

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

April 13, 2015

To: Committee on Energy and Commerce Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Full Committee Markup of H.R. 906, a bill to Modify the Efficiency Standards for Grid-Enabled Water Heaters; H.R. __, the “Improving Coal Combustion Residuals Regulation Act of 2015 and, H.R. __, the “Data Security and Breach Notification Act of 2015.”

On Tuesday, April 14, 2015, at 5:00 p.m. in room 2123 of the Rayburn House Office Building, the full Committee on Energy and Commerce will meet in open markup session for opening statements on H.R. 906, a bill to modify the efficiency standards for grid-enabled water heaters; H.R. __, the “Improving Coal Combustion Residuals Regulation Act of 2015;” and H.R. __, the “Data Security and Breach Notification Act of 2015”. The Committee will reconvene on Wednesday, April 15, at 10:00 a.m. in 2123 Rayburn House Office Building.

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

On April 16, 2010, the Department of Energy (DOE) published in the Federal Register a final rule establishing new energy efficiency standards for a number of products including most residential water heaters.¹ DOE initiated the rulemaking in 2006, and the final rule represents the first updating of standards for water heaters since January 2001.² The standards, which will take effect on April 16, 2015, cover all residential water heaters with the exception of “tabletop and electric instantaneous models.”³ The universe of water heater technology covered by the new

¹ Department of Energy, *Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters*, 75 Fed. Reg. 20112 (Apr. 16, 2010) (online at www.gpo.gov/fdsys/pkg/FR-2010-04-16/pdf/2010-7611.pdf).

² Id. at 20112.

³ Id.

standards includes what is commonly referred to as large capacity, electric resistance water heaters. In DOE's rulemaking they are defined as electric storage water heaters with tank storage of greater than 80 gallons.⁴

H.R. 906, sponsored by Chairman Whitfield and cosponsored by a number of Democratic and Republican Committee members allows for the continued sale and use of large capacity, electric resistance water heaters by amending EPCA Title III Part B to require creation of a new, separate efficiency standard for such units, referred to as a "grid-enabled water heater".⁵

The bill defines a grid-enabled water heater as an electric resistance water heater with rated storage tank volume of more than 75 gallons that is manufactured on or after April 16, 2016. An activation lock is required (either a physical device directly on the water heater or a control system integrated into the water heater) that is locked by default and contains a physical, software, or digital communication that must be activated to enable the product to operate at its designed specifications and capabilities. Without activation, the product will not be able to provide more than 50% of the delivery of hot water as certified by the manufacturer. The activation key can only be provided by the manufacturer to a utility or other company that operates an electric thermal storage or demand response.

The Energy and Power Subcommittee held a hearing on H.R. 906 on March 18, 2015. Although this is the first time the Energy and Commerce Committee is marking up legislation on grid-enabled water heaters, the bipartisan, consensus language contained in H.R. 906 has passed the House numerous times and is currently pending before the House as part of S. 535, the Portman-Shaheen efficiency bill, which recently passed the Senate.

Chairman Whitfield will offer an amendment to modify the definition of grid-enabled water heaters to include large capacity, electric resistance water heaters manufactured on or after April 16th of this year; the bill as introduced only includes those units manufactured on or after April 16, 2016. No other amendments are expected.

II. H.R. __, IMPROVING COAL COMBUSTION RESIDUALS REGULATION ACT OF 2015

The Subcommittee on Environment and the Economy held a legislative hearing on the Improving Coal Combustion Residuals Regulation Act on March 18, and March 24, 2015. On March 24-25, 2015, the Subcommittee convened a markup of a slightly revised version of the bill.

Two Democratic amendments were offered to improve the legislation, but they were defeated along party lines. Mr. Pallone offered an amendment to ensure that all of the requirements in EPA's final rule were incorporated into state permit programs, but was defeated by a roll call vote: 6-12. Mrs. Capps offered an amendment to ensure that state permit programs

⁴ Id.

⁵ H.R. 906, a bill to modify the efficiency standards for grid-enabled water heaters § 1(6)(A)(ii).

were required to be protective of human health and the environment, but was similarly defeated by a roll call vote: 8-12. The bill was ordered favorably forwarded to the full Committee by a roll call vote: 16-5.

A. Changes in the Text for Markup

The version of the bill to be considered at full committee markup includes slight revisions, which begin to address two of the major concerns raised at the legislative hearing. First, the draft now includes a requirement that states make information available to the public on an internet website. This revision addresses one of the concerns raised about limitations on public access to information. Second, the draft adds some limits to the discretion a state is afforded in choosing not to apply the Rule's requirements to address releases, but still affords discretion not included in the Rule. Other concerns and deficiencies remain, as described below.

B. The Discussion Draft Still Weakens Requirements for Public Access to Information

The EPA rule requires that companies make a substantial amount of operations and compliance data, including specific monitoring data, publicly available on an internet site, without exception for information that a company may consider confidential.⁶ The bill removes many of the specific posting requirements, creates exceptions for information that is claimed to be confidential, and gives discretion to states and facilities to decide how and what information is shared publicly.⁷ The latest version of the discussion draft adds a requirement that the information be made available on an internet website, strengthening one aspect of these requirements.⁸

C. The Discussion Draft Still Fails to Require That Every Permit Program Contain the Minimum Requirements Specified In the Bill.

The newest version of the discussion draft would still grant states significant discretion to change those requirements, or to enforce "alternative" requirements in their place. The following are key examples:

- **Groundwater Protection Standards.** The EPA Final Rule establishes minimum requirements for groundwater monitoring and groundwater protection in all states.⁹

⁶ EPA Final Rule, for a full discussion of the treatment of requirement to post information that may be considered confidential, see page 129.

⁷ Majority Discussion Draft, Subsection (c)(1)(B) and Subsection (l)(5).

⁸ Majority Discussion Draft §(c)(1)(B).

⁹ U.S. EPA, Prepublication Version of Final Rule, "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities" (December 19, 2014) (online at: <http://www2.epa.gov/coalash/pre-publication-version-coal-combustion-residuals-final-rule>). Note: official version is forthcoming in a Federal Register publication, which will appear on Regulations.gov in Docket No. EPA-HQ-RCRA-2009-0640, at pages 671-691 (Hereinafter, "EPA Final Rule").

The discussion draft, in contrast, gives states discretion to choose lower groundwater protection standards and weaken monitoring requirements by altering monitoring parameters and choosing alternative points of compliance away from the disposal boundary.¹⁰ The new version makes no changes to these requirements.

- **Cleanup Requirements.** Where the Final Rule requires all releases and groundwater contamination to be addressed,¹¹ the bill allows states to decide that groundwater contamination and other pollution need not be cleaned up.¹² The only limits on this state discretion are borrowed from municipal solid waste regulation.¹³ As noted above, the new version adds some limits to this discretion, but still affords greater discretion than the Rule, which would have applied cleanup requirements in all cases.¹⁴
- **Scope of Requirements.** Unlike the Final Rule, the discussion draft gives States broad discretion to redefine major terms, including terms that set the scope of permit requirements. For example, states have discretion to define “landfills” to exclude waste piles, to define “surface impoundments” to exclude impoundments below a certain size, and “aquifer” to exclude aquifers not currently serving as drinking water sources.¹⁵ All of these definitions have the potential to exempt structures that would be covered by minimum requirements in some states from coverage in others. The new version does not change this discretion.

D. The Minimum Requirements in the Discussion Draft Fall Short of Those in EPA’s Final Rule.

The requirements laid out in the most recent version of the discussion draft still fall short in significant ways of the requirements that are set forth in the Final Rule. In addition to the weakening alternatives discussed above, the following protective requirements in the Final Rule are not required by the discussion draft:

- **Location Restrictions.** The EPA Final Rule prohibits or restricts coal ash disposal structures (1) less than 5 feet above the upper limit of the uppermost aquifer, (2) in wetlands, (3) in fault areas, (4) in seismic impact zones, and (5) unstable areas.¹⁶ The bill would place restrictions on only one of these five dangerous locations: unstable areas.¹⁷ The new version of the discussion draft maintains this gap in protection.¹⁸

¹⁰ Majority Discussion Draft, Section (c)(2)(B)(ii)(I) and (II).

¹¹ EPA Final Rule, at pages 691-698.

¹² Majority Discussion Draft, Section (c)(2)(B)(ii)(III) and (IV).

¹³ Id.

¹⁴ Majority Discussion Draft, Section (c)(2)(B)(IV).

¹⁵ Majority Discussion Draft, Subsection (m); EPA Final Rule, at pages 613-625.

¹⁶ EPA Final Rule, at pages 625-634.

¹⁷ Majority Discussion Draft, Subsection (c)(2)(E).

¹⁸ Id.

- **Liner Requirements for Existing Surface Impoundments.** The EPA Final Rule requires existing wet surface impoundments to be lined, and lays out design criteria for acceptable liners.¹⁹ The bill would let individual states disregard this requirement, and allow unlined or insufficiently lined surface impoundments to continue to receive waste.²⁰ This requirement is still missing from the discussion draft.
- **Closure Requirements for Deficient Structures.** For surface impoundments that fail to meet EPA's standards, the Final Rule requires that they cease receiving waste within 6 months and close. This includes, for example, those that (1) are unlined and violate groundwater protection standards, (2) fail to meet location restrictions, or (3) fail to meet minimum structural stability requirements.²¹ The draft still lacks such closure requirements for deficient structures, and would permit continued operations for years or even indefinitely.²²

E. The Draft Fails to Address Inactive Coal Ash Disposal Sites in the Same Manner as EPA's Final Rule

The EPA Final Rule treats inactive coal ash surface impoundments the same as existing coal ash impoundments still receiving ash, unless and until they complete the closure process.²³ This means that until closure is completed, which must be done within three years, inactive impoundments must meet protective requirements. In contrast, the discussion draft provides extensions of that three year closure deadline to five years, and allows owners and operators of inactive impoundments to escape all requirements for that time period by notifying the implementing agency of their intent to close. In other words, an inactive impoundment will not be treated the same as an existing impoundment for what could be a significant period of time before closure is completed. If an owner or operator that has notified the implementing agency of that intent fails to close in that timeframe, there are no penalties. Such a facility would then enter the permitting process with no set deadline for compliance.²⁴

F. Compliance Timeframes Under the Draft Are Slower than EPA's Final Rule

The EPA Final Rule requires coal ash sites to quickly come into compliance with the Rule's standards. Several requirements go into effect in 6 months, including air criteria, inspection requirements, and recordkeeping requirements.²⁵ The discussion draft would require compliance with those requirements in 8 months.²⁶ However, the EPA rule requires compliance

¹⁹ EPA Final Rule, at pages 637-638.

²⁰ Majority Discussion Draft, Subsection (1)(5).

²¹ EPA Final Rule at pages 698-722.

²² Majority Discussion Draft, Subsection (c)(2)(C).

²³ EPA Final Rule, at page 699.

²⁴ Discussion Draft, Subsection (c)(4).

²⁵ Environmental Protection Agency, Frequent Questions on Coal Ash Rule, Dec. 19, 2014, Question #30. Available online at <http://www2.epa.gov/coalash/frequent-questions-coal-ash-rule>.

²⁶ Majority Discussion Draft, Subsection (c)(3)(B)(i).

with significant additional requirements including design criteria, structural integrity criteria, and closure and post-closure care within 18 months, whereas the discussion draft would still not require compliance with those requirements for 3-4 years. Under the draft, full compliance would still not be required until permits are issued -- potentially 6-7 years after legislation is enacted.²⁷

G. The Discussion Draft Will Impact the Ability to Bring Citizen Suits

Under the Resource Conservation and Recovery Act (RCRA), the main federal statute governing solid and hazardous waste disposal, citizen suits are available to enforce “any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to” the statute.²⁸ The Final Rule includes specific requirements, imposed on facility owners and operators.

The discussion draft, in contrast, imposes requirements on agencies implementing permit programs while refraining from applying them to owners and operators.²⁹ Citizen suits to enforce the requirements of the bill would therefore only be available against implementing agencies, not owners and operators. In addition, Subsection (l) of the discussion draft states that the Final Rule “shall be implemented only through a coal combustion residuals permit program under” the draft. The meaning of the word “implemented” in this context is not clear, but this limitation could be interpreted as a bar on enforcement of the final rule except through permit programs. Such an interpretation would bar citizen suits against owners and operators of facilities. The latest version of the discussion draft does not change this approach.

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

On March 24-25, 2015, the Subcommittee on Commerce, Manufacturing, and Trade forwarded, by voice vote, H.R. __, the Data Security and Breach Notification Act of 2015. A new draft of the bill, with substantial changes from what was forwarded, was released prior to the full committee markup.

A. Summary of the Draft Bill, as Released for Full Committee Markup

The draft bill imposes security and breach notification requirements on covered entities, which is defined in Section 5 as all entities over which the Federal Trade Commission (FTC) currently has authority, common carriers subject to the Communications Act, and non-profit organizations. The requirements of this draft do not apply to certain financial institutions subject to Gramm-Leach-Bliley (GLB), certain state-chartered credit unions, and covered entities and business associated subject to Health Insurance Portability and Accountability Act of 1996 and Health Information Technology for Economic and Clinical Health Act.

²⁷ Discussion Draft, Subsection (c)(3).

²⁸ RCRA Section 7002(a).

²⁹ See, e.g. Majority Discussion Draft, Subsection (c)(2) – “The Implementing Agency shall apply the following criteria.”

Section 2 of the draft requires covered entities to maintain reasonable data security, appropriate for the business and its activities, to protect personal information as defined in the draft only from unauthorized access.

Section 3 of the draft establishes the obligations of covered entities in the event of a breach of electronic data. Following a breach, covered entities would be required to restore the integrity of the security system and conduct an investigation only to determine whether the breach has resulted in identity theft or other financial harm. Notice to affected individuals is required unless there is no reasonable risk of financial harm. If the information of 10,000 or more individuals was accessed or acquired, the FTC and the Secret Service or Federal Bureau of Investigations must also be notified. Notice to state attorneys general is not required under any circumstances.

Notice to individuals is required to be made through regular mail or e-mail, if e-mail is the business's primary method of communication with its customers. If the breached entity does not have current contact information for 500 or more individuals, the breached entity must also provide substitute notice through e-mail and notice on the breached entity's website.

Section 3 also establishes a notification process that distinguishes between entities that have contracted with a covered entity to store or process information on behalf of a covered entity ("breached covered entity") and the covered entity with which they have contracted ("non-breached covered entity"). The process provides conditions under which breached covered entities and non-breached covered entities determine who will provide notice to individuals and when such notice must occur.

The notification requirements for service providers is limited to providing notice to a covered entity that connects to or uses the service, if that covered entity can be reasonably identified. Service providers are defined as communications service providers to the extent that they act as so-called "dumb pipes" in that they provide simple data transmission or transient data storage.

Section 4 of the draft provides for enforcement of this proposed law by the FTC and state attorneys general. The FTC would be able to seek civil penalties. Civil penalties for state attorneys general are capped at \$2.5 million for each violation of the data security requirement and \$2.5 million for all violations of the notification requirements. These civil penalty limits do not apply to the FTC.

Section 5 of the draft provides a definition of personal information covered by the bill, among other definitions. Personal information includes data that can directly lead to financial harm, such as a financial account number with a password or other access code, another unique account identifier with a security access code, or a full social security number. Personal information also includes, for telecommunications carriers or interconnected VoIP providers, limited telephone call information, such as the location of the call, the destination number of the call, and the time and duration of the call.

The draft includes a state preemption provision in Section 6. The provision as written would preempt all state data security and breach notification laws, as well as state consumer protection laws as applied to data security and breach notification. In addition, the preemption provision includes language that, according to the United States Supreme Court, expressly preempts state common law as applied to data security and breach notification.³⁰ Such language is in direct conflict with another sentence in Section 6 that apparently attempts to preserve state common law.

Section 6 of the draft also preempts data security and breach notification requirements that currently apply to telecommunications, satellite, and cable companies under the Communications Act and corresponding regulations. The language attempts to limit the preemption to only preempt certain provisions that cover privacy and data security as they apply to “securing information in electronic form from unauthorized access.”

Although telecommunications providers must comply with the data security requirements with respect to certain telephone call data, cable and satellite providers have no security obligations under the bill. In addition, while certain telephone call information must be secured, a breach of this information would not trigger notification in most cases because it would not directly lead to identity theft or other financial harm.

Sections 7 and 8 require the FTC to conduct education outreach and maintain a website with educational materials for small businesses on data security practices and how to prevent hacking.

B. Committee Consideration

Four amendments were adopted at the Subcommittee markup. A manager’s amendment offered by Reps. Burgess and Welch made minor changes to the definition of encryption and made broader an exception to the definition of covered entities for entities subject to GLB. The change to the GLB exception was mostly reversed in the newest draft bill. An amendment offered by Reps. Pompeo and Welch established procedures for breached covered entities and non-breached covered entities to provide notice to individuals. The language added by this amendment was also significantly changed in the new draft bill. Two amendments offered by Reps. Cardenas and Blackburn were adopted at the Subcommittee markup adding sections 7 and 8 to the bill regarding FTC education and outreach for small businesses.

In addition, five amendments were offered by Democratic members, all of which were voted down along party lines. Rep. Clarke offered an amendment to give the FTC rulemaking authority to change the definition of personal information as necessary. Rep. Rush offered two amendments to address concerns with the preemption of the Communications Act. The first amendment struck the preemption language entirely. The second amendment was intended to transfer as much enforcement authority from the Federal Communications Commission (FCC) to the FTC as the FCC loses in the underlying bill text. Rep. Kennedy offered two amendments intended to address state preemption and the conflict in the common law preemption language.

³⁰ *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014).