Protection was aware of many abandoned mine discharges that could be eliminated or improved at little or no cost to the Commonwealth if the potential for personal liability could be addressed.

In response to this problem, Pennsylvania enacted the Environmental Good Samaritan Act¹ (EGSA) in 1999. Projects must meet certain criteria to be covered by the EGSA and must be reviewed and approved by Pennsylvania's Department of Environmental Protection (PADEP). Eligible projects must restore mineral extraction lands that have been abandoned or not completely reclaimed, or they must be a water pollution abatement project that will treat or stop water discharges from abandoned mine lands or abandoned oil or gas wells. The Act provides that a person, corporation, nonprofit organization, or government entity that participates in an eligible Good Samaritan project qualifies for protection if they meet certain conditions, which are elaborated upon in Appendix A. Rather than a conventional permit, which in Pennsylvania's experience can be a significant discouragement to potential Good Samaritans, the Pennsylvania EGSA utilizes a registry system, wherein qualifying projects and Good Samaritans are registered after the details of the project and the Good Samaritan's background and capability are reviewed by PADEP, thereby providing the necessary liability protection for carefully considered and designed projects.

Pennsylvania's experience indicated that landowners' exposure to potential liability also impedes AML remediation efforts. The Act therefore also provides that a landowner who provides access to the land without charge or compensation to allow a reclamation or water pollution abatement project is eligible for protection.

Pennsylvania's Good Samaritan program has been a great success and provides proof of the Good Samaritan concept. Pennsylvanians have undertaken more than 50 Good Samaritan projects to date, and the participants have included local governments, individuals, watershed associations, corporations, municipal authorities, and conservancies. Some projects are simple low maintenance treatment systems while others are large and complex.

¹ Title 27 Pennsylvania Consolidated Statutes Annotated Sections 8101 - 8114

We would like to highlight a couple of examples from Pennsylvania: the Bennett Branch Restoration, a project successfully completed under the state's Good Samaritan protections, and the Gladden AMD Discharge, a project which was planned but never implemented as a result of liability concerns. These projects are discussed at length in Attachment B. While substantial progress has been made under the Pennsylvania program the opportunities for reclamation by Good Samaritans in Pennsylvania and throughout the country would be greatly enhanced by the enactment of federal Good Samaritan legislation.

The Good Samaritan Cleanup of Orphan Mines Act

The states and Tribes represented by IMCC and NAAMLPL are thankful to Senators Gardiner and Bennett and Representative Tipton for their efforts to develop a program to further the reclamation of hardrock AML sites and to provide protections for Good Samaritans seeking to facilitate remediation efforts. Overall, we are encouraged by the discussion draft and find that it includes many beneficial provisions. A summary of these beneficial provisions is included below, and they are further discussed in the subsequent section of this testimony titled, "Considerations in Crafting a Federal Good Samaritan Program."

IMCC and NAAMLPL are particularly supportive of the inclusion of the following provisions:

- ✓ Allows states and Tribes to apply for and administer delegated Good Samaritan programs
- ✓ Provides liability protections for both CWA and CERCLA
- ✓ Allows for partial remediation where appropriate
- ✓ Allows for permit transfer

We are however concerned about certain aspects of the discussion draft, in particular with the regard to the permitting scheme. The overall concern is that the elaborate permitting approach suggested by the bill would be unworkable and a discouragement for many potential Good Samaritans, for a number of reasons.

Potential Good Samaritans, in particular NGO's, tend to have limited funding, often in the form of discrete grants. They often acquire funding for watershed restoration projects in small incremental amounts over long periods of time. Overly burdensome permitting requirements will therefore be cost-prohibitive, as many NGO's will not be able to afford compliance with several aspects of the proposed permitting program. These permitting activities would have to be completed before the project is approved. Many NGO's will be reluctant to expend a substantial amount of their grant to develop a project which may never be implemented.

Furthermore, if the permits anticipated by this section would have end dates, meaning that protections would only apply during the time frame of the permit, many potential Good Samaritans will be reluctant to engage in activities for which they might incur liability beyond the termination date of a permit, as would be the case with water treatment projects. Good Samaritans must be supplied with liability protection in perpetuity in order to ensure that they can afford to undertake the project. Similarly, the permit requirement to provide evidence that the applicant has sufficient financial

resources to carry out any operation and maintenance activities related to the remediation will be extremely prohibitive. Most potential Good Samaritan groups, including the states, will not have the type of financial resources available to fulfill or guarantee this requirement.

As an alternative to a permitting system, we suggest consideration of the procedure utilized by the Commonwealth of Pennsylvania's successful Environmental Good Samaritan Act (EGSA). This system utilizes letters of approval that apply to a specific AML or AMD project rather than permits, and is generally more workable and less cost-prohibitive to the efforts of potential Good Samaritans. For example, grant applications include descriptions of the proposed projects, but are not required to submit detailed engineering plans until the basic aspects of the project have been approved, thereby preventing the potential Good Samaritan group from wasting limited resources. Additionally, the EGSA approval provides Good Samaritan projects involving treatment systems that require long-term operation and maintenance perpetual protection from liability, rather than only during the duration of a permit, which quells concerns with long-term liability. The system utilized by the Pennsylvania program is outlined further in Appendix A.

Considerations in Crafting a Federal Good Samaritan Program

Over the course of the past fifteen years, several bills have been introduced in the U.S. Congress to enhance the cleanup of inactive and abandoned mines by emulating the Pennsylvania Good Samaritan program. Each bill offered a unique approach for addressing Good Samaritan voluntary remediation efforts by removing the current disincentives in the federal Clean Water Act that inhibit these cleanups. From the states' and tribes' perspective, we have several recommendations and concerns that we believe should be considered in any Good Samaritan legislative effort.

In accordance with the principles of state primacy contained in laws such as SMCRA and the Clean Water Act, we believe it is essential that Good Samaritan programs be administered by state and tribal regulatory authorities as the states and tribes best understand the complexities associated with abandoned mine lands within their borders, including which sites can be improved and how to accomplish the improvement. States also tend to have a better working relationship and understanding of potential Good Samaritans. We believe that the states and tribes are in the best position to administer Good Samaritan programs with limited, appropriate oversight by federal agencies such as EPA and OSMRE. We are encouraged that the discussion draft would allow for states and tribes to apply for and administer delegated Good Samaritan programs. This section of the bill may require additional attention to clarify that programs administered by the states could undertake projects on state and private lands as well as federal land, and that existing successful state programs could meet the requirements for delegation.

Many previous Good Samaritan legislative efforts have focused only on liability with regard to the Clean Water Act. While this is certainly the most needed protection, we maintain that Good Samaritan remediation efforts will still be stifled by the prospect of incurring liability under a variety of other federal environmental protection laws such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The key here is that if potential Good Samaritans do not feel completely assured of liability protection related to these additional laws, many groups, private

individuals, and businesses will have little choice but to forego remediation at sites where the risk is simply too great a threat to their organization's financial health. We believe that the extension of protections provided by the discussion draft to CERCLA in addition to the CWA is reasonable and will encourage Good Samaritan remediation work.

Due to recent events, much attention has rightfully been paid to the problems of hardrock AML. A federal Good Samaritan program is imperative to the progress of hardrock AML work, but is also crucially important for work on abandoned coal sites. The real cost of addressing high priority coal AML problems likely exceeds \$9 billion. The cost of cleaning up all coal related AML problems, including acid mine drainage, could be 5 to 10 times this amount and far exceeds available monies. While we recognize that the discussion draft is largely focused on facilitating mine discharge treatment in the West, where hardrock AML is much more prevalent, we are concerned that the discussion draft would not apply to coal AML sites. The inclusion of coal AML will empower local groups to make a much greater impact on the vast inventory of remaining coal AML hazards and coal mine drainage impacted streams, which is especially important in Appalachian states such as Pennsylvania, where a massive inventory of unfunded coal AML-related mine discharge projects remains.

Furthermore, with regard to water quality treatment at coal AML sites, the state AML programs often find their hands tied by the same liability concerns from the CWA that impede the efforts of local watershed groups. Pursuant to the Fourth Circuit Court of Appeals decision in *West Virginia Highlands Conservancy v. Huffman*² that designated water treatment facilities as point-source discharges, West Virginia must now obtain CWA permits for all bond forfeiture sites. There have been concerns that this ruling could be extended to all AML projects being undertaken by states and tribes. Just as with Good Samaritans, the state and tribal AML programs are often unwilling to pursue simple but effective water treatment solutions where they lack the resources to engage in full remediation, for fear of incurring liability for the entire discharge as a result of affecting the site – even where the effect is undoubtedly positive.

State mining regulatory authorities have experienced significant permitting difficulties in trying to fit abandoned mine drainage treatment systems into the NPDES framework outlined in the CWA. Although treatment systems for abandoned mine drainage have the characteristics of a point source discharge, NPDES permits have not been routinely issued in most states, (either to the state or to non-profit watershed groups or trustees of trust funds), for these treatment systems. There are several reasons for this. First, passive water treatment systems constructed at abandoned mine sites often have not been designed to meet stringent effluent limitation requirements that would be imposed by an NPDES permit, and experience has shown that significant improvements in stream water quality can be achieved with partial remediation. Second, watershed groups often lack the resources needed to obtain, hold and comply with NPDES permit requirements. Third, funding limitations have led many states to adopt an approach that attempts to maximize the number of discharges that receive treatment, albeit at levels that do not strictly meet water quality based effluent requirements but nevertheless significantly improve the water quality in the receiving stream and the watershed such that they can support healthy populations of aquatic life.

² U.S. Fourth Circuit Court of Appeals in *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159 (4th Cir. 2010)

Historically, for abandoned discharges, EPA has not provided clear direction as to when permits are required and what the performance standards must be (likely because of the problem's complexity and scope and the lack of sufficient funding for an adequate remedy). As a result, hundreds of treatment facilities have been constructed by the states or by partnering groups or agencies in the past several decades without NPDES discharge permits being obtained for these facilities. Decisions regarding water treatment at these sites are often based on practical limitations such as available space, technology options, landowner cooperation, and cost. The mine drainage at these sites is being treated, pollution is substantially reduced, and noticeable water quality improvements are being made. For these reasons, a potential requirement to obtain NPDES permits for abandoned mine drainage treatment systems would severely complicate and discourage such work, and is of great concern to the state regulatory programs and local watershed groups. Therefore, we highly recommend the inclusion of a provision in the discussion draft exempting AML reclamation and water treatment work undertaken by the states pursuant to Title IV of SMCRA from NPDES requirements under the CWA. This provision will bolster the efforts of the state and tribal AML programs by protecting the programs from unnecessary and prohibitive potential liability.

With respect to applicable environmental standards for Good Samaritan projects, we believe it is absolutely critical that the legislation include flexible standards to allow for partial remediation, based on a determination by a state or federal regulatory authority that the Good Samaritan efforts will result in environmental improvement. Some abandoned mine problems are so intractable that it is not possible to achieve "total cleanup" even with today's advanced technologies. These types of cleanups could also be cost prohibitive. We know that in many circumstances, a limited cleanup can result in significant environmental improvement. It is poor public policy and short-sighted to reject the opportunity to achieve partial restoration that makes a significant improvement where total cleanup cannot be achieved for one reason or another. We also know that, in some circumstances, even where total cleanup is technically possible, at some juncture the cleanup reaches a point of diminishing returns and the money would be better spent on cleaning up other sites. The bottom line here is that some cleanup is usually better than none at all. We are encouraged to see that discussion draft allows for partial remediation.

As discussed earlier, it has been Pennsylvania's experience under its law that it is important that innocent landowners be covered for the Good Samaritan project activities. Some landowners will not cooperate if they are not protected. We recommend the inclusion of language that speaks directly to the potential liabilities of landowners who would otherwise allow free access to Good Samaritan groups seeking to do remediation work.

Good Samaritan protections should be extended to projects undertaken on state and private lands in addition to federal lands. Pollution problems know no such boundaries and must be addressed wherever they occur. The environment and public health and safety all benefit from cleanup of abandoned mine lands and restoration of AMD impaired streams, whether public or private. Some additional attention may be beneficial to clarify that the discussion draft would provide eligibility to projects on state and private lands.

Conclusion

The legacy of abandoned mine lands still looms large in many of our nation's communities. In the pursuit of eliminating the lingering effects of abandoned mines, and in particular the impairment of water resources, every source of help is needed. To that end, the enactment of reasonable CWA (and other federal environmental laws) liability protection for prospective Good Samaritan groups and State and Tribal AML programs holds immense potential benefit. The experience of Pennsylvania demonstrates that the Good Samaritan idea works, but the obstacles to further enfranchisement of these groups must be removed. It is time for Congress to act to enable Good Samaritans to help conquer the monumental task of reclaiming our abandoned mine lands and restoring our mine drainage impaired waters. IMCC and NAAMLPL would welcome the opportunity to continue developing the discussion draft of the Good Samaritans Cleanup of Orphan Mines Act in order to ensure that it achieves the maximum possible benefit to Good Samaritan efforts in remediating the multitude of AML sites which beset so many of our historic mining communities nationwide.

Thank you for the opportunity to submit this statement. Should you have any questions or require additional information, please contact us.

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Appendix-A - Provisions of the Pennsylvania Environmental Good Samaritan Act³

The effect of a projects acceptance under Pennsylvania's program are outlined below:

(a) General rule.—Except as specifically provided in subsection (b), a person who provides equipment, materials or services at no cost or at cost for a reclamation project or a water pollution abatement project:

- (1) Shall be immune from liability for any injury to or damage suffered by a person which arises out of or occurs as a result of the water pollution abatement facilities constructed or installed during the water pollution abatement project.
- (2) Shall be immune from liability for any pollution emanating from the water pollution abatement facilities constructed or installed during the water pollution abatement project unless the person affects an area that is hydrologically connected to the water pollution abatement project work area and causes increased pollution by activities which are unrelated to the implementation of a water pollution abatement project.
- (3) Shall not be deemed to assume responsibility for or incur liability for the operation, maintenance and repair of the water pollution abatement facilities constructed or installed during the water pollution abatement project.
- (4) Shall not be subject to a citizen suit under section 601 of the act of June 22, 1937 (P.L.1987, No.394), known as The Clean Streams Law, for pollution emanating from the water pollution abatement facilities constructed or installed during the water pollution abatement project.

Pennsylvania's Environmental Good Samaritan Act also provides that a landowner who provides access to the land without charge or compensation to allow a reclamation or water pollution abatement project is eligible for protection. The Good Samaritan Act also provides that a person, corporation, nonprofit organization, or government entity that participates in a Good Samaritan project is eligible for protection if they:

- Provide equipment, materials or services for the project at cost or less than cost.
- Are not legally liable for the land or water pollution associated with past mineral extraction.
- Were not ordered by the state or federal government to do the work.
- Are not performing the work under a contract for profit, such as a competitively bid reclamation contract.
- Are not the surety that issued the bond for the site.

Landowners who provide free access to the project area are not responsible for:

³ Title 27 Pennsylvania Consolidated Statutes Annotated Sections 8101 - 8114

- Injury or damage to a person who is restoring the land or treating the water while the person is on the project area.
- Injury or damage to someone else that is caused by the people restoring the land or treating the water.
- Any pollution caused by the project.
- The operation and maintenance of any water pollution treatment facility constructed on the land, unless the landowner damages or destroys the facility or refuses to allow the facility to be operated or repaired.

Landowners are not protected from liability if they:

- Cause injury or damage through the landowner's acts that are reckless, or that constitute gross negligence or willful misconduct.
- Charge a fee or receive compensation for access to the land.
- Violate the law.
- Fail to warn those working on the project of any hidden dangerous conditions of which they are aware within the project area.

Landowners are also not protected if adjacent or downstream landowners are damaged by the project and written or public notice of the project was not provided.

People who participate in a Good Samaritan project are not responsible for:

- Injury or damage that occurs during the work on the project.
- Pollution coming from the water treatment facilities.
- Operation and maintenance of the water treatment facilities.

Good Samaritan project participants are not protected if they:

- Cause increased pollution by activities that are unrelated to work on an approved project.
- Cause injury or damage through acts that are reckless, constitute gross negligence or willful misconduct.
- Violate the law.

Participants are also not protected if adjacent or downstream landowners are damaged by the project and written or public notice of that project was not provided.

Appendix-B - Relevant Examples of Pennsylvania AMD Treatment Projects

Bennett Branch Restoration Project

Beginning in 2004, the Pennsylvania Department of Environmental Protection (PA-DEP), Bureau of Abandoned Mine Reclamation (BAMR) worked with multiple partners to restore water quality and reclaim abandoned mines in the Bennett Branch Sinnemahoning Creek Watershed in northcentral Pennsylvania. The Bennett Branch is a tributary to the Susquehanna River which flows to the Chesapeake Bay in Maryland. Over 70% of the land in the watershed is publicly owned in the form of state park land, state forest land, or state game lands. The primary water quality problems in the watershed were the result of uncontrolled and untreated discharges of acid mine drainage (AMD) from abandoned mine lands (AML) that severely degraded the water quality in the lower 33 miles of the Bennett Branch and many of its tributaries. As a result of the AMD impairment, those 33 miles of stream were nearly completely devoid of life.

The primary objective of the Bennett Branch Restoration Project was to develop and implement a detailed mine drainage abatement and abandoned mine reclamation plan. The goals of the plan were to restore water quality in the main stem of the Bennett Branch, improve water quality in the AMD impacted tributaries, and maximize the reclamation of AML throughout the watershed. The plan included a combination of surface reclamation and both active and passive mine drainage treatment. Limestone reserves within the project area provided an opportunity to incorporate alkaline addition in the surface reclamation. Mineable reserves of Upper and Middle Kittanning Coal within the limestone extraction area provided an opportunity to partner with the mining industry in project implementation. The re-mining was conducted under a demonstration permit authorized under Project XL, an experimental permitting process cooperatively developed by EPA, OSM and the PA-DEP to both facilitate re-mining and highlight its benefits. The restoration work was pursued in conjunction with the PA Wilds Initiative which advocates economic development and tourism throughout north-central Pennsylvania.

The PA-DEP-BAMR partnered with the Bennett Branch Watershed Association (BBWA), several other state and federal agencies, and the mining industry to maximize the restoration work and to reduce the overall project cost. The BBWA applied for and received approval for PA Good Samaritan protections for their involvement in the project. The project included reclamation of over 800 acres of AML, much of which was restored to rangeland for PA's growing elk herd. Additionally, five passive mine drainage treatment systems and two tipping bucket lime dosers were constructed to treat abandoned mine discharges throughout the watershed. Work on the project was completed in 2012 with the Hollywood AMD Treatment Plant, which treats an average of 2,000 gallons per minute (2.9 million gallons per day) of AMD, being the single biggest project. The Hollywood Plant treats 21 separate AMD discharges at a centralized location which originate from four separate abandoned underground coal mine complexes. The number and severity of the AMD discharges located within the watershed made a "total clean up" to federal CWA standards cost prohibitive. The level of treatment was designed to allow for the biological recovery of the Bennett Branch to support a sport fishery. The project costs for this public-private partnership, which approached \$45 million, were split with industry bearing approximately 15% of the total project cost, federal agencies providing approximately 10%, and

state/local sources providing the remaining 75%. Water quality has been significantly improved to the point where, beginning in 2013, fish are now being stocked in the main stem of the Bennett Branch and fish have returned to the Dents Run tributary for the first time in roughly 100 years. In addition to restoration of the main stem of the Bennett Branch, the project allowed for the reconnection of numerous high-quality tributaries which facilitated that rapid biological recovery of the watershed. The PA-DEP developed a short documentary about the project which is posted on the Department's YouTube channel and can be view at the following web link:
<https://www.youtube.com/watch?v=xERv4sYgyLY>.



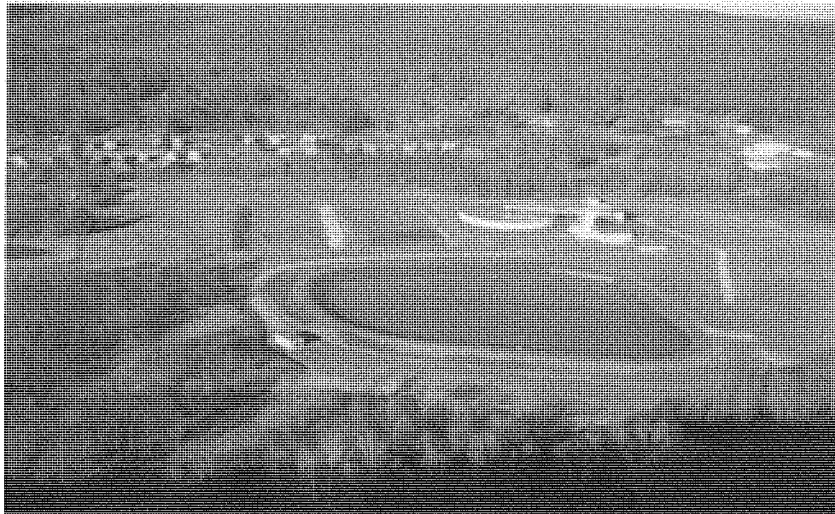
Abandoned Mine Discharge in the Bennett Branch Watershed



Bennett Branch near the Village of Hollywood Severely Impaired by AMD



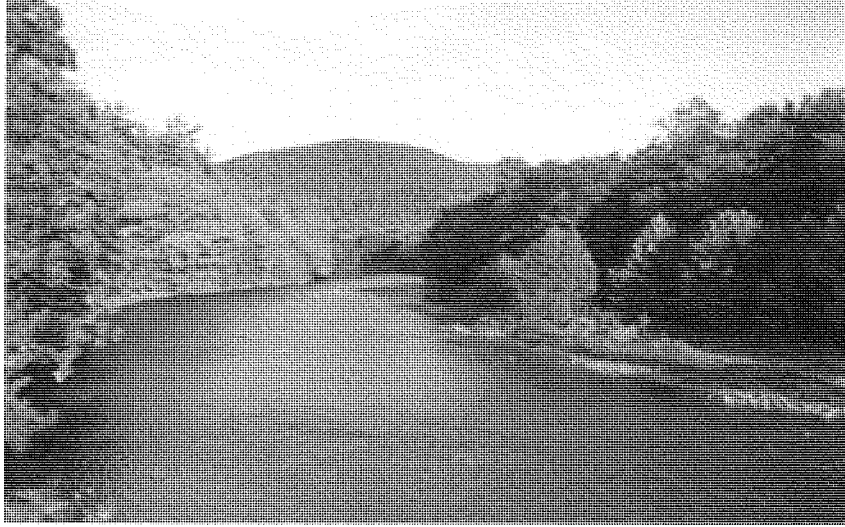
AMD Impacted Main Stem of the Bennett Branch Prior to Restoration



Aerial view of the Hollywood AMD Treatment Plant



Lime Doser Treating Abandoned Deep Mine Discharge in the Bennett Branch Watershed



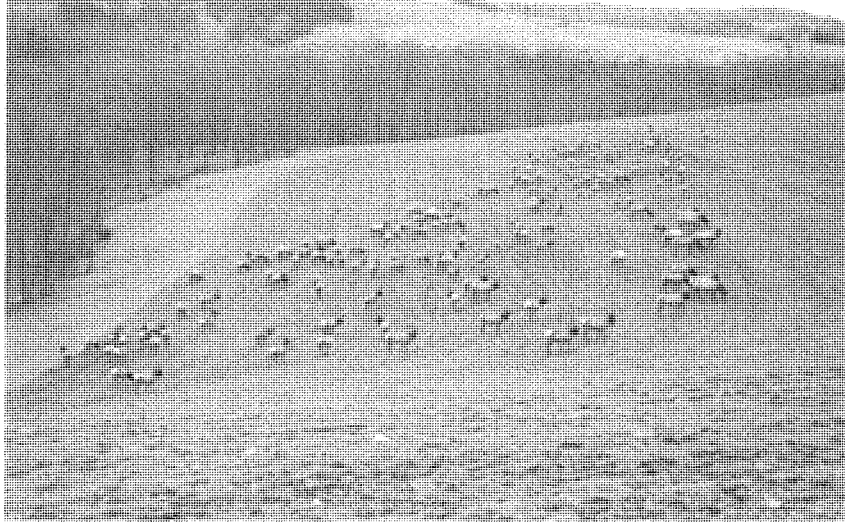
Main Stem of the Bennett Branch Following Restoration



Unreclaimed AML Site with Dangerous Highwalls on State Game Lands in the Bennett Branch



Unreclaimed AML Site with Dangerous Highwalls on State Game Lands in the Bennett Branch



Elk Grazing on Reclaimed AML Site in the Bennett Branch



Remining Operation that Provided Limestone for Other Reclamation Sites in the Bennett Branch



Fish Being Stocked in the Bennett Branch in April 2013



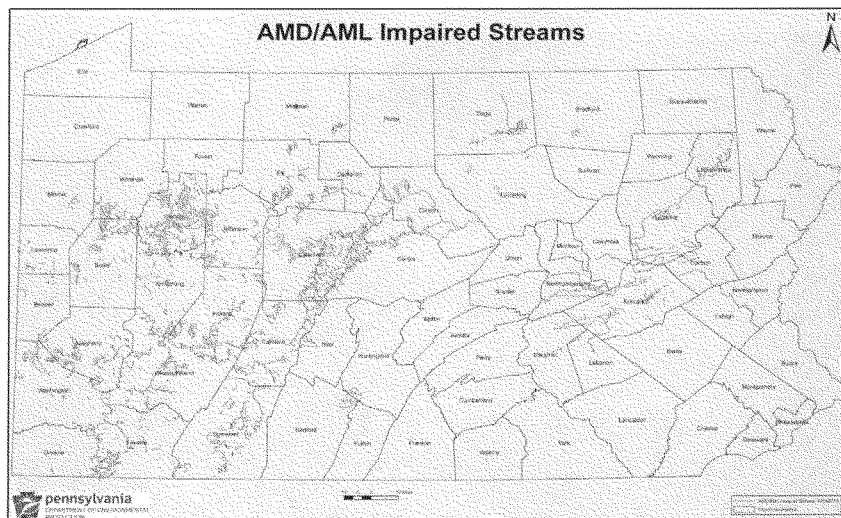
Fish Being Stocked in the Bennett Branch in April 2013

The Gladden AMD Discharge – Chartiers Creek Watershed

A relic of unregulated coal mining, the Gladden Discharge, named for the small community nearby, is just one of thousands of abandoned coal mine discharges that pollute more than 5,500 miles of streams in Pennsylvania. According to the Pennsylvania Department of Environmental Protection (PA-DEP), that represents about 1 mile out of every 15 miles of stream in the state. The Gladden Discharge flows from the abandoned Montour No. 2 underground coal mine operated by the former Pittsburgh Coal Company and abandoned circa 1920. The discharge dumps on average more than 900 gallons of iron-laden (approximately 100 mg/liter) water into Millers Run every minute (1.3 million gallons per day). According to watershed studies completed by the local conservation groups in conjunction with PA-DEP, the Gladden discharge is responsible for 60 % of the iron loading and 70% of the acidity loading to Chartiers Creek. Within a half-mile from where the Gladden Discharge enters Millers Run, it changes from a clear stream with trout to an orange stream with virtually no life. Millers Run then flows into Chartiers Creek degrading the stream quality to a point where it can support almost no aquatic life. Chartiers Creek, located partially in Washington and Allegheny Counties, flows into the Ohio River just a few miles downstream from the confluence of the Allegheny and Monongahela Rivers where the Ohio River is born in downtown Pittsburgh.

Two local conservation groups, the South Fayette Conservation Group and the Chartiers Nature Conservancy, have been working with the PA-DEP, Bureau of Abandoned Mine Reclamation, several other state and federal agencies, and private individuals and businesses for over a decade to develop and implement a plan to treat the Gladden Discharge and restore lower Chartiers Creek. In 2009, a private business approached the group with a concept to construct a treatment facility to treat the Gladden Discharge and to establish a long-term operation and maintenance (O&M) trust fund for the facility in exchange for the right to use some of the treated water for the water needs of the business. The total capital cost to construct the treatment facility was estimated at that time to be approximately \$1.2 million and the annual O&M was estimated to be approximately \$250 thousand. The facility was proposed to be built on private property and would be owned and operated by one of the conservation groups or the PA-DEP.

Both the private landowner and the private business inquired about long-term liability for their involvement in a project of this type. Both were happy to learn of Pennsylvania's Environmental Good Samaritan Act and the protections it afforded, but were disappointed to learn that no equivalent such law existed to protect them from third-party lawsuits and liability under the federal Clean Water Act. After further review by legal counsel for both the private landowner and the private business, both entities withdrew from the project. No subsequent treatment plan has been implemented for the Gladden Discharge and it continues to spew AMD into Millers Run and Chartiers Creek today.



Location of the 5,500 Miles of Streams Impaired by AMD in Pennsylvania



Gladden AMD Discharge in the Chartiers Creek Watershed



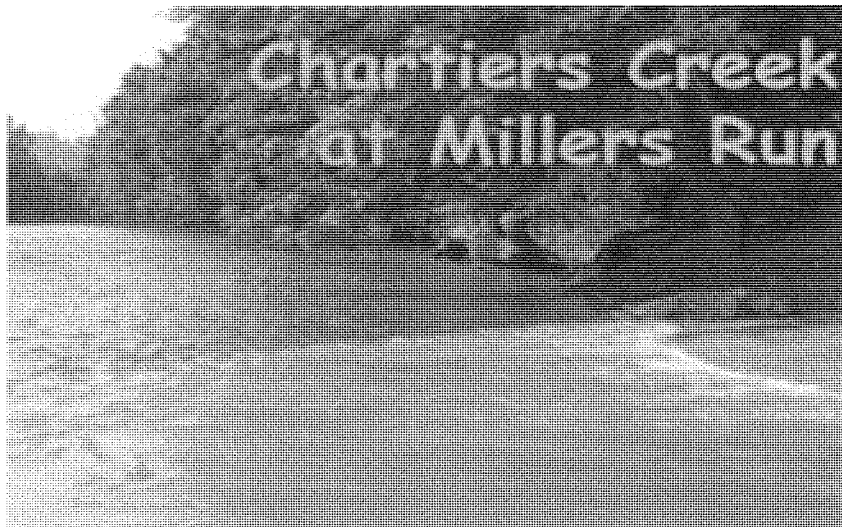
Gladden Discharge Confluence with Millers Run



Gladden Discharge Flowing into Millers Run



Millers Run Downstream of the Gladden Discharge



Confluence of Millers Run and Chartiers Creek



Aerial View of the Confluence of Millers Run and Chartiers Creek

Senator GARDNER. Mr. Chairman, we have talked about this for decades, Senator Domenici, Senator Campbell, Congressman Heffley, Senator Allard, Senator Salazar, but I think what is important about this legislation is simply this, that under the Acts of this legislation the environment will be better than it is today, and that is an important step that we can make for Colorado, the West, and this Country.

Mr. Chairman, I thank you so much for this opportunity.

Senator INHOFE. Thank you, Senator Gardner.

Senator BENNET.

**OPENING STATEMENT OF HON. MICHAEL F. BENNET,
U.S. SENATOR FROM THE STATE OF COLORADO**

Senator BENNET. Thank you, Mr. Chairman. I want to thank you and the Ranking Member for allowing Senator Gardner and I to speak this morning.

And I want to thank Senator Gardner for his leadership and for his partnership. As he said, this issue has been before us for decades, and I think this bill represents the broadest coalition that there has ever been because of the urgent need that is out there, and we appreciate very much, on behalf of the citizens of Colorado and the West, the bipartisan approach that you are taking on this bill, and whatever it is we can do to help, we will do. So please call on us.

As Senator Gardner said, the blowout at the Gold King was an environmental and economic disaster for communities throughout Southwest Colorado, and it was a stark reminder to all of us that abandoned mines are a constant source of pollution and threat to watersheds across the West. The Gold King Mine blowout released 3 million gallons of acid mine drainage all at once. But this same amount of polluted water was already being released from the Gold King Mine every single week, and there are thousands of other abandoned mines in Colorado and across the West.

We need solutions to address the acid mine drainage coming from all these old abandoned mines. That is why I introduced a separate bill with my colleagues from New Mexico to reform the 1872 mining law. But it is also why Senator Gardner and I have come together, along with Representative Tipton, to release the draft Good Samaritan bill that the Committee will consider today.

This draft represents the hard work of many people across our State, including the State of Colorado, elected officials, local Tribes, mining companies, nonprofits, and environmental groups. We would not have been able to craft this draft without people like today's witnesses, Steve Moyer from Trout Unlimited and Jennifer Krill from Earthworks.

I am the first to admit that there are still things we need to work on in this draft bill, but I think it represents a very important step forward and a positive compromise. The bill will encourage States, local governments, nonprofits, and companies to clean up abandoned mines.

As Senator Gardner said, it gives Good Samaritans who had no part in the creation of mine pollution the opportunity to apply for a permit to improve water quality. This bill exempts Good Samaritans from liability only under the necessary provisions of the Clean

Water Act and CERCLA, and it ensures that Good Samaritans will be held liable if they fail to comply with the terms of the permit. Although it is extremely unlikely that a Good Samaritan would cause a disaster like the Gold King spill, this bill makes sure that communities are protected if an accident does occur.

I remain hopeful that we can reach a consensus on outstanding issues, including citizen enforcement language; and we are still getting input from Colorado that will help improve the draft.

Thank you again to all of the Coloradans who worked with us on this effort, today's witnesses for their input, and to the Committee for holding this hearing. As Senator Gardner said, there is no time like the present to get this legislation moving, and we are very optimistic that we will be able to do it. Thank you, Mr. Chairman.

Senator INHOFE. Excellent statements. You may be excused, but if you would like to stay, of course, feel free to do so.

Senator BOXER. I am sure you would love to stay.

[Laughter.]

Senator INHOFE. All right, Senator Hoeven, you were the first one here. I am sorry we didn't get to you first, but you are recognized.

**OPENING STATEMENT OF HON. JOHN HOEVEN,
U.S. SENATOR FROM THE STATE OF NORTH DAKOTA**

Senator HOEVEN. Thank you, Mr. Chairman. Thanks to both you and to the Ranking Member. It is good to be with you. Appreciate you holding a hearing on a bill recently introduced by myself and Senator Manchin, the Improving Coal Combustion Residuals Regulation Act of 2016.

This legislation, which builds on our past efforts to find a bipartisan, bipartisan approach to coal ash, both ensures there is safe disposal of coal ash and provides greater certainty for its recycling. Coal ash is a byproduct of coal-based electric generation, and it has been safely recycled for buildings, for roads, for bridges, and other infrastructure for years.

In fact, I would like to invite the Ranking Member to come to Bismarck, North Dakota, where we have recently built a new heritage center for somewhere between \$50 billion and \$60 million out of recycled coal ash, a non-hazardous, non-toxic substance. I think she would find it a remarkably beautiful heritage center on our State capitol grounds. I would also take her over to Bismarck State University where we have a national energy center of excellence that was also built out of non-hazardous, recycled coal ash on our campus, and it is a tremendous resource for our students. I would certainly like to show her both beautiful buildings made from recycled coal ash.

In fact, I think it is important to take note of the environmental and fiscal benefits of coal ash recycling. Over 60 million tons of coal ash were beneficially used in 2014, including over 14 million tons in concrete. It has been calculated that taxpayers save \$5.2 billion per year thanks to the use of coal ash in federally funded roads and bridge construction.

Products made with coal ash are often stronger and more durable, and coal ash reduces the need to manufacture cement, resulting in greenhouse gas emission reductions of 13 million tons in

2014. So I would also want to make sure that the Ranking Member is aware that recycling coal ash and using it actually reduces greenhouse gas emissions.

So coal ash is an important resource for our economy, and it is imperative that coal ash that isn't recycled is disposed of and stored responsibly and safely. That is the other thing this legislation does, it makes sure that we do impoundment safely, something that I know is a concern for the Ranking Member, as well. As a matter of fact, looking at those pictures, this legislation will make sure that exactly is what we prevent from happening. So I appreciate her showing those pictures so that we can make the very strong point that this is the legislation that will actually make sure that we don't have an accident like she showed in those pictures.

In December 2014, the EPA put forth new legislation for the management of coal ash. The regulation made clear, at least for the time being, that coal ash would continue to be regulated as a non-hazardous waste, so again EPA coming back and saying non-hazardous waste, consistent with EPA's earlier findings.

But the regulation has major flaws. It relies solely on citizen suits for enforcement. What this means is that neither the EPA nor the States, neither the EPA nor the States can directly enforce the rule through a permit program with which owners and operators of coal ash disposal sites must comply. It means that the regulation does not create the constructive regulatory guidance and oversight necessary to ensure the proper management of coal ash.

Instead, the EPA regulation has created a situation where the only enforcement mechanism for the rule is that an operator of a coal ash site can be sued for not meeting EPA's new Federal regulatory standards. Those subject to this regulation, those responsible for keeping the lights on for families, for farmers, and job creators are themselves left in the dark about how EPA's standards will be defined in various court cases across the Nation. Instead of direct oversight, we will have lawsuits brought by those who want to shut down coal production.

Now, here is the analogy I want to make, and I hope that the Committee would consider. This is what we are dealing with under this regulation and why this law provides better certainty and better protection both for recycling and for impoundment. But here is how the regulation works. Imagine building an addition to your house and there being no building permit process to go through with your local government. You call the city or the county and they say that you should just read the rules, and if you violate those rules, just know that you can be sued at any time by anyone who thinks you didn't build that addition according to the law.

This process would leave you without any sort of assurance that you are complying with the law. You would get no inspection, no guidance, nothing. And, worse, you would have the threat of litigation hanging over your head. Doesn't make any sense, right? Sound terrible. We would never do that to people trying to build buildings or build houses.

Well, that is how the EPA coal ash regulations would be implemented and enforced, and that is why this Committee needs to consider this legislation and do something that makes sense. You would never do that to somebody building a house or building a

building or doing any kind of construction. Why in the world would you do it to somebody who is trying to safely recycle coal ash or impound it safely so that we don't have accidents?

Our bill would directly address this problem by taking the EPA's rule standards for coal ash disposal and incorporating all of them in EPA-approved State permit programs. The State would have direct oversight over disposal sites design and operation, including inspections, air criteria, run-on and run-off control, closure and post-closure care, and a requirement not in EPA's rule, financial assurance. We add financial assurance.

Meanwhile, we offer State regulators the same flexibility for implementing the groundwater monitoring and corrective action standards that are currently provided under both existing municipal solid waste and hazardous waste regulation, allowing State regulators to make tailored site-specific adjustments.

And we have been listening to issues the EPA has brought up about our previous versions of the legislation. In fact, we have updated the bill to include a more traditional EPA application process for the State permit programs. If the EPA finds a State's permit program deficient, then the EPA can take direct control over that State's permit program. And if a State doesn't want to have its own permit program, then the EPA steps in to run that State's permit program. That is a pretty important point when we are talking about the kind of protection that I know the Ranking Member wants to see. So we have made modifications to this law that greatly strengthens it.

Mr. Chairman, some groups have claimed that our bill undermines the EPA's coal ash rule, when in fact the truth is this legislation utilizes the expertise in State government to add real oversight and enforcement to the EPA's coal ash disposal standards. This bill is about responsible regulation. It is about certainty for recyclers and for the American public who will know that State and Federal regulators are proactively overseeing and working with energy producers to ensure safe disposal of coal ash. And I hope my colleagues will take a good hard look at this common sense legislation and work with us to pass it.

Thank you.

Senator INHOFE. We will do that. Thank you very much, Senator Hoeven.

Senator MANCHIN.

**OPENING STATEMENT OF HON. JOE MANCHIN III,
U.S. SENATOR FROM THE STATE OF WEST VIRGINIA**

Senator MANCHIN. Mr. Chairman, Ranking Member, and my fellow colleague from West Virginia, Senator Capito, it is good to be with you all and I really appreciate you all allowing us to come present before you.

Senator Bill 2446, the Improving Coal Combustion Residuals Regulation Act of 2016, Senator Hoeven and I introduced this legislation in January, continuing our efforts to find a common sense approach to ensuring safe disposal of coal ash, while also preserving the economic opportunities and benefits associated with the reuse of coal ash. The American Coal Council notes that beneficial use and reuse of this material is a means of ensuring billions of

dollars of economic benefits, supporting the creating and maintenance of hundreds of thousands of jobs across many industries, and multiple environmental benefits including GHG, greenhouse gas, reductions, reduce water use, and improve energy efficiency.

Coal ash and other combustion byproducts are used for a wide range of economically beneficial activities, including the manufacturing of materials such as wallboard, concrete, roofing materials and bricks. I think Senator Hoeven went over some of the things we are using it for now. The coal ash is actually bound into these products.

I want to offer an example in my State and Senator Capito's, our State of West Virginia. We have a gypsum wallboard plant in Moundsville, West Virginia. When I was Governor, I cut the ribbon on it, and it is her home where she was born and raised, her home area. Anyway, in 2008, CertainTeed, a large manufacturer of building products such as vinyl siding, roofing, and insulation, opened a plant in Marshall County, West Virginia. The plant would have never been opened if it had not been for the Mitchell Power Plant.

Mitchell Power Plant basically went to scrubbers. Scrubbers are meant to take SO₂ out of the air, no emissions of SO₂, which it does. The way it takes it out is using an injection of limestone with water that basically is sprayed in as coal is being burned, and it knocks out the sulfur. It creates a limestone base and that base basically is taken over across the road to the gypsum board plant. They compress this and make wallboard that you have drywall used in your homes. It is a tremendous product and it is a better recycled product and it is an added value product, and we are very proud of that. Flue-gas desulphurization scrubbers were installed on power plants allowing synthetic gypsum to be produced.

The project was \$150 million. In some States that might not be a big investment. In the State of West Virginia that is a tremendous investment; it really helps a lot of people have a good job, and that is really what it has done. It was a product that was known as a waste product before and, as John had mentioned, there is so much being used for this product. We build blocks, we have block factories that use it. We have road manufacturers, road builders that use this product. So it is a tremendous byproduct with added value.

The other thing that is not talked about much is basically when you have a scrubbed utility plant, you have a high alkalinity of ash. That is used in backfilling and mining that basically mitigated the water problems that we have, and that is a tremendous, tremendous asset for us, to be used in mining States.

Other innovative uses of coal ash continue to be developed, such as wastewater treatment, wastewater treatment because of coal ash. Basically, when you think about it, carbon filters, what do you think carbon filters are? Carbon filters are basically coal. And it is used for so many other different benefits.

It is calculated that taxpayers save \$5.2 billion per year thanks to the use of coal as in federally funded infrastructure projects. And although the EPA appropriately designated coal ash as non-hazardous, they had a ruling on that, we waited for quite some time to get their ruling, it is non-hazardous, but its rule misses the mark on two fronts: it does not provide certainty to recycles of coal

ash and it does not establish an effective enforcement mechanism for the disposal of coal ash. And I think Senator Hoeven went into that in detail of why we need certainty in this.

Our bill seeks to resolve these issues by establishing a State permitting program. The State permitting program in West Virginia, anybody that basically disposes of coal ash has to have water monitoring first. Their sites are inspected regularly, routinely by the DEP. And if the State fails to do that, this piece of legislation puts the EPA back in control. If we don't have a plan that is approved, then the EPA steps in. But at least they have to acknowledge the Tenth Amendment to the Constitution. Let us do our job in the States. That is all we ask for.

Senate bill 2446 also offers the States first approach to recycling of coal ash that prevents harmful effects of EPA over regulation, which would threaten vital industries and nearly cost my home State of West Virginia and the Nation more jobs. All we are saying is there should be a proper use, and if you have a disposal and you can use this as added value, that should be the plan the States put in place. If not, then it is basically disposal. Disposal has to be regulated, and if the States don't do it, again, the Feds step in.

It allows each State to use existing EPA health and environmental regulations to set up their own permitting programs. These programs will allow industry to continue to recycle and reuse coal ash. This approach protects jobs and our economy while giving families and businesses the certainty they need and be able to continue to produce the products that we use.

I encourage you to support and pass this legislation. I think it is most needed. It gives us certainty of how we move forward and it basically creates a protective environment that we all desire. So I want to thank you, Mr. Chairman, and thank Ranking Member Senator Boxer, my colleague, Senator Capito. She knows this issue as well as I know it. Thank you.

Senator INHOFE. Both are excellent statements. I appreciate it very much.

Senator Boxer has requested to respond to a couple of things and get a little bit of a dialog going. I think that is very appropriate.

Senator Boxer.

Senator BOXER. Thanks, Senator.

First of all, thanks, my friends. I know you are trying hard to get that balance between protecting the people and protecting coal ash and using it. I want to make a couple of points. I am going to put something in the record and hope that you will respond to it; not now, but when you get a chance, because it is a complicated, long letter.

First of all, as you know, people like me were hoping that this coal ash would be classified as a hazardous, so you know that I already think what the EPA did was not strong enough to protect the people who suffered this kind of a terrible nightmare in their homes from this coal ash. So you know where I am coming from.

Senator MANCHIN. Madam Chairman, was that the TVA?

Senator BOXER. That was Tennessee.

Senator MANCHIN. And that was Government controlled.

Senator BOXER. Yes. The way we store the coal ash???????

Senator MANCHIN. The Government doesn't do its job as well as it should.

Senator BOXER. Well, that is exactly why we have the rule, because you are absolutely right, these are terrible. And for years 40 of these ponds were listed as hazardous.

I don't have any skin in the game in California because we don't have coal ash stored, but we had people from your States, from particularly your southern States come before us. Let me go because I know my colleague wants to move on.

So, first of all, I think there is a misunderstanding because recycling of coal ash is absolutely allowed under the EPA rule. So if you and I could talk about why you feel the rule is too restrictive, and maybe we can find some common ground on that.

Also, what I really want you to do is we have received a letter from 38 organizations and 38 States, and they come up with 15 reasons as to why this bill is very, very dangerous, your bill. So rather than go through what they said and give you the list, some of them are very surprising like Girl Scout troops and others, unusual, send a letter. I want to get this to you, and if we could talk together about whether you agree that this criticism is in any way right, if you could fix your bill to respond to it, or if you just think this criticism is off the mark, I would love to know.

But I am very fond of both of you. I want to find some common ground. I don't know if we can with coal ash, but we will try. We will try.

Senator INHOFE. Thank you, Senator Boxer. I would comment that Senator Hoeven made the comment that those pictures that were used, that is the whole purpose of doing this, so that won't happen again.

Senator BOXER. That is the purpose of the rule that you are weakening with this bill.

Senator MANCHIN. If I could respond.

Senator INHOFE. OK, just very shortly.

Senator MANCHIN. Very shortly on that. I really respect and Senator Boxer and I have spoken about this before. Basically, it gets back to the people who don't want any fossil burnt whatsoever, because the residual of fossil is coal ash, depending on what type and how you burn it, whether you have alkaline based for sulfur, taking SO₂ out of the atmosphere, and then you have a byproduct.

We are trying to find ways to use all of these products because they get impounded. The impoundment, the Federal Government did a poor job in monitoring that, and we have had this, as well as our colleagues from Colorado talked about just the blowout that they had. These things can be prevented and they should be prevented if they could. This bill will give us more certainty.

If the States aren't doing their job, the Feds have all the oversight and control of it. That is all we are saying. But it gives us some certainty to try to use a product in a valued way.

Senator INHOFE. Thank you, Senator Manchin.

Any brief response, Senator Hoeven? Then we are going to have to get to our panel.

Senator HOEVEN. Well, I would like to respond directly to the points that the Ranking Member brought up. We have actually,

and I will enter into the record, a response to the letter that you brought up.

Senator BOXER. Get it to me.

Senator HOEVEN. We will. We have it. And if you want additional information, we will provide that as well. We would like to work with you and we have worked with the EPA on this.

The only other point that I would like to make is that we don't weaken the rule; we create certainty for the rule. In the same way we regulate other energy and other emissions where you have a State implemented program pursuant to EPA requirements, and as Senator Manchin said, the EPA still has oversight. So we are not weakening the rule; we are providing certainty so that the companies know what they have to do, rather than trying to guess on the basis of a potential lawsuit.

Senator BOXER. Well, that is what happened in Flint; they let the State do it, and look what happened.

Senator INHOFE. All right. Well, we will excuse the two of you and ask the panel to come forward.

[Pause.]

Senator INHOFE. Let me welcome our panel. I am sorry that we are a little bit late getting started with you guys, but we will make up for it. I would like to have the opening statement from each one. We will start with this side, with you, Ms. Krill, and ask you to try to keep it within the time that you were told, the 5-minutes, if you don't mind. Ms. Krill.

**STATEMENT OF JENNIFER KRILL,
EXECUTIVE DIRECTOR, EARTHWORKS**

Ms. KRILL. Thank you, Chairman Inhofe, Ranking Member Senator Boxer from my home State of California, and members of the Committee. Thank you for the opportunity to testify before you on the discussion draft of the Good Samaritan Cleanup of Orphan Mines Act of 2016. My name is Jennifer Krill. I am the Executive Director of Earthworks.

For over a quarter century, Earthworks has worked closely with a broad coalition of local governments, Native American citizen groups, and other conservation organizations to improve the policies governing hardrock mining, including abandoned mine reclamation. In the wake of the August 5th, Gold King Mine disaster that the Senators from Colorado were discussing earlier that spilled millions of gallons of acid mine drainage into a tributary of Colorado's Animas River, communities who live with the threat of old mines have demanded solutions.

Sadly, this pollution problem is not limited to the Gold King Mine; it is nationwide and it is focused on the West. This pollution harms western waters and the communities that rely on them for agriculture, recreation, tourism, and drinking water.

The Animas River running orange is a stark reminder, but does not adequately represent the hundreds of thousands of abandoned mines that litter the West, polluting water in more subtle, yet no less destructive, ways. There are many other ticking time bombs like the Gold King Mine, messy, complicated, and incredibly expensive to clean up, that cannot be solved by Good Samaritans alone.

According to the EPA, the estimated cleanup cost for abandoned hardrock mines total approximately \$50 billion. Tackling this largescale problem requires a largescale solution: 1872 Mining Law reform. If the hardrock mining industry had been subject to a less antiquated law similar to the surfacing mining law that governs the coal industry, the Gold King Mine spill likely would not have happened. An independent, dedicated funding source for hardrock abandoned mine cleanup similar to the SMCRA program for coal cleanup is long overdue, and communities are suffering for it.

Incentivizing the work of Good Samaritans can be one part of our Nation's response to the problem of old hardrock mines, but, frankly, it is nowhere near enough. Earthworks has supported several legislative proposals in past Congresses that create narrow exemptions from Clean Water Act liability. Given the scope and scale of the problem and the technical complications at many old and inactive mines sites, it is important to carefully word any Good Samaritan legislation to adequately protect communities and water supplies.

Good Samaritan permits must be reserved for true Good Samaritans, those entities that did not contribute to the pollution and are not interested in profiting from the reclamation. Any moneys from reprocessing of tailings at cleanup sites must be used only to offset the cost of the project. True Good Samaritans are not concerned about monetary gain, and Earthworks opposes any legislation that includes re-mining for profit.

This legislation must include provisions to hold Good Samaritans accountable for mistakes where water quality onsite becomes worse than before reclamation began.

Citizen suits provide accountability and ensure that agencies and permittees follow the intent and letter of the law. If something goes wrong, as had happened with the Gold King Mine, nearby communities must have access to the courts to adequately enforce all of our most important environmental laws.

Earthworks applauds Senator Bennet and Senator Gardner for their work on the discussion draft this far, and we are happy to see some of our key issues have been addressed. Our written testimony includes more detail regarding key improvements to protect communities and the water resources that they depend on.

We also look forward to moving beyond the Good Samaritan debate to get to the heart of the problem: a lack of funding for cleanup of these abandoned mines across the West. Good Samaritan initiatives that do not include a dedicated and significant funding source cannot solve the problem facing western communities and water resources. If this discussion draft becomes law, Good Samaritans will tackle a few reclamation projects, but the scope of the problem will dwarf their best efforts.

Several legislative proposals have been introduced to update the 1872 mining law, including S. 2275, the Hardrock Mining and Reclamation Act of 2015. Senators Udall, Bennet, Heinrich, Markey, and Widen's legislation would bring us closer to ensuring that the Animas mine disaster does not happen again. This legislation would facilitate the cleanup of abandoned hardrock mines while creating tens of thousands of reclamation jobs across the West far into the future.

Thank you for the opportunity to present the views of Earthworks on this discussion draft, and we look forward to working closer with the co-sponsors and the Committee to solve the problem that abandoned mine sites pose to air, water, farmland, and public safety in western States.

[The prepared statement of Ms. Krill follows:]

**Testimony of Jennifer Krill, Executive Director, Earthworks, before the U.S.
Senate Committee on Environment and Public Works on the Discussion Draft of
the Good Samaritan Cleanup of Orphan Mines Act of 2016
March 2, 2016**

Chairman Inhofe, Ranking Member Boxer, and members of the Committee, thank you for the opportunity to testify before you about the Discussion Draft of the Good Samaritan Cleanup of Orphan Mines Act of 2016. We especially appreciate the leadership of Senators Bennet and Gardner and look forward to working with the sponsors and this Committee to achieve legislation that will both protect water quality and encourage cleanup of abandoned mines.

Earthworks is a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral and energy development. For over a quarter century, we have worked closely with a broad coalition of local governments, Native Americans, citizen groups and other conservation organizations to improve the policies governing hardrock mining.

In the wake of the August 5th Gold King Mine disaster that spilled million gallons of acid mine drainage into a tributary of Colorado's Animas River, communities who live with the threat of old mines have demanded solutions. In the near term, the communities downstream from the Animas River spill need a permanent water treatment facility and immediate compensation for losses. But this problem is not limited to the Gold King Mine. It is nationwide, focused on the west.

Good Samaritan Policies Alone Won't Solve the Problem

To solve the problem of perpetual pollution from inactive and abandoned hardrock mines, we must reform the 1872 Mining Law and institute a reclamation fee similar to the one paid by the coal industry. Good Samaritan initiatives cannot solve the massive problem faced by western communities and water resources due to abandoned mine pollution.

Complicated, expensive clean ups like the Gold King Mine require a dedicated cleanup fund with significant resources, not a Good Samaritan. If Congress had reformed the 1872 Mining Law and created an abandoned mine reclamation fund, Silverton, Colorado would have had the ability to clean up surrounding old mines years before they became a catastrophic threat.

The Environmental Protection Agency (EPA) has an existing and clear administrative process¹ for bona fide Good Samaritans to clean up abandoned or inactive mines - yet

¹ x EPA memorandum - Clean Water Act Section 402 NPDES Permit Requirements for 'Good Samaritans' at Orphan Mine Sites.
<http://www.scribd.com/doc/116560607/2012-EPA-Good-Samaritan-Memo>

pollution from abandoned mines continues. To facilitate the Good Samaritan work of civic, religious, and conservation organizations, the EPA has created a process through which qualified projects can receive what is effectively a Good Samaritan permit. Due to lack of funds, very few mines have been cleaned up compared to the scope of the problem.

Old Mines Pollute Western Waters

In the early 1990's, Earthworks assessed the scope of this problem estimating that the United States has over 500,000 abandoned hardrock mines². To date, there is still no comprehensive inventory of abandoned hardrock mines, no system to prioritize clean up of the most dangerous of these mines, and almost no funds to pay for it.³

According to EPA, estimated cleanup costs total approximately \$50 billion dollars.⁴ This staggering figure far exceeds the resources available to Good Samaritans, illustrating the need for a polluters pay funding mechanism similar to that paid by the coal industry.

The Surface Mining Control and Reclamation Act (SMCRA) has for nearly two generations required the coal industry to pay a fee for abandoned mine reclamation.⁵ This fee has successfully funded coal mine clean ups across the country. Yet, the hardrock mining industry pays no such fee. In fact, in some states, the coal industry's funds go to clean up the messes of their hardrock brethren.

If the hardrock mining industry had been subject to a SMCRA-like law, the Gold King Mine spill likely would not have happened. An independent, dedicated funding source for hardrock abandoned mine cleanup, similar to the SMCRA program, is long overdue. Incentivizing the work of Good Samaritans is not enough. Only an industry-funded reclamation program will solve our nation's abandoned and inactive mine problem.

A Hardrock Mining Reclamation Fund: More Jobs, Cleaner Water

Senators Udall, Bennet, Heinrich, Markey, and Wyden have introduced legislation that would bring us closer to ensuring that the Animas mine disaster does not happen again. S. 2254, the Hardrock Mining and Reclamation Act of 2015, would facilitate the cleanup of abandoned hardrock mines while creating tens of thousands of reclamation jobs across the west far into the future.

² Earthworks/Mineral Policy Center, *Burden of Gilt: The legacy of environmental damage from abandoned mines, and what America should do about it*, (1993). See https://www.earthworksaction.org/library/detail/burden_of_gilt

³ Government Accountability Office, *Information on the Number of Hardrock Mines, Cost of Cleanup, and Value of Financial Assurances*, Jul 14, 2011. See <http://www.gao.gov/products/GAO-11-834T>

⁴ i EPA Liquid Assets 2000: Americans Pay for Dirty Water at <http://water.epa.gov/lawsregs/lawsguidance/cwa/economics/liquidassets/dirtywater.cfm>

⁵ See 30 U.S.C. 25 Subchapter IV §1231 et seq.

This bill modernizes the antiquated 1872 Mining Law by balancing mining with other land uses, ensures a fair royalty return for taxpayers, and creates a reclamation fee to fund cleanup of abandoned and inactive mines.

Creating a dedicated, significant, stream of funding is the only way to fully address the pollution problem from half a million abandoned hardrock mines. Without it, state, local and tribal governments and citizen groups can only clean up a small number of them. We also need a comprehensive inventory of these sites in order to prioritize which abandoned and inactive mines require immediate attention.

Good Samaritan Legislation: General concerns

Earthworks has supported several legislative proposals in past Congresses that create narrow exemptions from Clean Water Act (CWA) liability.⁶ Given the scope and scale of the problem, and the technical complications at many old and inactive mine sites, it is important to carefully word Good Samaritan legislation to adequately protect communities and water supplies.

Some language in the current draft leaves room for interpretation and should be clarified, edited or changed to protect the environment and nearby communities. Earthworks looks forward to working with the Committee and the sponsors to ensure that the necessary sections are altered.

One place where it is clear language needs to be changed is in regards to the cleanup standard. This standard must be clear and manageable to guarantee that land, water, wildlife and communities are protected. A clear and manageable standard will allow straightforward implementation.

Good Samaritan permits must be reserved for truly Good Samaritans -- those entities that did not contribute to the pollution and are not interested in profiting from reclamation. Any monies from the reprocessing of tailings for cleanup purposes must be used only to offset the cost of the project. True Good Samaritans are not concerned about monetary gain, and Earthworks opposes any legislation that includes re-mining for profit.

This legislation must include provisions to hold Good Samaritans accountable if mistakes are made and water quality on site is made worse than before reclamation began. Barring a well-defined case of force majeure, Good Samaritans must be liable

⁶ See Earthworks Policy Director Lauren Pagel June 14, 2006 testimony before the Senate Environment and Public Works at https://www.earthworksaction.org/files/publications/20060615_EARTHWORKS_GoodSam_testimony.pdf

See also S. 1848, the Cleanup of Inactive and Abandoned Mines Act and S. 2780, the Good Samaritan Clean Watersheds Act. S. 1848, (109th Congress), and S.1777 - The Good Samaritan Cleanup of Abandoned Hardrock Mines Act of 2009 (111th Congress)

for mistakes and permit violations, as well as held responsible for adhering to permit conditions.

Citizen suits provide accountability and ensure that agencies and permittees follow the intent and letter of the law. If something goes wrong, nearby communities must have access to the courts to adequately enforce all of our important environmental laws. Citizen suit provisions promote judicial economy, efficient enforcement, and citizen participation.

During the permitting process, it is important that the Good Samaritan include detailed information about the expertise of those involved in the cleanup process. It is important that the permittee hires qualified persons to do the job, and if any uncertainty exists about the qualifications or expertise of the persons involved, that should be considered when approving or denying the permit. This requirement to demonstrate technical capabilities must be a permit requirement. The current discussion draft lacks the details needed to certify that a mine engineer, geologist, or other qualified professional is onsite as needed.

In addition to technical expertise, Good Samaritans must establish clear and sufficient financial assurances to receive a permit. Good Samaritans should prove they have the funding in hand to carry out all required reclamation. Clear guidelines for what type of instruments represent adequate financial assurance should be defined by Good Samaritan legislation to ensure that monies are available if something goes wrong or a Good Samaritan goes bankrupt before reclamation is completed.

It is important to include clear emergency action and notification requirements in Good Samaritan legislation. As we learned from the Gold King mine disaster, if something goes wrong, there needs to be a process for who is notified and when.

The role of federal land managers must be clarified in the discussion draft to make sure that land managers have an approval and oversight role during the permitting process and remediation process.

Discussion Draft of the Good Samaritan Cleanup of Orphan Mines Act of 2016

Earthworks praises Senator Bennet and Senator Gardner for their work on the discussion draft thus far. It is important that key issues in the discussion draft be addressed so that we avoid potentially destructive unintended consequences. By making necessary improvements to the bill, we will ensure that the law can be properly implemented and avoid unplanned loopholes.

Section 2 Definitions: (7) Historic Mine Residue

The definition of historic mine residue should replace December 11, 1980 with October 18, 1972, the effective date of the Clean Water Act. Upon that date, mining companies became responsible for their pollutant discharges into waters of the United States. Mines permitted after the Clean Water Act are also more likely to have responsible owners or operators. Most of the pollution problem this discussion draft seeks to solve comes from pre-1972 mines.

Generally, some definitions in this the definitions section are problematic, vague or conflicting. It is important that all definitions are clear and precise.

Section 4(f)(2)(C) Activities Not Relating To Remediation

It is important that the scope of the discussion draft's liability waivers apply only to those activities authorized by the Good Samaritan permit. Off site activities or on site activities not described in the permit application (absent well-defined force majeure -- force majeure should be defined similar to the Clean Water Act and CERCLA definitions) should not receive liability waivers. This section should be clarified to achieve this intent.

Section 4(e)(1)(A)(ii) Permit Issuance - Meeting Applicable Water Quality Standards

Earthworks supports the discussion draft's requirements that permittees adhere to applicable water quality standards to the maximum extent practicable. The current language is potentially ambiguous and may make it difficult to ensure that Good Samaritans are doing everything possible to achieve the standards. This language should be rewritten to ensure easy and clear implementation.

Section 4(e)(1)(A)(iv) Financial Assurances

Earthworks supports the discussion draft's requirement that permittees provide adequate financial assurances to complete the permitted work. We suggest that the financial assurances, including bonding levels, be sufficient to cover the costs of clean up should something go wrong following project closure. This legislation should specifically bar corporate guarantees as an acceptable financial assurances instrument.

In order to make sure that taxpayers are not left to foot the bill for cleanup, Good Samaritans must prove financial solvency as well as post an adequate bond in case something goes wrong. Post-close maintenance must be addressed as well, with the permittee providing a funding source for any long term work that needs to be done onsite. The discussion draft should be edited to make sure that adequate funding is present at every stage of the project.

Section 4(f) Failure to Comply

Any non de minimus deterioration of ground or surface water quality resulting directly or indirectly from permitted activities must result in the removal of the liability protections. Even if that deterioration occurs following the termination of the permit.

Section 4(m) Enforcement

No policy or regulation makes any difference if not for effective enforcement. Under (m)(1), the Committee should raise the cap of the per penalty violation to \$37,500 per day. This is consistent with other environmental laws.

Section 4(f)(1)(D) Effect of Permits- Remining

This discussion draft authorizes re-mining to defray the costs of the permitted activities. The Committee should delete Section 4(f)(1)(D)(ii), which authorizes re-mining to fund off site remediation. Since mining inevitably creates a substantial risk of water quality deterioration, no Good Samaritan permit should allow any mining. Truly Good Samaritans should not receive compensation. Any funds generated from reprocessing of ores should only be allowed to offset the cost of the reclamation at the orphan mine site.

The current discussion draft leaves a potential opening for Good Samaritans to exploit remining for profit because of the way this section is drafted. We believe the intent of this section is to require all monies be used for current or future hardrock mine remediation projects, and the language should be changed to ensure that intent.

Section 4(o) Citizen Suits

In addition, this discussion draft must also include provisions allowing for citizen civil actions. Many of our bedrock environmental laws, including CWA⁷ and CERCLA⁸, include citizen suit provisions. We suggest that the citizen suit provision for this discussion draft contain a 60 day notice period similar to those found in the above mentioned statutes.

These provisions limit jurisdiction to cases where the permitting authority fails to act during the notice period. It allows agencies, citizens, and permittees the opportunity to resolve disputes and avoid litigation. This process promotes both judicial economy and agency action.

Congress provided mechanisms for citizen enforcement of our environmental laws to hold both agencies and permittees accountable to the standards and protections Congress created under their laws.

⁷ 33 U.S.C. § 1365

⁸ 42 U.S.C. § 6972

Everyone agrees that EPA is responsible for Gold King. As a practical matter, foreign mining companies may be some of the most likely candidates for the more challenging Good Samaritan projects. A citizen suit provision will hold these companies accountable and act as a deterrent from cutting corners on a project.

Section 4(f)(3) Termination of Permits

It is important to clarify who is responsible for the site once a permit ends under this section. Often long-term active or passive treatment is required on site, and the discussion draft is silent on what occurs once the permit is terminated.

For projects on federal land, it is important the taxpayer not be responsible for ongoing maintenance. If land managers are to operate the needed treatment long term, they must use a trust fund set up by the permittee or another non-taxpayer funded source.

Section 4(u)(1) Sunset Provision

Earthworks supports sunseting the permitting agency's authority to issue Good Samaritan permits after 10 years. This sunset provision will incentivize this Committee to evaluate the successes or shortcomings of Good Samaritan policy and, if necessary, make changes.

Section 4(u)(5) No Enforcement Liability

This section is too broadly drafted and needs to be changed in order to make sure bad actors are not unintentionally left off the hook.

Conclusion

Thank you for the opportunity to present the views of Earthworks on this discussion draft and we look forward to working further with the co-sponsors and the Committee to solve the problem that abandoned mine sites pose to air, water and public safety in western states.

Whether we find a path forward for Good Samaritans to help clean up some abandoned mines across the west or not, we must ensure that policymakers take care to prevent future mining disasters. And, while Good Samaritans will tackle a few reclamation projects, the scope of the problem will dwarf their best efforts. Real and meaningful mining reform with a robust reclamation fee, as in S. 2254, is the best solution to protect water and western communities from toxic mine waste.

Senator INHOFE. Thank you, Ms. Krill.
Mr. Holleman, you are recognized.

**STATEMENT OF FRANK HOLLEMAN, SENIOR ATTORNEY,
SOUTHERN ENVIRONMENTAL LAW CENTER**

Mr. HOLLEMAN. Thank you, Mr. Chairman and Senator Boxer, for having me here. My name is Frank Holleman. I live in Greenville, South Carolina and I now work at the Southern Environmental Law Center.

I am here on behalf of the communities of the Southeast to ask you please protect us from coal ash pollution by upholding the EPA coal ash rule and not adopting the proposed Senate legislation.

The proposed Senate bill would gut minimum standard protections for our drinking water supplies that were put in place, at long last, by the EPA coal ash rule. Right at the beginning I would like to address two points.

The EPA rule and strong coal ash regulation promotes recycling because it encourages the utilities to get this ash out of these unlined pits and do something with it. In fact, the recyclers have come to us to get us to help them get the recalcitrant utilities to act. That is one point.

The second point is the EPA and strong coal ash regulation promotes jobs and economic development, and coal ash pollution hurts it. Let me give you specific examples. In South Carolina we have a new \$40 million coal ash recycling plant purely because we forced Sandy Cooper to remove the ash from a coal ash lagoon. In North Carolina we produce jobs for everybody from the day laborer to the truck driver to the PAG geohydrologist in cleaning up coal ash.

On the other side of the coin, I met the other evening with over 100 families whose houses are around a coal ash site, and they can't sell the house, they are not allowed to drink their water, and the real estate market in that area is dead.

So if you want to promote economic development and you want to promote coal ash recycling, the EPA rule and strong enforcement is the way to go.

Here is the problem: Our utilities, and others, I believe, have stored millions of tons of industrial waste containing arsenic and lead in unlined pits next to drinking water supplies, held back by dikes made of earth that leak. It is hard to believe, but it is true. Our groundwater has been contaminated. You have seen the pictures about how sites have collapsed into our rivers, and we have had river pollution, as well as damage to drinking water supplies.

We have seen catastrophes in Kingston and on the Dan River in both North Carolina and Virginia, and we in the Southeast, Mr. Chairman, we have learned some hard lessons, and I have learned them. I didn't know these lessons a few years ago. First, and this is a true statement, we cannot count on our State agencies and our utilities to protect us. I wouldn't have believed this, but I will tell you why it is true. In North Carolina, Duke Energy refused to spend a few thousand dollars to inspect the pipe that broke at Dan River, even though its own staff asked for the money to do it and dam inspectors had warned them, and the State agency never made them do it.

In North Carolina, while Duke Energy's companies pleaded guilty 18 times to 9 Federal coal ash crimes, a United States District Court found that the State agency, which this bill would leave us at the mercy of, had done "little, if anything" to pursue a State enforcement action against Duke. In fact, and this is hard to believe, too, but it also is true, just 17 days after the Duke Energy companies pleaded guilty to coal ash crimes and were placed on criminal probation, their executives were hosted at a private dinner at the Governor's mansion with the State's chief environmental law enforcement officer.

In Virginia, the State agency refuses to adopt protections that are even in place in South Carolina, and even the State of Maryland is litigating with the State of Virginia in Virginia's own State courts.

In Tennessee, the State administrator said he brought suit against TVA when the citizens wanted to pursue enforcement because he thought "TVA would rather be dealing with us than a Federal judge."

The bottom line is this: This Senate bill would take power from the people and give it to State bureaucracies, and these are State bureaucracies which have failed us over and over and over again. The beauty of the EPA rule is that it gives us, the people in these communities, in Anderson County, South Carolina, in Pickens County, South Carolina, in Wilmington, North Carolina, the ability to protect ourselves.

Your Honor, Mr. Chairman, Senator Boxer pointed out the problem in Flint, and we have learned from Flint what happens when government does not take effective action to protect our water supplies. I can tell you I traveled all over the Southeast. There is not one person in the Southeast and the Carolinas who is asking this Congress give us less protection from coal ash pollution. And this is everybody from the Tea Party to no party.

Thank you.

[The prepared statement of Mr. Holleman follows:]

**THE NEED FOR NATIONAL STANDARDS FOR COAL ASH STORAGE AND FOR
EFFECTIVE CITIZEN ENFORCEMENT: WHY S. 2446 IS A THREAT TO
COMMUNITIES AND CLEAN WATER**

**Testimony of Frank Holleman, Senior Attorney at the Southern Environmental Law
Center**

U.S. Senate Committee on Environment and Public Works

March 2, 2016

Summary

The utilities in the Southeast – and elsewhere in America – store coal ash in a dangerous, polluting, and irresponsible way: The utilities store millions of tons of industrial waste – containing substances like arsenic and lead – in unlined pits filled with water next to drinking water reservoirs, rivers, and lakes, held back only by dikes made of earth that leak. These coal ash pits pollute groundwater, drinking water supplies, lakes, and rivers. These primitive and aging facilities (some are decades old) can and do fail catastrophically – as happened at Kingston, Tennessee, and on the Dan River in North Carolina and Virginia. These facilities also violate state and federal anti-pollution laws.

Yet, despite the clear threats to the public and violations of law, state regulators have for years failed to take effective action to require cleanups of coal ash pollution. Instead, the state regulators have been ineffective and quiescent, or in some instances they have even worked with law-breaking utilities to frustrate citizen law enforcement. The clear lesson of decades of experience in the Southeast is that state regulatory bureaucracies will not by themselves effectively protect local communities and clean water from the utilities' coal ash pollution. Instead, it is essential that there be uniform and effective national standards and that local citizens and communities have the power and the right to enforce the law to protect themselves when bureaucracies and utility monopolies will not.

The EPA's Coal Combustion Residuals Rule establishes some desperately needed minimum national standards for coal ash storage. The Rule protects all communities in America – including people and families, among them low-income and minority families, who do not have the resources to defend themselves against polluting utilities and ineffective state agencies. The Rule puts in place uniform standards that provide greater protection for public safety, for health, and for clean water. And the Rule wisely allows citizens to enforce meaningful requirements when state bureaucracies fail or refuse to do so.

The proposed S. 2446 guts the EPA Rule. It takes away from local citizens protections for their clean water, their safety, their health, and their communities. It takes power away from local communities and gives it to state bureaucracies by undercutting the citizens' ability to enforce the law and protect their communities from coal ash pollution. In short, S. 2446 is bad for local citizens and clean water, it shields polluting utilities, and it increases the power of state government bureaucracies at the expense of the public.

**THE NEED FOR NATIONAL STANDARDS FOR COAL ASH STORAGE AND FOR
EFFECTIVE CITIZEN ENFORCEMENT: WHY S. 2446 IS A THREAT TO
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**Testimony of Frank Holleman, Senior Attorney at the Southern Environmental Law
Center**

U.S. Senate Committee on Environment and Public Works

March 2, 2016

This proposed legislation is a blow to communities and clean water across the Southeast, and the rest of America.

In the Southeast and elsewhere, utilities store millions of tons of industrial waste, containing substances like arsenic and lead, next to rivers, lakes, and drinking water reservoirs in unlined pits filled with water and held back only by dams made of earth that leak. Using basic common sense, any observer can see that this approach to storing coal ash is dangerous, polluting, and irresponsible. It should come as no surprise that there have been catastrophic failures of coal ash pits in recent years, spilling billions of gallons and tens of thousands of tons of coal ash and coal ash pollution into rivers and lakes. Nor should it be a surprise that these sites pollute groundwater, drinking water supplies, rivers, and lakes, or that they violate state and federal anti-pollution laws.

Yet, state regulators and law enforcement authorities throughout the Southeast have failed to take effective action to clean up these sites. In Kingston, Tennessee, a massive catastrophic failure devastated nearby rivers and communities. On the Dan River in Eden, North Carolina, a catastrophic failure dumped 39,000 tons of coal ash and over 20 million gallons of coal ash pollution into the Dan River in North Carolina and Virginia. In Wilmington, North Carolina, coal ash pollution is threatening public drinking water supplies and has polluted a

popular fishing lake. In South Carolina, coal ash has contaminated groundwater with arsenic at hundreds of times the legal limit.

Over and over again, state regulators and utilities have let down Southeastern communities and their clean water. On the Dan River, both Duke Energy and the state regulator had been informed of problems with the pipe that broke and spilled coal ash into the Dan River. Yet, Duke Energy refused its own staff's request for a few thousand dollars to inspect the pipe, and the state regulator never required Duke Energy to do so. In the end, Duke Energy companies have pleaded guilty 18 times to 9 coal ash crimes across North Carolina, including crimes that led to the Dan River disaster. Duke Energy's companies have been fined \$102 million and are on nationwide criminal probation. All these crimes were apparent and known or knowable by the state regulator, yet for years the state regulator did nothing to stop those crimes.

Instead, the problems with and illegal activity inherent in coal ash storage in North Carolina was brought to the public's attention only because citizens and local communities have the right to enforce the law under the Clean Water Act. Local citizens initiated the law enforcement against Duke Energy's illegal coal ash practices and brought to light many of the violations that ultimately formed the basis of Duke Energy's criminal pleas.

In fact, instead of working with law-abiding citizens to enforce the law and protect local communities and clean water, the state regulator teamed up with the polluter – later determined to be involved in criminal activity – to thwart effective citizen law enforcement. The state regulator joined with Duke Energy to propose a settlement that would have not required Duke Energy to clean up its unlined coal ash storage and disregarded thousands of citizen comments objecting to the settlement. In the end, after the Dan River spill and after a criminal grand jury was impaneled, the state agency withdrew the proposed settlement, and Duke Energy agreed to

remove the ash from the three sites that citizens had noticed under the Clean Water Act – a process which is underway today.

In fact, the North Carolina environmental regulator has gone so far as to oppose a court-ordered cleanup of three coal ash sites in North Carolina – even though conservation groups and Duke Energy agree that they must be cleaned up. Fortunately, the state regulator lost in court.

In South Carolina, it had been known for years that coal ash sites in the state were illegally polluting the state's waters with large concentrations of arsenic. Yet, nothing had been done to force the utilities to remove the ash to dry, lined nonpolluting storage. Again, local citizen groups enforced South Carolina's antipollution laws – as South Carolina's law allows – and obtained agreements to remove coal ash from unlined water front pits to safe, dry lined storage away from waterways. Today, all of South Carolina's utilities have agreed to move all of their coal ash stored in waterfront unlined pits to safe, dry, lined storage away from waterways – and that movement is underway now. Once more, those cleanups would not have happened if the matter had been left up to the state regulator and if the local citizens had not had the power to enforce the law themselves.

In Tennessee, TVA was responsible for perhaps the greatest coal ash disaster in U.S. history, the 2008 Kingston spill. Local communities have a right to expect that TVA – a federal agency – and the state regulator would make sure that TVA complied with the law in storing its coal ash in the future. However, this past year, local citizens invoked their right to enforce the Clean Water Act against TVA's coal ash storage at its Gallatin plant on the Cumberland River near Nashville, after state regulators failed and refused to take effective action. In response, the state agency has confirmed that in fact TVA was and had been for years violating Tennessee's environmental laws at Gallatin – despite its record at Kingston.

In response to citizen action, the state agency did what TVA wanted it to do – it filed a pre-emptive action in state court on its own, without participation by the citizens who had brought the legal violations to public attention. The head of the Tennessee agency was candid about the agency’s motivations: He told a local TV station, “they’d [TVA] rather be dealing with us than a federal judge.”

What is clear is that the utilities’ unlined waterfront coal ash storage across the Southeast, and elsewhere in America, harms and threatens local communities and clean water. The EPA’s CCR Rule provides some minimum national uniform standards that protect all communities and water resources. These minimum national standards are important, because, among other things, coal ash is often stored near low-income communities that are not in a position to fight powerful utilities and reluctant state agencies. These national standards offer protections for these communities, as well as all others.

In addition, it is important that the enforcement of these standards is not left in the hands of state regulators. It has been demonstrated over and over again that state regulators will not or cannot enforce the law effectively against utilities who wield tremendous power in the state legislatures, which control the budgets for the state regulators. Citizens must have the right to protect their own communities and clean water when state bureaucracies will not.

The importance of the Coal Ash Rule is already becoming apparent. At least one coal ash storage facility in North Carolina was upgraded in light of the new rule to make it more protective of ground water. In South Carolina, citizens are looking to their enforcement of the Coal Ash Rule to provide them with minimum protections against proposed additional coal ash storage in the state. If S. 2446 were passed, the citizens of the Southeast and the rest of the country will lose these protections, and much of their ability to protect themselves.

S. 2446 takes away from local communities the minimum uniform national protections against irresponsible, polluting, and dangerous coal ash pollution. It eviscerates the ability of local communities to ensure that the protections against coal ash pollution are actually followed and enforced. It also exacerbates the threat of harm in low-income and minority communities where most coal ash dams are located. In short, S. 2446 guts the protections in the EPA Coal Combustion Rule. Here are some of the major threats to communities and clean water contained in S. 2446:

It erases EPA rule's requirement to immediately clean up all toxic releases and notify the public. This is a fundamental protection of clean water and of the public's right to know.

It eliminates clear and consistent national standards to protect public health and the environment. States will be able to create their own definitions of key terms, wiping out the nationwide protections in the CCR rule and will create programs that differ from state to state.

It leaves communities subject to the risks of unsafe existing coal ash pits. S. 2446 exempts existing coal ash impoundments from the requirement to close when location restrictions are not met, including when lagoons are located in wetlands, seismic zones, fault areas and unstable areas. If an impoundment meets the criteria in the bill for separation from groundwater, the impoundment is not subject to the closure requirements for siting in other highly dangerous areas. For example, the bill would allow high hazard dams to operate indefinitely in unstable areas where there is a heightened risk of collapse, if the owner/operator demonstrates that the coal ash is not in contact with groundwater.

It puts communities at risk from dangerous coal ash pits for up to six years. S. 2446 substantially delays, for up to six years, the CCR rule's closure requirement pertaining to

unstable and leaking coal ash impoundments, impoundments in contact with groundwater, and waste units that violate location restrictions, such as unstable areas. Under the bill, existing units are not subject to the rule's closure requirements until permitted, which take up to six-years.¹ As a result, surface impoundments that fail to demonstrate structural stability, unlined impoundments that violate groundwater protection standards, impoundments that store waste in contact with groundwater, and surface impoundments and landfills that violate location restrictions are not required to close—thereby creating substantial threats for years to neighboring communities.

It allows leaking coal ash pits to keep leaking. S. 2446 allows states to set alternative groundwater protection standards and alternative points of compliance for groundwater monitoring systems. By allowing states to tamper with monitoring systems and weaken groundwater protection standards, the CCR rule's closure/retrofit requirement will not be tripped, and the result will be that leaking unlined impoundments will continue to pollute groundwater indefinitely.

It allows coal ash pollution of communities and their clean water to continue. S. 2446 allows states to modify or waive critical national requirements establishing groundwater protection and cleanup standards, such as the requirement to install effective groundwater monitoring systems and to undertake thorough remediation when contamination is found. The bill allows States to establish “alternative points of compliance”² for groundwater monitoring systems, and choose “alternative groundwater protection standards.”³ Further the bill allows

¹ See § 4011(c)(3)(A).

² § 4011(c)(2)(B)(ii)(I).

³ § 4011(c)(2)(B)(ii)(II).

States to even “determine that corrective action is not necessary.”⁴ Under these provisions, States can erode the federal drinking water protections and cleanup standards in EPA’s rule.

It creates more delay, exposing communities and clean water to years more of coal ash pollution and threats of catastrophic failure. The bill allows States up to six years to issue permits for impoundments and landfills,⁵ and many critical requirements are not applicable until the permits are issued. For example, there is no public disclosure until after permitting. In addition, S. 2446 does not place any deadline on the permitting of new landfills and lagoons, so any new unit has no deadline by which to comply with critical requirements such as groundwater monitoring, structural stability inspections, fugitive dust control, public disclosure of data, etc. The only compliance deadlines contained in S. 2446 apply to existing CCR units.⁶ See the attached table for more specifics.

It wipes out minimum national standards that protect all communities and their clean water. S. 2446 contains no minimum standard of protection. Under the bill, States are not held to the RCRA subtitle D standard of establishing program criteria that prevents a “reasonable probability of adverse effects on health or the environment.”⁷ While S. 2446 allows EPA to review and approve State permit programs prior to implementation, EPA’s authority is extremely constrained, and a State’s discretion to implement a program that differs from the EPA rule is significant. EPA cannot deny authorization of a state program under S. 2446 because it fails to protect human health and the environment. Because States can change the definitions of key terms in the CCR rule, there is no guarantee that state programs will meet the RCRA standard of protection.

⁴ § 4011(c)(2)(B)(ii)(III).

⁵ § 4011(3)(B).

⁶ See § 4011 (c)(3)(A)(i).

⁷ See section 4004(a) of RCRA, 42 U.S.C. § 6944.

There is no guarantee that the state programs will protect communities and clean water. While S. 2446 permits EPA to approve state programs, the bill fails to provide EPA with authority to ensure the state programs meet the standard of protection to which all other state programs are held under RCRA.⁸ While the new bill contains a cursory “approval process” for state programs, EPA cannot deny authorization based on a state program’s failure to protect human health and the environment. Furthermore, EPA cannot deny a state program based on its failure to guarantee RCRA public participation standards in permitting.

It wipes out specific protections for communities and clean water contained in the EPA CCR Rule:

****It exposes taxpayers, communities, and states to great financial liability.**

The bill’s financial assurance requirement is grossly inadequate and is intended to shield polluters, not protect communities. S. 2446 requires owners and operators to comply with the financial assurance requirements for municipal solid waste landfills (MSWLFs) described in subpart G of Part 258.⁹ The financial assurance criteria for MSWLFs only require bonding sufficient to cover the closure of the waste unit. The MSWLF criteria do not include financial assurance for catastrophic releases, contamination of groundwater, and cleanup. Consequently, S. 2446 would permanently prevent EPA from addressing this critical gap in financial assurance requirements under RCRA, thereby putting Americans at risk for picking up billion dollar cleanup tabs when the next coal ash dams collapse.

⁸ See Section 4004(a) of RCRA, 42 U.S.C. § 6944(a).

⁹ § 4011(c)(2)(G).

****It does not prohibit siting of coal ash lagoons and landfills in the floodplains.** The new bill fails entirely to incorporate this critical siting restriction.

****It guts the ability of citizens and communities to protect themselves from coal ash pollution and threats.** The bill gives state bureaucrats, friendly to polluters and regulated industries, the ability to block any enforcement of the law. This is a massive transfer of power from the people to the bureaucrats. The bill states that compliance with a permit, “as determined by the implementing agency shall constitute compliance ... for the purpose of enforcement.”¹⁰ Consequently, if a state determines that an owner/operator has complied with its permit, the State may block a citizen suit under section 7002 of RCRA.

****Even the limited ability of local communities and citizens to protect themselves from coal ash pollution and threats is delayed for up to six years for existing units and potentially longer for new units.** Since permits for “existing” units may not be issued for up to six years and permits for new units have no deadline, citizens will no longer be able to immediately enforce the requirements of the CCR rule. According to S. 2446, prior to permit issuance for existing dumps, the States (and only the States) shall require compliance with several requirements that have specific deadlines in the bill.¹¹ However, since the bills requirements are not applicable directly to owners and operators, these

¹⁰ § 4011(c)(3)(C)(ii).

¹¹ § 4011(c)(3)(A).

provisions are not subject to citizen enforcement.¹² Similarly EPA cannot enforce these requirements.¹³

****It makes communities and clean water totally at risk for large coal ash fill projects.** S. 2446 contains almost no safeguards for use of coal ash as fill, even for large fill projects. The bill completely removes the CCR rule's requirement that structural fills above 12,400 tons would have to make a demonstration of safety. Instead, the bill exempts from regulation all "engineered structural fills." An implementing agency could step in to regulate a fill site only after a particular site does, in fact, release pollutants at levels of concern.¹⁴ In light of the total absence of monitoring at fill sites, there will rarely be evidence of a release from any of these unregulated and potentially very large unlined sites.

****EPA's "backstop authority" is almost nonexistent.** Under S. 2446, EPA has no authority to enforce State program requirements unless specifically invited by a State.¹⁵ Thus, EPA cannot step in to correct the problems of a dysfunctional state agency unless the dysfunctional state agency admits its dysfunction – a nonsensical concept. Further, a State will determine when facilities are in compliance.¹⁶ Third, EPA cannot withdraw a program based on States' failure to enforce permit requirements or conduct inspections. S. 2446 does not require States to run effective enforcement programs or even inspect landfills and dams— it simply requires States to issue permits.

¹² § 4011(c)(3)(A)(i).

¹³ § 4011(g)(2)(C).

¹⁴ § 4011(h)(2).

¹⁵ § 4011(g)(2)(C).

¹⁶ § 4011(c)(3)(C)(ii).

****Public participation in the permitting process is not guaranteed.** Unlike all other permit programs authorized under RCRA, S. 2446 does not guarantee residents the right to a hearing and appeal of a permit for toxic dumps in their communities. The bill contains a vague provision requiring notice and comment, but nothing guarantees that communities near dump sites will be able to participate meaningfully in the permitting process—a right that is central to RCRA and is guaranteed in all other RCRA permit programs.¹⁷

****Existing coal ash landfills are not subject to the location restrictions of the CCR rule.** S. 2446 does not subject expansions of existing landfills to the critical siting safeguards of the CCR rule.¹⁸ In other words, expansions of existing landfills do not have to meet the essential public health requirement to separate coal ash from the water table and the prohibitions against building landfills in wetlands, floodplains, fault areas and seismic zones.

****The bill's expansive definition of mine filling may foil application of the CCR Rule in areas near mines.** S. 2446 will allow CCR disposal near a coal mine to escape EPA's new requirements because of the bill's expansive definition of "coal mine." While the CCR rule exempted coal ash disposal at surface and underground coal mines, the bill's exemption of "coal mines" applies to disposal on the mine "site," as well as in the mine. This provision may threaten coalfield communities.

None of this can be fixed. S. 2446 will permanently end all EPA rulemaking on coal ash. The bill prohibits all future EPA rules. Regardless of potential changes in coal ash – in toxicity

¹⁷ See, for example, 40 C.F.R. § 256.63.

¹⁸ See §4011(c)(2)(E)(i).

or volume – EPA will be powerless to address new threats. No other waste stream under RCRA is similarly exempted. The bill therefore cements in place a defective scheme that does not guarantee protection of health and the environment.

CCR Rule Deadlines vs. Deadlines in S. 2446

S. 2446 will substantially delay critical safeguards of the EPA rule. The following table shows numerous requirements of the EPA rule for which S. 2446 has extended deadlines or imposed no deadline for compliance whatsoever. Furthermore, under S. 2446, *none of the EPA rule requirements apply to new landfills or surface impoundments built after the date of enactment until a permit is issued*, and there is no deadline in S. 2446 for permit issuance for new units. For existing units, most deadlines of the CCR rule are extended- some potentially up to six years. Indeed, for some critical safeguards, *S. 2446 entirely removes the requirements for existing dumps until permit issuance. Significant delay applies to the following: (1) the requirement to respond immediately to spills and perform cleanup (2-year delay for existing units), (2) the requirement to close or retrofit unlined impoundments that contaminate groundwater (potential 6-year delay), (3) the requirement to close unstable impoundments that fail federal safety criteria (potential 6-year delay), and (4)) the requirement to publicly disclose data (potential 6-year delay).*

CCR RULE REQUIREMENT	CCR RULE DEADLINE FOR EXISTING UNITS AND LATERAL EXPANSIONS	CCR RULE DEADLINE FOR NEW UNITS	S. 2446 DEADLINE FOR EXISTING UNITS AND LATERAL EXPANSIONS	S. 2446 DEADLINE FOR NEW UNITS (ABSENT PERMIT)
Design standards (liners, leachate collection systems) 257.70-72	Applicable NOW for all lateral expansions	Applicable NOW	1 year after enactment ¹	NO deadline for design standards for new units
Structural integrity criteria for surface impoundments 257.73	Hazard assessment, structural stability assessment, and safety factor assessment: 10/17/16	Applicable NOW	1 year after enactment ²	NO deadline for establishing structural stability for new units
Install/operate groundwater monitoring systems 257.90-95	10/17/17	Applicable NOW	2 years after enactment (with significant weakening of CCR requirements) ³	NO deadline for installing and operating groundwater monitoring for new units
Corrective Action	Response to	Applicable	2 years after	NO cleanup

257.96-98	spills and releases required immediately, including public disclosure	NOW	enactment (with significant weakening). NO response action to spills and releases required within 2 years of enactment. ⁴	requirements applicable to new units without permits. No deadline for new permits. ⁵
CCR RULE REQUIREMENT	CCR RULE DEADLINE: EXISTING UNITS & LAT EXPANSIONS	CCR RULE DEADLINE: NEW UNITS	S. 2446 DEADLINE FOR EXISTING UNITS AND LATERAL EXPANSIONS	S. 2446 DEADLINE FOR NEW UNITS (ABSENT PERMIT)
Air Criteria 257.80	Applicable NOW	Applicable NOW	Applicable at enactment	NO deadline for controlling fugitive dust at new units
Inspection of landfills and ponds 257.83-84	Applicable NOW	Applicable NOW	Applicable at enactment	No deadline for inspection of new landfills and impoundments
Closure requirement for inactive units 257.100	Deadline for closure 4/17/18	N/A	3 years after date of enactment 4011(c)(4)(A)(i)	N/A
Immediate closure requirements for leaking impoundments, unstable impoundments, siting in dangerous areas 257.101(b)	Location restrictions at existing units: 10/17/18. Leaking unlined pond closure: effective 10/17/17 Structural stability: 10/17/16	N/A	NO deadlines until permit issued -up to 6-year delay. If inspections reveal ponds don't meet federal stability standards, ponds will not have to immediately close. Similarly, unlined ponds violating groundwater standards will not have to close or retrofit until permit is issued. Landfills and ponds subject to	NO deadline for new landfills and surface impoundments.

			locations restrictions will not have to close until permit issuance (up to 6 years).	
Post-closure requirements 257.103	Applicable NOW upon closure of all active landfills and surface impoundments.	Applicable NOW	Not applicable to existing units that close before permits are issued. So if a unit closes before permit issuance (up to six years from enactment), no post-closure req'ts will apply.	NO deadline for new units
Location restrictions 257.60-64	Deadline 10/17/18	Applicable NOW	3 years after enactment	NO deadline for new units
Public posting requirements 257.107	Immediate	Applicable NOW	Not applicable to existing units until permit issued (up to 6 years)	NO deadline for new units

¹ 4011(c)(3)(A)(i)(III)

² 4011(c)(3)(A)(i)(III)

³ 4011(c)(3)(ii)(I)

⁴ 4011(c)(2)(B)(ii)(III), 4011(c)(3)(ii)(I)

⁵ 4011(c)(2)(B)(ii)(III), 4011(c)(3)(ii)(I)

Senator INHOFE. Thank you, Mr. Holleman. You don't very often hear people say that they are more concerned about the big bureaucracy at the State level than at the Federal level.

Mr. Moyer.

**STATEMENT OF STEVE MOYER, VICE PRESIDENT FOR
GOVERNMENT AFFAIRS, TROUT UNLIMITED**

Mr. MOYER. Mr. Chairman, Ms. Boxer, thank you very much for the opportunity to testify today on the Good Samaritan draft bill. We deeply appreciate the honor to be before the Committee and do that.

I am here on behalf of Trout Unlimited and its 150,000 members nationwide. Our members hunt and fish and recreate and live in communities across the Country that are affected adversely by abandoned mines, so we have seen firsthand the devastation that abandoned mine pollution can cause to watersheds and communities. But, as a Good Samaritan, we have also experienced firsthand the opportunity for recovery at these same locations.

TU has been a good Sam and has worked to restore streams and rivers damaged by abandoned mine pollution from the Appalachian coalfields in Pennsylvania to the hardrock mines in the Rocky Mountain States, so we are informed by these experiences and our message today is really simple: abandoned mine pollution is a widespread problem and we need to be more aggressive in addressing it. But the good news is that much of the problem is fixable, and this draft bill is a good step toward solving some of these problems.

We are grateful for the impressive draft bill accomplished through the hard work of its authors. It is a thoughtful blending of the past legislative approaches into a workable new model. There may be room for improvement in some areas, but we regard the overall draft as a significant bipartisan breakthrough, and we urge the Committee to give the draft strong consideration and eventual approval.

We face some daunting challenges on abandoned mine cleanup. The Gold King accident, which has been mentioned several times already, last August reminded us of those challenges. But while Gold King received extensive media coverage, what is less well known is that there are thousands of similar, smaller scale abandoned mines that pollute our rivers and streams every single day. Cleaning up abandoned mines is challenging and expensive, we agree with that, but that does not make it any less imperative.

According to the EPA, abandoned hardrock mines affect about 40 percent of the headwaters in the Western United States. But also in the East pollution from abandoned coal mines continues to damage thousands of miles of streams and rivers, over 10,000 miles just within Pennsylvania and West Virginia alone.

We and others have developed a number of model abandoned mine cleanup projects that can be easily replicated. In Pennsylvania, aided by sound State-based Good Sam policy, watershed groups, including Trout Unlimited, are working with State agencies, communities, and other partners to conduct more than 250 abandoned coal mine pollution control projects. Kettle Creek Watershed, in north central Pennsylvania, being just one example, has

seen dramatic water quality and fisheries restoration through this work.

In Colorado, the western leader in abandoned mine cleanup work, TU, again in partnership with State and Federal agencies and private landowners, has used the limited Good Samaritan tools afforded by EPA under current law to good effect in restoring Kerber Creek in Colorado.

Both these projects are described more fully in my written testimony.

Despite this progress, the lack of dedicated funding sources and burdensome liability risks for would-be Good Sams has hindered abandoned hardrock mine cleanups. In particular, as I mentioned, two of our best environmental laws, CERCLA and the Clean Water Act, produce barriers to this work.

So that is why we are here. We need the legislation to support Good Sam cleanup, and it is really needed today to allow some good projects to go forward.

Just a few words about the draft bill. It deals narrowly and appropriately with CERCLA and the Clean Water Act; it would allow Good Sam projects to be eligible for Clean Water Act Section 319 funding; it would allow approved States and Tribes to run the program; it provides protection from future liability from the two laws once Good Sams have successfully completed their permitted work activities; and just last, another consideration as the bill goes through the legislative process, we urge the Committee to consider fine-tuning enhancements to the permit mechanism in the bill that might diminish the permit burden for some low environmental risk, low complexity projects.

The draft does not address Good Sam policies for abandoned coal mine pollution, and we fully understand the reasons for not including coal Good Sam provisions, but coal Good Sam legislation is needed, but we really urge all stakeholders to seek ways to address coal Good Sam policy without undermining this really promising effort that we are talking about today.

So just to conclude, we really appreciate the Committee's focus on these issues and we urge the Committee to continue to work with us and the States and EPA and other stakeholders to help provide a really badly needed tool to facilitate these cleanups.

Thank you very much again for the opportunity.

[The prepared statement of Mr. Moyer follows:]



March 2, 2016

Testimony of Trout Unlimited on the Senate Environment and Public Works Committee's hearing on: Discussion Draft of Good Samaritan Cleanup of Orphan Mines Act of 2016.

Chairman Inhofe, Ranking Member Boxer, and Committee Members:

My name is Steve Moyer. I am the Vice President of Government Affairs of Trout Unlimited. Thank you for the opportunity to testify today on abandoned mine clean up legislation.

I offer the following testimony on behalf of Trout Unlimited and its 155,000 members nationwide. My testimony will focus on the Discussion Draft (Draft Bill), cleanup of abandoned mine lands, and specifically the need to facilitate abandoned mine cleanups by Good Samaritans — those individuals or entities who have no legal obligation to take on an abandoned mine cleanup, but who wish to do so in order to improve water quality and watershed health.

We deeply appreciate the Committee's focus on these issues, and we urge the Committee to continue to work with us, the states, EPA and other stakeholders on a Good Sam bill to help provide a badly needed tool to facilitate cleanups.

We are grateful for the impressive Draft Bill, accomplished through hard work of the authors: Senators Gardner, Bennet, and Representative Tipton. It is a thoughtful blending of past legislative approaches into a workable new model. There may be room for improvement in some areas, but we regard the overall draft as a significant, bipartisan breakthrough, and we urge the Committee to give the draft strong consideration and eventual approval.

TU's mission is to conserve, protect and restore North America's trout and salmon fisheries and the watersheds they depend on. In pursuit of this mission TU has worked to restore streams and rivers damaged by pollution from abandoned mines from the Appalachian coalfields in Pennsylvania to the hardrock mining areas of the Rocky Mountain States, and my testimony is based upon these experiences. TU stands ready to expand our work to clean up abandoned mine pollution, and we need such legislation to make it happen.

Abandoned mine pollution is a widespread problem but much of it is fixable.

The three-million gallon August spill of polluted water from the Gold King mine near Silverton, Colorado showed the world what TU members and staff who live in mining country see every day: Orange, polluted water leaking out from abandoned mines. For several days downstream

communities in Durango, tribes and river users in the Animas River faced the loss of access to the river, damaged river-based economies, and threats to agricultural and drinking water. For a recreation economy based city such as Durango, the threat of lost jobs and damaged businesses was a great concern.

Thankfully, this spill was not as severe as it might have been and the river has returned to pre-spill conditions, but the long-term impacts still need to be monitored carefully. Most importantly, EPA and other stakeholders must learn from the disaster as we move forward to address the broader problem of abandoned mine pollution.

The Gold King accident received extensive media coverage. What is less well known is that there are thousands of similar, smaller-scale abandoned mines that pollute our rivers and streams every day. One of the lessons from the Gold King spill surely must be that we need a much greater sense of urgency about addressing the problem of pollution from abandoned mines.

Cleaning up abandoned mines is challenging and expensive. That does not make it any less imperative. The legacy of historical mining practices — more than 500,000 abandoned hardrock mines in the American West with an estimated cleanup cost ranging from \$36-72 billion — has persisted for the better part of a century with insufficient progress toward a solution. According to the EPA, abandoned hardrock mines affect 40 percent of headwaters in the western United States. The lack of dedicated funding sources and burdensome liability risk for would-be Good Samaritans has hindered abandoned hardrock mine cleanups.

In the East, abandoned coal mines dot the Appalachian landscape. Pollution from abandoned coal mines continues to damage thousands of miles of streams and rivers — over 10,000 miles just within Pennsylvania and West Virginia — and while much has been accomplished through the Surface Mining Control and Reclamation Act's extremely valuable Abandoned Mine Lands Fund (AML Fund), a great deal more remains to be done. The cost of cleanup in Pennsylvania alone has been estimated as high as \$15 billion.¹

A reclamation fee, paid by the mining companies, is collected for each ton of coal produced to support the AML Fund. Since 1977, more than \$8 billion has been put to good use cleaning up and making safe abandoned coal mines. Unfortunately, no similar fund exists to clean up the legacy of hardrock mining, particularly in the Western U.S.

We have developed a number of model projects that can be easily replicated. In Pennsylvania, aided by state-based Good Samaritan policy, watershed groups, including Trout Unlimited, are working with State agencies, communities, and other partners to conduct more than 250 abandoned coalmine pollution projects throughout the state. And Trout Unlimited, again in

¹ <http://pa.water.usgs.gov/projects/energy/amd/>

partnership with state and federal agencies and private landowners, has used the limited Good Samaritan tools afforded by EPA under current law to good effect.

Across the country, we are working in local communities to leverage the resources that are available to restore rivers and streams that are impacted by abandoned mines. This work demonstrates the positive effect that dedicated Good Samaritans can have on local waters, as well as the limitations placed on Good Samaritans as a result of liability concerns under the Clean Water Act. Although projects by TU and others have addressed only a tiny fraction of the overall problem, each project has substantially restored the health of a particular river or stream. Although minor compared to the scope of the problem, these projects represent major victories for the local communities that have, in many cases, seen dead streams brought back to life. These projects also provide lessons on Good Samaritan restoration generally.

Two of our best environmental laws produce barriers to abandoned mine cleanup

Two of our most valued and effective environmental laws – the Clean Water Act (CWA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), have effectively allowed cleanup of many abandoned mine sites to fall through the cracks. Smaller sites generally are not a high enough priority to get funding under the “Superfund” provisions of CERCLA. For these sites, where the parties responsible for the mining pollution are long gone, and with current owners having little to no incentive to do any of the cleanup because of liability risks, projects to reduce pollution can become a legal quagmire. A partnership between TU, western states, and EPA resulted in EPA policy that provides useful protection to Good Samaritans from CERCLA liability in 2007,² but CWA liability has remained a significant obstacle.

CERCLA: When TU first started working on abandoned hardrock mines in the West, we had liability concerns under CERCLA and the Clean Water Act that prevented many Good Samaritan projects from moving forward. CERCLA presented a significant barrier to Good Samaritan projects, both because the statute presents real risks for any party helping to clean up toxic wastes, but also because the statute’s complexities and perceived risks are incredibly daunting for many watershed groups, local communities and NGOs. If any liability concerns were raised, even the legal cost of sorting through it would financially strain a nonprofit such as TU.

In 2006, TU completed a pioneering Good Samaritan cleanup in Utah’s American Fork Canyon that overcame CERCLA liability concerns with the help of EPA, the Forest Service and the state of Utah. The liability protection document (an Administrative Order on Consent, or “AOC”) negotiated with the EPA for the American Fork work led to the issuance of EPA guidance and model documents for dealing with CERCLA liability protection for future Good Samaritans to use in similar projects.

² <http://water.epa.gov/action/goodsamaritan/>

TU has now negotiated three separate AOCs with the EPA covering two different projects — one project on the American Fork in Utah (two AOC's for different phases of the project) and another on Kerber Creek in Colorado. These AOC's have allowed TU to undertake clean-up projects with significant local benefits while eliminating the risks of additional cleanup expenses or future liability under CERCLA. We greatly appreciate the work that EPA has put into their model AOC for Good Samaritan cleanups, and the work that EPA staff have put into negotiating the specific AOCs for TU. Though there remains room for improvement, the AOCs have helped to reduce one of the major impediments that have prevented communities, watershed groups, conservation organizations, TU chapters and others from undertaking abandoned mine cleanup projects.

Clean Water Act: There are many projects where water quality could be improved by collecting run-off, or taking an existing discrete discharge, and running the water through either an active or passive treatment system. However, for would-be Good Samaritans, Clean Water Act (CWA) compliance and liability issues remain a barrier to such projects. A number of courts have held that discharges from systems that treat wastewater from abandoned mines are point source discharges that require a National Pollutant Discharge Elimination System (NPDES) permit under section 402 of the CWA. Although EPA and some eastern states have not considered such projects to be point sources requiring NPDES permits, the Fourth Circuit's 2010 decision in *West Virginia Highlands Conservancy, Inc. v. Huffman* (discussed more below) creates some uncertainty around that approach.

Stakeholders in projects involving treatment of wastewater have balked because of CWA liability for two reasons. First, NGOs, including TU, are not well suited to apply for and hold permits for such projects. TU does not have an adequate funding mechanism to legally bind itself to pay for the perpetual costs associated with operating a water-treatment facility and permit compliance. Typically, NGOs implement Good Samaritan projects through specific grants provided by government agencies, individuals, private foundations, and other donors. Although such grants often include funding for future monitoring and maintenance, nonprofit groups do not have funding for major improvements to a system should those improvements be needed to comply with a permit. As a result, the liability risk associated either with complying with a permit, or building a system without a permit, represents a completely unfunded risk that could threaten the financial health of the organization to such a degree as to be untenable.

Second, for many projects it may be impossible to obtain a permit, because the treatment systems, even if they will improve conditions, may not be able to treat abandoned mine wastewater to a level that meets all applicable water quality standards or other applicable criteria. It should be noted that while these treatment systems are certainly capable of producing water that will support a healthy fishery, the resulting water quality might not meet CWA standards for some pollutants that are particularly difficult to remove from mine waste

(for example, passive wetland systems that effectively treat highly polluted water often leave levels of manganese that do not comply with CWA standards). Some passive systems also can comply with water quality standards most of the time, but may violate them occasionally, such as during high flow events. Imposition of current standard CWA permitting regulations, however, would require compliance with standards for all parameters at all times. Techniques do exist that might comply with all water quality standards at all times, but they are dramatically more expensive and create a much more “industrial” footprint in remote mountain areas. It is possible to spend \$X to clean water to 90 percent of the CWA standards, resulting in significant benefits for communities, fisheries, and aquatic systems. But the increment needed to get to 100 percent of the Clean Water Act standard may be \$5x.

It is also sometimes difficult to predict in advance the results that a given treatment system will achieve. Although one can know in advance that a project will produce a significant improvement in water quality, one cannot always know the exact treatment level it will achieve for every parameter until the treatment system has been in operation for some time. Finally, many of these projects are built in remote mountain areas where access for monitoring and maintenance is very difficult. These projects are not well suited for traditional NPDES permits that require monitoring for and compliance with detailed numeric criteria.

This is not to say that CWA standards should be weakened; just the opposite, in fact. But there should be incentives for would-be Good Samaritans to make water cleaner even if still short of full CWA standards. Put another way, the fundamental problem is that Good Samaritan projects can dramatically improve water quality and streams health, but can’t comply with all of the substantive and procedural requirements of the CWA.

Good Samaritan policy is needed today to allow good projects to go forward

Good Samaritan projects need an appropriate mechanism that requires the project to produce significant improvements in water quality, implement best-design and management practices, and conduct appropriate monitoring, but that does not expose the Good Samaritan to liability if the project at some point fails to achieve a required criterion for a given pollutant.

Cleanup opportunities have been missed because of the lack of such a Good Samaritan policy. For example, the sulfate-reducing bioreactor phase of the Tiger Mine Restoration Project near Leadville, Colo., a proposed project in the headwaters of the Lake Fork of the Arkansas River, is on hold. Though other portions of this project have been successful in stabilizing and conveying adit discharge, the sulfate-reducing bioreactor would be another downstream option to treat the acid mine drainage coming from the tunnel. The planned bioreactor is designed to address the low pH and high metals concentrations that are causing the Lake Fork of the Arkansas to be contributing significant metals loading to one of Colorado’s most treasured fisheries, the Arkansas River. Despite the fact that the project would dramatically improve water quality, TU and its partners cannot proceed without a manageable way to comply with the Clean Water

Act. There is simply not a practicable option for a Clean Water Act permit currently, and none of the parties will proceed without one.

In short, any entity that constructs a bioreactor or other similar treatment system becomes liable for that discharge in perpetuity under the Clean Water Act. Also, any landowner that allows such a project to proceed on their property is at risk as well. Understandably, this is a risk that the Tiger Mine project partners are not willing to take even though a study of a bioreactor has been completed, the site has been prepared and several sources of funding have been secured.

TU has worked with the EPA to address these challenges, and we appreciate the efforts the agency has made to help us and other would-be Good Samaritans. For example, in December of 2012 the EPA issued a guidance memo designed to clarify how the Clean Water Act applies to Good Samaritan abandoned mine cleanup projects. The guidance memo requires potential Good Samaritans to fully comply with the 2007 Superfund policy, but allows eligible Good Samaritans to avoid CWA requirements under certain circumstances.

Several years of experience now indicate that the restrictions in the guidance memo may not be a good fit for the type of work that is needed. Indeed, the details of the policies application remain quite unclear, in part because no one has yet opted to use it for a project because, among other questions, the policy leaves open the liability and compliance obligations of owners of land where projects take place. Nonetheless, we are pleased that EPA is making abandoned mine cleanup a higher priority, and we are eager to explore ways to increase our work with EPA at sites around the West.

In spite of this progress, the Clean Water Act remains a barrier to cleanups at the Tiger Mine and similar projects elsewhere. Federal legislation is needed to provide permitting authority to facilitate these and other cleanups in a way that provides clarity and certainty to Good Samaritans.

Good, exciting projects could be expanded and replicated with effective Good Samaritan policy

Eastern coal mines are not subject to the CERCLA liability, but a recent court decision has extended the Clean Water Act liability concerns that have long plagued the West to the Eastern coalfields. In *West Virginia Highlands Conservancy v. Huffman*, 625 F. 3d 159 (4th Cir. 2010), the Fourth Circuit held that facilities run by the state of West Virginia to treat water pollution coming from abandoned coal mines met the definition of a point source under the CWA. In addition, the court held that the state was the operator of those facilities and therefore needed a permit under sections 301 and 402 of the CWA. The decision has introduced some new uncertainty regarding how the CWA applies to projects that treat acid mine drainage from abandoned coal mines in Pennsylvania and other eastern states. But the contrast between

what is occurring to clean up abandoned coal mines in the East and what is happening in the West, especially in terms of use of active and passive treatment facilities, is striking.

In Pennsylvania, as we explain below, polluted water is being successfully treated and streams and rivers are being brought back to life because the Commonwealth has provided Good Samaritans with dedicated funding and at least limited liability protection via state Good Samaritan law. The Pennsylvania model is precisely what we need to export to the federal level for all abandoned mine pollution.

There are numerous watershed groups that have formed in this country for the purpose of protecting, conserving and enhancing the natural resources of their local communities. They work collaboratively with government agencies and landowners to develop solutions to complex watershed problems. The following are some examples of the good work that is occurring.

By using the CERCLA liability protection and avoiding projects that trigger Clean Water Act liability, and with the support of the Tiffany & Co. Foundation, Freeport-McMoRan Copper & Gold, Inc., and other partners and supporters, TU has made substantial progress in cleaning up abandoned mine impacts in several watersheds in the West.

American Fork, Utah. The Pacific Mine cleanup in the American Fork Canyon was the first voluntary, non-profit-led abandoned hardrock mine restoration project in the West. TU and its partners received awards from the Utah Board of Oil, Gas and Mining and the EPA for work on the American Fork. Anglers can now catch Bonneville cutthroat trout immediately downstream of the area where pollution used to run off mine tailings piles.

Mores Creek, Idaho. To date, over 14,000 cubic yards of mine tailings have been removed from the banks of Mores Creek to create a more natural floodplain area, and trees planted along the stream will provide critically needed shade for coldwater fish. Hundreds of schoolchildren from the area have participated in tree plantings and other restoration work. Migratory fish are now seen using instream habitat structures installed as part of the restoration effort.

Kerber Creek Watershed, Colorado. In total, TU and its partners restored over 80 acres of mine tailings, improved 8 miles of stream, and installed more than 340 instream structures that are now home to a reproducing brook trout population. Volunteers logged over 13,000 hours of work in the watershed over the past three years. The restoration project has received four prestigious awards: the BLM's *Hardrock Mineral Environmental Award*, the Colorado Riparian Association's *Excellence in Riparian Area Management Award*, the Rocky Mountain Region of the USFS's *Forest and Grassland Health Partner of the Year*, and the Public Lands Foundation's *Landscape Stewardship Award*.

Leavenworth Creek Watershed, Colorado. In 2015, TU and Federal partners removed and capped 5,400 cubic yards of mill tailings containing high levels of zinc and lead, while constructing 2,500 feet of hardened channel through a dispersed tailings area adjacent to the Waldorf Mine. Removing the mill tailings, creating a vegetated floodplain, and establishing a hardened channel will allow for the conveyance of clean surface water runoff to Leavenworth Creek. This is an important step in improving water quality to downstream South Clear Creek, which acts as the drinking water source for the town of Georgetown, Colo.

Clark Fork River Basin, Montana. TU and partners have reclaimed four mine sites in the Middle Clark Fork River and have six ongoing mine reclamation project in the planning and design phases. For example, on Mattie V Creek, TU and its partners removed 12,000 cubic yards of dredge tailings and reclaimed 500 feet of stream channel reclamation project. Fish are now swimming up Mattie V Creek from Ninemile Creek for the first time in 80 years. Because of these and other accomplishments, the TU project manager in Montana was awarded with the American Fisheries Society's Individual Achievement Award and the US Forest Service's Rise to the Future Award in 2010.

Kettle Creek, Pennsylvania. Our experiences in Pennsylvania, where Clean Water Act liability has historically not been a concern, are illustrative of the positive affect of Good Samaritan cleanups. Over the past 10-15 years, Pennsylvania has seen a dramatic increase in abandoned mine reclamation projects by watershed groups, including TU. This boom has been fueled by funding from the state's Growing Greener grant program and the federal Abandoned Mine Land (AML) reclamation fund. Most of these projects involve treatment of acid mine drainage using passive treatment systems, which run the polluted mine drainage through a series of limestone basins and wetlands that increase the water's pH and cause heavy metals to precipitate out. These projects have significantly improved water quality and restored fish populations in numerous Pennsylvania streams.

The Pennsylvania Department of Environmental Protection estimates that public funding sources have paid for the construction of nearly 250 passive treatment systems in the state, the majority of which have been constructed by private watershed groups, conservation districts or other local groups.

Beginning in 1998, the work of TU and its partners in the lower Kettle Creek watershed has resulted in the reclamation of approximately 160 acres of scarred abandoned mine lands and installation of nine treatment systems that successfully improved mine water polluted with high levels of acidity and metals. The results to date have been tremendous, with water quality restored to 3 miles of previously dead streams and 6 miles of a fully reconnected and thriving native brook trout population.

This story of recovery plays out again and again in individual streams and watersheds. Several years ago, the Babb Creek Watershed Association accomplished delisting 14 miles of Babb

Creek, now a wild trout fishery, from EPA's impaired streams list. Another 14 miles in the Tangascootack Creek watershed is pending removal from the impaired streams list as a result of passive treatment systems constructed by the Clinton County Conservation District.

On a much larger scale, the West Branch Susquehanna River watershed has made tremendous strides over the past few decades. A comparison of conditions in the West Branch Susquehanna in 1972 with those in 2009 indicated that fish species increased 3,000 percent, and pH increased from 3.8 to 6.6. In acknowledgement of TU's leading role in advancing abandoned mine cleanup projects that focus on restoring trout streams across the West Branch Susquehanna River watershed, TU was honored with the prestigious *President's Fishery Conservation Award* in 2011 from the American Fisheries Society.

These improvements result in economic benefits. In Pennsylvania, almost \$4 billion was spent on fishing, hunting, and wildlife viewing in 2006. A 2008 study found that full remediation of the West Branch Susquehanna River watershed would result in "an additional \$22.3 million in sport fishing revenues could be expected to be generated each year. Additional recreation spending—over and above that for fishing—would be expected after remediation is completed."^[1]

Regardless of the overall scope of the abandoned mine problem, each of these Good Samaritan projects restored a significant water body and represents a big win for the local community.

Assessment of the Draft Bill

There are two main ingredients for effective abandoned mine pollution cleanups: (1) well-designed liability protection for Good Samaritans involved in cleanup efforts, and (2) increased, dedicated funding to get the job done. The Draft bill focuses solely on the challenging task of developing Good Samaritan policy.

1. Positive Features of the Draft Bill

The Draft is a good blend of past approaches. In particular, it uses features found in the Tipton/Udall/Bennet bill from the 113th Congress (H.R. 2970;S. 1443, as well as the Salazar/Allard (S.1848), of the 109th Congress, which was approved by this committee but advanced no further through the legislative process.

The bill proposes a new permitting process, but deals narrowly and appropriately with the two laws that matter most to successful Good Samaritan policy, CERCLA and the Clean Water Act.

^[1] Evan Hansen, Alan Collins, Julie Svetlik, Sarah McClurg, Alyse Shrecongost, Rob Stenger, Mariya Schilz, and Fritz Boettner. *An Economic Benefit Analysis for Abandoned Mine Drainage Remediation in the West Branch Susquehanna River Watershed, Pennsylvania*. Downstream Strategies, LLC. July 3, 2008.

The Draft does not include NEPA limitations or exemptions from other environmental law. EPA and approved states and Tribes are the appropriate implementing agencies

The Draft's permitting mechanism has numerous requirements and steps, but we view it as workable. We like the bill's fundamental permitting standard: Projects must meet applicable water quality standards to the maximum extent practicable "under the circumstances." We will need to make sure that implementing agencies understand that "under the circumstances" will mean performing cleanup activities that are cost-effective at high elevations and in remote locales.

Another positive feature is that projects are eligible for Clean Water Act Section 319 funding. Abandoned mine clean activities sometimes fall in to a gray area of the law between non-point and point source control. Greater application of 319 funds to this work will be very helpful.

We appreciate the provisions for approved States and Tribes to run the program. Colorado, for example, leads the way for hardrock mining cleanup, and it should be well positioned to run an effective Good Samaritan program. Another hopeful sign is that, as we observed above in the testimony, Pennsylvania leads the nation in cleanup of abandoned coal mines. That state is showing all of us how much can be accomplished when both funding and effective state-based Good Samaritan policy are nourishing good projects on the ground.

Lastly, the Draft provides protection from future liability from the two laws once Good Samaritans have successfully completed their permitted work activities. This provision is much appreciated and is in fact, essential for any Good Samaritan projects.

2. Sections of the Draft where improvements might be added

Permit compliance issues: Trout Unlimited has never violated any of the terms of the CERCLA-based Good Samaritan projects, or any of the Pennsylvania state Good Samaritan policies. We ALWAYS work very hard to be good Good Samaritans.

However, we and our contractors are human, and in the unlikely event that permit terms would be violated under the provisions envisioned by the Draft, the ensuing enforcement actions must be reasonable and commensurate with the harms caused by the permit violations, or prospective Good Samaritans will never do any projects because of risk and liability concerns. Monitoring violations which led to no damage to water quality, for example, would be far less egregious than a violation that caused substantial damage to water quality below the baseline established in the permit.

Therefore, the three sections that come in to play due to permit violations, the "Failure to Comply" liabilities, the "Enforcement" penalties, and the prospective "citizen suit" provision,

should be viewed individually and collectively, as they would be by a prospective Good Samaritan.

- In the “Failure to Comply” section, we appreciate the “deminimus” exception for violations that do not substantially degrade water quality.
- In the Enforcement section, we appreciate the requirement to restore any degradation caused by permit violations, but the \$10,000/day fines are a little daunting, even though this provision is rooted in existing and longstanding Clean Water Act policy.
- Regarding, Citizen Suits, TU has no problem with its inclusion, as long as it is narrowly targeted on the permit conditions and standards, and as long as any ensuing penalties are truly commensurate with water quality damage caused by permit violations.

Permit mechanism: Finally, we note that all 16 steps of the permit mechanism are reasonable, but when the process is viewed in its entirety, it is potentially a lot of work, and potentially significant expense to incur, for prospective Good Samaritans to obtain permits. As we go through the legislative process, we urge the Committee to consider fine-tuning enhancements to the permit mechanism that might diminish the permit burden for some low environmental risk, low complexity projects.

3. Other Considerations for Cleaning Up Abandoned Mine Pollution

The Draft does not address Good Samaritan policies for abandoned coalmine pollution. We fully understand the reasons for not including coal Good Samaritan provisions. Coal Good Samaritan legislation is needed, but we urge all stakeholders to seek ways to address coal Good Samaritan policy without undermining the promising effort embodied in the Draft. We think the old axiom applies to this situation: There are many different paths to the top of the mountain, but when we get there, the view is the same. Let’s find a path for coal Good Samaritan legislation that enhances prospects for both hardrock and coal Good Samaritans

Finally, and importantly, increased, dedicated funding for hardrock abandoned Mine cleanup work is needed. Even if a perfect Good Samaritan bill is approved and implemented, the work will be hampered without adequate funding.

We urge Congress to consider establishing a fair royalty from any minerals taken from public lands, a portion of which could be invested in an abandoned hardrock mine cleanup fund. Almost every commodity developed on our public lands — coal, wood fiber, oil, gas, and livestock forage — has dedicated funding for mitigation of impacts and restoration. The only commodity that lacks such a dedicated fund is hardrock minerals.

Similarly, Congress needs to start work on reauthorizing Title IV AML for coal. The AML fund is the lifeblood of funding for abandoned coal mining work in the coalfield areas of America, especially the East. Congress passed a very useful 15-year reauthorization for the AML fund in 2006. Trout Unlimited and other stakeholders urge Congress to get started on the task of reauthorization now to ensure a smooth reauthorization is achieved by 2021. Such a valuable, complex law is worth the effort needed to make sure the critical funding is maintained.

Conclusion

Improving water quality around the Nation is a fundamental goal of the work of this Committee, and thus we are pleased that the Committee is looking at one of the most vexing water problems remaining in the U.S. We stand ready to work with you so that affected communities around the country will again have clean, fishable waters.

Thank you for considering our views, and thank you for working with us on these important matters.

Senator INHOFE. Thank you, Mr. Moyer.
Mr. MERRIAM.

STATEMENT OF CHIP MERRIAM, VICE PRESIDENT, LEGISLATIVE, REGULATORY & COMPLIANCE, ORLANDO UTILITIES COMMISSION, ON BEHALF OF THE AMERICAN PUBLIC POWER ASSOCIATION

Mr. MERRIAM. Mr. Chairman and Ranking Member Boxer, thanks very much for allowing me to speak today. My name is Chip Merriam. I am the Vice President of the Legislative and Regulatory Compliance area of the Orlando Utilities Commission. We call ourselves OUC, the Reliable One.

We are the second largest municipal utility in Florida and the fourteenth largest in the Nation. We provide affordable, reliable, and sustainable energy to more than 234,000 meters in the city of Orlando, the city of St. Cloud, and in unincorporated areas Orange and Osceola Counties.

One of the things we wrestle with, we are now again at the recession of a growing area. But 40 percent of our ratepayers still today earn less than \$35,000 annually. So the cost of implementing regulatory programs and meeting those requirements is something that is very important to us.

OUC is a member of, and today testifying on behalf of, the American Public Power Association, a national service organization representing the interests of over 2,000 community-owned, not-for-profit electric utilities that actually provide electricity to over 48 million Americans. We are your neighborhood utilities.

OUC operates two coal plants and we are currently constructing a solar farm right now on the footprint of a 90-acre coal ash landfill. We do not impound coal ash; we actually do a landfill process, similar to a municipal storage waste system.

And had the Environmental Protection Agency not classified into this river rule that CCRs are hazardous, we may not have been able to do what we are doing today, which is actually on the top of this closed landfill installing many megawatts of solar energy.

Additionally, we understand the impact of a carbon-constrained environment at this point in time. We are looking at an additional expansion for a coal pile which we are turning into another solar field at this particular point in time as we look to the future. Our industry is changing. We recognize that.

However, constructing in Florida coal residual landfills is very complex. Because the facilities are going to be operated and used for many decades, one of the things we actually like to see in the State regulations, which our State does a very good job at, is governing the construction, the operation, the monitoring, and even the closures, and they do it on the engineering basis and on a science basis to make sure that these are protective of the environment. Having rules that are conflicting, like this particular rule will provide for our organization to deal with, gets us into a position of a very impossible to meet compliance requirement.

We just provided a 30-acre expansion of our landfill. It is lined. It is overbuilt. It goes beyond the requirements of municipal waste storage. For the 30-acre expansion it was \$15 million for these same people that I just described as our ratepayers. My written

testimony actually describes what was required by our State in order to do this.

Our ratepayers and our governing body insist that we manage all the surrounding resources in a manner that are responsible, visionary, and affordable. In fact, when we built our power plant in the 1980's, it was a long way outside of town. Today we are surrounded on one side by a county landfill, but on the other side by golf course communities. So that is the type of infill that has been created near our particular power plant.

As Senator Hoeven and Senator Manchin described, Subtitle D is self-implementing. One of the difficulties for us in this industry is trying to read between the lines of what the risk is and what it looks like, and trying to make sure we are building something that is compliant and we are not going to be spending time in court defending what we believe was the correct thing to do.

We actually believe in the State's regulatory program and we think that it is very thorough. Our facilities, when these types of rules come forward, are confronted with conflicting Federal and State requirements. We believe, as we read this particular bill, bill 2446, that this actually takes away the conflict we have to deal with; it does make, as the two Senators said, give us more direction and even raise the power a little bit on the regulatory process.

We do not see a loss in our particular State, as an example, of citizens' input; we actually see an addition. In our State process there is an administrative procedure process that is actually part of your permit. You can challenge my permit any time I make a change in it. Further, you can go forward and you can challenge it civilly if you don't get the answer you want from the State, and you can challenge these in the process on the EPA side.

I was a former regulator for 20 years. I was also responsible for water quality and most of the Everglades restoration projects. There is no value in destroying the environment that surrounds the product that you are dealing with, trying to provide benefit for this, your ratepayers. I took great pride in every regulation I made, every rule I made, and every permit I issued that it was balanced, it protected the unique environment of Florida, and that I stood by the decisions I made and made sure that those were implemented correctly and there was no risk to the environment or those who were complying with the rules.

Mr. Chairman, I will end at that point in time.

[The prepared statement of Mr. Merriam follows:]

Hearing of the Senate Environment & Public Works Committee

**Written Statement of Chip Merriam
Vice President, Legislative, Regulatory, & Compliance
Orlando Utilities Commission
On Behalf of the American Public Power Association
March 2, 2016**

Chairman Inhofe and Ranking Member Boxer, thank you for the opportunity to testify at today's hearing entitled, "Economic Opportunities from Land Cleanup Programs and a Legislative Hearing on S. 1479, S. 2446, and Discussion Draft of Good Samaritan Cleanup of Orphan Mines Act of 2016." My name is Chip Merriam and I am the Vice President of Legislative, Regulatory, & Compliance at the Orlando Utilities Commission (OUC) – the "Reliable One."

Established in 1923, OUC is the second largest municipal utility in Florida and the fourteenth largest in the nation. OUC provides water, chilled water, and lighting services to more than 234,000 meters in the City of Orlando, City of St. Cloud, and parts of unincorporated Orange and Osceola Counties. We take great pride in providing affordable, reliable, and sustainable electricity and water for our ratepayers. Forty percent of our ratepayers earn less than \$35,000 per year and 50 percent live in multi-family residences.

OUC is a member of, and testifying today on behalf of, the American Public Power Association (APPA), the national service organization representing the interests of over 2,000 community-owned, not-for-profit electric utilities. These utilities include state public power agencies, municipal electric utilities, and special utility districts that provide electricity and other services to over 48 million Americans, serving some of the nation's largest cities. However, the vast majority of APPA's members serve communities with populations of 10,000 people or less.

Overall, public power utilities' primary purpose is to provide reliable, efficient service to local customers at the lowest possible cost, consistent with good environmental stewardship. Public power utilities are locally created governmental institutions that address a basic community need: they operate on a not-for-profit basis to provide an essential public service, reliably and efficiently, at a reasonable price.

APPA and OUC commend the Committee for holding today's hearing on the economic opportunities from land cleanup programs and how S. 2446, the Improving Coal Combustion Residuals Regulation Act, promotes such opportunities by ensuring the continued safe disposal and recycling of coal combustion residuals (CCRs). Legislation is needed to address the problems arising from the self-implementing nature of the Environmental Protection Agency's (EPA) final CCR rule issued under Subtitle D of the Resource Conservation and Recovery Act (RCRA). S. 2446, introduced by Senators John Hoeven (R-ND) and Joe Manchin (D-WV), does

this by establishing state CCR permitting programs to oversee the implementation of EPA's final CCR rule. The creation of these state permitting programs, subject to EPA approval, will provide utilities with regulatory certainty by eliminating the current dual regulatory regime and by giving the states the ability to implement and enforce state rules that are at least as stringent as EPA's final CCR rule. APPA supports S. 2446 and respectfully urges the Committee to mark up this important legislation.

Background on EPA's Final Rule to Regulate Coal Combustion Residuals Under RCRA

On April 17, 2015, EPA promulgated its final rule to regulate the disposal of CCRs from electric utilities. The rule became effective October 19, 2015. It correctly regulates CCRs as non-hazardous waste under Subtitle D of RCRA. APPA and OUC strongly agree with EPA's determination that CCRs are non-hazardous, which ensures that they can continue to be recycled and used in the manufacture of a variety of products, such as concrete, wallboard, roofing materials, and bricks. The beneficial reuse of CCRs is good for the environment and the economy—it reduces the need for landfills, the use of virgin materials (and the associated energy costs of acquiring them), and reduces carbon dioxide emissions.

EPA's categorization of CCRs as non-hazardous waste results in CCRs being regulated under Subtitle D, which is self-implementing. This means that neither the states nor EPA have the ability to implement or enforce the final rule; rather facilities subject to the rule must determine for themselves how to interpret and comply with the rule. States are not authorized to implement rules issued under Subtitle D through state permitting programs (with the notable exception of the municipal solid waste landfill rules), and EPA cannot enforce its own rules. Thus, facilities are confronted with conflicting federal and state CCR regulatory requirements, which makes compliance difficult and confusing. While EPA encourages states to adopt the requirements of the final CCR rule into state law, this does not resolve the problem of dual regulatory requirements, as the federal rules remain independently applicable even if the states adopt the federal rules.

Another problem with the self-implementing nature of the CCR rule is that it is enforceable solely through RCRA citizen suits. Therefore, any legal disputes concerning compliance with the final CCR rule can only be determined on a case-by-case basis by federal district courts. Federal district court judges will have to make decisions about complex technical matters rather than state regulatory agencies that have the technical expertise and experience needed to determine compliance. This will result in a patchwork of differing legal interpretations across the country regarding the scope and applicability of the final CCR rule based on where a citizen suit is filed.

How EPA's Final CCR Rule Impacts OUC

OUC and APPA agree with the promulgated rule's classification of CCRs as non-hazardous. This action is allowing OUC to construct a solar farm on the top of a closed CCR

landfill, and is providing opportunities to offset some of the costs of generation with a variety of products to help in the effort to keep the cost of energy affordable. The addition of this solar farm further diversifies OUC's fuel mix. OUC takes great pride in the diversity of our fuel mix to provide the most reliable generation for our customers. Our reliance on natural gas, coal, landfill gas, nuclear, and solar buffers our customers from economic shifts in fuel markets.

It is this fuel mix that provided a very valuable lesson during the 2004-2005 hurricane season. In at least one instance, OUC's service territory was impacted by three hurricanes in a period of 13 weeks. This occurred while other hurricanes or tropical storms were also impacting the northern Gulf of Mexico. Those storm events reduced the volume or capacity of natural gas into the state of Florida. Having 40 days of solid fuel (coal) stored at our site proved invaluable as OUC and others in the state were able to meet the needs of much of the state until natural gas was again being transported in the volumes needed.

Constructing CCR landfills is complex. Because these facilities will last many decades, the regulations governing their construction, operation, monitoring, and eventual closure need to be based on sound science, protective of the environment, and consistent. Having rules that are conflicting or changing create an impossible compliance requirement.

The state of Florida's design, permitting, and construction requirements are rigorous. Florida Administrative Code 62-701 requires the construction of new landfills to first start with a layer of sand 18 uniform inches deep. Underlying the sand are underdrains and monitoring devices to detect any leaks. Underdrains are utilized to stabilize the layers of protection from the perennially high water table in Florida. These underdrains are also fitted with alarms to notify OUC's professionals via electronic communications to reduce groundwater pressure or when a leak is detected. This infrastructure is needed to ensure the pressure from below does not cause the shifting of the protection layers and liner.

In addition, the sand layer is covered with a six-inch thick layer of washed clay that provides the landfill with its first impermeable layer. On top of this layer is a high pressure direct injected (HPDI) liner that is rolled over the entire site where the CCRs are placed. The seams between the rolled HPDI are hand welded and inspected to ensure there are no gaps or places for moisture to leak. After inspection by contractors of the stratified approach, the agency of record also inspects the installation. Exceeding Florida's requirements, OUC's pond that captures the leachate from the active landfill is even more fortified with the same underlying infrastructure, but also covered with soil cement and surrounded by a 55 foot bentonite clay wall that prevents any possibility of a leak from ever leaving the footprint of the pond.

Central Florida receives over 50 inches of rainfall a year with the majority of that rain occurring within a period of four months. OUC has chosen to capture all that storm water to protect downstream receiving water bodies. This adds to the complexities of design, permitting, and operation of these systems. An agency that understands these complexities and has the

technical expertise to make timely decisions needs to be within arm's reach to ensure OUC's construction and operation plans are in balance overall with the state of Florida's environmental goals. Furthermore, OUC's ratepayers insist we manage the surrounding resources in a manner that is responsible, visionary, and affordable. We are committed to providing regulatory agencies with the assurances that our landfill will exceed their criteria. The differing criteria of the final CCR rule and FL regulations, and the fact that we now have to comply with both sets of CCR regulations, will most likely put OUC in conflict with the state criteria or vice versa.

Why Legislation Is Needed to Make EPA's CCR Rule More Workable

Federal legislation, as set forth in S. 2446, is the only way to resolve the implementation/enforcement issues inherent in EPA's final CCR rule. Such legislation would give the states the ability to create state permitting programs to administer the federal CCR rule in lieu of the self-implementing nature of the existing rule. State permitting programs would, as Alexandra Dunn of the Environmental Council of the States stated before this Committee back on June 17, 2015, provide "certainty, clarity of roles, and even incorporate[] sufficient flexibility so that requirements can be risk-based and environmentally appropriate to the soil and hydrology of an area."

Under S. 2446, state permitting programs would provide CCRs facilities with regulatory certainty by eliminating the dual regulatory scheme created by the existing structure of RCRA Subtitle D. States that create permitting programs to implement the final EPA CCR rule would be the primary enforcers of the CCR regulations. State regulatory agencies would be responsible for ensuring that affected facilities comply with CCR regulations that are at least as stringent as those in the final CCR rule. State regulatory agencies are the most knowledgeable about the soil and hydrology within their borders and have a strong interest in protecting their citizens and the environment. This knowledge and the ability of states to issue and enforce permits would allow for the site-specific tailoring of groundwater monitoring and corrective action requirements that EPA proposed to include in CCR rule, but removed from the final rule because of the lack of a permitting agency to administer and enforce the rule. S. 2446 resolves this issue by expressly directing that a regulatory body administer and enforce the rule. Just as states can do when implementing the federal rules for municipal solid waste landfills, this provision will enable them to tailor the application of certain CCR rule requirements, as appropriate, for specific sites rather than be forced to use a one-size-fits all approach.

Importantly, should a state fail to create a permit program that complies with EPA's final CCR rule, the legislation directs that EPA shall administer and enforce the CCR permit program. Further, the legislation would not take away the right of citizen suits under RCRA; rather it would augment this authority by placing primary enforcement authority on the permitting agency (either the state or EPA), with citizens able to bring suit if the permitting agency fails to act. This is the model that has worked well for virtually all other federal environmental statutes.

It is important to note that S. 2446 also addresses the concerns raised by EPA and the Administration when coal ash legislation approved by the House Energy & Commerce Committee was being debated on the House floor. Nothing in the Hovden-Manchin bill eliminates restrictions on how close CCR impoundments can be located to drinking water sources. The legislation requires that new surface impoundments comply with the same location restrictions that are in the final CCR rule by requiring that existing surface impoundments not come into contact with a drinking water aquifer and that the design and construction of the impoundments prevent the release of constituents at levels above groundwater protection standards.

In addition, S. 2446 requires that any releases from disposal units are addressed, and that the authorities are notified when such a release occurs. It also requires that unlined CCR impoundments not meeting groundwater protection standards implement a corrective remedy and close in accordance with the provisions of the final CCR rule. Under the legislation, inactive impoundments would be required to close within three years of enactment or be subject to the same regulation as active disposal sites.

Conclusion

APPA and OUC believe legislation is needed to address inherent flaws in the final CCR rule. Despite EPA's best efforts to craft a workable rule that allows for states to have some role in its implementation, the fact remains that the final CCR rule is self-implementing with no effective mechanism to prevent the existence of dual regulatory regimes. It is solely enforceable through citizen suits, which will result in judges, not state or federal regulators with technical expertise, making decisions regarding how to apply the final rule's provisions on a site-specific basis. This will result in a patchwork of differing interpretations across the country.

S. 2446, the Hovden-Manchin bill would fix these issues while still upholding the work done by EPA on the regulation of CCRs. It will provide utilities, such as OUC, with the regulatory and compliance certainty they need through the creation of state permitting programs that appropriately address the site-specific circumstances of each facility to better protect the public. APPA thanks the Committee for holding this important legislative hearing on S. 2446, and respectfully encourages the Committee to mark up the legislation.

Senator INHOFE. All right, right on 5 minutes. Thank you.
Mr. KIRBY.

**STATEMENT OF PATRICK KIRBY, DIRECTOR, NORTHERN WEST
VIRGINIA BROWNFIELDS ASSISTANCE CENTER**

Mr. KIRBY. Thank you, Mr. Chairman and Ranking Member Boxer and the Committee members for the opportunity to be here today. I am Patrick Kirby. I am the Director of the Brownfields Assistant Center at West Virginia University. I am here to talk about how the funding and support provided by the U.S. EPA brownfields program would be enhanced through the BUILD Act.

Brownfield projects across rural West Virginia and the thousands more across the Country would benefit from the expanded brownfield assistance provided in the BUILD Act. In terms of an example to begin the process of how that would happen would be the kind of project that could benefit would be the Taylor, Smith & Taylor site in Chester, West Virginia, which is home to the world's largest teapot. If you haven't been there, you should; it is quite the site to see.

The TS&T site is an 8.65 acre former pottery manufacturing site closed in 1982 after 80 years of manufacturing the famous Taylor, Smith & Taylor ceramics and fine pottery.

This brownfield site is still the first image travelers see when crossing from the Ohio River into West Virginia. The site sat vacant for more than 30 years, until it was purchased by a local economic development authority in 2011. Now, that was a challenging process, just structuring the deal with Federal regulators, State regulators, a private property owner. It was a massive undertaking that also involved specifically the community. There was a project task force put together where the community met every month for over 5 years; they are still meeting now.

The site was assessed and cleaned up using EPA brownfield grants, and the economic development authority is still currently working with the task force completing remediation of the river bank as the last phase of the cleanup to prepare building a \$2 million building that is going to be leased by a job-creating prospect, which is actually funded privately.

The BUILD Act would have helped this project in three distinct ways: a multipurpose brownfield grant, which is proposed in the BUILD Act, would have reduced the project time by as much as 3 years, which would have brought jobs and public health benefits to the community sooner, while maintaining the same high environmental safety standard. The project would have also significantly benefited from a higher maximum cleanup grant proposed by the BUILD Act. Currently, the remediation grants are topped at \$200,000 and would be expanded under the BUILD Act.

While this is also a highly visible project being viewed by motorists both within West Virginia, coming from Ohio through West Virginia to Pennsylvania and vice versa, the village of Chester is a rural community of 2,551 people, and they could have really utilized the proposed technical assistance grants that are in the BUILD Act, as well as the removal of the prohibition of administrative costs that are currently in the grant.

While that seems like a small change, as we have all heard today, the process of going through managing Federal grants and managing Federal programs is challenging, especially for the rural communities.

So the projects that will be impacted by the BUILD Act are not hypothetical. There are major opportunities for environmental remediation and economic redevelopment that exist in communities across all of rural America, and they are in need of additional assistance the legislation would provide.

The Brownfields Assistance Center at West Virginia University partners with the West Virginia Department of Environmental Protection and the West Virginia Development Office to help communities access these Federal resources and help with revitalization efforts to move forward for appropriate site reuses. We have worked on over 150 brownfield projects since our creation in the last 10 years from former glass, pottery, and steel factories to former gas stations, foundries, and maintenance facilities, creating community assets and sites ready for job-creating facilities.

We are currently working on over 60 specific projects in 32 West Virginia communities spanning 23 counties. Through our work with communities and through the EPA brownfields program, we have used \$13 million in brownfield grants to leverage over \$62 million in private and local investment.

With 7.4 jobs being leveraged for every 100,000 of EPA's investment in West Virginia, we safely estimated the creation or retention of 1,000 jobs due to brownfield redevelopment. That is progress, but there are more sites to reclaim, there are more jobs to create, and there are more communities to revitalize. With 391 communities with less than 15,000 in West Virginia alone, there are many more potential projects for the BUILD Act to impact and improve the rural landscape across the Country.

In conclusion, brownfields redevelopment improves local economies, increased municipal budgets, creates jobs, spurs private investment, and protects public health and the environment.

I thank you for the opportunity to be at this hearing and to share the positive impacts the BUILD Act would have on rural West Virginia and all over the Country.

[The prepared statement of Mr. Kirby follows:]

EPW Subcommittee Hearing on the BUILD Act

Patrick Kirby, Director
Brownfields Assistance Center at WVU
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Thank you for the opportunity to be here today. My name is Patrick Kirby. I am the Director of the Brownfields Assistance Center at West Virginia University. I am here today to speak in support of the US EPA Brownfields program and the BUILD Act. I was asked to testify based on my experience with rural brownfield redevelopment. Specifically, I would like to share the impact of brownfields in the rural communities of West Virginia, and the value the redevelopment of former brownfields sites adds to local and regional economies, redevelopment which is made possible in large part by the funding and support provided by the US EPA Brownfields Program.

As you know, brownfields are real property that is being hindered from redevelopment due to real or perceived contamination. West Virginia has thousands of brownfields properties across the state with a majority resulting from the decline of the steel and coal industries. Sites in the region range from large-scale steel mills, metal fabrication and processing plants, pottery and glass manufacturing facilities, chemical factories, and coal mining and processing sites, to small gas stations, dry cleaners, and old school buildings, to name a few.

Redevelopment of brownfields properties pose complex challenges including a lack of local leadership capacity, a lack of financial resources, a lack of redevelopment experience, and/or potential environmental challenges and other unknown risks on the site. While a number of programs and services exist to assist communities in different aspects of the redevelopment process, rural communities are challenged to access those resources due to administrative and financial constraints.

Projects across rural West Virginia and the thousands more across the country would benefit from the expanded brownfields assistance provided by the BUILD Act. Specifically, The BUILD Act expands the eligibility of certain types of property to apply for brownfields funds, expands eligible applicants to include non-profit organizations which are often the entity in the community best suited to help move the project forward, and eliminates the prohibition of the use of the funds to cover administrative costs. This may seem like a small change, but federal grant administration as you know is a big task, and in rural towns and counties that are struggling it is a deterrent to apply for needed resources.

A prime example of the kind of project that would benefit from these changes is the Taylor, Smith, & Taylor site in Chester WV, home of the World's Largest Teapot. The TS&T site is an 8.65-acre former pottery manufacturing site that closed in 1982. For over 80 years, the factory onsite produced the famous Taylor, Smith, and Taylor ceramics and fine pottery. Located along U.S. Route 30, this brownfield site is the first image travelers see when crossing the Ohio River into West Virginia. The site sat vacant for more than 30 years until it was purchased by the local economic development authority, in 2011. Structuring the deal was a massive undertaking

involving the entire community, whose citizens stayed involved through a project Task Force that met monthly.

The TS&T site was assessed and cleaned up using EPA Brownfields grants, and the BDC is currently completing remediation of the river bank as the last phase of cleanup and preparing to build a \$2 million dollar building for lease by a prospect.

The BUILD Act would help this project in 3 ways:

- 1) A multi-purpose brownfields grant would have reduced the project time by as much as 3 years, bringing jobs and public health benefits to the community sooner with the same high environmental safety standards.
- 2) This project would have also significantly benefited from a higher maximum clean-up grant proposed by the BUILD Act. The total site remediation easily top the \$
- 3) While this is a highly visible project being viewed by motorists as they cross from PA, to WV into Ohio, the Village of Chester is a rural community of 2,551 people and could utilize the technical assistance grants, and the Riverfront designation as an “other factor” in the grant process to compete with the applications from larger urban areas.

Much like Chester, the great majority of WV’s rural towns and communities have been facing continued population losses, due primarily to the closing and down-sizing of steel mills and coal companies, for several decades. Many of the once-prevalent high paying jobs in the steel and coal mining industries are gone. As a result of these circumstances and the resulting reduction in taxes, communities have been faced with budget cuts and revenue shortfalls on a regular basis, resulting in reduced staff (many positions either eliminated or reduced to part-time) and limited services provided to residents. With extremely limited resources, these communities are not in a position to seek EPA Brownfields funding, nor able to undertake a large-scale remediation project.

West Virginia is lucky enough to have 2 unique Brownfields Assistance Centers, one at West Virginia University and one at Marshall University. The Assistance Centers help communities address two of the major challenges to Brownfield redevelopment: (1) capacity and (2) uncertainty. The lack of local capacity to identify all the necessary resources to tackle the project often leads to long project delays and frustration, and at times perpetuates false perceptions about project barriers. The uncertainty of a successful outcome to the project, due to concerns about liability, site conditions, and a fear of the public’s reaction also contribute to problems engaging the right players, and available programs and services to advance the project to completion.

The Brownfields Assistance Center at WVU partners with the West Virginia Department of Environmental Protection and the West Virginia Development Office to help communities access the federal brownfield resources needed to address a site’s environmental uncertainty and potential liability concerns, and help with revitalization efforts to move forward with an appropriate site reuse. That re-use can range from important community assets such as libraries

and recreation facilities to traditional job creators such as distribution, commercial and industrial facilities. We have worked on over 150 brownfields projects over the last 10 years, from former glass, pottery and steel factories to former gas stations, foundries and maintenance facilities. We are currently working on over 60 specific projects in 32 West Virginia communities spanning 23 counties. WV has used \$13 million in EPA grant dollars to leverage 62.3 million in private and non-EPA funds. With 7.4 jobs being leveraged per \$100,000 of EPA's investment in WV, we can safely estimate the creation or retention of almost 1,000 jobs.

With 60 active projects and 391 communities below 15,000 people in West Virginia alone, there are many more examples of how the BUILD Act could and would improve the redevelopment landscape for rural America.

To conclude, Brownfields redevelopment improves local economies, municipal budgets, creates jobs, spurs private investment, and protects public health and the environment. Again, thank you to the subcommittee for hosting this hearing and providing me the opportunity to share the positive impacts the BUILD Act would have on the rural communities of West Virginia.

Senator INHOFE. Thank you, Mr. Kirby. Excellent statement.

I agree with the EPA's decision that coal ash is a non-hazardous waste, and I can assure you, in case you are wondering, that there are not 60 votes in the U.S. Senate that would change that ruling, so Congress should amend RCRA to authorize the State permitting programs for coal ash. The President supports it.

As Ranking Member Boxer noted at last year's hearing on EPA's coal ash regulation, authorizing State permitting programs "is really not that different from so many other laws. If you want to talk about permitting, I would be happy to work with you to make that fix, if necessary." Now, I agree. I see no reason why coal ash should not be regulated through the EPA's approved State permitting programs, just like air, water, and hazardous waste.

I have served in different capacities, Mr. Holleman. I have served as mayor of a major city; I have served in the State legislature; I have served in Congress; and I have served in the Senate. It has been my experience that the closer you get to the people, the more local, the more responsible the decisions are, because they can find you. You can hide up here; you can't hide when you're in a city council. So I reject the idea that you can't count on, and I am quoting now, I think, Mr. Holleman, you can't count on States to protect us. I don't agree with that at all.

Mr. Merriam, the President supports Congress amending RCRA to establish State permitting programs. S. 2446 establishes State permitting programs. Now, if we don't pass it, what enforces regulation for coal ash? What enforcement is out there if we do not pass this?

Mr. MERRIAM. Well, my belief, Mr. Chairman, is that we would be subject to the citizen lawsuits, and then we would actually be taken into a Federal court in order to determine the remedial action or the remedy for what is believed to have been an impact.

Senator INHOFE. And who benefits from the increase in lawsuits?

Mr. MERRIAM. Pardon me? I couldn't hear you.

Senator INHOFE. I will give you the answer: trial lawyers.

Mr. MERRIAM. OK.

[Laughter.]

Senator INHOFE. What other environmental regulations are solely enforced by outside lawsuits by trial lawyers?

Mr. MERRIAM. Mr. Chairman, I have to tell you I have done this for a long time and, again, I was a regulator and dealt with some fairly significant laws.

Senator INHOFE. You mentioned you were a regulator for 20 years?

Mr. MERRIAM. For almost 20 years, 19 and a half years, yes, with the South Florida Water Management District. And in that I had never seen a rule that was self-implementing in this way from the Federal Government that actually had an outcome that I would be taken to a process that was in Federal court.

Now, I will also admit to you that it had happened under our numeric nutrient criteria on the clean water side. There was a citizens group that did challenge the State of Florida. We passed legislation in the State in order to make that still a State-owned product and work with EPA in that process.

Senator INHOFE. Mr. Holleman, is your opposition to setting up State regulatory programs for coal ash because it would undermine your business model for filing lawsuits and collecting attorney's fees?

Mr. HOLLEMAN. Certainly not, Mr. Chairman, as you must know by asking that question. I should tell you that until 5 years ago I was in a private law firm in Greenville, South Carolina that was probably one of the State's leading corporate law firms, until I decided to spend full time working to try to protect the environment. You should know we aren't trial lawyers; we don't sue for money; we don't sue for attorney's fees. We sue to protect communities and get them to clean up.

Senator INHOFE. I see.

Mr. HOLLEMAN. If I could respond to your statement to me. And I would emphasize this, Mr. Chairman. What is at stake are not lawyers. There hasn't been a lawsuit yet that I am aware of under this Act. In North Carolina, Duke Energy has already built a coal ash landfill and complied with the law. And I would expect they will, and we haven't challenged those. This is not about lawyers. We need to be clear about this.

Senator INHOFE. Well, OK.

Mr. HOLLEMAN. This is about the people I saw with my own eyes in Salisbury, North Carolina who cannot sell their homes, who are concerned about their families.

Senator INHOFE. OK, you already had your opening statement.

Mr. Merriam, I am running out of time here. Would you like to respond to that? Mr. Holleman's testimony claims EPA's rule would limit citizen suits and gut groundwaters for coal ash facilities. You want to clear the record in your opinion?

Mr. MERRIAM. The way I read the rule, as Senator Hoeven and Senator Manchin had brought into their discussion, it actually brings in the rule for the groundwater monitoring and those requirements into the Act. I have many on our site monitoring wells. We have to protect the groundwater in our systems and we have to protect it. Again, it is our backyard; we drink the water also.

Senator INHOFE. Do you agree with my statement that, from my personal experience, the closer you get to the people, whether at the city level, the State level, as opposed to Federal level, the more responsible and responsive to the citizens results?

Mr. MERRIAM. Absolutely, Mr. Chairman. Like I said, I drink the same water we manufacture for potable water, I use the same energy and I live in the same neighborhoods as those people who pay salary.

Senator INHOFE. That makes a difference, doesn't it?

Senator Boxer.

Senator BOXER. Thanks.

I want to say, Mr. Merriam, it is good that you live in a State that cares. Unfortunately, not every State is as good as your State or my State. So you can't really be here and speak for the whole Country as much as you are trying to.

I learned from my dad, who was a lawyer, never ask a question you don't know the answer to. So, Mr. Holleman, that was a great question my colleague asked you, and you had a great response; and it says it all. It says it all. This isn't about lawyers.

What I love about my Republican friends, and I do love a lot about them, they attack lawyers all the time. But when they need one, boy, they get the best one. We all do. So it depends what side of the fence you are on. And when you worked for corporations, I am sure my colleague was rah-rahing you all the way.

The bottom line is what happens to people. Now, my colleague quoted me saying I am happy to work about State permits. That is fine. But I want to say two things about that. There has to be Federal minimum standards. And the problem with the bill that Senators Hoeven and Manchin have, there is no Federal standard. So people aren't protected.

So I am not going to deal with that issue unless we have minimum protections. That is essential. Whether it is a TOSCA law or anything else, we have to make sure people are protected; there is some kind of floor. And then if the States want to do more, that is fine with me. The more the better to protect clean air and water. As I often say, no one has ever asked me, as you pointed out, please weaken our clean water rules; I really don't want to have sure pure air or water. Baloney. They want it better.

And the other thing that has shaken my view, I say to my friend, is the Flint story. Because I did say I am very willing to work with a bill that has minimum standards and then the States permit. But after seeing the corruption in Flint, the out-and-out corruption, and the corruption, Mr. Holleman, you talked about. I am going to ask you to expand on that one more time. You pointed out not that you favor bureaucracy. I never heard you say that. That is what my colleague sort of put words in your mouth. You never even used the word bureaucracy. You said what you saw at the State level was out-and-out cronyism, to put it in the mildest form.

Would you repeat that you said about that?

Mr. HOLLEMAN. Well, what we saw, and I wouldn't have believed this, Mr. Chairman, I didn't expect this from my past life, frankly, but as soon as we began to enforce the law in North Carolina on behalf of local citizens, and I agree with you local communities need to maintain their ability to defend themselves. That is where the authority needs to be, in the people, not just in the government.

But as soon as we started enforcing the law, in my experience, when I grew up in Oconee County, South Carolina, when law-abiding people report law breaking to the law enforcement authorities, I expect the law enforcement authorities to communicate and work with the law-abiding people who reported it.

But what we discovered in official documents, almost as soon as these events were reported to the State and the utility, the utility's lobbyist and its lawyers immediately began meeting with the State law enforcement authorities. They weren't meeting with us, they were meeting with them to come up with the strategy to do us in. And the very things we reported later formed the basis of the criminal guilty pleas to Federal crimes in response to charges brought by the United States Department of Justice.

And as I said before, 17 days after those Duke Energy companies pleaded guilty 18 times to 9 crimes, and were placed on Federal nationwide criminal probation, their executives were hosted at a private dinner at the Governor's mansion with the State's chief envi-

ronmental law enforcement officer, which had pending at that time a number of charges against Duke Energy.

Senator BOXER. Well, Mr. Holleman, I just want to say you are the best witness that I have ever had on my side of an issue, for many reasons. You are very articulate; you worked for the busy side of it; you see the picture; and you are motivated by doing what is right. And I hope that we will keep that in mind before we pass weakening amendments to the coal ash rule that would, without minimum standards, minimum standards, allow these State people, with all their cronyism, to move forward.

And, by the way, Federal agencies are not protected completely from this type of cronyism, but it is a little bit easier to monitor them from here.

Thank you.

Senator INHOFE. Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman.

I want to thank all of our witnesses here today. I particularly want to thank Mr. Kirby from WVU for being here, and I want to recognize his two children who are in the audience, Wyatt and Katherine. If you all would stand up so we can say hello. There they are. Thank you. They are learning that government gets along, doesn't always agree, and it can be quite interesting at the same time. So thank you all and thanks for coming.

Mr. Kirby, you are doing great work on the brownfields issue in West Virginia, and I am glad to know that you agree that the BUILD Act will help you with that. I would like to know, in your experience, what are the challenges faced by small communities? You sort of addressed this in your opening statement, in competing for the brownfield grants.

For example, do they have the same experience and access to technical expertise? I am sure this is where you aid those local communities like Chester. What can we do to make sure that our local communities, rural communities, small communities, are able to get the technical expertise they need to access these grants?

Mr. KIRBY. This is being seen in the BUILD Act with some technical assistance grants that were put in, but also we work a lot with private foundations now, and they are recognizing the need for communities to have access to technical assistance even to apply for grants that everybody gets a fair shake, but when you walk into a city manager's office and you say here is an opportunity, it is a \$200,000 grant, it has a 56-page guideline. They already had their plate full that day and it is hard enough to understand what a brownfield is. So then they look at their projects and they say this is going to be a little overwhelming.

So with us able to work on 60 projects, when there are 10 times that many that we could be working on in the State, so the technical assistance grant within the BUILD Act, as well as building that local capacity, which we have been doing through some programs funded through private foundations.

Senator CAPITO. Great. Well, I want to thank you, too, I know you are working with the Town of Shepherdstown on their new public library brownfields project, so we look forward to that. I think the Ranking Member and the Chair, we could get them over there because that is a pretty close part of West Virginia to see.

And also in the city of Charlestown, one of the first brownfields that I worked on was American Public University, which was an old Maytag, I think, factory and now I think there is 60 solar panels out there along with other wonderful educational opportunities. So I know we are doing good things there and I appreciate that.

I would like to say, since Senator Manchin has left, he is obviously my colleague, I have been on Capitol Hill for several years. We haven't quite found the answer to this. I went to a dam that was celebrating its 50 year anniversary of construction. We will go to just about anything at certain times of the year. And I was just amazed to realize that this dam, 50 years old, was built with coal ash. So it is a very durable product when it is recycled and used in construction. So I think we want to try to make sure that we retain that ability while maintaining the safety and security of our water supplies and all those issues.

So what I hear you saying, Mr. Merriam, is that you are not conflicted, but you feel like there are conflicts that exist in the law now that this coal ash bill would help to mediate. But at the same time you keep talking about the rule being self-implementing. So for people who don't really understand what a self-implementing regulation is, could you kind of explain that what means from your perspective?

Mr. MERRIAM. Thank you, Senator. From my perspective, typically, rules come and go through a very vetted process, public process, lots of comments. Rules go through periods of challenge and actually you have the ability to work with the agencies and the public gets to be active within that process also. We don't see that same level of activity when you have a self-implementing rule, especially one that has limited access even for us to make further comments on.

We don't disagree with Ranking member Boxer that there needs to be minimums. We also agree that the State should strive and exist the minimums; however, we believe that the bill today does have minimums in there that is cited in the code of Federal requirements and so forth. So it is an unusual process having this type of process move forward. It is not one we had a lot of comment period in order to put our concerns online, and to build these things and to do them correctly. It is nice to know what the floor is so if we choose to go to the ceiling in meeting the regulations, we can do that without risk of additional lawsuits that may be because the Federal requirements are different than the State requirements and different from how we interpret the actual requirements in the rule.

Senator CAPITO. All right, thank you.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Capito.

Senator BARRASSO.

Senator BARRASSO. Thank you very much, Mr. Chairman.

I would first like to take a moment to speak on S. 2446, introduced by Senators Hoeven and Manchin. My home State of Wyoming is a coal State. The issue of regulating the byproduct of burning coal is a very important issue to my constituents. The EPA decided, after public comment, that regulating this byproduct as hazardous was the wrong approach to storing coal ash. The EPA de-

cided it was better to regulate it as a solid waste, and I agree. There is clearly need for legislation on this issue.

As written testimony before us today spells out, without legislation, there would likely be conflicts between State programs and the EPA rule. So I commend Senators Hoeven and Manchin for trying to solve this issue. As the bill continues to move forward, I want to ensure that States have the certainty that they need that the EPA won't move the goalposts or impose unnecessary criteria in the face of legitimate State plans that are based on sound science. So I am going to work with the bill sponsors, members of the Committee, and you, Mr. Chairman, to ensure that the States are adequately protected in this legislation.

Which leads me to my question for Mr. Merriam. In written testimony by some other witnesses here today and by outside groups who oppose the legislation, there is a constant theme that seems to be appearing. The theme is that somehow States aren't up to the task of protecting communities, and that by giving States more control over addressing coal ash storage we are somehow taking power away from local communities. I believe it was Mr. Holleman, who is shaking his head yes, who said in his written testimony that this takes power away from local communities and gives it to State bureaucracies.

So my question is if we give EPA all the power to address coal ash, how does that not take power away from local communities and simply just give it to Washington?

Mr. MERRIAM. And I think the Chairman actually brought that point up, too, Senator. It is, in our particular situation, nice that we are responsible to the community that we serve. It is also important that we work with the State. It is a lot easier for the taxpayers and the citizens of Florida, as an example, to come to Downtown Orlando than it is to go to Tallahassee for public hearings and for some requirements, or to get to the Washington offices in order to make these, or even Atlanta for our Region 4. We very much listen to our citizens in our communities and it is a very important part of how we do business.

We also work very closely with the State as they do regulations so that there is not just consistency, but there is flexibility, which is a part of the preamble of this particular rule, but we work with the flexibility in that to make sure that those rules are applied with the flexibility on a site-by-site basis. Hydrology is not the same in every State, not within every State, and this allows us to write almost a prescriptive way to do the best we can to protect our resources.

Senator BARRASSO. Thank you, Mr. Merriam.

Ms. Krill, I want to talk about the record of this Administration's EPA for a moment, especially as it relates to addressing the needs of local communities impacted by the Gold King Mine Animas River spill. Yesterday there was an opinion piece in a national paper written by Ryan Flynn, who is New Mexico's Secretary of the Environment, and he wrote about the EPA's response to the spill. The piece was entitled Downstream From a Slippery EPA. This is from the New Mexico Secretary of Environment, and he states, "About 2 weeks after the spill, the EPA released an environmental

standard for the Gold King Mine sediment that was in order of magnitude weaker than those applied to other polluters.”

So the EPA sets a standard for itself weaker than those applied to other polluters. He went on to say, “Even months later, although the EPA yellow water has passed, the EPA’s data shows that storms have disturbed contaminated sediment, have pushed lead levels back above the tolerance for safe drinking water.”

So as the Secretary of Environment of New Mexico points out, EPA persisted in claiming, in spite of that, that the watershed had returned to pre-spill conditions, and he said, look, “this has been a campaign of minimization and misdirection by the EPA.” This is the Secretary of Environment for New Mexico.

So as you mentioned in your written testimony, the EPA is responsible for the spill, and it appears that they are not protecting the local communities and the Tribes dependent on this water but are, instead, misinforming the public about the health hazards to protect themselves.

So my question is, what is your opinion of EPA’s record with regard to this spill, and do you support empowering the States and others with the tools necessary to solve these and other environmental problems, rather than empowering the EPA that has this level, which to me seems irresponsible? That is the question regarding how they run things versus what they make others do.

Ms. KRILL. Well, thank you for the question. I have not read the op-ed that you mentioned, so I can go back and review that later. We do support empowering the States through reforming the mining law of 1872, which would create a reclamation fee and a fund that would then be distributed by the States in order to manage cleanups of these technically complicated sites. If 1872 mining law reform had passed when it was first introduced in 1993, or any time subsequent from then, then the EPA wouldn’t have been on-site doing the job that it was doing in the headwaters of the Animas River.

Senator BARRASSO. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Barrasso.

I want to thank the panel. It is a very good panel. I do apologize you had to wait quite a while because we had members that were in here and, you know, Senators do sometimes talk a little bit longer than other people. But thank you very much for being here.

Senator BOXER. Speaking of that, could I make a closing statement of a minute?

Senator INHOFE. One minute. There we go.

Senator BOXER. I thank you.

Senator INHOFE. All right.

Senator BOXER. To the issue of minimum standards, Mr. Merriam, because I think we can work together here, the problem that we have in the bill that was introduced by my friends, Senators Hoeven and Manchin, is that it eliminates one, two, three, four, five, six, seven of the minimum standards in the rule, and it significantly delays one, two, three, four, five, six others, and it prohibits the EPA from enforcing in three circumstances. So, yes, there are some minimum requirements on process, but on protection of the people they are just not there.

I do think we can work together to try to get something accomplished, but I am with Mr. Holleman and Ms. Krill, and all of you who I know want to protect the people. Let's make sure what we do doesn't lead to another Flint, Michigan. If there ever was a poster child for walking away from responsibilities and leaving it to folks and letting them decide what to do, that is the example.

And, Mr. Kirby, thank you. I think that this bill that my colleague, Senator Capito, lauded, I laud it as well. I think it is an occasion where we can all work together. Thank you very much.

Senator INHOFE. I would agree with that.

Without objection, I am going to make as part of the record the article that Senator Barrasso referred to.

[The referenced information follows:]

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<http://www.wsj.com/articles/downstream-from-a-slippery-epa-1456791558>

OPINION | COMMENTARY

Downstream From a Slippery EPA

In the aftermath of the Gold King spill, the agency is holding itself to a lower standard than polluters.



Wastewater at the entrance of the Gold King Mine in San Juan County, Colo., Aug. 5, 2015. PHOTO: REUTERS

By **RYAN FLYNN**

Feb. 29, 2016 7:19 p.m. ET

The bright yellow water that gushed from Colorado's Gold King mine and into the Animas River last summer has dissipated, but the environmental disaster continues downstream. An estimated 880,000 pounds of lead and other metals poured out of the Gold King in August when the Environmental Protection Agency fumbled a construction project and blew out the mine's plug.

This water raced down the Animas River in mountainous Colorado, and then meandered gradually through my state of New Mexico, the territory of the Navajo Nation and Utah, before dumping into Lake Powell. Geography is important here: The slower the flow, the more that heavy metals drop out of the water and into the riverbed.

From the start, the EPA bungled its response to the spill. The first call alerting New Mexico that contaminated water was on its way didn't even come from the agency. The water-quality manager of the Southern Ute Tribe, who live in Colorado right on the border with New Mexico, contacted my department with a warning on Aug. 6.

The New Mexico Environment Department quickly dispatched technical staff to take advance water samples, to establish a water-quality baseline. The Animas River is much more than a kayaking spot or a fishing hole for New Mexicans. The drinking water of eight communities—about 90,000 people—is drawn directly from the river, which also sustains crops and livestock, and supports thousands of people's livelihoods.

After failing to alert New Mexico promptly, the EPA to a large extent left the states and tribes downstream to fend for themselves. No one from the EPA's regional office in Dallas showed up in New Mexico for nearly a week, by which time the plume had passed. New Mexico's representative to the EPA's Incident Command Center in Colorado reported that she was shut out of closed-door meetings where decisions were made.

When EPA staff did finally arrive in New Mexico on Aug. 9, they were rotated out of the state every few days. This led to redundant briefings and inconsistent execution. One EPA communications officer arrived in New Mexico with no capability to text, email or dispatch photos from the field.

As the spill wound its way downstream, EPA Administrator Gina McCarthy repeatedly went on camera to say that the agency would hold itself to a "higher standard." Instead it engaged in a careful campaign of minimization and misdirection.

About two weeks after the spill, the EPA released an environmental standard for the Gold King mine sediment that was an order of magnitude weaker than those applied to other polluters. The agency used a "recreational" standard and suggested that lead in the soil at 20,000 parts per million would be "safe" for campers and hikers. But in New Mexico people live along the Animas, so a

“residential” standard would be more appropriate. During a cleanup of a superfund site in Dallas, in the regional EPA office’s own backyard, the standard for lead in the soil was 500 parts per million.

The EPA released a chart that seemed to show lead levels in the Animas to be near zero. But the chart used a linear, instead of a logarithmic, scale. As any high-school science student can tell you, a linear scale can visually compress data and make it appear close to the zero line. In reality the lead levels had screamed past maximum contaminant levels for drinking water, defined as 15 parts per million. We advised communities that drew from the river to close their water intakes and rely on emergency backup supplies, which they did.

Even months later, although the yellow water has passed, the EPA’s data show that storms have disturbed contaminated sediment and pushed lead levels back above the tolerance for safe drinking water. The city of Farmington (pop. 45,000) still shuts its water intakes whenever storms or snowmelt increase water turbulence.

Yet the EPA persisted in claiming that the watershed had returned to “pre-spill” conditions. Such subterfuge made our job of educating the public on the consequences of the spill much more difficult. It seems clear to me that the EPA sacrificed truth on the altar of image management.

Today, New Mexico and Utah continue to work on a comprehensive long-term plan to monitor the Gold King spill’s effects on health, wildlife and agriculture. We have invited the EPA and the state of Colorado many times to join the effort. Both have refused, preferring to pursue a narrow, short-term plan that ignores critical issues such as damage to wildlife and groundwater. As Utah’s assistant director of water monitoring said at the beginning of February, the levels of contamination seen so far could be “the tip of the iceberg.”

Citizens who depend on the Animas River for their drinking water, crops and livelihoods deserve better. They deserve answers from the EPA, as they would expect from any other polluter.

Under Gov. Susana Martinez’s direction, the New Mexico Environment Department is vigilantly monitoring the water to ensure that lead and other heavy metals from the Gold King mine do not find their way into crops, wildlife, livestock or humans. We urge the EPA and Colorado to wake up, drop the charade of minimizing the disaster, and join us.

Downstream From a Slippery EPA - WSJ

<http://www.wsj.com/articles/downstream-from-a-slippery-epa-14567915...>

Mr. Flynn is New Mexico's secretary of environment.

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Senator INHOFE. Thank you very much. We are adjourned.
[Whereupon, at 11:03 a.m. the committee was adjourned.]
[Additional material submitted for the record follows.]

February 25, 2016

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510-6175

The Honorable Barbara Boxer
Ranking Member
Committee on Environment and Public Works
456 Dirksen Senate Office Building
Washington, DC 20510-6175

Re: Opposition to S. 2446, the "Improving Coal Combustion Residuals Regulation Act of 2016"

Dear Chairman Inhofe and Ranking Member Boxer:

The undersigned public interest groups and state legislators strongly oppose S. 2446, the "Improving Coal Combustion Residuals Regulation Act of 2016." Introduced by Senators Hoeven (R-ND) and Manchin (D-WV), S.2446 threatens health, safety and the environment while relieving owners of coal-fired power plants of their responsibility to safely dispose of the toxic coal ash they generate. The bill greatly increases the potential for harm to communities in the United States and its territories by amending the Resource Conservation and Recovery Act (RCRA) to remove critical and long-awaited safeguards established by the U.S. Environmental Protection Agency (EPA) on December 19, 2014 in their final coal ash rule.

The EPA's first-ever coal ash rule was a compromise that went to great lengths to address the concerns of industry, recyclers and states by characterizing coal ash as non-hazardous waste, allowing the continued operation of coal ash ponds, exempting the beneficial use of coal ash, and establishing generous timeframes for compliance and closure. Despite these generous concessions, S. 2446 further guts the new EPA rule of public health protections and places American communities at increased risk of toxic exposure and catastrophic disasters in the following ways.

The Improving Coal Combustion Residuals Regulation Act of 2016 (S. 2446) will:

- **ELIMINATE** the EPA rule's requirement to immediately clean up all toxic releases from coal ash and notify the public;
- **ELIMINATE** the EPA rule's national standard for drinking water protection and cleanup of coal ash contaminated sites;
- **ELIMINATE** the rule's nationwide protective standards and allow each state to set different standards for disposal;
- **ELIMINATE** the EPA rule's requirement to close existing coal ash lagoons that are sited in dangerous and unstable areas;
- **ELIMINATE** the EPA rule's environmental and health protections for large coal ash fill projects;
- **ELIMINATE** the EPA rule's prohibition against siting coal ash dumps in floodplains;
- **ELIMINATE** all protective standards for coal ash waste piles nationwide;
- **SIGNIFICANTLY DELAY**, for up to six years, the requirement to close leaking and structurally unsound impoundments;
- **SIGNIFICANTLY DELAY** the application of safety, design, and operating standards for new coal ash lagoons and landfills;
- **SIGNIFICANTLY DELAY** the EPA rule's guarantee of public access to information regarding water contamination and assessments of dangerous coal ash dams;
- **SIGNIFICANTLY DELAY** critical requirements, such as inspections, control of fugitive dust, groundwater monitoring and cleanup requirements for all new coal ash lagoons and landfills;

- **SIGNIFICANTLY WEAKEN AND DELAY** the ability of citizens to enforce safety requirements;
- **PROHIBIT** effective federal oversight of state coal ash programs;
- **PROHIBIT** EPA enforcement of state program requirements unless invited by a state.
- **PROHIBIT** EPA from requiring financial assurance under RCRA to ensure utility companies are able to pay for the cleanup of spills and contaminated drinking water. The financial assurance provision in the bill does not cover spills or releases of hazardous substances.

The EPA coal ash rule is currently protecting hundreds of American communities. Coal plant owners have already established publicly accessible websites, posted fugitive dust control plans, and initiated weekly inspections. In addition, coal plants have already announced plans to close nearly 100 inactive and leaking coal ash lagoons by April 2018. This month, all owners and operators will complete their first major inspections of all active landfills and impoundments. S.2446 will delay for years critical public health protections that are now in effect.

In summary, we oppose S. 2446 because the bill places the health of our communities and environment in great danger and fails to guarantee consistent nationwide protection. S. 2446 would particularly harm the nation's most vulnerable communities, since coal ash lagoons are disproportionately located in communities of color and low-income neighborhoods. Relief from coal ash dumping is long overdue:

- Two major coal ash disasters have occurred since 2008 (including the largest toxic waste spill in our nation's history);
- U.S. utilities operate more than 300 high and significant-hazard earthen coal ash dams that can significantly harm communities and their environment if they fail;
- More than 200 coal ash sites have already contaminated water in 37 states, and
- Communities across the nation are threatened by toxic dust from coal ash dumpsites.

The EPA's 2014 coal ash rule is already providing protection to our most vulnerable communities and our irreplaceable water resources. Congress must refrain from causing irreparable harm by denying and delaying such protection, and consequently we respectfully request that you oppose S. 2446.

Respectfully submitted,

NATIONAL

Center for Biological Diversity
Citizens Coal Council
Clean Air Task Force
Clean Water Action
Defenders of Wildlife
Earthjustice
Environmental Integrity Project
Friends of the Earth
Greenpeace
League of Conservation Voters
Natural Resources Defense Council
New Energy Economy
Rachel Carson Council
Sierra Club
Southern Environmental Law Center
Waterkeeper Alliance

ALASKA

Alaska Community Action on Toxic

ALABAMA

Alabama Rivers Alliance
Black Belt Citizens Fighting for Health and Justice
Black Warrior Riverkeeper
Cahaba Riverkeeper
Friends of the Locust Fork River
GASP
Shoals Environmental Alliance
Tennessee Riverkeeper

ARKANSAS

Sweet Water Consortium

ARIZONA

Dine' Citizens Against Ruining our Environment
People Demanding Action, Tucson Chapter
Physicians for Social Responsibility, AZ Chapter

CALIFORNIA

As You Sow
Our Children's Earth Foundation

DELAWARE

Delaware Riverkeeper Network

FLORIDA

Florida Wildlife Federation
Suncoast Waterkeeper
St. Johns Riverkeeper

GEORGIA

Altamaha Riverkeeper
Chattahoochee Riverkeeper
GreenLaw
Fall-line Alliance for a Clean Environment (FACE)

ILLINOIS

Better Building Institute, Inc. (nfp)
Citizens Against Longwall Mining
Eco-Justice Collaborative
Friends of Bell Smith Springs
Girl Scout Troop #6195
Prairie Rivers Network
Sierra Club, Illinois Chapter
Sierra Club, Piasa Palisades Group
Environmental Law & Policy Center

INDIANA

Earth Charter Indiana, Inc.
Fishable Indiana Streams for Hoosiers, Inc. (FISH)
Hoosier Environmental Council
Valley Watch, Inc.
Wabash Riverkeeper Network

IOWA

Environmental Law & Policy Center
Iowa Environmental Council

KENTUCKY

Kentuckians For The Commonwealth
Kentucky Environmental Foundation
Sierra Club, Cumberland Chapter

LOUISIANA

Atchafalaya Basinkeeper

MASSACHUSETTS

Toxics Action Center Campaigns

MARYLAND

Assateague Coastal Trust
Waterkeepers Chesapeake

MICHIGAN

Environmental Law & Policy Center
Lone Tree Council
Progress Michigan

MINNESOTA

Environmental Law & Policy Center
Minnesota Center for Environmental Advocacy

MISSOURI

Earth Ethics Committee of the Ethical Society of St. Louis
Labadie Environmental Organization
Mid-Missouri Peaceworks/Missourians for Safe Energy
Midwest Coalition Responsible Investment
Missouri Coalition for the Environment

MONTANA

Montana Environmental Information Center

NEVADA

Moapa Band of Paiutes

NEW YORK

Concerned Residents of Portlant, NY + People

NORTH CAROLINA

Alliance for Energy Democracy
Appalachian Voices
Cape Fear River Watch
Catawba Riverkeeper Foundation
Clean Air Carolina
Clean Water for North Carolina
Environment North Carolina
MountainTrue
NC Council of Churches
NC Interfaith Power & Light
NC WARN
New River Conservancy
River Guardian Foundation
We Need Water! Campaign
Western North Carolina Chapter, Physicians for Social Responsibility
Yadkin Riverkeeper

NORTH CAROLINA STATE LEGISLATORS

Representative Pricey Harrison
Representative Ralph Johnson
Representative Bobbie Richardson

Representative Brian Turner
 Representative Cecil Brockman
 Representative Duane R. Hall
 Representative Evelyn Terry
 Representative Graig Meyer
 Representative Robert T. Reives, II
 Senator Erica Smith-Ingram

NORTH DAKOTA
 Environmental Law & Policy Center

OHIO
 Ohio Citizen Action
 Environmental Law & Policy Center

OREGON
 Southern Oregon Climate Action Now

PENNSYLVANIA
 Friends of Dunkard Creek
 Foundation for Pennsylvania Watersheds
 Little Blue Regional Action Group
 Mountain Watershed Association
 Residents Against the Power Plant
 Youghiogheny Riverkeeper

PUERTO RICO
 Comite Dialogo Ambiental, Inc.

SOUTH CAROLINA
 Save Our Saluda
 Upstate Forever
 Winyah Rivers Foundation

SOUTH DAKOTA
 Environmental Law & Policy Center

TENNESSEE
 Southern Alliance for Clean Energy
 Statewide Organizing for Community
 eMpowerment (SOCM)
 Tennessee Clean Water Network
 Tennessee Riverkeeper

TEXAS
 Bastrop County Environmental Network

UTAH
 HEAL Utah
 Utah Physicians for a Healthy Environment

VIRGINIA
 Concerned Citizens of Giles County LLC
 James River Association
 Potomac Riverkeeper
 Shenandoah Riverkeeper

WISCONSIN
 Clean Wisconsin
 Environmental Law & Policy Center
 Milwaukee Riverkeeper

WEST VIRGINIA
 Ohio Valley Environmental Coalition
 West Virginia Highlands Conservancy

WYOMING
 Powder River Basin Resource Council

**RESPONSE TO FEBRUARY 25, 2016 LETTER OPPOSING S.
2446, THE IMPROVING COAL COMBUSTION RESIDUALS
REGULATION ACT OF 2016**

The letter is wrong in claiming that S. 2446 will:

“Eliminate the EPA rule’s requirement to immediately clean up all toxic releases from coal ash and notify the public.”

S. 2446 incorporates the groundwater monitoring and corrective action provisions in EPA’s coal ash rule that require a complete and accurate assessment of the corrective measures necessary to effectively clean up all releases from a CCR unit: reference (c)(2)(B) of S. 2446. Additionally, S. 2446 preserves the rule’s requirements regarding public availability of information and notification: reference (c)(2)(M) and (N) of S. 2446.

“Eliminate the EPA rule’s national standard for drinking water protection and cleanup of coal ash contaminated sites.”

S. 2446 applies the groundwater monitoring and corrective requirements of the EPA’s rule. The bill allows for the same tailoring of these programs by state regulatory agencies that EPA provides for the implementation of municipal solid waste and for hazardous waste groundwater monitoring and corrective action regulations: reference (c)(2)(B) of S. 2446.

“Eliminate the rule’s nationwide protective standards and allow each state to set different standards for disposal.”

S. 2446 provides the same flexibility to state regulatory agencies that EPA provides for the implementation of municipal solid waste and for hazardous waste regulations. In fact, in the preamble to the EPA’s coal ash rule, EPA repeatedly acknowledged that it would have provided such authority if its rule was not self-implementing.

“Eliminate the EPA rule’s requirement to close existing coal ash lagoons that are sited in dangerous and unstable areas.”

EPA’s rule DOES NOT mandate the closure of surface impoundments in dangerous and unstable areas: The rule applies location restrictions (§§ 257.62- 257.64) requiring that coal ash surface impoundments located in fault areas, seismic impact zones, and unstable areas make demonstrations regarding their structural integrity and stability in order to continue to operate. S. 2446 applies those same location restrictions: reference (c)(2)(E) of S. 2446.

“Eliminate the EPA rule’s environmental and health protections for large coal ash fill projects.”

S. 2446 identifies specific applications of coal ash that are defined as beneficial use but specifically allows regulatory agencies to regulate such uses in the same manner as a disposal: reference (h)(2) of S. 2446.

“Eliminate the EPA rule’s prohibition against siting coal ash dumps in floodplains.”

EPA’s rule DOES NOT contain a location restriction regarding floodplains. Coal ash disposal units are already subject to the location standards in subpart A of 40 CFR part 257 for floodplains, endangered species, and surface waters. EPA’s coal ash rule did not change this requirement. S. 2446 preserves the requirement in § 257.52 of EPA’s rule that coal ash disposal units must comply with all other applicable federal, state, tribal, or local laws or other requirements: reference (i)(3) of S. 2446.

“Eliminate all protective standards for coal ash waste piles nationwide.”

S. 2446 provides implementing agencies with the ability to determine that the placement of coal ash in piles for storage prior to beneficial use constitutes disposal if such placement results in the release of constituents to the environment: reference (h)(2) of S. 2446.

“Significantly delay, for up to six years, the requirement to close leaking and structurally unsound impoundments.”

Nothing in S. 2446 would extend the ability of these units to operate for an additional six years.

Note that The EPA rule’s groundwater monitoring and corrective action provisions require unlined impoundments that exceed a groundwater protection standard to cease the receipt of coal ash as early as January 2019, however the rule would allow those impoundments to operate under the rule’s “alternative closure provision” for up to an additional five years if certain conditions are met. Meanwhile, the EPA rule’s structural integrity provisions require coal ash surface impoundments that do not meet the rule’s structural stability requirements to initiate closure by April 2017.

S. 2446 specifically incorporates the rule’s groundwater monitoring and corrective action requirements (reference: (c)(2)(B) of S. 2446) and requires compliance with those requirements no later than 2 years after enactment (reference: (c)(3)(A)(ii)(I) of S. 2446). The bill specifically incorporates the rule’s structural integrity provisions (reference (c)(2)(K) of S. 2446) and requires that these requirements be met no later than 12 months after enactment (reference (c)(3)(A)(i)(III) of S. 2446).

“Significantly delay the application of safety, design, and operating standards for new coal ash lagoons and landfills.”

S. 2446 establishes deadlines for meeting the requirements of the coal ash rule prior to the issuance of a permit by the state regulatory agency. The deadlines for these provisions allow for the same length of time for compliance as under EPA’s rule (i.e., 12 months to meet design requirements, run-on and run-off standards, hydrologic and hydraulic capacity requirements and structural stability requirements; 24 months to meet groundwater monitoring requirements; and 36 months to meet location restrictions) – reference (c)(3)(A) of S. 2446.

“Significantly delay the EPA rule’s guarantee of public access to information regarding water contamination and assessments of dangerous coal ash dams.”

S. 2446 preserves the EPA rule’s requirements regarding public availability of information and notification, which apply to all operating requirements, including impoundment inspections and safety assessment, and results of groundwater monitoring (reference (c)(2)(M) and (N) of S. 2446).

“Significantly delay critical requirements, such as inspections, control of fugitive dust, groundwater monitoring and cleanup requirements for all new coal ash lagoons and landfills.”

S. 2446 establishes deadlines for meeting the requirements of the coal ash rule prior to the issuance of a permit by the state regulatory agency. The deadline for inspections and dust control matches the coal ash rule; deadlines for other provisions allow for the same length of time for compliance as under EPA’s rule (i.e., 12 months to meet design requirements, run-on and run-off standards, hydrologic and hydraulic capacity requirements and structural stability requirements; 24 months to meet groundwater monitoring requirements; and 36 months to meet location restrictions): reference (c)(3)(A) of S. 2446.

“Significantly weaken and delay the ability of citizens to enforce safety requirements.”

S. 2446 would implement the coal ash rule through enforceable permits rather than relying solely on citizen suits to enforce EPA’s self-implementing rule. In addition, S. 2446 explicitly preserves the ability of citizen groups to bring a citizen suit against CCR disposal facilities: reference (g)(3) of S. 2446.

“Prohibit effective federal oversight of state coal ash programs.”

EPA currently has NO enforcement authority for the coal ash rule. S. 2446 actually creates an enforcement mechanism for EPA’s coal ash rule. The bill requires EPA to review and approve state coal ash permit programs, and it requires EPA to implement the permit program if the states chose not to implement the permit program or in cases where EPA determines the states’ programs are deficient: reference (b)(A) and (d) of S. 2446.

“Prohibit EPA enforcement of state program requirements unless invited by a state.”

EPA currently has NO enforcement authority for the coal ash rule. S. 2446 actually creates an enforcement mechanism for EPA’s coal ash rule. The bill requires EPA to review and approve state coal ash permit programs, and it requires EPA to implement the permit program if the states chose not to implement the permit program or in cases where EPA determines the states’ programs are deficient: reference (b)(A) and (d) of S. 2446.

“Prohibit EPA from requiring financial assurance under RCRA to ensure utility companies are able to pay for the cleanup of spills and contaminated drinking water. The financial assurance provision in the bill does not cover spills or releases of hazardous substances.”

EPA’s coal ash rule does NOT impose financial assurance requirements. S. 2446 goes further than EPA’s rule by requiring owners and operators to comply with financial assurance: reference (c)(2)(G) of S. 2446.

114TH CONGRESS
2D SESSION

S. _____

To promote remediation of orphan mines, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. GARDNER (for himself and Mr. BENNET) introduced the following bill;
which was read twice and referred to the Committee on

A BILL

To promote remediation of orphan mines, and for other
purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Good Samaritan
5 Cleanup of Orphan Mines Act of 2016”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) ADMINISTRATOR.—The term “Adminis-
9 trator” means the Administrator of the Environ-
10 mental Protection Agency.

2

1 (2) APPLICABLE WATER QUALITY STAND-
2 ARDS.—The term “applicable water quality stand-
3 ards” means the water quality standards promul-
4 gated or established under the Federal Water Pollu-
5 tion Control Act (33 U.S.C. 1251 et seq.).

6 (3) COOPERATING AGENCY.—The term “cooper-
7 ating agency” means any Federal, State, tribal, or
8 local agency or other person (other than the Admin-
9 istrator) that—

10 (A) is authorized under Federal or State
11 law, tribal, or local ordinance, to participate in
12 issuing a permit under this section; and

13 (B) elects to participate in the process of
14 issuing the permit.

15 (4) COOPERATING PERSON.—The term “cooper-
16 ating person” means any person that is named by
17 the permittee in the permit application as a cooper-
18 ating entity in an orphan mine remediation project.

19 (5) ELIGIBLE APPLICANT.—The term “eligible
20 applicant” means any person that applies for a per-
21 mit under this Act.

22 (6) GOOD SAMARITAN.—The term “Good Sa-
23 maritan” means a person that, with respect to his-
24 toric mine residue—

3

1 (A) is not a past or current owner or oper-
2 ator of—

3 (i) the orphan mine site; or

4 (ii) a portion of the orphan mine site;

5 (B) had no role in the creation of the his-
6 toric mine residue;

7 (C) had no role in creating the environ-
8 mental pollution caused by the historic mine
9 residue; and

10 (D) is not potentially liable under any Fed-
11 eral, State, tribal, or local law for the remedi-
12 ation, treatment, or control of—

13 (i) the historic mine residue; or

14 (ii) current or past discharge of pollu-
15 tion from the orphan mine site.

16 (7) HISTORIC MINE RESIDUE.—

17 (A) IN GENERAL.—The term “historic
18 mine residue” means mine residue or any con-
19 dition at an orphan mine site resulting from ac-
20 tivities conducted prior to December 11, 1980.

21 (B) INCLUSIONS.—The term “historic
22 mine residue” includes—

23 (i) previously mined ores and minerals
24 that directly contribute to acid mine drain-
25 age or other pollution;

1 (ii) equipment (including materials in
2 equipment);

3 (iii) any waste or material resulting
4 from any extraction, beneficiation, or other
5 processing activity that occurred during
6 the active operation of an orphan mine
7 site;

8 (iv) any acidic or otherwise polluted
9 flow in surface water or groundwater that
10 originates from, or is pooled and contained
11 in, an inactive or abandoned mine site;

12 (v) any hazardous substance (as de-
13 fined in section 101 of the Comprehensive
14 Environmental Response, Compensation,
15 and Liability Act of 1980 (42 U.S.C.
16 9601));

17 (vi) any pollutant or contaminant (as
18 defined in section 101 of the Comprehen-
19 sive Environmental Response, Compensa-
20 tion, and Liability Act of 1980 (42 U.S.C.
21 9601)); and

22 (vii) any pollutant (as defined in sec-
23 tion 502 of the Federal Water Pollution
24 Control Act (33 U.S.C. 1362)).

1 (8) INDIAN TRIBE.—The term “Indian tribe”
2 has the meaning given the term in section 4 of the
3 Indian Self-Determination and Education Assistance
4 Act (25 U.S.C. 450b)).

5 (9) ORPHAN MINE SITE.—

6 (A) IN GENERAL.—The term “orphan
7 mine site” means an abandoned or inactive
8 mine site and any facility associated with an
9 abandoned or inactive mine site—

10 (i) that was used for the production of
11 a mineral other than coal; and

12 (ii) for which, despite reasonable and
13 diligent efforts under the circumstances by
14 the Good Samaritan to the satisfaction of
15 the permitting authority, no responsible
16 owner or operator has been identified—

17 (I) who is potentially liable or
18 has been required to perform or pay
19 for environmental cleanup activities
20 under applicable law; and

21 (II) other than, in the case of
22 Federal land, a Federal land manage-
23 ment agency that has not been ac-
24 tively involved in mining activity on
25 the Federal land.

6

1 (B) EXCLUSIONS.—The term “orphan
2 mine site” does not include a mine site (includ-
3 ing associated facilities)—

4 (i) in a temporary shutdown or ces-
5 sation;

6 (ii) included on the National Priorities
7 List developed by the President in accord-
8 ance with section 105(a)(8)(B) of the
9 Comprehensive Environmental Response,
10 Compensation, and Liability Act of 1980
11 (42 U.S.C. 9605(a)(8)(B));

12 (iii) that has a responsible owner or
13 operator; or

14 (iv) that actively mined or processed
15 minerals after December 11, 1980.

16 (10) PERMITTING AUTHORITY.—The term “per-
17 mitting authority” means—

18 (A) the Administrator; or

19 (B) a State or Indian tribe with a Good
20 Samaritan program approved under section
21 4(c).

22 (11) PERSON.—The term “person” includes—

23 (A) an individual;

24 (B) a firm;

25 (C) a corporation;

7

- 1 (D) an association;
- 2 (E) a partnership;
- 3 (F) a consortium;
- 4 (G) a joint venture;
- 5 (H) a commercial entity;
- 6 (I) a nonprofit organization;
- 7 (J) the Federal Government;
- 8 (K) a State (including a political subdivi-
- 9 sion of a State);
- 10 (L) an interstate entity;
- 11 (M) a commission; and
- 12 (N) an Indian tribe.

13 (12) RESPONSIBLE OWNER OR OPERATOR.—

14 The term “responsible owner or operator” means a
15 person that is—

16 (A) legally responsible under section 301 of
17 the Federal Water Pollution Control Act (33
18 U.S.C. 1311) for a discharge that originates
19 from an orphan mine site; and

20 (B) financially capable of complying with
21 each requirement described in that section of
22 that Act.

23 **SEC. 3. SCOPE.**

24 Nothing in this Act (or an amendment made by this
25 Act)—

- 1 (1) reduces any existing liability; or
2 (2) facilitates the conduct of any mining or
3 processing other than the conduct of any processing
4 of previously mined ores and minerals that is re-
5 quired for the remediation of historic mine residue
6 to facilitate the cleanup of an orphan mine site for
7 the public good.

8 **SEC. 4. REMEDIATION OF ORPHAN MINE SITES BY GOOD**
9 **SAMARITANS.**

10 (a) PERMITS.—The permitting authority may issue
11 a permit to a Good Samaritan to carry out a project to
12 remediate historic mine residue at all or part of an orphan
13 mine site in accordance with this section.

14 (b) ELIGIBILITY FOR PERMITS.—

15 (1) IN GENERAL.—To be eligible for a permit
16 to carry out a project to remediate an orphan mine
17 site under this section—

18 (A) the mine site shall be located in the
19 United States;

20 (B) the purpose of the project shall be the
21 reduction of pollution caused by historic mine
22 residue to enhance the public good;

23 (C) the person seeking the permit shall
24 propose only those activities that are directly
25 required for the remediation of historic mine

1 residue at the mine site to enhance the public
2 good; and

3 (D) the person obtaining the permit shall
4 be a Good Samaritan.

5 (2) OTHER ACTIVITIES.—Any activity other
6 than the activities described in paragraph (1)(C)
7 conducted by the permittee or any other person at
8 the orphan mine site shall not be authorized under
9 a permit issued under this section.

10 (c) STATE OR TRIBAL PROGRAM.—

11 (1) PROGRAM.—

12 (A) IN GENERAL.—Before a permit may be
13 issued by a State or Indian tribe to carry out
14 a project under this Act, the State or Indian
15 tribe shall have in effect a voluntary Good Sa-
16 maritan program approved by the Adminis-
17 trator.

18 (B) APPLICATION.—

19 (i) IN GENERAL.—The Governor of
20 any State, or the head of the governing
21 body of an Indian tribe, may submit to the
22 Administrator, at any time, an application
23 to administer a Good Samaritan program
24 for activities under the jurisdiction of the
25 State or Indian tribe.

1 (ii) REQUIREMENTS.—An application
2 submitted under clause (i) shall include—

3 (I) a complete and detailed de-
4 scription of the permit program pro-
5 posed to be administered under State
6 or tribal law; and

7 (II) a statement from the State
8 attorney general or an equivalent trib-
9 al official that the laws of the State or
10 Indian tribe provide adequate author-
11 ity to carry out the proposed program.

12 (iii) APPROVAL OR DISAPPROVAL.—
13 The Administrator shall approve an appli-
14 cation received under clause (i) not later
15 than 120 days after the date of receipt of
16 the application unless the Administrator
17 determines that the applicable State or In-
18 dian tribe does not meet the requirements
19 described in paragraph (2), in which case
20 the Administrator shall deny the applica-
21 tion.

22 (2) REQUIREMENTS.—A State or Indian tribe
23 that seeks to administer a Good Samaritan program
24 shall—

11

1 (A) designate a lead State or tribal agency
2 that is responsible for carrying out permitting
3 responsibilities of the State or Indian tribe
4 under this section;

5 (B) possess legal authority to implement a
6 Good Samaritan program with program ele-
7 ments consistent with those described in this
8 Act, including State or tribal enforcement au-
9 thorities;

10 (C) agree to carry out the program in ac-
11 cordance with this Act (except that a State or
12 Indian tribe shall not be precluded from omit-
13 ting or modifying any program element for the
14 purpose of imposing requirements that are
15 more protective of the environment);

16 (D) provide for and encourage public par-
17 ticipation in the permitting process; and

18 (E) review permit applications for each
19 project for which a State or tribal permit for
20 remediation in the State or relevant area under
21 the jurisdiction of the Indian tribe is issued
22 under this section.

23 (3) STATES AND INDIAN TRIBES WITHOUT
24 GOOD SAMARITAN PROGRAMS.—In the case of a
25 State or Indian tribe without a Good Samaritan pro-

12

1 gram approved under paragraph (1), the Adminis-
2 trator shall issue permits for Good Samaritan
3 projects if—

4 (A) the State or Indian tribe designates a
5 lead State or tribal agency that is responsible to
6 carry out permitting responsibilities of the
7 State or Indian tribe under this section;

8 (B) the State or tribal agencies and polit-
9 ical subdivisions of the State or Indian tribe are
10 authorized by the Administrator to participate
11 in the permit process under this section, as ap-
12 propriate, and assist in providing the resources
13 to enable that participation;

14 (C) the State or Indian tribe reviews and
15 concurs in the issuance of permits for each
16 project for which a permit for remediation in
17 the State or on that tribal land is issued under
18 this section; and

19 (D)(i) the State or Indian tribe agrees that
20 a permittee shall comply with the terms and
21 conditions of the permit in lieu of compliance
22 with—

23 (I) section 402 of the Federal Water
24 Pollution Control Act (33 U.S.C. 1342);
25 and

13

1 (II) section 121 of the Comprehensive
2 Environmental Response, Compensation,
3 and Liability Act of 1980 (42 U.S.C.
4 9621); or

5 (ii) in the case of a State authorized to im-
6 plement State law in lieu of section 402 of the
7 Federal Water Pollution Control Act (33 U.S.C.
8 1342), the State agrees that a permittee shall
9 comply with the terms and conditions of the
10 permit in lieu of—

11 (I) State law; and

12 (II) section 121 of the Comprehensive
13 Environmental Response, Compensation,
14 and Liability Act of 1980 (42 U.S.C.
15 9621).

16 (d) APPLICATION FOR PERMITS.—To obtain a permit
17 to carry out a project to remediate an orphan mine site
18 under this section, an eligible applicant shall submit to
19 the permitting authority an application, signed by the eli-
20 gible applicant, that provides, to the extent known or rea-
21 sonably discoverable by the eligible applicant on the date
22 on which the eligible applicant submits an application for
23 a permit—

24 (1) a description of the orphan mine site (in-
25 cluding the boundaries of the orphan mine site);

1 (2) subject to the requirements of the permit-
2 ting authority—

3 (A) a description of the reasonable and
4 diligent efforts taken by the eligible applicant,
5 under the circumstances, to identify a respon-
6 sible owner or operator of the orphan mine site
7 for which the eligible applicant seeks a permit
8 under this subsection;

9 (B) the identification of any person with a
10 legal right—

11 (i) to exclude other persons from the
12 orphan mine site; or

13 (ii) to affect activities on the orphan
14 mine site; and

15 (C) a description of any legal right de-
16 scribed in subparagraph (B);

17 (3) evidence that the eligible applicant has or
18 will acquire all legal rights or the authority nec-
19 essary to enter the mine site and perform the reme-
20 diation described in the application;

21 (4) a statement that, despite reasonable and
22 diligent efforts, the eligible applicant has not identi-
23 fied a responsible owner or operator;

15

1 (5) documentation satisfactory to the permit-
2 ting authority that the mine site is an orphan mine
3 site;

4 (6) a detailed description of the historic mine
5 residue to be remediated;

6 (7) a description of the baseline environmental
7 conditions (as of the date of submission of the appli-
8 cation), including potentially affected surface water
9 quality and hydrologic conditions, affected by the
10 historic mine residue to be remediated that in-
11 cludes—

12 (A) the nature and extent of any adverse
13 impact on the water quality conditions of any
14 body of water caused by the drainage of historic
15 mine residue or other discharges from the or-
16 phan mine site; and

17 (B) the level of any pollutant in any body
18 of water caused by drainage of historic mine
19 residue or other discharge from the orphan
20 mine site that has resulted in an adverse impact
21 described in subparagraph (A);

22 (8) a remediation plan for the orphan mine site
23 that describes—

1 (A) the nature and scope of the proposed
2 remediation, including any pollutant to be ad-
3 dressed by the remediation plan;

4 (B) each activity that the eligible applicant
5 proposes to take that, to the maximum extent
6 practicable under the circumstances, will assist
7 in the attainment of each applicable water qual-
8 ity standard;

9 (C) the monitoring or other form of assess-
10 ment that will be undertaken by the eligible ap-
11 plicant to evaluate the success of the activities
12 described in subparagraph (A) during and after
13 the remediation, with respect to the baseline
14 conditions;

15 (D) detailed engineering plans for the
16 project; and

17 (E) any proposed recycling or reprocessing
18 of historic mine residue to be conducted by the
19 eligible applicant (including a description of
20 how each proposed recycling or reprocessing ac-
21 tivity relates to the remediation of the orphan
22 mine site);

23 (9) a schedule for the work to be carried out
24 under the project, including a schedule for periodic

1 reporting by the eligible applicant on the remedi-
2 ation of the orphan mine site;

3 (10) in the case of a remediation activity that
4 requires plugging, opening, or otherwise altering the
5 portal or adit of an orphan mine, an evaluation of
6 orphan mine site conditions, including an assessment
7 of any pooled water or hydraulic pressure in the or-
8 phan mine;

9 (11) a health and safety plan that is specifically
10 designed for mining remediation work;

11 (12) a specific contingency plan designed to re-
12 spond to unplanned adverse events, including the
13 sudden release of mine water, waste rock, or other
14 deleterious substance;

15 (13) a budget for the work to be carried out
16 under the project that includes a description of each
17 funding source;

18 (14) a project budget and description of finan-
19 cial resources that demonstrate that the permitted
20 work, including any operation and maintenance, will
21 be completed;

22 (15) a detailed plan for the required operation
23 and maintenance of any remediation; and

24 (16) a description of planned post-remediation
25 monitoring.

1 (e) PERMIT ISSUANCE.—

2 (1) IN GENERAL.—The permitting authority
3 may issue a permit to carry out a project for the re-
4 mediation of an orphan mine site only if—

5 (A) the permitting authority determines
6 that—

7 (i) the project will improve the envi-
8 ronment on or in the area of the orphan
9 mine site to the maximum extent prac-
10 ticable under the circumstances, as deter-
11 mined by the permitting authority;

12 (ii) to the maximum extent practicable
13 under the circumstances, the project will
14 meet all applicable water quality stand-
15 ards;

16 (iii) activities will not result in water
17 quality that is worse than the baseline
18 water conditions;

19 (iv) the permittee has—

20 (I) provided adequate evidence of
21 the financial and other resources to
22 complete the permitted work;

23 (II) demonstrated that the per-
24 mittee will complete the permitted
25 work; and

19

1 (III) the financial and other re-
2 sources to address any contingencies
3 identified in the permit application de-
4 scribed in subsection (d); and

5 (v) the project meets the requirements
6 of this Act;

7 (B) with respect to a State or Indian tribe
8 without a Good Samaritan program approved
9 under subsection (c), the State or Indian tribe
10 reviews and concurs with the issuance of the
11 permit;

12 (C) in the case of a proposed project to be
13 carried out on Federal land, each State or In-
14 dian tribe (or political subdivision of the State
15 or Indian tribe) in which the Federal land is lo-
16 cated meets the requirements described in sub-
17 paragraph (B); and

18 (D) the Federal, State, or tribal land man-
19 agement agency with jurisdiction over an or-
20 phan mine site that is the subject of a permit
21 application consents to the issuance of a permit.

22 (2) DISCRETIONARY ACTION.—The issuance of
23 a permit by the permitting authority and the concur-
24 rence of the affected State or Indian tribe (and any
25 political subdivision of the State or Indian tribe) to

1 participate in the permit process shall be discre-
2 tionary actions taken in the public interest.

3 (3) COMPLIANCE WITH APPLICABLE LAW.—

4 (A) IN GENERAL.—A permit issued under
5 this subsection shall authorize the permittee
6 and any cooperating person to carry out the ac-
7 tivities described in the permit.

8 (B) COMPLIANCE WITH PERMIT.—Compli-
9 ance with the permit by the permittee and any
10 cooperating person constitutes compliance with
11 applicable law, with respect only to the remedi-
12 ation of historic mine residue authorized by the
13 permit.

14 (4) DEADLINE.—

15 (A) IN GENERAL.—The permitting author-
16 ity shall issue or deny a permit for the remedi-
17 ation of a mine site not later than—

18 (i) the date that is 180 days after the
19 date of receipt by the permitting authority
20 of an application for the permit that, as
21 determined by the permitting authority, is
22 complete; or

23 (ii) such later date as may be deter-
24 mined by the permitting authority with the
25 agreement of the applicant.

21

1 (B) CONSTRUCTIVE DENIAL.—If the per-
2 mitting authority fails to issue or deny the per-
3 mit in accordance with subparagraph (A), the
4 application shall be considered to be denied by
5 the permitting authority.

6 (f) EFFECT OF PERMITS.—

7 (1) IN GENERAL.—A permit issued under this
8 section to carry out a project for the remediation of
9 an orphan mine site—

10 (A) authorizes the permittee to carry out
11 the activities described in the permit;

12 (B) authorizes enforcement under this sec-
13 tion;

14 (C)(i) provides to the permittee, in car-
15 rying out the activities authorized under the
16 permit, protection from actions taken, obliga-
17 tions, and liabilities arising under—

18 (I) sections 402 and 505 of the Fed-
19 eral Water Pollution Control Act (33
20 U.S.C. 1342, 1365); and

21 (II) sections 107 and 310 of the Com-
22 prehensive Environmental Response, Com-
23 pensation, and Liability Act of 1980 (42
24 U.S.C. 9607, 9659); or

1 (ii) in the case of a State authorized to im-
2 plement State law in lieu of section 402 of the
3 Federal Water Pollution Control Act (33 U.S.C.
4 1342), provides to the permittee, in carrying
5 out the activities authorized under the permit,
6 protection from actions taken, obligations, and
7 liabilities arising under—

8 (I) the authorized State program; and

9 (II) sections 107 and 310 of the Com-
10 prehensive Environmental Response, Com-
11 pensation, and Liability Act of 1980 (42
12 U.S.C. 9607, 9659); and

13 (D) allows the permittee to sell or use ma-
14 terials recovered during the implementation of
15 the plan only if the proceeds from the sale or
16 use of the materials are used to defray the costs
17 of—

18 (i) remediation of the orphan site ad-
19 dressed in the permit; or

20 (ii) voluntary remediation of another
21 orphan mine site addressed in a permit
22 issued by the same permitting agency.

23 (2) CROSS-COMPLIANCE.—

24 (A) IN GENERAL.—A permittee shall com-
25 ply with the terms and conditions of a permit

1 issued under this section in lieu of compliance
2 with—

3 (i) section 402 of the Federal Water
4 Pollution Control Act (33 U.S.C. 1342);
5 and

6 (ii) section 121 of the Comprehensive
7 Environmental Response, Compensation,
8 and Liability Act of 1980 (42 U.S.C.
9 9621).

10 (B) STATE AUTHORIZED TO IMPLEMENT
11 STATE LAW.—In the case of a State authorized
12 to implement State law in lieu of section 402 of
13 the Federal Water Pollution Control Act (33
14 U.S.C. 1342), the permittee shall comply with
15 the terms and conditions of permit issued under
16 this section in lieu of—

17 (i) the authorized State program; and
18 (ii) section 121 of the Comprehensive
19 Environmental Response, Compensation,
20 and Liability Act of 1980 (42 U.S.C.
21 9621).

22 (C) ACTIVITIES NOT RELATING TO REME-
23 DIATION.—Any activity not relating to the re-
24 mediation of historic mine residue for the public
25 good, as authorized by the permit issued under

1 subsection (e) and as determined by the permit-
2 ting authority, is subject to liability and en-
3 forcement under all applicable law, including—

4 (i) the Federal Water Pollution Con-
5 trol Act (33 U.S.C. 1251 et seq.); and

6 (ii) the Comprehensive Environmental
7 Response, Compensation, and Liability Act
8 of 1980 (42 U.S.C. 9601 et seq.).

9 (3) TERMINATION OF PERMIT.—A permit
10 issued under subsection (e) shall terminate at the
11 completion of the project in accordance with sub-
12 section (t).

13 (g) CONTENT OF PERMITS.—

14 (1) IN GENERAL.—A permit issued under sub-
15 section (e) shall contain—

16 (A) the information described in subsection
17 (d);

18 (B)(i) a provision that states that the per-
19 mittee is responsible for securing, for all activi-
20 ties authorized under the permit, all authoriza-
21 tions, licenses, and permits that are required
22 under applicable law other than—

23 (I) section 402 of the Federal Water
24 Pollution Control Act (33 U.S.C. 1342);
25 and

1 (II) section 121 of the Comprehensive
2 Environmental Response, Compensation,
3 and Liability Act of 1980 (42 U.S.C.
4 9621); or

5 (ii) in the case of a State authorized to im-
6 plement State law in lieu of section 402 of the
7 Federal Water Pollution Control Act (33 U.S.C.
8 1342), a provision that states that the per-
9 mittee is responsible for securing, for all activi-
10 ties authorized under the permit, all authoriza-
11 tions, licenses, and permits that are required
12 under applicable law except—

13 (I) the authorized State program; and

14 (II) section 121 of the Comprehensive
15 Environmental Response, Compensation,
16 and Liability Act of 1980 (42 U.S.C.
17 9621); and

18 (C) any other terms and conditions that
19 are determined to be appropriate by the permit-
20 ting authority.

21 (2) FORCE MAJEURE.—A permit issued under
22 this section may include, at the request of the Good
23 Samaritan, a force majeure provision.

24 (3) TIMING.—Work authorized under a per-
25 mit—

1 (A) shall commence not later than the date
2 that is 18 months after the date of issuance of
3 the permit; and

4 (B) shall continue until completed, with
5 temporary suspensions permitted during ad-
6 verse weather or other conditions specified in
7 the permit.

8 (4) SIGNATURE BY PERMITTEE.—The signature
9 of the permittee on the permit shall be considered to
10 be an acknowledgment by the permittee that the
11 permittee accepts the terms and conditions of the
12 permit.

13 (5) TRANSFER OF PERMITS.—A permit may be
14 transferred to another person only if—

15 (A) the permitting authority determines
16 that the transferee qualifies as a Good Samari-
17 tan;

18 (B) the transferee signs, and agrees to be
19 bound by the terms of, the permit; and

20 (C) the permitting authority includes in
21 the transferred permit any additional conditions
22 necessary to meet the goals of this section.

23 (6) TERMINATION OF PERMIT.—The authority
24 to carry out work under a permit issued under this
25 section shall terminate if the work does not com-

1 mence by the date that is 18 months after the date
2 of issuance of the permit.

3 (7) OTHER DEVELOPMENT.—

4 (A) IN GENERAL.—Any activity relating to
5 mineral exploration, processing, beneficiation,
6 or mining, including development by a per-
7 mittee or any cooperating person, not author-
8 ized in a permit issued by the permitting au-
9 thority shall be subject to all applicable law.

10 (B) NO AUTHORIZATION OR WAIVER.—Ex-
11 cept as provided in subsection (f)(1)(D), no
12 mineral exploration, processing, beneficiation, or
13 mining shall be—

14 (i) authorized by a permit issued
15 under this Act; or

16 (ii) covered by any waiver of liability
17 from applicable law.

18 (C) CONNECTION WITH OTHER ACTIVI-
19 TIES.—The commingling or association of any
20 other discharge, water, or pollutant or any ac-
21 tivity, project, or operation with any aspect of
22 the project subject to a permit issued under
23 subsection (e) shall not limit or reduce the li-
24 ability of any person associated with the other

1 discharge, water, or pollutant or activity,
2 project, or operation.

3 (h) ROLE OF PERMITTING AUTHORITY.—In carrying
4 out this section, the permitting authority shall—

5 (1) consult with prospective applicants;

6 (2) accept permit applications under this sec-
7 tion;

8 (3) convene, coordinate, and lead the applica-
9 tion review process;

10 (4) maintain all records relating to the permit
11 and the permit process;

12 (5) provide an opportunity for cooperating
13 agencies and the public to participate in the permit
14 process, including—

15 (A) a public comment period; and

16 (B) a public hearing, if requested;

17 (6) issue the permit under this section, if ap-
18 propriate; and

19 (7) enforce and otherwise carry out this section.

20 (i) COOPERATING AGENCIES AND STATE, LOCAL,
21 AND TRIBAL COMMUNITIES.—

22 (1) IN GENERAL.—If the permitting authority
23 learns that an application for the remediation of an
24 orphan mine site under this section will be submitted
25 to the permitting authority, the permitting authority

1 shall (as soon as practicable) provide a notice of the
2 application to—

3 (A) the lead State or tribal agency des-
4 ignated under subsection (c)(2)(A);

5 (B) each local government located within a
6 radius of 75 miles of the mine site; and

7 (C) each Federal, State, and tribal agency
8 that may have an interest in the application.

9 (2) COPY OF APPLICATION.—As soon as prac-
10 ticable after the date on which the permitting au-
11 thority receives an application, the notice described
12 in paragraph (1) shall be supplemented with a copy
13 of the application.

14 (j) PUBLIC NOTICE OF RECEIPT OF APPLICA-
15 TIONS.—

16 (1) IN GENERAL.—On receipt of a complete ap-
17 plication for the remediation of an orphan mine site
18 under this Act, the permitting authority shall, not
19 later than 30 days after receipt of the application,
20 provide to the public a notice that—

21 (A) describes—

22 (i) the location of the orphan mine
23 site;

24 (ii) the scope and nature of the pro-
25 posed remediation; and

1 (iii) the name of the Good Samaritan
2 applying for a permit to carry out the pro-
3 posed remediation; and

4 (B) provides to the public a means of view-
5 ing or obtaining the application, including, at
6 the minimum, posting the application on the
7 website of the permitting authority.

8 (2) HEARING.—

9 (A) IN GENERAL.—Before the date of per-
10 mit issuance, if requested, the permitting au-
11 thority shall hold a public hearing in the vicin-
12 ity of the orphan mine site to be remediated.

13 (B) NOTICE.—Not later than 30 days be-
14 fore the date of the hearing, the permitting au-
15 thority shall provide the public with notice of
16 the hearing and a draft permit.

17 (C) COMMENTS.—The permitting authority
18 shall provide the applicant and the public with
19 the opportunity—

20 (i) to comment on the draft permit at
21 the public hearing; and

22 (ii) to submit written comments to the
23 permitting authority during the 30-day pe-
24 riod following the date of the hearing.

25 (k) MONITORING.—

1 (1) IN GENERAL.—The permittee shall take
2 such actions as the permitting authority determines
3 are necessary to ensure appropriate baseline moni-
4 toring, monitoring during the remediation project,
5 and post-remediation monitoring of the environment
6 under paragraphs (6), (7), (8), and (16) of sub-
7 section (d).

8 (2) MULTIPARTY MONITORING.—The permit-
9 ting authority may approve in a permit the conduct
10 of monitoring by multiple cooperating persons if, as
11 determined by the permitting authority, the
12 multiparty monitoring will effectively accomplish the
13 goals of this section.

14 (1) FAILURE TO COMPLY.—

15 (1) IN GENERAL.—If a permittee or any cooper-
16 ating person fails to comply with any condition or
17 limitation of the permit, the permittee or cooper-
18 ating person shall be subject to liability under the
19 Federal Water Pollution Control Act (33 U.S.C.
20 1251 et seq.) and the Comprehensive Environmental
21 Response, Compensation, and Liability Act of 1980
22 (42 U.S.C. 9601 et seq.).

23 (2) STATE AUTHORIZED TO IMPLEMENT STATE
24 LAW.—In the case of a State authorized to imple-
25 ment State law in lieu the Federal Water Pollution

1 Control Act (33 U.S.C. 1251 et seq.), if the per-
2 mittee or any cooperating person fails to comply
3 with any condition or limitation of the permit, the
4 permittee or cooperating person shall be subject to
5 liability under—

6 (A) the authorized State program; and

7 (B) the Comprehensive Environmental Re-
8 sponse, Compensation, and Liability Act of
9 1980 (42 U.S.C. 9601 et seq.).

10 (3) EXCEPTION.—This subsection shall not
11 apply to a permittee that fails to comply with any
12 condition or limitation of the permit if that failure
13 to comply results in only a de minimus adverse im-
14 pact on water quality.

15 (m) ENFORCEMENT.—

16 (1) CIVIL PENALTY.—Any person that violates
17 a permit issued under this section shall be subject
18 to a civil penalty of up to \$10,000 for each day of
19 the violation.

20 (2) INJUNCTIONS.—

21 (A) IN GENERAL.—A district court may
22 issue an injunction—

23 (i) mandating that a person comply
24 with a permit or take action to abate a
25 permit violation;

1 (ii) prohibiting a person from vio-
2 lating a permit; or

3 (iii) prohibiting additional activities
4 under a permit (except activities carried
5 out pursuant to subparagraph (B)).

6 (B) MINIMUM REQUIREMENT.—In the
7 event of a permit violation or negligent action
8 by a permittee or any cooperating person, and
9 absent extraordinary circumstances, the court
10 shall, at a minimum, require—

11 (i) the permittee to repair the damage
12 to any part of the environment that is
13 caused by an action of the permittee in vio-
14 lation of the permit; and

15 (ii) the environment to be restored to
16 a condition that is, at a minimum, as good
17 as the condition of the environment prior
18 to the action of the permittee in violation
19 of the permit, as determined by the per-
20 mitting authority.

21 (3) AGENCIES.—Any permitting authority that
22 signs a permit issued under this section may enforce
23 the permit through appropriate administrative or ju-
24 dicial proceedings.

1 (n) GRANT ELIGIBILITY.—A remediation project con-
2 ducted pursuant to this section shall be eligible for funding
3 pursuant to section 319 of the Federal Water Pollution
4 Control Act (33 U.S.C. 1329).

5 [(o) CITIZEN CIVIL ACTIONS.—Under discussion]

6 (p) JUDICIAL REVIEW.—Pursuant to the judicial re-
7 view provisions of section 706 of title 5, United States
8 Code, a court may set aside or modify an action of the
9 Administrator or permitting authority in issuing or deny-
10 ing a permit under this section, or an action of a State
11 or Indian tribe (including a political subdivision of the
12 State or Indian tribe) in signing a permit.

13 (q) TRANSFER OF PERMITTING AUTHORITY.—

14 (1) IN GENERAL.—Subject to paragraph (2),
15 not later than 120 days after the date on which a
16 State or Indian tribe has submitted an application
17 to administer a Good Samaritan program, the Ad-
18 ministrator shall suspend the issuance of permits
19 under this Act for remediation activities in that
20 State or relevant area under the jurisdiction of an
21 Indian tribe unless the Administrator determines
22 that the Good Samaritan program of the State or
23 Indian tribe does not satisfy the requirements of this
24 Act.

1 (2) EXTENSION.—The period before which the
2 Administrator will suspend permitting activity under
3 this subsection may be extended by mutual agree-
4 ment of the Administrator and the applicable State
5 or Indian tribe.

6 (r) NOTIFICATION OF ADMINISTRATOR.—

7 (1) IN GENERAL.—Each State or Indian tribe
8 authorized to administer a Good Samaritan program
9 shall—

10 (A) submit to the Administrator a copy of
11 each permit application received by the State or
12 Indian tribe; and

13 (B) provide notice to the Administrator of
14 each permit proposed to be issued by the State
15 or Indian tribe (including any proposed permit
16 modifications, transfers, or terminations).

17 (2) OBJECTION TO ISSUANCE.—

18 (A) IN GENERAL.—No permit shall be
19 issued by a State or Indian tribe referred to in
20 paragraph (1) if the Administrator, by not later
21 than the date that is 90 days after the date of
22 submission of the proposed permit notification,
23 objects in writing to the issuance of the permit
24 on the basis that the permit would not be in ac-
25 cordance with this Act.

1 (B) STATEMENT OF REASONS FOR OBJEC-
2 TION.—An objection by the Administrator de-
3 scribed in subparagraph (A) shall include a
4 statement of the reasons for the objection.

5 (3) ISSUANCE OR DENIAL OF PERMITS.—

6 (A) IN GENERAL.—In any case in which
7 the Administrator objects to the issuance of a
8 permit under paragraph (2), the permitting au-
9 thority, in consultation with the Good Samari-
10 tan, may resubmit an amended permit.

11 (B) FAILURE TO RESUBMIT APPLICA-
12 TION.—If a State or Indian tribe, in consulta-
13 tion with the Good Samaritan, does not resub-
14 mit a permit revised to meet the objections of
15 the Administrator by the date that is 30 days
16 after the date of the issuance of an objection
17 under subparagraph (A), the Administrator
18 shall deny the permit in accordance with this
19 Act.

20 (s) WITHDRAWAL OF APPROVAL OF STATE OR TRIB-
21 AL PROGRAM AND RETURN OF STATE OR TRIBAL PRO-
22 GRAM TO ADMINISTRATOR.—

23 (1) IN GENERAL.—Each State or tribal Good
24 Samaritan program approved under this Act shall be
25 administered in accordance with this Act.

1 (2) STATES AND INDIAN TRIBES WITHOUT
2 GOOD SAMARITAN PROGRAMS.—In the case of a
3 State or Indian tribe without a Good Samaritan pro-
4 gram approved under subsection (c)(1), the Adminis-
5 trator may issue permits under subsection (c)(3).

6 (3) NOTIFICATION AND WITHDRAWAL.—

7 (A) IN GENERAL.—Subject to subpara-
8 graph (B), if the Administrator determines,
9 after a public hearing, that a State or Indian
10 tribe is not administering a program approved
11 under this Act in accordance with this Act, the
12 Administrator shall—

13 (i) notify the State or Indian tribe of
14 the determination; and

15 (ii) if appropriate corrective action is
16 not taken within a reasonable time, not to
17 exceed 90 after the date of notification
18 under clause (i), withdraw approval of the
19 program.

20 (B) NOTIFICATION OF REASONS FOR
21 WITHDRAWAL.—The Administrator shall not
22 withdraw approval of a program under subpara-
23 graph (A) until the Administrator notifies the
24 State or Indian tribe, and makes available to

1 the public, in writing, the reasons for the with-
2 drawal.

3 (C) REAPPLICATION.—A State or Indian
4 tribe for which the Administrator has with-
5 drawn approval of a Good Samaritan program
6 may reapply to administer a Good Samaritan
7 program.

8 (t) EMERGENCY AUTHORITY AND LIABILITY.—

9 (1) EMERGENCY AUTHORITY.—Nothing in this
10 section affects the authority of a Federal, State,
11 tribal, or local agency to carry out any emergency
12 authority, including an emergency authority pro-
13 vided under Federal, State, or local law.

14 (2) LIABILITY.—Except as specifically provided
15 in this Act, nothing in this Act or a permit issued
16 under this Act limits the liability of any person (in-
17 cluding a permittee or any cooperating person)
18 under any provision of law.

19 (u) TERMINATION OF AUTHORITY.—

20 (1) TERMINATION.—

21 (A) IN GENERAL.—Except as provided in
22 subparagraph (B), the authority to issue per-
23 mits pursuant to this Act shall terminate on
24 September 30, 2026.

1 (B) EXCEPTION.—Notwithstanding sub-
2 paragraph (A), a permitting authority may
3 issue a permit pursuant to this Act after Sep-
4 tember 30, 2026, if the application for the per-
5 mit—

6 (i) was submitted not later than 180
7 days before that date; and

8 (ii) was completed in accordance with
9 subsection (d) by not later than September
10 30, 2026.

11 (2) EFFECT ON CERTAIN PERMITS.—Any per-
12 mit issued pursuant to this Act before September
13 30, 2026, that is in effect on that date (including
14 any permit issued pursuant to paragraph (1)(B))
15 shall remain in effect after that date in accordance
16 with—

17 (A) the terms and conditions of the permit;
18 and

19 (B) this Act.

20 (3) COMPLETION OF PROJECTS.—Each project
21 authorized under a permit issued pursuant to this
22 Act shall be completed by the later of—

23 (A) the date that is 10 years after the date
24 of enactment of this Act; and

1 (B) the date that is 6 years after the date
2 of issuance of the applicable permit.

3 (4) TERMINATION OF PERMIT.—A permitting
4 authority shall terminate a permit issued under sub-
5 section (e) on the date on which a project is com-
6 pleted in accordance with paragraph (3).

7 (5) NO ENFORCEMENT LIABILITY.—

8 (A) DISCHARGES.—The permittee of a per-
9 mit, or a cooperating person, shall not be sub-
10 ject to enforcement under the Federal Water
11 Pollution Control Act (33 U.S.C. 1251 et seq.)
12 or the Comprehensive Environmental Response,
13 Compensation, and Liability Act of 1980 (42
14 U.S.C. 9601 et seq.) for liability for any past,
15 present, or future discharges at or from the or-
16 phan mining site that is the subject of the per-
17 mit.

18 (B) OTHER PARTIES.—Subparagraph (A)
19 does not limit the liability of any person that is
20 not described in that subparagraph.

21 (C) VIOLATION OF PERMIT PRIOR TO TER-
22 MINATION.—The discharge of liability for a per-
23 mittee of a permit, or a cooperating person,
24 under subparagraph (A) shall not apply with
25 respect to any violation of the permit that oc-

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1 curs on a date that is before the date on which
2 the permit is terminated.

3 (v) REPORT TO CONGRESS.—

4 (1) PREPARATION AND SUBMISSION.—Not later
5 than January 1, 2026, the Administrator shall sub-
6 mit to the Chairpersons and Ranking Members of
7 the Committee on Environment and Public Works of
8 the Senate and the Committees on Transportation
9 and Infrastructure, Energy and Commerce, and
10 Natural Resources of the House of Representatives
11 a report evaluating the permit program under this
12 Act.

13 (2) INCLUSIONS.—The report under paragraph
14 (1) shall include—

15 (A) a description of—

16 (i) the number, types, and objectives
17 of permits issued pursuant to this Act; and

18 (ii) each remediation project author-
19 ized by those permits;

20 (B) qualitative and quantitative data on
21 the results achieved under the permits before
22 the date of issuance of the report;

23 (C) a description of—

24 (i) any problems encountered in ad-
25 ministering this Act; and

1 (ii) whether the problems have been or
2 can be remedied by administrative action
3 (including amendments to existing law);

4 (D) a description of progress made in
5 achieving the purposes of this Act; and

6 (E) recommendations on whether the per-
7 mit program under this Act should be contin-
8 ued after September 30, 2026, including a de-
9 scription of any modifications (including
10 amendments to existing law) required to con-
11 tinue administering this Act.

12 (w) REGULATIONS.—

13 (1) IN GENERAL.—Subject to paragraph (2),
14 not later than 1 year after the date of enactment of
15 this subsection, the Administrator, in consultation
16 with the Secretary of the Interior and the Secretary
17 of Agriculture, and appropriate State, tribal, and
18 local officials, shall promulgate regulations to estab-
19 lish—

20 (A) requirements for remediation plans de-
21 scribed in subsection (d); and

22 (B) any other requirement that the Admin-
23 istrator determines to be necessary.

24 (2) SPECIFIC REQUIREMENTS BEFORE PROMUL-
25 GATION OF REGULATIONS.—Before the date on

1 which the Administrator promulgates regulations
2 under paragraph (1), a permitting authority may es-
3 tablish, on a case-by-case basis, specific require-
4 ments that the permitting authority determines
5 would facilitate the implementation of this sub-
6 section with respect to a Good Samaritan permitting
7 program.

8 **SEC. 5. INVESTIGATIVE SAMPLING.**

9 (a) IN GENERAL.—A permit issued under section
10 4(e) may identify an appropriate program of investigative
11 sampling of historic mine residue to be completed prior
12 to remediation, as determined by the permitting authority
13 on submission of the application.

14 (b) APPLICATION.—If an eligible applicant proposes
15 to conduct a program of investigative sampling, the eligi-
16 ble applicant shall submit to the permitting authority a
17 plan that contains, to the extent known by the eligible ap-
18 plicant as of the date on which the eligible applicant sub-
19 mits the application—

- 20 (1) each description required under paragraph
21 (1) and paragraphs (2)(A) and (C) of section 4(d);
22 (2) the identification required under paragraph
23 (2)(B) of section 4(d);
24 (3) the evidence required under paragraph (3)
25 of section 4(d);

1 (4) the statement required under paragraph (4)
2 of section 4(d);

3 (5) the documentation required under para-
4 graph (5) of section 4(d);

5 (6) the evaluation required under paragraph
6 (10) of section 4(d);

7 (7) the plan required under paragraph (12) of
8 section 4(d);

9 (8) the budget required under paragraph (13)
10 of section 4(d); and

11 (9) a plan of investigative sampling.

12 (c) PERMIT CONTENTS.—If an eligible applicant sub-
13 mits an application for investigative sampling of historic
14 mine residue that only includes the requirements described
15 in subsection (b), the permitting authority may only issue
16 a permit that authorizes the eligible applicant to carry out
17 the program of investigative sampling of historic mine res-
18 idue.

19 (d) REQUIREMENTS RELATING TO SAMPLES.—In
20 conducting a program of investigative sampling of historic
21 mine residue, an eligible applicant shall—

22 (1) collect samples that are representative of
23 the conditions present at the orphan mine site that
24 is the subject of the program, as determined by the
25 permitting authority; and

1 (2) retain publically available records of all
2 sampling events for a period of not less than 3
3 years.

4 (e) OPTION TO DECLINE REMEDIATION.—An inves-
5 tigative sampling permit may allow the permittee to de-
6 cline to undertake remediation based on the results of the
7 investigative sampling program if the activities carried out
8 under the program of investigative sampling result in sur-
9 face water quality conditions that are not worse than the
10 baseline water quality conditions due to drainage of his-
11 toric mine residue or other discharges from the orphan
12 mine site.

13 (f) PERMIT MODIFICATION.—

14 (1) APPLICATION FOR PERMIT MODIFICA-
15 TION.—

16 (A) IN GENERAL.—Based on investigative
17 sampling results, a permittee shall submit an
18 application for a permit modification using the
19 permit procedures in this Act, unless the per-
20 mittee declines remediation under subsection
21 (e).

22 (B) CONTENTS.—An application for per-
23 mit modification shall include any requirement
24 described in section 4(d) that was not sub-

1 mitted with the investigative sampling applica-
2 tion under subsection (b).

3 (C) PUBLIC NOTICE AND COMMENT.—An
4 application for permit modification shall be sub-
5 ject to—

6 (i) a period of public notice and com-
7 ment; and

8 (ii) a public hearing.

9 (2) UNFORESEEN CIRCUMSTANCES.—Except as
10 provided in paragraph (3), the permitting authority,
11 in cooperation with the permittee, shall seek to mod-
12 ify a Good Samaritan permit to take into account
13 any event or condition that—

14 (A) significantly reduces the feasibility or
15 significantly increases the cost of completing
16 the remediation project that is the subject of
17 the Good Samaritan permit;

18 (B) was not—

19 (i) contemplated by the permittee; or

20 (ii) taken into account in the remedi-
21 ation plan of the permittee; and

22 (C) is beyond the control of the permittee,
23 as determined by the permitting authority.

1 (3) EXCEPTION.—Notwithstanding paragraph
2 (2), the permitting authority shall terminate the per-
3 mit if—

4 (A) the permittee does not agree to the
5 modification of a permit; or

6 (B) the permitting authority determines
7 that remediation activities conducted by the
8 permittee pursuant to the permit have resulted
9 or will result in surface water quality conditions
10 that are or will be worse than the baseline
11 water conditions.



II

114TH CONGRESS
1ST SESSION

S. 1479

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to modify provisions relating to grants, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 2, 2015

Mr. INHOFE (for himself, Mr. MARKEY, Mr. ROUNDS, Mrs. BOXER, Mr. CRAPO, and Mr. BOOKER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to modify provisions relating to grants, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Brownfields Utiliza-
5 tion, Investment, and Local Development Act of 2015” or
6 the “BUILD Act”.

1 **SEC. 2. EXPANDED ELIGIBILITY FOR NONPROFIT ORGANI-**
2 **ZATIONS.**

3 Section 104(k)(1) of the Comprehensive Environ-
4 mental Response, Compensation, and Liability Act of
5 1980 (42 U.S.C. 9604(k)(1)) is amended—

6 (1) in subparagraph (G), by striking “or” after
7 the semicolon;

8 (2) in subparagraph (H), by striking the period
9 at the end and inserting a semicolon; and

10 (3) by adding at the end the following:

11 “(I) an organization described in section
12 501(c)(3) of the Internal Revenue Code of 1986
13 and exempt from taxation under section 501(a)
14 of that Code;

15 “(J) a limited liability corporation in which
16 all managing members are organizations de-
17 scribed in subparagraph (I) or limited liability
18 corporations whose sole members are organiza-
19 tions described in subparagraph (I);

20 “(K) a limited partnership in which all
21 general partners are organizations described in
22 subparagraph (I) or limited liability corpora-
23 tions whose sole members are organizations de-
24 scribed in subparagraph (I); or

1 “(L) a qualified community development
2 entity (as defined in section 45D(e)(1) of the
3 Internal Revenue Code of 1986).”.

4 **SEC. 3. MULTIPURPOSE BROWNFIELDS GRANTS.**

5 Section 104(k) of the Comprehensive Environmental
6 Response, Compensation, and Liability Act of 1980 (42
7 U.S.C. 9604(k)) is amended—

8 (1) by redesignating paragraphs (4) through
9 (9) and (10) through (12) as paragraphs (5)
10 through (10) and (13) through (15), respectively;

11 (2) in paragraph (3)(A), by striking “subject to
12 paragraphs (4) and (5)” and inserting “subject to
13 paragraphs (5) and (6)”; and

14 (3) by inserting after paragraph (3) the fol-
15 lowing:

16 “(4) MULTIPURPOSE BROWNFIELDS GRANTS.—

17 “(A) IN GENERAL.—Subject to subpara-
18 graph (D) and paragraphs (5) and (6), the Ad-
19 ministrators shall establish a program to provide
20 multipurpose grants to an eligible entity based
21 on the considerations under paragraph (3)(C),
22 to carry out inventory, characterization, assess-
23 ment, planning, or remediation activities at 1 or
24 more brownfield sites in a proposed area.

25 “(B) GRANT AMOUNTS.—

1 “(i) INDIVIDUAL GRANT AMOUNTS.—
2 Each grant awarded under this paragraph
3 shall not exceed \$950,000.

4 “(ii) CUMULATIVE GRANT
5 AMOUNTS.—The total amount of grants
6 awarded for each fiscal year under this
7 paragraph shall not exceed 15 percent of
8 the funds made available for the fiscal year
9 to carry out this subsection.

10 “(C) CRITERIA.—In awarding a grant
11 under this paragraph, the Administrator shall
12 consider the extent to which an eligible entity is
13 able—

14 “(i) to provide an overall plan for re-
15 vitalization of the 1 or more brownfield
16 sites in the proposed area in which the
17 multipurpose grant will be used;

18 “(ii) to demonstrate a capacity to con-
19 duct the range of eligible activities that
20 will be funded by the multipurpose grant;
21 and

22 “(iii) to demonstrate that a multipur-
23 pose grant will meet the needs of the 1 or
24 more brownfield sites in the proposed area.

1 “(D) CONDITION.—As a condition of re-
2 ceiving a grant under this paragraph, each eli-
3 gible entity shall expend the full amount of the
4 grant not later than the date that is 3 years
5 after the date on which the grant is awarded to
6 the eligible entity unless the Administrator, in
7 the discretion of the Administrator, provides an
8 extension.”.

9 **SEC. 4. TREATMENT OF CERTAIN PUBLICLY OWNED**
10 **BROWNFIELD SITES.**

11 Section 104(k)(2) of the Comprehensive Environ-
12 mental Response, Compensation, and Liability Act of
13 1980 (42 U.S.C. 9604(k)(2)) is amended by adding at the
14 end the following:

15 “(C) EXEMPTION FOR CERTAIN PUBLICLY
16 OWNED BROWNFIELD SITES.—Notwithstanding
17 any other provision of law, an eligible entity
18 that is a governmental entity may receive a
19 grant under this paragraph for property ac-
20 quired by that governmental entity prior to
21 January 11, 2002, even if the governmental en-
22 tity does not qualify as a bona fide prospective
23 purchaser (as that term is defined in section
24 101(40)), so long as the eligible entity has not
25 caused or contributed to a release or threatened

1 release of a hazardous substance at the prop-
2 erty.”.

3 **SEC. 5. INCREASED FUNDING FOR REMEDIATION GRANTS.**

4 Section 104(k)(3)(A)(ii) of the Comprehensive Envi-
5 ronmental Response, Compensation, and Liability Act of
6 1980 (42 U.S.C. 9604(k)(3)(A)(ii)) is amended by strik-
7 ing “\$200,000 for each site to be remediated” and insert-
8 ing “\$500,000 for each site to be remediated, which limit
9 may be waived by the Administrator, but not to exceed
10 a total of \$650,000 for each site, based on the anticipated
11 level of contamination, size, or ownership status of the
12 site”.

13 **SEC. 6. ALLOWING ADMINISTRATIVE COSTS FOR GRANT**
14 **RECIPIENTS.**

15 Paragraph (5) of section 104(k) of the Comprehen-
16 sive Environmental Response, Compensation, and Liabil-
17 ity Act of 1980 (42 U.S.C. 9604(k)) (as redesignated by
18 section 3(1)) is amended—

19 (1) in subparagraph (B)—

20 (A) in clause (i)—

21 (i) by striking subclause (III); and

22 (ii) by redesignating subclauses (IV)

23 and (V) as subclauses (III) and (IV), re-
24 spectively;

25 (B) by striking clause (ii);

1 (C) by redesignating clause (iii) as clause
2 (ii); and

3 (D) in clause (ii) (as redesignated by sub-
4 paragraph (C)), by striking “Notwithstanding
5 clause (i)(IV)” and inserting “Notwithstanding
6 clause (i)(III)”; and

7 (2) by adding at the end the following:

8 “(E) ADMINISTRATIVE COSTS.—

9 “(i) IN GENERAL.—An eligible entity
10 may use up to 8 percent of the amounts
11 made available under a grant or loan
12 under this subsection for administrative
13 costs.

14 “(ii) RESTRICTION.—For purposes of
15 clause (i), the term ‘administrative costs’
16 does not include—

17 “(I) investigation and identifica-
18 tion of the extent of contamination;

19 “(II) design and performance of
20 a response action; or

21 “(III) monitoring of a natural re-
22 source.”.

1 SEC. 7. SMALL COMMUNITY TECHNICAL ASSISTANCE
2 GRANTS.

3 Paragraph (7)(A) of section 104(k) of the Com-
4 prehensive Environmental Response, Compensation, and
5 Liability Act of 1980 (42 U.S.C. 9604(k)) (as redesign-
6 nated by section 3(1)) is amended—

7 (1) by striking “The Administrator may pro-
8 vide,” and inserting the following:

9 “(i) DEFINITIONS.—In this subpara-
10 graph:

11 “(I) DISADVANTAGED AREA.—
12 The term ‘disadvantaged area’ means
13 an area with an annual median house-
14 hold income that is less than 80 per-
15 cent of the State-wide annual median
16 household income, as determined by
17 the latest available decennial census.

18 “(II) SMALL COMMUNITY.—The
19 term ‘small community’ means a com-
20 munity with a population of not more
21 than 15,000 individuals, as deter-
22 mined by the latest available decennial
23 census.

24 “(ii) ESTABLISHMENT OF PRO-
25 GRAM.—The Administrator shall establish

1 a program to provide grants that pro-
2 vide,"; and

3 (2) by adding at the end the following:

4 "(iii) SMALL OR DISADVANTAGED
5 COMMUNITY RECIPIENTS.—

6 "(I) IN GENERAL.—Subject to
7 subclause (II), in carrying out the
8 program under clause (ii), the Admin-
9 istrator shall use not more than
10 \$600,000 of the amounts made avail-
11 able to carry out this paragraph to
12 provide grants to States that receive
13 amounts under section 128(a) to as-
14 sist small communities, Indian tribes,
15 rural areas, or disadvantaged areas in
16 achieving the purposes described in
17 clause (ii).

18 "(II) LIMITATION.—Each grant
19 awarded under subclause (I) shall be
20 not more than \$7,500."

21 **SEC. 8. WATERFRONT BROWNFIELDS GRANTS.**

22 Section 104(k) of the Comprehensive Environmental
23 Response, Compensation, and Liability Act of 1980 (42
24 U.S.C. 9604(k)) is amended by inserting after paragraph
25 (10) (as redesignated by section 3(1)) the following:

1 “(11) WATERFRONT BROWNFIELD SITES.—

2 “(A) DEFINITION OF WATERFRONT
3 BROWNFIELD SITE.—In this paragraph, the
4 term ‘waterfront brownfield site’ means a
5 brownfield site that is adjacent to a body of
6 water or a federally designated floodplain.

7 “(B) REQUIREMENTS.—In providing
8 grants under this subsection, the Administrator
9 shall—

10 “(i) take into consideration whether
11 the brownfield site to be served by the
12 grant is a waterfront brownfield site; and

13 “(ii) give consideration to waterfront
14 brownfield sites.”.

15 **SEC. 9. CLEAN ENERGY BROWNFIELDS GRANTS.**

16 Section 104(k) of the Comprehensive Environmental
17 Response, Compensation, and Liability Act of 1980 (42
18 U.S.C. 9604(k)) (as amended by section 8) is amended
19 by inserting after paragraph (11) the following:

20 “(12) CLEAN ENERGY PROJECTS AT
21 BROWNFIELD SITES.—

22 “(A) DEFINITION OF CLEAN ENERGY
23 PROJECT.—In this paragraph, the term ‘clean
24 energy project’ means—

1 “(i) a facility that generates renew-
2 able electricity from wind, solar, or geo-
3 thermal energy; and

4 “(ii) any energy efficiency improve-
5 ment project at a facility, including com-
6 bined heat and power and district energy.

7 “(B) ESTABLISHMENT.—The Adminis-
8 trator shall establish a program to provide
9 grants—

10 “(i) to eligible entities to carry out in-
11 ventory, characterization, assessment,
12 planning, feasibility analysis, design, or re-
13 mediation activities to locate a clean en-
14 ergy project at 1 or more brownfield sites;
15 and

16 “(ii) to capitalize a revolving loan
17 fund for the purposes described in clause
18 (i).

19 “(C) MAXIMUM AMOUNT.—A grant under
20 this paragraph shall not exceed \$500,000.”.

21 **SEC. 10. TARGETED FUNDING FOR STATES.**

22 Paragraph (15) of section 104(k) of the Comprehen-
23 sive Environmental Response, Compensation, and Liabil-
24 ity Act of 1980 (42 U.S.C. 9604(k)) (as redesignated by

1 section 3(1)) is amended by adding at the end the fol-
2 lowing:

3 “(C) TARGETED FUNDING.—Of the
4 amounts made available under subparagraph
5 (A) for a fiscal year, the Administrator may use
6 not more than \$2,000,000 to provide grants to
7 States for purposes authorized under section
8 128(a), subject to the condition that each State
9 that receives a grant under this subparagraph
10 shall have used at least 50 percent of the
11 amounts made available to that State in the
12 previous fiscal year to carry out assessment and
13 remediation activities under section 128(a).”.

14 **SEC. 11. AUTHORIZATION OF APPROPRIATIONS.**

15 (a) BROWNFIELDS REVITALIZATION FUNDING.—
16 Paragraph (15)(A) of section 104(k) of the Comprehen-
17 sive Environmental Response, Compensation, and Liabil-
18 ity Act of 1980 (42 U.S.C. 9604(k)) (as redesignated by
19 section 3(1)) is amended by striking “2006” and inserting
20 “2018”.

21 (b) STATE RESPONSE PROGRAMS.—Section
22 128(a)(3) of the Comprehensive Environmental Response,
23 Compensation, and Liability Act of 1980 (42 U.S.C.

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13

1 9628(a)(3)) is amended by striking “2006” and inserting
2 “2018”.

○



II

114TH CONGRESS
2D SESSION

S. 2446

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.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 2016

Mr. HOEVEN (for himself and Mr. MANCHIN) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Improving Coal Combustion Residuals Regulation Act of
6 2016”.

1 (b) TABLE OF CONTENTS.—The table of contents for
 2 this Act is as follows:

Sec. 1. Short title and table of contents.
 Sec. 2. Management and disposal of coal combustion residuals.
 Sec. 3. Effect on regulatory determinations.
 Sec. 4. Technical assistance.
 Sec. 5. Federal Power Act.

3 **SEC. 2. MANAGEMENT AND DISPOSAL OF COAL COMBUS-**
 4 **TION RESIDUALS.**

5 (a) IN GENERAL.—Subtitle D of the Solid Waste Dis-
 6 posal Act (42 U.S.C. 6941 et seq.) is amended by adding
 7 at the end the following:

8 **“SEC. 4011. MANAGEMENT AND DISPOSAL OF COAL COM-**
 9 **BUSTION RESIDUALS.**

10 “(a) STATE PERMIT PROGRAMS FOR COAL COMBUS-
 11 TION RESIDUALS.—Each State may adopt and implement
 12 a coal combustion residuals permit program in accordance
 13 with this section.

14 “(b) STATE ACTIONS.—

15 “(1) NOTIFICATION.—Not later than 6 months
 16 after the date of enactment of this section, the Gov-
 17 ernor of each State shall notify the Administrator,
 18 in writing, whether such State will adopt and imple-
 19 ment a coal combustion residuals permit program.

20 “(2) APPLICATION FOR, AND APPROVAL OF,
 21 STATE COAL COMBUSTION RESIDUALS PERMIT PRO-
 22 GRAM.—

1 “(A) IN GENERAL.—Not later than 24
2 months after the date of enactment of this sec-
3 tion, each State that has notified the Adminis-
4 trator that it will adopt and implement a coal
5 combustion residuals permit program under
6 paragraph (1) shall submit to the Adminis-
7 trator an application for such coal combustion
8 residuals permit program for review and ap-
9 proval by the Administrator.

10 “(B) CONTENTS OF APPLICATION.—An ap-
11 plication submitted under this paragraph shall
12 include—

13 “(i) a letter identifying the lead State
14 implementing agency, signed by the head
15 of such agency;

16 “(ii) identification of any other State
17 agencies to be involved with the implemen-
18 tation of the coal combustion residuals per-
19 mit program;

20 “(iii) an explanation of how the State
21 coal combustion residuals permit program
22 will meet the requirements of this section,
23 including—

24 “(I) a description of the
25 State’s—

1 “(aa) process to inspect or
2 otherwise determine compliance
3 with such permit program;

4 “(bb) process to enforce the
5 requirements of such permit pro-
6 gram, including any enforcement
7 of the requirements of subsection
8 (c)(3)(A);

9 “(cc) public participation
10 process for the promulgation,
11 amendment, or repeal of regula-
12 tions for, and the issuance of
13 permits under, such permit pro-
14 gram;

15 “(dd) process for judicial re-
16 view;

17 “(ee) proposed or existing
18 statutes, regulations, or policies
19 pertaining to public access to in-
20 formation, including information
21 on groundwater monitoring data,
22 structural stability assessments,
23 emergency action plans, fugitive
24 dust control plans, notifications
25 of closure (including any certifi-

1 cation of closure by a qualified
2 professional engineer), and cor-
3 rective action remedies; and

4 “(ff) proposed coordination
5 plan under subsection (c)(1)(C);
6 and

7 “(II) if a State proposes to apply
8 a definition different from a definition
9 included in section 257.53 of title 40,
10 Code of Federal Regulations, for pur-
11 poses of the State coal combustion re-
12 siduals permit program, an expla-
13 nation of such application, including
14 an explanation of the reasonable basis
15 for applying such different definition,
16 in accordance with subsection (i)(4);

17 “(iv) a statement that the State has
18 in effect, at the time of application, stat-
19 utes or regulations necessary to implement
20 a coal combustion residuals permit pro-
21 gram that meets the requirements de-
22 scribed in subsection (c);

23 “(v) copies of State statutes and regu-
24 lations described in clause (iv);

1 “(vi) copies of any proposed forms
2 used to administer the coal combustion re-
3 siduals permit program; and

4 “(vii) such other information as the
5 Administrator may require.

6 “(C) APPROVAL.—

7 “(i) IN GENERAL.—The Administrator
8 may approve an application for a State
9 coal combustion residuals permit program
10 only if the Administrator determines that
11 such application demonstrates that the coal
12 combustion residuals permit program
13 meets the requirements described in sub-
14 section (c).

15 “(ii) EVIDENCE OF ADEQUACY.—In
16 evaluating an application for a State coal
17 combustion residuals permit program
18 under this paragraph, the Administrator
19 shall consider a State’s approved permit
20 program or other system of prior approval
21 and conditions under section 4005(c) or
22 authorized program under section 3006 as
23 evidence regarding the State’s ability to ef-
24 fectively implement a coal combustion re-
25 siduals program.

1 “(iii) ADOPTION BY STATE.—A State
2 may adopt and implement a coal combus-
3 tion residuals permit program if, not later
4 than 90 days after receipt of a complete
5 application under this paragraph (includ-
6 ing a revised application under subpara-
7 graph (D))—

8 “(I) the Administrator publishes
9 in the Federal Register a notice of the
10 Administrator’s decision to approve
11 such application; or

12 “(II) the Administrator does not
13 publish in the Federal Register a no-
14 tice of the Administrator’s decision to
15 approve or deny such application, in
16 which case such application shall be
17 deemed approved.

18 “(D) REVISED APPLICATION.—If the Ad-
19 ministrator denies an initial application for a
20 State coal combustion residuals program under
21 this paragraph—

22 “(i) the Administrator shall notify the
23 State of the reasons for such denial; and

24 “(ii) the State may, not later than 60
25 days after the date of such notification,

1 submit to the Administrator a revised ap-
2 plication for such coal combustion residu-
3 als permit program for review and ap-
4 proval by the Administrator.

5 “(c) REQUIREMENTS FOR A COAL COMBUSTION RE-
6 SIDUALS PERMIT PROGRAM.—A coal combustion residuals
7 permit program shall consist of the following:

8 “(1) GENERAL REQUIREMENTS.—

9 “(A) PERMITS.—The implementing agency
10 shall require that owners or operators of struc-
11 tures apply for and obtain permits incor-
12 porating the applicable requirements of the coal
13 combustion residuals permit program.

14 “(B) PUBLIC AVAILABILITY OF INFORMA-
15 TION.—The implementing agency shall ensure
16 that—

17 “(i) documents for permit determina-
18 tions are made publicly available for review
19 and comment under the public participa-
20 tion process of the coal combustion residu-
21 als permit program;

22 “(ii) final determinations on permit
23 applications are made publicly available;
24 and

1 “(iii) information regarding the exer-
2 cise by the implementing agency of any
3 discretionary authority granted under this
4 section and not provided for in the rule de-
5 scribed in subsection (i)(1) is made pub-
6 licly available.

7 “(C) COORDINATION PLAN.—The imple-
8 menting agency shall develop and maintain a
9 plan for coordination among States in the event
10 of a release that crosses State lines.

11 “(2) CRITERIA.—The implementing agency
12 shall apply the following criteria with respect to
13 structures:

14 “(A) DESIGN REQUIREMENTS.—For new
15 structures, including lateral expansions of exist-
16 ing structures, the criteria regarding design re-
17 quirements described in sections 257.70
18 through 257.72 of title 40, Code of Federal
19 Regulations, as applicable.

20 “(B) GROUNDWATER MONITORING AND
21 CORRECTIVE ACTION.—

22 “(i) IN GENERAL.—Except as pro-
23 vided in clause (ii), for all structures, the
24 criteria regarding groundwater monitoring
25 and corrective action requirements de-

1 scribed in sections 257.90 through 257.98
2 of title 40, Code of Federal Regulations,
3 including—

4 “(I) for the purposes of detection
5 monitoring, the constituents described
6 in appendix III to part 257 of such
7 title; and

8 “(II) for the purposes of assess-
9 ment monitoring, establishing a
10 groundwater protection standard, and
11 assessment of corrective measures, the
12 constituents described in appendix IV
13 to part 257 of such title.

14 “(ii) EXCEPTIONS AND ADDITIONAL
15 AUTHORITY.—

16 “(I) ALTERNATIVE POINT OF
17 COMPLIANCE.—Notwithstanding sec-
18 tion 257.91(a)(2) of title 40, Code of
19 Federal Regulations, the imple-
20 menting agency may establish the rel-
21 evant point of compliance for the
22 down-gradient monitoring system as
23 provided in section 258.51(a)(2) of
24 such title.

1 “(II) ALTERNATIVE GROUND-
2 WATER PROTECTION STANDARDS.—
3 Notwithstanding section 257.95(h) of
4 title 40, Code of Federal Regulations,
5 the implementing agency may estab-
6 lish an alternative groundwater pro-
7 tection standard as provided in section
8 258.55(i) of such title.

9 “(III) ABILITY TO DETERMINE
10 THAT CORRECTIVE ACTION IS NOT
11 NECESSARY OR TECHNICALLY FEA-
12 SIBLE.—Notwithstanding section
13 257.97 of title 40, Code of Federal
14 Regulations, the implementing agency
15 may determine that remediation of a
16 release to groundwater from a struc-
17 ture is not necessary as provided in
18 section 258.57(e) of such title.

19 “(C) CLOSURE.—For all structures, the
20 criteria for closure described in sections
21 257.101, 257.102, and 257.103 of title 40,
22 Code of Federal Regulations, except the criteria
23 described in section 257.101(b)(1) of such title
24 shall not apply to existing structures that com-
25 ply with the criteria described in section 257.60

1 of such title by making a demonstration in ac-
2 cordance with subparagraph (E) of this para-
3 graph.

4 “(D) POST-CLOSURE.—For all structures,
5 the criteria for post-closure care described in
6 section 257.104 of title 40, Code of Federal
7 Regulations.

8 “(E) LOCATION RESTRICTIONS.—For all
9 structures, the criteria for location restrictions
10 described in sections 257.60 through 257.64 of
11 title 40, Code of Federal Regulations, except—

12 “(i) for existing structures that are
13 landfills, sections 257.60 through 257.63
14 shall not apply; and

15 “(ii) the owner or operator of an ex-
16 isting structure that is a surface impound-
17 ment may comply with the criteria de-
18 scribed in section 257.60 of such title by
19 demonstrating that—

20 “(I) the design and construction
21 of the existing structure that is a sur-
22 face impoundment will prevent an
23 intermittent, recurring, or sustained
24 hydraulic connection between any por-
25 tion of the base of the structure and

1 the upper limit of the uppermost aqui-
2 fer; and

3 “(II) the existing structure that
4 is a surface impoundment is designed
5 and constructed to prevent the release
6 of the constituents listed in appen-
7 dices III and IV to part 257 of such
8 title at levels above the groundwater
9 protection standards established under
10 this section.

11 “(F) AIR CRITERIA.—For all structures,
12 the criteria for air quality described in section
13 257.80 of title 40, Code of Federal Regulations.

14 “(G) FINANCIAL ASSURANCE.—For all
15 structures, the criteria for financial assurance
16 described in subpart G of part 258 of title 40,
17 Code of Federal Regulations.

18 “(H) RECORDKEEPING.—For all struc-
19 tures, the criteria for recordkeeping described
20 in section 257.105 of title 40, Code of Federal
21 Regulations.

22 “(I) RUN-ON AND RUN-OFF CONTROLS.—
23 For all structures that are landfills, sand or
24 gravel pits, or quarries, the criteria for run-on

1 and run-off control described in section 257.81
2 of title 40, Code of Federal Regulations.

3 “(J) HYDROLOGIC AND HYDRAULIC CAPAC-
4 ITY REQUIREMENTS.—For all structures that
5 are surface impoundments, the criteria for in-
6 flow design flood control systems described in
7 section 257.82 of title 40, Code of Federal Reg-
8 ulations.

9 “(K) STRUCTURAL INTEGRITY.—For
10 structures that are surface impoundments, the
11 criteria for structural integrity described in sec-
12 tions 257.73 and 257.74 of title 40, Code of
13 Federal Regulations.

14 “(L) INSPECTIONS.—For all structures,
15 the criteria described in sections 257.83 and
16 257.84 of title 40, Code of Federal Regulations.

17 “(M) PUBLIC AVAILABILITY OF INFORMA-
18 TION.—For all structures, the criteria described
19 in section 257.107 of title 40, Code of Federal
20 Regulations.

21 “(N) NOTIFICATION.—For all structures,
22 the criteria described in section 257.106 of title
23 40, Code of Federal Regulations.

24 “(3) PERMIT PROGRAM IMPLEMENTATION FOR
25 EXISTING STRUCTURES.—

1 “(A) COMPLIANCE WITH CERTAIN RE-
2 QUIREMENTS.—

3 “(i) INITIAL DEADLINES.—The State,
4 in the case of a State that has notified the
5 Administrator under subsection (b)(1) that
6 it will adopt and implement a coal combus-
7 tion residuals permit program, or the Ad-
8 ministrator, in the case of each other
9 State, shall require owners or operators of
10 existing structures to comply with—

11 “(I) as of October 19, 2015, the
12 requirements under paragraphs
13 (2)(F), (2)(H), and (2)(L);

14 “(II) not later than 6 months
15 after the date of enactment of this
16 section, the requirement under para-
17 graph (2)(G); and

18 “(III) not later than 12 months
19 after the date of enactment of this
20 section, the requirements under para-
21 graphs (2)(A), (2)(I), (2)(J), (2)(K),
22 and the requirement for a written clo-
23 sure plan under the criteria described
24 in paragraph 2(C).

1 “(ii) SUBSEQUENT DEADLINES.—The
2 implementing agency shall require owners
3 or operators of existing structures to com-
4 ply with—

5 “(I) not later than 24 months
6 after the date of enactment of this
7 section, the requirements under para-
8 graph (2)(B); and

9 “(II) not later than 36 months
10 after the date of enactment of this
11 section, the requirements under para-
12 graph (2)(E).

13 “(B) PERMITS.—Not later than 72 months
14 after the date of enactment of this section, the
15 implementing agency shall issue, with respect to
16 an existing structure, a final permit incor-
17 porating the applicable requirements of the coal
18 combustion residuals permit program, or a final
19 denial of an application submitted requesting
20 such a permit.

21 “(C) EFFECT OF COMPLIANCE.—

22 “(i) INTERIM REQUIREMENTS.—Prior
23 to the date on which a final permit or final
24 denial is issued under subparagraph (B),
25 compliance with the requirements of sub-

1 paragraph (A), as determined by the State
2 or Administrator, as applicable, shall con-
3 stitute compliance with the requirements of
4 this section and the rule described in sub-
5 section (i)(1) for the purpose of enforce-
6 ment.

7 “(ii) FINAL PERMIT.—Compliance
8 with a final permit issued by the imple-
9 menting agency, as determined by the im-
10 plementing agency, shall constitute compli-
11 ance with this section and the rule de-
12 scribed in subsection (i)(1) for the purpose
13 of enforcement.

14 “(4) REQUIREMENTS FOR INACTIVE COAL COM-
15 BUSTION RESIDUALS SURFACE IMPOUNDMENTS.—

16 “(A) NOTICE.—Not later than 2 months
17 after the date of enactment of this section, each
18 owner or operator of an inactive coal combus-
19 tion residuals surface impoundment shall sub-
20 mit to the Administrator and the State in which
21 such inactive coal combustion residuals surface
22 impoundment is located a notice stating wheth-
23 er such inactive coal combustion residuals sur-
24 face impoundment will—

1 “(i) not later than 3 years after the
2 date of enactment of this section, complete
3 closure in accordance with section 257.100
4 of title 40, Code of Federal Regulations; or

5 “(ii) comply with the requirements of
6 the coal combustion residuals permit pro-
7 gram applicable to existing structures that
8 are surface impoundments (except as pro-
9 vided in subparagraph (C)(ii)).

10 “(B) FINANCIAL ASSURANCE.—The imple-
11 menting agency shall require the owner or oper-
12 ator of an inactive surface impoundment that
13 has closed pursuant to this paragraph to per-
14 form post-closure care in accordance with the
15 criteria described in section 257.104(b)(1) of
16 title 40, Code of Federal Regulations, and to
17 provide financial assurance for such post-clo-
18 sure care in accordance with the criteria de-
19 scribed in section 258.72 of such title.

20 “(C) TREATMENT AS STRUCTURE.—

21 “(i) IN GENERAL.—An inactive coal
22 combustion residuals surface impoundment
23 shall be treated as an existing structure
24 that is a surface impoundment for the pur-
25 poses of this section, including with respect

1 to the requirements of paragraphs (1) and
2 (2), if—

3 “(I) the owner or operator does
4 not submit a notice in accordance
5 with subparagraph (A); or

6 “(II) the owner or operator sub-
7 mits a notice described in subpara-
8 graph (A)(ii).

9 “(ii) INACTIVE COAL COMBUSTION RE-
10 SIDUALS SURFACE IMPOUNDMENTS THAT
11 FAIL TO CLOSE.—An inactive coal combus-
12 tion residuals surface impoundment for
13 which the owner or operator submits a no-
14 tice described in subparagraph (A)(i) that
15 does not close by the deadline provided
16 under subparagraph (A)(i) shall be treated
17 as an existing structure for purposes of
18 this section beginning on the date that is
19 the day after such applicable deadline, in-
20 cluding by—

21 “(I) being required to comply
22 with the requirements of paragraph
23 (1), as applicable; and

1 “(II) being required to comply,
2 beginning on such date, with each re-
3 quirement of paragraph (2).

4 “(d) IMPLEMENTATION BY ADMINISTRATOR.—

5 “(1) FEDERAL BACKSTOP AUTHORITY.—The
6 Administrator shall implement a coal combustion re-
7 siduals permit program for a State if—

8 “(A) the Governor of the State notifies the
9 Administrator under subsection (b)(1) that the
10 State will not adopt and implement a coal com-
11 bustion residuals permit program;

12 “(B) the State fails to submit a notifica-
13 tion or an application by the applicable deadline
14 under subsection (b);

15 “(C) the Administrator denies an applica-
16 tion submitted by a State under subsection
17 (b)(2) and, if applicable, any revised application
18 submitted by the State under subparagraph (E)
19 of such subsection;

20 “(D) the State informs the Administrator,
21 in writing, that such State will no longer imple-
22 ment such a permit program; or

23 “(E) the Administrator withdraws approval
24 of a State coal combustion residuals program
25 after the Administrator—

1 “(i) determines that the State is not
2 implementing a coal combustion residuals
3 permit program approved under this sec-
4 tion in accordance with the requirements
5 of this section;

6 “(ii) notifies the State of such deter-
7 mination, including the reasons for such
8 determination and the particular defi-
9 ciencies that need to be remedied; and

10 “(iii) after allowing the State to take
11 actions to remedy such deficiencies within
12 a reasonable time, not to exceed 90 days,
13 the Administrator determines that the
14 State has not remedied such deficiencies.

15 “(2) REVIEW.—A State may obtain a review of
16 a determination by the Administrator under para-
17 graph (1)(E)(iii) as if the determination were a final
18 regulation for purposes of section 7006.

19 “(3) INDIAN COUNTRY.—The Administrator
20 shall implement a coal combustion residuals permit
21 program in Indian country.

22 “(4) REQUIREMENTS.—If the Administrator
23 implements a coal combustion residuals permit pro-
24 gram under paragraph (1) or (3), the permit pro-

1 gram shall consist of the requirements described in
2 subsection (c).

3 “(5) ENFORCEMENT.—If the Administrator im-
4 plements a coal combustion residuals permit pro-
5 gram for a State under paragraph (1) or in Indian
6 country under paragraph (3)—

7 “(A) the authorities referred to in section
8 4005(c)(2)(A) shall apply with respect to coal
9 combustion residuals, structures, and inactive
10 coal combustion residuals surface impound-
11 ments for which the Administrator is imple-
12 menting the coal combustion residuals permit
13 program; and

14 “(B) the Administrator may use those au-
15 thorities to inspect, gather information, and en-
16 force the requirements of this section in the
17 State or Indian country.

18 “(6) PUBLIC PARTICIPATION PROCESS.—If the
19 Administrator implements a coal combustion residu-
20 als permit program under this subsection, the Ad-
21 ministrator shall provide a 30-day period for the
22 public participation process required under sub-
23 section (c)(1)(B)(i).

24 “(e) STATE CONTROL AFTER IMPLEMENTATION BY
25 ADMINISTRATOR.—

1 “(1) NEW ADOPTION BY STATE.—For a State
2 for which the Administrator is implementing a coal
3 combustion residuals permit program under sub-
4 paragraphs (A) through (D) of subsection (d), the
5 State may adopt and implement such a permit pro-
6 gram through the application process described in
7 subsection (b)(2) (notwithstanding the deadline de-
8 scribed in subparagraph (A) of such subsection). An
9 application submitted pursuant to this paragraph
10 shall include a timeline for transition to the State
11 coal combustion residuals permit program.

12 “(2) RESUMPTION AFTER REMEDYING DEFI-
13 CIENT PERMIT PROGRAM.—

14 “(A) PROCESS.—For a State for which the
15 Administrator is implementing a coal combus-
16 tion residuals permit program under subpara-
17 graph (E) of subsection (d)(1), the State may
18 adopt and implement such a permit program
19 if—

20 “(i) the State remedies only the defi-
21 ciencies included in the notice described in
22 such subparagraph; and

23 “(ii) by the date that is 90 days after
24 the date on which the State notifies the

1 Administrator that the deficiencies have
2 been remedied—

3 “(I) the Administrator publishes
4 in the Federal Register—

5 “(aa) a determination, after
6 providing a 30-day period for no-
7 tice and public comment, that the
8 deficiencies included in such no-
9 tice have been remedied; and

10 “(bb) a timeline for transi-
11 tion to the State coal combustion
12 residuals permit program; or

13 “(II) the Administrator does not
14 publish in the Federal Register a de-
15 termination regarding whether the de-
16 ficiencies included in such notice been
17 remedied, in which case such defi-
18 ciencies shall be deemed remedied.

19 “(B) REVIEW.—A State may obtain a re-
20 view of a determination by the Administrator
21 under this paragraph as if such determination
22 were a final regulation for purposes of section
23 7006.

24 “(f) IMPLEMENTATION DURING TRANSITION.—

1 “(1) EFFECT ON ACTIONS AND ORDERS.—Pro-
2 gram requirements of, and actions taken or orders
3 issued pursuant to, a coal combustion residuals per-
4 mit program shall remain in effect if—

5 “(A) a State takes control of its coal com-
6 bustion residuals permit program from the Ad-
7 ministrator under subsection (e); or

8 “(B) the Administrator takes control of a
9 coal combustion residuals permit program from
10 a State under subsection (d).

11 “(2) CHANGE IN REQUIREMENTS.—Paragraph
12 (1) shall apply to such program requirements, ac-
13 tions, and orders until such time as—

14 “(A) the implementing agency that took
15 control of the coal combustion residuals permit
16 program changes the requirements of the coal
17 combustion residuals permit program with re-
18 spect to the basis for the action or order; or

19 “(B) with respect to an ongoing corrective
20 action, the State or the Administrator, which-
21 ever took the action or issued the order, cer-
22 tifies the completion of the corrective action
23 that is the subject of the action or order.

24 “(3) SINGLE PERMIT PROGRAM.—Except as
25 otherwise provided in this subsection—

1 “(A) if a State adopts and implements a
2 coal combustion residuals permit program
3 under subsection (e), the Administrator shall
4 cease to implement the coal combustion residu-
5 als permit program implemented under sub-
6 section (d) for such State; and

7 “(B) if the Administrator implements a
8 coal combustion residuals permit program for a
9 State under subsection (d)(1), the State shall
10 cease to implement its coal combustion residu-
11 als permit program.

12 “(g) AUTHORITY.—

13 “(1) STATE AUTHORITY.—Nothing in this sec-
14 tion shall preclude or deny any right of any State to
15 adopt or enforce any regulation or requirement re-
16 specting coal combustion residuals that is more
17 stringent or broader in scope than a regulation or
18 requirement under this section.

19 “(2) AUTHORITY OF THE ADMINISTRATOR.—

20 “(A) IN GENERAL.—Except as provided in
21 subsections (d) and (f) of this section and sec-
22 tion 6005, the Administrator shall, with respect
23 to the regulation of coal combustion residuals
24 under this Act, defer to the States pursuant to
25 this section.

1 “(B) IMMINENT HAZARD.—Nothing in this
2 section shall be construed as affecting the au-
3 thority of the Administrator under section 7003
4 with respect to coal combustion residuals.

5 “(C) ENFORCEMENT ASSISTANCE ONLY
6 UPON REQUEST.—Upon request from the head
7 of a lead State implementing agency, the Ad-
8 ministrator may, including through the use of
9 the authorities referred to in section
10 4005(c)(2)(A), provide to such State agency
11 only the enforcement assistance requested.

12 “(D) CONCURRENT ENFORCEMENT.—Ex-
13 cept as provided in subparagraph (C) of this
14 paragraph and subsection (f), the Administrator
15 shall not have concurrent enforcement authority
16 when a State is implementing a coal combustion
17 residuals permit program, including during any
18 period of interim operation described in sub-
19 section (e)(3)(C).

20 “(3) CITIZEN SUITS.—Nothing in this section
21 shall be construed to affect the authority of a person
22 to commence a civil action in accordance with sec-
23 tion 7002.

24 “(h) USE OF COAL COMBUSTION RESIDUALS.—

1 “(1) IN GENERAL.—Except as provided in para-
2 graph (2), use of coal combustion residuals in any
3 of the following ways, and storage prior to such use,
4 shall not be considered to be receipt of coal combus-
5 tion residuals for the purposes of this section:

6 “(A) Use as—

7 “(i) engineered structural fill con-
8 structed in accordance with—

9 “(I) ASTM E2277 entitled
10 ‘Standard Guide for Design and Con-
11 struction of Coal Ash Structural
12 Fills’, including any amendment or re-
13 vision to that guidance;

14 “(II) any other published na-
15 tional standard determined appro-
16 priate by the implementing agency, in-
17 cluding standards issued by the Amer-
18 ican Association of State and High-
19 way Transportation Officials and the
20 Federal Highway Administration; or

21 “(III) a State standard or pro-
22 gram relating to—

23 “(aa) fill operations for coal
24 combustion residuals; or

- 1 “(bb) the management of
2 coal combustion residuals for
3 beneficial use; or
4 “(ii) engineered structural fill for—
5 “(I) a building site or foundation;
6 “(II) a base or embankment for
7 a bridge, roadway, runway, or rail-
8 road; or
9 “(III) a dike, levee, berm, or dam
10 that is not part of a structure.
11 “(B) Beneficial use—
12 “(i) that provides a functional benefit;
13 “(ii) that is a substitute for the use of
14 a virgin material; and
15 “(iii) that meets relevant product
16 specifications and regulatory or design
17 standards, if any, including standards
18 issued by voluntary consensus standards
19 bodies such as ASTM International and
20 the American Concrete Institute.
21 “(2) EXCEPTION.—With respect to a use de-
22 scribed in paragraph (1) that involves placement on
23 the land of coal combustion residuals in non-road-
24 way and non-highway applications, the implementing
25 agency may, on a case-by-case basis, determine that

1 long-term storage of coal combustion residuals at the
2 generating facility for such a use or permanent
3 unencapsulated use of very large volumes of coal
4 combustion residuals constitutes receipt of coal com-
5 bustion residuals for the purposes of this section if
6 the storage or use results in releases of hazardous
7 constituents to groundwater, surface water, soil, or
8 air—

9 “(A) in greater amounts than those that
10 would occur from long-term storage or use of a
11 material that would be used instead of coal
12 combustion residuals; or

13 “(B) that exceed relevant regulatory and
14 health-based benchmarks, as determined by the
15 implementing agency.

16 “(i) EFFECT OF RULE.—

17 “(1) IN GENERAL.—With respect to the final
18 rule entitled ‘Hazardous and Solid Waste Manage-
19 ment System; Disposal of Coal Combustion Residu-
20 als from Electric Utilities’ and published in the Fed-
21 eral Register on April 17, 2015 (80 Fed. Reg.
22 21302)—

23 “(A) such rule shall be implemented only
24 through a coal combustion residuals permit pro-
25 gram under this section; and

1 “(B) to the extent that any provision or re-
2 quirement of such rule conflicts, or is incon-
3 sistent, with a provision or requirement of this
4 section, the provision or requirement of this
5 section shall control.

6 “(2) EFFECTIVE DATE.—For purposes of this
7 section, any reference in part 257 of title 40, Code
8 of Federal Regulations, to the effective date of such
9 part shall be considered to be a reference to the date
10 of enactment of this section, except that, in the case
11 of any deadline established by such a reference that
12 is in conflict with a deadline established by this sec-
13 tion, the deadline established by this section shall
14 control.

15 “(3) APPLICABILITY OF OTHER REGULA-
16 TIONS.—The application of section 257.52 of title
17 40, Code of Federal Regulations, is not affected by
18 this section.

19 “(4) DEFINITIONS.—The definitions under sec-
20 tion 257.53 of title 40, Code of Federal Regulations,
21 shall apply with respect to any criteria described in
22 subsection (c) the requirements of which are incor-
23 porated into a coal combustion residuals permit pro-
24 gram under this section, except—

25 “(A) as provided in paragraph (1); and

1 “(B) a lead State implementing agency
2 may apply different definitions if—

3 “(i) the different definitions do not
4 conflict with the definitions in subsection
5 (j); and

6 “(ii) the lead State implementing
7 agency—

8 “(I) identifies the different defi-
9 nitions in the explanation included
10 with the application submitted under
11 subsection (b)(2); and

12 “(II) provides in such expla-
13 nation a reasonable basis for the ap-
14 plication of the different definitions.

15 “(j) DEFINITIONS.—In this section:

16 “(1) COAL COMBUSTION RESIDUALS.—The
17 term ‘coal combustion residuals’ means the following
18 wastes generated by electric utilities and inde-
19 pendent power producers:

20 “(A) The solid wastes listed in section
21 3001(b)(3)(A)(i) that are generated primarily
22 from the combustion of coal, including recover-
23 able materials from such wastes.

24 “(B) Coal combustion wastes that are co-
25 managed with wastes produced in conjunction

1 with the combustion of coal, provided that such
2 wastes are not segregated and disposed of sepa-
3 rately from the coal combustion wastes and
4 comprise a relatively small proportion of the
5 total wastes being disposed in the structure.

6 “(C) Fluidized bed combustion wastes that
7 are generated primarily from the combustion of
8 coal.

9 “(D) Wastes from the co-burning of coal
10 with non-hazardous secondary materials, pro-
11 vided that coal makes up at least 50 percent of
12 the total fuel burned.

13 “(E) Wastes from the co-burning of coal
14 with materials described in subparagraph (A)
15 that are recovered from monofills.

16 “(2) COAL COMBUSTION RESIDUALS PERMIT
17 PROGRAM.—The term ‘coal combustion residuals
18 permit program’ means all of the authorities, activi-
19 ties, and procedures that comprise a system of prior
20 approval and conditions implemented under this sec-
21 tion to regulate the management and disposal of coal
22 combustion residuals.

23 “(3) ELECTRIC UTILITY; INDEPENDENT POWER
24 PRODUCER.—The terms ‘electric utility’ and ‘inde-
25 pendent power producer’ include only electric utili-

1 ties and independent power producers that produce
2 electricity on or after the date of enactment of this
3 section.

4 “(4) EXISTING STRUCTURE.—The term ‘exist-
5 ing structure’ means a structure the construction of
6 which commenced before the date of enactment of
7 this section.

8 “(5) IMPLEMENTING AGENCY.—The term ‘im-
9 plementing agency’ means the agency responsible for
10 implementing a coal combustion residuals permit
11 program, which shall either be the lead State imple-
12 menting agency identified under subsection
13 (b)(2)(B)(i) or the Administrator pursuant to sub-
14 section (d).

15 “(6) INACTIVE COAL COMBUSTION RESIDUALS
16 SURFACE IMPOUNDMENT.—The term ‘inactive coal
17 combustion residuals surface impoundment’ means a
18 surface impoundment, located at an electric utility
19 or independent power producer, that, as of the date
20 of enactment of this section—

21 “(A) does not receive coal combustion re-
22 siduals;

23 “(B) contains coal combustion residuals;

24 and

25 “(C) contains liquid.

1 “(7) INDIAN COUNTRY.—The term ‘Indian
2 country’ has the meaning given that term in section
3 1151 of title 18, United States Code.

4 “(8) STRUCTURE.—

5 “(A) IN GENERAL.—Except as provided in
6 subparagraph (B), the term ‘structure’ means a
7 landfill, surface impoundment, sand or gravel
8 pit, or quarry that receives coal combustion re-
9 siduals on or after the date of enactment of this
10 section.

11 “(B) EXCEPTIONS.—

12 “(i) MUNICIPAL SOLID WASTE LAND-
13 FILLS.—The term ‘structure’ does not in-
14 clude a municipal solid waste landfill meet-
15 ing the revised criteria promulgated under
16 section 4010(c).

17 “(ii) COAL MINES.—The term ‘struc-
18 ture’ does not include the location of sur-
19 face coal mining and reclamation oper-
20 ations or surface coal mining operations
21 (as those terms are defined in section 701
22 of the Surface Mining Control and Rec-
23 lamation Act of 1977 (30 U.S.C. 1291)) or
24 an active or abandoned underground coal
25 mine.

1 “(iii) DE MINIMIS RECEIPT.—The
 2 term ‘structure’ does not include any land-
 3 fill or surface impoundment that receives
 4 only de minimis quantities of coal combus-
 5 tion residuals if the presence of coal com-
 6 bustion residuals is incidental to the mate-
 7 rial managed in the landfill or surface im-
 8 poundment.

9 “(9) UNLINED SURFACE IMPOUNDMENT.—The
 10 term ‘unlined surface impoundment’ means a sur-
 11 face impoundment that does not have a liner system
 12 described in section 257.71 of title 40, Code of Fed-
 13 eral Regulations.”.

14 (b) CONFORMING AMENDMENT.—The table of con-
 15 tents contained in section 1001 of the Solid Waste Dis-
 16 posal Act is amended by inserting after the item relating
 17 to section 4010 the following:

 “Sec. 4011. Management and disposal of coal combustion residuals.”.

18 **SEC. 3. EFFECT ON REGULATORY DETERMINATIONS.**

19 Nothing in this Act, or the amendments made by this
 20 Act, shall be construed to alter in any manner the effect
 21 on coal combustion residuals (as defined in section 4011
 22 of the Solid Waste Disposal Act, as added by this Act)
 23 of the Environmental Protection Agency’s regulatory de-
 24 terminations entitled—

1 (1) “Notice of Regulatory Determination on
2 Wastes From the Combustion of Fossil Fuels”, pub-
3 lished at 65 Fed. Reg. 32214 (May 22, 2000); and

4 (2) “Final Regulatory Determination on Four
5 Large-Volume Wastes From the Combustion of Coal
6 by Electric Utility Power Plants”, published at 58
7 Fed. Reg. 42466 (August 9, 1993).

8 **SEC. 4. TECHNICAL ASSISTANCE.**

9 Nothing in this Act, or the amendments made by this
10 Act, shall be construed to affect the authority of a State
11 to request, or the Administrator of the Environmental
12 Protection Agency to provide, technical assistance under
13 the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

14 **SEC. 5. FEDERAL POWER ACT.**

15 Nothing in this Act, or the amendments made by this
16 Act, shall be construed to affect the obligations of an
17 owner or operator of a structure (as such term is defined
18 in section 4011 of the Solid Waste Disposal Act, as added
19 by this Act) under section 215(b)(1) of the Federal Power
20 Act (16 U.S.C. 824o(b)(1)).

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