



Via electronic mail

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Re: Sierra Club Feedback on the Draft Rule Incorporating Federal CCR Requirements into Wisconsin Regulations Governing CCR Landfills, Reg. No. WA-17-18

To Whom It May Concern:

Sierra Club, Action for the Climate Emergency, Clean Power Coalition of Southeast Wisconsin, Midwest Environmental Advocates, Milwaukee Riverkeeper, Physicians for Social Responsibility Wisconsin, Wisconsin Advocates for Public Health, Wisconsin Conservation Voters, Wisconsin Environment, Wisconsin Environmental Health Network, Wisconsin Health Professionals for Climate Action, Wisconsin Interfaith Power & Light, and 350 Madison (together “Conservation and Environmental Health Organizations,” or “CEHOs”) respectfully submit these Public Comments regarding the Wisconsin Department of Natural Resource’s (DNR’s or Department’s) Draft Rule incorporating federal requirements under the Resource Conservation and Recovery Act (RCRA) and implementing regulations, into existing Wisconsin

rules governing Coal Combustion Residual (CCR) Landfills located in NR 500 to 520, Wis. Adm. Code (the Draft Rule).

Each year, coal-fired power plants including those in Wisconsin generate millions of tons of coal combustion residuals (“CCR” or “coal ash”), a toxic waste made up of fly ash, bottom ash, scrubber sludge and boiler slag. CCR contains some of the deadliest chemicals known, including carcinogens, neurotoxins, and poisons such as arsenic, cadmium, hexavalent chromium, lead, mercury, and thallium. When CCR is dumped without proper safeguards, hazardous chemicals are released to groundwater, surface water, soil, and air, endangering nearby communities and ecosystems.

As with many states, Wisconsin will also have to continue to address the decades-long legacy of coal-fired power generation. Even as coal plants across the state have shut down or announced plans to retire, they are leaving behind untold tons of CCR (or coal ash) materials that are usually stored in varying combinations of ash impoundments and landfills. These legacy ash storage sites will not stop leaching into ground and surface waters as coal plants retire. Thus, although continuing to regulate the treatment and storage of newly generated ash remains a crucial task for the DNR, it must also address longer-term storage needs that have already been created.

It is critical to the well-being of Wisconsin residents and our environment that the DNR adopt a careful and cautious state-administered program that regulates CCR materials wherever they are found. This includes not only the substantive strictures of the program but also procedural components, such as transparency of application and approval processes, and robustness of public participation rights. With those dangers, values, and needs in mind, the Conservation and Environmental Health Organizations offer the below comments.

I. DNR SHOULD PRESERVE IMPROVEMENTS ITS DRAFT RULE CONTAINS OVER THE FEDERAL CCR RULE, AND ADD ADDITIONAL IMPROVEMENTS

CEHOs have noted and appreciate the DNR’s improvements on the federal CCR Rule. In our previous comments, we identified several actual or potential implementing weaknesses in the federal rule, each of which appears to be addressed by the Draft Rule:

- The federal CCR Rule improperly waives groundwater monitoring at sites where owners purport to show ‘no migration’ of contaminants to groundwater, but the Draft Rule appears to contain no such waiver;
- The CCR Rule continues to omit boron – one of the most ubiquitous and dangerous pollutants associated with coal ash – from the list of assessment monitoring constituents, but the Draft Rule includes it in the list; and
- The CCR Rule lacks adequate enforcement mechanisms to ensure landfill owners and operators draw inter-well statistical comparisons of groundwater monitoring data in order to detect spatial patterns (including with the proper use of background wells), but the Draft Rule requires that these comparisons be drawn, and that background wells be created.

However, the Draft Rule does not resolve a fourth deficiency in the CCR Rule relating to the closure requirements for existing landfills. As CEHOs previously explained, the closure of coal ash disposal units in place (rather than by excavation and removal), often described as “capping in place,” is not protective of the environment if the coal ash in question is in contact with groundwater, because such a closure does nothing to prevent the lateral infiltration of groundwater. Both the CCR Rule and DNR’s Draft Rule reference the following standard,

which should prevent any landfill operator from closing a landfill with CCR materials at or below the uppermost aquifer:

Control, minimize[ation] or eliminate[ion], to the maximum extent feasible, [of] post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere.¹

However, neither rule makes explicit that allowing coal ash to be capped in place when some of that coal ash is saturated with groundwater fails to “minimize or eliminate” the infiltration of water into the coal ash, and is therefore prohibited by the CCR Rule and the Draft Rule. DNR must resolve this ambiguity and make clear it will require owners and operators to describe how much of each landfill is in contact with groundwater, and prohibit the practice of capping in place where there is such contact. Requiring anything less would fail to be protective of human health and the environment.

II. THE DNR SHOULD FURTHER TIGHTEN THE REVIEW SCHEDULE CONTAINED IN WIS. ADM. CODE SECS. NR 500.07 AND 508.06

CEHOs appreciate the Department’s well-supported decision to impose a clear step-by-step process owners and operators of CCR Landfills must follow to remediate any contamination that is discovered through monitoring; and to impose reasonable time restrictions throughout most of the process. Specifically: NR 508.06(2)(g) requires that an owner or operator submit a site investigation work plan and investigation report to DNR within 60 days; NR 508.06(3) requires that owner or operator to determine remedial action options within 60 days of DNR approval of the site investigation report; and NR 508.06(5) requires that owner or operator to initiate remedial actions after DNR approval within 90 days. Similarly, NR 500.07 requires the

¹ 40 C.F.R. § 257.102(d); *see* Draft Rule at Section 32, NR 514.07(10)(c)(3)(a).

Department to “review and approve, deny or deem incomplete requests for plan approvals or exemptions within 6 business days after receiving the request.”

However, the deadlines listed above unfortunately leave open the possibility for long-term delay of a site remediation process, in a few key areas. First, the Draft Rule does not make explicit that the 65-business-day deadline on DNR for action on “plan approvals or exemptions” applies to a site operator’s presentation and proposed selection of remedial action options under NR 508.06(3) and (4). Second, the Draft Rule also references a requirement under NR 508.06(2)(f) that a site owner or operator determine the nature and extent of contamination that shows up in monitoring, but provides no timeline for when that would be prepared. Third, and perhaps most concerning, the existing set of deadlines leaves a giant hole in the schedule in the event that the Department “deems incomplete” any submission by a site owner or operator under the Draft Rule; CEHOs are not aware of any deadline imposed either on the Department or on the site owner or operator to complete any given plan or selection so as to ensure that progress continues in a reasonably timely manner toward site remediation. In its final rule, the DNR should address each of these three potential loopholes in the otherwise-timely process, to eliminate the possibility of unreasonable delay where CCR Landfills are found to be contaminating nearby environments.

III. DNR SHOULD REQUIRE IMMEDIATE PROCESS TOWARD CORRECTIVE ACTION AT COAL ASH DISPOSAL UNITS THAT ARE KNOWN TO BE CONTAMINATING GROUNDWATER

Although CEHOs appreciate the controlled timeline that has been established for rapid remediation of detected contamination, this process need not wait for monitoring to commence at all sites. As the DNR is surely aware, extensive testing at numerous sites has already been

conducted under the CCR Rule as part of a series of stages that include baseline monitoring, detection monitoring, and in some cases assessment monitoring. In other words, the Department already is aware of testing at several sites indicating which landfills are currently contaminating the groundwater. In such cases, the Department should immediately start those sites on the remediation pathway described in NR 507.15(3)(m); it should add a section enabling those sites to move more expeditiously toward corrective actions.

IV. DNR SHOULD REGULATE ALL COAL ASH LANDFILLS AND OTHER CCR DEPOSIT LOCATIONS OUTSIDE OF ASH PONDS

CEHOs respect that DNR apparently does not intend to regulate non-landfills as part of this rulemaking process. However, non-landfill ash impoundments represent a significant portion of the CCR storage facilities currently operating or closed in the state of Wisconsin. And while non-landfill impoundments will of course still be subject to the federal CCR Rule requirements, the Department will inevitably run into complications setting standards for one portion of the CCR impoundments in the state, while leaving the other exposed to federal regulation. Thus, even as it avoids applying the Draft Rule to coal ash ponds and other non-landfill permitted impoundments, DNR should set forth a schedule for promulgation of another rule that covers all coal ash disposal areas.

V. THE DNR SHOULD CLEARLY DEMONSTRATE HOLISTIC ANTI-EROSION PROTECTIONS IN ITS REGULATION OF CCR LANDFILLS

The Draft Rule requires that both the written closure plan and the long-term care plan address slope stability and making repairs as needed to correct settlement, subsidence, erosion and other events to ensure that the "final cover" remains intact. This is good to see, but DNR

should either a) clarify that the "final cover" includes not just the containment equipment above the CCR material, but also addresses the containment equipment below and around the CCR material; b) add an explicit requirement that the long-term stability of the entire CCR containment system (including the existing landfills) be ensured in the written closure and long-term care plans; or c) explicitly incorporate by reference existing regulations that the Department believes are sufficient to ensure the long-term stability of CCR Landfills in their entirety. If the Department chooses the third option, it should explain in an updated Analysis that is presented with any updated final version of the Draft Rule (a "Final Rule") why it believes existing regulations ensure equivalent anti-erosion protections as the Draft Rule grants to "covers".

VI. THE DNR MUST INCLUDE A CITIZEN SUIT PROVISION TO ENSURE AVENUES ARE AVAILABLE FOR ENFORCEMENT OF ITS PERMITS

Conservation and Environmental Health Groups have previously explained why it is so important for the DNR to modify the existing enforcement provision located at Wis. Adm. Code Sec. NR 500.11, to add avenues for public citizens to assist with enforcement of the final version of the Draft Rule. If DNR believes an existing citizen suit provision under Wisconsin Law offers such an avenue, it should identify this avenue somewhere in an updated Analysis prepared by the Department and presented with any updated Final Rule. Absent that, DNR should be aware that failing to grant an explicit right to the public to enforce its CCR Landfill regulations via a Citizen Suit could expose the entire Draft Rule to legal challenge—and could subject the entire Draft Rule to disapproval by the EPA—because it would cause the Draft Rule to fall short of the minimum federal protections. As discussed previously, EPA may not approve a program that is not "at least as protective as" federal law. 42 U.S.C. § 6945(d)(1)(b)(ii); and RCRA includes an explicit citizen Suit provision.

VII. CONCLUSION

The Conservation and Environmental Health Groups thank DNR for its consideration of these Public Comments on the Draft Rule. Please contact the undersigned with any questions or updates.

Respectfully Submitted,

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