

ONE HUNDRED THIRTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

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January 31, 2013

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Shimkus  
Chairman  
Subcommittee on Environment and the Economy  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Upton and Chairman Shimkus:

Last month, I wrote to bring to your attention a Congressional Research Service (CRS) report that analyzed coal ash legislation from the last Congress.<sup>1</sup> This report is an example of what CRS does best, providing members of Congress with useful and timely analysis of legislative proposals. I have not received a response to my letter, but it is now clear that you have seen the report.

On January 8, you wrote to the director of the Congressional Research Service, criticizing the CRS analysis and claiming that it contains “an implicit bias based on the policy preference of a single analyst.”<sup>2</sup> This is an extraordinary allegation and one that appears to lack any merit. The flaws in the coal ash legislation identified by the CRS analysis are the same flaws that the

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<sup>1</sup> Congressional Research Service, “H.R. 2273 and S. 3512: Analysis of Proposals to Create a Coal Combustion Residuals Permit Program Under RCRA” Congressional Research Service, R42847 December 5, 2012.

<sup>2</sup> Letter from Rep. Fred Upton, Chairman, House Energy and Commerce Committee, Rep. John Shimkus, Chairman, House Subcommittee on Environment and the Economy, and Rep. David McKinley to Mary Mazanec, Director, Congressional Research Service (Jan. 8, 2013).

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Environmental Protection Agency identified when it provided the Committee its own expert analysis of H.R. 2273, the House-passed coal-ash bill.

Like CRS, the Environmental Protection Agency found numerous flaws with the legislation. For example, EPA's technical assistance noted that the bill "omits most of the existing Part 258 operating criteria" such that "neither landfills nor surface impoundments would be required to comply" with those operating criteria or other "key design requirements that relate to the long term structural stability of a surface impoundment."<sup>3</sup> On groundwater monitoring, EPA said that the bill "could result in further contamination of groundwater and surface water resources to levels that exceed safe drinking water maximum contaminant levels."

EPA also found that the bill "does not grant EPA the authority to meaningfully evaluate the substance or adequacy of state CCR programs at the time of the initial certification." This analysis was echoed by the Congressional Budget Office, which found that "this legislation would not provide EPA with the authority to substantially review certifications."<sup>4</sup>

According to your January 8 letter, the CRS analysis did not give sufficient deference to the debate in the Committee on H.R. 2273. Your letter states:

Thoughtful members of our Committee from both parties discussed this legislation carefully in open mark-up June 16, 2011, and July 11-13, 2011. Based on the quality of the discussion, we know they understood it clearly and believed it would result in an effective program for regulating coal ash.

It is not CRS's job to base its analysis on what some members may "believe" a bill will accomplish. CRS's role is to look at the actual bill language and provide an objective analysis of what that language requires, which is exactly what CRS did. Moreover, your characterization of the Committee's process is not accurate and is not reflected in the transcript of those markups or in the Committee's report on H.R. 2273.

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<sup>3</sup> EPA, "Response to Chairman Waxman: Technical Assistance on H.R. 2273" (Sept. 2011)(online at [http://democrats.energycommerce.house.gov/sites/default/files/documents/MemoCoalAsh\\_10.07.11.pdf](http://democrats.energycommerce.house.gov/sites/default/files/documents/MemoCoalAsh_10.07.11.pdf)).

<sup>4</sup> EPA, "Response to Chairman Waxman: Technical Assistance on H.R. 2273" (Sept. 2011)(online at [http://democrats.energycommerce.house.gov/sites/default/files/documents/MemoCoalAsh\\_10.07.11.pdf](http://democrats.energycommerce.house.gov/sites/default/files/documents/MemoCoalAsh_10.07.11.pdf)).

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In fact, the text voted to be reported from the Committee was not shared with members or offered for discussion until the last day of the markup – July 13 – which lasted just 48 minutes.<sup>5</sup> Confusion over the effects of the bill reigned supreme that day. Over the course of those 48 minutes, Democratic members requested a hearing to clear up confusion about the text four times. In fact, Mr. Rush was in the process of repeating that request as Chairman Upton gavelled the markup to a close. Several members explicitly said that a clear understanding was lacking. I expressed for the record the disagreement over the effectiveness of the legislation that we had moments before in the Committee's ante chambers, saying:

We had a vigorous debate in the other room on how much EPA can do if the state is not doing an adequate job. Mr. Chairman, your lawyers say that you have addressed it. EPA lawyers and my counsel say it is not sufficiently addressed.<sup>6</sup>

Mr. Dingell also highlighted the lack of a clear explanation of authorities in the legislation,

[W]e have not yet heard what I think is a clear enough statement of either what the problems are that we are addressing or what the problems are that we will be leaving unaddressed, and I think that is unfortunate.<sup>7</sup>

The Committee's confusion was described in more detail in the formal views filed by several Democratic members when the Committee reported H.R. 2273. Those members, including myself, wrote:

there is no legislative record that explains how the legislation is envisioned to be implemented, or what stakeholders' views are on the legislation. Although members requested a hearing at the full committee markup to better understand the legislation, no hearing has been scheduled. Instead, members on both sides of the Committee were forced to rely on representations made by majority staff about the effect and intent of the legislation. Those representations are not reflected in the report on this bill.<sup>8</sup>

You may not like the views expressed by CRS, but this does not justify smearing the reputation of the organization and its analyst. The CRS analysis is accurate, fact-

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<sup>5</sup> Committee on Energy and Commerce, Full Committee Markup of H.R. 2273 and H.R. 2401, July 13, 2011.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Additional Views on Coal Residuals Reuse and Management Act (Sept. 26, 2011).

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based, and consistent with other independent analyses of the legislation. We should seek to correct the flaws identified by CRS, not intimidate and silence its hard-working analysts.

I continue to believe that it is possible to find a bipartisan approach to coal-ash legislation that can meet the needs of industry, protect the environment, and win broad support. I renew my offer to work with you to draft legislation that would actually establish an effective and protective coal ash disposal program.

Sincerely,



Henry A. Waxman  
Ranking Member