



June 17, 2019

Submitted via electronic <http://shw.wyomingdeq.commentinput.com>

Mr. Luke Esch, Administrator
Wyoming Department of Environmental Quality
Division of Solid and Hazardous Waste
200 West 17th Street
Cheyenne, Wyoming 82002

RE: Proposed Revisions to the Wyoming Solid Waste Rules and Regulations

Comments of PacifiCorp on the Revision of Wyoming Solid Waste Rules and Regulations Chapter 3, Industrial Landfill Regulations; and Chapter 18, Disposal of Coal Combustion Residuals in Landfill and Surface Impoundments

Dear Mr. Esch:

PacifiCorp is an energy services provider serving approximately 1.9 million customers across a 141,000 square mile service area in six western states. PacifiCorp's operating companies include Pacific Power, which provides regulated electric service in California, Oregon and Washington; and Rocky Mountain Power, which provides regulated electric service in Idaho, Utah and Wyoming.

PacifiCorp believes a diversified generating portfolio is important to ensuring reliable and reasonably priced electricity; thus PacifiCorp's energy portfolio includes renewables, hydroelectric, natural gas, and coal-fired power generation. Forty one percent of PacifiCorp's nearly 11,000 megawatts of net-owned and contracted generating capacity are generated at coal power plants. To facilitate its coal-generation operations, PacifiCorp operates 13 Coal Combustion Residual ("CCR") units, 11 of which are in the state of Wyoming. PacifiCorp will therefore be directly impacted by any final decision made by the State of Wyoming regarding the proposed revisions to Wyoming's solid waste rules.

Section 2301 of the Water Infrastructure Improvements for the Nation (WIIN) Act amended Section 4005 of the Resource Conservation and Recovery Act (RCRA) to create a new subsection (d) which establishes a Federal permitting program similar to those under RCRA subtitle C.¹ Under the WIIN Act, states may develop and submit a CCR permit program to EPA for approval. Once approved, the state permit program operates in lieu of the Federal CCR Rule

¹ See 42 U.S.C. § 6945(d).

requirements.² To become approved, the WIIN Act requires that a State provide “evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State”³. In addition, the WIIN Act directs states to submit evidence that the program meets the standard in RCRA Section 4005(d)(1)(B), such that it will require each CCR unit located in the State to achieve compliance with either: (1) the Federal CCR requirements at 40 CFR Part 257, Subpart D; or (2) other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the Federal requirements.⁴

On May 17, 2019, the Wyoming Department of Environmental Quality proposed for comment revisions to the state’s Solid Waste Rules and Regulations. Those revisions are being proposed as Wyoming’s CCR permit program (referred to herein as “Wyoming’s Proposed CCR Rule”). These comments provide responses to the proposed revisions; specifically to revisions to Chapter 3, Industrial Landfill Regulations; and the creation of a new Chapter 18, Disposal of Coal Combustion Residuals in Landfill and Surface Impoundments. These comments are supplemented by PacifiCorp’s comments provided to the Division of Water Quality, dated June 17, 2019.

I. Wyoming Properly Revised Chapter 3 of the Wyoming Solid Waste Rules to exclude Coal Combustion Residuals and Eliminate the Requirement that All Monitoring Wells be Permitted by the Wyoming State Engineer’s Office.

PacifiCorp supports Wyoming’s addition of Chapter 18 to the state’s solid waste rules, which will allow the state to regulate the disposal of CCR waste in landfills and surface impoundments. Chapter 3 of the Wyoming Solid Waste Rules was also properly revised to exclude CCR from the chapter, and to eliminate the requirements that all monitoring wells be permitted by Wyoming’s State Engineer’s Office.

II. The Compliance Deadlines that require both Certification from a Professional Engineer and Approval by the Administrator Should be Deemed Complete when the Professional Engineer’s Certification is submitted to the Administrator for Approval.

Section 3 (d)(ii)(C) of Wyoming’s Proposed CCR Rule requires both Professional Engineer (PE) certification *and* approval of the Administrator for numerous substantial documentation requirements, including: assessment of corrective action measures; selection of remedy; implementation of the corrective action program; and thirty six (36) others.⁵ EPA’s “Phase I Part I” revisions to the 2015 CCR Rule⁶ state that “States might chose to retain the required certification by a qualified PE and use its own expertise to evaluate that certification.” EPA clearly intended to give states the discretion and authority whether to require Administrator

² See 42 U.S.C. § 6945(d)(1)(A).

³ *Id.*

⁴ See 42 U.S.C. § 6945(d)(1)(B).

⁵ See generally 40 CFR § 257.

⁶ See Fed. Reg. Vol 83, No 146 at 36447.

approval instead of, or in addition to the PE certification. However, because there are thirty-nine separate places within the 40 CFR § 257 Subpart D regulations (which Wyoming is adopting as part of Wyoming’s Proposed CCR Rule) where the submission of PE certifications are needed to meet the regulatory deadline in the CCR Rule, PacifiCorp is concerned that the requirement of Administrator approval for each individual PE certification will create untimely delays in the approval process. Specifically, due to the sheer number of submissions required by Wyoming’s Proposed CCR Rule, and the amount of time required to properly review each PE certification, retaining the requirement for Administrator approval for all 39 submissions would create a high administrative burden that could lead to delays. It is possible that operators’ compliance would be indefinitely delayed or the compliance status would be uncertain pending Administrator review and approval.

PacifiCorp recommends that Wyoming modify its proposed rule to clearly state that operators’ compliance with the rule is deemed complete when the PE Certification is submitted to the Administrator for approval.

III. Wyoming Should Clarify That an Existing Chapter 3 CCR Landfill Permit Can be renewed under Chapter 18.

Section 4(b)(i) of Wyoming’s Proposed CCR Rules states:

“Existing CCR Landfills permits that do not have a lifetime permit and intend to continue disposal of CCR after the effective date of this chapter, shall submit a permit renewal application no later than twelve (12) months prior to the expiration date of the facilities existing permit or twelve (12) months after the effective date of this chapter, whichever comes later, unless an alternative schedule is approved by the Administrator for good cause.”

PacifiCorp currently operates two Industrial Landfills which are permitted to receive CCR wastes under Chapter 3. PacifiCorp therefore has experience in the permitting and renewal processes for this type of existing CCR Landfill permit. The proposed language of Section 4(b)(i), as currently worded, creates uncertainty as to whether an existing Chapter 3 Industrial Landfill permit (which includes CCR disposal) can be renewed as a separate CCR Landfill permit under Chapter 18. PacifiCorp therefore recommends that Section 4(b)(i) be revised as follows to provide clarification:

“Existing CCR Landfills ~~permits~~ permits which are permitted under Chapter 3 that do not have a lifetime permit and intend to continue disposal of CCR after the effective date of this chapter, shall submit a permit renewal application under Chapter 18 no later than twelve (12) months prior to the expiration date of the facility’s existing permit or twelve (12) months after the effective date of this chapter, whichever comes later, unless an alternative schedule is approved by the Administrator for good cause.”

IV. Wyoming Should Allow Adequate Time for Issuance of Chapter 18 CCR Permits.

Section 4(b)(ii) of Wyoming’s Proposed CCR Rule requires that existing CCR surface impoundments, which currently have a permit with Wyoming’s Water Quality Division, obtain a CCR Permit within eighteen (18) months of the enactment date of the proposed rule.

PacifiCorp currently has six (6) existing active CCR surface impoundments and three (3) inactive CCR surface impoundments which are permitted by Wyoming’s Water Quality Division. These nine (9) CCR surface impoundments will each be required to obtain a permit under Chapter 18. PacifiCorp is concerned that eighteen (18) months will not be adequate time to obtain the required permits, due to the technical and complex nature of CCR impoundment permitting. PacifiCorp will likely need longer than eighteen (18) months to properly prepare and submit its nine (9) permit applications. Furthermore, eighteen (18) months would not leave adequate time for Wyoming to review all nine (9) applications and issue the permits, which will also require additional time for notice and comment processes. PacifiCorp therefore recommends that Section 4(b)(ii) be revised as follows:

“Existing CCR Surface Impoundments that currently have a permit with the Water Quality Division shall ~~obtain~~ submit a new permit application under this section within eighteen (18) months of the enactment date of the rule, unless an alternate schedule is approved by the Administrator for good cause.”

V. Wyoming Should Clarify that All CCR Unit Permits Should be Issued for the Operating Life of Facility, Through Post-Closure

Section 4(c) of Wyoming’s Proposed CCR Rule addresses permit terms for: new CCR unit permits; CCR unit permit renewals; and CCR unit closure permits. It is evident that Wyoming intended to include all CCR unit permits under Section 4(c). However, the rule does not clearly address permit terms for *existing* permitted CCR units. PacifiCorp suggests that the wording in Section 4(c)(i) be revised as follows to provide the needed clarification:

“Permits for new CCR units, or existing CCR units seeking a permit under this section, will be issued for the operating life of the facility, through post-closure.”

PacifiCorp also suggests that the wording in Section 4(c)(ii) be revised as follows to provide the needed clarification:

“Renewal permits for existing CCR units will be issued for the operating life of the facility, through post-closure.”

VI. Wyoming Should Modify Section 5 of Chapter 18 to Avoid Confusion and Ambiguity about Facility Information Required in the Application.

Section 5 of Wyoming’s Proposed CCR Rules is titled “General Facility Information”. The title does not provided similar clarity as is provided by the title of Section 4: “CCR Landfill and Surface Impoundment and Permit Application Requirements”. PacifiCorp recommends that Section 5 be re-titled “General Facility Information to Be Included in a Permit Application” to avoid confusion and eliminate ambiguity.

Furthermore, while PacifiCorp acknowledges that the language proposed in Section 5(a) of Chapter 18 matches the language of Chapter 3, Section 2(b)(iii)(A)(I) of Wyoming’s Industrial Landfill Regulations, PacifiCorp considers the information requirements as overly broad for purposes of CCR compliance, particularly as it relates to reporting resolved issues. PacifiCorp therefore recommends that Section 5(a) be modified as follows:

“Operator: The name, address and telephone number of the operator of the facility to whom the permit would be issued, and a listing of any unresolved administrative order, civil or administrative penalty assessment, bond forfeiture, misdemeanor or felony conviction, or unresolved court proceeding, for any violations of any local, state or federal law relating to environmental quality or criminal racketeering, in which the applicant (including any partners in a partnership or executive officers in any corporation, if the applicant is a partnership or corporation) has been or is currently involved;”

VII. The Access Agreement in Section 5(h) Must Include a Condition that Department Representatives will Comply with the Regulated Facility Safety and Security Requirements

Section 5(h) of Wyoming’s Proposed CCR Rules requires operators to grant the state access to regulated CCR facilities to ensure compliance with the rules and regulations. PacifiCorp agrees that Wyoming representatives should have access to regulated CCR facilities to ensure rule compliance. However, the Energy Policy Act⁷ requires the Federal Energy Regulatory Commission (“FERC”) to enforce the North American Electric Reliability Corporation critical infrastructure protection (“NERC CIP”) standards. Under NERC CIP Standard CIP-006-1, PacifiCorp is required to secure the assets required for operating North America’s bulk electric system. Therefore, Wyoming representatives that visit CCR facilities must follow the security and access standards requirements of electrical operating facilities.

Furthermore, PacifiCorp is required by the Occupational Safety and Health Administration (“OSHA”) to ensure the safety of personnel on-site. Therefore, Wyoming representatives must also follow required OSHA safety requirements. PacifiCorp suggests that the Access Agreement in Section 5(h)(i) of Wyoming’s Proposed CCR Rule include the following statement:

“Department representatives must follow the regulated facility’s FERC, NERC CIP, and OSHA security safety requirements while on site.”

VIII. Wyoming Should Take into Consideration Issues of Legal Durability and Regulatory Certainty as it Relates to Federal and State Primacy.

Section 6(f)(ii) of Wyoming’s Proposed CCR Rules states:

⁷ See 42 U.S.C. §13201.

“Local zoning ordinances: CCR landfill and surface impoundment locations shall not be in conflict with local zoning ordinances or land use plans that have been adopted by a county commission or municipality.”

PacifiCorp is concerned that in certain situations this language could potentially create uncertainty relating to primacy and conflicts between local zoning ordinances and state or federal CCR laws. PacifiCorp therefore recommends that Wyoming review Section 6(f)(ii) and add language which properly takes into consideration issues of legal durability and regulatory certainty as it relates to federal and state primacy issues. The added language should clearly state that notwithstanding the limitations in Section 6(f)(ii), the authority of a county commission, municipality or other political subdivision to regulate CCR waste disposal is expressly preempted, except that a municipality may enact, amend, or enforce an ordinance or other measure that does not effectively prohibit CCR disposal; and is not otherwise preempted by state or federal law.

IX. Wyoming Should Modify Certain Provisions of Chapter 18 Section 8 to correlate to EPA’s CCR Rule.

Sections 8(f)(vii)-(ix) of Wyoming’s Proposed CCR Rules provide descriptions of operating standards which must be met by CCR facilities. However, the operating standards are already incorporated by reference into Wyoming’s Proposed CCR Rule in Section 8(a)-(e). If Wyoming considers it necessary to reiterate specific standards in Sections 8(f), the provisions should reference the corresponding federal regulations to avoid confusion. Furthermore, Section 8(f)(x) should be modified to align with the requirements of the federal CCR Rule. PacifiCorp therefore recommends that Sections 8(f)(vii)-(x) be modified as follows:

(vii) “Surface water contact: ~~Standing or running water shall not be allowed to come into contact with solid waste.~~ Adequate measures shall be taken to prevent and/or alleviate ponding of water over filled areas. Surfaces shall be graded to promote lateral surface water runoff in accordance with the criteria of 40 CFR part 257, Subpart D § 257.81-84.”

(viii) “Surface water discharges: Facilities shall be operated such that leachate, contaminated groundwater, and/or surface water run-off from the active portion of the facility is not allowed to enter any surface water, either on-site or off-site, unless authorized by a National Pollutant Discharge Elimination in accordance with the criteria of 40 CFR part 257, Subpart D § 257.81-84.”

(ix) “Groundwater contact: Wastes shall not be allowed to be placed in contact with groundwater in accordance with the criteria of 40 CFR part 257, Subpart D § 257.60.”

(x) “Groundwater contact and discharges: CCR units shall protect against waste coming into contact with groundwater and discharges that could alter groundwater quality as outlined in this section.”

X. Wyoming Should Remove the Constituents Improperly Included for Appendix IV

Section 9(d)(i) of Wyoming’s Proposed CCR Rules states “Appendix IV shall include constituents identified in Chapter 8 Table 1 of the Wyoming Water Quality Rules and Regulations.”

PacifiCorp is concerned that simply adding all of the constituents included in Chapter 8 Table 1 as Appendix IV constituents will create unnecessary burdens on operators as well as the state. In the preamble of the 2015 CCR Rule⁸ the EPA discussed each Appendix IV constituent and the reason why each of the constituents were included. The preamble also discussed why some constituents were not included in Appendix IV and were instead included in Appendix III. Under the CCR Rule, when Appendix III constituent sampling shows a statistically significant increase (SSI) over background, assessment monitoring programs are triggered. When Appendix IV constituent sampling shows a SSI over background, the operator is required to develop a corrective action program. Assessment monitoring and corrective action plan development are large endeavors which require substantial time and expense by both operators to prepare and agencies to review and approve. Therefore, determinations about including any constituent as either Appendix III or IV must be well thought-out and adequately justified.

As currently written, Chapter 8 Table 1 includes thirty seven (37) constituents, five (5) of which are in Appendix III of the CCR Rule, and thirteen (13) of which are in Appendix IV of the CCR Rule. This means that Wyoming is arbitrarily adding twenty four (24) additional constituents to Appendix IV without any discussion or justification. Furthermore, Chapter 8 Table 1 is missing two (2) Appendix III constituents (calcium and pH); and three (3) Appendix IV constituents (antimony, molybdenum, and thallium). Therefore, simply incorporating all of Chapter 8 Table 1 as Appendix IV constituents is not proper. Because the appropriate constituents from Chapter 8 Table 1 are already incorporated by reference in Appendix III and Appendix IV, and because EPA specifically vetted which constituents are appropriate for assessment monitoring or corrective action, adding other constituents from Chapter 8 Table 1 is not justified. PacifiCorp recommends that Wyoming develop new tables in Chapter 18 Section 9 which clearly identify the appropriate Appendix III and Appendix IV constituents, as they currently exist in EPA’s CCR Rule.

PacifiCorp supports Wyoming’s inclusion of established standards for groundwater quality based on the underground water class (included in Chapter 8 Table 1). The appropriate corresponding standards for groundwater quality should also be included in the tables that are developed for Chapter 18 Section 9.

XI. Wyoming Should Correct Errant References to the Federal CCR Rule in Section 9(f)(ii)(D).

Section 9(f)(ii)(D) of Wyoming’s Proposed CCR Rules currently states “The groundwater protection standard shall be . . . For constituents for which the background level is higher than the levels identified in paragraphs (h)(1) and (h)(2) and (h)(3) of this section, the background concentration”.

⁸ See Fed. Reg. Vol 80, No 74, 21151, 21404.

While it appears that WDEQ is referencing the language related to 40 CFR §257.95(h)(1)-(3), there is no reference or clarification as to where paragraphs (h)(1) and (h)(2) and (h)(3) are located in Wyoming’s Proposed CCR Rules.

PacifiCorp recommends Section 9(f)(ii)(D) be revised to state:

“For constituents for which the background level is higher than the levels identified in paragraphs ~~(h)(1) and (h)(2) and (h)(3)~~ (f)(i) and (f)(ii)(A) and (f)(ii)(B) of this section, the background concentration.”

XII. The Cost of Groundwater Removal and Treatment as well as the Cost of Alternative Water Supplies Were Properly Included as Considerations for Selection of Remedy

Section 9(h)(i)(F)-(G) of Wyoming’s Proposed CCR Rules requires operators to consider groundwater removal costs and the cost and availability of alternative water supplies in its selection of remedies for constituents for which background levels are higher than background concentration.

The 2015 CCR Rule supports the inclusion of such cost considerations when state oversight exists for CCR rule compliance.⁹ Specifically, the Rule explains why costs were excluded from consideration in the 2015 CCR Rule but that where state oversight and permitting occur, it is appropriate for costs to be considered as a factor, just as they are considered in the Municipal Solid Waste Landfill (MSWLF) rule. The CCR Rule states that CCR operators must

“... assess the effectiveness of potential remedies in meeting the objectives of § 257.97 by addressing at least: (1) Performance, reliability, ease of implementation and potential impacts; (2) time requirements; and (3) institutional requirements. The proposed rule also included consideration of the costs of remedy implementation. However, that language came directly from the MSWLF rule in part 258.”¹⁰

The Rule later explains that the cost provision was removed to ensure it is paired with state oversight and permitting.

“For similar reasons, EPA deleted ... provisions in the proposal ... that would authorize a facility to determine that remediation of a release is not necessary. These sections which came from the MSWLF rule in part 258 *are appropriate where there is state oversight.*”¹¹

The Rule further states that

⁹ See Fed. Reg. Vol 80, No 74 at 21406-21407.

¹⁰ *Id.* at 21406.

¹¹ *Id.* at 21407 (emphasis added).

“The proposed rule included a provision that would allow an owner or operator to determine that compliance cannot be reasonably achieved with any currently available methods. This has been deleted from the final rule. The Agency determined that without *state oversight or a permitting program*, that provision was potentially subject to abuse ...”¹²

Because Wyoming will have state oversight and its own permitting program, cost considerations like those in the MSWLF are appropriately included for remedy selection. Wyoming’s permit program protects against potential compliance abuse or lack of oversight. PacifiCorp therefore supports the inclusion of cost considerations in the Selection of Remedy section of the Corrective Action Program in Wyoming’s Proposed CCR Rules.

XIII. Wyoming’s Requirement for Publication of Information on a Publicly Accessible Internet Site is Unnecessary and Should Be Removed

EPA’s CCR Rule was developed as a self-implementing federal rule. Thus operators of CCR units are not required to submit permit applications to an approving agency. Because of this, EPA deemed it necessary to require CCR information to be published on a publicly accessible website to allow public access to documents and to enhance protectiveness¹³. Specifically, the EPA stated:

“In response to EPA’s lack of authority to require a state permit program or to oversee state programs, EPA has sought to enhance the protectiveness of the regulatory requirements by providing for state and public notifications of the third party certifications, as well as requiring a robust set of other information that documents the decisions made or actions taken to comply with the technical requirements of the rule. Consistent with the proposed rule, owners or operators of CCR units are required to document how the various provisions of the rule have been met by placing information (*e.g.*, plans, records, notifications, reports) in the operating record and providing notification of these actions to the State Director/or appropriate Tribal authority. The owner or operator is also required to establish and maintain a publicly accessible Internet site that posts documentation that has, in many instances, also been entered into the operating record.”¹⁴

With the implementation of Wyoming’s Proposed CCR Rules, permit applications and plans must be submitted to the state for review and approval. Therefore, the public will have access through Wyoming state permitting procedures to all relevant data and information that documents the decisions made or actions taken by operators to comply with the technical requirements of the state’s CCR rule (*e.g.*, plans, records, notifications, and reports). Therefore, EPA’s initial purpose for use of a website for public access, as well as the corresponding notification requirements, are no longer necessary, and should not apply to Wyoming. Section 11(c) of Wyoming’s Proposed CCR Rules should be modified accordingly.

¹² *Id.*

¹³ See 40 C.F.R. § 257.107; *see also* Fed. Reg. Vol 80, No 74 at 21407-21408.

¹⁴ Fed. Reg. Vol 80, No 74 at 21426.

XIV. Information Submittals Required by Section 11(d) should Instead be Included in The Annual Groundwater Corrective Action Report to Reduce the Reporting of Similar Information

Companies that currently have existing CCR units are required under 40 CFR §257.90(e) to submit an annual groundwater monitoring and corrective action report no later than January 31 of each year. Much of the information requested in Chapter 18 Section 11(d) of Wyoming's Proposed CCR Rule is already included in that report. In order to reduce redundant reporting, PacifiCorp requests the additional information required in the annual report in Section 11(d) be instead included in the annual groundwater monitoring and corrective action report due no later than January 31 each year.

XV. Section 13 of Chapter 18 Should Be Modified For Clarification

Section 13 of Wyoming's Proposed CCR Rules states: "Special waste standards: The permit application shall demonstrate compliance with the requirements of Chapter 8."

For clarification as to when the special waste standards apply, PacifiCorp recommends that Section 13 be modified as follows:

"Special waste standards: If an operator opts to dispose of special waste in a CCR unit permitted under this section, the permit application shall demonstrate compliance with the requirements of Chapter 8."

As it has consistently done in past comments, PacifiCorp urges Wyoming to develop its rules in ways that are legally durable and provides regulatory certainty. PacifiCorp respects and recognizes Wyoming's authority and the hard work put in to modify its rules, and appreciates the opportunity to provide comments on the proposed Solid Waste Rules and Regulations.

Respectfully,



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