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February 4, 2008

VIA E-MAIL & HAND DELIVERY,
RETURN RECEIPT REQUESTED

Stephen Pattison, Assistant Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, Maryland 21230

Re: Proposed Amendments to Solid Waste Management (COMAR 26.04.07.02 and .04) and New Regulations under Management of Coal Combustion Byproducts (COMAR 26.04.10.01-.08); Special Performance Standards (COMAR 26.20.24.08); and Utilization of Coal Combustion Byproducts in Surface Mine Reclamation (26.21.04.01-.12) published at 34 Md. Reg. 2287-2298 (December 21, 2007)

Dear Mr. Pattison:

We file these comments on behalf of the BBSS, Inc. ("BBSS"), Reliable Contracting Co., Inc. and Greenberg Gibbons Commercial Corporation (the "Commentors") on the above-referenced proposal (the "Proposed Rule") to govern the use of the coal combustion byproducts ("Coal Ash"). BBSS owns property in Anne Arundel County which has or is being mined for sand and gravel. Reliable Contracting Co., Inc. ("Reliable") and Greenberg Gibbons Commercial Corporation ("Greenberg") develops property for commercial and residential uses. All three companies have a significant interest in the Proposed Rule as a result of a Coal Ash reclamation project on a portion of a sand and gravel mine located in Gambrills, Maryland. BBSS owns the property, Reliable operates the mine, and Greenberg is managing the development of a portion of it.

General Comments:

First, the Commentors seek clarification that the Proposed Rule applies prospectively only, and not to properties reclaimed using Coal Ash prior to the effective date of the regulations. Persons, permittees and property owners for the sites already involved in reclaiming surface mines with Coal Ash have relied on prevailing laws and regulations and conformed their conduct to comply with prevailing laws and regulations. The design and implementation of the reclamation (e.g.

development of the floor and sides of excavation, placement of the Coal Ash, design of interim and permanent caps and adherence to development guidelines of such sites) was done in accordance with these prevailing laws. It would be inappropriate (and likely outside of the Department's legal authority) to attempt to apply the requirements retroactively.

While, viewed as a whole, it appears that the Department intended for the Proposed Rule to apply prospectively, the regulations contain no specific language to acknowledge this. The Commentors, therefore, propose revisions to a number of provisions of the Proposed Rule to clarify the prospective character of the regulations in its Specific Comments below. The proposed revisions are intended to clarify that new regulations will not alter the regulatory status of property where Coal Ash has been placed for mine reclamation, soil stabilization, fill or other purposes prior to the effective date of the regulations, and to clarify that the Department does not intend to classify such properties as "open dumps", or an illegal Coal Ash "storage" sites, or regulated "facilities".

Second, the Commentors note that the language used throughout the Proposed Rule regarding the regulatory status of Coal Ash, and products made using Coal Ash as an ingredient, is overbroad. Absent clarification, the Proposed Rule will impose unintended burdens on persons who have products made with Coal Ash and properties where Coal Ash has been placed for reclamation or stabilized fill. The regulations should clarify that only Coal Ash is subject to the regulations, not products using Coal Ash as an ingredient. Finally, the regulations need to clarify that use of Coal Ash for reclamation of mines, is a beneficial use.

Specific Comments:

The Commentors identify specific sections of the Proposed Rule which they believe require clarification or revision and propose revisions, below.

26.04.07 - Solid Waste Management

This Amendment arguably exceeds the Department's authority by altering the intent of the General Assembly when it adopted the Pozzolan Act in 1974. Putting aside that issue, the revised definition of "ashes" creates an inherent conflict with the general solid waste management law and regulations. It gives Coal Ash a unique status among materials, chemicals or substances, implying that "ashes" could include coal combustion byproducts not used in accordance with the new regulations, even if the material is not discarded, disposed or otherwise managed as a waste. MDE's authority under the state Solid Waste Management law is limited to regulation of "solid waste". If a material is not a solid waste, whether it is Coal Ash or any other form of ashes, it cannot be regulated as a solid waste.

Proposed Solution:

.02B.(3) [It] "*Ashes*" does not include [pozzolans as defined in Natural Resources Article, §7-464, Annotated Code of Maryland]:

- (i) *Pozzolan as defined in Environment Article, §15-407, Annotated Code of Maryland, if the pozzolan is used in accordance with Environment Article, §15-407, Annotated Code of Maryland, and COMAR 26.04.10; or*
- (ii) *Coal combustion byproducts as defined in COMAR 26.04.10, if the coal combustion byproducts are used in accordance with COMAR 26.04.10.*

26.04.10 - Management of Coal Combustion Byproducts

26.04.10.02 Definitions

This section of the Proposed Rule contains a number of loosely worded definitions for which Commentors suggest revisions.

B.(2) Beneficial Use

This definition creates confusion by including the characteristic of “not contributing to the adverse affects to public health and the environment.” Doing so injects an unacceptable element of subjectivity; it provides the Department, the public and the regulated community no objective criteria for determining whether a use is beneficial. The objective criteria should be the same as for any materials which would otherwise be a solid waste if disposed, and that is whether it is a legitimate substitute in a manufacturing process for a raw material or commercial product, or whether the material has been discarded, abandoned or otherwise made a waste by the way it is handled. Further it makes no sense to try to exclude the use of Coal Ash in a mining operation or a mine reclamation activity from the concept of beneficial use. Clearly it has been and is a beneficial use. By limiting the reach of the Solid Waste Law and regulations to “solid waste”, the General Assembly adopted the goal and purpose of the federal Solid Waste Law, 42 U.S.C. §§ 6901 *et. seq.*, to encourage recycling and beneficial use of materials which would otherwise become part of the cost and hassle of the solid waste disposal problem.

Proposed Solution:

B.(2) Beneficial Use.

- (a) “Beneficial use” means the use of coal combustion byproducts in a*

manufacturing process to make a product or as a substitute for a raw material or commercial product, which does not contribute to adverse effects to public health or the environment, or

(b) —“Beneficial use” does not include the use of coal combustion byproducts in a mining operation or in mine reclamation activities.

B.(4) “Coal combustion byproducts facility”, and (9) “Facility” -

The definitions of “facility”, and “coal combustion byproducts facility” are overlapping, overbroad, internally contradicting and unnecessary. They encompass large parcels of property solely as a result of common ownership. Also, through the reference to recycling, processing or use, the definition draws in properties and businesses which use products containing Coal Ash. Clearly, neither outcome is the Department’s intention. The inherent contradiction is created by lumping all types of locations where Coal Ash may be found. The definitions fail to distinguish among facilities or properties which generate Coal Ash (such as steam electric generating facilities), those where such ash is disposed or discarded (and therefore become a solid waste), those which accept Coal Ash for use in manufacturing operations as a substitute raw ingredient and those such as mine reclamation projects where the ash is placed for beneficial purposes without being processed. Then the regulation imposes use, storage, reclamation and disposal requirements on “coal combustion byproducts facilities”, some of which are storage facilities, some of which are disposal facilities and some of which are reclamation facilities.

A stand-alone definition of “facility” is not truly necessary and creates confusion. The term “facility” is used in multiple ways in the proposed regulations. It refers to an air pollution control “facility” in one place, and a “solid waste acceptance” facility in another. The term “facility” is also referenced in the definition of “sludge.” Therefore, we suggest omitting the stand-alone definition of facility (proposed 26.04.10.02(9)), and instead adding the clarification as to the scope of facility as suggested in the above-recommended change in the definition of a “coal combustion byproducts facility.”

The exclusion set forth in “(b)” is recommended to be consistent with what we believe to be the agency’s intention. In the proposed regulations, the term “coal combustion byproducts facility” is almost always used in association with generation or disposal. The term may or may not be appropriate for a reclamation location. Regardless, the term does not seem to be used in connection with beneficial use. It would not accomplish a legitimate regulatory purpose to view every location of coal combustion byproducts reuse a “coal combustion byproducts facility.” For instance, a location where coal combustion byproducts are utilized in cement or other manufactured products should not be a coal combustion byproducts facility, and neither should

the ultimate location at which the cement is used. Similarly, a road bed or building foundation with (non-reclamation) structural coal combustion byproducts should not fall within this facility definition. We suggest that the definition of "coal combustion byproducts facility" be narrowed to exclude beneficial uses, or, perhaps more appropriately, all allowable reuse.

Proposed Solution:

Change the definition for 'coal combustion byproducts facility' as follows and delete the definition of "Facility":

B.(4) *"Coal combustion byproducts facility" means:*

(a) a facility or site where coal combustion byproducts are generated, stored, handled, processed, recycled, disposed of, or used; and

(b) "Coal combustion byproducts facility" does not include locations at which coal combustion byproducts are used exclusively for beneficial use.

B.(7) Dispose -

Based upon the structure of these regulations, it appears that a variety of "uses," such as mine reclamation are allowed, will be regulated, and are not disposal. Yet we are concerned that "as determined by the Department" provides too much uncertainty while further regulation may be developed, and that this set of proposed regulations must be able to stand alone without creating unacceptable uncertainty. This can be accomplished by defining the term "Use" to encompass all intended allowable Uses, including the subset of "beneficial uses." Then the regulations governing specific "uses" may be phased in and these are developed. The Department's development of the new regulations will accomplish the goal of the "as determined by the Department" clause in the current proposal.

The term "land disposal site" is not defined, so we suggest clearly incorporating the term disposal, which is a stand-alone defined term. Also, the regulations should be clarified to ensure that they are not applied retroactively. This is one location where this can be accomplished.

Proposed Solution:

B.(7) *"Disposal" means the discarding or abandonment of coal combustion byproducts in a manner that is not a ~~so that they are not recycled or "use" d, as determined~~*

by the Department as this term is defined herein. Disposal does not include recycling, placement of coal combustion byproducts in a mine or for purposes of structural fill or soil conditioning or other uses or beneficial uses.

B.(12) Open Dump -

These definitions raises uncertainty about properties where Coal Ash has been placed for reclamation, grading, stabilized fill, etc., prior to the effective date of the regulations. In addition, it fails to clarify that a mine reclaimed with Coal Ash after the effective date in accordance with COMAR 26.20.24 or 26.21.04 will not be an “open dump.”

Proposed Solution:

B.(12) “Open dump” means a land disposal site which receives discarded or abandoned coal combustion byproducts for disposal after the effective date of these regulations and:

- (a) Is not designed or operated in accordance with the requirements for a sanitary landfill under COMAR 26.04.07; or*
- (b) Is in violation of the Resource Conservation and Recovery Act, Section 4005, and 40 CFR § 257.*

B.(19) Solid Waste -

The text “as determined by the Department” provides too much uncertainty while further regulation may be developed. This set of proposed regulations must be able to stand alone without creating unacceptable uncertainty. This can be accomplished by defining the term “Use” to encompass all intended allowable Uses, including the subset of “beneficial uses.” Then the regulations governing specific “uses” may be phased in and these are developed. The Department’s development of the new regulations will accomplish the goal of the “as determined by the Department’ clause in the current proposal.

Proposed Solution:

B.(19) “Solid waste” means any garbage, refuse, sludge, or liquid from industrial,

commercial, mining, or agricultural operations or from community activities, including coal combustion byproducts that are not managed in a manner that is a "use" recycled or used, as that term is defined in this regulation, determined by the Department

B.() (New)

We are proposing a definition of "use" that is intended encompasses all anticipated coal combustion byproducts management activities except disposal. This definition serves important functions. It ties together Chapter 10 with the Chapter 7 permit exclusion. It also fills in a key missing element in the structure of Chapter 10, which revolves around "use" of the coal combustion byproducts. It removes some of the uncertainty created by these regulations and the silence concerning activities such as structural fill, by at minimum declaring these to be a use and allowing for their further definition as a beneficial use.

Proposed Solution:

() "Use" means the utilization of coal combustion byproducts in a manner that is not discarding or abandoning the material. Use includes recycling, raw product substitution, manufacturing, reclamation of coal and non-coal mines, structural fill, soil conditioning and any other use authorized by Md. Env't Article, § 15-407(b)(2) and this chapter.

26.04.10.05 – Storage

As written, storage could be construed to encompass even the most temporary placement of Coal Ash regardless of the purpose of the storage. Many activities involving the processing, recycling, or use of land reclaimed with Coal Ash involve short-term storage of coal combustion byproducts that should be exempt from the storage requirements. For example, coal combustion byproducts may need to be temporarily moved or removed to develop land already reclaimed with Coal Ash. Some Coal Ash will be removed and stored during the repair, decommissioning or replacement of utilities, foundations and other subsurface features. The Proposed Rule acknowledges that temporary storage on the ground or not in an approved "storage system" may be allowed, but it requires the "authorization of the Department". Obtaining such authorization will be a cumbersome process both for landowners and the Department.

Proposed Solution:

Commentors propose an exemption for Coal Ash removed for such purpose that is stored less than thirty (30) days. Thirty days provides a short, but reasonable time to make arrangements for longer-term storage, use or disposal of the Coal Ash. The following revision to Section .05B would provide a solution:

- B. *Except for the temporary storage for thirty (30) days or less, a person may not store coal combustion byproducts directly on the surface of the ground or in an unlined surface impoundment, pit, pond, or lagoon without the authorization of the Department.*

26.21.04 Utilization of Coal Combustion Byproducts in Surface Mine Reclamation

26.21.04.01 – Scope

This provision should clearly articulate that the chapter applies solely to non-coal surface mine reclamation receiving Coal Ash after the effective date of these regulations. Further, both subsections A and B include unnecessary phrases which create unnecessary ambiguity. The chapter applies to reclamation of mines with Coal Ash and should say so.

Proposed Solution:

- A. *The purpose of this chapter is to establish certain requirements pertaining to the use of coal combustion byproducts in the reclamation of a non-coal surface mine with coal combustion byproducts after the effective date of this chapter.*
- B. *Except as otherwise specifically provided in this chapter, this chapter applies to persons who deliver to, receive for placement or place coal combustion byproducts at to engaged in the generation, storage, handling, processing, recycling, or use of coal combustion byproducts that are used or are to be used in the reclamation of a noncoal surface mine after the effective date of this chapter.*

C. ...

26.21.04.02 Definitions

B.(14) - "Site"

The definition of Site is too broad and all encompassing. It extends to areas of the mine which have not been reclaimed using Coal Ash. The phrase "including areas contiguous to the mine" in the definition creates uncertainty. For example, it could extend to properties owned by others or alternatively could provide a basis for the Department to assert jurisdiction over all property owned by the same company no matter how far it removed from the reclaimed or mined area, merely because the property has not been subdivided. It is not unusual for only portions of property to have been reclaimed with coal ash (as is the case of the Gambrills mine owned by BBSS). The definition of "Site" should be limited to the area of the surface mine reclaimed with coal ash and a reasonable buffer. The focus of the buffer should be to encompass an area necessary to ensure the proper operation of the cap, liner, surface, water drainage and surface water drainage features. The appropriate buffer will be determined by the unique characteristics of each site.

Proposed Solution:

B.(14) "Site" means those areas of a noncoal surface mine where coal combustion byproducts are used, or are proposed to be used, for reclamation of the surface mine, including areas contiguous to the mine including an appropriate buffer.

In addition, Commentors propose adding a definition for the word buffer:

B.(?) "Buffer" means an area extending from the edge of the area at a non-coal surface mine where coal combustion byproducts have been placed for reclamation deemed necessary by the Department to achieve the water and air quality protection standards established by this chapter and designated in the Application for Use for the Site approved by the Department.

26.21.04.03 - Authorization of Use and General Requirements

The requirements do not provide for the temporary storage of coal combustion byproducts. Subsection B.(8) requires immediate placement and compaction, and allows no stockpiling and subsection 10 prohibits the storage of uncompacted Coal Ash. This will impose needless logistical difficulties (adding unnecessary cost) for development of mining sites reclaimed with Coal Ash, without adding any environmental benefit. During development of land that has been reclaimed with Coal Ash it is foreseeable that some Coal Ash will be excavated for several reasons: to allow for grading of the reclaimed land to promote drainage; to allow for the installation of utilities and foundation materials; and for maintenance of cover materials or repair of erosion. Exemption of short-term, temporary storage of coal combustion byproducts would accommodate these and other reasonable activities.

Proposed Solution:

Commentors propose adding a new subsection B.(16):

B.(16) Any coal combustion byproducts excavated or moved during development of a Site shall be placed in a Storage System or removed from the Site within thirty (30) days of being excavated or moved.

Also change, 26.21.04.04 – Application for Use

C.(14)(e) Where and how coal combustion byproducts will be stored before placement, if storage will be for longer than thirty (30) days.

26.21.04.09 Post-Closure Monitoring and Maintenance

The Gambrills Site represents a unique situation. It contains the only surface mine reclaimed with Coal Ash in the state subject to a Consent Decree. The Consent Decree requires the recordation of a deed restriction which includes construction guidelines and use restrictions.

26.21.04.09G

The operations plan and development guidelines being prepared pursuant to the Consent Decree should satisfy this requirement.

Proposed Solution:

.09G. If post-reclamation land use includes development of a site, a permittee shall submit to the Department for review and approval an operations plan for disturbance of the closure cap and to verify the integrity of the liner and leachate collection system. Sites that are under a Consent Decree or which have submitted to the Department Construction Guidelines for the development of land reclaimed with coal combustion byproducts are exempt from the requirements of 26.21.04.09(G).

26.21.04.09H

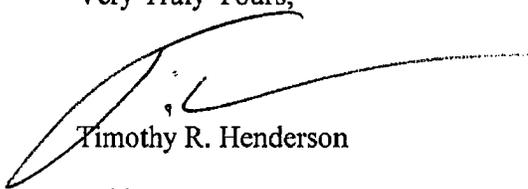
This provision provides no objective criteria for the Department, the permittee or the public in ascertaining whether "no offsite impacts will occur." For such a provision to work smoothly, it should include some benchmark referencing permit limits, indicator parameters or environmental quality standards.

Proposed Solution:

.09H. The Department may retain . . . until the Department is satisfied that no offsite impacts from the coal combustion byproducts will occur. In making that determination the Department shall consider the monitoring and post-closure monitoring results reported by the permittee pursuant to regulations .07 and .09.

Thank you for the opportunity to comment on the Proposed Rule.

Very Truly Yours,



Timothy R. Henderson