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

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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.

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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 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 <u>not</u> 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 <u>closure</u> of the waste unit. <u>The MSWLF criteria do not include financial assurance for catastrophic releases, contamination of groundwater, and cleanup</u>. 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 assess-ment, 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)