

Hearing of the Senate Environment & Public Works Committee

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On Behalf of the American Public Power Association
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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 Hoeven-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 Hoeven-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.